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Right to Health under Indian Legal Framework: An Unfulfilled Dream

Dr. Om Prakash Sharma[1]

I. INTRODUCTION

The legal protection of right to health is comparatively a new phenomenon and it was right to life which was hitherto given much stress upon. Health and wellbeing were considered as personal matters rather than a public issue. But with the emergence of health as a public issue, the concept of health changed. Good health is one of the components of an adequate standard of living. Health law is as old as law itself. Its development demonstrates that the state of an individual's health is often determined by factors beyond a person's medical condition. A strict understanding of right to health implies that everyone has the guarantee of perfect health. Access to quality health care is not only a human need, a right of citizenship and a public good, but it is also a pre-requisite to good health, which is essential to enjoy and achieve fruits of equitable development. The present study aims at exploring the question of right to health in the context of Indian law and practice. In the present paper the concept of health was taken in its totality. It will attempt to see the position of right to health under the Indian legal system and will investigate whether we have achieved our goal to have good health for all.

II. CONCEPTS OF HEALTH AND HEALTH RIGHT

Health does not mean merely physical health or the absence of disease, disability or infirmity. It is a state of complete physical mental, emotional, social, and spiritual wellbeing both of the individual and of the nation. The goal of extending the benefits of sustainable health over an expanding life span, to all members of the human family is the cardinal tenet of health rights. A strict understanding of right to health implies

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that it would be more correct to speak of a right to health protection including two components a right to health care and a right to healthy conditions. The concept of rights grows out of a perception of the inherent dignity of every human being. Thus, use of rights language in connection with health emphasis that the dignity of each person must be central in all aspects of health. The health of any nation is the sum total of the health of its citizens, communities and settlements in which they live. The declaration of human rights eloquently upholds the right to life as an inalienable entitlement of all human beings. The right to health includes not only the right to health care but it goes beyond health care to encompass the underlying determinants of health, such as safe drinking water, adequate sanitation and access to health-related information. The right includes freedoms, such as the right to be free from discrimination and involuntary medical treatment. It also includes entitlements, such as the right to essential primary health care. The right has numerous elements, including child health, eternal health and access to essential drugs. Like other human rights, it has a particular concern for the disadvantaged, the vulnerable and those living in poverty. The right requires an effective inclusive health system of good quality. The evolution towards defining health as a social issue led to the founding of the World Health Organization in 1946.

The World Health Organization uses a holistic definition of Health according to which health does not merely consist of the absence of disease or handicaps but refers to the highest attainable standard of physical, mental and social well-being and not merely the absence of diseases or infirmity.[2] Even when we think about Health merely in terms of lack of disease of handicap, there might be differences in interpretations of its meaning across cultural, national and generational borders. In 1977 the World Health Assembly and WHO declared, "the attainment by all citizen of the World by the year 2000 of a level of health that will permit them to lead a socially and economically productive life". With the adoption of health as an integral part of socio-economic development by the United Nations in 1979, health has also become a major instrument of overall socio-economic development and the creation of a new social order.[3]

III. THE DETERMINANTS OF HEALTH

Right to health is an inclusive Right which include certain entitlements as well. It includes a wide range of factors that can help us lead to a healthy life and those are called the Determinants of Health. The determinants of a good health include:

2. The Preamble of the 1946 World Health Organization (WHO) Constitution.
3. Nandita Adhikari, *Law & Medicine* 107 (Central Law Publications, Darbhanga Castle, Allahhabad, 2019)

(i) Safe drinking water and adequate sanitation

(ii) Safe food

(iii) Healthy working and environmental conditions

(iv) Gender equality

(v) The right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health

(vi) The right to prevention, treatment and control of diseases

(vii) Access to essential and quality medicines

(viii) Public health and health care facilities

(ix) Maternal, child and reproductive health

(x) Equal and timely access to basic health services

(xi) The provision of health-related education and information

(xii) Health services, goods and facilities must be provided to all without any discrimination.

IV. INTERNATIONAL CONCERNS FOR RIGHT TO HEALTH

With the establishment of WHO, for the first time the right to health was recognized internationally. It affirms that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic and social condition.[4] The right to the highest attainable standard of physical and mental health was subsequently incorporated into the International Covenant on Economic, Social and Cultural Rights (1966). In international human rights law, the right to health is an inclusive right, extending beyond healthcare to the underlying determinants of health, such as access to potable water, sanitation, adequate food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

Article 25 of the Universal Declaration of Human Rights provides – (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his

4. Right to Health, *available at*: http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module14.htm (Visited on: 20/4/2020)

control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection[5]. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) defines the right to adequate health in a relative fashion: "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." This statement does not, however, settle the issue since it is not clear whether the "highest attainable standard" should be assessed with respect to the economic infrastructure of a single nation or with respect to the global community. Certainly, in some cases the highest attainable standard of living that a nation can provide does not satisfy the existing consensus on the minimum health-related rights to which all people are entitled (i.e., vaccines, physical therapies, geriatric care). Partially because many governments in developing world cannot provide adequate health care and living conditions for all their citizens, their populations suffer disproportionately from diseases that are routinely preventable or curable in developed nations.

Unlike many other International Rights, the right to adequate health is not contained in a single specific treaty, but is subsumed under other treaties and resolutions. There are so many international instruments protecting the health right.[6]

The major international instruments for protection of the right to health are:

A. Universal Declaration of Human Rights, 1948

B. International Convention on the Elimination of all Forms of Racial Discrimination, 1966

C. International Convention on Economic, Social and Cultural Rights, 1966. While the treaty language varies across UN documents, three key concepts arise[7]: therefore, health is multidimensional. It has three dimensions – physical, mental and social.[8]

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5. UDHR, 1948, art. 25
6. The major international instruments for protection of the right to health are:
   A. Universal Declaration of Human Rights, 1948
   B. International Convention on the Elimination of all Forms of Racial Discrimination, 1966
   C. International Convention on Economic, Social and Cultural Rights, 1966
   D. Declaration on the Rights of Mentally Retarded Person, 1971
   E. Universal Declaration on the Eradication of Hunger and Malnutrition, 1974
   F. Declaration on the Right of Disabled Person, 1975
   G. Alma Ata Declaration, 1978
   H. Convention on the Elimination of all Forms of Discrimination against Women, 1979
   I. Convention on the Rights of Child, 1989
7. The Right to Means to Adequate Health, *available at:* http://hrlibrary.umn.edu/edumat/studyguides/righttohealth.html (Visited on: 20/4/2020).
8. Office of the United Nations High Commissioner for Human Rights, WHO.

1. States have the responsibility to guarantee their citizens the right to adequate health. When for whatever reason they are unable to do so, the international community must assume that responsibility.
2. States have the responsibility to ensure that none of their citizens are deprived of this right by state action.
3. These rights are guaranteed to all citizens, regardless of race, religion, gender, age, or social standing in the community, or other status.

V. NATIONAL CONCERNS FOR RIGHT TO HEALTH AND HEALTH PROTECTION

The Universal Declaration of Human Rights, to which India is signatory, recognises the right to a standard of living adequate for the health and well-being to humans including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond human control. Although health is a fundamental human right, without which no other rights would be possible. The Constitution of India does not expressly guarantee a fundamental right to health. However, there are multiple references in the Constitution to public health and on the role of the State in the provision of healthcare to citizens.

The right to healthcare is not explicitly stated to be a fundamental right under the Constitution of India. The Directive Principles of State Policy in Part IV of the Indian Constitution provide a basis for the right to health. Article 39 (E) directs the State to secure health of workers, Article 42 directs the State to just and humane conditions of work and maternity relief, Article 47 casts a duty on the State to raise the nutrition levels and standard of living of people and to improve public health.[9]" Moreover, the Constitution does not only oblige the State to enhance public health, it also endows the Panchayats and Municipalities to strengthen public health under Article 243G. This is not enforceable against the state since it is a directive principle and the state is not bound to follow them. However, the Supreme Court has clearly mentioned in Akhil Bhartiya case[10] that while directive principles cannot be held to be enforceable against the state, they can still be binding. Further, the jurisprudential progress on the scope and purport of the directive principles of state policy over time as reflected by various

9. Article 47 of the Constitution of India, 1950, "The state shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as among its primary duties, and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drink and of drugs which are injurious to health"
10. *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India,* AIR 1981 SC 204

landmark precedents by the apex court traverse the shift from plain non-enforceability to a harmonious interrelationship between fundamental rights and directive principles, particularly in specifying that the directive principles are supplementary and complementary to fundamental rights.

Given no explicit recognition of the right to health or healthcare under the Constitution, the Supreme Court of India in *Bandhua* case[11] interpreted the right to health under Article 21 which guarantees the right to life. In Mohinder Singh Chawla case[12] the apex court reaffirmed that the right to health is fundamental to the right to life and should be put on record that the government had a constitutional obligation to provide health services. The court went on to endorse the State's responsibility to maintain health services. In,a case[13] where the supreme Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person and that preservation of human life is of paramount importance. This obligation on the State stands irrespective of constraints in financial resources. The Court stated that denial of timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of this right. The Court asked the Government of West Bengal to pay the petitioner compensation for the loss suffered. It also directed the Government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.

The case was the first in which the Supreme Court held that the right to life included an obligation to provide timely medical treatment necessary to preserve human life. In 19992, the apex court stated the following[14]:

"Right to livelihood springs from the right to life guaranteed under Art.21. The health and strength of a worker is an integral part of right to life." Further, in a case[15], the Supreme Court buttressed this point by saying: "Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person".

VI. LEGISLATIVE COMPETENCY ON HEALTH

Health is a state subject and according to the Seventh Schedule of the Constitution of India, it is only state who is competent to make law on it. It the primary responsibility

11. *Bandhua Mukti Morch* v. *Union of India,* AIR 1984 S C 802
12. *State of Punjab & Ors* v *Mohinder Singh Chawla,* A I R 1997 S C 1225
13. *Paschim Banga Khet Mazdoor Samity & Others* vs. *State of West Bengal,* A I R 1986 S C 2426
14. *CESE Ltd* v. *Subhash Chandra Bose,* 1992 SCC (1) 441
15. *Consumer Education & Research Centre* v. *Union of India,* A I R 1995 S C 1811

of state to look after the health of its citizen but health subject is so complicated and diverse that it is not possible for the state only to look after. Therefore, the Centre should also be made responsible for such a big subject like health.

In September 2019, a High-Level Group on the health sector constituted under the 15th Finance Commission had recommended that the right to health be declared a fundamental right. It also put forward a recommendation to shift the subject of health from the State List to the Concurrent List. The recommendation to declare the right to health a fundamental right, if implemented, will strengthen people's access. However, the latter recommendation to shift health to the Concurrent List will lead to a constitutional conundrum on whether the centralisation of public health will be helpful in the context of Indian cooperative federalism. At present, the subject of "public health and sanitation; hospitals and dispensaries" falls under the State List of the 7th Schedule of the Constitution of India – which means that state governments enjoy constitutional directives to adopt, enact and enforce public health regulations.

VII. PUBLIC HEALTH CARE SYSTEM IN INDIA

In India, the healthcare system is organised into primary, secondary, and tertiary levels. At the primary level are Sub Centres and Primary Health Centres (PHCs). At the secondary level there are Community Health Centres (CHCs) and smaller Sub-District hospitals. Finally, the top level of public care provided by the government is the tertiary level, which consists of Medical Colleges and District/General Hospitals. The number of PHCs, CHCs, Sub Centres, and District Hospitals has increased in the past six years, although not all of them are up to the standards set by Indian Public Health Standards.

Due to India's federal system of government, the areas of governance and operations of health system have been divided between the union and the state governments. The Union Ministry of Health & Family Welfare is responsible for implementation of various programs on a national scale (National AIDS Control Program, Revised National Tuberculosis Program, to name a few) in the areas of health and family welfare, prevention and control of major communicable diseases, and promotion of traditional and indigenous systems of medicines and setting standards and guidelines, which state governments can adapt. In addition, the Ministry assists states in preventing and controlling the spread of seasonal disease outbreaks and epidemics through technical assistance. On the other hand, the areas of public health, hospitals, sanitation and so on come under the purview of the state, making health a state subject. However, areas having wider ramification at the national level, such as family welfare and population

control, medical education, prevention of food adulteration, quality control in manufacture of drugs, are governed jointly by the union and the state government.[16]

The present health policy and systems have been evolved with the recommendations made by the recommendation of the Bhore Committee Report, 1946[17], for three-tiered health-care system to provide preventive and curative health care in rural and urban areas placing health workers on government payrolls and limiting the need for private practitioners became the principles on which the current public health-care systems were founded. This was done to ensure that access to primary care is independent of individual socioeconomic conditions. However, lack of capacity of public health systems to provide access to quality care resulted in a simultaneous evolution of the private health-care systems with a constant and gradual expansion of private health-care services[18]. The committee was instrumental in bringing about the public health reforms related to peripheral health centres in India. Primary Health Centres were built across the nation to provide integrated promotive, preventive, curative and rehabilitative services to entire urban as well as rural population, as an integral component of wider community development programme.

VIII. PRIVATE HEALTH CARE

India has a mixed health-care system, inclusive of public and private health-care service providers. However, most of the private health-care providers are concentrated in urban India, providing secondary and tertiary care health-care services. The public

16. M. Chokshi, *Journal Of Perinatology*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5144115
17. The Bhore Committee was set up by the Government of India in 1943. It was a health survey taken by a development committee to assess health condition of India. The development committee worked under Joseph William Bhore, who acted as the chairman of committee.
18. Some of the important recommendations of the Bhore Committee were:
    A. Integration of preventive and curative services at all administrative levels.
    B. Development of Primary Health Centres (PHC) in 2 stages:
    C. Short-term measure - one Primary Health Centre was suggested for a population of 40,000. Each PHC was to be staffed by 2 doctors, one nurse, four public health nurses, four midwives, four trained dais, two sanitary inspectors, two health assistants, one pharmacist and fifteen other class IV employees. The first was established in 1952. Secondary health centres were also envisaged to provide support to PHCs, and to coordinate and supervise their functioning
    D. A long-term programme (also called the 3 million plan) of setting up primary health units with 75 - bedded hospitals for each 10,000 to 20,000 population and secondary units with 650 - bedded hospital, again regionalised around district hospitals with 2500 beds.
    E. Major changes in medical education which included 3 months training in preventive and social medicine to prepare "social physicians".[4]
    F. Abolition of the Licentiate in Medical Practice (etc) qualifications and their replacement by a single national standard Bachelor of Medicine and Bachelor of Surgery (MB BS) degree.
    G. Creation of a major central institute for post-graduate medical education and research: which was achieved in 1956 with the All-India Institute of Medical Sciences (AIIMS).

health-care infrastructure in rural areas has been developed as a three-tier system based on the population norms.

IX. THE ACHIEVEMENTS AND CHALLENGES

The positive achievement in this regard is that the longevity of human life has increased. Though our achievement in regard to longevity and other key health indicators are impressive but, in many respects, uneven across States. Longevity, always a key for national goal, is not merely the reduction of deaths as a result of better medical and rehabilitative care at old age. In fact, without reasonable quality of life in the extended years marked by self-confidence and absence of undue dependency and longevity may mean only a display of technical skills. So, quality of life requires as much external bio-medical interventions. At the same time, some segments will remain always more vulnerable - such as women due to patriarchy and traditions of infra-family denial), aged (whose survival but not always development will increase with immunization) and the disabled. Reduction in child mortality involves as much attention to protecting children from infection as in ensuring nutrition and calls for a holistic view of mother and child health services.[19] The difference between rural and urban indicators of health status and the wide interstate disparity in health status are apparent. Clearly the urban rural differentials are substantial.[20]. Some of the major challenges to right to health in India are following:

IX. 1. Neglected Public Health Care

Public healthcare infrastructure in India has long suffered from neglect and a chronic lack of funding. The increase of India's population from around 39 crores at the time of its independence to around 135 crores today has not seen proportionate robustness in policy response in reasonably quantitative terms, particularly in developing public health infrastructure in rural areas. This is despite an early recognition of the fact that a universal public healthcare system was essential to the growth and development of the nation. The Bhore report of 1946, holds up the then newly established National Health Service of England as an example to be aspired to and clearly spells out the need thereof in the following words*:* "This is an ideal which we in this country may well place before ourselves, not as some distant shadowy objective to be approached through leisurely advances if and when conditions are favorable, but as a definite goal

19. R. Srinivisan, Health Care in India-Vision 2020 Issues and Prospects, *available at*: https://www.studocu.com/in/document/indian-institute-of-technology-kharagpur/financial-engineering/health-care-in-india-vision-2020/2998565 (Visited on: 20/3/2021).
20. Supra Note 8

the attainment of which, at the earliest possible moment, is vital for the nation's progress and therefore demands an inflexible, concentrated and sustained effort on the part of all, to whom the nation's health and welfare are a matter of vital concern[21]." Despite this, public spending on health in India remains low. In fact, at 33% of the total healthcare spend, it is one of the lowest in the world. India ranks 184 out of 191 countries in public spending on health. Despite the fact that almost 70% of India's population lives on less than $2 a day, the country continues to have one of the highest out of pocket expenditures on health. It is estimated that 62.4% of the total current health expenditure is paid for by the patients themselves and the government only contributes 16.7%. Compare this to Sri Lanka, where only 49% of a person's healthcare expenditure is out of their pocket and 43% of the total comes from government expenditure. This is reflected in Sri Lanka's general health outcomes and in the Human Development Index score of 0.757, significantly above the South Asian average of 0.607.

IX. 2. Low Quality Health Care

Low quality care is prevalent due to misdiagnosis, under trained health professionals, and the prescription of incorrect medicines. A study discovered a doctor in a PHC in Delhi who prescribed the wrong treatment method 50% of the time. Indians in rural areas where this problem is rampant are prevented from improving their health situation. Enforcement and revision of the regulations set by the Union Ministry of Health and Family Welfare IPHS is also not strict. The 12th Five-Year Plan dictates a need to improve enforcement and institutionalize treatment methods across all clinics in the nation in order to increase the quality of care. There is also a lack of accountability across both private and public clinics in India, although public doctors feel less responsibility to treat their patients effectively than do doctors in private clinics. Impolite interactions from the clinic staff may lead to less effective procedures[22].

IX. 3. Corruption

Healthcare professionals take more time off from work than the amount they are allotted with the majority of absences being for no official reason. India's public healthcare system pays salaries during absences, leading to excessive personal days being paid for by the government. This phenomenon is especially heightened in Sub Centres and PHCs and results in expenditure that isn't correlated to better work performance.

21. Ibid
22. Supra Note 8

IX. 4. Overcrowded Clinics

Clinics are overcrowded and understaffed without enough beds to support their patients. Statistics show that the number of health professionals in India is less than the average number for other developing nations. In rural Bihar the number of doctors is 0.3 for every 10,000 individuals. Urban hospitals have twice the number of beds than rural hospitals do but the number is still insufficient to provide for the large number of patients that visit. Sometimes patients are referred from rural areas to larger hospitals, increasing the overcrowding in urban cities.

Overcrowding also increases the likelihood of diseases spreading, particularly in urban, crowded areas of cities. Improper sanitation and waste disposal, even within clinics, can lead to an increased incidence of infectious diseases.

IX. 5. Cost Factor

Public health services have low cost or mostly in India, work at free of cost. Since the government provides these services, they don't charge any extra money to serve the patients. That is the reason why most people who come to public hospitals to do their treatment are those who can't afford enough money to treat themselves or their family.

IX. 6. Barriers of Access

Both social and financial inequality results in barriers of access to healthcare services in India. Services aren't accessible for the disabled, mentally challenged, and elderly populations. Mothers are disadvantaged and in many rural areas there is a lack of abortion services and contraception methods. Public clinics often have a shortage of the appropriate medicines or may supply them at excessively high prices, resulting in large out of pocket costs (even for those with insurance coverage). Large distances prevent Indians from getting care, and if families travel far distance there is low assurance that they will receive proper medical attention at that particular time[23]. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.

IX. 7. Policymaking Neglect

This neglect is also reflected in the policymaking process. India is yet to receive the new and updated pharmaceutical policy, a draft of which is still pending in its 2017 iteration. Further, while the National Health Policy of 2017 envisages an increase in health spending to 2.5% of the GDP by 2025, there has been no movement in this direction, with the last recorded allocation being 1.1% of the GDP. In this scenario,

23. Supra Note 8

instead of a greater push to increase public capacity in the field of medical infrastructure, the NITI Aayog came out with a report last year encouraging the privatisation of healthcare in the country. When even the highly privatised US healthcare system has suboptimal health outcomes compared to similarly developed countries with public and freely accessible healthcare systems, the recommendation is surprising. The pandemic has exposed the deep vulnerabilities of India's healthcare system. Much of this is blamed on India's low expenditure on public health –1.29% of the GDP (in 2019-20), lower than most other countries. Another critical reason for the weak public health in India is the absence of a statutory framework that guarantees a fundamental right to health.

X. CONCLUSION

Our overall achievement in regard to longevity and other key health indicators are impressive but, in many respects, uneven across States. Through the Directive Principles of State Policy, the Constitution has made a forceful appeal to the State to provide a decent standard of living. Several legal precedents have dictated that the state is responsible for citizens' healthcare. India's commitment to international legal treaties and conventions also binds it, as a state party, to enhance and provide adequate public services and a minimum standard of universal health care. Existing constitutional guarantees, legal precedents and global commitments form a solid basis for a fundamental right to health in India. A legislatively guaranteed right will make access to health legally binding and ensure accountability. A constitutional amendment on the lines of the 93rd Amendment to the Constitution which provided a constitutional sanction to the right to education, should be adopted for providing adequate healthcare in India.

With the rapid industrialization and urbanization health problems are increasing quite rapidly, and for a welfare country like India it is essential to recognize right to health as a fundamental right. There is a need to make the right to health a fundamental right - and implement it within the framework of legal devices and human rights principles of solidarity, proportionality, and transparency which will help India address the challenges mentioned above. Implementing the right to health within India's framework of co-operative federalism will build capacities where they are most needed - at the grassroots. On a crucial subject like health, there must be coordination between the centre and states without impeding cooperative federalism - an essential element of the Indian Constitution. In the context of the right to health, solidarity can guarantee equal access to public health systems to all. In the current situation, India's marginalised communities are disproportionately hurt due to the lack or minimal access to healthcare and other basic needs which have further deepened stark inequalities. The assertion of

solidarity requires that the government and institutions treat people and protect their rights equally without any discrimination based on sex, caste, class, religion and language. At the national level, domestic solidarity would mandate state governments and institutions to look for standard solutions to shared challenges for combined interests. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health. Between 2009 and 2019, India invested less than 2% of its GDP in public health. This percentage has continued to drop, with barely 1.1% of the GDP going towards public health last year

Thus, the challenge before us is not merely the promotion of health, but providing a fair and reasonable chance for all to achieve it. In the present scenario of 21 century right to health has become an important right equal to life. The world is becoming global village and MNCs are playing their vital role in the service providing sectors. As the governments all over the world has adopted the policy of liberalization which is integral part of globalization and cutting its involvement in the economic activity with the aim to provide basic infrastructure for social sectors like education and health etc. it is the obligation of the government to provide all the basic necessities for good health and education.

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24. Nishant Sirothi, Declaring Right to Health as Fundamental Right, *available at*: https://www.orfonline.org/expert-speak/declaring-the-right-to-health-a-fundamental-right/ (Visited on: 21/4/2021)

2

Childhood Statelessness: Causes, Effects and International Safeguards to protect the Human Rights of Stateless Children

Dr. Satarupa Ghosh[1]

I. INTRODUCTION

Children are the gifts of God with the Holy spirits as they are innocent and truthful. All the children have the right to health, education and protection and every society has a responsibility in expanding opportunities in a children's life. Around the World there are many children who start their life with a disadvantage because of whom they are and where they are from. Most of us are lucky enough to take birth in a country where we passed our childhood under the shelter of a recognized Nationality and we were capable of enjoying all the democratic rights which we are entitled to after our generations fought several wars for democracy throughout the greater part of human history. But there is another story behind the scene which mostly remains hidden due to several socio-political issues. That story is no other than the story of those children who are born out of illegal migrants having no valid Citizenship of a particular nation.[2] Stateless children are born into a world in which they will face a lifetime of discrimination; their status profoundly affects their ability to learn and grow, and to fulfill their ambitions and dreams for the future. With a stateless child being born somewhere in the world at least every 10 minutes, this is a problem that is growing. In countries hosting the 20 largest stateless populations, at least 70,000 stateless children are born each year. The effects of being born stateless are severe. In more than 30 countries, children need nationality documentation to receive medical care. In at least 20 countries, stateless children cannot be legally vaccinated. This report aims to go beyond these statistics, providing direct testimony of children and young people and how being stateless affects them.[3]

1. Assistant Professor, Department of Law, Cooch Behar Panchanan Barma University, Cooch Behar.
2. Jayanta Boruah, "Legal Status of Stateless Children in India and their Right over Access to Justice", 1644, International Journal of Law Management and Humanities, Vol. 4 Issue 3.
3. I Belong, Statelessness Report, UNHCR 2015, available at https://www.unhcr.org.

II. WHAT IS CHILD STATELESSNESS?

As per the report of UNHCR, it is estimated that at least 10 million people are stateless worldwide: they are not considered as nationals by any State under the operation of its law. Statelessness is sometimes referred to as an invisible problem because stateless people often remain unseen and unheard. They often aren't allowed to go to school, see a doctor, get a job, open a bank account, buy a house or even get married. Denial of these rights impacts not only the individuals concerned but also society as a whole, in particular because excluding an entire sector of the population can lead to social tensions and significantly impair economic and social development.

Childhood Statelessness is a significant worldwide problem. The UN estimates that approximately one third of all people affected by statelessness globally are children. It is a phenomenon found on every continent and in most countries.[4]

II.1. Types of Statelessness:

Statelessness may be of two types; De Jure Statelessness and De Facto Statelessness.

(a) De Jure Statelessness: Article 1(1) of the ConventionRelating to the Status of Stateless Persons 1954defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law', with 'any State' referring to States to which a person has a certain link, such as by habitual residence or birth. This type of statelessness is also referred to as de jure statelessness, that is, statelessness according to the law. Most frameworks are concerned with this type of statelessness only. Importantly, article 1(1) of the Convention Relating to the Status of Stateless Persons 1954 has been recognised as part of customary law.

(b) De Facto Statelessness: 'De facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'. De facto statelessness should be understood as a situation in which, according to the law, a person would have acquired a nationality of at least one State with which he or she has a link but – for whatever reason has failed to do so; in addition, the authorities of that State deny either this entitlement to the nationality or its acquirement. An example is a child who, according to the law, would acquire a nationality but who has failed to do so due to birth registration issues.

II.2. Causes of Child Statelessness

4. The Child's Right to A Nationality and Childhood Statelessness, Statelessness Essentials: Childhood Statelessness,9-12, Institute of Statelessness and Inclusion,UNICEF, available at htts:// files.institutesi.org/childhood-statelessness.pdf.

(a) Discrimination: Constituting the most common cause, statelessness can be the result of discriminatory laws that exclude certain people directly or indirectly from acquiring a nationality. This can occur when the right to a nationality is only attributed to certain people, when certain people or groups are being excluded or if it has been made virtually impossible for them to access their right to a nationality. A clear and common form of this is gender-based discrimination; several States employ a system in which nationality can be derived only from the father, which may in certain cases lead to stateless children, for example if the father happened to be stateless or a non-national.

On the basis of ethnicity, race, religion or gender – is the major cause of statelessness globally. The majority of the world's known stateless populations belong to a minority group, and at least 20 countries maintain nationality laws which deny nationality or permit the withdrawal of nationality on the grounds of ethnicity, race or religion. In some countries, even where the law is discrimination-free, the practice can be very different. Worldwide, 27 countries have nationality laws that do not allow women to pass their nationality to their children on the same basis as men. This can leave a child stateless in situations where the father is stateless, has died, has abandoned the family or is unwilling or unable to transmit his nationality. In Italy, a personally prepared application or an individual's declaration of willingness is required to acquire nationality through naturalization.[5]

(b) Gaps in nationality laws: The lack of a solid nationality framework leaves room for people to fall outside systems. An important notion in this regard is that, in principle, it is up to States themselves to determine their nationality laws and policies. Their systems can be divided roughly into the "iussanguinis system" and the "ius soli system". The former, literally meaning 'the law of blood', makes the acquisition of nationality dependent on descent. In case of the ius soli system, nationality is linked to territory, with the place of birth being the general criterion. In theory, the use of these different systems is not necessarily problematic. However, when people start to move across borders the issue of statelessness may come into play. For example, if a pregnant woman coming from an 'ius soli country' moves to an 'iussanguinis country' where she delivers a baby, her child might become stateless if no other provisions enable the acquisition of a nationality for her child. Furthermore, in States where the iussanguinis system is applicable, statelessness can automatically be passed on to one's spouse.

5. I Belong, Statelessness Report, UNHCR 2015, available at https://www.unhcr.org.

In nationality laws against statelessness at birth prevent statelessness from being passed down from one generation to the next. They also help to avert statelessness where parents have a nationality but are unable to confer it on their child, or where a child has been abandoned and the parents are unknown. More than half the States in the world lack or have inadequate safeguards in their nationality laws to grant nationality to children born stateless in their territory. In certain cases, nationality laws may include safeguards, but there may be gaps in their application. This is a major cause of childhood statelessness – at least 70,000 stateless children are born each year in the countries hosting the 20 largest statelessness situations. Abandoned children whose parents cannot be identified (foundlings) are another group at risk of statelessness. Nearly one third of all States lack provisions in their nationality laws to grant nationality to such children found in their territory.[6]

(c) Lack of birth registration: Administrative practices such as excessive fees, lack of required documentation, and the general failure to register births due to factors such as distance or insufficient knowledge can contribute to de facto statelessness as well. According to a study by UNICEF, 36 per cent of all births remain unregistered, often due to these obstacles, leaving 48 million children without a nationality every year. These problems arise much less from the lack of nationality according to the law than to deficiencies in registration and the like, which are common causes of de facto statelessness.

Lack of birth registration can make it difficult for individuals to prove that they have the relevant links to a State that entitle them to nationality, and therefore creates a risk of statelessness. This is because birth registration indicates where a person was born and who his or her parents are – key pieces of information needed to establish which country's nationality a child can acquire. Lack of birth registration creates a particularly high risk of statelessness for specific groups, such as refugees and migrants, as well as nomadic and border populations. Birth registration is therefore of vital importance to, for example, Syrian refugee children born in countries of asylum, many of whom have been separated from their parents or families; it would help prevent statelessness among these children, ensure they are recognized as Syrian nationals and allow them to return to Syria when conditions permit.[7]

(d) Laws relating to marriage: In some countries women automatically change their nationality when marrying a man who is a non-national. If he is stateless

6. Ibid.
7. Ibid.

or if she does not automatically obtain his nationality, she is likely to become stateless (too). However, this does not necessarily mean the child will become stateless as well. Another issue can arise due to the fact that in some countries children only obtain a nationality if their parents are married. In Austria and Denmark, for example, children with an Austrian or a Danish father will only obtain that respective nationality if their father marries the mother during their childhood.

(e) Denationalisation or denunciation of people: The denationalisation or denunciation of people might cause statelessness. Entire groups can be deprived of their nationalities, for example, on grounds of race, as evidenced by the horrific treatment of Jews during the Second World War. In addition, severe crimes or fraud can be grounds for denationalisation. Moreover, in the case of state succession, dissolution, independence or restoration, some citizens might lose their nationality and not obtain a new nationality. A good example of this is the break-up of the Soviet Union, which left many people stateless.

II. 3. Violation of Rights of Stateless Children

(a) Education: UNHCR's consultations with stateless children and youth found that they confronted challenges when it came to pursuing their education. In some cases, schools denied non-nationals entry to the classroom or demanded the far higher fees applicable to foreigners, making education unaffordable. In others, stateless children were refused admission to final exams or had their diplomas and graduation certificates withheld, halting their progress to higher education and better job prospects. Such children also frequently found themselves ineligible for scholarships or student loans.[8]

Primary education –Virtually all of the young stateless people that UNHCR spoke to had been able to attend primary school. While the Dominican Republic, Italy, Malaysia and Thailand do not restrict access to primary education for stateless children. Despite this, almost all those consulted had found a way to go to primary school, although not without struggle and often reliant on the flexibility and goodwill of school principals and teachers. In a survey conducted by UNHCR number of parents shares their bothering and embarrassment they faced by the school staffs. Some of them are being able to complete their study in school sometimes with the help of teachers and school directors.[9]

8. Supra Note 5.
9. Ibid.

(b) Health: Many young stateless people and their parents were forced to forgo professional treatment, even in cases of serious illness or injury. Travel restrictions, the prohibitively high medical costs imposed on foreigners, discrimination and lack of health education often conspired to impede access to health care for the young people. In some cases, lack of nationality documents meant that stateless mothers gave birth at home rather than in a hospital, thereby also complicating access to birth registration. Even those who were able to acquire nationality as adults continued to pay a psychological toll as a result of their stateless childhoods.

More than 30 countries require documentation to treat a child at a health facility. In at least 20 countries, stateless children cannot be legally vaccinated. Travel restrictions, the prohibitively high medical costs levied on non-nationals and discrimination conspired to impede access to health care services by many of the stateless children and youth. This not only affected their ability to participate in preventive child-health programmes, it also prompted decisions to defer or forgo professional treatment even for serious illness or injury. The psychological toll of childhoods spent stateless also had serious consequences for the self-esteem and future prospects of some of the young people, even if they were able to acquire nationality during adulthood. Obstacles to treatment Many participants in the consultations said they had difficulties in accessing health care due to lack of national identity documents. In Italy, Roman parents noted that because their stateless children were not able to use public paediatric services or child health education, they had resorted to taking them to the emergency departments of public hospitals, even for basic ailments. In Malaysia, parents and guardians of young stateless children with profound disabilities faced difficultiesin access State care and support for these children. Cost barriers,the most significant barrier to accessing health care highlighted by participants in the consultations was the high cost of treatment. Although States frequently offer subsidized or even free health services to their nationals, a person who is stateless will often have to pay the higher fees imposed on foreigners. This often puts much-needed treatment out of reach. For some of the parents interviewed, the prohibitively high costs of treatment applied to non-citizens, meant that their own births and those of their children had taken place at home rather than in a hospital, making it difficult to secure birth registration documents. In a few cases, parents admitted that they would consider fraudulently using the nationality identity documents of friends and neighbours.

(c) Freedom: In addition to denying children their rights to education and health, statelessness also threatened the freedom of many to feel secure, to play, to explore – to simply be children. Labelled as outsiders in what they saw as their own country, many had to deal with discrimination from an early age. Some had already lived through experiences that had forced them to grow up far too quickly, such as working from a young age, living in insecure housing arrangements or suffering harassment by the authorities. In more extreme cases, stateless girls and boys were vulnerable to exploitation and abuse.

(d) Employment: Left unresolved, statelessness created new and insurmountable roadblocks for many of the young people moving from adolescence to adulthood. The single most-cited frustration of the young stateless women and men is the lack of jobs that matched their ability, ambition and potential. Barriers to education and freedom of movement played a major role in limiting job opportunities and denied many the chance to break previous cycles of poverty and marginalization – the impacts of statelessness being passed from one generation to the next.

III. INTERNATIONAL SAFEGUARDS

A 'stateless person' is defined in Article 1(1) of the 1954 Convention[10]:

"For the purpose of this Convention, the term stateless person means a person who is not considered as a national by any State under the operation of its law".

III. 1. Rights of the Stateless Person:

(a) The right to a nationality: Convention Relating to The Status of Stateless Persons, 1954, traditionally afforded discretion to states in relation to their nationality practices, but this has been considerably restricted by developments in international human rights law.

Article 15 of the Universal Declaration of Human Rights (UDHR) declares the right to a nationality and the right not to be arbitrarily deprived of one's nationality.

(b) Prevention and reduction of statelessness: The UN Convention on the Reduction of Statelessness, 1961 remains the only global legal instrument with the aim of preventing and reducing statelessness:

(i) Articles 1–4: Rules for the grant of nationality at birth making loss or renunciation of nationality conditional.

10. Convention Relating to The Status of Stateless Persons, 1954

(ii) Articles 5–7: Upon an individual having, or having assurance of acquiring, another nationality.

(iii) Article 8: Prohibiting deprivation of nationality if this would result in statelessness.

The convention does, however, allow for limited (but significant) exceptions to these obligations and prohibitions. Its provisions have been supplemented by the subsequent development of international human rights law in relation to nationality.

III. 2. Convention on the Rights of the Child (CRC)

(i) Articles 7 and 8: Set out a child's right to acquire a nationality and preserve his or her identity (including nationality), and prohibits unlawful interference with the child's right to preserve his or her nationality.

(ii) Article 7(1): States must register children immediately after birth, an essential step in establishing nationality through birth on the territory or descent.

(iii) Article 7(2): Requires states to ensure implementation of the right to acquire a nationality in accordance with their obligations under relevant international instruments, in particular where the child would otherwise be stateless.

III. 3. United Nations High Commissioner for Refugee (UNHCR)

The prevention and resolution of childhood statelessness is one of the key goals of UNHCR's Campaign in the year of 2015 to End Statelessness in 10 Years, or by 2024. To achieve this goal, UNHCR urges all States to take the following steps in line with the Global Action Plan to End Statelessness:

(i) Allow children to gain the nationality of the country in which they areborn if they would otherwise be stateless.

(ii) Reform laws that prevent mothers from passing their nationality to theirchildren on an equal basis as fathers.

(iii) Eliminate laws and practices that deny children nationality because of theirethnicity, race or religion.

(iv) Ensure universal birth registration to prevent statelessness.

III. 4. The Legal Framework

1. Birth registration system: The right to be registered immediately after birth requires a birth registration system that is:

a) effective

b) free

c) universally accessible (without discrimination)

d) flexible

e) responsive to the circumstances of families.

f) Right to acquire a nationality

2. The right to acquire a nationality needs to be:

a) distinguished from the right to a nationality

b) realised for all, without discrimination

c) enforced in compliance with the best interests of the child.

IV. CHILDHOOD STATELESSNESS IN INDIA

Article 1 of the 1954 Convention relating to the status of Stateless Persons defines stateless person as 'who is not considered as a national by any state under operation of its law'. In India the right to grant or determine citizenship exits with the state, any person who is rendered a non-national by citizenship law has the status of 'de jure' stateless which is purely a legal description whereas any person whose nationality is disputed or ineffective and is unable to establish their nationality but have not formally lost their legal ties to their country as considered as 'de facto' stateless. The primary responsibility of a state is prevention and reduction of statelessness, in India people lack effective nationality due to effects of partition, decolonization, internal politics, and illegal migration. Security issues in India, negative legislative intent, civil war in Sri Lanka, Bhutan and Myanmar and Indo-China relationships, etc. together with the lack of measures in the Indian citizenship laws worsens the condition of the stateless community and the children of stateless persons are the worse affected in such situations.

V. NATIONAL LEGAL FRAMEWORK

In India decolonization following the partition of British India resulting in the creation of two sovereign states, India and Pakistan caused a large mass migration of 14 million people who became displaced, moving to either Pakistan or to India.[11] The decolonization also affected the status of Indians who were sent to Sri Lanka during the British rule and were rendered stateless upon independence, the people are still facing the effects of the partition and British governance to this day.[12] Though India as a history of hosting refugees and stateless person, it does not legally recognize these persons. Furthermore years of illegal migration, thousands of refugees including stateless refugees feeling persecution such as Rohingyas and Tibetans and vast number of people Assam and other states are rendered stateless and stripped of their nationality.[13]

11. R.S. Pillai, "Indo-Sri Lankan Pact of 1964 and the problem of statelessness-ACritique", 31, Afro Asian Journal of Social Sciences, 1-14(2021).
12. Mohanty, & R. Tandon, R, Participatory Citizenship: Identity, Exclusion, Inclusion, 15- 17 (Sage Publications, 2006).
13. UN General Assembly, Convention Relating to the Status of Stateless Persons, Sept 28 1954, U.N.T.S 360.

(a) The Constitution of India, 1950: The constitution of India lays down provisions to regulate Citizenship in India. Article 5 of the constitution states than any person, who was or either of the parents was born in the territory of India or who has been ordinarily resident of India for at least five years before the commencement of the constitution shall be deemed to be a citizen of India.

(b) The Citizenship Act, 1955: The citizenship act enacted by the parliament in 1955 regulates the accusation and termination of citizenship in India. As per the act, citizenship could be acquired by birth, decent, registration, naturalization, and by incorporation of territory. In addition to acquiring citizenship through these provisions Section 13 of the act is a supplement provision that deals with issuance of certificate citizenship, thus the Act aims to provide for the accusations, determination and regulation of citizenship in India along with the Constitution of India forms the epicenter for acquiring citizenship in India.[14]

Status of Stateless Children under Indian Law of Citizenship of a Child: The Citizenship Act, 1955 focuses on citizenship of children in different categories which include:

(a) Child born in territory of India (section 3)

(b) Child born to Indian parent(s), outside the territory of India (Section 4)

(c) Registration of minors as citizens (Section 5)

(d) Children born aboard a ship, an air craft or in transit (section 2(2))

(e) Child found in India and Children Born in the Territory of India.

Section 3 of Citizenship Act provides for accusation of citizenship by birth. This provision confers citizenship Jus Soli on the basis of birth in the territory According to the provision, a child acquires citizenship by birth, if one parent is a citizen of India while the other is not an illegal migrant'. The term illegal migrant was inserted in the Citizenship Act by the Citizenship (Amendment) Act 2003 and has been defined as a foreigner who has entered into India without prescribed documents or has stayed in India beyond permitted date. In terms to this section it is very unlikely that the citizenship act would grant nationality via jus soli to children born in the territory of India who are at risk of being stateless, this is not in accordance with Article 120 of 1961 Convention which requires States to "grant nationality to a person born in its territory". Further Section 3 of the Citizenship Act has defined the meaning for parent and fails to clarify

14. Namitha Melwin, "The Rights of Stateless Children in India: Issue of Nationality", International Journal of Legal Developments and Allied Issues,Volume 4 Issue 5 September 2018.

the different sets of parents of a child such as biological parent 'adoptive parent', 'unmarried parent' 'surrogate parent', etc. all of which are necessary to determine the nationality of the child. The law in India is also silent of children born out of wedlock. The provision also fails to take into account children born to both parents who may not citizens of India or may be without nationality thus the Citizenship Act does not provide nationality to children born in the territory of India who would otherwise be stateless and has the potential to create statelessness by operation of law. The statutory provisions in India are also silent on the nationality of children found in India. These are the children in the territory of India who are of unknown parentage and pose a challenge with regard to determination of citizenship. Article 2 of the 1961 Convention on Reduction of Statelessness has laid down that in case no proof to the contrary a child found in the territory of the state shall be considered born in that state. Article 7 of the Convention on Rights of Child states that every child shall be registered after birth and have right to nationality, further Article 8 states that every child has the right to preserve his/her identity. With respect to international laws. India's legal framework fails to determine the nationality and status of stateless children.

Extent of stateless children in India: There is no Comprehensive, publically available government record of the number of stateless persons in India. The census in India which is carried out under the Census Act, 1948 along with Census Rules, 1990 is a statutory framework for creating a social, economic, demographic and numerical profile of citizens of India, however it fails to take into consideration such persons without nationality or persons having unknown nationality. In the absence of specific procedures to identify stateless persons it is unclear how many children go unnoticed and unidentified. The stateless children of India are vulnerable to exploitation and human rights violations as India has not ratified the two UN conventions on statelessness and the protection of these children is left to the state. The relationship between protection of these stateless children and human rights is one of the primary issues in India, these children lack opportunity of participation, education, Health Care, Employment, Identification, social security or any other form of recognition in the society. Apart from the UN convention on Statelessness India is a part of a significant body of International Law that has elaborated the principle of nondiscrimination on basis of race, ethnicity, religion etc. and also elaborates on significance of nationality and equality under law, India's acceding of the ICCPR[15], ICESCR[16], CRC[17], ratification of ICERD[18], and CEDAW[19] which have widened the scope of human rights'.

15. International Convent on Civil and Political Rights, 1966.
16. International Covenant on Economic, Social and Cultural Rights, 1966.
17. Convention on the Rights of the Child, 1989.
18. International Convention on the Elimination of All Forms of Racial Discrimination, 1969.
19. Convention on the Elimination of All Forms of Discrimination against Women, 1979.

Significance of nationality: Article 15 of the Universal declaration of Human Rights confers upon everyone the right to nationality. No one shall be arbitrarily deprived of his nationality or denied the right to change nationality. Nationality is the fundamental element of human security, it ensures a sense of recognition and identity nationality entitles the individual to the protection of the state and provides a legal basis to exercise civil and political rights. Nationality is a legal bond between the individual and the state, this bond is easily established for the vast majority of people and in situations where these conditions do not pertain the problem of statelessness arises. Every child has the right to survive, develop and reach their full potential without discrimination and free from exploitation. Yet stateless children are exploited and vulnerable to human rights violations and are often denied the basic resources and protection available to other children in the society. This denied protection due to lack of nationality affects every aspect of the child's life such as;

Legal Identity: Nationality ensures legal identity and with no legal identity stateless children lack birth registration or be otherwise recognized and protected by state. Stateless children have no documents proving their name, age, and origin making them hard to trace if they are abandoned, go missing or orphaned.

Heath Care: Children born in a state are ensured right to access to health care, yet children born to stateless mother may not have access to antenatal care, child born may not be entitled to any postnatal care by the state. In several countries stateless children cannot be legally vaccinated and require documentation to have access to health facilities.

Education: Stateless children are often excluded from school, even if they are able to secure primary education they are barred from taking state exams and attaining secondary education as they have no form of identification to be entitled to state facilities. Social Welfare and Child Protection Social welfare programmes are rarely extended to stateless communities, since it is difficult to establish legal existence of these children, most stateless children are trapped in poverty and exploited.

Missing and missing out in Emergencies: The lack of registration or any legal documentation makes it difficult for these children to obtain relief during emergency situation. Those displaced by long term conflict or other disasters are separated from families go untraced for years. Without documentation children may remain in orphanages or foster care because it is difficult to trace their families.

Protection from Violence and Abuse: Stateless children are also vulnerable to violence, abuse, and exploitation. They may have recruited or used by armed forces and other groups as soldiers, slaves etc. These children are trafficked and sold as bride or domestic workers. Stateless children who are victims of violence or abuse often find it harder to access support services and remain unprotected.

Child Labourers: Laws prohibiting child labour offer little protection to children born in the stateless community because parents are often poor and unable to obtain legal employment themselves, many stateless children are unable to access schools and end up working in hazardous and exploitative conditions. Without documentation to prove the age of these children it is difficult to prosecute the employers.

Children in Conflict with Law: Without any form of identification these children are at risk of being prosecuted as adults and locked up in adult prisons and detention centres or convicted for crimes they have not committed. The unwillingness of governments to assume their proper responsibility with respect to the question of nationality has some significant consequences to child security and welfare. Governments must acknowledge, both formally and in practice that withholding the benefits of citizenship from whole section of society is more likely to cause harm in the society. Failure to acquire status under the law creates significant human problems, these problems can negatively impact many important elements of life including the right to vote, right to own property, right to employment, right to health care and other facilities granted by the state.

VI. PROSPECTIVE WAY OF ACTION

1. **Compulsory Birth Registration**: Birth registration is the first official record of a child's birth, although it does not confer nationality it establishes a child's legal identity, age and place of birth. Birth registration is crucial to reducing statelessness as all children are entitled to basic rights regardless of national status. Without birth records and formal documentation children are legally invisible and denied basic rights and facilities from the state. Despite the importance of birth registration each year 51 Million new-born remain unregistered. This may be for several reasons such as high cost, discriminatory laws against and excluding girls, restrictions on late birth registration, social barriers and other factors.
2. **The Registration of Births and Deaths Act, 1969**: The registration of birth of any child in India is governed by the Registration of Births and Deaths Act 1969. The preamble of the act or the definition clause do not mention the extent of applicability of the act. The act is also silent on ascertaining the nationality of a child at birth, or his/her parents. Furthermore, the act mandates registration of all births in the country and creates a national and state level authority to regulate these registrations. Section 8, 9 and 10 of the act mandates officials to submit the information of birth to persons in responsible position of the child or persons who are based in the place of occurrence of birth. Registration of Child's birth forms an effective tool to prevent statelessness

and provides for proof of decent, age and place of birth. It is the first step is assisting the process of identification of newborn. Certificate of Identity Certificate of Identity is a document issued by the government to non-citizens of the state, to facility the person's entry, exit or status of the person in that country. Certificate of Identity establishes the identity but not nationality of that person, it gives the person right to enter/leave the country. A certificate of identity allows a person to be recognized and protected by the government.

3. **The Passport Act, 1967:** The Passport Act 1967 is the only law that recognizes the term stateless for the issuance of Certificates of identity. It is the only statutory provision that caters to the need of stateless persons to an extent. Schedule II Part II of the Passport Rules 1989 lays down provisions to issue a Certificate of Identity to stateless persons residing in India or foreigners whose country is not represented in India or whose national status is in doubt. Moreover, schedule III Part I of the rules provide for travel document of stateless person and takes into consideration the spouse of such a person along with any children below the age of 15. Issuing a certificate of Identity is a positive step towards recognizing the status of stateless children and their parents who either resides in India without nationality or is a foreigner whose nationality is ineffective. The certificate of Identity would help such persons to exerciser their human right to travel. The recognition of statelessness through this certificate is a significant step toward redressing the problem.
4. **Determination of Nationality**: In India the term stateless persons require further deliberation and explanation. The meaning of citizens and non-citizens are not clearly mentioned in the Citizenship Act, 1955. The act must be amended to incorporate 'stateless persons' in its provisions and also incorporate procedures to establish and determine the nationality of such persons.
5. **Determination of Status of Personsof Stateless Community**: A centralized authority set up by the state to determine the procedure for Identification and recognition of Stateless persons in order to prevent the children of these stateless person from becoming stateless once they are adults. This centralized authority could also take into consideration to assist asylum seekers and refugees alongside stateless persons. This may further facilitate the central authority to obtain qualitative and quantitative data to statelessness and facilitate research and development programs to reduce statelessness among children as well as adults and ensure the protection of human rights among stateless communities.

6. **Judicial review**: Courts should avail their inherent powers and exercise judicial review in matters pertaining to fundamental rights or human rights issues of stateless persons. Any decision against the central authority violating the basic rights of individuals in the state must be addressed by the court by way of appeal and courts must have power to protect basic rights of individuals irrespective of nationality. Awareness Campaigns and Monitoring Statelessness in order to ensure people are aware of the importance of nationality and determination of citizenship the state must take a step toward redressing statelessness by holding nationality campaigns and national verification camps so that people can have access to recognise their status and implement identification process. Also an uniform procedure to monitor and keep a track of the extent of statelessness through domestic bodies can help analyse the extent of statelessness in the country and help redress the causes of the statelessness.[20]

The UN estimates that at least 10 million people are stateless, including communities excluded from citizenship for generations. Lacking a formal status, stateless persons are among the most vulnerable and marginalized.Protracted disputes over the citizenship status of communities can lead to conflict and refugee movements.Despite relatively low levels of participation, the UN treaties concerning statelessness continue to play a significant role. International human rights law adds to the protection of stateless persons and to the safeguards against statelessness, but the law is not being sufficiently observed. Further efforts to improve understanding and compliance with the existing legal framework are necessary, not new legal standards.

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20. Namitha Melwin, "The Rights of Stateless Children in India: Issue of Nationality", International Journal of Legal Developments and Allied Issues, Volume 4, Issue 5, September 2018

3

Cyber Crime: New Dimensions of Crime

Dr. Girish Chandra Rai[1]

I. INTRODUCTION

As Karnow has said "it is in this digital soap, this is hyper relational environment, that we see the death of the barrier…….What we do have is, the network and death dichotomy. This Fatal for the legal system, which depends, for its very life,in the existence of barriers-after all, that's what the law does: it utters the line between this and that, and punishes the transgressor." Curtis E.A. Karnow

Cyber crimes are a new class of crimes which are rapidly increasing due to extensive use of Internet Information Technology enabled services. The term Cybercrime is a combination of two words cyber and crime.Term cyber means, "involving, using, or relating to computers, especially the internet" and term crime in its simple meaning as "an actor omission against the law" or "a legal wrong that can be followed by criminal proceedings which may result in punishment". Cyber Crime may be defined as "unlawful acts where a computer is either a tool or target or both". In simple words Cybercrime is any crime that is committed with a computer over a network. The computer or network may be the target of the crime, or the computer may be the device utilized to carry out other crimes. There isn't a fixed definition for the term cybercrime. The Indian legislations have not given any definition to the term 'cybercrime'. Infact, the Indian Penal Code,1860 does not use the term 'cybercrime' at any point even after its amendment by the Information Technology (Amendment) Act 2008.

Cybercrime or computer related crime is crime that involves computer networks.[2] The computer may have been used in the commission of a crime, orit maybe the target.[3] Cybercrimes can be defined as: "Offences that are committed against individuals

1. Principal, Uttarayan College of Law, Matikata, Madhupur, Coochbehar.
2. R. Moore, *Cybercrime: Investigating High Technology Computer Crime* (Anderson Publishing, Cleveland, Mississippi, 2005).
3. Warren G Kruse and Jay G. Heiser, *Computer Forensics: Incident Response Essentials* (Addison Wesley, 2001).

or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm, or loss, to the victim directly or indirectly, using modern telecommunication networks such as Internet (networks including but not limited to Chatrooms, emails, notice boards groups) and mobile phones (Bluetooth/ SMS/MMS)"[4] Cybercrime and the Victimization of Women: Laws, Rights, and Cybercrime may threaten a person or a nation's security and financial health.[5] Issues surrounding these types of crimes have become high profile,particularly those surrounding hacking, copyright infringement, unwarranted mass surveillance, child pornography, and child grooming. There are also problems of privacy when confidential information is intercepted or disclosed, lawfully or otherwise.

Cyber crime is the new breed of crime. Cyber crime is a general term that refers to all criminal activities done using the medium of computers, the Internet, cyber space and the worldwide web.In this digital world whereas the usage of computers and smart gazettes like smartphones and other electronic instruments became more popular, there was expansion in the growth of technology as well, and the term 'Cyber' or 'Net' became more common to the every person of the society. The evolution of Information Technology gave birth to the cyberspace where in net facilities provides equal opportunities to all the people to access any information, datastorage, analyse etc.with the use of high technology with high speed.Due to increase in the number of net users, misuse of technology in the cyberspace was clutching up which gave birth to cybercrime sat the national and international level as well.

Debarati Halder and K. Jaishankar further define cybercrime from the perspective of gender and defined 'cybercrime against women' as "Crimes targeted against women with a motive to intentionally harm the victim psychologically and physically, using modern telecommunication networks such as internet and mobile phones". Internationally, both governmental and non-state actors engage in cybercrimes, including espionage, financial theft, and other cross-border crimes. Activity crossing international borders and involving the interests of at least one nation state is sometimes referred to as cyberwarfare.

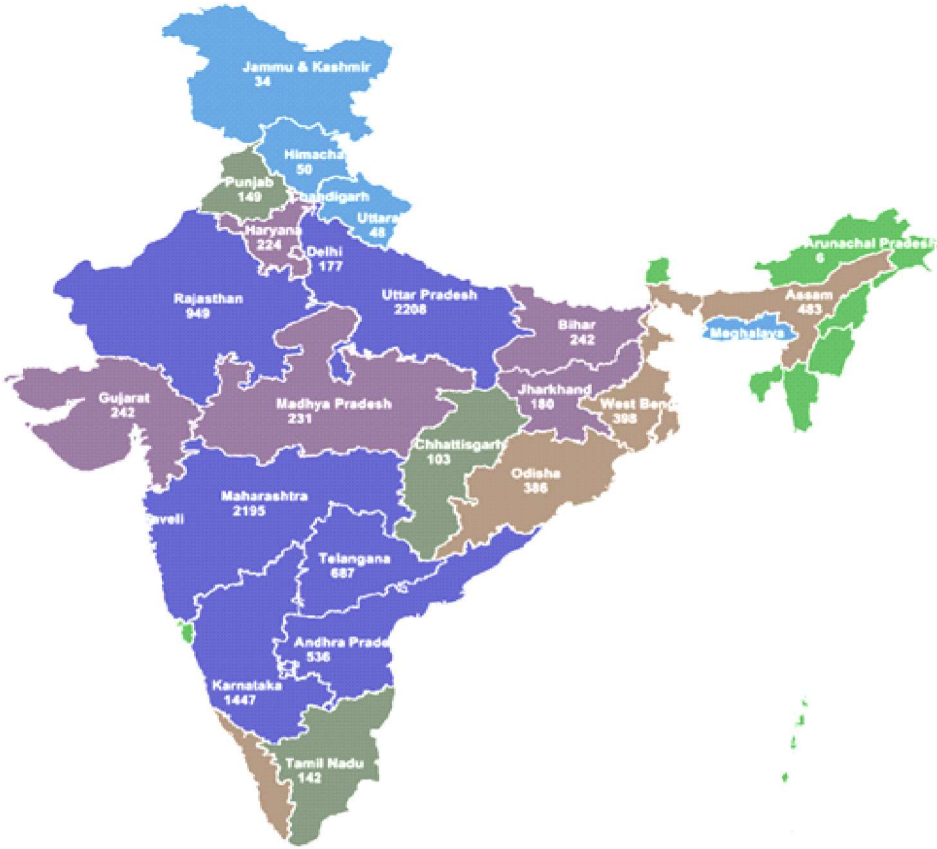
> A report (sponsored by McAfee) estimates that the annual damage to the global economy is at $445 billion; however, a Microsoft report shows that such survey-

4. Debatri Halder and K. Jaishankar, *Cybercrime and the Victimization of Women: Laws, Rights and Regulations* (IGI Global, USA, 2011).
5. Steve Morgan, Cyber Crime Costs Projected To Recah $2 Trillion by 2019, *available at:* forbes.com. (last visited on Sept. 22, 2020).
6. Dinei Florencio and Cormac Herley, *Sex, Lies and Cyber Crime Surveys*, *available at:* https:// www.microsoft.com/en-us/research/wp-content/uploads/2016/02/SexLiesandCybercrime Surveys.pdf (last visited on: Sept. 22, 2020).

based estimates are "hopelessly flawed" and exaggerate the true losses borders on magnitude.[6] Approximately $1.5 billion was lost in 2012 to online credit and debit card fraud in the US.[7] In 2016, a study by Juniper Research estimated that the costs of cybercrime could be as high as 2.1 trillion by 2019.[8]

Cyber Crimes which are growing day by day, it is very difficult to find out what a cybercrime actually is and what the conventional crime is. The number of cyber crime increasing very rapidly, their port of National Crime Record Bureau shows the increasing cases of cyber crime in our country.

II. CASES REGISTERED UNDER CYBER CRIME



Source: NCRB

7. "Cybercrime-what are the costs of victims-North Denver News". North DenverNews. Retrieved 16 May 2019.
8. "Cyber crime will Cost Businesses Over $2 Trillion by 2019" (Press release). Juniper Research. Retrieved May 21, 2019.

S. N.	Crime head under I.T. Act	Cases Registered			%Var.	Persons Arrested			%Var.
		2013	2014	2015		2013	2014	2015	
01	Tempering computer sources	137	89	88	-1.1	59	64	62	-3.1
	document								
02	Computer Related Offences	2516	5548	6567	18.7	1011	3131	4217	34.7
03	Cyber terrorism	-	05	13	160.	-	0	3	0
04	Publication/transmission of obscene/sexually explicit content	1203	758	816	7.7	737	491	555	13
05	Intentionally Not Complying With The order of controller	13	3	2	-33.3	3	4	3	-25
06	Failure To Provide Or Monitor Or interceptor decrypt information	6	2	0	-100	-	0	0	-
07	Failure To Block Access Information hosted etc.	-	1	0	-100	-	0	0	-
08	Not Providing Technical Assistance to Govt.to enable online access	-	0	3	-	-	0	0	-
09	Unauthorised Access/attempt to access to access to protected computer system	27	0	8	-	17	0	4	-
10	Misrepresentation/suppression of fact for obtaining Licence etc.	12	5	4	-20	14	13	2	-84.6
11	Breach Confidentiality/privacy	93	16	20	25	30	13	6	-53.8
12	Disclosure Of Information In Breach of lawful contract	-	2	4	100	-	5	2	-60
13	Publishing/making available false elect. Signature Certificate	4	0	3	-	8	0	0	-
14	Create/publish/make available electronic signature certificate for unlawful purpose	71	3	3	0	51	5	3	-40
15	Others	274	769	514	-33.2	161	520	245	-52.9
	Total offences under IT. Act	4356	7201	8045	11.7	2098	4246	5102	20.2

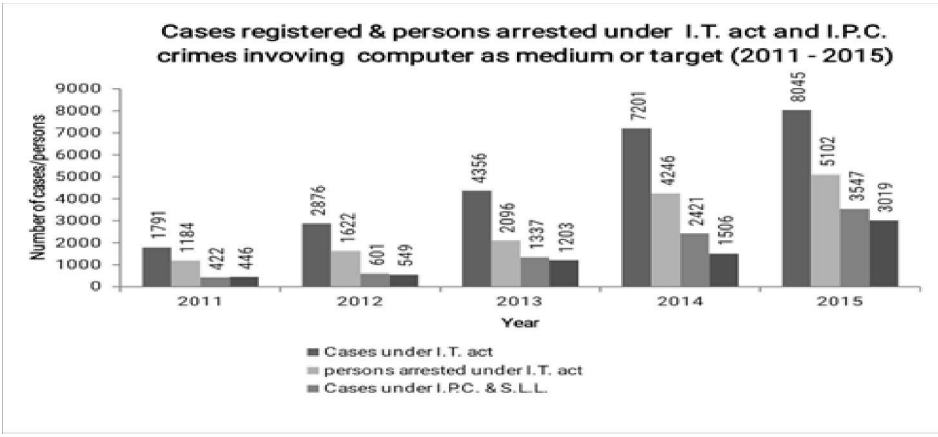
Source: NCRB

Note: '-' implies sezo value in previous year. %Var.–refers the Percentage Variation During 2015 Over 2014 '@' implies data collected in 2014 for the first time

According To National Crime Record Bureau total 11,592 cases were registered under the cyber crimes (which include cases under Information Technology Act, offences under related sections of IPC and offences under Special and Local Laws (SLL)) in comparison to 9,622 cases registered during the previous year (2014) which shows an increase of 20.5% over the previous year. Uttar Pradesh Has Reported The Highest Number Such crimes accounting for 19.0% (2,208 cases out of 11,592 cases) of total cyber crimes followed by Maharashtra (2,195 cases out of 11,592 cases) accounting for 18.9% and Karnataka (1,447 cases out of 11,592 cases i.e. 12.5%).

In these cases a total of 8,121 persons were arrested during 2015 in comparison to 5,752 persons arrested during the previous year (2014) registering 41.2% increase over the previous year. Uttar Pradesh (1,699) has reported the maximum number of persons arrested under such crimes.

A total of 8,045 cases were registered under the IT Act during the year 2015 in comparison to 7,201 cases during the previous year (2014), showing an increase of 11.7% in 2015 over 2014. 81.6% (6,567 cases) of the total 8,045 cases under IT Act were related to computer related offences(under section 66 & 66A, 66B, 66C, 66D and 66E of IT Act) followed by 10.1% (816 out of 8,045 cases) under publication/ transmission of obscene/sexually explicit content (undersection 67 & 67A, 67B and 67C of ITAct). A total of 14,121 cases under IT Act including 6,268 cases pending from previous year were investigated during the year 2015 and at the end of the year 8,088 cases remained pending for investigation. A Total Of 2,396 cases were charge-sheeted during 2015. A total of 4,191 cases were pending for trial at the end of the year 2015, in which the maximum number of cases are computer related offences (under section 66 & 66A, 66B to 66D of IT Act) (3,110 cases) during 2015. In 486 cases trials were completed, 193 cases ended in conviction.



III. TYPES OF CYBER CRIME

Computer crimes fall into two general categories: those that target computer networks or devices and those that merely use a computer network to target individuals.

The following are some types of cybercrimes:

1. Hacking or unlawfully accessing a computer system or network

Unlawful access means any kind of access without the permission of either the rightful owner or the person in charge of a computer, computer system or computer network. Every act committed towards breaking into a computer and/or network is hacking. Hackers write or use ready-made computer programs to attack the target computer. They possess the desire to destruct and get the muck out of such destruction. Some hackers hack for personal monetary gains, such as stealing the credit card information, transferring money from various bank accounts to their own account followed by withdrawal of money. By hacking web server taking control on another person's another person's website called as web hijacking

2. Changing, damaging, copying or stealing software or data

Any unlawful act by which the owner is deprived completely or partially of his Intellectual property rights is a cyber crime. The common form of IPR violation may be said to be software piracy, infringement of copyright, trademark, patents,designs and service mark violation, theft of computer source code, etc.

3. Placing malware or a virus on a computer system

Viruses are computer programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worm attacks plays major role in affecting the computerized system of the individuals.

4. Launching denial of service attacks

A distributed denial of service (DoS) attack is accomplished by using the Internet to break into computers and using them to attack a network. Hundreds or thousands of computer systems across the Internet can be turned into "zombies" and used to attack another system website.

Flooding a computer resource with more requests than it can handle. This causes their source to crash thereby denying access of service to authorized users.

5. Using a computer for fraud or identity theft

Identity theft is a form of fraud or cheating of another person's identity in which someone pretends to be someone else by assuming that person's identity, typically in order to access resources or obtain credit and other benefits in that person's name. Information Technology (Amendment) Act, 2008, crime of identity theft under Section 66-C, whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person known as identity theft. Identity theft is a term used to refer to fraud that involves stealing money or getting other benefits by pretending to be someone else.

6. Blocking someone's computer or network access

In such types of cybercrimes a person becomes unable to access the computer network. The computer of the person is blocked by a third person.

7. Faking email source information or E-mail spoofing

E-mail spoofing is e-mail activity in which the sender addresses and other parts of the e-mail header are altered to appear as though the email originated from a different source. E-mail spoofing is sending an e-mail to another person in such a way that it appears that the e-mail was sent by someone else. A spoof email is one that appears to originate from one source but actually has been sent from another source. A spoofed e-mail or faking e-mail may be said to be one, which misrepresents its origin. It shows its origin to be different from which actually it originates.

8. Cyberstalking, or stalking someone over the Internet

Cyberstalking involves following a person's movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the chat-room frequented by the victim, constantly bombarding the victim with emails etc.

In general, the harasser intends to cause emotional distress and has no legitimate purpose to his communications.

9. Stealing services or information

Data Theft is a growing problem, primarily perpetrated by office workers with access to technology such as desktop computers and handheld devices, capable of storing digital information such as flash drives, iPods and even digital cameras. The damage caused by data theft can be considerable with today's ability to transmit very large files via e-mail, webpages, USB devices, DVD storage and other hand-held devices.

10. Cyber terrorism

Cyber terrorism is a major burning issue in our country as well as at international level. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyberterrorism activities endanger the sovereignty and integrity of the nation.

11. Economic cyber crime

In the digital world where every transaction of money completed through net banking, the crimes related to money transaction increasing day by day. Such Type of crimes may be classified as:

(i) Banking/Credit card Related crimes
(ii) E-commerce/Investment Frauds
(iii) Sale of illegal articles
(iv) Online gambling

12. Child Pornography

The literal meaning of the term 'Pornography' is "describing or showing sexual acts in order to cause sexual excitement through books, films, etc." This would include pornographic websites; pornographic material produced using computers and use of internet to download and transmit pornographic videos, pictures, photos, writings of children.

13. Defamation

It is an act of imputing any person with intent to lower down the dignity of the person by hacking his mail account and sending some mails using vulgar language to an unknown person's mail account.

14. Cyber Squatting

It means where two persons claim for the same Domain Name either by claiming that they had registered the name first on by right of using it before the other or using something similar to that previously.

IV. NATIONAL LEGAL FRAMEWORK

The cyber and E-Commerce laws are under continuous process of development in various countries of the world. Due to the versatile nature of cybercrime the amendment and the enactment of relevant laws are also in developing condition. The object of the development of relevant laws is to harmonise the existing laws and enact new laws to sort out the social and legal problems.

The world's first computer specific law was enacted in the year 1970 by the German State of Hesse in the form of 'Data Protection Act, 1970' with the advancement of cyber technology. With the emergence of technology the misuse of technology has also expanded to its optimum level and then re-arises a need for strict statutory laws to regulate the criminal activities in the cyberworld and to protect technological advancement systems. It is under these circumstances Indian Parliament passed its "INFORMATION TECHNOLOGY ACT, 2000" on 17th October to have its exhaustive law to deal with the technology in the field of e-commerce, e-governance, e-banking as well as penalties and punishments in the field of cyber crimes.

The following Act, Rules and Regulations are included under cyber laws:

(i) Information Technology Act, 2000

(ii) Information Technology (Certifying Authorities) Rules, 2000

(iii) Information Technology (Security Procedure) Rules, 2004

(iv) Information Technology (Certifying Authority) Regulations, 2001

Major objectives of the Information Technology Act, 2000 are to provide legal recognition for transactions carried out by means of electronic communication,which is termed as "electronic commerce" and involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies. The aims of the Act make it facilitating Act, an enabling Act, and a regulating Act. The Information Technology Act, 2000 is a facilitating Act because it allows both e-commerce and e-governance. The Information Technology Act, 2000 is also considered as an enabling Act which allows a legal system of electronic records and digital signatures.

V. CONCLUSION

Millions of people around the world use computers and the internet everyday. We all use it in school, work, and even at home. Computers have made our lives easier, it has brought so many benefits to society but it has also brought some problems and cyber crimes are one of them. The number of computer system users and internet users are increasing worldwide, and it is very easy to access any information within a few

seconds by using the internet which is the medium for huge information and a large base of communications around the world. Certain precautionary measures should be taken by net users while using the internet which will assist in challenging this major threat Cyber Crime.

The nature of cyber related crimes changed rapidly due to the advancement of technology. New gazettes launched with new technology and it's a major factor behind the problem of versatile characteristics of cyber crimes. Increasing number of net users and digital transactions provide an ideal environment for cyber crime. The lack of proper knowledge about the technical equipment and technology also leads to the problem of cyber crime. Because of the complexities of computer viruses and the questions of access and showing intent, it becomes a very complex area to be investigated. Cyber crime in the Act is neither comprehensive nor exhaustive. The Information Technology Act has not dealt with cyber nuisance, cyber stalking, and cyber defamation and soon. Cases of Spam, hacking, stalking and e-mail fraud are rampant although cyber crimes cells have been set-up in major cities. The problem is that most cases remain unreported due to lack of awareness.

Cyber crime has become an important concern for not only the business firms, government, law enforcement agencies but also for the common people because these kinds of issues are related to the consumer's day-to-day activity. Due to these types of crimes, consumer's money, children, business organization's integrity, consumer and company's privacy, society, etc.are in danger. The home user segment is the largest victim of cybercrime; they are less likely to have established security measures in place and therefore it is necessary that people should be made aware of their rights and duties. Users must try and save any electronic information, trail their computers, use anti-virus software, firewalls, use intrusion detection systems, etc and further make the application of the laws more stringent to check crime.

It is very horrible to think that you could be the victim of a cybercrime but it is certainly a possibility and one that increases in likeness on a daily basis. Cyber crimes are taking place in the millions every year and that is a shocking number. There are many different types of cyber crimes being committed and it is upto each person to protect themselves to the best of their ability. It is the only way to fight back against such types of cybercrimes.

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4

Law and Offences against Children in the Cyber World

Dr. Manu Sharma[1]

I. INTRODUCTION

In the ever changing society nothing is static including the law. The mode of committing the offences has undergone huge change with the advent of Information technology. That's why the law has to change itself to meet the needs of changing society. Information technology has become an integral part of lifestyle. Right from the personal dependence on information technology to the e-governance, there is no sphere which has remained untouched from its impact. The mushroom growth of Information Technology from the past few decades has created numerous opportunities for children to learn and explore the world around them. The use and misuse of information technology has been a point of contention in the contemporary world. One such issue which is being witnessed by India is increasing cybercrimes against children. Most of the children due to their tender age are usually got allured by free sites and social media and fell prey of cybercrimes. Children are easy prey of online sexual abuse and exploitation all over the world. It is the responsibility of State to maintain law and order and to protect the life and property of the citizens including children. According to National Crime Records Bureau (NCRB), during the year 2016, the maximum number of cases registered under Section 14 and Section 15 of the POCSO Act, 2012 was in the State of Jharkhand[2].

II. OBJECTIVE

The present paper aims at analysing the problem of increasing crimes against children which are committed with the help of information technology in India. The present

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2. Ministry of Women and Child Development, "Controlling Child-Porn Related Crimes", *PIB Delhi*, 25 July, 2019 *available at*: https://pib.gov.in/PressReleasePage.aspx?PRID=1580264 (last visited on March 24, 2020).

paper also aims at evaluating the various legislative provisions dealing with the commission of cybercrimes against the children and various other measures taken by the government to cope up with the present problem.

III. MEANING AND DEFINITION

The term offence has been defined under Section 40 of IPC as an act prohibited by the Act. That means offence includes only those acts which are included under IPC whereas the other acts are excluded from the purview of term "offence". However in general sense the term offence can be understood as any act which violates the law of State for which certain penalty will be imposed.

The term "child" has been defined by various legislations. According to Indian Majority Act, 1857 a minor means any person who is below the age of 18 years. However any child for whom guardian has been appointed by the court the age of majority is 21 years. As per Section 2(d)of the Prevention of Child from Sexual Offences Act, 2012 defines the term child. It states that any person who has not completed the age of 18 years is a child[3]. As per Section 2 (da) of Prevention of Child from Sexual Offences Act, "child pornography" means and includes any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child.[4]

IV. LEGAL PROVISIONS

a) **The Indian Penal Code, 1860** provides for various offences and their punishments. The code had defined various traditional offences and their punishment. As per Section 10 of Indian Penal Code the term "woman" female human being of any age. In view of increasing crimes against children and women in India the parliament has passed Criminal Amendment Act, 2013 which provides for various new offences. One of such offence is Sections 354A sexual harassment. The offence of sexual offence covers various acts and make them punishable such as physical contact and advances involving unwelcome overture, demand or request for sexual favours, showing pornography against the will of women etc. Section 354D of Indian Penal Code provides punishment for stalking which includes stalking via computer resources. Section 354D covers the acts of following a woman and contacting such woman to maintain personal interaction despite the disinterest shown by

3. The Protection of Children from Sexual Offences Act, 2012, s. 2(d).
4. *Ibid*.

such woman. Secondly it covers the act of monitoring women by the use of the internet, email or any other form of electronic communication. However these offences are generally defined, without any specific mention of child. As mentioned under Section 10 the women includes female human being of any age. However these provisions are general in nature and failed to meet the present tricky situation of the world.

b) The Information Technology (IT) Act, 2000 is the first legislation in India which tried to cover all the issues related with internet technology. The Act has adequate provisions to deal with prevailing cybercrimes. Cyber Pornography has become a global problem. Cyber Pornography can be defined as publishing, distributing or designing pornography by using cyberspace. The technology has its own advantages and disadvantages. The cyber pornography is the result of the advancement of technology only and its access by people. With the easy availability of the Internet, people cannot only view porn content on their mobile or laptops but they even upload the pornographic content online. In the modern era, the concept of pornography has been widened. Pornography has now been categorized into softcore pornography and hard-core pornography. The only point of difference between softcore pornography and hard-core pornography is that softcore pornography does not depict penetration, while hard-core pornography depicts penetration. Hence it cannot be denied that the internet has made child pornography more accessible to the distributors, as well as the collectors[5].

Section 67B of the Act specifically provides strict punishment for publishing, browsing or transmitting child pornography in electronic form. Section 67B of the IT Act, 2000 makes it a punishable act to publish, transmit, view or download child pornography. It further states that child pornography can be committed in the following five ways:

(i) Publish or transmit any material electronically that depicts the children engaged in a sexually explicit act or conduct.
(ii) Depict children in an obscene or sexually explicit manner.
(iii) Induce children to online relationship with one or more children for and on a sexually explicit act, or in a manner that may offend a reasonable adult on the computer resource.
(iv) Facilitate child abuse online.
(v) Record own abuse or that of others pertaining to sexually explicit act with others[6]

5. Cyber Pornography Law in India, *available at*: https://blog.ipleaders.in/cyber-pornography-law-india/(last visited on May 21, 2020).
6. *Idbi*

Section 79 of the IT Act and The Information Technology (Intermediary Guidelines) Rules 2011 require that the intermediaries shall observe due diligence while discharging their duties and shall inform the users of computer resources to act accordingly. The Protection of Children from Sexual Offences (POCSO) Act, 2012 has been enacted to effectively address the issues of sexual offences and sexual exploitation of children in India. The objectives of the POCSO Act are to protect children from the offences of Sexual assault, Sexual harassment, Pornography and to establish Special Courts for speedy trial of such offences**.** Section 11 of the Act provides for the offence of sexual harassment. This offence covers various acts which amount of sexual harassment. Such acts also cover showing the content with the help of the media. A person is said to commit sexual harassment upon a child when such person does any of the following act or acts with the required *mens rea:*

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
(ii) makes a child exhibit his body or any part of his body so as it is seen by any other person; or
(iii) shows any object to a child in any form or media for pornographic purposes; or
(iv) repeatedly or constantly follows or watches or contacts any child either directly or through electronic, digital or any other means; or
(v) threatens to use against any child a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
(vi) Allures a child for pornographic purposes or offers gratification for the same[7].

Section 14 of the POCSO Act, 2012 makes uses a child or children for pornographic purposes a punishable offence. Such an act shall be punished with imprisonment for a term which shall not be less than five years and shall also be liable to fine. This section further provides for enhances punishment in the event of second or subsequent conviction which shall be imprisonment not be less than seven years and also be liable to fine[8].

Further under Section 15 of the Act makes the storage of pornographic material involving child a punishable act. It states that any person, who stores or possesses pornographic material in any form involving a child and fails to delete or destroy or

7. The Protection of Children from Sexual Offences Act, 2012, s. 11.
8. This provision has been substituted by The Protection Of Children From Sexual Offences (Amendment) Act, 2019

report the same to the designated authority with an intention to share or transmit child pornography shall be liable to fine not less than five thousand rupees. In the event of second or subsequent offence the amount of fine will be enhanced, which shall not be less than ten thousand. The sub-section (2) further states that any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting or for use as evidence in court of law shall be punished with imprisonment which may extend to three years or with fine, or with both. Sub-section (3) further states that whoever stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both. In case of second or subsequent conviction the offender will be punished with more stringent punishment which shall be imprisonment not be less than five years but which may extend to seven years and shall also be liable to fine[9].

V. OTHER PREVENTIVE MEASURES

Government has taken a number of steps to be implemented by Internet Service Providers (ISPs) to protect children from sexual abuse online. Some of which are as following:

(i) Government blocks the websites containing extreme Child sexual Abuse Material (CSAM) based on INTERPOL's "Worst-of-list". Such a list has been shared periodically by the Central Bureau of Investigation (CBI) which is the National Nodal Agency for Interpol. Thereafter the list has been shared with the Department of Telecommunications who then directs major ISPs to block such websites.

(ii) The Government ordered major ISPs in India to adopt and disable the online CSAM dynamically based on Internet Watch Foundation (IWF), UK list.

(iii) The Ministry of Electronics and Information Technology has implemented a major programme on Information Security Education and Awareness (ISEA). A dedicated website for information security awareness has also been set up.[10]

(iv) Beside this, the Central Bureau of Investigation has set up an Online Child Sexual Abuse and Exploitation (OCSAE) Prevention and Investigation Unit at New Delhi under its Special Crime Zone. The objective of this special unit is

9. See Section 15 of The Protection of Children from Sexual Offences (POCSO) Act, 2012
10. *Supra* note 2.

to control the child pornography on the internet. This step has been taken after the Germany Police provided information about seven Indian Nationals involved in International Child pornography, who are being investigated by the CBI. According to the CBI, this newly specialised unit will collect, collate and disseminate information regarding publication, transmission, creation, collection, seeking, browsing, downloading, advertising, promoting, exchanging, distribution of information relating to online child sexual abuse and exploitation and investigation of such offences. These crime will be covered under provisions of the Indian Penal Code (IPC) 1860, the Protection of Children from Sexual Offences (POCSO) Act 2012 (32 of 2012) and the Information Technology Act 2000 (21 of 2000) and under various other legislations.[11]

(v) The newly set up online Child Sexual Abuse and Exploitation (OCSAE) Prevention and Investigation Unit of CBI has jurisdiction throughout the territory of India.

VI. CONCLUSION AND SUGGESTIONS

From the above analysis it is clear that there are sufficient laws to deal with the cybercrimes against children in India. However what is required is to protect the child by making him or her aware about misuse of technology. This awareness can be effectively done by small efforts on the part of parents and school authorities. There are few suggestions in this context:

(i) Talk to your children about the potential online threats such as grooming, bullying, and stalking, keep track of their online activities. Set clear guidelines for internet and online games usage.

(ii) Awareness programs regarding cyber safety and maintaining privacy to be conducted at school level.

(iii) The government should from time to time find out and block the sites which depicts violence against children or any pornographic material to discourage the access of such things.

(iv) Mass media, NGO etc. should be motivated to create awareness through workshops or other programmes regarding protective laws for children.

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11. Munish Pandey, "CBI sets up special unit against child pornography", *India Today*, April 5, 2020.

5

Transforming Journey of Corporate Social Responsibility in India: Philanthropic to Imperative

Pritam Banerjee[1]
Dr. Pradip Banerjee[2]

I. INTRODUCTION

Corporate Social Responsibility (CSR) is a managerial aspect of Corporates wherein they combine social and environmental concerns in their business activities and provide a progressive step towards their stakeholders.[3] To engage in CSR means that along with the regular course of business, a company is performing several other activities in such a way that enhance society and the environment, instead of mere exploiting or contributing negatively to them.[4] Clarkson has revealed that a fundamental problem in the sector of business and society has been noted regarding lack of proper definitions of three nearly meaning terms as Corporate Social Performance (CSP), Corporate Social Responsibility (CSR), and Corporate Social Responsiveness (CSR2). Further, absence of awareness about the actual meaning and definitions of these terms becomes an obstacle for its operational or managerial aspect.[5] Indian entrepreneurs and business enterprises have a long tradition to work within the values. Nevertheless, few corporations have been criticized of violating concern legal framework of their nations, they have been denounced for not fulfilling social expectations. Thus, social responsibility connotes bringing corporate attitude up to a level where it is analogous

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2. LL.M., Ph.D. (Law), Post-doctoral Research Fellow, National Institute of Technology, Durgapur (W.B.).
3. "What is CSR?", United Nations Industrial Development Organization (UNIDO), *available at:* https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr (Visited on Nov. 9, 2021).
4. James Chen, "Corporate Social Responsibility (CSR)", *Investopedia*, Feb 22, 2020, *available at:* https://www.investopedia.com/terms/c/corp-social-responsibility.asp (Visited on Nov. 9, 2021).
5. Max B. E. Claerson, "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance" 20(1) The Academy of Management Review 92-117 (1995).

to the prevailing social norms, values, and anticipations of performance.[6] By way of a regulatory approach towards these responsibilities, companies will be put under obligation to bother about social and environmental risks associated with their business activities. It will also compel them to formulate and execute effective strategy to prevent harmful effects of the identified risks.[7]

II. HISTORICAL EVOLUTION

The concept of CSR is not completely new in India. In medieval period, Kautilya stated about performing of several ethical principles while doing any business operations. Several incidents of helping poor and contribution towards disadvantaged section of the society can be traced in various ancient literatures.[8] In India, the early stage of corporations can be found under the system of guilds and their commercial character became prominent during 300 BCE. Primarily, Guilds being pioneer of corporations started to perform diplomatic, legislative, and administrative activities such as employing people and enjoying immunity under specific charters. Later on, more organized concept of corporation was introduced in India with entrance and emergence of European charter companies viz, the English East India Company which was formed by a charter in 16th century.[9]

Traditional corporate philanthropy that is also known as 'Shareholder theory', principally evolved and concentrated with the welfare of the instantaneously participants such as employees and their family members of any corporate body.[10] The 'corporate paternalist' supported philanthropic ventures by using some of their wealth till late 19th centuries. Thereafter, Industrialisation gave a new direction for business influences towards society and environment. Howard Bowen, an American economist coined the term 'Corporate Social Responsibility' (CSR) in his publication 'Social Responsibilities of the Businessman' in 1953. Subsequently, he became known as the father of CSR.[11] Afterward, the 'Sociologist theory' argued that corporations derive wealth and earn

6. S. Prakash Sethi, "Dimensions of Corporate Social Performance: An Analytical Framework", 17(3) California Management Review 58-64 (1975).
7. Li-Wen Lin, "Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences", *University of Oxford, Faculty of Law*, Nov. 18, 2020, *available at:* https://www.law.ox.ac.uk/business-law-blog/blog/2020/11/mandatory-corporate-social-responsibility-legislation-around-world (Visited on Nov. 10, 2021)
8. Balbir Sihag, "Kautilya on the Scope and Methodology of Accounting, Organizational Design and the Role of Ethics in Ancient India" 31(2) Accounting Historians Journal 125-148 (2004).
9. "Evolution of CSR in India", *SoulAce*, Jul. 23, 2019, *available at:* https://www.soulace.in/blog/evolution-of-csr-in-india/ (Visited on Nov. 15, 2021).
10. Madhumita Chatterji, *Corporate Social Responsibility* 39 (Oxford University Press, New Delhi, 6th edn., 2015).
11. Paulina Ksiezak, Barbara Fischbach, "Triple Bottom Line: The Pillars of CSR", 4 (3) *Journal of*

profit from the society and therefore it is society that actually gives permission for the same. So, there must have an obvious demand about legitimate sharing of the wealth which was earned by the business world from the society.[12] Moreover, Business activities are backed by human needs which sometimes go beyond justification due to greed and unhealthy competition among business sectors. Consequently, it directly or indirectly affects and exploits the society at large. Whereas CSR works as a saviour to provide justice for the society and therefore it often called as social cost. Consequently, apart from mere protecting the interest of its shareholders and employees, responsibility of corporate sectors, it extends towards society and environment as a whole.[13]

III. GOVERNMENTAL GUIDELINES- A VOLUNTARY PHENOMENON

III. 1. Corporate Social Responsibility Voluntary Guidelines, 2009:

Diagram 1: Core elements to cover through CSR policy under CSR Voluntary Guidelines, 2009

12. "What's wrong with Corporate Social Responsibility?" Corporate Watch Report (2006), *available at:* https://corporatewatch.org/wp-content/uploads/2017/09/CSRreport.pdf (Visited on Nov. 16, 2021).
13. "Concept of Corporate Social Responsibility", *India CSR: Corporate Sustainability & Responsibility*, Apr. 16, 2010 *available at:* https://indiacsr.in/concept-of-csr/ (Visited on Nov. 18, 2021).

The Ministry of Corporate Affairs (MCA), Government of India for the first time in India recognised the concept of CSR by way of introducing the Corporate Social Responsibility Voluntary Guidelines in 2009. Hereby, the MCA felt that the culture of social responsibility of Indian business houses which need to go deeper in the governance of the businesses and prepared a set of voluntary guidelines in this regard.[14] It did not denote CSR as philanthropy rather referred as voluntary activities which a company would like to do irrespective of any legal bindings. It was intended to provide guidance for companies while working closely within the framework of national aspirations and policies.[15] It proposed for each business entity to formulate CSR policy which supposed to be an integral part of their overall business policy and goals.[16] Moreover, it also categorised the sphere where CSR need to be utilised along with effective implementation guidelines thereof. The following Diagram no. 1 presents core areas provided under the said guidelines to normally cover by CSR Policy of each business entities.

III. 2. National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011:

The MCA further decided to reverse CSR Voluntary Guidelines, 2009 with a more comprehensive set of guidelines which can encompasses social, environmental and economical responsibilities of business entities. Accordingly, the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business was formulated in 2011. However, it replaced the term CSR with 'Responsible Business' (RB), which expressed a limited scope and understanding of CSR.[17] It provided a wide range of applicability upon every business irrespective of their size, sector or location. It also promoted the 'triple bottom-line' (TBL) approach as well as emphasized upon the 'Apply or Explain' principle which advocated for demonstration of concern adopted RB policy through credible reporting and disclosures to stakeholders.[18] Hereby, nine principles (as referred under Diagram No. 2) have been articulated with equal importance and in the form of non-divisible for adopting an effective RB strategy.[19]

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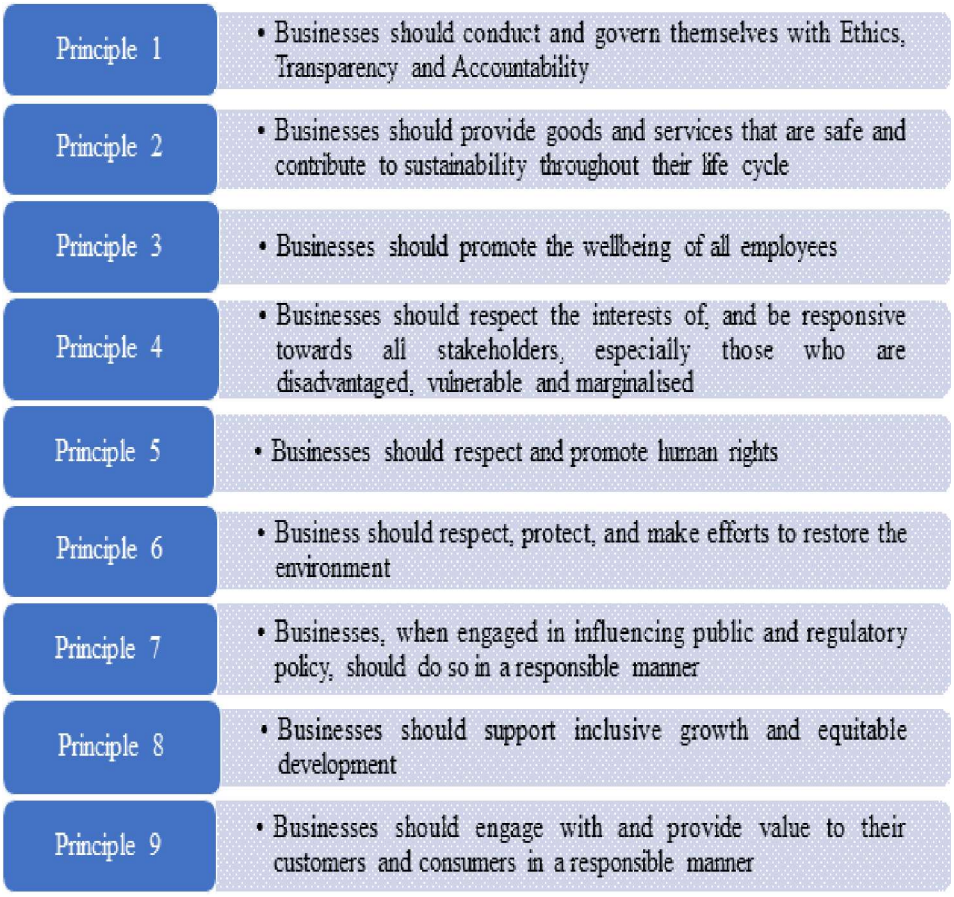
14. K.S. Ravichandran, *Corporate Social Responsibility Emerging Opportunities and Challenges in India*, 7 (Lexis Nexis, Haryana,1st edn. 2016).
15. R. Bandyopadhyay, Corporate Social Responsibility Voluntary Guidelines 2009, Ministry of Corporate Affairs, Government of India (Dec., 2009) Preface.
16. Corporate Social Responsibility Voluntary Guidelines 2009, Ministry of Corporate Affairs, Government of India, Preamble, para 3.
17. *Id.*, Fundamental Principle.
18. D.K. Mittal, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011, Ministry of Corporate Affairs, Government of India (Jul., 2011) Preface.
19. National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011, Ministry of Corporate Affairs, Government of India, Chapter 1.

Diagram 2 : Principles for RBs as provided under the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011



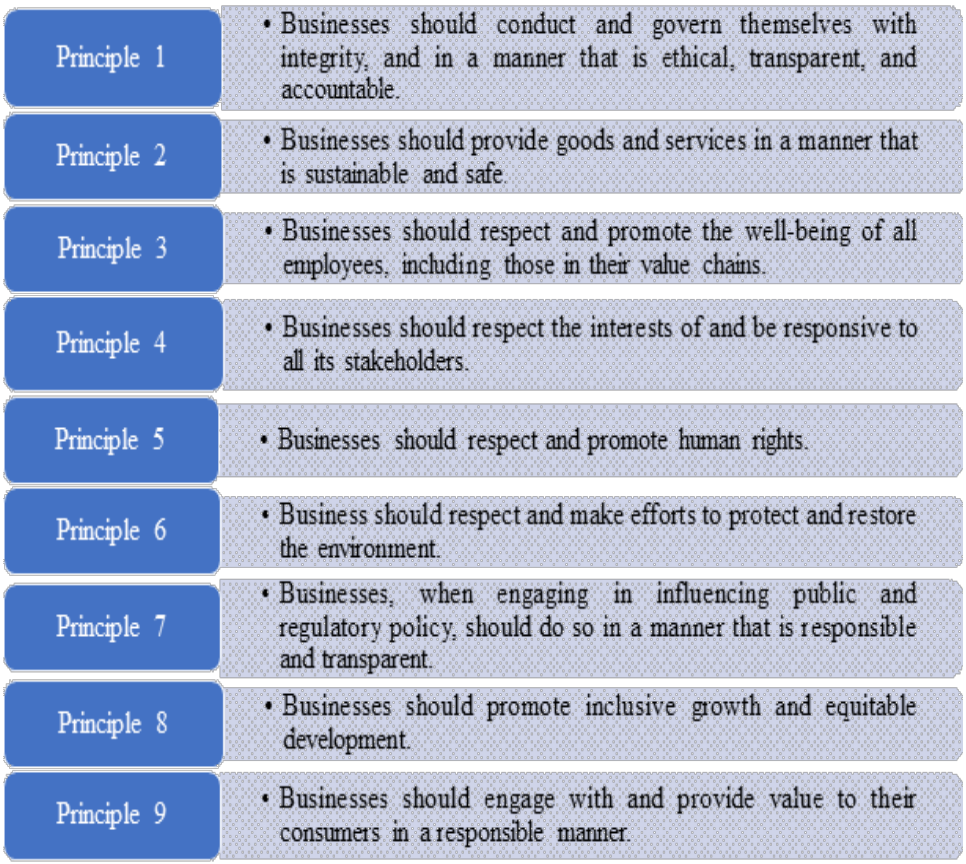
III. 3. National Guidelines on Responsible Business Conduct (NGBRC), 2018:

The NGRBC which is an updated and revised version of the aforesaid guidelines of 2011, was introduced by the MCA in 2018. It has been designed to encourage Responsible and Sustainable Business (RSB) by way of performing above and beyond the requirements of regulatory compliance.[20] The NGRBC intends not only to make companies more responsible and accountable but also to create a whole ecosystem to 'Protect, Respect and Remedy' framework as envisaged in the United Nations Guiding Principles on Business & Human Rights. The UN Sustainable Development Goals (SDGs) was one of the key drivers behind the NGRBC. Moreover, it covers a wide

20. *Id.*, Chapter 2.

range of applicability and therefore expects following up of concern guidelines by all businesses investing or operating in India, including foreign multinational corporations (MNCs).[21] It provides nine principles (referred under Diagram No.3) which are designated as thematic pillars of business responsibility and accompanied by a set of core elements to operationalize concern principles.[22] Moreover, it emphasized upon significance of Micro, Small and Medium Enterprises (MSMEs) thereat[23] along with guided the Business Responsibility Reporting Framework (BRRF)[24].

Diagram 3:Principles for RSBs as provided by the NGBRC, 2018



21. Narendra Modi, National Guidelines on Responsible Business Conduct 2018, Ministry of Corporate Affairs, Government of India (Dec., 2018) Message.
22. National Guidelines on Responsible Business Conduct 2018, Ministry of Corporate Affairs, Government of India, Chapter 1.
23. *Id.*, Chapter 2.
24. *Id.*, Annexure 2.

IV. CORPORATE LAWS- A MANDATORY STAND POINT

IV. 1. Intervention by the Securities Exchange Board of India (SEBI):

In conformity with the said Voluntary Guidelines of 2011 as well as considering the larger interest of public disclosure from Environmental, Social and Governance (ESG) perspective, the Securities Exchange Board of India (SEBI) in 2012 made it mandatory to include Business Responsibility Reports (BRR) as a part of Annual Reports for top one hundred listed entities.[25] Later on, inclusion of regulation 34 (2)(f) under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 substituted the said circular of 2012.[26] This new Regulation mandated BRR requirement for top 500 listed entities by market capitalisation and it was further increased to top 1000 listed entities in 2019. Further, this BRR has been replaced with the Business Responsibility and Sustainability Report (BRSR) w.e.f. FY-2022-23 as amending regulation 34 (2)(f) of the SEBI LODR Regulations.[27] This BRSR is intended to have quantitative and standardized disclosures on ESG parameters and guided by the nine principles of the National Guidelines on Responsible Business Conduct (NGBRC) of 2018.[28]

IV. 2. The Companies Act, 2013

Section 135 along with Schedule VII of the Companies Act, 2013 primarily deals with the provision of Corporate Social Responsibility (CSR). Hereby, every company are liable to constitute CSR committee, if it fulfills any one of the following three criteria such as (i) net worth of ₹ 500 crore or more; or (ii) turnover of ₹ 1000 crore or more; or (iii) net profit of ₹ 5 crore or more during any financial year.[29] This CSR committee further entrusted with functions in respect of formulation, recommendation and supervision over CSR policy of that particular company.[30] Thereafter, the Board is under obligation to establish and implement concern CSR policy and publish the same at company's official website.[31] The actual CSR expenditure for a financial has been also stipulated as minimum two percent of the average net profit gained in last consecutive three years; or only in last year in case of newly incorporated company.[32]

25. *Id*., Annexure 3.
26. Securities Exchange Board of India, Circular vide memo no. CIR/CFD/DIL/8/2012 dated 13th Aug., 2012.
27. Securities Exchange Board of India, Circular vide memo no. CIR/CFD/CMD/10/2015 dated 4th Nov., 2015.
28. The SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021, vide Gazette notification no. SEBI/LAD-NRO/GN/2021/22 dated 5th May, 2021.
29. Securities Exchange Board of India, Circular vide memo no. SEBI/HO/CFD/CMD-2/P/CIR/2021/562 dated 10th May, 2021.
30. The Companies Act, 2013 (No. 18 of 2013) s. 135(1).
31. *Id*., S. 135 (3).

This Act also stressed upon proper utilization unspent amount of CSR fund[33] along with backed the same with penal consequences.[34] Additionally, Schedule VII prescribes a list of activities which can be undertook by a company for the purpose of CSR policy.

In General, this Act bind the Board of Directors (BoDs) under a statutory obligation to attach CSR policy report before company's general meeting[35] and provide penal consequences for contravention[36]. Furthermore, Section 450 shall applicable where no specific penalty or punishment is provided for contravening any provision under this Act and section 451 is there for repeated violation of the same.

IV. 3. The Companies (Corporate Social Responsibility Policy) Rules, 2014

Company which meets the criteria of section 135(1), also includes its holding or subsidiary and foreign companies having its branch or project office in India need to comply with CSR provisions.[37] Notably, if a company ceases to cover by section 135(1) for three successive financial years, it will be relinquished from CSR provisions until it regain prescribed requirements thereof.[38] This CSR Policy Rules did not limit the scope of CSR activities only within the specified projects or programs stated under schedule VII of the Companies Act, 2013.[39] However, entire CSR expenditure must have a conformity or in the line of activities which fall within the purview of said schedule VII[40] and need to be undertook within India only.[41] Furthermore, it has excluded some activities within the purview of CSR activities such as (i) activities related to its normal course of business; (ii) projects or programs or activities only benefited to the employees or their family members of that company; (iii) contribution of any amount directly or indirectly to any political party.[42]

V. CONCLUSION

The Companies Act as well as SEBI categorized business entities with few predetermined criteria to bring them under the legal provision of CSR. Parallelly, Indian Government issued NGBRC in 2018 but unlike prior guidelines on CSR, the term 'voluntary' has

33. *Id*., s. 135 (5).
34. *Id*., s. 135 (5), (6).
35. *Id*., s. 135 (7).
36. *Id*., s. 134 (3)(o).
37. *Id*., s. 134 (8).
38. The Companies (Corporate Social Responsibility Policy) Rules, 2014, (G.S.R. 129-E of 2014) r. 3(1).
39. *Id*., r. 3(2).
40. *Id*., r. 2(c).
41. *Id*., r. 7.

not been mentioned at that time. However, there is no need to say that these guidelines have no binding force behind it nor these are enforceable before any court of law. Thus, it has been observed that India has taken a combination of both narrower and liberal view point to look into the matter of CSR. Under the narrower sense, some big business entities strictly brought under the purview of CSR mandate. On the other hand, India liberally deals with the remaining type of businesses where CSR has been left over as a matter of discretion. Hence, CSR in India is not fully voluntary nor fully mandatory as seen from a broader perspective.

In 2013, provision of CSR was enacted under the Companies Act without any legal sanction in case of contrary. Then, imprisonment and fine both type of punishments for contravention was introduced through amendment in 2019 and it was restructured with penalty for non-compliance in 2020. Indeed, it was a very significant change of enforcement mechanism for CSR. That is to say, the concept of 'punishment' is directly linked with the criminal law but the word 'penalty' has a greater implication in both civil as well as criminal aspects. Remarkably, the Ministry of Corporate affairs denotes non-compliance of CSR provisions is a civil wrong.[43] India currently follows the principle of 'Minimum Government-Maximum Governance' which was also reflected in the Union Budget 2021-22.[44] Consequently, accountability of businesses plays a crucial role and seeks effective responsiveness towards society at large. Indeed, position of CSR under the Corporate law are still evolving and it urge more filtration and flexibility with the need and desire of a developing country like India. Then again, Azim Premji, Former Chairman and Managing Director of Wipro stated that-

"*I do not think we should have a legal mandate for companies to do CSR. Philanthropy or charity or contribution to society must come from within, and it cannot be mandated from outside.*"[45]

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43. *Id*., r. 4 (1), (5), (7).
44. Ministry of Corporate Affairs, Government of India, E-file no.CSR-05/01/2021-CSR-MCA, General Circular No. 14 /2021 dated 25th Aug. 2021 para 8.1.
45. "Government follows "Minimum Government – Maximum Governance" principle as presented in Union Budget 2021-22: Finance Minister Smt. Nirmala Sitharaman", Ministry of Finance, *PIB Delhi*, Feb. 8, 2021.

6

Impact of Armed Conflict in Nepal: A Study

Dolly Biswas[1]

I. INTRODUCTION

The armed conflict of Nepal was a conflict between government forces and Maoist rebels which started from 1996 and lasted 2006. The Communist Party of Nepal (Maoist) had begun the war with the aim of overthrowing the Nepalese monarchy and establishing the "People's Republic of Nepal." A decadelong armed conflict was formally ended with signing of the "Comprehensive Peace Accord (CPA)" between government of Nepal and Communist Party of Nepal (Maoists) on 21 November 2006. This article deals with the political development of Nepal and its history of armed conflict. This article is the outcome of the stories of weaker section like women and children who have been first-hand victims of the violence as a result of the armed conflict in Nepal. The objectives of this study were to identify the root causes of the armed conflict through the lenses of structural violence and human rights and human needs, to assess the overall impact of the armed conflict on society, to audit the ongoing peace interventions by varied stakeholders and their impact on country, and to provide recommendations for conflict transformation in Nepal. The effects of the armed conflict on the Nepalese economy and on Nepalese society are summarized to show how the poor and weaker sections of society are the worst sufferers of violence.

According to Informal Sector Service Centre (INSEC) - one human rights organization in Nepal, more than 13,000 people were killed and an estimated 100,000 to 150,000 people were internally displaced as a result of the conflict. According to INSEC, an organization which specializes in human rights issues in Nepal, 1,665 out of the 15,026 deaths (approximately 11 percent of all deaths) that occurred during the People's War were female victims. Based on this dataset, the dynamics of the violence

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against women appears to very asymmetric, with government forces being responsible for 85 percent of the killings. Although the dataset does not explicitly differentiate between members of the Maoist movement and unaffiliated civilians, the Maoists are recognized for their inclusion of a significant number of women during the People's War. However, with more recent estimates provided by the UN illustrated that only 24% of the combatants in the People's Liberation Army (Maoist) were women.[2] This discrepancy in estimates could be due to the fact that there were many women who were participants in the movement, and yet were not necessarily engaged in combat. State and Maoist violated the human rights and international humanitarian law (IHL) during the armed conflict. IHL governs the conduct of parties involved in armed conflicts. Geneva Conventions applies to non-international armed conflicts. Nepal has ratified the four Geneva Conventions but has not ratified the two Protocols. By virtue of Nepal's ratification of the four Geneva Conventions, both the Nepalese security forces and the CPN-M are bound by common Article 3 of the Geneva Conventions. In addition, both parties are also bound by customary law applicable to internal armed conflicts. According to Office of the High Commissioner for Human Rights in Nepal (OHCHR), both parties committed serious violations of IHL, principally endangering the lives of the civilian population, including through launching attacks in civilian areas; using civilian houses and schools as shields; indiscriminate bombing; abandoning of explosive devices in areas frequented by civilians; and the use of children.

II. RIGHT TO LIFE

Right to life is the most important fundamental right of human. According to the Universal Declarations of Human Rights (UDHR), article three, "Everyone has right to life, liberty, and security of person". Article six of the International Covenant on Civil and Political Rights says "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." In 1776, the United States Declarations of Independence declared that all men are endowed with certain inalienable rights and that "among these are life, liberty and the pursuit of happiness". Nepal signed the Universal Declarations of Human Rights and other International Human Rights laws. But during the armed conflict, Nepal government does not able to protect the people's fundamental human rights. For example, more than 13,000 people were killed, and thousands of people were displaced during the conflict. According to INSEC, 13,347 people were killed between the 13 February 1996 and 31 December 2006. Out of them, 8,377 persons were killed by state and 4,970 persons were killed by Maoist. There were sharp increases in the number of

2. Punam Yadav, *Social Transformation in Post-conflict Nepal: A Gender Perspective* (Routledge, 1st edn., 2016).

human rights violations particularly after November 2001 when the Royal Nepalese Army (RNA) was deployed. From November 2002, the Nepal Police (NP) and the Armed Police Force (APF) were placed under the "unified command" of the RNA for counterinsurgency operations.[3] A clash between the Nepalese government forces and the Communist Party of Nepal (CPN- Maoist) occurred between 1996 and 2006, resulting in an increase in human rights abuses throughout the country. Both sides have been accused of torture, unlawful killings, arbitrary arrests, and abductions. Nepal was home to the most disappearances in the world during the conflict. The conflict is also considered one of major reasons for lack of development in Nepal.

The conflict also resulted in a reduction in human rights in the realms of poverty, health, education, and gender equality. Issues in these realms continue to persist today. Nepalese people face discrimination based on ethnicity, caste, and gender, and citizens living in rural parts of Nepal face a lack of access to adequate health care, education, and other resources. Violence continues to plague the country, particularly towards women. Economic inequality is prevalent, and health issues persist — including high child mortality rates in some areas, mental illness, and insufficient health care services. However, things have started to change after 2006, when the Comprehensive Peace Agreement was signed between the government, political parties and the Maoists to end a decade-long conflict from 1996-2006 and restore democracy and rule of law in Nepal. Nepalese common people were trapping in-between both State and Maoist. Nepalese villagers would often find themselves caught in the middle of the conflict. Maoists gave the pressure to civilians for money, foods, and shelter. But State security person punished civilians assuming that they were helping Maoist. So, common people were faced double pressure and threaten by State security and Maoist. During conflict period, both the parties were involved in extra judicial killing, torture, enforced disappearance, illegal detention, displacement of people. They violated the rights of the children and women, explosion of ammunition causing human deaths and injuries, violation of various economic and social rights. According to the Ban Landmines Campaign Nepal, both the army and the Maoists have been using landmines, which have victimized civilians more than the combatants. Both the rebels and security forces targeted civilians; the rebels attacking those deemed "enemies of the people," including politicians and teachers, and government forces targeting those perceived to be supportive of the Maoist cause. The rebels used guerrilla tactics such as ambushes, landmine, and bombing. The 10-year conflict in Nepal (1996-2006) between Maoist and government forces killed more than 15,000 people and displaced 10 times as many from their homes. Unfortunately, Nepal has yet to sign the Mine Ban Treaty

3. Informal Sector Service Center (INSEC) 'Annual Report 2006', *available at*: http: // www.insec.org.np/index.php (Visited on February 1, 2010).

(MBT) and the Nepal Army began using landmines in 2002. Landmines have claimed at least 860 victims in Nepal and injured as many as 1,500 (IRIN). In the post-conflict setting, unstable government and lack of political order has road-blocked the effective implementation of national victim assistance. State and Maoists both were commitment to respect the fundamental human rights and humanitarian laws. But in practice, both the parties were failed to protect human rights.[4]

III. CIVIL AND POLITICAL RIGHTS

According to the International Covenant on Civil and Political Rights (ICCPR), Part I Article 1, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Nepal government accession ICCPR on 14 May 1991. But, during the armed conflict, both government and Maoist violated the civil and political rights of the people. Individual political freedom, rights of individuals, freedom of thought, freedom of speech and expression, freedom of press, freedom of movement all rights are violated during the armed conflict in Nepal. For example, for Maoist side, they killed the people, give the torture to the people, they stopped the people for movement from one place to another place of Nepal. They violated the people right to privacy, right to peaceful assembly, rights of self-determination. Maoist closed the thousands of schools, kidnapped the student and teacher, and gave to threaten to the school administration, give pressure for money. According to INSEC report, during armed conflict, 145 teachers and 344 students were killed by state and Maoist. By the name of justice, Maoist run the "JANA AADALAT" (people court) and gave the decision whatever they want. They violated the people rights to natural justice in law. For example, Maoist killed the journalist and Human Rights Violations during Armed Conflict in Nepal threatens other journalist and people who do not believe and support their views. For example, 15 February 2004, Ganesh Chilwal who leaded an anti-Maoist protest, was shot killed in his Kathmandu office by two suspected Maoist. Nepali citizen must ask for permission to Maoist for visit in different part of the Nepal. Sometimes, they did not give the permission to the people. Maoist violated the people rights to freedom of movement. Mainstream political parties were unable to run political programme in most of the districts due to Maoist threaten.

Government had also violated civil and political rights of the people. For example, security person of the state captured the civilians assuming they were Maoist and

4. "Ban Landmines Campaign Nepal" *available at:* http: //www.nepal.icbl.org (Visited on March 10, 2021).

killed illegally. Especially, when King Gyanendra took the power in his hand, Neplai Press faces the directly censor from government. F.M radios were compelled to stop the news. But F.M stations were very much popular to increase the political awareness in Nepali community. Nepal armies censor the news from newsroom of the media. According to INSEC, nine journalists were killed by State and four were from Maoist side during the armed conflict. State were not successes to respect the citizens' rights to individual dignity, freedom and movement include protection against torture, and inhuman behaviour, against abduction or unwarranted detention, freedom to movement, respect of secrecy as provisioned by law, and right of the displaced and their family members to live in their original settlement or a place of their choice. The security persons of state were involved inhuman behaviour and incidents of assault were found during this period as well. Both parties gave torture and thrashing, inhuman and dishonorable activities to the people.

IV. MIGRATION AND INTERNAL DISPLACEMENT

The ongoing armed conflict has huge impacts on migration and displacement. Migration from rural to urban and hills to terai areas has been a general demographic phenomenon in Nepal for the years, particularly after the eradication of malaria in Terai.[5] Conflict induced internal displacement is one of the main forms of migration observed in Nepal. India is the largest destinations of migrants from Nepal. Because of accessibility (Open border; similar religion culture and language; relatives working there).[6] Very large proportions of Nepalese migrants go to India. Conflict-induced displacement in Nepal is becoming a major concern particularly after the break down of the peace talks in August 2003. The phenomenon of displacement has significantly increased with the increased intensity of conflict. For example, approximately 24000 people of 3500 households of Rjapiur areas of Bardiya District recently left their village and entered the Baharaich and Bahjya areas of India.[7] The growing phenomenon of displacement has numerous economic and social implications for host communities. Pressure in the existing basic infrastructure (such as roads water supplies sanitation waste management and housing infrastructures): increasing competition for unskilled labour market and irrational exploitation of scarce natural resources of the host areas and consequent mistrust and conflict are some of the immediate effects of the internal displacement. It is realized that the government is not yet able to internalize the gravity of the IDPs problems. Donor community and big INGOs are also not proactive and say that Nepal

5. Nepal's Maoists prepare for final offensive, Asia Pacific Media, *available at:* www.asiapacificms.com/articles/nepal_maoists/, (last visited on March 14, 2021).

6. Id. at 2.

7. Shankar Pokharel, "Political Unrest in Nepal" *available at:* vic.com/nepal/politics.html (Visited on February 18, 2021).

is not in a situation of humanitarian intervention to address conflict induced displacement. Based on experiences of other countries they argue that IDPs are managing themselves (often illegally) settling around the east- west highway and other road heads with relatively safe location with some opportunities of several diffusing with host communities and staying with their relatives) and therefore there is no need to intervene.[8]

V. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS:

International Covenant on Economic, Social and Cultural Rights (ICESCR) part I, article 1(1) says "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Economic and Social Rights of people during conflict period were violated by State and Maoist. Nepalies people could not enjoy their economic and social rights such as rights to employment and livelihood, right to food, right to health, right of workers, social security, family life and right to property. On the one hand, to search employment and social security, thousands of Nepalese continued to go abroad as migrant workers due to the war. In the failure to create opportunities of employment within the country, thousands of Nepalese youth compelled to go abroad. On the other hand, Maoist rebels bombarded larger regions, cut telephone and electricity lines and enforced economic and transport blockades in Kathmandu. Maoists forcefully collected tax, cash against people will; they robbed the bank, they looted the civilian land, property. Because of conflict, health workers did not go to village and rural part of the country. The health post continued to face the shortage of health workers, medicine and equipment during the conflict period. There was a lack of health workers and medicine in time of an outbreak of diarrhea in some hilly and Tarai districts. The Maoist seized the property of civilian and government. One the one hand, Maoist captured the property from individuals, organizations and government. Maoist cadres collected forced donations, held houses belonging to individuals and did not return all buildings and land held during the insurgency. On the other hand, security forces not vacating the land used by them during the armed conflict for the safety of their camps. In Siraha, residents of Badarmala VDC staged an agitation citing that Nepali Army had not returned property. In October, the National Human Rights Commission (NHRC)[9] said received that local Maoist cadres seized houses belonging to six individuals in Sankhuwasabha. There were reports of Maoist cadres seizing and distributing among

8. Harka Gurung, "Nepal Regional Strategy for Development", *available at*: www.adb.org/ Documents/ Papers/NRM/wp3.pdf (Visited on March 14, 2021).

9. National Human Rights Commission, Nepal, *Three-Year Comprehensive Peace Accord (CAP) Summary Report 2006-2009* (2009) *available at:* http: //www.nhrcnepal.org (Visited on March 14, 2021).

the local landless 147 bigaha 13 kattha land area in Sunsari's Chhitaha VDC. NHRC continued to receive reports of land seizure during the period.

VI. IMPACT ON WOMEN AND CHILDREN RIGHTS:

Many young children and pre-adolescents in Nepal have become deliberate targets and active combatants in the armed conflict. Thousands of them have been separated from their families, and hundreds of them have died in bomb explosions, crossfire, landmines and other forms of violence.[10] Years spent out of school, experiences as child soldiers, and injuries leave emotional traumas having long-lasting impressions and make them vulnerable to adverse circumstances. Also, problems like child labor, street children, child abuse, trafficking, sale and commercial use of children for the sex trade has been exacerbated due to the armed conflict. Children were deprived of their right to education due to strike and blockade. Political parties were using children in protests and demonstrations of various kinds. Shortage of teachers in proportion to the number of students violated the rights to education for student during the period. Students and teachers were abducted by State and Maoists. Nepal signed the Convention on the Rights of Child on 8 September 2000. But Nepal was not successes to protect the child rights during armed conflict. During the armed conflict period, children were used by both Maoist and Nepalese Army. According to UNICEF[11], children were used in a "wide range of role including as spies, porters, and combatants". Maoist compelled individuals less than 18 years of age to join their armies. Because of war, child rights to educations, health and nutrition were affected. According to the CWIN[12] a organization in Nepal for the rights of children, 402 children were directed affected by conflict. The health indicators in Nepal were already amongst the worst in the world before the outbreak of armed conflict in 1996, with Nepal ranking 124 out of the 137 countries on the UNDP's Human Development Index that year. The armed conflict has further hampered access to health care, food and social services for many families, particularly women and children.[13] State and Maoist both violated the women rights during the armed conflict. Women were facing the problem of sexual exploitation and misbehaviour by state security person and Maoist. Women's right to

10. According to the Informal Service Sector Center (INSEC) approximately 286 children have been killed since the outset of the "People's War" in 1996.

11. UNICEF, *Children Affected by Armed Conflict*, (2005) *available at*: http: //www.unicefirc.org/research/children-affected-by-armed-conflict/ (Visited on March 14, 2021).

12. CWIN Nepal, *Annual Report 2006* (2009), *available at*: http://www.cwin.org.np (Visited on March 14, 2021).

13. Watchlist on Children and Armed Conflict, "Caught in the Middle: Mounting Violations Against Children in Nepal's Armed Conflict" (January 2005) *available at*: *available at*: http://watchlist.org/wp-content/uploads/watchlist-english-final-20-jan.pdf (Visited on March 14, 2021).efaidnbmnnnibpcajpcglclefindmkaj/http://watchlist.org/wp-content/uploads/watchlist-english-final-20-jan.pdf (Visited on March 14, 2021).

reproduction and reproductive health; physical, mental and any kind of violent activity against women to be punishable and equal right to ancestral property were not preserved by State and Maoist[14]. There has been a severe impact on women's health, particularly in regards to childbirth and post-natal care in the remote parts of the country. Furthermore, women are likely to get malnourished when food becomes scarce owing to shortage of agricultural production or in the process of being displaced. Likewise, Maoist looting, blockades and security checks interrupt the transportation of food supplies. Also, during conflict, children don't have much access to food, medicine and immunization. Studies conducted by the Watchlist on Children and Armed Conflicts have found that some children in conflict-affected districts have only rice water with salt for their meals.[15] The Maoist People's War has caused concern amongst various stakeholders in the sector of education, specifically with regard to children's education. According to a recently published UNICEF report, on an average, in the year 2004, schools were open in the country only for 100 days. Teacher's displacement, destruction of schools, forced closure of private schools, the use of school premises as battleground by both the Maoists and the security forces, bandhs (strikes), and schools targeted for attacks and used as ground for child recruitment and abduction are some key reasons for the decreasing rate of attendance and enrollment. Kantipur, a daily newspaper, reported that the Maoists were digging trenches inside as many as 58 schools in different districts of the country to facilitate retaliation against security forces in case of attack. According to the report, the Maoists even coerced students, teachers and parents to participate in the digging effort.[16]

VII. ECONOMIC COST OF CONFLICT

Economic cost of the ongoing armed conflict is quite complicated to measure precisely. Calculating indirect cost such as loss of life, losses caused due to mass displacement and social vale thereof, erosion of trusts etc. is not only extremely difficult but also highly controversial. The state is also paying more than NRs one billion rupees as compensation for the loss of lives of people by the Maoists, Reduction of tourist, business losses due to strike, sanctions and regulations from rebels in their areas, displacement of economically productive workforce, centralization of projects, reduction of foreign investment, closure of industries have negative impacts on the

14. Government of Nepal, Ministry of Peace and Reconstruction, *Comprehensive Peace Accord Concluded Between the Government of Nepal and The Communist Party of Nepal (Maoist),* (2006), *available at*: http: // www.peace.gov.np/admin/doc/CAP-eng-vercorrected.pdf (Visited on March 14, 2021).

15. Ibid.

16. Margit van Wessel and Ruud van Hirtum, "Schools as tactical targets in conflict: What the case of Nepal can teach us" 51 (7) *Comparative Education Review* 1-21 (2013).

national economy. There are frequents reports about Maoists taxing tourists, which affects the tourism industry. Negative impacts are far wider and have long –term implications than the positive impacts of the ongoing armed conflict. However, it is extremely difficult to find authentic figure on the financial and economic cost this war. Nevertheless, the crude estimate goes beyond billions of rupees, as several infrastructures have been destroyed.[17]

VIII. CULTURE OF IMPUNITY AND BREAKDOWN OF RULE OF LAW IN NEPAL

Nepal is trying to recover from years of conflict which weakened the rule of law institutions and seriously undermined the capacity of the state to implement its own laws. The state institutions became weak and fragile. Nepal is currently suffering from a culture of impunity, which became a rule rather than exception. The rule of law is grossly undermined due to the culture impunity and lawlessness. There is a gross violation of human rights and breakdown of rule of law in Nepal. The culture of impunity and breakdown of the legal regime might jeopardize the peace building process in Nepal. The peace process doesn't mean a blanket amnesty to the perpetrator. The justice, accountability and rule of laws are the essential component of peace building process. In the name of peace process no one is allowed to break the law. The genuine peace building process requires a culture of accountability and rule of law. There is popular misconception in Nepal that emphasis on justice and accountability would jeopardize a peace process and peace can be traded with rule of law, but it should not be forgotten that if the rule of law is allowed to be undermined there could neither peace nor justice. Any genuine peace building process must generate people's support and ownership in the process. The people's faith and support are the critically important component for the lasting and sustainable peace. The gross violation of the human rights in Nepal is being committed by the state as well as non- state actor. The grave crimes including crimes against humanity are going unpunished in Nepal. Nepal's judicial and law enforcement institutions lost their credibility and failed to deal with the serious issue of impunity which is the biggest threat for the peace building endeavor in Nepal. The judicial institution and law enforcement agencies lack the credibility, integrity and professionalism. The law enforcement machinery's in Nepal are the largely weak and inefficient institutions. These institutions are also highly politicized and lack the will and motivation to enforce the laws. There is gross violation of international human rights and humanitarian law, but one is brought to the justice till date in Nepal. There

17. Seira Tamang, Carmen Malena, "The Political Economy of Social Accountability in Nepal", *Open Knowledge Repository, available at*: http://documents.worldbank.org/curated/en/855631468061145926/pdf (Visited on March 14, 2021).

is a massive violation of comprehensive peace agreement which is the major roadmap for post conflict rebuilding process. Nepal needs a credible peace process which requires justice and accountability. Under the basis of state lawlessness and widespread or systemic violation of rule of law it would be extremely difficult and challenging to make a new Constitutional order based on human rights and rule of law.

IX. NEPAL NEEDS TO RATIFY ROME STATUTE

Nepal needs to ratify the Rome statute of international criminal court in order to end the culture of impunity, since Nepal's judicial institutions and law enforcement agencies fail and unwilling to deal with this issue. The culture of impunity creates a vicious cycle. The punishment of the present crime is work as strong deterrents against future crimes. 'The prosecution of perpetrators who have committed gross violation of human rights is a critically important component of any efforts to deal with a legacy of past abuse. Prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions.'[18] Nepal did not sign the Rome Statute and it has not signed the agreement on privilege and immunities of the court. On 31 December 2002 Nepal singed a bilateral non-surrendered agreement with United States which is against the integrity and effectiveness of the Rome Statute. It undermines the notion of international justice and international rule of law, because anyone who committed a crime under the Rome Statute must be the subject of the Court's jurisdiction. No perpetrator can claim a privilege and immunities under the Rome Statute. It also undermines the universality of the Court. Nepal's signing a non-surrender agreement with United States is also a big obstacle toward Nepal's accession to Rome Statute of International Criminal Court. Nepal's major donor EU did not like this step; it sent a letter to the government Nepal. The letter expressly mentions that 'the EU cannot support bilateral non-surrender agreements that do not confirm with the Rome Statute. The letter also mentions that 'EU is willing to provide technical assistance on implementing legislation.[19] The National Human Rights commission also expressed its concern on the issue of non-ratification of the Rome statute, despite of the legislative directives.[20] The crime of disappearance constitutes a 'crime against humanity'. Nepal has an extremely bad reputation regarding the incidence and crime of disappearance, the highest number of cases of disappearances was recorded in the UN sub-committee on disappearances. The high number of incidences is the result of state lawlessness

18. N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice,* (Oxford University Press, Oxford, 1995).
19. EU letter to Nepal dated December 4, 2006.
20. NHRC Report Number 33/3/64

and culture of non- accountability. The crime of disappearance is still continuing despite of signing of comprehensive peace agreement. The OHCHR in 'September, submitted some 330 past cases of disappearances to the relevant security forces and to the United Nations working group on Enforced and involuntary Disappearances. The Nepalese army provided a response on 42 out of 315 cases which it said were clarified. In all but one of the cases followed up subsequently, OHCHR found no evidence to support the army's version that they had either been killed in security forces operation with CPN (M) or released. OHCHR does not consider the Nepalese Army's investigations is transparent or impartial.[21] The Supreme Court of Nepal directed to government to enact a comprehensive law which criminalize the crime of disappearance. The Court held that 'while enacting the law the state should take note of its commitments concerning disappeared persons expressed in the constitution, the fundamental rights and freedom of its citizens, international instruments ratified by state concerning human rights and humanitarian law. The state should also take note of the standards established in the international instruments accepted by the international community.[22] This is a one of the landmark judgments in the judicial history of Nepal but despite of the Court rulings no concrete initiation was taken from the government to implement the judgment of the Supreme Court.

Nepal also needs to enact an implementing legislation immediately, since ICC work on the principle of complementary and primarily it is a state's obligation to take prompt action and brought the perpetrator to the justice. Nepal need to show its genuine commitment to human rights and justice, only cosmetic commitment and lip service doesn't work. 'Trials can also help to reestablish trust between citizens and the state by demonstrating to those whose rights have been violated that state institutions will seek to protect rather than violate their rights. This may help to restore the dignity of victims and reduce their sense of anger; marginalization and grievances.[23] Nepal already signed a several human rights conventions. Nepal is the party of all four Geneva Conventions; the Geneva Convention also applies to non-international armed conflict.[24] Common Art. 3 of all the Four Geneva Convention 1949.

Nepal is also the member of United Nations, under the UN charter member states are also obligated to abide by principle of human rights. Nepal's accession to Rome Statute would give credibility to peace process and deepen its commitment to justice

21. UN OHCHR, 2007 *Report: Activities and Results,* (January 17, 2007), *available at*: www.ohchr.org/sites/default/files/Documents/Press/OHCHR_Report_07_Full.pdf (Visited on March 21, 2021).

22. *Rabindra Prasad Dhakal* v. *Nepal Government, Ministry of Home Affairs and others*, NLR, Vol. 49, No 2, Decision No 7817 P, 169, ILDC 756 (NP 2007), Nepal, Supreme Court, 1 June 2007

23. Alan Bryden, Heiner Hanggi (eds.), *Security Governance in Post-Conflict Peacebuilding* (Geneva Center for the Democratic Control of Armed Forces, 2005).

24. Common Art. 3 of all the Four Geneva Convention 1949.

and rule of law. Nepal badly needs a culture of justice and accountability and in order to break the vicious cycle of human rights violation the participation into the Rome Statute is critically important. It would work as a strong deterrent against those who are continuously engaged in the crime against humanity in Nepal, despite the signing of comprehensive peace agreement there is not a much improvement of the situation in Nepal.

Nepal's participation to the Rome Statute would enhance its international prestige and inspire other fellow Asian nation. It would be a significant contribution toward the promotion of global justice, by the ratification of the treaty Nepal also gets an opportunity to participate in the working of the Court. The establishment of International Criminal Court is one of the most important breakthroughs in the field of contemporary international law; it was a longstanding aspiration of humankind to have some sort of concrete machinery for international justice. Nepal also should not stay away from this process of international justice and rule of law and participate in the universal ratification endeavor of International Criminal Court. Nepal's ratification of ICC is critically important to its peace building effort, without effectively addressing the issue of impunity it would be hard to move Nepal's peace process ahead and also difficult to write a new democratic constitutional order based on human rights, rule of law and socio-economic justice.

X. POSITIVE IMPACTS

There is a direct relationship between economic deprivation, instructional dysfunction and armed conflict. The ongoing armed conflict has not only negative impacts but also several positive impacts. The important issues sidelined by the state for more than two centuries, such as poverty; social exclusion; discriminations based on caste, class, ethnicity, religion and elite-centric political and governing system are now in the mainstream national debate because of the armed insurgency. The Maoists have also forced to promote transparency and minimise corruption in development activities at local level. Direct entitlement of land and assets to certain households and poor people is increased in the Maoist stronghold areas.[25] Awareness on and sensitisation of existing social problems has increased. It has helped to empower women, dalit, ethnic groups, and marginalized people of the society. Gambling and alcohol abuse in Maoist controlled villages is decreased. In the villages, moneylenders had lowered interest rates (some time from 60 to 12 percent); police harassment is decreased in villages. The armed conflict forced the government to start some reform programmes. The government started land reform process, redefining women's property rights, regulation for sale

25. J. Goodhand, "Violent conflict, poverty and chronic poverty", Working Paper 6 *Chronic Poverty Research Centre* (2001).

and consumption of liquor, bills to regulate private schools, anti-corruption bill, etc. were some of the examples of such reform. However, they were neither enough nor sincerely implemented. Because of the armed conflict; exploitation by landlords and elite in the rural areas was decreased. The Maoists also introduced various community decision-making mechanisms such as people's court, to deal on land issues, domestic violence, alcoholism, polygamy, etc. that have given a voice to socially excluded people, poor and rural women. Maoists' raised legitimate questions to development projects on amount of budget spent and types of people benefited, which forced donors to think on these issues. However, each of these impacts also negative sides.

XI. CONCLUSION

In brief, during this period both the parties were found involved in various cases of human rights violation such as extra judicial killing, torture, enforced disappearance of human persons, illegal detention, displacement, rights of the child and women, explosion of ammunition causing human death and injuries followed by violation of various economic and social rights.This conflict has changed the image of Nepal from a peaceful mountainous country with peace-loving people to a corrupt and war-torn country with unprecedented human rights violence. It would be almost impossible to change that perception once it is cemented. Because of the conflict and extremely poor performance of the government, many international donors are even withdrawing support (e.g. the recent decision of the Dutch government). Arms supply is increasing and international arms traders are active and they want to keep the conflict going. The ongoing conflict has opened the space for them to voice their concerns and to undertake power to bring about change. Most activists have seen women and children as only victims rather than as agencies for change in their potential capacity as leaders and counselors. The armed conflict has brought about a need to address the issues of inclusivity of the diverse ethnic, indigenous, marginalized and religious groups in all spheres of lives. However, internalization of this process is yet to take place at a personal and at an institutional level. Some organizations have initiated affirmative action, but the process has a long way to go.

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7

Legislative Measures for Human Trafficking in India: Gaps and Concerns

Joshika Thapa[1]

I. INTRODUCTION

Trafficking is a multidimensional concept. It is a reflection of the complex social issues that the global society is witnessing today. From forced labour to organ harvesting the trafficking can take the different shapes that create physical and emotional consequences to the victims. It is a terrible reality that stares in the face of the civilized global community.[2] The recruitment and harboring of the victims is one of the toughest job but the traffickers with the help with advanced modern technology are executing it efficiently. There are numerous laws in the country for suppressing this heinous crime but due to the changing nature of the crime it has become difficult to curb the issues from the grass-root level. Sex trafficking in India is in the gravest form. Sex trafficking is a like a disease that affects human civilization.[3] The study has found that 79% of trafficked victims are subject to sexual exploitation. Trafficking is in fact the result of various socio-economic disparities such as unemployment, increasing population, migration, poverty and lack of education.[4]

There are established laws in the country for combating trafficking but due to various shortcomings and loopholes in the existing laws, the traffickers are running away from the punishment. Besides the shortcomings, the challenges faced by the law enforcement agencies are hindrance towards the effective work of the law

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2. Rekha Roy, *Women and Child Trafficking in India: A Human Right Perspective* 52 (Akansha Publishing House, New Delhi, 2010).

3. Siddharth Kara, *Sex Trafficking Inside the Business of Modern Slavery* (Columbia University Press, New York, 2010)

4. Manabendra Mandal, "Social Reintegration of the Child Victims of Trafficking and Sexual Abuse", in Nirmal Kanti Chakrabarti (eds.), *Child and Law,* 162 (R. Cambray & Co. Pvt. Ltd. 2nd edn. 2011).

enforcement agencies. Consequently, these laws have failed in various stages to punish the people involved in trafficking. When it was carefully assessed, the research found out that numerous factors like lack of knowledge for identifying the human trafficking cases, lack of reliable data, tremendous workload on the police officials, lack of resources, lack of proper training and workshops, confusing legal provisions, lack of co-operation from victim's side are some of the reason why the law enforcement agencies cannot work efficiently. According to the provisions in the existing laws, the trafficked woman should be treated as a victim but the law enforcement actors treat them as offenders. The punishment prescribed under the Indian legal instruments is also only 14 years. The reality is that the criminals or pimps generally get out of bail within 2 years. The traffickers and other associated criminals believe that they can escape easily because the prosecution may take years and years. Besides efforts in curbing human trafficking, another issue is the absence of proper rehabilitation facilities. The established laws and the criminal justice system has already recognized the problem of human trafficking but rehabilitation and relief of the victims is not addressed by these laws. This handicaps the efforts of criminal justice system to obtain convictions of offenders. Due to lack of victim protection measures and rehabilitation schemes, the prosecution suffers for lack of evidence.

Globalisation has brought major changes across the world. There is an interconnection and interaction between the people all over the globe. Further, the process of globalisation process has opened a various opportunities for women across the globe.[5] This encourages the women to seek livelihood opportunities at an international level. It leads to marginalization and victimization of many rural people seeking to migrate for livelihood choices and more so in the case of women further laying down a fertile ground for traffickers to use their vulnerability for sexual exploitation. Due to advancement of technology, globalization and liberalization, the trafficking has been become one of the most profitable business in the world. The most important point that is missed under our legal framework is the absence of advanced procedure for preventing human trafficking caused by modern methods. It is a fact that most of the ant-trafficking laws in India are enforced before the development of advanced technology. These laws are based on the understanding how human trafficking occurred in the past. As human trafficking is emerging with its advanced techniques the existing framework seems insufficient to curb the complex issues. Currently, trafficking in India is covered by flaws-ridden laws that enable to have an impact on the increasing magnitude of human trafficking.

5. Samarjit Jana, Nandinee Bandopadhyay *et. al.* "A Tale of Two Cities: Shifting the Paradigm of Anti-Trafficking Programmes", 10 1 *Gender and Development* 69-79 (2002).

II. HIGHLIGHTING THE GAPS IN THE ANTI-TRAFFICKING LAWS IN INDIA

The Unite Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons also promotes the protection and support of victims of trafficking.[6] It is a sad reality that having national, international and regional instruments is of no use as it lacks its effective implementation. The shortcoming in the existing anti-trafficking laws can be looked from three perspectives i.e. Prevention, Prosecution and Protection.

II. 1. Key Gaps in Prevention Measures

"Prevention is the first imperative of justice".[7] Prevention of crime is very important for the protection of the rights of every individual. The several measures established by the government of India for human trafficking always stand as a prevention mode for curbing human trafficking cases in India. Prevention, prosecution and protection are the three pillars for established legislation in the country. The anti-trafficking laws in the country prevent the criminals from committing the crimes by providing strict punishments, compensation and liabilities. However, in terms of the prevention of the crime, there are shortcomings as well.

The Immoral Traffic Prevention (hereafter referred as ITPA) Act, 1956 is the first legislation that was enacted for human trafficking in India. But this Act has been criticized for various reasons. The objective behind the Act is to prevent the human trafficking with the objective of commercial prostitution. Hence, when the prostitution is carried on privately or outside the area prescribed by the State government then the prostitutes are not liable. This leads to the possibility of women being engaged in prostitution forcefully. The objective of the Act is to prevent and combat trafficking for commercial exploitation that means the term 'trafficking' is still absent under this Act. The Act does not mention about the trafficking committed for the purpose of sex tourism and organ trafficking. The Act is also silent with regard to cross-border trafficking which is one of fastest growing criminal activity today. The punishments for the offences under this Act are maximum 14 years and fine are maximum Rs. 5000 which is way less than expected.

The another issue is that there is no uniformity in the legal age of the child which stands as a barrier for the law enforcement agencies to determine the child trafficking cases. When it comes to the child trafficking, it is important to know who is a child. There are several legislations in India that prescribes the age of the child. According to

6. Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti-Human Trafficking, UNODC (2013).
7. United Nations document S/2004/616, para.4.

ITPA, 1956, the Juvenile Justice (Care and Protection) Act, 2000, the Child Labour (Prohibition and Regulation) Act, 1986 and the Factories Act, 1948 defines a child as a person who has not completed the age of 16 years of age. The Children's Act, 1960 fixes the age of child as 16 years in case of a boy and 18 years in case of a girl. The age of a child under the Convention on the Rights of Child, 1989 is a person below the age of 18 years. The Child Marriage Restraint Act, 1929, stipulates the minimum age of 21 years for boys and 18 years for girls. But these provisions are also flouted with impurity as underage girls are also married off or sold to the prostitution racket.

The provisions of kidnapping, selling of minor girls, abduction, importation of girls under the India Penal Code, 1860 are also used for human trafficking cases. The Indian Penal Code, 1860 is narrower in scope to deal with the wide range of activities that are involved in trafficking which does not clearly fit into the definition of kidnapping or abduction.[8] Some of the issues like persuading individuals, false promises for better lifestyle, mail order brides, cyber trafficking which are importantly part of human trafficking are not mentioned clearly under the Code.[9] The Code is not well sufficient to handle all the nuisances involved in organized crime of trafficking. Further, Sections 372 and 373 criminalize the exploitation of children through prostitution without such demonstration mentioned in Section 370, thereby addressing this gap. The police officials also sometimes knowingly register the human trafficking case as kidnapping or abduction cases to stay away from the long liability of human trafficking cases.

II.2. Key Gaps in Prosecution Measures

Prosecution is an inclusive answer to address human trafficking cases. Punishing and prosecuting the perpetrators and protecting the victims are the three main responses required for successfully eliminating the human trafficking cases. Prosecution involves investigating the crime, collecting the evidences and witnesses against traffickers, punishing the perpetrators and protecting and compensating the victims. Prosecution is important because it lays down the role of the law enforcement agencies for responding human trafficking cases. The law enforcement agencies must ensure protection to the victims by providing the necessary requirements. The objective behind the prosecution is to stop the offenders from committing crime. If the prosecution provides them the imprisonment sentences and compensation provisions for committing crime, then there a chance of reduction of crimes in the society.

The first difficulties faced by the law enforcement agencies under the existing human trafficking laws are the confusion for booking the case. At the initial stage of

8. Rajalakshmi Ramprakash, "Delinking Prostitution from Trafficking-A look at India's Immoral Traffic Prevention Act, 1956", 22 (3,4) *Canadian Women's Studies* 110-113 (Jan. 2003).
9. *Id.*

booking of human trafficking case, the police officials fails to recognize it and register as the case of kidnapping or abduction. The human trafficking for being lengthy case the police officials sometimes intentionally register it as kidnapping or abduction.

With regard to the role of law enforcement in the process of raid, recue, rehabilitation and repatriation aspects, the ITPA Act is totally silent over it. Section 16 of ITPA, 1956 lays down the power to the Magistrate to direct any Police Officer but not below the rank of SI of Police to rescue any person if the Magistrate thinks that the rescue is required. This provision becomes vague when the Police officers below the said rank comes to know about the prostitute racket but for not having sufficient powers under this Section may stop themselves to implement the provisions with immediate effect. Further, during the trial period, the police officials behave arrogantly with the victims. They do not even show sympathy towards then rather they are treated as offenders.

The police officials under this Act have power to raid the brothel. They conduct the raid in insensitive and abusive manner leaving the victims at the mercy of the authorities.[10] In addition, the information of raids get leaked in advance which becomes easier for the brothel owners to hide the trafficked victims. Jurisdiction is another challenge faced by the law enforcement agencies under this Act. Filing of the FIRs has been difficult task because it can be filed either at the place of origin or at the place of destination. If FIR is filed at two different places then the question that arises is which police station has a jurisdiction to hear the case. The Act has been established to prevent trafficking in girls and women for the purpose of organized sex work for which the police officials have the power to raid the brothel. The objective behind the anti-trafficking laws in India is to rescue the trafficked victims but the powers given to the authorities under these laws has given more power to the public to demoralize the women by pointing in their chastity. In reality, the Act ends up penalizing the victims of trafficking.

Research and studies shows that law enforcement agencies also misuse their position by forcing the victims for 'sexual act' when they are under their custody. The present legislations have often followed their breach than in their observance.[11] As trafficking is an organized chain that has a strong connection with the powerful teams like police forces, business leaders, political leaders and other powerful officers. This often makes the prevention of crime near impossible.[12]

10. Manya Ahuja, "Policing organized sex work in India: A Critical Analysis of the Immoral Traffic (Prevention) Act, 1956", *available at*: https://blog.ipleaders.in/policing-organized-sex-work-indiacritical- analysis-immoral-traffic-prevention-act-1956/ (last visited on: Jan. 8, 2021).
11. *Supra* note 8.
12. *Id.*

II. 3. Key Gaps in Protection Measures

India as a stereotype society has always blamed the victims of the trafficking. The victims must be the first priority of every legislation and criminal justice system. The impact of this heinous crime upon the victims is devastating. The needs and requirements of the victims must be the utmost requirement of anti-trafficking laws. The victims are in need of rehabilitation and reintegration which again is a challenge because the protection system in India is still grappling with infrastructural deficiency and other resource deficit.[13]

Rehabilitation is not only about rescuing the victims but it is all about psychological healing and economic empowerment. The victims of the sex trafficking are usually subject to sexual exploitation and psychological damage which makes them pathetic enough to live as a normal human being in the society. There are various mental illness faced by the victims, such as stress disorders, depression disorders and psychotic disorders. In case of sex trafficking, women are forced to have sex without protection because of which they becomes vulnerable to HIV/AIDs infection and other sexual transmitted diseases.[14] 8 out of 10 women have to go through abortions which may affect their reproductive health. Some of the victims are also affected by drugs and harmful medicines which results in physical and mental deterioration. They have to face the threat of emotional well-being, their social support system and constant fear of arrests.[15] There are some studies that have concluded of not having enough models for recovery, repatriation and reintegration based on prioritizing the preference and interests of trafficked women and children. The protection of victims after being rescued is a very technical issue. Unfortunately, the protection part is not properly managed. The authority responsible for protection lacks their responsibilities at the protection stage but it has direct effect on the prosecution process. Ironically, the link between the protection and prosecution is not realized.[16] In addition, there is also a challenge on part of the victims themselves and the law enforcers for not having a sufficient knowledge about the crime. They lack the ability to understand that they are the victims of human trafficking. As a result, many victims go unnoticed.[17]

13. *Supra* note 4.
14. There is an integral connection between HIV/AIDS, gender and trafficking (UNDP 2002).
15. Abhishek Singh Bhadouriya, "Human Trafficking Its Issues and Challenges in India: A Study from Human Rights Perspective", 2 *International Journal of Law, Management and Humanities* 1-14 (2019).
16. *Supra* note 29.
17. Haether J. Clawsaon, Nicole Dutch, Addressing the Needs of Victims of Human Trafficking: Challenges, Barriers and Promising Practices (U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation).

The Supreme Court in the case of *Gaurav Jain* vs. *Union of India*[18] has stated that human trafficking violates right to life of trafficked victims. The Supreme Court has ordered the Central Government to form a committee to take a response of rehabilitation of trafficked women and children. Similarly, in the case of *Vishal Jeet* vs. *Union of India*[19] the Supreme Court directed the Central and State Governments to set up Advisory Committees to make suggestions for the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims, the children, girls recued either from the brothel houses of from the vices of prostitution. It is well not enough if few homes are established but the question is these homes should provide the proper medical aid, shelter, education and training.[20] In India, the Ministry of Women and Child acts as a nodal ministry for co-ordination of this crime. The care and protection of the victims of trafficking are reflected in the Juvenile Justice (Care and Protection) of Children Act, 2015 and the ITPA, 1956. The problem of anti-trafficking laws in India is that it covers only few areas for trafficked victims. The objective behind the human trafficking laws is to prevent trafficking, punish the offenders and rehabilitate the victims. However, it has been witnessed that only punishing the traffickers has been focused.

The establishment of the Protective Homes under Section 21 of the ITPA, 1956 has been criticized for many shortcomings. Government Protective homes for sex trafficking victims are found in almost every states of the country but the quality of assistance and facilities is different. These protective homes fail to provide the dedicated health care facilities, nutritious foods, proper sanitation and recreation facilities for the victims. It is due to various factors; one such factor is delay in releasing of fund by the government. Running of protection homes by unprofessional, untrained and insensitive people under the anti-trafficking provisions are criticized numerous times.

One of the lacunas in the existing anti-trafficking laws is the absence of the provisions or guidelines for the protective or rehabilitation homes on the basis of which they can adhere to the well-being of the victims. These resource deficient protective homes are regulated on the basis of the guidelines given by the Supreme Court and the different High Courts of the country. There is not a single provision that gives emphasis on the regulation of protective homes which is the only hope of the victims. Further, obligatory provisions with regard to the role of the NGOs for repatriation and reintegration are also silent under the existing anti-trafficking laws.[21]

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18. *Gaurav Jain* v. *Union of India,* AIR 1997 SC 3021.
19. *Vishal Jeet* v. *Union of India*, AIR 1990 SC 1414.
20 *Supra note* 13.
21. *Supra note* 12.

Victim compensation is another arena which is not much focused by the Indian anti-trafficking laws. According to Section 357A of Cr PC, 1973, the time limit for awarding the compensation is 2 months but the study has found delay in inquiry following receipt of recommendation of court.[22] There is an absence of data for this Scheme for various crimes that hinders to understand the proportion of compensation received by the human trafficking victims. Victim Compensation Scheme established under the Code of Criminal procedure (Amendment) Act, 2008 also lacks in its efficiency, effectiveness and sustainability.

The existing laws are strict but no laws have been passed from the victim's perspective. Prosecuting the traffickers is not enough if the victims are left unprotected. Every law in the country provides punishment for traffickers but these laws are silent over the assistance towards the victims.

III. CONCLUDING REMARKS

The shortcoming in the existing laws, policies and practices contributes an ineffective response towards human trafficking. The responsibilities taken by legislative mechanisms still fall short. The current human trafficking laws in India gives flexibility to perpetrators, clients and procurator to go free but the women victims are faced with legal disapproval and human rights challenges. Due to absence of institutional accountability, delayed amendments to existing laws and poor rehabilitative processes for rescued victims the trafficking cases in India is increasing at faster rate. The country is in urgent need of strong and efficient trafficking law for preventing and suppressing human trafficking. Adopting international provisions in the national legislation is appreciated.

The existing laws in India have given insufficient attention to the prevention, rescue and rehabilitation. Anti-trafficking system should always go with proper rehabilitation and awareness. There are always difficulties in investigating the human trafficking cases as it goes for more than 5 years. The witnesses cannot be kept for a longer time. As the crime is very lengthy the offenders also get acquittals and it becomes difficult for the prosecution to secure testimonies and witness against the accused traffickers. As a result, the traffickers may change their identities and resume their business by adopting smarter methods to target the victims. In such scenario Section 22A of ITPA, 1956 which talks about the establishment of fast track courts in every district at a regional level especially for human trafficking cases must be implemented effectively.

With globalisation the human trafficking has changed different forms. These new featured human trafficking cases are difficult to be handled under the present laws.

The Immoral Traffic (Prevention) Act, 1956 already lacks in prevention, prosecution and protection. In addition, this law lacks with the real enforcement in case of trafficking which takes place by the modern method, for example trafficking executed with the use of internet. There is a change in the dynamic nature of human trafficking.[23] The policies and the preventive measures are slow to take action to such new forms of trafficking. Therefore, the new laws with strict and effective measures are required to understand and respond to the new flow of trafficking.

With regard to human rights perspectives, the police have to be sensitive, responsive and victim friendly while adopting the procedures. The police officers while concealment of prostitutes has to be very much careful because these prostitutes may also be the victims of trafficking. The victims of the trafficking and offences committed by others under this Act deserve to be rescued and rehabilitated and not to be punished as criminals.[24] Further, the law enforcement agencies must be fully equipped not only with the knowledge and resources but also with clear attitudinal orientation and all smart and appropriate skills to handle modern trafficking.

Judiciary sensitization is very necessary in order to deal with the complexities involved in trafficking offences. In order to implement the laws of human trafficking effectively in the society there must be workshops for police officers, railway forces, prosecutors and other agencies so that they will be competent enough to understand the grave nature of this crime and will not leave any cases even by mistake. The police officers have to extend their vigil in the tourist attracted places because due to development of roads and communication facilities there is a growth in the sex tourism. Strong collaboration between the security forces and police officials is required in order to check and restrict the movement of people for illegal purposes. Co-operation between government departments, border securities, police officials, custom officials and NGOs is needed in real sense to stop the cross-border trafficking between the source and destination countries.

The major reasons for unfortunate or insufficient responses to trafficking are defiance of the problem, objectifying the victims and failure for recognition of human rights of victims and reprehensible definition of the crime. Financial stability and sustainability options are the major detriments of the return and reintegration of an individual in a community.[25] It is always the financially viable situation that contributes to trafficking which leads further leads to risk of re-trafficking. The victims may feel returning to sexual exploitation or resume their work when they face vulnerable

22. *Supra* note 5.
23. G. P. Chaulagai, *Trafficking in Nepal: An Exploratory Study of Trafficked Women's Experience and Perspectives* (2009) (Unpublished Ph.D. Thesis, University of Bergen).

economic situation after returning to home from being rescued from the prostitute racket. In lack of possible economic choices and the victims continue to experience humiliation and suffering.[26] Therefore, there should be an inclusive approach that targets the eradication of poverty because poverty is the compelling factors that make individuals vulnerable to trafficking.[27]

It is the time that the existing laws and policies have to be reviewed or reformed for efficient consequences to eliminate human trafficking. The new amendments to the existing laws are always appreciated. When the new laws are developed it has be backed by the comprehensive policy that concerns prevention, rescue, repatriation, re-integration and rehabilitation effectively. We witness the increasing number of rapes, domestic violence, molestation etc. through daily newspapers and social networking websites. The problem is still not addressed. It is righty said that law is only good in paper. Lack of proper implementation of the laws always makes the crime even worst. Gender sensitization is very important as it helps the communities and individuals to indentify the violence they are experiencing and also break free from stereotype attitude towards women. As a result, it will help in improving the effectiveness of the preventive and protective system of anti-trafficking laws.

Trafficking of women and children is one of the gravest organized crimes that goes beyond boundaries and jurisdictions. Combating and preventing human trafficking requires a holistic approach by all stakeholders and integrated action on prevention, protection and prosecution.[28] We need to accept that every person is potential victim and equally potential perpetrator, besides being a potential informer and saviour. So, our approach to spread information should be well-designed, which must incorporate all elements, talking about prevention, prosecution and protection.[29]

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24. M. Hennink, P. Simkhada, Sex Trafficking in Nepal: Context and Process. Discussion Opportunities and Choices Working Paper (Southampton: University of Southampton, 2004).
25. Joshika Thapa, "Contribution of Poverty in Human Trafficking: Interface" in Gangotri Chakraborty, Rathin Bandhopadhyaya et. al. (eds.), *Trafficking in Persons: Prevention, Control and Rehabilitation* 215-224 (University of North Bengal, 2017).
26. Compendium of Best Practices on Anti Human Trafficking by Non Governmental Organizations, Government of India, United Nations Office on Drugs and Crime.
27. *Supra* note 4.

8

Human Rights of Migrant Women Workers in Informal Economy: Issues and Challenges

Priyashikha Rai[1]

I. INTRODUCTION

Migration has been a continuous human phenomenon going back to the earliest of human civilization and is continuing till date varying in forms at different times. Colonialism marked the beginning of planned migration with traders, soldiers, sailors, priests and administrators being the migrants. Globalisation then changed the entire course of migration expanding the scope to migrants from different social and economic backgrounds. In today's time the migrant workers force and frequency of movement is far more than any other time in human history. Women participation, however, has a different course than their male counterparts in the labour market. The role of women in migration has changed over the time, from being mere accompaniment as members of the family of male migrant to independant migrants in pursuit of better opportunities not just for themselves but also for their families. Migration of women for the purpose of employment changes the traditional gender roles by reshaping the dictates of social norms, as migrant women act as agents of change both economically and socially with the economic empowerment they attain.

There are 3.3 billion labour force globally, out of which approximately 2 billion workers are engaged in the informal economy which accounts for more than 60 percent of the world's employed population and represents the most vulnerable group in the labour market as they are engaged in casual work arrangements with no fixed salary or lack social protection, rights at work and decent working conditions.[2] Out of two billion workers in informal employment, women workforce comprises over 740 million of them. The percentage share of informal workers in developing countries is

1. Assistant Professor of Law, Uttarayan College of Law, Cooch Behar, West Bengal.
2. ILO, "As Job Losses Escalate, Nearly Half of Global Workforce at Risk of Losing Livelihoods", *ILO News*, 29 April, 2020, *availale at*: https://www.ilo.org/global/ about-the-ilo/newsroom/news/ WCMS_743036/lang—en/index.htm (last visited on March 17, 2021).

staggering where more than 90% of workers rely on the informal economy. The sector within the informal economy with the highest level of informal employment is agriculture which is estimated by ILO at more than 90% globally.[3]

The scale of informal workers in the Indian economy showed significant increase since the 1970s.[4] According to the Government of India Report on 12th Five Year Plan 2012-2017, out of a total labour force of 45.9 crore, 94% is in the unorganized sector and only 6% is in the organized sector.[5] A Survey Report of NSSO (National Sample Survey Office) in 2007-08 estimated the size of migrant labour in India comprise 28.3% of the total workforce of India.[6] Census 2011 data reflects that there are more inter-state migration for work than intra-state migration. Amongst women migrants, marriage is a major factor of migration at 54% and meagre 5% of women is shown to migrate for work in comparison to 50% of male migrating for work.[7] Thus, at a glance a predominant factor of female migration is 'for marriage'. However, a nuanced study states the nexus between marriage and work factor in female migration. Women who migrate for marriage are also found joining the labour force, especially in rural migration. The NSSO Report 2007-08 revealed that female migrants comprising 62.5% in rural areas and 31.2% in urban areas who migrated 'for marriage' constitute the share in total women workforce. Thus, an overwhelming 57.4% of the female workforce are women who migrated for marriage in India.[8]

In a country like India economic integration of women is still not a living reality. The archaic societal norms still discourage economic participation of women which has led to the majority of women participating in informal economy. In India, of the total women workforce, almost 94% are engaged in the informal sector. In the informal economy women are largely engaged as construction labour, domestic workers, garment workers, vendors/petty traders and sales girls.[9] Of many reasons why women choose to work in the informal economy is ease of entry and work availability within the vicinity of their house. The household chores of cooking and cleaning increases

3. Florence Bonnet *et al*, Women and Men in the informal economy-A Statistical Brief, *WIEGO* 1,5 (2019), *available at*: https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_711798.pdf (Visited on April 15, 2021)
4. Piu Mukherjee, *et al, Migrant Workers in Informal Sector: A Probe into Working Conditions,* ATLMRI Discussion Paper Series Discussion Paper 9, Tata Institute of Social Sciences (2013), *available at:* http://www.shram.org/uploadFiles/20130305105845.pdf (Visited on April 15, 2021).
5. Government of India, *Report of the Working Group on Social Security for Twelfth Five Year Plan (2012-2017)*, Ministry of Labour & Employment, (December 2011).
6. Ministry of Housing and Urban Poverty Alleviation, *Report of Working Group on Migration*, (January 2017), http://mohua.gov.in/upload/uploadfiles/files/1566.pdf
7. Madhunika Iyer, "Migration in India and the impact of the lockdown on migrants", *PRS Legislative Research available at*: https://prsindia.org/theprsblog/migration-in-india-and-the-impact-of-the-lockdown-onmigrants (last visited on Oct. 21, 2021)
8. *Ibid n.* 5

the burden of women labour, the tasks which are attributed particularly to women in India is a major barrier to most women to seek other employment. To uplift the socio-economic status of women, economic empowerment alone is not sufficient as the status of women at work and home is still characterised by gender based vulnerabilities.[10] The issue of women workers is not only subject to economic and political aspects but has a nexus of cultural and sociological factors as well.[11]

II. GENDER DIMENSIONS IN MIGRATION

Migration undoubtedly has a human development quotient, however, it operates differentially for males and females. Under the conditions of decent work gender inclusivity is an important indicator. There persists neglected dimension of gender in the migration and development discourses. The invisibilisation of gender based approach to migration has resulted in considering only male migration as the indicator in development analysis.[12]

The migration policies have not been gender inclusive and women migrant workers fall at the suffering end. The language usage in the 1949[13] and 1975[14] international labour instruments reflects the stereotyped view towards migrant workers during that time in the labour market. The 'typical migrant worker' engaging in migration for economic reasons was viewed as male, as the family of a migrant worker is defined as his "wife and minor children".[15] For a very long time there has prevailed invisibilization of women's contribution in the labour market. They were reduced to domestic and care providing roles within the family. In the migration process women have been merely accompanying their spouse. In the national legal framework also similar gender biased terms can be found which reflects the general notion of invisibilisation of women in the migrant labour force. The gender analyses in migration study and gender based official statistics is fairly recent.[16] Migration together with traditional roles women are subjected to in householes profoundly affects the gender.

9. Tripti Singh *et al*, "Women Working in Informal Sector in India: A Saga of Lopsided Utilization of Human Capital", 4 *IPEDR* 534 (2011).
10. Kamala Kanta Mohapatra, "Women Workers in Informal Sector in India: Understanding the Occupational Vulnerability", 2(32) *IJHS* 197, 201 (2012).
11. Neha Mittal, "Women Workers in Unorganized Sector: Socio-Economic Perspective", 1(3) *AJMR* 183, 185 (2012).
12. Indrani Mazumdar, *et al*, "Migration and Gender in India" XLVIII (10) *EPW* 54, 57 (2013).
13. Migration for Employment Convention (Revised), 1949
14. Migration Workers (Supplementary Provisions) Convention, 1975
15. Paragraph 15(3) of Recommendation No. 86 ILO
16. Jayati Ghosh, *Migration and gender empowerment: Recent trends and emerging issues*, UNDP (April , 2009)

Contemporary migration trends show large scale feminization of the migration process in comparison to the past.[17] Today almost half of the migrant population of the world are women. The early trend of integration of women in the migration process was largely associational migration with their male counterparts as members of their family. Independant participation of women in the migration process has been a result of integration of women in labourforce. Participation of women of developed and developing countries in the labour force is not alike. There is a global demand for women labour in peculiar types of employment. These employment cater to women migrants of developing countries who are in search of economic opportunities. Certain employment have been generally restricted to males and there are some restricted to females. Employment opportunities open to women are comapartively low-wage jobs.[18] Demand for women workforce is largely domestic workers, care workers and health professionals. Gender is a decisive criterion in the migration and employment process. The increase in participation of women in the labour market is linked with the requirement of cheap, informal and flexible labour in emerging economies. In fact the enormous increase has been partly a result of a greater number of migrant women workers who account for approximately half of global migrants.[19] Feminisation of labour migration is higher especially in developing countries.[20] Female migrants face dual vulnerability, one as women and the other as a migrant.[21]

III. LABOUR MIGRATION AND INFORMAL ECONOMY

According to Fields the migrant workers have three choices namely, a formal sector job, open urban unemployment and a job in the urban informal sector. The focus for migrants with low aptitude is on the informal sector with has relative ease of entry and offers more opportunities as compared to the formal sector.[22] Limited job opportunities in formal economies has naturally led to an exponential growth of informal economies, which acts as a catalyst for rural-to-urban migration.[23]

17. According to the 2004 World Survey on the Role of Women in Development: Women and International Migration, about 90 million women resided outside their countries of origin, constituting 49 per cent of the total world migrants in 2000, up from 46.6 per cent in 1960.
18. Michael Reich *et al*, "Dual Labor Markets: A Theory of Labor Market Segmentation", 63(2) *AER* 359 (1973).
19. Pamela Sharpe, *Women, Gender and Labour Migration: Historical and Global Perspectives* 17 (Routledge, 2001).
20. K. Shanthi, *Female Labour Migration in India: Insights From NSSO Data*, Working Paper 4/2006 (Madras School of Economics, Chennai, 2006).
21. Arun Kumar Acharya, "Feminization of Migration and Trafficking of Women in Mexico", 30 *RCIS* 23 (2010).
22. Sarabjit Chaudhuri and Ujjaini Mukhopadhyay, *Revisiting the Informal Sector: A General Equilibrium Approach*, 5 (Springer, New York, 2010).
23. Gengzhi Huang *et al*, "Integrating Theories on Informal Economies: An Examination of Causes of Urban Informal Economies in China", 12 *SUS* 2 (2020).

In India, migrants are mostly visible in the informal economy, in categories of work such as construction work, domestic work, agricultural labourers, street hawkers and vendors , rickshaw pullers, masons, plumbers, security personnel,etc. They work in precarious conditions devoid of social security protection.[24] Employment in the organised sector has been growing at a very slow rate over the years, subsequently the labour force is absorbed by the informal economy. In case of female workers the informalisation is more pronounced, 96% of women workforce are engaged in informal economy as compared to 91% of men.[25]

In general understanding migration is a movement of people over some distance for a varied time frame. Thus the concept of migration has both 'distance' and 'time' dimensions.[26] Labour Migration denotes migration or movement of people from an original place of residence to another for the purposes of finding work or employment. These categories of people are called 'migrant workers'. In Migration literature, countries from where the people migrate or countries in which the migrants originally resided before migration are known as "sending countries" and the countries to which the migrants move are known as "host countries" or "destination countries". Migrant workers are not a homogenous category of workers, rather vary and may be highly skilled, semi-skilled, low-skilled or unskilled class of labourers. Broadly, in terms of changing geographical area, migration can be international and internal migration. The former includes migration within one's own country, such as between provinces, municipalities, cities or states and the latter involves crossing international boundaries.[27] Internal migration is further of two types, intra-state migration which involves migration within the state and inter-state migration which involves migration from one state to another.

The ILO has suggested various features of the informal sector, such as ease of entry for new enterprises, ownership of enterprises by family, labour intensive workers who are paid low wage with risk and uncertainty of job, inadequate government support, etc. amongst others.[28] The terms 'informal sector' and 'unorganised sector' are used synonymously in the research literature in India. In India first National Commission of Labour constituted in the year 1966 for the first time defined 'unorganised labour' as *"those who have not been able to organise in pursuit of a*

24. P.A. Ansari, "Internal migration: An analysis of Problems faced by the migrants in India- A step to the Solution", 6(6) *IJAR*, 8 (2016).
25. Kamala Kanta Mohapatra , *Ibid* 9
26. Pieter Kok, "The Definition of Migration and its Application: Making sense of recent South African census and survey data" 7(1) *SAJD* 19 (1999).
27. A. Bhende, T. Kanitkar, *Principles of Population Studies* 22 (Himalaya Publishing House: New Delhi 2006).
28. International Labour Organisation, *Report on Employment, Income and Equality-a strategy for increasing productive employment in Kenya*, 6 (January 1972).

common objective because of constraints such as (a) casual nature of employment, (b) ignorance and illiteracy, (c) small size of establishments with low capital investment per person employed, (d) scattered nature of establishments, and (e) superior strength of the employer operating singly or in combination."[29] The Commission further provided illustrative categories of unorganised labourers in India such as construction workers, contract and casual workers, sweepers and scavengers, workers engaged in tanneries, handloom/powerloom, bidi and cigar industries and unprotected labourers in other small scale industries. Other categories of workers engaged in the informal economy are domestic workers, street vendors, home-based workers, self-employed workers, platform workers, gig workers, etc.

IV. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Human Rights are those fundamental rights which all persons possess simply by the virtue of being a human being.[30] They are inherent to all human beings regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status. It covers a wide range of rights including civil rights, political rights, economic rights, social rights, cultural rights and collective rights. The Human Rights protection of migrant workers has been covered by an array of international legal instruments which has set standards and guidelines for human and labour rights. These standards can be found in UN Conventions (or Protocols), which are legally binding international treaties that may be ratified by member states, or Recommendations, which serve as non-binding guidelines, standards set by ILO for workers in general and migrant workers in particular, Treaties between two or more nations covering workers in general or migrant workers in particular. The adoption of Universal Declaration of Human Rights (UDHR) established a normative human rights system which is recognised internationally. Although UDHR is legally non-binding and is simply a declaration creating moral obligations upon the member states, however, in spirit it is unanimously considered as the basic standard of human rights recognition globally. The intention of UDHR was to attain a common standard for all peoples and nations to achieve. On the basis of principles laid down in UDHR a number of legally binding international Conventions and Treaties have been adopted by the United Nations which has created and shaped the body of International Human Rights Law. In order to give legal force to the rights contained in UDHR, the ICESCR and the ICCPR were adopted in 1966. The International

29. Government of India, *Report on the National Commission of Labour,* 63 (Ministry of Labour and Employment and rehabilitation, 1969).
30. L. J. Macfarlane, *The Theory and Practice of Human Rights* 7 (Dartmouth Publishing Co. Ltd., 1985).

Bill of Human Rights which consists of five core[31] Human Rights documents, provides general protection to the migrant workers. ICESCR commits all State parties to work towards the protection of economic, social, and cultural rights including labour rights and the right to health, the right to education, and the right to an adequate standard of living for all individuals. The core of economic and social rights is the 'right to an adequate standard of living' which has found recognition under Article 25 of the UDHR and the same has been reiterated under Article 11 of the ICESCR. The fulfilment of this important right requires a plethora of other social and economic rights supplementing and complementing its realisation to all individuals. ICESCR sets forth rights of adequate food and nutrition, clothing, housing and to continuous improvement of living conditions[32] and right to physical and mental health.[33] Right to social security[34] laid down by ICESCR is an important and dynamic right when it comes to protection of the working class in general and migrant workers in particular.

Civil and political rights which are essential for the protection of life and personal liberty are recognised by ICCPR. The Covenant recognises no distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,[35] protection against torture or cruel, inhuman or degrading treatment.[36] The most important right concerning migrant workers is the right to liberty of movement and freedom to choose his residence and protection against arbitrary deprivation of the right to enter his own country.[37] Right to freedom of association with others, including the right to form and join trade unions for the protection of his interests has also been recognised by the Covenant[38]

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) adopted in 1979 is often described as an international bill of rights for women. The Convention provides the basis for realising equality between women and men through access to equal opportunities in political as well as public life. CEDAW Committee has been formed under the Convention to monitor its proper implementation.

International Labour Organisation (ILO) have adopted Conventions and issued recommendations which has developed international labour standards for protection

31. Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; Optional Protocol to the International Covenant on Civil and Political Rights & Second Optional Protocol to the International Covenant on Civil and Political Rights.
32. ICESCR, art. 11
33. *Ibid* art. 12
34. *Ibid* art. 9
35. ICCPR, art. 2
36. *Ibid,* art. 7
37. *Ibid*, art. 12
38. *Ibid*, art. 22

and migrant workers and govern labour migration. Two main Conventions have been adopted by ILO in 1945 Migration for Employment Convention (Revised) and Migrant Workers (Supplementary Provisions) Convention in 1975 along with recommendations which are non-binding.

The International Convention on Migrant Workers and Their Families was adopted by the United Nations ((ICRMW) in 1980 which specifically addressed the peculiar concerns of migrant workers and their families. The Convention extends its protection to the entire process of migration of migrant workers along with their family members. The process of migration involves preparation, departure, transit, stay for the entire period with remunerated activity in the State of employment and it will also include return to the State of habitual residence or State of origin.[39] The migrant workers are protected against torture, cruelty, inhuman or degrade treatment. Although ICRMW is a comprehensive international human rights mechanism protecting the rights of migrant workers and their family members as compared to other international human rights treaties, the ICMW has been less recognized by the international community.[40] As of August 2021, 56 states have ratified the Convention. The countries that have ratified the Convention are primarily countries of origin of migrants and the Convention is an important tool to protect their citizens living abroad. India has not ratified the Convention yet, although India has a large number of migrant workers residing in other countries and India also hosts a huge number of migrant workers from other countries. The primary reason is that some countries, including India continue to categorise themselves primarily as senders consequently ignoring their role as a receiving country. This tendency results in adverse implications for the rights of migrants within their territory.[41]

V. NATIONAL LEGAL FRAMEWORK

The Indian system of labour laws at present is very extensive and complex. Labour law, more than many other areas of regulatory policy, has immediate and fundamental implications for social and economic stability and progress. Although there is a great volume of written labour laws in India counting more than 150 laws combining Central and State laws, the protection of the working class still remains inadequate in the Indian labour market.[42]

39. ICMRW, art. 1(2)
40. Sheetal Sheena Sookrajowa, Antoine Pécoud, *The Palgrave Handbook Of Ethnicity* 1813-1827 (Palgrave Macmillan, Singapore 2019).
41. Wayne Palmer and Antje Missbach, "Enforcing labour rights of irregular migrants in Indonesia" 40 (5) *TWQ* 908–925 (2019).
42. Richard Mitchell, *et al*, "The Evolution of Labour law in India: An overview and Commentary on Regulatory objectives and Development" 1(2) *AJLS* 413, 427 (2014).

It is a fundamental right of every citizen to move freely throughout the territory of India and to reside and settle in any part of the territory of India guaranteed by the Constitution of India enshrined in Article19(1), clauses (d) and (e).[43] Amongst other grounds, discrimination on the basis of place of birth is prohibited by Article 15 and in matters of public employment equality of opportunity is guaranteed to all citizens under Article 16. Upholding these fundamental rights, restrictions to employment based on residence were held unconstitutional by the Supreme Court.[44] In addition to Constitutional safeguards, Inter-State Migrant Workmen (Conditions and Regulation) Act, 1979 and Unorganized Workers Social Security Act, 2008 has been enacted to specifically address the issues and concerns of inter-state migrant workers in India and the latter addressing the unorganised labour force of India. The extent of the social security benefits provided through various legislative measures are largely exclusive to the labourers in the organized or formal sector. Migrant workers and unorganised sector are closely linked with each other. Most of the migrants who come to work in the urban area are likely to be absorbed in informal work.[45] To regulate the employment and conditions of service of the inter-State migrant workmen 1979 Act was enacted. It imposes certain duties on the Contractors. A contractor has a duty to issue a passbook to the migrant worker indicating his personal and work details. The contractor has the liability for regular payment of wages and ensuring equal pay for equal work irrespective of sex.[46]

For a very long time welfare of unorganised workers was done on a piecemeal basis and a large section of the workers thus were left out of any system of social security. However, the Act[47] was brought into force only in 2008 in India which provided basic social security safeguards to the informal workers or unorganised workers. The 'unorganised sector' comprises enterprises owned by individuals or self-employed workers which employ less than ten workers.[48] The Act requires the Central government to notify different welfare schemes for the unorganised workers.

VI. HUMAN RIGHTS CONCERN

The migrant workers and informal workers are one of the most vulnerable sections of our society. The social protection laws are already inadequate which is aggravated by

43. The Constitution of India, 1950, arts. 19(1)(d), 19(1)(e)
44. Charu Khurana v. Union of India and Others, AIR 2015 SC 839
45. Piu Mukherjee, *et al*, *Supra n.* 3
46. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, s. 6
47. Unorganised Workers' Social Security Act, 2008
48. *Ibid*, S. 2(l) "unorganised sector" means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.

no proper implementation and lack of awareness amongst the workers themselves. The nature of the work is also one of the significant factors as these categories of workers are either constantly moving or are employed in a scattered manner which hinder the organisation of the workforce. The Standing Committee on Labour (2011-2012) reported that the employment system of inter-state migrant workers is exploitative and results in various abuses.[49] A Task Force constituted by the Ministry of Women and Child Development recommended the amendment of the title of 1979[50] Act to make it gender neutral by replacing the words 'workman' and 'workmen' with 'worker' and 'workers' respectively wherever they occur. The key issues faced by migrant workers are:

(a) Insufficient social security protection

(b) Lack of access to healthcare benefits

(c) Poor implementation of minimum standards law

(d) Non-portability of benefits provided by the government

(e) Gaps in process of registration

(f) Poor housing and sanitation

(g) Informal nature of work

Low wage rates and uncertainty of job are major concerns of the informal workforce. The deplorable socio-economic status of migrant workers is further aggravated by reasons owing to their difference in culture and language in destination place, improper shelter and sanitation, lack of healthcare facilities and education of their children. In case of women migrant workers, gender discrimination and sexual harassment are common practice. The minimum social security measures available for the benefit of migrant workers in the informal economy are not properly implemented by the employer or contractor in the workplaces.

With measures to combat spread of covid-19, the Government of India had announced nationwide lockdown on March 24th, 2020. With the announcement of lockdown, a huge exodus of migrant workers was witnessed and thousands of migrant workers were stranded in cities, highways, railway stations and some proceeded towards their native places by walking and cycling long distances.[51] The pandemic

49. Ministry of Labour and Employment, Standing Committee on Labour (2011-2012), *The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Amendment Bill, 2011*, Lok Sabha Secretariat, New Delhi, (December 2011).

50. Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

51. India Today Web Desk, "Hit by lockdown, stranded on roads: Migrant labourers walk for days to reach home", *India Today*, March 26, 2020, *available at*: https://www.indiatoday.in/india/story/coronavirus-outbreak-lockdown-migrant-workers-condition-1659868-2020-03-26 (last visited on May 12, 2021).

time has severely affected the migrant workers reflecting upon the precarious and deplorable conditions of the lives of migrant workers who particularly were engaged in the informal economy. In May 26, 2020, the Supreme Court of India took *suo motu* cognisance of the issues of migrant workers and pointed out the lapses and inadequate response of the governments both at Centre and state in dealing with the crisis of migrant workers. The Court ordered the government to provide food, shelter and transport free of cost to the migrant workers who were stranded.[52] In June 29, 2021 the Supreme Court delivered a landmark judgement on "Problems and Miseries of Migrant Workers" highlighting the vulnerability of the migrant workers and unorganised workers and recognising their contribution in the development of the national economy. The Court highlighted that workers in the informal sector are unable to get access to various welfare schemes because of the delay in registration of workers on the national database maintained by the Ministry of Labour and Employment.

The issues and challenges face by women in informal economy may be discussed under following heads;

(a) Poor implementation of minimum standards law: The Standing Committee reported that the government did not have annual data of people migrating from one state to another. Although the principal Act concerning the welfare of migrant workers : require Central Government and State Governments to appoint registering officers and licensing officers. The government did not have complete information on them with regard to many states. No concrete efforts were made by the government to ensure mandatory registration of the migrant workers by principal employers and contractors as required by 1979 Act.[53]

The three major laws for the protection of migrant workers who are concentrated in the informal sector, Interstate Migrant Workmen Act, Building and Other Construction Workers Act and the Unorganised Sector Social Security Act. The registration of the workers is not being done properly by the contractors and employers which is a major barrier in claiming access to the benefits provided under these Acts.[54] The migrant workers who register to claim benefits in one state lose access to benefits upon migrating to another state. In particular the migrant workers were having problems availing the benefits of subsidised food grains through the Public Distribution System

52. Krishnadas Rajagopal, "Supreme Court orders Centre and States to immediately provide transport, food and shelter free of cost to stranded migrant workers", *The Hindu,* May 26, 2020, https://www.thehindu.com/news/national/supreme-court-takes-suo-motu-cognisance-of-migrantworkers-issue/article31679389.ece (last visited on Oct. 12, 2021)
53. *Ibid n.* 48
54. Priya Deshingker, "Why the Supreme Court order on registration of migrant workers is welcome", *The Indian Express*, July 22, 2021 , *available at*: https://indianexpress.com/article/opinion/columns/whythe-supreme-court-order-on-registration-of-migrant-workers-is-welcome-7415997/ (last visited on Oct. 21, 2021).

(PDS) under the National Food Security Act (NFSA), 2013. Although One Nation One Ration Card Scheme was launched back in 2019, the implementation was not done effectively. With covid-19 crisis, the government announced the scheme to roll out nationwide as part of economic relief to the migrant workers. With recent Supreme Court judgement 34 states and Union Territories have been integrated in this scheme to enable the migrant workers to buy subsidised ration from any fair price shop across the country.[55]

(b) Informality of Domestic Workers and Legal Protection gap: Urbanisation, growth of informal sector and migration has changed the nature of household which has huge demand for domestic workers. Domestic work is mainly carried out by women and girls, transporting the traditional household gender role to work culture. A large section of domestic workers are migrants. ILO has recognised that domestic work still continues to be undervalued and invisible.[56] Domestic work is characterised by the informal nature of work, with no job security, low wage and vulnerable to gender based abuses.

(c) Problem of Trade unionism: The Migrant workers are susceptible to exploitation as they are unorganised because of the nature of their work. The practice of forming trade union for furthering the demands is not common. Women migrant workers face specific challenges like child care facilities, maternity leave and sexual harassment issues. The 'hire and fire' policy of the informal sector acts as implicit coercion against voicing the concerns. Moreover, women hesitate in participating in trade union activities because patriarcal norms burden women with household chores and care which are not counted as labour.

(d) Barrier in claiming Maternity Benefit: Migrant women workers have increased probability of being subject to complications in pregnancy and childbirth owing to the nature of their work. The complex employer and employee relationship, frequent change of jobs often pose a barrier in claiming maternity benefit. In many enterprises maternity benefit are not granted.[57]

(e) Fragmented Social Security delivery system: Social Security schemes launched by the union government which have different eligibility criteria and delivery mechanisms. There are state-level benefits which again have different apparatuses for implementation. The beneficiary identification system of these social security schemes

55. Express News Service, "34 states/UTs now implementing ration card scheme: Govt.", *The Indian Express,* August 28, 2021, *available at:* https://indianexpress.com/article/india/one-nation-oneration-card-scheme-states-uts-7475799/ (last visited on Oct. 12, 2021).
56. ILO, Domestic Workers Convention, 2011, Preamble.
57. Sanghita K. Bhattacharyya and Kim Korinek, "Opportunities and Vulnerabilities of Female Migrants in Construction Work in India" 16(4) *APMJ* 517 (2007).

are cumbersome. Administrative bottleneck persists for the migrant workers as the schemes do not make specific provisions addressing the peculiar position of migrant workers.

(f) Trafficking: Feminisation of migration has been abused for the purpose of women trafficking for the sex industry. Migration of this form has developed into a highly organised criminal trade which results in exploitation of women.[58] The socio-economic status of women is a leading factor in falling prey to this organised crime. Some women are trafficked by getting tricked into marriages[59] and false promises of good paying jobs. Poverty, unemployment, lack of proper education and economic opportunities are major factors which compel the women to migrate.

(g) **Structural Discrimination:** Some forms of discrimination are structurally generalised in social and work environment which hinders the realisation of equal rights and opportunities. Within the already deprived category of labour force, as migrant and informal workers, women are treated as inferiors. Thus, women are subjected to layers of discrimination stemming from the status of being a woman, a migrant and an unorganised worker.[60]

VII. CONCLUSION

Thus, a comprehensive social security protection framework de-linking the delivery mechanism from the place of origin of the migrant workers is the need of the hour. Several studies have found that migration factors for women migrants are influenced by societal norms and the actual intention to migrate is not articulated. Migration for marriage is still the dominating form of migration amongst women, as reflected in different statistics. However, the fact that married women are also participants in the labour force is neglected. The ability of women to migrate alone is determined by social norms and conditions. As many societies have strong social controls, the movement of women is adversely affected. Despite an elaborate human rights framework both at international and national level, an improved and effective mechanism to ensure social security protection is needed. Devising social security schemes that could be availed in the state of employment would benefit a large section of migrant workers.

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58. Vincenzo Musacchio, "Migration, Prostitution and Trafficking in Women: An Overview" 5(9) *GLJ* 1015, 1019 (2004).
59. Tellmy Jolly, "Critically Analysing the Existing Legal Framework For Providing Access To Health Care Facilities To Migrant Women In India" 1(1) *IJIRL* 2 (2021).
60. *Ibid* 9

9

Victims of Crime and Abuse of Power: A Critical Study in Human Rights Perspective

Anit Kumar[1]

I. EXORDIUM

The aim of criminal justice is to punish the wrong doer. The offender must be made to suffer for the wrong committed by him. He is punished by the State. The objective of the criminal justice is to safeguard and add to the welfare of the state and humanity. Offender infringe right of another person by doing an act forbidden by law. Such person is termed as victim. Criminal justice system is mainly accused oriented justice system. Less regards were given to the victim's rights. Victims have often been silent partners in the legal process, with little role and at the mercy of the court. In past, victims were ignored. No steps were taken to reduce their alienation from the process or to ensure that the experience did not contribute to further trauma or to a risk of reprisals. In modern world, few steps have been taken to deal with the problems faced by victims. International law has given impetus to victim's right. As a result, international standards for victims include the U.N. Declaration of Basic Principles for Victims of Crime and Abuse of Power, 1985 (hereinafter referred as the Victims Declaration) and the United Nation Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The main aim of all these declarations is that the investigation and prosecution of crimes must take into account the interest of victims and witnesses, including women and children. This article focuses on the international standards developed for the protection of victims' human rights. This article also focuses upon responsibility of criminal justice system to protect and safeguard rights of victims.[2]

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2. Nandita S Deshpande, "Human Rights of Victims: International and National Perspective" 12(1) Journal of the Institute of Human Rights 125 (2009)

II. UNDERSTANDING THE TERM 'VICTIMS' UNDER VICTIM DECLARATION

The word victim primarily indicates suffering. Oxford English Dictionary[3] defines the person harmed, injured or killed as a result of crime, accident etc. Etymologically, it suggests and includes a person suffering physical, emotional or financial harm as a direct result of a crime or spouses and children of the person who has suffered due to direct or indirect result of crime, or parents, foster parents, siblings, guardians or other indirect result of a crime or mentally or physically incapacitated victims of homicide. This general meaning suggests various view points. No rigid concept could be given unless the same is a factual matrix. This is not only an issue regarding etymological definition but about a true international understanding.[4] The idea of victim through international conventions is also wide in its amplitude and in this regard UN adopt- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 which is often consider as the Magna Carta[5] of victims human rights[6]. The declaration defines victims under two head viz. victims of crime and victims of abuse power. Under victims of crime the term victims means person who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights and claims, through acts or omissions that are in violation of criminal laws operative within the Member States, including those laws proscribing criminal abuse of power.[7] It also state that where appropriate the term victim will also include the immediate family or dependents of the direct victim and persons who have suffered harm in

3. See, https://www.oxford learners dictionaries .com /definition/American_english/victim #:~: text = noun-, noun,disease %2C%20an%20accident% 2C%20etc. (last visited on 19 March 2020 at 5pm)
4. Girjesh Shukla, *Criminology: Crime Causation, Sentencing and Rehabilitation of Victims* 209 (Lexis Nexis, New Delhi, 2013)
5. Magna Carta, meaning 'The Great Charter', is one of the most famous documents in the world. Originally issued by King John of England (r. 1199–1216) on June 15, 1215, under the threat of civil war or as a practical solution to the political crisis he faced in 1215. Magna Carta established for the first time the principle that everybody, including the king, was subject to the law. It sought to prevent the king from exploiting his power, and placed limits of royal authority by establishing law as a power in itself. By declaring the sovereign to be subject to the rule of law and documenting the liberties held by "free men," the Magna Carta provided the foundation for individual rights in Anglo-American jurisprudence, available at https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction, https://www.britannica.com/topic/Magna-Carta
6. Besa Arifi, "Relevance to Magna Carta to Rights of Victims of Abuse of Power"11(1) *Seeu Review* (2015) *available at* https://www.researchgate.net/publication/290601157_ Relevance _Of_Magna_Carta _To_Rights_Of_Victims_Of_Abuse_Of_Power and also *available at* https:// sciendo.com/pdf/10.1515/seeur-2015-0008 (last visited 18.07.2019 at 7pm)

intervening to assist victims in distress or to prevent victimization.[8] On the other hand, under the head of victims of abuse of power, the term victim signifies person who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitutes violation of national criminal laws but internationally recognized norms relating to human rights.[9]

III. UN DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER: THE MAGNA CARTA OF VICTIMS HUMAN RIGHTS

In the year 1985, the U. N. General Assembly adopted the "UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power. This declaration is considered as one of the most important development in the field of victimology and is often refereed as the Magna Carta in the field of victim's human rights.[10] The adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims' Declaration)[11] constituted an important recognition of the need to set norms and minimum standards in international law for the protection of victims' human rights. This declaration asks for need to protect victims' as the growing responsibility of criminal justice system.[12] The Salient feature of the UN Declaration may be summarized as under;

a) The victim deserves to be treated with compassion and respect for his/her dignity.

b) The victim is entitled to access the courts of justice for prompt redressal for the harm suffered.

c) The procedure for judicial and administrative redressal must be expeditious, fair and accessible.

d) The victim is entitled to be informed of the rights under the established procedures for seeking redressal. The right to information includes; i) Awareness of the

7. Paragraph 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
8. Paragraph 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
9. Paragraph 18 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
10. Samraggi Chakraborty and Nirmal Kanti Chakrabarti. "Victimology in Human Rights Perspective" 5(2) *Indian Human Rights Law Review* 285 (2014)
11. Adopted by General Assembly resolution 40/34 of 29 November 1985 at 96 plenary meeting
12. Paragraph 1 and 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985

legal procedure; ii) About the role of the victim in the judicial process and extent thereof and ; iii) Notice about the timing and progress of the proceedings and of its disposition.

e) The victim is entitled to excpress/present his/her views and concerns and for the same to be considered at appropriate stage particularly when personal interest are involved though of course without causing prejudice to the accused.

f) The victim is entitled to proper assistance throughout the legal process with minimum inconvenience along with space where necessary, to protect privacy and safety (including insulation from intimidation)

g) The victim is entitled for prompt disposition of the case and execution of order particularly where there is award in his/her favour.

h) The victim is entitled to participate in proceedings of mediation, conciliation etc to facilitate informal resolution of dispute.

i) The victim is entitled to fair restitution which would include return of the property or payment for loss suffered, towards which end the State is expected to suitably modify its laws and practices so as to include it as another sentencing option.

j) The victim be provided "financial compensation" by the State when it is not fully available from the offender or other sources.

k) The victim is entitled to receive all necessary material, medical, psychological and social assistance through governmental, voluntary, community basis or indigenous matters.[13]

The declaration underscored the State obligation to ensure "access" for the victim of crime to "justice" and "fair treatment", his/her right to "restitution" and "compensation" and for all these purposes, proper and effective "assistance".[14] Hence it can be state that the Declaration of 1985 has recognized the following four rights for the victims;

i. Access to Justice and Fair Treatment
ii. Restitution
iii. Compensation
iv. Assistance

13. G.S. Bajpai, and Shriya Gauba, *Victim Justice: A Paradigm Shift in Criminal Justice System in India* 223-24 (Thomson Reuters, New Delhi, 1st edn. 2016)
14. *Ibid*

IV. HUMAN RIGHTS VIS-A-VIS VICTIM OF CRIME AND ABUSE OF POWER

Human Rights[15] are those rights which an individual for being an individual is entitled to. The core element of human rights is universal and consists of freedom, equality and liberty. Victims are human too and their rights are fundamental entitlement for all victims of crime and abuse of power. Although international human rights documents such as UDHR[16] does not mention victim of crime specifically, but there are plethora of rights identified under International standards which can be viewed from the perspective of a victim. The international concern about the role, rights and treatment of the victims of crime and abuse of power within the criminal justice system have influenced "the formulation of new international (though normally non-binding) standards and have also driven victim developments in international courts tribunal which are as follow.[17]

IV. 1. Access to Justice & Fair Treatment to Victims and International Standards

The expression and phrase "Access to justice" is a fundamental principle of the rule of law across the globe. Access to justice is a basic right that guarantees protection of law to all irrespective of caste, colour, creed, language, ethnicity, religion, race etc. It is integral to rule of law. In the absenteeism of access to justice principle, the individuals or people are incapable to have their voice heard, exercise their rights and claims, challenge discrimination or hold authority/establishment accountable under civil and criminal law or international law. It is general principle that on earth, no one is above the law, not even the State also. Everyone should be able to seek protection of the laws and legal redress and remedies for their grievances. Article 14 of Constitution of India provides that, "The State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India". This implies a right in every individual within the territory of India, and a duty on State to ensure that legal protection is accessible to all irrespective of social or economic constraints. The Constitution Bench of the Supreme Court, in its judgement of *Ajay Kumar Pandey* vs *State of Jammu and Kashmir* C.P

15. Section 2(1)(d) of Human Rights Act, 1993 human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Consti-tution or embodied in the International Covenants and enforce-able by courts in India.
16. The universal declaration of human rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages. For details please see, https://www.un.org/en/about-us/universal-declaration-of-human-rights
17. Chakraborty *supra* note 9 at 282

No. 5597 of 2012 also held that access to justice is a fundamental right that is guaranteed to all its citizens by Article 14 and Article 21 of the Constitution of India. To quote Martin Luther King "Injustice anywhere is a threat to justice everywhere"[18]. The fundamental human rights instruments for victims i.e. UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 provides that victims should be treated with dignity. They are entitled to approach to the mechanism of justice and to promote redress that is expeditious, fair, inexpensive and accessible provided by national legislation for harm. It stated that victims should be informed of their rights in seeking redress through the establishment of judicial and administrative mechanisms or through the informal mechanism such as mediation, arbitration etc to facilitate conciliation. Victim declaration further provides for informing victims' about their role, the scope and progress of the proceedings, right to present whenever it necessary to protect their privacy, to give proper assistance through legal process and avoiding delay in execution of case and to order / grant awards to victims'. Even the Rome Statute of International Criminal Court[19] expressly provides protection to victims and witness and their participation in the proceedings. The Article 68(1) clearly states that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.[20] The UDHR gave universal recognition to these rights including the right of 'access to justice'; Article 6 states that everyone has the right to recognition everywhere as a person before the law. Article 7 states that "all are equal before the law and are entitled without any discrimination to equal protection of the law". According to Article 8 "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law". Whereas Article 10 states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him. According to Article 21(1) "everyone has the right to take part in the government of his country, directly or through freely chosen

18. Mayukha Parcha & Anicham Tamilmani, "Access to Justice in India" 2(1) *International Journal of Law Management & Humanities* 1-7 (2018) *available at*https://www.ijlmh.com/wp-content/uploads/2019/03/Access-to-Justice-in-India.pdf (last visited on 20 March 2020 at 5pm)
19. The text of the Rome Statute reproduced herein was originally circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations
20. For details please see Rome Statute of the International Criminal Court-The text of the Rome Statute reproduced herein was originally circulated as document A/CONF.183/9 of 17 July 1998, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org*available at* https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (last visited on 10 March 2020 at 9pm)

representatives". Article 21 (2) state that everyone has the right of equal access to public service in his country.[21] There are certain provisions such as Articles 3[22], 6[23], 14(1)[24], 16[25], 25[26], 26[27] of the ICCPR, 1966;Articles 6[28] and 13[29] of the European Convention on Human Rights, 1950 and other regional conventions[30] that underscore the importance of the right of access to impartial and independent justice. From above provisions it is clear that right to access justice and fair treatment is considered as basic human right of all including victim. It is a basic human right guaranteed by international law.

IV.2. Right to Restitution and International Standards

The term "Restitution" means any form of compensation (payment) made by an offender to a victim for expenses suffered by a victim because of the offender's wrongful act. The term generally refers to restoration of the harm caused by the defendant, most commonly in form of payment for damage. In other words, it is an order made by a judge/court requiring the defendant or convicted offenders, as part of their sentences, to pay the victim's out of pocket expenses that were not covered by insurance and

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21. For detail please see Universal Declaration of Human Rights *available at*https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited on 14 March 2020 at 2pm)
22. Art 03 of ICCPR, 1966 states that "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"
23. Art 6(1) of ICCPR, 1966 "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"
24. Art 14 (1) of ICCPR, 1966 state that- "All persons shall be equal before the courts and tribunals…….. everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
25. Art 16 ICCPR, 1966 "Everyone shall have the right to recognition everywhere as a person before the law."
26. Art 25 (c) ICCPR, 1966 "To have access, on general terms of equality, to public service in his country."
27. Art 26 of ICCPR, 1966 state that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
28. The European Convention on Human Rights (ECHR) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953Article 06 ECHR state -Right to a fair trial
29. Article 13 of ECHR, 1950 -Right to an effective remedy
30. Such as African Charter on Human and Peoples' Rights, 1981; American Convention on Human Rights, 1969; European Convention on the Compensation of Victims of Violent Crimes, 1983; Committee of Minister Recommendation No. R(85) 11 to the Members States of the Council of Europe on the position of the Victim in the Framework of Criminal Law and Procedure, 1985 etc

were incurred as a direct result of the crime and abuse of power.[31] Expenses which are eligible for restitution directly relating to the crime and abuse of power comprises: medical expenses, therapy costs, prescription charges, counseling costs, expenses related to participating in the criminal justice process such as travel costs and child care expenses, lost wages, lost or damaged property, insurance deductibles etc. The Victims Declaration provides for fair restitution to victims, their families or dependants. It includes the return of property or payment for the harm or loss suffered and restoration of rights.[32] Governments should review their laws regulation etc to consider restitution as an available sentencing option in criminal cases in addition to other criminal sanction.[33] Further, if the harm is to the environment, the restitution should include restoration of the environment etc[34]. Furthermore, if public officials or agent acting in on official or quasi-official capacity violates national criminal law then it is the state that shall be responsible for such act of official and therefore victims receive restitutions from the state.[35] The UDHR also confers to every person right to property[36].

IV.3. Right to Compensation and International Standards

Compensation in general term is payment of monetary damages to one whose rights have been violated by a breach of law. Victim of crime and abuse of power compensation is a government program designed to reimburse victims of violent crime for their expenses relating to the crime. Surviving or affected family members are also being eligible for limited compensation. Usually, it is been seen that victims' apply to the compensation program of the state where they live or where the crime occurred. The Compensation can be paid even when no one is arrested or convicted for the crime. The Victim Declaration provides for compensation. Generally the offender is responsible for providing and giving compensation to victims but in case when compensation is not available from the offender then it is for state to provide financial compensation to victims who suffered from bodily injury or impairment of physical or mental health asa result at crimes and abuse of power[37].

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31. For details please see, *Crime Victims Right to Restitution,* Office of Victims Advocacy, Frankfort, Kentucky *available at*https://ag.ky.gov/AG%20Publications/Restitution-brochure.pdf (last visited on 15 Feb 2020 at 2pm)
32. Paragraph 08 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
33. Paragraph 09 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
34. Paragraph 10 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
35. Paragraph 11 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
36. Art 17 of UDHR, 1948
37. Paragraph 12 a UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985

The victim declaration also makes provisions for compensation to the family of victims.[38] Furthermore it recommends for the establishment, strengthening and expression of national funds for compensation to victims.[39] The European Convention for the Protection of Human Rights and Fundamental Rights (ECHR) in its Protocol No.726 under Article 03 provides for victims the right to compensation for a miscarriage of justice and shall have an enforceable right to compensation, if they were a victims of arrest or detention in contravention of Right to liberty and security of the said convention. Under Article 5(5) of ECHR provide "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". Similarly the same provisions is available under Article 9(5) of ICCPR[40], 1966 to the victims of unlawful arrest and detention of enforceable rights to compensation in ICCPR, 1966 and if they have suffered punishment as a result of such conviction i.e. through miscarriage of justice, then they shall be compensated according to law under Article 14(6) of ICCPR, 1966.[41] Through just compensation we can wipe out the all the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed which means the payment of a sum corresponding to the value which restitution in kind would bear[42]. Thus compensation programs can be termed as "payers of last resort." International standards consider compensation as a right of victims'.

IV. 4. Right to Assistance and International Standards

In addition to compensation, victims of crimes and abuse of power may also require immediate or even long-term medical care as well as other forms of assistance. In general parlance assistance means "help". These needs are recognized in paragraph 14 of the United Nations Declaration of Basic Principles, 1985 according to which: "Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means."[43]

38. Paragraph 12 b UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
39. Paragraph 13 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
40. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49
41. Rohini A. Mahurkar, "Compensatory Justice: A Human Right Perspective"12(1) *Journal of the Institute of Human Rights*73-74 (2009)
42. Held in the land mark judgment case of Chorzow Factory Case of 1928, *Germany* v. *Poland* 1928
43. For details please see, *Chapter 15: Protection And Redress For Victims of Crime and Human Rights Violations available at*https://www.un.org/ruleoflaw/files/training9chapter15en.pdf (last visited on 25 March 2020 at 5pm)

Less regard is given to victim's assistance through law. However the aforesaid provisions envisage various forms of assistance not only from the State but also from the community and specialized associations. The state helps the victims of criminal actions through means other than punishment of the criminals. The assistance may be financial, medical, legal or social. It includes victim friendly facilities and victim empowerment services such as accommodation, waiting rooms and specialized courts, shelters, health services and others. Provision of counseling services and health services and health services including psychological and psychiatric, legal aid services, interpretation and translation services improved and automated administration of deceased estates, improved and automated guardian fund services etc should be included. The Victims Declaration provides for assistance provision to the victim e.g. medical, psychological and social assistance through government, NGO's. It asks for the training to police, judges, health and social service and other personnel to help victim and to ensure proper guidance and promote aid.[44] The UDHR also considers the right of social security of every individual under Article 22[45] Similar provision is enacted in the ICCPR through Article 14 which talks about the free legal assistance should be provided to all[46]. International law recognizes victims' right to assistance against all and ensures respect for implementation of this right as well. To be able to provide victims of crime and abuse of power with prompt and efficient assistance, all pertinent professional groups, including judges, prosecutors and lawyers, must be sensitized to the needs of victims and available assistance schemes.

From above discussion it can be said that international standards through these documents recognize that victims should be tried with compassion and respect for their dignity, and recommend measures to improve their access to justice and prompt redress for the harm they suffered. But the major drawback is that the rights given to victims are through declaration and guidelines. They have no binding effect still its clauses serve as useful document.[47]

V. CONCLUSION

The brief review of the existing international human rights standards in relation to rights of victims of crime and abuse of power reveals that it gives much respect to victims' right to compensation and very little with respect to restorative justice to the victims of crime and abuse of power through effective declaration, convention etc.

44. Paragraph 14-17. UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, 1985
45. Art 22 of UDHR, 1948 "Right to Social Security"
46. Art 14 of ICCPR, 1966 "to have free legal assistance"
47. Deshpande *supra* note 2 at 129-133.

The concept of restorative justice is woven around four major themes, namely restoration, accountability of the perpetrators, community protection through assistance such as scheme, policies and programme, and skill development through rehabilitation. Moreover the remedies available to victims of abuse of power lack incorporation of access to justice and fair treatment under paragraph 19 of victim declaration. The victim has been made secondary to right of international criminal and human rights law. The human rights, criminal law and legal system have been from a long time preoccupied with safeguards and the protection of the accused. The time has now ripened for a viable and social justice oriented and effective scheme, policies and programme for the right of victims of crime and abuse power. Democratic societies have an obligation to alleviate the effects of crime, including the adverse consequence that victimization has on all aspects of life. Society has to demonstrate responsibility towards victims' in order to prevent pain and suffering to them. Victims' should be entitled to benefit from effective programs of social reintegration. Despite of the effort taken by the world community, the end result not as it was expected. This made the world academic community to think and aim for an effective legal instrument: Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power, 2005 was prepared but unfortunately still have not been adequately been recognized and that they may in addition, suffer hardship when assisting in the prosecution of perpetrators, but has unfastened the fashion for new deliberations on the best possible range of victims rights and policy measures on a international level across the globe. At international level, several measures have been taken to improve the plight of the victims. Victims' rights are now considered as human rights. Since 1985, much has been achieved in the field of victim's rights, but a lot more needs to be done.[48]With the science of victims nourishing our brave hope for the future we can dream that one day soon there will be a UN convention on victim of crime and abuse of power addressing prevention, rights, access to justice and fair treatment and human rights remedies on behalf of all types of victims, since victims' rights like human rights are only meaningful if they confer entitlement as well as assuring restorative justice through fixing accountability of the perpetrators; and obligation on the people and community against victims for rehabilitation.[49]

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48. Chakraborty *supra* note 10 at 289.
49. *Id.* at 284

10

Rights of Minorities in India: A Study With Special Reference to Educational and Cultural Rights

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I. INTRODUCTION

The observation of Pt. Jawaharlal Nehru, regarding the situation of minorities' in India clearly reflects the necessity of recognizing the existence of minorities in a plural society and accordingly adopt and implement measures for the protection and promotion of their ethnic, religious, linguistic, and cultural rights. Nehru emphatically observed:

"The history of India and of many of the countries of Europe has demonstrated that there can be no stable equilibrium in a country so long as attempt is made to crush a minority or to force it to conform to the majority. There is no surer method of rousing the resentment of the minority and keeping it apart from the rest of the nation than to make it feel that it has not gotten the freedom to stick to its own ways. Repression and coercion can never succeed in subjugating minority but make it more self-conscious and more determined to value and hold fast to what it considers its very own"[3].

India is currently an emerging industrialized country. It holds a prominent position as the largest nation-state with a democratic system in the globe. In contrast to several developing nations, this polity has experienced multiple successful elections without any interference from the military in political affairs. It is a nuclear power and is playing an increasingly significant role in the current era of "New Globalization" as a key economic player. Despite India's remarkable progress, the country still faces human rights issues concerning minority groups. This paper aims to reflect on minority rights in India, with a special focus on "cultural and educational rights," as these rights have been explicitly recognized as fundamental rights under the Indian Constitution.

II. HISTORICAL PERSPECTIVE

Humans are granted certain rights or privileges singularly or collectively as a group. 'Minority rights' is an example of such collective human rights. The differences between individual and collective human rights become apparent when they are violated. Collective human rights must be enforced together on behalf of a group or community, not separately. Whereas, individual human rights are measured in the context of a person.

Large-scale human rights violations may lead to collective action; for example, whole-sale prohibition of free speech may lead to insurrection. However, an individual human right does not automatically become a collective human right just because of collective action. The attainment of full enjoyment of individual human rights is beyond the bounds of possibility without the implementation of collective human rights. Consider the concept of religious freedom. Unless the institutions necessary for worship and religious practices are built, individual members of a religious minority cannot fully express their freedom of religion as a fundamental human right. This implies that the exercise of individual human rights is contingent upon the bestowal of collective human rights.[4]

The two schools of thought on the significance of minority rights are as follows: Moralists believe that a democracy's political stability is dependent on the universal rights of equality of opportunity and liberty for minorities. Realist scholars believed such a society could only exist in philosophical writing. Realists claim that the Constitution, human rights conventions, and religious texts cannot guarantee "human equality" in practice. They believe that state interests frequently override human rights principles framed in sacrosanct agreements.[5]

Collective rights pertaining to ethnic, religious, and linguistic minorities enjoy a privileged position, and these rights are universal in nature. After the Second World War concluded, the issue of minority groups seemed largely resolved, especially in Europe. This was either due to the occurrence of genocide or the relocation of populations. The focus transitioned from safeguarding collective human rights to advocating for individual human rights. The United Nations Organisation has typically refrained from addressing matters concerning minority groups. While it does have a special Sub-Commission, which reports to the Commission on Human Rights, that is specifically responsible for dealing with the protection of minorities and primarily focuses on discrimination and neglects faced by minorities. Nonetheless, in reality, it is rare to find a state that truly guarantees the freedom of minorities and addresses their issues unreservedly.[6] In recent years, the difficulties faced by minorities have significantly worsened in various parts of the world. It is evidently counterproductive

to pursue individual human rights without taking into account the collective demands of minorities.

The 'Brahmins', the 'Kshatriyas', the 'Vaishyas', and the 'Shudras' were the four classes that constituted the social order of ancient India. The Brahmins were the intellectuals, the Kshatriyas were the warriors and law enforcers, and the Vaishyas were merchants and shopkeepers. Shudras were menial laborers, scavengers, and cleaners. The Shudras were the "depressed classes" as they were exploited and treated as outcasts, untouchables and denied access to any public places and basic amenities. The Indian Constitution later referred to them as the Scheduled Castes and the Scheduled Tribes. However, discriminatory treatment affected more than just the Shudras. During the course of India's development, a number of other minority groups with diverse religious, ethnic, and linguistic roots came into existence. These groups include Muslims, Sikhs, Jains, Jews, Parsis, Christians, and Anglo-Indians. The welfare and equal protection of the minority groups have been a cause of concern in an evolving society.[7]

India is a home to diverse groups of people since ancient times. In a multicultural society, different ethnic, religious, and linguistic groups lived harmoniously with each other. Discord between different groups began during the "British Raj" in India. In the political process, they divided Indian society into various groups to further their colonial agenda rather than prioritising the individual interests of citizens. For instance, the Indian Councils Act of 1909 created separate electorates on a communal basis. The Government of India Act continued and extended this practice of communal electorates, as well as enacting reservation policies in public services. To achieve fraternity and unity, the Nehru Committee Report of 1928 recommended mixed electorates with special reservations for socially and educationally backward people and emphasised individuals' fundamental rights. This vision has led the Constitution maker to give special attention to the minority interests.[8]

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3. Jawahar Lal Nehru, *Young India*, 15th May, 1930.
4. Yoram Dinstein, "Collective Human Rights of Peoples and Minorities." 25 (1) *The International and Comparative Law Quarterly*, 102–20 (1976).
5. Ghatak, Sambuddha, and E. Ike Udogu. "Human Rights Issues of Minorities in Contemporary India: A Concise Analysis." 29 (1) *Journal of Third World Studies* 203–30 (2012).
6. Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities," 62 *American Journal of International Law* 872-877.
7. Pankaj Bhanot, "Minorities in India" 1 (2) *International Journal on Group Rights* 137-157 (1993).
8. Shailendra K Tiwary, "Minorities and the Constitution: Problem of National Integration." 71 (2) *The Indian Journal of Political Science* 519–24 (2010).

The Supreme Court clarified that the term "minority" is not explicitly defined in the Constitution. It can be inferred that a minority community is one that constitutes less than 50% of the population.[9] However, it remains ambiguous whether this refers to 50% of India's overall population or 50% of a specific state's population.[10] The Assam High Court, in a case[11] observed that individuals claiming to be minorities must be minorities in the specific region where the educational institution is situated.

Minority may be identified on a state basis. While identifying minority groups, the Central Government must examine the group's social, cultural, and religious conditions, and not just follow the advice of the National Commission for Minorities. A group need not be numerically dwindling to be considered a minority group. If a majority of community members are affluent industrialists, businessmen, professionals, and property owners, they may not need to be notified under the "National Commission for Minorities Act, 1992" or given special treatment or protection.[12]

II. CONSTITUTIONAL PROVISIONS

Worldwide, all citizens, especially minorities without political power, don't benefit equally from human rights proclamations. However, both constitutionally and doctrinally, the supreme law guarantees the enjoyment of human rights for all citizens. In Art.29 and 30, the apex law of the land guarantees "cultural and educational rights" as fundamental entitlements to all its citizens, irrespective of religion, race, caste, sex, or language.

The rights can be classified into four parts:

(i) All citizens having different language, scriptures, or culture are endowed with rights to preserve the same.

(ii) All citizens belonging to minority religious, racial, caste, sexual or linguistic groups shall have right to take admission in public educational institutions or govt. aided institutions.

(iii) All religious or linguistic minorities shall have the right to establish and maintain educational establishments. Additionally, through 1976 amendment, it is inserted that if government acquires any property belonging to minority communities, then they should be adequately compensated in a way not to abrogate their educational and cultural rights.

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9. *Re Kerala Education Bill case*, AIR 1958 SC 956.
10. *Ibid*.
11. *Ramni Kanta Bose* v. *Gauhati University*, AIR 1951 Assam 163.
12. *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355.

(iv) The State shall not discriminate while giving aid to minority educational institution.

Article 29(1) does not mention any minority group technically. It grants the right to any group of citizens residing in India to preserve their unique language, script, or culture. So the right given under Article 29(1) is to a group of citizens residing in India who may not be considered a minority in the strict sense. On the other hand, the beneficiaries under Article 30(1) are linguistic or religious minority. Another difference between Articles 29(1) and 30(1) is that Article 29(1) grants rights regarding preservation of language, script, or culture, whereas Article 30(1) specifically addresses the ability to establish and manage educational institutions. Article 29(1) do not explicitly discuss about the establishment of any educational institution but a group of citizens with a unique language, script, or culture can preserve their heritage by creating an educational institution. According to Article 30(1), the freedom given to religious or linguistic minorities includes the right to create educational institutions of their choice not for any particular purpose such as preservation of language, script, or culture.[13] There is a possibility that, in a specific situation, the two Articles may coincide. Article 29(1) allows for the preservation of language, script, or culture through methods that are not related to educational institutions. Similarly, Article 30(1) permits minority groups to establish and manage educational institutions without the intention of preserving the language, script, or culture. A minority group may oversee an institution dedicated solely to religious instruction, without any involvement in the preservation of a language, script, or culture. It was determined that Article 29(1) is wider than Article 30(1) and both Articles can exist independent of each other.[14]

Article 26 grants any religious group to maintain religious or charitable institution, is complementary to Article 30. Article 30 guarantees the right to religious minorities to establish own educational institution.

Aside from Article 29 and Article 30, there are additional Articles that safeguard the fundamental rights of minority groups. The enforceable provisions include the right to equality[15] and non-discrimination[16] the right to freedom[17], the right against exploitation

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13. *Ahmedabad St. Xavier's College Society* v. *State of Gujarat* (1975) 1 SCR 173.
14. *D.A.V. College* v. *State of Punjab (II)*, AIR 1971 SC 1737.
15. The Constitution of India, article 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
16. The Constitution of India, article 15: "(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition…"
17. The Constitution of India, article 19(1): "All citizens shall have the right— (a) to freedom of speech and expression …."

and unfair treatment[18] The Constitution of India, article 23(1): "… similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." The Constitution of India, article 27: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.", and the right to religious freedom[19]. The Constitution also incorporates additional provisions about preferential treatment for the protection of Scheduled Castes, Scheduled Tribes, and backward classes.[20] The Anglo-Indian Community also received accommodations in various sectors, such as positions in the railway, customs, and postal services, as well as grants for educational purposes.[21] The Constitution entrusts a commission with the task of investigating the state of disadvantaged social groups.[22] Furthermore, the country implemented specific measures to safeguard the religious and social customs, traditional legal systems, land ownership, and resource transfer for indigenous communities residing in the North-Eastern states and other regions.[23]

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18. The Constitution of India, article 23(1): "…similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."
    The Constitution of India, article 27: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law."
    The Constitution of India, article 46 provides that the state shall promote with special care the educational and economic interest of weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
19. The Constitution of India, article 25(1): "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion..."
20. The Constitution of India, article 16 provides that nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens.
21. The Constitution of India, article 336-337.
22. The Constitution of India, article 338 provides for establishment of National Commission for Scheduled Castes.
    Article 338A provides for establishment of National Commission for Scheduled Tribes
    Article 338B provides for establishment of National Commission for Backward Classes.
    Article 339 provides that the President may at any time by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled tribes in the States.
    Article 340 provides that the President may by order appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India.
23. The Constitution of India, Schedule V and VI, Article 371A (Nagaland), Article 371B (Assam), Art.371F (Manipur), Article 371G (Sikkim), Article 371H (Mizoram).

IV. LEGISLATIVE PROVISIONS

The National Commission for Minorities Act, 1992, established a statutory body in 1993 to safeguard minorities' rights. The Central Government nominates five members for three years, including a chairperson and a vice chairperson, to form the National Commission for Minorities[24]. The main function of this Commission is to monitor the implementation of fundamental and legal rights promised to minorities. The NCM also carries out research into the social conditions of minorities and recommends measures to the government for the upliftment of the minorities periodically or on an ad hoc basis.[25] The NCM also admits complaints relating to crimes against minorities and while disposing of such matters acts like civil courts.[26]

The establishment of the "National Human Rights Commission" had been authorised under the Protection of Human Rights Act. This body functions to address and resolve complaints pertaining to infringements of human rights. The NHRC investigates complaints of human rights violations and negligence in preventing such violations by public servants, either on its own volition or upon a petition submitted by a victim, or on a court order. With the consent of the Court, the NHRC intervenes in any existing legal proceedings concerning allegations of human rights violations. The Commission conducts visits to jails or other institutions under the jurisdiction of the State Government, where individuals are held for the purpose of treatment, rehabilitation, or protection. The goal is to assess the living circumstances of the inmates and present suggestions to the Government. The NHRC systematically examines the elements that impede the full realisation of human rights and proposes suitable corrective actions. It examines treaties and other international instruments pertaining to human rights and provides suggestions for their efficient enforcement. The Commission also engages in and advances research in the domain of human rights, raises awareness relating human rights violations across different strata of society through printed materials, media, seminars, etc. Furthermore, it promotes the initiatives of non-governmental organizations and institutions engaged in the field of human rights.[27]

24. Section 3-4 of the NCM Act, 1992.
25. Section 9 of the NCM Act, 1992.
26. Section 9 of the NCM Act, 1992.
27. Section 12 of the Protection of Human Rights Act, 1993.

V. ROLE OF JUDICIARY

The Indian Constitution has provided for a set of rights protecting the minorities, in addition to the fundamental rights available to all citizens. Beside religious freedom, minority rights are inclusive of cultural and educational rights. These rights have been a point of contention in several litigations.

The right to conserve one group's language can extend to objection by resident of a state having different script or language against illegal migration from neighboring country which might change the language or culture of the area. It was observed by the Supreme Court that "the right to conserve the language of the citizens includes the right to agitate for the protection of the language. Political agitation for conservation of the language of a section of the citizens cannot therefore be regarded a corrupt practice within the meaning of Section 123(3) of the Representation of the People Act."[28]

The *Stephen's College*[29], decision established that a minority community has the right to reserve a maximum of 50% of seats for its own community members in an educational institution that is formed and managed by the community, even if the institution receives financial assistance from the State. In the *Pai Foundation case*[30], the court loosened the restriction of 50 percent and clarified that the State where the minority institution is located has the authority to determine a suitable percentage. Enrolling non-minority students in minority institutions will not be considered violative as long as it is based on merit and to a reasonable degree.

In a case involving the State of Bombay, the government issued a circular directing the admission of only Anglo-Indians and citizens of non-Asiatic descent into English-medium schools, while denying admission to students whose mother tongue is not English. The Court held the order to be ultra vires as it denies admission in an educational institution on the ground of language, which is prohibited under Art. 29(2).[31]

In *P.A. Inamdar* Case[32], the court held that "neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institution are free to admit students of their own choice including students of non-minority community, but to a limited extent only and not in a manner

28. *Jagdev Singh Shidhant* v. *Pratap Singh Daulta,* AIR 1965 SC 183.
29. *St. Stephen's College* v. *University of Delhi* 1992 (1) SCC 558.
30. *TMA Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 48.1
31. *State of Bombay* v. Bombay Education Society, AIR 1954 SC 561.
32. *P.A. Inamdar* v. *State of Maharashtra* 2005 (6) SCC 537.

and to such extent that minority educational status is lost." This statement regarding reservation in unaided non-minority institution is diluted by the 2005 Amendment and 2019 Amendment to the Constitution which Clause (5) and Clause (6) to Article 15[33]. This case further laid down that "any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by majority or the minority. The right under Art. 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf." Later on, in the case of *Usha Mehta*[34]on the basis of the above observation, compulsory teaching of Marathi language in all schools including minority schools was upheld.

The Supreme Court ruled that the Ramkrishna Mission is a Hindu religious denomination, not a separate minority religion. Therefore, the Ramkrishna Mission's established and administered educational institution does not qualify for right granted under Article 30(1).[35]

The Supreme Court, in the case of *D.A.V. College*[36], asserted that under Article 29(1), it is undeniable that the script of Arya Samaj differs from that of Sikhs, who constitute the majority in Punjab. Sikhs use Gurumukti as their writing system, Arya Samajists exclusively use Devanagari script. The Supreme Court articulated the legal principle that if a state legislation is being contested then the population of that state should be considered to determine 'who is a minority?'. Conversely, if the law is to be applied at the national level, it should consider the population of the entire country of India. In the state of Punjab, Arya Samaj constituted a minority community.

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33. The Constitution of India, article 15(5) "Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."
Article 15(6)(b) "Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category."
34. *Usha Mehta* v. *State of Maharashtra* AIR ONLINE 2004 SC 60.
35. *Bramchari Sidheswar Bhai* v. *State of West Bengal*, AIR 1995 SC 2089.
36. *D.A.V. College* v. *State of Punjab* 1971 SCR 677.

VI. CONCLUSION & SUGGESTIONS

Minorities in an ultranationalist and fanatic society under the rule of despots face many hardships, such as suppression and eradication, forceful conversion, and hostility. Despite its establishment in 1992, the National Commission for Minorities in India has failed to adequately address the crisis affecting minority communities. Only political mileage has motivated the development of legislative safeguards for minorities at the union and state levels. We expect the Commission to fulfill its constitutional mandate by spearheading the protection of minorities. The Commission's function is to investigate complaints for any wrong done to a member of a minority community. But given the flagrant violation of rules and propagation of hate speech, it is for the Commission to take suo moto cognizance of offenses and invoke the laws of "Indian Penal Code" and "Criminal Procedure Code." The National Commission must act as an independent body, devoid of any political influence. The National Commission's motto should be to improve the socioeconomic condition of minorities by safeguarding their cultural and educational rights.

Equal application of human rights principles is taking place in society, and activists persist in advocating for their universal respect. The common desire, among human rights agents, to fight for the respect of minorities' human rights globally has gained currency. Indeed, their advocacy for those who experience victimisation in their political, economic, religious, and social environments has reached its peak. Human rights campaigners' criticism of human rights infractions aims to exert pressure on politicians to legally and politically alter those actions and policies that frequently marginalize individuals and minority groups within a system. The hope is that an emphasis on the observance of human rights provisions may result in their proper implementation, resulting in peaceful coexistence in society.

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11

A Study on Protection of Environmental and International Instruments

Priya Singh[1]

I. INTRODUCTION

Environmental protection is a global concern that requires international cooperation. In recent decades, many international treaties and conventions have been ratified to address environmental issues and promote sustainable development. These treaties have shaped the worldwide environmental conservation landscape and advanced climate change, biodiversity, and pollution management. The 1992 UN Framework Convention on Climate Change organizes international climate change efforts, and the 2015 Paris Agreement aims to curb global warming and keep it within 2 degrees Celsius. Important agreements include the 1992 Convention on Biological Diversity, which preserves biodiversity and its sustainable use, and the 1994 UN Convention to Combat Desertification, which addresses desertification and drought. Rich nations often provide financial help and technical distribution, while poor countries focus on improving their capacities and implementing the agreements.

Notwithstanding these endeavours, the global community continues to encounter substantial obstacles in safeguarding the environment. Climate change is a significant environmental concern, and there is a continuous emission of global greenhouse gas. Furthermore, the preservation of biodiversity and the deterioration of ecosystems continue to be significant issues, along with pollution and the excessive use of nature.

II. GLOBAL ENVIRONMENTAL CRISIS

The current global environmental catastrophe is a multidimensional and intricate problem stemming from a multitude of reasons. The primary factors contributing to the

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environmental catastrophe encompass population expansion, urbanization, industry, and technology breakthroughs. The growing population predominantly attributes to the environmental catastrophe. The continuous growth of the global population has resulted in an equivalent increase in the need for critical resources, including energy, food, and water. This may lead to the depletion of these resources beyond their carrying capacity, resulting in habitat devastation and ecosystem degradation such as air pollution, water scarcity, and deforestation. Urbanization contributes substantially to the environmental catastrophe. Furthermore, the migration of people to urban areas contributes to population expansion, which in turn causes the development of cities and the expansion of urban regions. As a result, this expansion frequently gives rise to the degradation of ecological habitats and an escalation in levels of pollution. Furthermore, as the population grows, there is an additional increase in waste generation, which can lead to complications in waste management and compromise the integrity of aquatic and terrestrial ecosystems. Beyond a sustainable approach, population growth can generally exert pressure on the environment and generate significant problems.

Industrialization is a significant contributor to the environmental catastrophe. Industrialization has precipitated an environmental disaster through a multitude of means. Industrialization involves the extensive utilization of fossil fuels, like coal and petrol, which emit carbon dioxide and other greenhouse gases into the environment. These emissions are a significant factor in climate change, resulting in the elevation of sea levels, the escalation of temperatures, and alterations in weather patterns that have the potential to negatively impact both human populations and natural ecosystems.

Aside from the emissions generated by fossil fuels, industrialization also gives rise to various other types of pollution. For instance, the utilization of industrial chemicals can result in the pollution of the atmosphere, water bodies, and land. Industries generate substantial quantities of trash, posing challenges in terms of sustainable management and potentially causing land and water pollution. Moreover, industrial activities frequently entail the extraction of natural resources, such as minerals and lumber, which can result in deforestation, soil erosion, and various other forms of environmental degradation.

Industrialization significantly affects biodiversity. Industrial activities are the primary drivers of habitat destruction, pollution, and climate change, which are significant threats to biodiversity. For instance, the transformation of natural habitats into industrial or urban areas can result in the extinction of species and the degradation of their ecosystems. The introduction of noxious chemicals and pollutants can also inflict injury or cause the demise of species, while the alterations in climate patterns resulting

from industrialization can provide challenges for the survival of numerous species. The process of industrialization has exerted a substantial influence on the environment and has played a role in the emergence of numerous contemporary environmental issues. The exponential growth of the population and the corresponding surge in the need for resources, energy, and goods has propelled the expansion of industrial activity. Consequently, this has resulted in substantial pollution, habitat degradation, and climate alteration.

Technological improvements have contributed to the environmental crisis. The swift advancement of technology has resulted in the creation of novel items and procedures that do not consistently prioritize environmental sustainability. For instance, the extensive utilization of electronic gadgets has resulted in a surge in electronic trash, which significantly contributes to pollution and the loss of habitats. A significant factor is that numerous technological breakthroughs heavily depend on the utilization of non-renewable resources, such as fossil fuels, which significantly contribute to climate change and various forms of pollution. For instance, the use of automobiles and other vehicles propelled by internal combustion engines has resulted in heightened emissions of carbon dioxide and other greenhouse gases, contributing to climate change. Similarly, utilizing energy derived from the combustion of fossil fuels has caused air pollution and various other types of environmental harm. Due to the rapid growth of technology, electronic equipment has become outdated quickly, leading to the generation of substantial quantities of electronic trash. E-waste frequently harbours hazardous substances, including lead, mercury, and cadmium, that can pose risks to both human health and the environment if not appropriately disposed of.

III. DECLARATIONS AND TREATIES FOR THE PROTECTION OF ENVIRONMENT

Treaties and agreements are essential in safeguarding the environment. Treaties are legally binding agreements between nations or international organizations that create regulations and principles for the preservation and administration of the environment. These agreements can encompass a broad spectrum of topics, including climate change, biodiversity preservation, pollution management, and sustainable development.

a) Brussels Resolution on International Cooperation Concerning Pollutants Other Than Oil, 1969

In 1969 at the International Legal Conference on Marine Pollution Damage held under the auspices of IMCO (International Marine Control) at Brussels a resolution was adopted. The participating States while noting that pollution may be caused by substance

other than oil, recognised the limited scope of the International Convention specially relating to Intervention on the High Seas in cases of Oil Pollution Causalities to oil which was not intended to link coastal right of States and against the environmental pollution. This resolution intended to take protective measures for the pollution caused by other agents or substances and desired IMCO to gear up measures on all aspects of pollution by agents other than oil.

b) Oslo and London Convention on Dumping, 1972

Under the Oslo Convention and London Convention the signatories have arrived at the agreement to take steps to prevent pollution of the sea by dumping of harmful wastes and coordinate their policies on this issue. It is to be highlighted that both the conventions provide absolute prohibition of dumping. In both conventions (Oslo and London) however, under different circumstances the duty of enforcement is vested in the coastal States, port States and flag States. These Conventions require that vessels should be registered with States where it is loading or unloading cargo or non-cargo goods or dumping its wastes of any kind. But, the London Convention requires the parties to apply the measures to "vessels and aircraft and fixed or floating platforms under its jurisdiction believed to be engaged in dumping".

d) Convention on Prevention of Pollution by Radioactive Substances

Though various treaties were adopted to prevent and control the pollution caused by nuclear or radioactive substances. The liability for nuclear accident should be based on sound principle of law and the absolute liability principle should be adopted as the nuclear activities are extremely hazardous. There are conventions on prevention of pollution by radioactive substances. These conventions are as follows:-

(i) Antarctic Treaty, 1959

(ii) Nuclear Test Ban Treaty, 1963

(iii) The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967

(iv) Treaty for Prohibition of Nuclear in Latin America (Tlateloco Treaty, 1967)

(v) The Treaty on the Non-proliferation of Nuclear Weapon, 1968

(vi) U.N. General Assembly Resolution 1971 on the urgent need for suspension of nuclear and thermonuclear tests

(vii) The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and Ocean Floor and Sub-Soil thereof, 1971

e) United Nations Conference on Human Environment, 1972

In 1972, Stockholm, Sweden, played host to the UN Conference on the subject-matter of Human Environment. It serves to be an inaugural United Nations-hosted significant international conference devoted to the discipline of environmental preservation. Representatives from 113 countries participated in the conference, which resulted in the setting up of the UN Environment Programme.

The objective is to bring attention to the escalating problems concerning environment that threaten our planet, including deforestation, water and air pollution, and biodiversity loss. Additionally, it sought to establish a recent international institution to coordinate and provide support for activities related to environment and to develop a legal structure for assuring global cooperation on the matters involving environmental problems or degradation.

The summit led to formation of UNEP, an organization whose primary responsibility is to coordinate environmental initiatives within the UN system. UNEP has been instrumental in the formulation of environmental agreements globally and the promotion of "sustainable development (SD)" ever since its inception. It laid down the groundwork for the concerned environmental agenda at international level and was a pivotal moment in the history of environmentalism. Furthermore, it served as a catalyst for global collaboration regarding environmental issues and aided in generating consciousness regarding the imperative of preserving the planet for generations to come.

f) Vienna Convention for the Protection of the Ozone Layer, 1985

In 1985, the global community signed the "Vienna Convention for the Protection of the Ozone Layer" with a view to safeguard the ozone layer from the harmful effects of chemical substances. The ozone layer is a stratospheric region characterized by an abundance of ozone molecules, which serve to absorb solar UV radiation that is harmful to life. Scientists discovered that ozone-depleting substances, such as man-made compounds like chlorofluorocarbons, halons, and methyl bromide, cause the ozone layer depletion. The Vienna Convention established a framework for international cooperation to preserve the ozone layer by limiting the manufacture, sale and usage of ODS.

g) Montreal Protocol 1987

The 1987 multinational Montreal Protocol on Substances that Deplete the Ozone Layer phases out the production and usage of ODS to safeguard the Earth's ozone layer. The Montreal Treaty took effect in 1989. The Protocol is commonly accepted UN treaties, with 197 nations and territories ratifying it. High concentrations of ozone molecules in the stratosphere absorb UV energy from the sun. Ozone-depleting

substances, including chlorofluorocarbons, halons, and methyl bromide, are human-made. The Protocol phases down ODS production and use and reduces ozone-depleting chemicals to safeguard the ozone layer.

h) Kyoto Protocol, 1997

The Kyoto Protocol is a multinational agreement that was adopted in 1997 within the framework of "the United Nations Framework Convention on Climate Change (UNFCCC). The treaty was signed in Kyoto, Japan, and took effect in 2005. This is an international treaty that establishes obligatory goals for 37 developed countries and the European Community to decrease their emissions of greenhouse gases. The targets for 1st commitment period (2008-2012) are expressed as percentages of emissions levels in 1990. These targets vary from 8% to 10% below the emissions levels in 1990.

The Protocol also introduced three market-oriented methods that enable nations to fulfil their emissions objectives: Clean Development Mechanism, Joint Implementation, and International Emissions Trading. These mechanisms enable governments to allocate funds towards initiatives that aim to reduce emissions in other countries, or to engage in the trading of emissions permits as a means to meet their commitments.

i) Aarhus Convention, 1989

In 1989, a multilateral treaty Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters was adopted under the United Nations Economic Commission for Europe, popularly known as Aarhus Convention. In 2001, the treaty was signed into force. It encourages public participation in environmental decision-making and guarantees the public's access to justice, right to information, and participation in environmental affairs. The European Union and the majority of its member states are among the 46 signatories that have ratified the Aarhus Convention.

It incorporates a wide range of environmental concerns and is pertinent to all levels of government and industries. The Convention additionally established the Compliance Committee with the aim of supervising the parties' compliance with the Articles of the Convention. The Aarhus Convention is widely recognized as a seminal instrument in the promotion of public participation, environmental transparency, and access to justice.

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2. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989.

j) Basel Convention, 1989

Adopted in 1989, the Basel Convention[2] is a multinational agreement. It was formed under the auspices of the Economic Commission for Europe of the UN. In 1992, the treaty was ratified and commenced legal force. A global accord regulates the transportation and elimination of hazardous materials across international borders. The principal aim of the instrument is to assure the protection of the environment & public health through implementing of measures that minimize the production of hazardous waste and alleviate its detrimental impacts. The Basel Convention's scope extends to include hazardous wastes and other types of wastes that the participating countries explicitly designate as such. This includes municipal sludge, industrial residues, and by-products of mineral processing and mining. Furthermore, it encompasses any type of refuse that may pose a potential hazard or danger to both the environment & health of entire humanity.

k) Convention on Biological Diversity, 1992

The Convention on Biological Diversity (CBD) is a United Nations Environment Programme-adopted multilateral treaty from 1992 that seeks to advance the preservation of biodiversity, the sustainable utilization of its constituents, and the just and equitable distribution of the benefits stemming from the usage of genetic resources. The Convention is applicable to all ecosystems, species, and genetic resources, and it addresses a vast array of biodiversity conservation-related issues. The agreement delineated three primary goals: safeguarding biodiversity, ensuring the sustainable utilization of its constituent parts, and promoting the just and equitable distribution of the benefits stemming from the genetic resources. It is regarded as all- encompassing international agreements concerning the preservation of biodiversity. Some of the protocols/agreement are- The Nagoya Protocol on Access to Genetic Resources, the Cartagena Protocol on Biosafety, and the Fair and Equitable Sharing of Benefits Arising from their use.

l) United Nations Conference on Environment and Development, 1992

The Earth Summit[3] was conducted in Rio de Janeiro, Brazil in 1992. In addition to debating urgent environmental and developmental concerns, the conference convened delegates from more than 178 nations in order to negotiate and ratify a variety of international conventions and agreements. A significant number of non-governmental organizations and other civil society groups participated in the Earth Summit,

3. The United Nations Conference on Environment and Development,1992.

contributing to the discussions and negotiations while actively engaging in the conference.

In its entirety, the UNCED constituted a momentous occurrence within the annals of global environmental and development policy. Constraints and conventions that were ratified during the conference persistently influence international endeavours aimed at mitigating climate change and advancing sustainable development.

m) Paris Agreement, 2016

Adopted in 2016 at the 21st session of the Conference of the Parties to the UNFCC[4], the Paris Agreement is an international treaty. The primary aim of the agreement is to ensure that the increase in global temperature during this century remains significantly below 2 degrees Celsius above pre-industrial levels. Furthermore, it endeavours to restrict the temperature rise to a maximum of 1.5 degrees Celsius. In addition to strengthening countries' capacities to address the effects of climate change, the Paris Agreement promotes climate resilience and low greenhouse gas emissions.

The Paris Agreement is founded upon the principle of "common but differentiated responsibilities and respective capabilities". This signifies that developing as well as developed countries are obligated to reduce their greenhouse gas emissions. However, the scope of ambition and the specific measures implemented will fluctuate in accordance with a country's current stage of development and past emissions.

n) Kyiv Protocol on Pollutant Release and Transfer, 2009

Adopted in 2003, the Kyiv Protocol became a legally binding international accord in 2009. The protocol was formulated as an adjunct to the Aarhus Convention, which regulates environmental information access, citizen involvement in decision-making, and access to justice. It was developed by the Economic Commission for Europe of the United Nations.

The objective of the Kyiv Protocol is to establish a system of pollutant release and transfer registers to inform the public about the discharge of pollutants into the air, water, and land from industrial and other sources. The main aim of the protocol is to encourage the mitigation of these releases and transfers through the enhancement of transparency and public engagement in environmental decision-making.

o) Durban Climate Change Conclave, 2011

The battle on Kyoto Protocol at the Durban climate talks had begun on 28th November, 2011 boils down to ensuring the global community does not impose an unjust tax on

4. United Nations Framework Convention on Climate Change.

its energy and growth. At the two weeks long talks between 195 countries, the effective date of the Kyoto Protocol is for finite period. India's citizen will have to then pay unjust rate for coal, gas, oil, energy and renewable in the near future. Kyoto Protocol is last alternative to keep the hopes alive the only on equity and historical responsibility that reduces emissions. Developed world have been made responsible to ensure emission cuts under it beyond 2012, to turn it into new global deal is signed.

IV. INTERNATIONAL ORGANIZATIONS FOR THE PROTECTION OF THE ENVIRONMENT

International agencies have a vital role in safeguarding the environment and advancing sustainable development. These organizations facilitate the collaboration of governments and other stakeholders in order to synchronize endeavours, exchange information, and formulate unified policies and laws to tackle global environmental concerns.

a) United Nations Environmental Programme, 1972

The UN General Assembly founded the UNEP in 1972 as a worldwide environmental institution. The Programme is based in Nairobi, Kenya. The United Nations Environment Programme has been entrusted with the responsibility of advocating for environmental concerns within the United Nations framework. Its primary objective is to assume a leadership role and foster collaboration in the preservation of the environment. United Nations Environment Programme achieves this by inspiring, educating, and empowering nations and individuals to enhance their quality of life while safeguarding the well-being of future generations.

The United Nations Environment Programme is overseen by a Governing Council consisting of 36 members, who are delegates from UN member states. The Executive Director of UNEP, who acts as the primary administrative official of the organization, is appointed by the Secretary-General of the United Nations.

b) Intergovernmental Panel on Climate Change, 1988

"The Intergovernmental Panel on Climate Change (IPCC)" was created as an international body in 1988 by the World Meteorological body and the UNEP. The major aim of this organization is to furnish the global community with a scientific foundation for comprehending the hazards associated with climate change caused by human activities, and to equip. The IPCC consists of international experts who willingly contribute their time and expertise to evaluate the scientific literature on climate change. The IPCC does not engage in independent research, but instead assesses the findings of several scientists worldwide. The organization publishes regular assessment reports

that offer a thorough overview of the present understanding of climate change, including its origins and prospective effects on both the environment and human society.

The IPCC functions via three working groups:

The task of Working Group I is to evaluate the fundamental scientific principles underlying change in climate.

The mandate of Working Group II is to evaluate the impact of climate change on both natural and human systems.

The task of Working Group III is to evaluate the various strategies available for reducing the impact of climate change.

c) Global Environment Facility, 1991

The Global Environment Facility is an international financial institution founded in 1991 with the purpose of providing finance for initiatives and initiatives aimed at tackling worldwide environmental concerns, including the injury to biodiversity, climate change, and desertification. The Global Environment Facility is the foremost public financier of initiatives aimed at enhancing the global environment. It functions as an autonomous financial institution.

The Global Environment Facility (GEF) is overseen by a Council consisting of delegates from 32 member countries, with 14 from wealthy nations and 18 from developing nations. The Council is responsible for determining the allocation of "Global Environment Facility funds", which are sourced from a combination of donations from developed and developing nations. **d) Earth System Governance Project, 2009**

"The Earth System Governance Project (ESGP)," founded in 2009, seeks to advance the examination of regulating and governing the Earth system, encompassing the intricate and interrelated processes comprising our planet. The project is an international research network consisting of experts from several fields like law, political science, sociology, economics, and environmental science. Their primary objective is to enhance our comprehension of how government can effectively tackle the difficulties confronting the Earth system.

The initiative primarily concentrates on the governance of worldwide environmental concerns, encompassing climate change, biodiversity decline, and environmental deterioration. Additionally, it prioritizes the management of other worldwide predicaments such as poverty, energy security, and food security, which are intricately connected to environmental concerns.

The ESGP is essential for advancing the study of Earth system governance, which enhances our comprehension of how governance may effectively tackle the difficulties confronting the Earth system.

e) Global Green Growth Institute, 2010

The Global Green Growth Institute is an international organization founded in 2010 with the objective of advancing green growth and facilitating the shift towards a sustainable and low- carbon economy. The Green Growth Knowledge Platform is an inter-governmental organization established by a treaty, consisting of 37 member countries. Its headquarter is located in Seoul, South Korea. The governance of GGGI is entrusted to a Council of delegates from the member nations. The Council designates a Director-General to fulfil the role of the organization's principal executive officer.

f) United Nations Youth Climate Summit, 2019

The annual UN Youth Climate Summit is convened by the United Nations with the aim of convening young leaders from across the world to deliberate on the impacts of climate change and explore prospective remedies. The 2019 version took place on September 21st at the United Nations headquarters in New York City. The event showcased a sequence of panel discussions, workshops, and speeches centred on climate change, encompassing themes such as the involvement of young people in tackling the issue, the repercussions of climate change on susceptible communities, and the urgency of promptly mitigating greenhouse gas emissions.

The summit was attended by young leaders from diverse backgrounds, including environmentalists, legislators, and representatives of indigenous groups. Greta Thunberg, a Swedish climate activist, delivered the keynote speech, attracting global recognition for her endeavours to increase awareness of the pressing necessity to tackle climate change.

The summit's objective was to establish a forum for young leaders to exchange their ideas and tactics for tackling climate change and to motivate others to engage in proactive measures. Additionally, its purpose was to function as a summons for governments, businesses, and individuals to undertake resolute and immediate measures to diminish greenhouse gas emissions, safeguard susceptible communities, and establish a sustainable future for everyone.

g) United Nations Climate Action Summit, 2019

The UN Climate Action Summit, a major international summit, took place at the UN headquarters in New York City on September 23, 2019. The purpose of the summit was to convene government officials, industry leaders, and members of civil society

in order to expedite actions against climate change and accomplish the objectives outlined in the Paris Agreement. The event featured a series of panel discussions, speeches, and activities focused on important subjects related to climate change. These topics included the urgent need to transition to renewable energy, the significance of protecting biodiversity, and the function of urban areas in addressing climate change.

In addition to the aforementioned activities and initiatives, the summit marked the inception of the Race to Zero initiative. The primary aim of this initiative is to mobilize the participation and backing of corporations, municipalities, areas, and investors in order to accomplish a robust recuperation that is devoid of carbon emissions, mitigates forthcoming hazards, generates employment opportunities of superior quality, and advances holistic and sustainable development.

V. CONCLUSION

Currently, the globe is divided between rich and poor countries, the rich and developed nations are exploiting the material resources to the optimum use for maintaining their status and becoming richer which is nothing but waste of money and valuable material resources. The developing and under-developed countries are striving hard for development and unrestricted exploitation of natural resources by the developed countries is not acceptable to us i.e. developing countries. The developed world wants to forget the existing stock of CHG's in the atmosphere that it has accumulated; it alone is liable for 70%. The Kyoto Protocol is the only tool for UN convention that ensures the burden between countries is shared based on these historical facts. The rich countries prefer to forget history and instead tax the emerging economics for its future emissions it will spew in coming years. Once the principles of equity that all citizens have equal rights to global resources on the planets or in the atmosphere indisposed with alongside the Kyoto Protocol, there would be no fair formula to decide who bears the costs of fixing planets. A new global treaty would be fought over afresh with new rules, with chances of an even deal being near non-existent India, along with the other developing countries, shall have been requiring for reparation for the poor that have been impressed by inevitable climate charge, now left with, at best, the space to defend its right to growth, right to atmosphere that permits its economy to better.

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BOOK REVIEW

TEXT BOOK OF COMPARATIVE CONSTITUTIONAL LAW WRITTEN (2021) BY DR. DURGA DAS BASU, THIRD EDITION REPRINT EDITION LEXIS NEXIS, GURGAON.

The Constitution of every country is a prime legal document which deals with relationship of government and public. Constitution of a country define structure of government and their method of governance. Comparative study of constitution is process for find similarity and differences between constitution of various countries. It helps to making constitution more efficient by adopting various good things from the constitution of other countries. The fine example of it is interpretation of term 'procedure establish by law' into 'due process of law' in the Maneka Gandhi case. At the time of making the constitution we have already adopted various concepts and provisions related that from constitution of different countries.

The author has made a very good attempt to comparatively analyse various principles and doctrines of Constitutional law from different countries. Author deeply discussed scope of comparative study of constitutional law and compare interpretation, amendability of the constitution covering various principles including Natural Justice, Rule of Law as well as role of judiciary and judicial review. The book under review is divided into 18 chapters containing 459 pages.

Chapter 1 is headed by scope of the comparative study of constitutional law. In this chapter author explains need of comparative study for the prospective of protection of human rights, democracy, judicial review and importance of comparative study in making of constitution, concept of referendum, trends towards codification of British constitution. In the last of chapter author emphasizes the significance of comparative study in interpretation of the constitution.

Chapter 2 is headed by history of constitution making and it's development in India. This chapter deals with applicability of foreign precedents in the interpretation of the constitution of India specially in interpretation of fundamental rights of Art.14, Art.19. and Art. 21. Author explains in depth about form of government and it's adoptability in the constitution of India.

Chapter 3 is under the heading of natural justice deals with doctrine of natural justice and it's position in the constitution of U.K., U.S.A, India, Federal republic of Germany and Japan in brief.

Chapter 4 headed by departures from foreign precedents. In this chapter author discuss those precedents which should be admissible while interpreting the various principles and provisions of constitution. In Indian context author describe provisions related to implied power, Immunity of instrumentalities, Art. 355-356 and privileges

of parliament how these should be interpreted according to the interpretation of other countries.

Chapter 5 is under heading of bill of rights. In this chapter author explains importance of bill of rights as primary and key document on human rights. Further he explain how various rights of bill of right took place in U.S.A. constitution, Indian constitution and in other laws of India through judicial interpretation. In last of this chapter author briefly analyse doctrine of state action and it's extension till the judiciary in the context of India, Australia and other countries having written constitution.

Chapter 6 is under heading of Judicial decision violating due process. In this chapter author discuss violation to the principal of equal protection in judicial decision, applicability of Art 14 in division given by court and tribunal.

Chapter 7 is under heading of scope of the present work. In this chapter author explains deeply the scope of comparative study of constitution. For the same further author discuss the comparative study from legal point, comparative government and comparative constitutional law, legal philosophy involve in the constitution, legal sovereignty of constituent body, alteration of constitution of Australia and U.S.A, doctrine of basic structure in Indian constitution prospective, implied limitation on amending power of constitution of different countries along with India. At the end of chapter author discuss difficulties in the comparative study at world level.

Chapter 8 is under heading the basic concepts involved. In this chapter author explains basic concepts evolved in governance as state, sovereignty government and state action in U.S.A and India. Further he describe characteristics of written constitution, constitution and constitutional law under a written constitution.

Chapter 9 headed by incidents and justiciability of a written constitution. In this chapter author discuss all incidents of written constitution as legal instrument which make it justifiable and no other evidence admissible to prove it. Further author explains various aspects in the regard of constitution like it's changeability by formal amendment, higher law of the land, limitation upon the legislature and judicial review in brief. After that author explains in detail about justiciability of written constitution in different countries like Canada, Australia, Japan, West Germany along with India.

Chapter 10 is under heading of interpretation of the constitution deals with interpretation of constitution as legal instrument in India, Australia, Canada, Bermuda and Island, limits of liberal interpretation in India and U.S.A. After that author describe where there is spirit of the constitution is clear in the world no need to interpretation he also cite example of U.S.A, Canada, Australia, Eire and India. At the end of chapter author conclude with doctrine of basic feature and doctrine of separation of power on constituent body and legislature in different countries.

Chapter 11 headed with equality and rule of law. In this chapter author explains

equality and rule of law and it's various aspects in different countries. Further author explains importation of the American doctrine of prospective overruling not warranted why and how through comparative analysis of constitution of different countries.

Chapter 13 headed by extraneous evidence: admissibility of. In this chapter author explains general and special rules regarding admissibility of extraneous evidence in different countries like Canada, Australia, Nigeria along with India and U.K in respect of fundamental rights such as freedom of press, right to privacy, right to travel abroad, right of human dignity, equality of every person as a human being, immunity of a convict or under- trial prisoner from inhuman treatment etc in deep.

Chapter 14 is under heading of amendability of the constitution deals with amendability of the constitution of China, U.S.A, France, Japan, and Canada, analogy of amendment of pleading not applicable in respect of Switzerland, West Germany, U.S.A, Japan, France and Eire. At the end of this chapter author discuss the amendability of Indian constitution in the context of list of basic feature and fundamental rights.

Chapter 15 is headed by the constitution as higher law. In this chapter author explains how constitution is higher law in the context U.S.A, Eire, Japan, West Germany, India, elements of rule of law and distinguish between higher law and rule of law, federalism and rule of law in U.S.A and Australia. Further author explains the rule of law whether it is basic feature of Indian constitution in the context of West Germany and India.

Chapter 16 is under heading of the written constitution as a limitation. In this chapter author explains in very deep about why and how written constitution as a limitation on power and functions of different organs of the state, various kinds of limitations like procedural requirements regarding ordinary legislation, distribution system in three fold, supremacy of constitution, fundamental rights. Further he describes about implied limitation which arises from judicial interpretation like separation of power as limitation upon executive and legislature.

Chapter 17 is under heading of the principle against delegation of Constitutional powers as a limitation. In this chapter author explains how constitution work as limitation upon judiciary. Further he discusses constitution binding on all organs of state as well as judiciary analysing Constitutional power in U.S.A and India.

Chapter 18 is headed by judicial review, role of judiciary and doctrine of state action. In this chapter author describes judicial review a characteristic of a written constitution in context of India and U.S.A, the doctrine of higher law, court as a guardian of constitution, provisions conferring power of judicial review in Indian constitution, judicial review in commonwealth countries having written constitution, exceptions to judicial review, role of judiciary as guardian of a federal constitution, in specially under written constitution in general, special function of judiciary in a federation, balancing between federal and state powers.

It may be submitted that author of this book comparatively analyse all the doctrines and principles of constitutional law. He discusses scope of comparative study of constitutional law, history of constitution making and its development in India, from of government, doctrine of natural justice it's characteristics and implementation in the constitution, acceptability of foreign precedents and departures from it, bill of rights, judicial division violating due process, scope of the present work, basic concepts involved in the constitution, written constitution, incidents and justiciability of a written constitution and interpretation of the constitution, limits of liberal instrument, doctrine of basic features, separation of power. Author covers all doctrines and principles involved in the constitution. Author divided all the aspect of constitution in very sequential chapters with simple and effective language in constitution of India, along with constitution of various countries. Author also elaborates rule regarding interpretation of constitution, amendability of constitution, the constitution as higher law and the written constitution as a limitation on the organs of the state. This book does not include the complete constitution of India or other countries but this book author comparatively analyse necessary principles of constitution between India and other countries. It may undoubtedly be said that this book is very informative for advocates UG, PG student of law, research scholar and academician specially. This book is also beneficial for bar, bench and people in general.

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