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(A Peer Reviewed Journal)

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The Tamil Nadu Dr Ambedkar Law University

(A *State University)*

"Poompozhil, 5, Dr. D.G.S. Dinakaran Salai,
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From the Editor in Chief's Desk

I am extremely happy to present the volume of the Ambedkar Law University Journal (ALUJ), Volume XVI to XVII for the years 2021 and 2022. The significant change that has been introduced with this combined volume is that the articles submitted for publication in the Journal are peer reviewed, in order to meet the research and academic expectations. Accordingly, the articles except the invited ones from eminent academicians, all other submissions are peer reviewed by the experts and basing on the recommendations, the research papers are included in the volume and the same will be continued in future, in order to maintain the academic and research outlook of the Journal.

The invited articles and the peer reviewed research papers discusses on the contemporary perspectives of law and policy on varied issues of Constitution, Labour Laws and Intellectual Property Rights, Family Laws, Property Law and that of International Law.

We publish articles submitted by professors, judges and practitioners. All articles are selected, edited and published by the Review's Editorial Board. Additionally, almost every issue contains at least one comment or casenote selected by the Editorial Board.

I am grateful to all the dignitaries and the researchers who have contributed their papers in enriching the academic and research outlook of the University. It is a great challenge to bring a

new journal into the world, especially when the journal aims to publish high quality manuscripts. I thank the Editors and other Members of the Editorial Board for their constant support that they render in bringing up this quality research journal. I hope that the readers of the Journal will find that the contributions are extremely useful for further research.

I hope you enjoy this issue, and I welcome your feedback.

Col. Prof. (Dr). N. S. Santhosh Kumar

Editor in Chief

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Sustainable Renewable Energy Development to Combat Climate Change: An Analysis on Emerging Challenges and Capability in Transition from Conventional Energy Systems to Clean Energy

Dr. J. Mahalakshmi[1]

Abstract

Energy is the heart and soul for the modern economy. But the economic activities have risen the pressures on environmental resources and increasing population also strains the resources by increasing the utilization of resources. Further, consumption of coal, petrol, diesel, and other activities such as mining, agricultural practices, deforestation, etc., generate excess of green-house gases rising the temperature of the planet. As a consequence of increased emissions of green-house gases due to human activities, global warming has reached at the alarming level which has an impact on climate change. There have been lot of issues relating to every aspect or day to day life. Climate change has an impact on rainfall pattern, changes in food production, heat waves, cold issues, raise of sea level, threat to wildlife, etc. Sustainable development has become significant to address these issues in the contemporary world to restrict the generation of green-house effect. The role of sustainable development is to identify the alternative energy sources which are non-conventional and renewable energies to make the world livable in a healthy manner not only for the present generation but

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also for the future generation. The object of this paper is primarily to focus on relationship between energy sources and climatic changes secondly to analyse the challenges in stabilizing the green-house gas emissions by shifting to clean energy in India.

Keywords: Energy, economy, sustainable, climate change, environmental, resources,

Sustainable Development

Generally sustainable development is interpreted in terms of sustainability. The sustainable development is concerned with environment and society with the consideration in the development of relevant methods and policies to prevent the drastic exploitation of natural resources. Raymond stated that "the preservation of the productivity and the full functioning of the natural resource base are the criteria for potentially measuring sustainable development with an objective approach"[2].

According to Conroy and Litvionff, the main concern of sustainable development is in utilizing the resources of the earth for the material wellbeing or at least over several decades, living off natures' interest rather than depleting the capital[3]. The World Commission on Environment and Development (WCED), better known as the Brundtland Commission 1987, defines "sustainable development as society's ability to satisfy the requirements of the present generation without jeopardising future generations' ability to meet their own needs." Therefore, looking at the numerous

[2]Patil, S.G. (2013). *Gandhian Approach in Litigating the impacts of climatic change on Environment & Sustainable development in Sustainable development in India: issues and approaches*. 95 (Thakur, A. and Kumar, D. Ed.). Regal publications, New Delhi.
[3] Ibid.

definitions of sustainable and imperishable development, it could be inferred that sustainable development means effort to ensure environment and supply of natural resources adequately for the present and future generation.

In India, the concept of energy as 'Shakti' has been almost at the focus of philosophic, scientific and meta physical from the time immemorial. The term energy has been coined by Thomas Young, which means capacity to do work. Later Newton has applied it to be called as kinetic energy.

Energy has been considered as an important yardstick to measure the development of an economy. In the economy developing process the energy sector has become the largest emitter of green house gases resulting in climate change[4]. Industrial revolution has led the energy developed in carbon, coal and gas as life blood because it has led to the path of overall prosperity of the Country along with the human welfare. But it has resulted in serious problem that is release of gases from fossil fuels resulting in rising of global temperature on climate change.

Conservation of Energy

Energy Conservation means to ensure the steady supply of generation of energy producing resources by making thrift use of energy. Total demands of energy on the rise everyday due to the requirement of activities of present day by taking note of the growing population. Preventing fossil fuel (coal, petroleum, natural gas) are the sources of energy extensively used and is

[4] Sharma, D & Ors,. (2013). *Growing power demand in India: Environmental issues and remedial measures in Sustainable development in India: issues and approaches* 284 (Thakur, A. and Kumar, D. Ed.). Regal publications, New Delhi.

evident that if the exploitation and consumption of the resources continues at the incredible rate, then their supply may last for a few more decades[5].

Renewable Energy Resources

Renewable energy resources, are otherwise known as non-conventional energy resources of which include solar, wind, water, geothermal, ocean, hydrogen, biomar and solid waste. These are renewable resources because they are fastly renewed and recycled in nature and constitute as a sustainable energy.

Non-Renewable Energy

Conventional sources that is to say fossil fuels like oil, gas, coal are otherwise known as sources of non-renewable energy. Fossil fuels was heavily relied upon as a source of energy at the beginning of the industrial revolution. This resulted in liberation of carbon-di-oxide in to the atmosphere. However, certain naturally occurring substances like CO2, water vapour, methane present in the atmosphere in small quantities trap some of the sun's energy due to the absorption of radiation in the infra-red region. The activities of man have also added other greenhouse gases like nitrogen oxides (NO2) and Chloro Fluro Carbons (CFC)[6].

Fossil fuels are the major contributing factors to global climate change due to greenhouse gas emission. Climate change caused by human activities resulted in intensive extreme events

[5]Sinha, U.P. (2001). *Economics of social sector and environment*. Concept and publishing company, New Delhi.
[6] Sinha, P.C. (1998). *Global Warming 2*. Anmol Publications Pvt Ltd., New Delhi.

often leading to heavy loss and damage to nature and people[7]. Climate change has significantly resulted in food shortage and water scarcity causing hurdles for attaining goals of sustainable development. Increasing frequent changes in weather and climatic conditions, with extreme environmental events has affected millions of hundreds of people with acute shortage of food has also created scarcity of water in many places. The Countries such as South Africa, Central Asia, South America, Central America's small islands, The Artic, etc., are a few to mention with malnutrition in many communities such as indigenous people with food producers at small scale and low-income household. The brunts of these events are mostly children, pregnant women and elderly people[8].

It is very difficult to make choice between Hen and egg so as in the case of choice to balance between the development and environment. The rapid growth of urbanization and economic and technological development has an impact on land, water, energy, health, sanitation, and extinction of species.

Global Warming

Global warming and climate change conveys a state of an increase in temperature globally. "Greenhouse" gases are one of the most important global environment problems of which carbon dioxide is responsible for 50% of the increase in greenhouse effect as the result of burning fossil fuels. Methane takes the second place of the green houses in terms of the quantities released as a result of human activity. It is produced through the energy-related

[7]IPCC (2022). *Summary for Policymakers in: Climate Change*. Cambridge University Press in Press.
[8]Ibid.

activities during the extraction of fossil fuels and during their distribution[9].

Iron Rhine Arbitration in para 59 has observed: "The development may create major environmental harm; therefore, it is necessary to prevent or at least mitigate any potential harm."[10] The appropriate plan to be devised is not simply to curtail the energy consumption but also to curtail unnecessary of wastage consumption of energy. The rapid depletion of conventional energy sources prompted that State to identify and tap renewable energy sources as alternative. But there are challenges to their practicable applicability.

Climate Change and Innovations in Renewable Energy

The most important challenge faced by the humanity is the climate change and its implication on food, health, nature, etc. The scientific assessment has conveyed that the earth climate system has been drastically altered globally and regionally in comparison with the period before industrialization.[11]The Kyoto protocol has provided the mechanism of carbon credit wherein the countries have decided to take efforts for bringing down the level of carbon which is emitting toxic green-house gases at higher level which consists mostly of ozone (O_3), carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O) and even water vapour (H_2O) have decided voluntarily. This will help in analysing and quantifying

[9]Supra note 5 at pg. 20
[10] Birnie, P & Ors. (2009). *International law and the Environment* 119. Oxford University Press.
[11]Ranade, P. (2013) *Sustainable development with carbon credits in*, *Sustainable development in India: issues and approaches* 260 (Thakur, A. and Kumar, D. Ed.). Regal publications, New Delhi.

the levels of emission assessing the level of environmental depletion.

Usage of fuels has driven the economy in the path of human welfare with overall prosperity. The world has shrunk and the life on the earth flourished due to the development in the economic activities. For ex, we have shifted the means of transport from carts driven by horses and developed to space flight. There has been rise in income level, international trade, consumption and production. The greater utilization of resources and expansion of activities made us to pay the price that is climate change as well as fossil fuels are at the risk of being exhausted within next century[12].

Moreover, the Inter-Governmental Panel of Climate Change has given a warning that roughly between 3.30 billion people and 3.60 billion people are settled in places which are massively prone and exposed to perils of climate change[13]. The UN high level-dialogue on energy in 2021 showed its concern by highlighting how distant we are from realizing our commitment to ensure universal accessed energy[14].

Therefore, accelerating the energy transition is an urgent need as a renewable-energy based adaptation is the most reliable method to steer clear of the adverse effect of climate change. Sustainable transformation of energy sector is a need of the hour with right mix of technologies and other conventional sources for enhancing the energy efficiency along with reasonable management.

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[12]Zillman, D. & Ors. (2018). *Innovation in energy law and technology dynamic solutions for energy transitions* 6. UK Oxford University Press.

[13] International renewable energy agency. Executive summary of IRENA (2022), *World Energy Transitions Outlook, 1.5 C Pathway* 6. Abu Dhabi.

[14]Ibid at pg.4

Air pollution has contributed undesirable consequences creating an impact on the quality of regional as well as global ecological system[15]. Air pollution results from the process of burning of fossil fuels for home or commercial or community heating units and energy generation in industrial sectors. In the process of deriving fuels from fertilized plant materials, carbon or its compounds such as coal, coke, oil and natural gases are emissioned. Further the combustion of fuel give rise to carbon di oxide on complete combustion and carbon monoxide in case of incomplete combustion. Depending upon the nature of fuel and efficiency of combustion units' smoke particles, hydrocarbons, Sulphur dioxide and oxides of nitrogen also be released. These emissions remain suspended in air and settle down or washed away by rain. Where there is a large concentration of these chemicals such as Sulphur dioxide and nitrogen oxides becomes harmful pollutants when these pollutants washed from the ground due to rain it adds acids in the rain and called as acid deposition. Apart from these pollutants, various studies show that global warming is a result of emission of carbon dioxide and other green-house gases causing more heat to be confined in the atmosphere. The climatologist of the 'Inter-Governmental Panel on Climate Change' has issued warning that global warming is accelerating faster day by day which is changing the patterns of climate.

India and Climate Change

Owing to the increasing demand for energy and the increasing concerns for economic and environmental consequences, our country has taken steps to solve the problem of

[15] Thakur, K. *Environmental protection law and policy* 49.

power crisis with effective and absolute energy governance. The objectives of energy policies in India, access to energy, energy security and mitigation of climate change cannot stand with one another in the process of implementation. (P. 59 or 72) Access to electricity to all is one of the objectives but supplying the considerable amount of energy in an affordable cost (low-cost energy fuels is coal) will defeat the effort to tackle the issues relating to climate change. Further to enhance security utilization of domestic resources as well as renewable energy technologies could of help only in the long term. Therefore, one cannot expect to solve energy problem in India in the short span of time.

Renewable Energy

India is considered to be one of the world leaders in renewable energy capacity. During the last 7.5 years, India has exhibited a growth of 2.9 times in renewable energy capacity and 18 times in solar energy. According to Economic Survey 2021-2022, at present renewable energy constitute: "Over 24.71 per cent of the country's installed power capacity and roughly 10.7 per cent of electrical energy output for 2020-21". Therefore, total renewable energy installed capacity in India has reached over 103.05 GW. Hydro's proportion in electrical energy generation is anticipated to be around 26.96 percent.[16]

Solar

Solar energy is the highest generated renewable energy resource in India which accounts for 23.8% of the total power

[16] Ministry of Finance. (2021-2022). *Economic survey* https://www.indiabudget.gov.in/economicsurvey/ebook_es2022/index.html#p=334

generation in India[17]. In 2010, 'The *'Jawaharlal Nehru National Solar Mission'* has been launched by India's Ministry of New and Renewable Energy. It is one amongst the eight core national missions of the National Climate Change Action Plan. The aim of this mission is to enhance the capacity and technological innovation to bring down costs towards grid parity[18]. Through use of Renewable Purchase Obligation (RPO), it aims to add grid connected solar power generation of over twenty thousand mega watt by the year 2022, by utilities backed with a preferential tariff. "Pradhan Mantri Kisan Urja Suraksha evam Utthaan Mahabhiyan Yojna (PM-KUSUM)" is a schematic plan that aims to integrate solar and other renewable capacity of 25,000 750 megawatts by December 2022. They have offered a comprehensive financial assistance of Rs. 34,422 crores for this purpose, including service charges that might be payable to the government agencies that implement them[19].

Biofuel

It is hydrocarbon fuel derived from the organic matter in a very short period . The advantages of biofuel is that it is renewable and it can be produced from easily accessible organic matters such crop wastes, manures and other organic wastes. Biofuels helps in managing municipal solid wastes as it can be converted into fuel. The evolution of biofuel in India can be traced from 1975 where India began experimenting by blending ethanol with petrol. In 2018 National Policy on Biofuels was introduced by Government

[17] Ministry of Power. (2022, September 26). *Power Sector at a Glance ALL INDIA* https://powermin.gov.in/en/content/power-sector-glance-all-india

[18] Grid parity refers to the moment at which the cost of using alternative energies like as solar is less than or equal to the cost of using conventional energy sources such as coal, oil, and natural gas.

[19] Ministry of New and Renewable Energy. (2022). https://mnre.gov.in/

of India. By 2030, a target of around 20% ethanol in gasoline as well as 5% biofuel in diesel were to be established.

Hydro Energy

Hydro energy is an electricity produced from generators which is run by turbines. It converts the potential energy of falling water into mechanical energy. India is rated 5th in the world in terms of installed hydroelectric generating capacity. Hydroelectric power generation accounts for 11.6% of total power generation in India[20]. Till this day our country has 197 hydro power plants. Small hydro plants usually fall under the purview of the "Ministry of New and Renewable Energy (MNRE)" and therefore have a capacity of 25 megawatts or less. Mini hydel projects have an approximate capability of 21135.37 MW from 7135 locations for electricity generation in the nation.[21]

Wind Energy

Wind energy is a well-known renewable energy source in India. Wind energy accounts for 10.1% of India's overall renewable energy contribution. It is basically of two forms: onshore wind farms and offshore wind forms. India currently has 13.4 GW of prospective projects in wind energy. But India has a potential of 60 GW of wind. The 2018 National Solar-Wind Policy lays the groundwork for the promotion of massive grid-connected wind-solar PV hybrid systems. This is for the effective use of wind and solar resources, as well as the transmission of infrastructure.

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[20] Supra note 16 at pg. 7

[2121] The Alternate Hydro Energy Centre (AHEC) of IIT Roorkee (2016) in its *"Small hydro database"*, https://www.iitr.ac.in/Placements/pages/

Technology Innovation, Capabilities, Challenges and the Role of Law

The energy conservation plan involves two approaches, one is relating to the technologies for more energy efficiencies that have to be improved and other one is energy conservation[22]. With regard to the technologies for the energy efficiencies, we should think practically to see that whether more power could be generated for every unit of coal/oil burned with the thermal power plant (as more energy efficient). Further, we would ask questions as follows:

- Could this vehicle cover more distance for every unit of fuel consumed?
- How to make good use of the least quantity of coal with the technical efficiency?

Therefore, research study is need to be conducted for identifying the ways in which efficiencies can be improved.

A healthy growing economy requires a growing supply of energy. Not enough people in energy supply industries in Government/private agencies aware of the full range of possibilities in energy conservation and luxurious energy technologies problems and issues related to petroleum and life-time of the reserves, the Governments had to focus their attention on carbon-di-oxide emission due to the using of oil and natural gas and to make a start with taking measures and formulating policies that should help or which were thought to be necessary to reduce green-house gas emission for the fulfilment of the commitments accepted due to Kyoto protocol.

[22]Husain, D.A. (2007). *Environment and new legal dimensions* 23.

Before technically improved kerosene burning lamps was introduced, light on the streets and in houses and offices was provided by the gas lamps in which inflammable gas which is known as town gas was burned. The town gas was manufactured from coals containing a high percentage of volatile matter. Kerosene burning lamps succeeded in becoming the most important source of light till this lamp was gradually displaced due to the arrival of the electric lamp[23].

Industrialization and population growth has polluted the atmosphere creating an impact on climate. Industries rely on traditional energy sources such as fossil fuels like oil and coal and petroleum. Coal is considered to be the largest contributor of green-house gases, a prime factor responsible for global warming. It is one of the most important factors for global warming. When the fossil fuels are burnt, they produce waste products such as carbon dioxide, oxides of Sulphur, methane and carbon ----. Fossil fuels are to be exhausted in the next century which cannot be reconstituted as a resource because they are in the form of heat and mechanical energy and thermal compounds. There is an immediate necessity to find a suitable alternative renewable energy technology to improve the efficiency and cost of energy systems as well as non-renewable fossil fuel sources to meet the foreseeable global demands for present and future generation beyond the next100 years.

Energy Access

[23] Taverne, B.G. *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* 47. (2nd Edn). Kluwer Law International.

In India providing energy access to the entire population is one of the major goals that is reflected in electrification scheme for villages. Unlike developed, countries the situation in India for energy demands still remains unmet.

Energy Security

In India, energy security is comprehensively defined. “We are energy secure and stable when we can deliver lifeline energy to all of our citizens, regardless of their ability to pay for it, as well as their impactful requirement for safe and convenient energy to meet their varied needs at competitive rates, at all times, and with a prescribed level of confidence, taking into account surges and breakdowns that can be reasonably expected.” The energy security in india can be provided in three fold format as,

- India recognized that energy is the means of survival for all citizens.
- India ascertains about national financial burden due to increase in global energy prices.
- India is concerned about abrupt supply disruption. (p. 17)

Need Policy for Governance of Energy In India

The Government of India pursues three major energy strategies. The objectives of the policies are:

i. Access and adequate supply of reliable energy.
ii. Energy security that is decreasing dependence of imported fuels to meet energy demand in India.

iii. Mitigation of climate change that is sustainable transformation of energy sector[24].

Policies Relating to Energy

Power Sector

a) The Mega Power Policy of 1995- The policy aims to speed up investment in generating power and by giving additional incentives to power plants with capacity above 1000Mega Watt .

b) The Electricity Act of 2003- This Act established a policy by merging "production, transmission, distribution, trading, and electricity consumption based on market-based methods," this Act established a policy. Furthermore, the National Electricity Policy, 2005 was tasked to carry out the objectives of the Electricity Act 2003, and the National Tariff Policy, 2006 was mandated to increase the sector's economic viability in order to attract investments.

c) Ultra Mega Power Projects, 2005- In the year 2005, Coal based power plant projects has been launched for acceleration of expansion of power capacity, by using supercritical technology.

d) Rural Electrification Policy, 2006- to provide all families with access to and dependable electricity supply at decent prices by the year of 2009. This period was later extended to 2012.

[24]Joo, S.A. & Dagmar, G. (2012). *Understanding energy challenges in India-policies, players and issues, International energy's agency* 12. Deep and Deep publications Pvt. Ltd., New Delhi.

Implementation of Power Policy

Power lies within the Concurrent list of the Indian Constitution, which grants power to both the state and federal governments to govern.

a) Ministry of Power (MOP)- This Ministry is an authority to plan, formulate, implement, and monitor power sector policy.

b) State Governments- The role played by state government in power sector is noteworthy. The increasing financial collapse of State Electricity Boards, as well as the demonstration of the constraints of the SEB-oriented plan for power sector growth, resulted in the SEBs' demise in 2003.[25]

c) Regulatory Commissions- The Electricity Regulatory Act of 1998 established the Central Electricity Regulatory Commission (CERC). It is an autonomous body established by the statute .The CERC regulates tariffs of central government power generating companies and Independent Power Producers (IPPs) which supply more than one state. These commissions advise the Central Government by formulating tariff policy and also regulate inter-state transmission tariffs.

d) Independent Power Producers (IPP)- The Act of 2003 allows Independent Power Producers to enter into long-term contracts with distribution firms to sell power to customers via open access to the grid. IPPs owned around 27 GW, or 15% of total capacity, in 2012, excluding renewables.[26]

[25]International Energy Agency (2012). *Understanding Energy Challenges in India: Policies, Players and Issues*, 32.
[26]Ibid at pg. 33

e) Captive Power Plants (CPPs)- This grants a right to open access to transmission lines for the purpose of transporting self-generated power to destinations for personal use or to see the additional electricity in the grid at a price approved by CPP under the electricity act.

f) "State transmission utility (STU) and distribution companies (DISCOMs)"- STUs are mainly operated by state and are responsible for intra-state transmission. STUs are not permitted to participate particularly for power trading under the Electricity Act of 2003.

Policies relating to Coal

In India when Coal Mines (Nationalisation) Act 1973 came into force it nationalised all the private coal mining companies. This Act aims "to ensure the logical, coordinated, scientific and professional development and utilization of coal resources in accordance with the country's expanding needs". The National Mineral Policy 1993 aimed to boost investment in India's mineral sector. International Energy Agency states: "In 2011, India was the third biggest coal producer and user behind United states and China, and it is predicted to overtake the United States as the second biggest consumer by 2025".[27]

a) Colliery Control Order 2000- "The Colliery Control Order 2000 enabled the "Ministry of Coal and Mines" to control the price as well as distribution of coal and subsidies to companies.

b) New Coal Distribution Policy 2007- It is introduced for facilitating the matter of supplying of certain quantities of coal

[27]Ibid at pg. 46

consumers. They operate in both core and non-core areas at pre-determined prices.

c) Coal Mines (Amendment) Bill 2000- It was yet another attempt to allow non-captive coal mining by Indian businesses on level with the CIL for the purpose of increasing domestic coal production. But it had been withdrawn in 2014.

Implementation of policies relating to coal

a) Ministry of Coal- Establishes policies and plans for the exploration and development of coal and lignite deposits. The ministry licences coal projects and makes decisions on coal-related problems such production, supply, pricing, and distribution.

b) Captive Producers- Public and private businesses that requires large quantity of coal on a regular basis have been permitted to run coal mines in India since 1976.

c) State Governments- The Central Government exercise its control over the majority of control over coal sector in India.The State Governments also has significant influence on coal mining. These include the right to give permits, contracts, licenses and leases for mining purposes in the individual states, which are required for final approval from the MOC.

d) MOP and NTPC - As India's leading coal consumer, Ministry of Power (MOP) and National Thermal Power Corporation Limited (NTPC) though conflicting at times, have a co-ordinated relationship with Ministry of Coal (MOC) and State-run Coal India Limited (CIL).

e) Ministry of Environment, Forest and Climate Change (MoEF&CC) – Before any implementation of coal projects,

environmental and forestry clearances has to be obtained from MoEF&CC, which is a prominent statutory permission.

f) Indian Railways- Indian Railways, a PSU within the Ministry of Railways, relies heavily on coal as its primary source of freight.

Policies relating to Oil and Gas

a) New Exploration Licensing Policy- NELP, the backbone of India's upstream policy, aiming at accelerating the discovery and exploitation of hydrocarbon reserves in India in order to meet expanding domestic need.

Implementation of Policies relating to Oil & Gas

a) Ministry of Petroleum and Natural Gas (MoPNG)- This Ministry exercises its supervision over the oil and gas sector. It also supervises the matters relating to refining, distribution to marketing and pricing, etc.

b) Petroleum and Natural Gas Regulatory Board- This Board was established in the year 2006 for the purpose of regulating the process relating to refining, processing, storage, transportation, distribution, marketing, etc.

c) State Governments- States impose taxes on sales and earn royalties and dividends from petroleum products.[28]

Policies relating to Renewable Sector and its implementation

a) Ministry of New and Renewable Energy- The MNRE creates nation-wide policies to encourage the development and utilisation of new and sustainable energy sources. In addition, the ministry

[28]Ibid at pg. 60

undertakes programmes in rural regions to use renewable power for electricity, cooking, and motive power for motors and vehicles.

b) Indian Renewable Energy Development Agency (IREDA)- This agency was first created in the year 1987. It provides financial assistance to projects on renewable energy and energy conservation.

c) Regulatory commissions (CERC and SERCs)- The generic tariff with regard to renewable-based electricity, which is produced from the sources such as small hydropower, biomass, biofuels, wind, thermal, as well as non-fossil fuel based co-generation is set up by CERC. With regard to state renewable tariffs the concern SERC has the right to decide in consideration of of the CERC guideline at the State level.

d) NTPC Vidyut Vyapar Nigam- This is a central agency that is a completely held subsidiary of NTPC and was established for the purpose of selling and purchasing of solar power connected to the grid.

e) State Governments- The State governments has the power to approve the projects relating to renewable energy within the respective states because the role of renewable energy varies within one state to another state. This will include acquisition of land and allocation of water for solar thermal projects.

f) Private Companies- India's - journey to world class level is accelerated by core competencies of private renewable companies, by considering the advancement in technology, capacity to manufacture and operational experience.

Initiatives and Challenges to Promote Renewable Energy in India

India being a country with vast renewable resources, for promoting renewable energy has taken various initiatives like National Solar Mission, The Wind Energy Revolution, National Bio-fuel policy and SATAT, International Solar Alliance, Small Hydro Power, National Hydro Energy Mission, Production Linked Incentive Scheme. Although, there are several obstacles that are lying ahead for India in shifting to renewable sources like Poor Monetary State of Discoms, Fluctuation in its age, Feeble Transmission Matrix, Beginning Innovation, Influence on climate, Lack of talented workforce, Establishment Cost Issue.

Policies relating to Nuclear Sector

a) Atomic Energy Act, 1962- the central government is given power to make policies on all activities of nuclear-related which includes controlling of nuclear resources, fixing tariffs for generation of electricity from nuclear plants and disposal of its waste, etc.

b) The Civil Liability for Nuclear Damage Act of 2010- The purpose of the Act is to impose civil liability in the event of nuclear and associated damage and to provide sufficient compensation to victims of nuclear accidents using the no-fault liability principle.

Key Challenges

a) Technological Challenges
b) Anti- Nuclear Public Sentiment

c) Even with plans, commitments, targets and vision in achieving nuclear energy, The percentage of nuclear energy in India's energy mix remains minimal;
d) d) In order to increase plant load, our country must improve fuel supplies to current facilities;
e) India also requires timely and well-developed communication systems to aid nuclear energy reliance by public and
f) India’s thorium-based strategy should be accelerated as a long-term goal to be achieved in energy security on the paths of sustainable Development.

Conclusion

The large-scale depletion of non-renewable energy sources, environmental deterioration, Climate change has necessitated the development of a strong legislative framework in India to promote clean renewable energy. In order to achieve net zero emission target and to meet the required energy supply through sustainable development, it is inevitable to have a legal framework which is stable and uniform. Alongside it is necessary to take reformative actions in renewable energy production as following. Small scale hydroelectric schemes can be encouraged over large scale hydro power schemes so as to avoid damming rivers and flooding agricultural lands. Incentivization in retail price of renewable energy devices and tax advantages shall be provided to manufacturers to encourage competition. In addition to that energy laws in India should be amended to encourage private players in renewable energy production. At the International level the development of renewable power generation can be achieved only by providing and sharing

innovative technology for developing and under developed countries. The United Nations Framework Convention on Climate Change (UNFCCC) must develop a new protocol to support sustainable energy. India has a huge potential to become a leader in renewable power generation, if only optimum use of renewable energy resource is achieved through proper legislative framework and policies.

Further, the role of law in safeguarding energy resources differ amongst the various sources of energy because the mode of turning energy resources in to productive and profitable differs for each sources. Therefore, the application of law to regulate in the allocation of rights and duties with regard to exploitation of all energy resources between the interested parties must be separately considered. Energy conservation is equivalent to the use of primary energy resources when there is a capability in fulfilling the demands of the society Therefore , the reference to energy resources should extend to secondary and substitute source of energy because due to the use of energy conservation techniques the demand for secondary source of energy can be reduced thereby correspondingly reducing the consumption of primary energy

Ban on Single Use Plastics- A Critical analysis

A.Tamilselvan. & Dr. S. Durga Lakshmi [1]

Introduction:

The word plastic[2] was derived from the Latin word "plasticus" which means it is capable of being moulded into any form. Plastics emerged as a suitable alternative for the natural material. Plastics were considered as a saviour for protecting natural substances like ivory, wood, paper and so on, until it posed a great threat to the environment. Plastics waste forms around 80% of the marine litter[3] and they also enter the landfills. They pose a great threat to the wildlife and humans by entering the food chain. Several incidents of consumptions of plastics by the wildlife eventually leading to its death have been reported. The year 2018 marked the death of a huge Sperm Whale at Wakatobi National Park[4] in Indonesia with around plastics weighing about six kilos was found in its stomach. Almost half of the death of camels in the United Arab Emirates is caused by the plastics. The land filed plastic material reduces the absorption of nutrient by the plant

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[2] https://www.todayifoundout.com/index.php/2010/09/where-the-word-plastic-came-from/, Sep 22, 2010, Daven Hiskey.

[3] Sapto Hermawan and Wida Astuti, "Analysing several ASEAN countries' policy for combating marine plastic litter", sagepub.com/journals-permissions DOI: 10.1177/1461452921991731 journals.sagepub.com/home/elj

[4] https://www.plasticsoupfoundation.org/en/plastic-problem/plastic-affect-animals/animals-eat-plastic/, animals eat plastics

thereby hindering its growth[5]. The plastic waste circulated in the open air ends up in blocking the drainage causing serious threat to the waste management system. In these circumstances ban single use plastics has been considered as a welcoming change by experts. The author in this article analyses the ban on single use plastics.

Historical development of plastics:

The first synthetic plastic was invented by John Wesley Hyatt in the year 1869 by treating cellulose derived from cotton fibre with camphor as a replacement for ivory[6]. This breakthrough invention was considered as liberator for the elephants, who were unnecessarily slaughtered for their ivories. Followed by this in the year 1907 "Bakelite" fully synthetic form of plastic was invented by "Leo Baekeland" as a solution for rapidly electrifying states. Consequently the usage of plastics in one field or the other marked its growth. Post World War II the production of plastics increased by about 300% in its volume[7], owing to its lightweight, durability, longevity, resistance to bacteria[8] and its ability to transform into different shapes. According to UN environment the plastic produced from 1950 accounts for about 8.3 billion tones[9]. Though the production of plastics started facing downfall by 1960, when plastic debris was noticed in the ocean[10]. The growing environmental awareness has highlighted the deleterious effects of plastic waste on the environment. Human health is inextricably

[5] Qunfang Zhu, An Appraisal and Analysis of the Law of "Plastic-Bag Ban"
[6] Science Matters: The Case of Plastics, https://www.sciencehistory.org/the-history-and-future-of-plastics
[7] i.b.i.d
[8] A.Thaslima Ma, The environmental impact of plastic from waste to wealth
[9] Liam Pritchett, 11 most impressive plastic ban around the world
[10] i.b.i.d

related to that of environmental health, so several countries have enacted legislations for the proper management and disposal of the plastic waste. Several countries have banned the usage of single use plastics.

Single use Plastics Prohibition Regulation, 2022 – Canada:

The Government of Canada vide the powers provided in the Sec 93(1) of *Canadian Environmental Protection Act, 1999* enacted the Single use Plastics Prohibition Regulation, 2022 to regulate the manufacture, import, sale and export of 6 categories of Single use Plastics[11] such as single-use plastic checkout bag, single-use plastic cutlery, single-use plastic flexible straw, single-use plastic foodservice ware, single-use plastic ring carrier, single-use plastic stir stick, single-use plastic straw. The regulation was ratified mainly with the aim to reduce plastic pollution and move towards a more sustainable circular economy[12].

However the regulation lays down certain exemption in the supply of single use plastic straw to hospitals[13], medical facility, disabled persons and for business to business sales. Moreover the Government of Canada has not banned the single use plastic in transit, i.e from a place outside Canada to another place outside

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[11] Single-use Plastics Prohibition Regulations – Guidance for selecting alternatives,https://www.canada.ca/en/environment-climate-change/services/managing-reducing-waste/reduce-plastic-waste/single-use-plastic-guidance.html

[12] Definition of circular economy: The circular economy is a model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, **the** life cycle of products is extended." https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits"

[13] As per sec 2(6) Single-use Plastics Prohibition Regulations: SOR/2022-13, Canada Gazette, Part II, Volume 156, Number 13

Canada[14]. The Canadian Government in order to protect the domestic manufactured has not levied any curb on the production for exports[15]. The import of the six categories of Single use Plastic for the purpose of exports has not been banned.

Bangladesh – Plastic ban:

Bangladesh became the first country in the world to ban Plastic bags of lesser than 20 microns thickness by the year 2002. The ban in lighter plastic ban was due to the clogging of drains during a devastating flood[16]. Though the ban in thinner plastic gained significance, it did not last owing to its poor implementation and improper management of plastic waste deposited for recycling. The plastic waste generated increased from 5.56kg per person in 2005 to 14.9 per person in 2014[17].

Rwanda's Zero Plastic waste models:

The Rwanda Government has enacted legislations to manage plastic waste specifically and policies to deliver and enforce the practices across the country. The national moto for sustainable environmental management is: "whatever cannot be recycled or reused must not be produced"[18]. As an initiative to

[14] As per sec 2(1) Single-use Plastics Prohibition Regulations: SOR/2022-13, Canada Gazette, Part II, Volume 156, Number 13

[15] As per sec 2(2) Single-use Plastics Prohibition Regulations: SOR/2022-13, Canada Gazette, Part II, Volume 156, Number 13

[16] Jane Onyanga-Omara, Plastic bag backlash gains momentum, https://www.bbc.com/news/uk-24090603

[17] Nilofur Banu, Single-use Plastic Ban and its Public Health Impacts: A Narrative Review, https://aos.sbvjournals.com/doi/pdf/10.5005/jp-journals-10085-8102

[18] Janvier Hakuzimana, Break Free From Plastics: Environmental Perspectives and Lessons from RwandaJournal of Pollution Effects & Control 9(3):1-12, https://www.researchgate.net/publication/351224885_Break_Free_From_Plastics_Environmental_Perspectives_and_Lessons_from_Rwanda

phase out plastics the Rwanda government initially banned the manufacture, use, importation and sale of polythene bags[19]. The 2008 law created national sensation and raised awareness to implement the ban on plastic bags. This ban was enacted using various channels, such as community work, media campaigns on television, radio, and print. Furthermore, training, school environmental clubs, environmental committees, and the involvement of different stakeholders in the private sector, revenue authorities, local government, standards bureau, and security sector were implemented[20]. The 2008 law extended the focus to residents as well as businesses. Overall, the plastic bag ban has significantly reduced the use of plastic bags across Rwanda. The import of polyethylene sacks, bags, and cones begun to drop sharply in 2004 when Rwanda introduced its public education campaign to prepare banning polyethylene bags, from 1,092 tonnes in 2003 to just 18 tonnes in 2006.

The implementation of plastic ban by the government has resulted in the higher rate of recycling ranging from 70 -80%. The municipalities took stringent effort to enforce the law by levying fines which may go up to 300,000 francs according to the Director of REMA[21]. Apart from that approximately 70 to 80 business owners have been imprisoned for violating the ban though only fine has to be levied[22] Further the ban on plastics have significant

[19] Law No. 57/2008 of 10/09/2008 Relating to the Prohibition of Manufacturing, Importation, Use and Sale of Polythene Bags in Rwanda

[20] Rwanda: A global leader in Plastic Pollution Reduction, https://zerowasteworld.org/wp-content/uploads/Rwanda_A-global-leader-in-plastic-pollution-reduction_April-2021-1.pdf

[21] Rwanda Environment Management Authority

[22] Emmanuel Dsilva, Going Surgical on plastics in Rwanda, https://www.downtoearth.org.in/news/waste/going-surgical-on-plastics-in-rwanda-68446

outcome in reducing the pollution within water treatment systems and reduced litter clean up costs. The reduced plastic pollution has lowered the content of microplastics in the soil which in turn has improved Rwanda's cattle and human being health. This reduction in plastic pollution is believed to be contributing to a reduction of microplastics in soils with a potential improvement upon the health of Rwanda's cattle and human beings. The Rwanda Government has adopted several policies like "Polluter pays principle", To promote better management of wastes[23] the Government of Rwanda has adopted policies like Polluter Pays Principle and offered incentives and disincentives. In order to further restrict the use of plastics, the 2019 law repeals and expands the law No 57/2008 beyond polythene bags. The 2019 law further prohibits the manufacture, use, importation, and sale of plastic carry bags and single-use plastic items[24]. The new single-use plastic ban states that businesses dealing in the production of single-use plastic materials like plastic cups, forks and straws have three months to start the process of shifting to manufacturing other product materials to replace plastic[25].

The Rwandan government simultaneously concentrated on the growth of plastic alternates by supporting the local factories involved in production of packing material from bamboo and paper. Though paper is considered as safe biodegradable alternative it is considered as significant contributor of deforestation. In order to curtail deforestation the Government of

[23] Organic Law No. 04/2005
[24] No. 17/2019 Relating to the Prohibition of Manufacturing, Importation, Use and Sale of Plastic Carry Bags and Single-Use Plastic Items
[25] Republic of Rwanda. (2019). Law No.17/2019 Of 10/08/2019 relating to the prohibition of manufacturing, importation, use and sale of plastic carry bags and single-use plastic items.

Rwanda initiated the 10 years tree planting initiative to monitor the growth of tree and its impact on ecosystem[26]. According to a statement by Vincent Biruta, the former Minister of Environment the economy of the country has gradually improved by banning plastics. He further states that plastics have to imported into the country whereas products made of bamboo is a part of small scale industry, thereby generating employment to the people[27]. To protect the environment the Government of Rwanda mandates the community work on its entire people every month on the last Saturday to clean their neighbourhood[28]. The efforts taken by the Government is significant in contributing to the cleanliness of the city. Kigali, the capital city of Rwanda is considered to be one of the tidiest urban area in the African continent[29].

Ban on Single use Plastics in India:

With high rate of plastic littering India tops the nation worldwide in terms of plastic waste generated. The plastic waste generated in India in the year 2020 alone accounts to 4.1 million metric tones[30]. Due to poor recycling or improper plastic waste management around 13 million metric tones of plastic waste was found littering in India. In addition to it Indian factories manufacture around 2,43,000 metric tones of plastics each year. In

[26] Sabiiti, D. (2020, July). Rwanda Sets Ambitious Reforestation Targets. KT Press. https:// www.ktpress.rw/2020/07/rwanda-setsambitious-reforestation-targets/

[27] Sabiiti, D. (2019, October). Rwanda Finds Alternative: What Plastics Do, Paper And Bamboo Will Do. KT Press. https://www.ktpress.rw/ 2019/10/rwanda-finds-alternative-what-plasticsdo-paper-and-bamboo-will-do/

[28] Emmanuel Dsilva, Going Surgical on plastics in Rwanda, https://www.downtoearth.org.in/news/waste/going-surgical-on-plastics-in-rwanda-68446

[29] Bafana, B. (2016, April). Kigali sparkles on the hills. Africa Renewal. https://www.un.org/ africarenewal/magazine/april-2016/kigalisparkles-hills

[30] India begins to ban single-use plastics including cups and straws, https://www.npr.org/2022/07/01/1109476072/india-plastics-ban-begins

order to curb the greenhouse gas emissions from plastics the Government of India has regulated the production and disposal of plastic waste since 2016 by enacting rules and regulations. As per the Plastic Waste Management rules, 2016 the minimum thickness of manufacture of plastic sheets was increased from 40 to 50 microns. The rules further provided directions to the local body to ensure proper disposal of plastic waste by collection, proper segregation, collection, storage, processing and disposal[31]. The Plastic Waste Management, rules 2016 necessitated the producers, importers and brand owners to prepare modalities for the collection of plastic waste generated by the sale of their products[32] as a part of Extended Producers Responsibility[33]. The phasing out of Multilayered Plastics[34] which was introduced by the year 2016 within a period of two years[35] was restricted only to Multilayered Plastic products which are non-recyclable, non-energy recoverable or have no alternative use in the 2018 amendment[36]. The PWM[37]rules 2016 provides for explicit pricing of carry bags on the shop keeper for the management of plastic waste at the rate of

[31] Sec 6, Plastic waste management rules, 2016
[32] Sec 9, Plastic waste management rules, 2016
[33] "Extended Producer Responsibility (EPR) is a policy approach under which producers are given a significant responsibility – financial and/or physical – for the treatment or disposal of post-consumer products". Extended producerresponsibility,https://www.oecd.org/env/toolsevaluation/extendedproducerresponsibility.htm#:~:text=Extended%20Producer%20Responsibility%20(EPR)%20is,disposal%20of%20post%2Dconsumer%20products.
[34]Sec 3(n) defines multilayered packaging as any "means any material used or to be used for packaging and having at least one layer of plastic as the main ingredients in combination with one or more layers of materials such aspaper, paper board, polymeric materials, metalised layers or aluminium foil, either in the form of a laminate or co-extruded structure".
[35] Sec 9(3), Plastic waste management rules, 2016
[36]Sec 9(3), Plastic waste management rules, 2018
[37] Plastic Waste Management

rupees forty eight thousand i.e four thousand rupees per month[38] which was subsequently omitted by the PWM rules 2018.

Following the Plastic Waste Management amendment rules 2018, the amendment rules 2021 was introduced with the aim to ban the use of Single Use Plastics having low utility and high littering potentials by July 2022. As per the Plastic Waste Management rules 2021, the minimum thickness of plastic carry bags to be increased from 50 to 75 microns by September 2021 and up to 120 microns by December 2022[39]. Adopting the 4th United Nations Environment Assembly held in 2019, India took a resolution to ban Single Use Plastics which led to the enactment of Plastic Waste Management, rules 2022. The list of banned items includes -ear buds with plastic sticks, plastic sticks for balloons, plastic flags, candy sticks, ice- cream sticks, polystyrene (Thermocol) for decoration, plastic plates, cups, glasses, cutlery such as forks, spoons, knives, straw, trays, wrapping or packing films around sweet boxes, invitation cards, cigarette packets, plastic or PVC banners less than 100 micron, stirrers[40].

The Plastic Waste Management rules has been enacted and amended since 1999, as per the powers conferred by sections 6, 8 and 25 of the Environment Protection Act 1986 to combat the growing plastic waste. Despite the several initiatives taken by the

[38] Sec 15, Plastic waste management rules, 2016

[39] Ministry of Environment, Forest and Climate Change, Government notifies the Plastic Waste Management rules, 2021, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1745433

[40]Ban on identified Single Use Plastic Items from 1st July 2022, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1837518#:~:text=India%20will%20ban%20manufacture%2C%20import,country%20from%20July%201%2C%202022.

government to reduce plastic waste they still pose a great threat to the environment. The Plastic Waste Management rules have failed to lay down strict guidelines as to the types of plastics to be used for each and every purpose. The intense lobbying by plastic manufacturers[41] association has delayed the phasing out of the Multilayered Plastics[42]. The proposal to restrict the usage of Multilayered Plastics in the packing of Fast Moving Consumer Goods[43] was introduced in the year 2009[44]. Gradual elimination of MLP has been reattempted in Plastic Waste Management rules 2016 whereas the 2018 rules introduced the restriction of phasing out of MLP only to "non-energy recoverable" and "alternate use" alongside "non-recyclable". In the guise of energy recovery the urban local bodies are paying huge amount to transport these MLP to cement factories, hence it is indispensable to ban the usage of MLP[45].

The plastic sachet used in the packing of FMCG possessing a serious threat to the environment and recycling has not been addressed by the Plastic Waste Management rules so far. The sachets range from smaller ones starting from 1ml upto 1l. Most of the plastic sachets fall under the marking 7 category[46] (others types of Plastics), which are difficult to recycle. Plastic sachets consist of different layers of materials, adhesives, dyes

[41] By Siddharth Ghanshyam Singh, Draft plastic waste rules: Why multi-layered plastic needs to be phased out, https://www.downtoearth.org.in/blog/waste/draft-plastic-waste-rules-why-multi-layered-plastic-needs-to-be-phased-out-76899
[42] MLP short form for MultiLayered Plastics
[43] FMCG short form for Fast Moving Consumer Goods.
[44] Sec 5(f) Plastic Waste Management rules, 2009.
[45] By Siddharth Ghanshyam Singh, Draft plastic waste rules: Why multi-layered plastic needs to be phased out, https://www.downtoearth.org.in/blog/waste/draft-plastic-waste-rules-why-multi-layered-plastic-needs-to-be-phased-out-76899
[46] Sec 11(2) of Plastic Waste Management rules 2016.

making it problematic for recycling. In order to prove that sachet could be a part of circular economy Unilever introduced new technology but in vain. In the process of recycling sachets almost 40 to 60% of waste feedstock was lost in residue form proving it is difficult to recycle the sachets[47].

Conclusion:

To curb the plastic pollution several countries have enacted legislations but in vain. Wide spread consumer sensitisation is critical for the reduction in the use of plastics. Empirical study has revealed that cash-back schemes, spreading information through posters/banners has significantly reduced the use of plastic bag among consumers[48]. The lifecycle of the plastics should be regulated from manufacture to disposal, certain countries ban the usage of plastics whereas they without banning the production which is yet a continuing threat to the environment. Hence complete ban on plastics to be adopted without partial ban.

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[47] Bobins Abraham, Plastic Sachet: Convenience For All But A Nightmare For Environment And Recycling, https://www.indiatimes.com/news/india/plastic-sachet-threat-to-environment-recycle-560832.html

[48] Kanupriya Gupta and Rohini Somanathan, Consumer Responses To Incentives To Reduce Plastic Bag Use: Evidence From A Field Experiment In Urban India, https://www.isid.ac.in/~pu/conference/dec_11_conf/Papers/kanupriyagupta.pdf

Is Speaking Order a Third Pillar of Natural Justice? - A Critical Study

Dr.P.Balamurugan[1]

Providing reasons for decisions is a topical and developing area of administrative law, and this is largely because the publication of reasons boosts public confidence in the administrative process.[2] As pointed out by the Lord Denning giving of reason is one of the fundamentals of good administration.[3] "Reason" is an essential requirement of the rule of law.[4] The reason is considered as the heartbeat of every conclusion as it introduces clarity in an order and without the same, the order becomes lifeless.[5] Reasoned decision ensures transparency and fairness in decision making,[6] as well as it reveals how the mind is applied to the subject- matter for a decision, whether it is purely administrative or quasi-judicial in nature. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded by shown to be manifestly just and reasonable.[7] Indeed, this is highly desirable because the existence of reasons will tend to support the idea that justice is seen to be done, and done on a rational basis.[8] Reasons are the links between the materials on which certain

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[2] Peter Leyland & Terry Woods, "Administrative Law" (London: Blackstone Press Limited), 1997 Edition, p. 266.
[3] Lord Denning, M.R. In Breen v. Amalgamated Engg (1971 (1) All E.R. 1148.
[4] I.P.Massey, "Administrative law" (Lucknow: Easter Book Company) 2012 edn, 233.
[5] D.P.Mittal, "Principles of Constitutional Law & Administrative Law" (Kolkata: K.G. Maheswari Book corporation) 2017 edn, p.999.
[6] *Ibid*.
[7] Union of India v. M.L. Capoor, 1973 2 SCC 836 : AIR 1974 SC 87.
[8] *Supra* note 1, at 266.

conclusions are based and the actual conclusions.[9] A failure by ban public authority to given reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.[10] There is still a controversy whether "speaking order" is a third pillar of natural justice. Therefore, an attempt has been made in this research paper to trace the development of Speaking order and to analyse its emergence as a third pillar of natural justice.

Speaking Order - Meaning

The expression 'speaking order' was first coined by Lord Chancellor Earl Cairns.[11] A speaking order is a reasoned order. It explains itself and tells its own story.[12] One of the salutary requirements of natural justice is spelling out reasons for the order made.[13] A party has a right to know not only the result of the inquiry but also the reasons in support of the decision.[14] A "Speaking order" means an order speaking for itself i.e., every order must be speaking, which must contain reasons in support thereof, and should not be like the "inscrutable face of a sphinx."[15] The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. In such an order all the contentions raised are dealt with; conclusions are drawn and

[9] Lord Denning, M.R. In Breen v. Amalgamated Engg (1971 (1) All E.R. 1148.
[10] Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, "De Smith's Judicial Review"(London : Sweet & Maxwell) 2007 edn, P.410.
[11] *Supra* note 4, at 997.
[12] *Ibid*, at 998.
[13] *Ibib*, at 998-999.

[14] C.K. Thakker" Administrative law"(lucknow : Eastern book Company)2012 edn.,p.394.
[15] *Ibid*, at 394.

findings, supported by reasons which can be tested by reference to the material on record of the case, including oral and documentary evidence.[16] Every judicial order must be supported by reasons recorded in writing as recording of reasons is an indispensable element of principles of natural justice. When an application has been rejected, the person who is adversely affected must know the reason for it.[17] An administrative order itself may contain reasons, or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue.[18]

Advantage of Speaking Order

There is numeral of advantages of insisting that an order made by administrative adjudicating authorities should be speaking or reasoned decisions. A decision should contain reason for the decision for the following reasons: -

i) **Gives faith and confidence of people**

The prime object of recording reasons is to have faith and confidence of people in judicial and quasi–judicial authorities.[19] The reason for decisions enhances public confidence in decision-making. Giving of reasons is not an optional extra which is bolted on the end of the decision-making process, but as something which is integral to the very notion of good administration, providing an incentive to adhere to the principles of good administrative practice.[20]

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[16] *Supra* note 4, at 998.
[17] *Ibid*, at 999.
[18] *Supra* note 3, at 233.
[19] Rani Lakshmi bai Kshetriya Gramin Bank v. Jagdish Sharan Varshney, (2009) 4 SCC 240.
[20] Mark Elliot, "Administrative Law" (Oxford: oxford University press) 2005 Edition, p.393.

ii) **Gives Justification, Motive or Logic for the Order**

Reason given for a decision or order, explain the justification, the motive or logic for the order. Theses can open the mind of the adjudicating authority.[21]

iii) **Careful Examination of the Relevant Issues**

The giving of reasons may among other things concentrate the decision-makers' mind on the right questions.[22] It encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision- making.[23] Consciously duty-bound to articulate their reasons, decision makers' minds are focused and their substantive decision-making the better.[24] Thus, the requirement of stating the reasons in support of the decision cautions the authority to consider the matter carefully and to apply seriously his mind to the facts and questions of law involved in the matter.[25]

iv) **Provide an Explanation of the Basis for Their Decision**

To have to provide an explanation of the basis for their decision is a salutary discipline for those who have to decide anything that adversely affects others.[26]

v) **Affected Party Can know the grounds of an Order**

The party affected must know why and on what grounds an order

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[21] Prof. Narendra Kumar, "Administrative Law" (Faridabad: Allahabad law Agency) 2011 edn, p.275.
[22] *Supra* note 19, at 393.
[23] *Supra* note 9, at 414.
[24] *Supra* note 19, at 393.
[25] *Supra* note 20, at 275.
[26] Tramountana Annadora SA v. Atlantic Shipping Co SA (1978) 2 All E.R. 870 at 872.

has been passed against him. This is one of cardinal principles of natural justice.[27]

vi) **Protects form Unjustified Challenges**

The giving of reasons may protect the body form unjustified challenges, because those adversely affected are more likely to accept a decision if they know why it has been taken.[28]

vii) **Gives satisfaction to the person against Whom the decision has been given**

A second dimension is that the giving of reason serves the interests of the person affected by the decision.[29] It gives satisfaction to the person against the decision has been given. It convinces him that the decision is not arbitrary but genuine.[30] Reasons disclose the process of ratiocination and the way and the manner the adjudicatory and the administrative process travels. The affected person experiences a satisfaction of receiving an explanation in the speaking order why a decision is being made in a certain way.[31] The existence of reasons gives an opportunity to him to satisfy himself about the reasonableness.[32] Basic fairness and respect for the individual often requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit: in short ,

[27] *Supra* note 13, at 394-395.
[28] *Supra* note 9, at 414.
[29] *Supra* note 19, at 393.
[30] *Supra* note 20, at 275.
[31] *Supra* note 4, at 1013.
[32] *Ibid*.

"justice will not be done if it is not apparent to the parties why one has won and the other has lost".[33]

viii) **Enables the Affected Party to Examine his Right of Appeal**

It enables the affected party to examine his right of appeal. He is thus, put in a position, to decide as to whether and on what ground he may exercise his right of appeal effectively.[34] A reasoned decision is necessary to enable the person prejudicially affected by the decision to know whether he has a ground of appeal or alternatively, a ground of challenge by way of judicial review.[35]

ix) **Assist the Courts in Performing Their Supervisory Functions**

Reasons can assist the courts in performing their supervisory functions. Substantive review based on relevancy, propriety of purpose or proportionality is much easier to apply if the agency's reasons are evident.[36] It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular

[33] *Supra* note 9, at 414-415.
[34] *Supra* note 20, at 275.
[35] R. v. Independent Assessor (2004) EWCA Civ 1035 at (77).
[36] Paul craig , "Administrative law " (London : sweet and maxwel) 2011 (First South Asian) Edn p. 401.

hearing.[37] In the absence of reasons, it is difficult for the court to ascertain whether decision is right or wrong.[38] Reasons will also assist the appellate court to scrutinise effectively the decision for relevant error, without necessarily usurping the function of the decision- making by itself re- determining the questions of fact and discretion which parliament entrusted to the decision-maker.[39]

x) **Enables the Court to Read the Mind of the Authority**

Reasons stated for the decision enables the court to read the mind of the authority concerned and, thus, enable the court to decide as to whether there are any legitimate grounds for it to interfere with the decision.[40] The speaking order would indicate the existence of the grounds and the application of mind of the authority. If grounds exist and the application of mind is discernible, the order is not assailable.[41] If an order is unspeaking or the authority is absentminded, it suffers from vice of violation of natural justice. Non-application of mind may render the order liable to be struck down.[42] In ***Jaswant Rai* v. *CBDT***,[43] Supreme Court quashed an order, because it appeared that the authority did not apply its mind or made it without revealing its mind by a speaking order.

xi) **Introduces Clarity in an Order**

Reason is said to be heart beat of every conclusion. It introduces clarity in an order and without same, it becomes lifeless. Reasons substitute subjectivity by objectivity.[44]

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[37] *Supra* note 4, at 1014.
[38] *Ibid*.
[39] Cullen v. Chief Constable of the Royal Ulstor Constabulary (2003) UKHL 39; (2003) 1 W.L.R. 1763 at (7) (Lord Steyn).
[40] *Supra* note 20, at 275.
[41] *Supra* note 4, at 1010-1011.
[42] Ibid, at 1011.
[43] (1999) 231 ITR 745 (SC).
[44] Secretary & Curator, Victoria Memorial hall v. Howarh Ganatantric Nagarik Samity, AIR 2010 SC 1285.

xii) **Makes Judicial Review Very Effective**

The first dimension is that the giving reasons serves the interests of the court (or other tribunal) reviewing the decision.[45] Speaking orders are necessary if the judicial review is to be effective.[46] It enables the appellate authority to examine the propriety or decision or the order impugned before it.[47] Without reasons, it can be extremely difficult to detect errors.[48]

xiii) **Operates as an Important Check on the Abuse of Administrative Powers**

The requirement of stating reasons operates as an important check on the abuse of administrative powers. It excludes or at least minimizes arbitrariness on the part of the adjudicating authority. It, thus, introduces fairness in the administrative action.[49]

xiv) **Provides Guidance to Other Adjudicating Authorities**

If published, reasons can provide guidance to others on the body's likely future decisions, and so deter applications which would be unsuccessful.[50]

xv) **Ensures Fairness in Decision Making**

In addition to all reasoned decisions ensures fairness in decision making. Recoding of reasons is part of fair procedure. Recording of reasons ensures that the decision is not a result of caprice, whim or fancy but arrived at after considering the relevant law and that the decision was just.[51] Fairness founded on reason is

[45] *Supra* note 19, at 392.
[46] *Supra* note 13, at 394.
[47] *Supra* note 20, at 275.
[48] R. V.Nat Bell Liquors Ltd (1922) 2 A.C. 128 at 159 (Lord Summer).
[49] *Supra* note 20, at 275.
[50] *Supra* note 9, at 414.
[51] *Supra* note 4, at 1009-1010.

the essence of guarantee epitomized in Article 14 of the Indian constitution.[52]

xvi) **Appearance of Justice**

Reasoned conclusions gives appearance of justice. Unreasoned conclusions may be just, but may not appear to be those who read them. It is well known principle that justice should not only be done but should also appear to be done.[53]

Disadvantages of a Duty to Give Reasons

There are however some significant objections which can be raised to the courts extending a general requirements to provide reasons and findings of fact to all administrative bodies that are in any case obliged by the duty of fairness to inform those whom they may prejudicially affect of the case that they have to meet and to offer them an opportunity to submit representations.[54]

i) It will affect formal nature of the decision making process

These include the possibility that reasons especially if published will affect the formal nature of the decision making process.[55]

ii) Place burdens upon decisions makers and may cause delay

Place burdens upon decisions makers will occasions administrative delays and encourage the disappointed to pore

[52] *Ibid*, at 1010.
[53] *Ibid*, at 1012.

[54] *Supra* note 9, at 416.
[55] cf. Veerndell v Kearney and Trecker Marwin Ltd (1983) I.C.R.683at 694-695

over the reason in the hope of detecting some shortcomings for which to seek redress in the courts.[56]

iii) May Reveal confidences or endanger national security

In addition a reluctance to give reasons perhaps because they may occasion harm (by example, causing personal distress[57], revealing confidences or endangering national security)[58] could discourage the making of difficult or controversial decisions or results in the production of anodyne uninformative and standard reasons.[59]

iv) In addition the determination of an issue may not lend itself to reasoning being a matter of impression or taste or a matter on which no objective justification is possible or useful.[60]

v) It can stifle the exercise of discretion and overburden the administration

The disadvantages of a duty to provide reasons are said to be that it can stifle the exercise of discretion and overburden the administration.[61]

Nonetheless, apart from the exceptional case, the advantage of providing reason so clearly outweigh the disadvantage that fairness requires that the individual be informed on the basis of the decision.[62]

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[56] Mclnnes v Onslow –Fane (1978) 1 W.L.R. 1520 at 1535 ;R. v Chief Registrar of Friendly Societies Exp. New Cross Building Society (1984) Q.B. 227 at 245.
[57] Mclnnec v Onslow –Fne (1978) 1 W.L.R. 1520 at 1533
[58] R v. Secretary of State for the Home Department Ex.P .Adams (1995)ALL E.R.(E.C)177
[59] *Supra* note 9, at 416.
[60] Institute of Dental Surgery (1994) 1 W.L.R.242
[61] *Supra* note 35, at 401.
[62] Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, "De Smith's Judicial Review"(London : Sweet & Maxwell) 2007 edn, p.416.

English Law on Speaking Order

In England, there is no common-law duty of recording reasons, yet the present trend has been towards recording of reasons, which is consistent with development towards openness in government and quasi-judicial administration.[63] As the Justice-All Souls Committee concluded, "no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".[64] The need for giving reasons for decisions was recognised both by the Committee on Minister's powers, 1932, and by the Committee on Administrative Tribunals and Enquiries of 1957 and the latter's recommendation was implemented by the Tribunals and Inquiries Act, 1958 which required reasons to be given on request by statutory tribunals and by ministries after statutory enquiries.[65] It may be noted that the Committee on Ministers' Powers (1932) made strong plea that the principles of natural justice must be so extended as to include reasoned decisions.

In England, section 12(1) of the Tribunals and Inquiries Act, 1958 imposes a duty to give reasons only when the party request on or before the giving or notification of the decision. But many tribunals give reasons as a matter of course without waiting for such requests. This clause however admits certain exemptions. In some cases of rule-making actions based on hearing, reasons may not be given. Reasons may be refused by any individual

[63] C.K.Thakker, "Administartive Law" (Lucnow:Eastern Book Company) 2012 edn, p.399.
[64] Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, "De Smith's Judicial Review"(London : Sweet & Maxwell) 2007 edn, P.414.
[65] H.W.R. Wade & C.F. Forsyth, "Administrative Law" (Oxford: Oxford University Press) 2009 edn, p.441.

tribunal if in its opinion it may cause injustice. For example, the Mental Health Tribunal, which determines the question whether a mental patient should be forcefully confined, does not give reasons in the interests of the patient. Under the Tribunals and Inquiries Act, 1958, Lord Chancellor also has the power to direct by order that in certain classes of decisions, the authority shall not give reasons if in its opinion it is unnecessary or impracticable.[66]

In ***R.* v. *Civil Service Appeal Board ex.p. Cunningham***,[67] an award of abnormally low compensation to an unfairly dismissed prison officer, by Civil Service Appeal Board was quashed by the Court of Appeals holding that natural justice demanded the giving of reasons, both in deciding whether the dismissal was unfair and in assessing compensation, though there was a rule to the effect that no reasons were to be taken.

Similarly in ***R.* v. *North Derbyshire Health Authority ex.p. Fisher***,[68] the Health Service Authority's refusal, without giving reasons, to follow the policy of the National Health Service Executive to introduce a new and expensive drug was quashed. The action taken without assigning reasons was held to be violative of principles of natural justice.

Without entering into wider controversy whether recording for reasons is or is not one of the principles of natural justice, it may be agreed with the following observations of Wade& Forsyth[69]:

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[66] I.P.Massey, "Administrative law" (Lucknow: Easter Book Company) 2022 edn, pp.243-244.
[67] (1991) 4 All ER 310.
[68] (1998) 10 Admn. L.R. 27.
[69] *Supra* note 64, at 443.

"*The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principles of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them*."

American Law on Speaking Order

So far as the US is concerned, the Administrative Procedure Act, 1946 enjoins every adjudicatory body to include in its decision a statement of findings and conclusions "as well as the reasons or basis therefor" on all material issues of fact, law or discretions. Even otherwise, the courts have taken the view that all administrative authorities must record reasons in support of their decisions. Without reasons, it would be difficult for a superior court to exercise the power of judicial review.[70] The administrative agencies are required to give reasons for their decisions as per Section 8(b) of the Administrative Procedure Act, 1946. The right to reasoned decision unaccompanied by reason may be considered a "due" decision. Moreover, due process also includes a right to have a written record which must consist of evidence, arguments, reasons, and all the papers filed in the case.[71] In recent cases, the Courts seem to be moving from the traditional requirement of findings to one of reasoned explanation of agency decisions.[72] It

[70]*Supra* note 13, at 396.
[71] *Supra* note 65, at 244.
[72] Dr.Narender Kumar, "Administrative Law" (Faridabad: Allahabad Law

has been declared that "The Necessity for administrative agencies to provide a statement of reasons… is a fundamental principle of administrative law.[73]

Indian Law on Speaking Order

The Supreme Court of India in several cases consistently insist that the adjudicating authorities should give reason for their decisions. It may be stated here that by a pronouncement of the supreme court in ***Siemens Engg. Mfg. Co. Of India Ltd.*** **v.** ***Union of India***,[74] that the rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them is a basic principle of natural justice. Similarly in the case of ***M.J. Sivani*** **v.** ***State of Karnataka***,[75] it was observed that when a rule mandates recording of reasons, it is a *sine qua non* and a condition precedent for a valid order. In the aforesaid case, Bhagwati J observed:

"*If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi –judicial functions will be able to justify their existence and*

Agency) 2018 edn, p.300. See also Atchison, Topeka & S.F.R.Co. v. Witchita Board of Trade, 412 US 800 (1973); Brennan v. Gilles Inc, 504 F. 2d.1255 (4th Cir.1974).

[73] *Supra* note 71, at 300. See also Brooks v. AEC, 476 F.2d.924 (D.C. Cir 1973).

[74] (1976) 2 SCC 981 : AIR 1976 SC 1785.

[75] (1995) 6 SCC 289.

carry credibility with the people by inspiring confidence in the adjudicatory process."

Further, in ***S.N.Mukerjee* v. *Union of India,***[76] Constitutional Bench of the Supreme Court said that the purpose of disclosure of reasons by judicial and quasi-judicial bodies was that:

"*it exhibits that the authority had applied its mind and that it minimises the chance of arbitrariness, an essential requirement of rule of law*"

Again another Constitution Bench of the Supreme Court in ***Krishna Swami* v. *Union of India***,[77] said that if a statutory/public authority/functionary did not record the reasons, its decision would be rendered arbitrary, unfair, unjust and violative of the Articles 14 and 21. The Court said:

"*Reasons are the links between material, the foundation of their reaction and the actual conclusions*".

In ***Maneka Gandhi* v. *Union of India***,[78] the Supreme Court has observed that "*the government was wholly unjustified in withholding the reasons for impounding the passport of the Petitioner as this not only amounted to breach of statutory duty but also to denial of opportunity for hearing*."

Further, the Apex Court in **State of W.B. v. Krishna Shaw**,[79] it was observed "*Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a*

[76] AIR 1990 SC 1407.
[77] AIR 1993 SC 1407.
[78] AIR 1978 SC 597.
[79] AIR 1990 SC 2205.

valid discipline for the tribunal itself. Therefore, statement of reasons is one of the essentials of justice." Similarly, in the context of State Information Commissioner, it was held in **Manohar v. State of Maharashtra**,[80] that the Commission has to hear the parties, apply its mind and record the reasons, as they were the basic elements of Natural Justice.

The Supreme Court in ***Stare Enterprises* v. *City and Industrial Development Corpn. Of Maharastra***,[81] observed that:

"*The Traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large, justifying large social audit, judicial control and review by opening of public gaze; these necessitate recording of reasons for executive actions… that very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability*."

If any decision or order is not a speaking and reasoned order, then the matter may be remitted back to the authority who has decided for fresh disposal. This was held by the Supreme Court in the case of ***National Insurance Company Ltd.*** v. ***Bharat Bhushan.***[82] The Supreme Court in the above case concluded the following:

[80] AIR 2013 SC 681.
[81] (1990) 3 SCC 280.
[82] (2008) 11 SCC 112.

"*the High Court had disposed of the appeal without applying its mind and without passing a speaking and reasoned order. That being the position, only on this ground the matter is remitted back to the High Court for fresh disposal in accordance with law. It is expected that this time, the High Court shall decide the same by passing a speaking and reasoned order*."

Thus, it may be stated that now it is firmly established that an adjudicatory must give reasons for its decision.

Is Speaking Order a Part of Natural Justice?

Whether speaking order can be said to be one of the principles of natural justice and it comprise a third pillar of natural justice is still a difficult and controversial question. One view suggests that giving of reasons is a matter of legislative policy which should be left to the decision of the legislature. However, there are those who hold the view that reasons are implicit in every administrative action having civil consequences as a requirement of natural justice, and the exceptions, if any, would be required to be provided for either expressly or by necessary implications as are arising out of the "useless formality" and "no-prejudice" doctrines.[83] Better view appears to be that good administration implies reasons where a person legitimately expects to be treated fairly.[84]

In India the Supreme Court for the first time in ***Siemens Engg. Mfg. Co of India* v. *Union of India***,[85] held that the rule requiring reasons to be recorded by quasi- judicial authorities in support of the orders passed by them must be held to be a basic

[83] Rajesh Kumar v. CIT, (2007) 2 SCC 181.
[84] *Supra* note 3, at 240.
[85] (1976) 2 SCC 981: AIR 1976 SC 1785.

principle if natural justice. Speaking for the court, Bhagwati J was observed:

"*The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."*

Justice Bhagwati again reiterated the above view in the leading case of ***Maneka Gandhi* v. *Union of India***,[86] and observed that,

"*… the government was wholly unjustified in withholding the reasons for impounding the passport of the petitioner as this not only amounted to breach of statutory duty but also to denial of opportunity for hearing.*"

The Constitution Bench of the Supreme Court has given a landmark with regard the reasons for the decisions in ***S. N. Mukherjee* v. *Union of India***,[87] In this case, the appellant, a major of Indian army, was charge-sheeted and tried by general court martial. Since some of the charges were held proved, punishment of dismissal was awarded. The findings were confirmed by the chief of the army staff though reasons were not recorded for such confirmation. The post- confirmation petition was dismissed by the central Government. His writ petition was also dismissed. The appellant approached the Supreme Court. A substantial question of law was raised in the appeal, namely, whether recording of reasons

[86] AIR 1978 SC 597.
[87] (1990) 4 SCC 594: AIR 1990 SC 1984.

in support of an order can be said to be one of the principles of natural justice. The Constitution bench decided the said question in the affirmative. Referring to a number of leading cases on the point, Agarwal J observed:

"*Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reasons can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities*."

Recently, the Supreme Court in ***G. Vallikumari* v. *Andhra Education Society***,[88] stressed on need of recording reasons in support of the order passed describing it as "one of the recognised facets of the rules of natural justice".

The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions.[89] Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justices.[90]

Extinguistion of Distinction Between Administrative Or Quasi-Judicial Authority

The distinction between an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. The order of an administrative authority may not provide reasons like a judgement but the order must be supported by the reasons of rationality. It is essential that administrative authorities and tribunals should accord fair and proper hearing to

[88] (2010) 2 SCC 497 : AIR 2010 SC 1105.
[89] R v. Home secretary ex p Doody (1994) 1 AC 531 at 564 E.
[90] *Supra* note 64, at 440.

the affected persons and record explicit reasons in support of the order made by them.[91] The Supreme Court opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the 'inscrutable face of a sphinx'.[92]

Reasons Need Not Be Elaborate

It is not necessary that it is a lengthy recording in detail of all reasons that played on the mind of the court. An order cannot, however, be said on non-speaking because it is brief and not elaborate.[93] Brevity in reasoning cannot be understood in legal parlance as absence of reasons. The brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful.[94] It is enough if the order in a nut shell records the relevant reasons which were taken into consideration by the authority in coming to the conclusion and in disposing the petition thereby enabling the aggrieved party seeking justice and the appellate or the revisional authority to know the mind and the reasons for its finding on question of law and facts in deciding the said petition.[95]

Reasons to be Proper and Adequate

The rule requiring reasons in support of an order is as basic as following the principles of Natural Justice which must be observed in its proper sprit. A mere pretence of compliance would not satisfy the requirement of law. The courts treat failure to give

[91] *Supra* note 4, at 1000.
[92] Kranti Associates p Ltd. V. Masood Ahmed Khan (2010) 9 SCC 946.
[93] Tara Chan v. Delhi Municipality AIR 1977 SC 567.
[94] Asst. Commissioner v. Batten and Ors. (2001) 10 SCC 607.
[95] *Supra* note 4, at 1001.

reasons which are substantial and not an apology for reasons as necessary requirement for compliance with the principle of audi alteram partem. Reasons must, therefore, be proper and adequate. They must set out, whether right or wrong, must be reasons which are not only are intelligible but also can be said to deal with the substantial points that have been raised. To act on no evidence or to give reasons which are inadequate is an error of law.[96]

Circumstances Where Reasons for Decision have to be Provided

Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully.[97] The circumstances where reasons for decision has to be given are as follows:

1. When the Statute Requires Reason for decision;
2. Reasons may be Mandated by the Constitution;
3. When the Order is subject to Appeal or Revision;
4. When Serious Personal or Proprietary Prejudice is Caused; and
5. When it Affects the Public Interest.

1. When the Statute Requires Reason for decision

If the statute requires recording of reasons, then it is the statutory requirement, but, even when the statute does not impose such an obligation, it is necessary for the quasi- judicial authority to record reasons, as it is the "only visible safeguard against

[96] *Ibid*, at 1017-1018.
[97] *Supra* note 64, at 441.

possible injustice and arbitrariness" and thereby affords protection to the person adversely affected.[98] If reasons are mandated by law, it is considered as mandatory. There is a plethora of laws which mandate reasons for an administrative action. For example, section 31 of the Arbitration and Conciliation Act, 1966 mandates reasons by the arbitrator for an award.[99] Similarly, the passport Act, 1967, requires the Government to record its reasons and furnish a copy of the same to the concerned individual on demand while impounding his passport. At the same time the authority may refuse to give reasons in public interest among other grounds. If reasons are not given , it would vitiate an administrative action when required by law.[100]

In ***S.N. Mukherjee* v. *Union of india***,[101] the Supreme Court observed, an administrative authority exercising judicial or quasi – judicial functions must record reasons in support of their decisions except in cases where the requirement of recording reasons has been dispensed with expressly or by necessary implication.

In ***Gurdial Singh Fijji* v. *State of Punjab***,[102] it was held that there is no general requirement for administrative agencies to give reasons for their decisions in the absence of any particular statutory requirement. However, it is mandatory for the administrative agency to give reasons if the statute under which they are functioning requires reasoned decisions. Such reason should not be merely "rubber-stamp" reasons but it must be a brief

[98] *Supra* note 13, at 396.
[99] *Supra* note 3, at 235.
[100] *Supra* note 20, at 278.
[101] AIR 1990 SC 1407.
[102] (1979) 2 SCC 368.

and clear statement providing the link between the material on which certain conclusions are based and the actual conclusion.

In cases where the statute does not provide for reasoned decisions, courts in India are still in the process of developing workable parameters between the claims of individual justice and administrative flexibility.[103]

2. Reasons may be Mandated by the Constitution

In case of legislative silence, a reasoned decision may be a constitutional requirement.[104] The Calcutta High Court in ***Anumathi Sadhukhan* v. *A.K. Chatterjee***,[105] allowed the challenge to the validity of law which did not require a speaking order on the ground of unreasonable restriction on the exercise of fundamental rights. In this case, clauses 9 and 13 of the West Bengal Rice Mills Control Order, 1949 – which had authorised the refusal to issue or renew a licence, or for suspension or cancellation of a licence already issued "without assigning any reasons" were held as imposing unreasonable restriction on the petitioner's right to trade and business guaranteed under Article 19(1)(g) of the Constitution, hence unconstitutional.

A Law which allow any administrative authority to take a decision affecting the rights of the people without assigning any reason cannot be accepted as laying down a procedure which is fair, just and reasonable and hence, would be violative of Articles 14 and 21 of the Constitution. It may be emphasised that the implied requirement of "reasons" is the foundation on which the whole scheme of judicial review under the Indian constitution is

[103] *Supra* note 3, at 234.
[104] *Ibid*, at 234.
[105] 1951 SCC Online Cal 57: AIR 1951 Cal 90.

based. Articles 32, 136, 226 and 227 provide for judicial review of administrative actions. The decisions of administrative agencies unaccompanied by reasons will have the effect of whittling down the efficacy of these constitutional provisions. If an administrative authority is allowed to keep its errors off the record by not writing reasons, the whole concept of judicial review would be meaningless.[106]

3. When the Order is subject to Appeal or Revision

The need for speaking order has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on the grounds of improper purpose, irrelevant consideration and errors of law of various kinds. If the reasons are not given the appellate or revisional court will not be in a position to understand what weighed with the authority and whether the grounds on which the order was passed were relevant, existent and correct. Thus, the exercise of the right of appeal would be futile.[107]

In ***Union of India*** **v.** ***E. G. Nambudiri***,[108] a representation was made by a government servant against certain adverse remarks made in his confidential record. The said representation was rejected, however, without recording reasons. The petitioner approached the central administrative Tribunal against that order and the tribunal allowed his application and quashed the order on the ground that it was vitiated since no reasons were recorded. The union of India approached the supreme court.

[106] *Supra* note 3, at 238.
[107] *Supra* note 13, at 397.
[108] (1991)3 SCC 38 : AIR 1991 SC 1216.

Allowing the appeal and setting aside the order of the Tribunal, the Supreme Court observed:

"*(Principles of natural justice do not require the administrative authority to record reasons for the decision as there is no general rule that reasons must be given for administrative decision. Order of an administrative authority which has no statutory or implied duty to state reasons or the grounds of its decision is not rendered illegal merely on account of absence of reasons. It has never been a principle of natural justice that reasons should be given for decisions.*"

The court, however, rightly stated:

Though the principles of natural justice do not require reasons for decision, there is necessity for giving reasons in view of the expanding law of judicial review to enable the citizens to discover the reasoning behind the decision. Right to reasons is an indispensable part of a sound system of judicial review. Under our constitution an administrative decision is subject to judicial review if it affects the right of a citizen, it is, therefore, desirable that reasons should be stated.

The Supreme Court in ***Bhagat Raja* v. *Union of India***,[109] observed that "the decisions of the tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected", or "dismissal. In such a case, this court can

[109] AIR 1967 SC 1606.

probably only exercise its appellate jurisdiction satisfactorily by examining the entire record of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal.

Further, in ***Santhosh kumar* v. *State of U.P.***,[110] the licensing authority could, under law, cancel the licence of the appellate to deal in wholesale in sugar "for good and adequate reasons". The license of the appellant was cancelled and on demand he was not supplied the copy of the order. An appeal to the State Government was rejected without communicating any reasons to him. The Apex Court quashed the order of cancellation and held:

"……*the licensing authority should give reasons for cancellation of the licence. Only then could the right to appeal to the State Government be effective. In case the Aggrieved party is not supplied the reasons, his right to appeal become an empty formality*."

Since the order of the State Government was subject to appeal under Article 136 as also judicial review under Articles 226 and 227, the Court was said to be subjected to disadvantage in the absence of reasons for the order. The Court characterised the non-giving of reasons by the adjudicating bodies as "*Striking at the very root of the rule of law*."[111]

4. When Serious Personal or Proprietary Prejudice is Caused

[110] AIR 1970 SC 1302.
[111] *Supra* note 71, at 304.

When authority's action causes serious prejudice, reasons may be mandated by the principles of natural justice. This situation may arise where law is silent, but a person has suffered a serious personal or proprietary prejudice. The judicial, quasi-judicial and even administrative decisions must be supported by reasons as a requirement of a higher law, even if statutory law is silent. It will serve a wider principle of administrative law that is not enough that justice be done but it must also be seen to be done.[112] Thus, when an administrative action carries civil or evil consequences, reason for decision has to be given even in the absence of a statutory provision.

In ***Dev Dutta* v. *Union on India,***[113], the Supreme Court opined that besides two known principles of natural justice, the third principle is transparency and good-governance; which mandate a duty to give reasons when a person suffers a prejudice, even in the face of contrary instructions. In this case, a person was not promoted even though he had a "good" entry in his confidential record because others had better entries. However, this "good" entry had not been communicated to him as office instruction provided that only adverse entry is to be communicated. Court held that even a good entry is to be communicated if a person suffers prejudice. Transparency and good-governance, as a facet of fairness, demand a duty to give reasons by the authority which gave entry. If reasons are not given, it would make an action arbitrary violative of Article 14 of the Constitution, which is a constitutional habitat of the principles of natural justice. Thus, even in the face of legislative silence

[112] *Supra* note 65, at 239.
[113] (2008) 8 SCC 725.

"reasons" may be mandated by the principles of natural justice. In all disciplinary matters reasons are mandatory.

Thus when civil consequences ensue, there is hardly any distinction between an administrative order and quasi-judicial order, and principles of natural justice are applied in both the situations.

5. When it Affects the Public Interest

Reasons are to be recorded when it affects the public interest.[114] In ***T.R. Thandur* v. *Union of India,***[115] it was held that, in matters of granting exemption by the state, requirement of recording reasons is implicit even in the absence of express statutory provisions to give an administrative decision a non-arbitrary look. Keeping in view the basic principle of administrative law that every State action must satisfy the rule of non-arbitrariness. The Supreme Court in ***Kishan Lal* v. *Union of India***,[116] held that while disposing an application made under Section 220(2-A) for reduction in interest imposed on account of default in payment of tax, it must be disposed of by a speaking order by the Central Board of Direct Taxes.

Reasons for Decision in Disciplinary Matters

In disciplinary matters where full-scale hearing is given to the person, and a detailed report giving full facts and reasons is prepared by the enquiry officer, perhaps, the writing of reasons by the disciplinary authority when it fully agrees with the report will

[114] *Supra* note 65, at 241.
[115] (1996) 3 SCC 690.
[116] (1998) 2 SCC 392.

be mere duplication of the process.[117] However, where the disciplinary authority disagrres with the report of the enquiry officer, it must state its reasons.[118] In ***Tara Chand Khatri* v. *MCD***,[119] it was observed that it would be laying down the proposition a little too broadly to say that even an order of occurrence must be supported by reasons. In this case, an assistant teacher had been dismissed on the ground of moral turpitude. An enquiry was conducted in which the charge was fully established. The Assistant Education Commissioner confirmed the report without giving reasons. On appeal, the Commissioner of Education also upheld the dismissal by an "elaborate order". The petition challenging the dismissal order was dismissed by the Delhi High Court. In the special leave appeal under Article 136 the main contention was that the order of dismissal was bad, as the Assistant Education Commissioner, while confirming the report of the enquiry officer, did not give reasons.

Reasons for Decision and Court Martial

The Court Martial as a proceeding is sui generis in nature and the Court of Martial is different, being called a Court of Honour and the proceedings therein are slightly different from other proceedings.[120] Therefore, Court Martial need give reason for their decisions. In ***S.N. Mukerjee* v. *Union of India***,[121] the supreme Court held that reasons are not required to be recorded for an order confirming the finding and sentence recorded by Court Martial. Further, in ***Som Datta* v. *Union of India and***

[117] *Supra* note 65, at 241.
[118] Ibid.
[119] (1977) 1 SCC 472.
[120] *Supra* note 4, at 1018.
[121] AIR 1990 SC 1984.

others,[122] it was held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. It was also held that an order confirming such proceedings does not become illegal if it does not record reasons.

Conclusion

The reasons for decisions should be treated as a central facet of procedural fairness in administrative law as it ensures greater openness and transparency in administrative adjudications. Now transparency and good-governance have been added as a new dimension to natural justice which includes the duty to give reasons. Good administration implies reasons where a person expects to be treated fairly. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the adjudicating authority itself and it is an indispensable part of sound system of judicial review. The Supreme Court in *Kranti Associates case* has gone to the extent that the requirement of recording reasons is now virtually "a component of human rights". Therefore, now reasoned decisions is virtually a component of human rights. Article 6 of the European Convention of Human rights which requires, "adequate and intelligent reasons must be given for judicial decisions". In order to maintain and uphold the rule of law, the all administrative and quasi-judicial decisions must contain reasons for decisions unless expressly excluded. However, reasons may be withheld in public interest or it would frustrate the procedure or produce more harm than benefit or where a person has not suffered prejudice and

[122] AIR 1969 SC 414.

other justiciable reasons. Therefore, giving of reasons in support of a decision may be considered as the third principle of natural justice

Teaching the Abilities of (Dis) abled to the (Able) Students of "Human" Rights Law-Human Observation as Methodology: The Pedagogy of Compassion, Care and Contribution

Dr. Mujahid ul Islam[1]

Abstract

Teaching the form and spirit of disability in a Human Rights Law (HRL) course forms a soulful exercise. The exercise instills the virtues of humanness, compassion and service upon the future legal professionals. For legal conscience is subservient to human welfare. However, the intrinsic challenge in imparting the knowledge about persons with disability is that the learners mostly are not disabled. Here, self-awareness is not equivalent to disability awareness. Given the sensitive nature of disability based impairments conceptualizing 'disability' is a complex project. Commonly, a social approach vis-à-vis anti-discriminatory objective is adhered. The Convention on the Rights of Persons with Disabilities (CRPD) rightly calls for an evolutionary outlook. Understanding the day to day life, challenges, perceptions, thought processes, existence and maintenance of the disabled requires a human sensical lens and caring resolve. The carriers of welfare of the disabled basically emerge from the fields of Theology, Social Work, Health Care and Psychiatry. Now, the query is: What kind of teaching tool ought to be adopted to impart lessons on the impact of human rights law on disability? The author, basing, on the experience of teaching the human dimensions of the disabled to students of human rights law will demonstrate the pedagogy of disability with the certain select cases, such as Mental Illness, Mental Retardedness, Pediatric Cancer Patients, Patients in Palliative Care and HIV/AIDS Infected/Affected Children. The methodology adopted in the field study was primarily observation (sensory) technique. The course students were exposed to the interviews conducted by the course-

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instructor with the care takers and restrictively, with the care taken. Realistically, every project was filled with the first impression based observations, the question-answer, the internalisations, interpretative discussions and the suggestion put forth by the care takers. All these informations constitute the content of the lessons, realization and dissemination of the subject matter. In line with such field based insights, the author will present and interpret the entire blue print of the field based clinical education along with the life inspiring lessons learnt by all those involved.

The research study is structured to capture the true relationship between human nature oriented insights and field visit based understanding obtained from the contribution of care givers implementing human rights. Section I lays emphasis on the importance of teaching human rights law with the identity of humanness. Section II explains fundamentals about the human nature oriented original study of human rights law. Section III relates to the methodology used to orient the students in conducting the clinical cum field based research on the disabled persons. Section IV interpretatively highlights the human experience gained in the case studies of rehabilitation of persons suffering from mental illness, mental retardation, pediatric cancer patients, palliative care and HIV/AIDS infected/affected children. Section V summates with the eventual observations and standpoints.

Section I. Introduction

Natural Purpose and Value in Studying 'Human' Rights Law rather Human 'Rights' Law

'Human' Rights Law almost in all the lecture halls of legal education is taught from the Human 'Rights' Law perspective rather from the human perception. Surely, humans are real in the

subject matter whereas all other aspects, inclusive of serious societal problems are related. Comparatively, all the other courses in legal curricula accord maximum respect and adherence to the essence of the subject matter except Human Rights Law (HRL). For instance, the composition of ecological systems remains central in the legal insights of learning environmental law. So is the pre-eminence of labour in labour laws. However, in the process of dissemination of HRL, the element of humanness is neither a concern nor curiosity. Regrettably, it is neglected whilst applying the legal standards and measures involved in the law of human rights and duties. The regular textbooks on the discipline commence the lessons with the introduction of the British Magna Carta, 1215; the French Declaration of the Rights of Man and of the Citizen, 1789; the American Declaration of the Rights and Duties of Man, 1948; the Universal Declaration of Human Rights, 1948.[2] All these instruments are responsive by their very nature in

[2] The historiography of human rights law cannot be traced comprehensively from the infant and highly reactionary last 300 years based time line. Common sensically, the creation and inception of mankind as natural inhabitants of earth predates many trillion centuries. Moreover, the so called foundational Western and European traditions and legal understanding of human rights took its own evolution to come to terms with the spirit of human rights law. To explain, the Monroe doctrine was launched to protest against the European colonial intervention and annexation of the Americas. Contrarily, the various American governments since their independence have only promoted American colonial and neo colonial intervention and annexation throughout the world. The European and Western regimes are living as violators of human rights without any true remorse or remedial justice to the oppressed native societies. But they are campaigning for universal peace and harmony. To add, they have also set the tone for compromised international human rights law. Here 'compromised' means the tendency to accept as well as disrespect human rights obligations. For instance, norms of human rights are only written in treaties but not complied and implemented. Again, compromise may also include the Statist behaviour of applying human rights law territorially and restrictively. An illustrative case of the compromise is the much celebrated instrument of the universal declaration of human rights. The instrument magnificently promotes the notion of recognition of the worth of the human being alongside universal brotherhood and sisterhood. However, there is a conspicuous omission of the right to self-determination as a universal human right. The reason is due to the fact that the

terms of the centuries of human oppression and in evolution are regulated by the Statist rule of law.

Can the constitution of humans be understood with the constitution of reactionary human agreement based laws? In other words, can HRL be taught sans the quotient of universalness in the human nature? Will rule of law without the relevance of human nature and concerns provide for human welfare and address rule of life? How far human rights law can be understood without a discourse on the Creator of human kind and the creation plan or design for human beings? Whether the historiography of human rights based on regional conceptions depict the time immemorial conception and existence of human life on earth? Also, can it be interpreted circumventing the human sojourn in earth, from life towards the eventual reality of death? Conversely, in the academic legal environment of HRL syllabi and discourse, the legal approach attains pre-eminence and is prioritized. This precisely affects the foundational standpoints in teaching the otherwise signpost curriculum in the whole of legal education. When students directly attribute the subject matter with international or national societal concerns, the nexus between the real and related becomes complicated. Here, the aspect of human nature gets submerged into the abyss of legalism and becomes irrelevant. Contrary to the belief of human nature and purpose of human life on earth, the HRL is disseminated only with the debates on violence, its consequences or prevention. This process completely

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European and Western powers intended to expand their territories in the native societies of Asia, Africa, Latin Africa and Within Europe through the colonial and imperialistic projects. In sum, it is evident that the so called Western and European revolution triggered the birth of modern international human rights law without true allegiance to the welfare of all humanity and other life forms.

neglects the base knowledge of creation design *vis a vis* the human and nature interactions of living in peace and harmony.

Clearly, the student as human being can study, understand, interpret and implement human rights law only by self-association or awareness. It is readily concluded that human rights are human rights. On the contra, plainly as well as technically the HRL as an education requires a tremendous self examination by the student as a human. This also removes the distinction of male or female student, at a soulful and species level. Moreover, the human dimensions of human rights law lead to a value cum solution based approach. As the key challenges of our times, call for a result oriented enquiry, such as: are human rights enforceable or why there is nil implementation? How and who are the enforcers? Is it State, government or humans themselves? Essentially, natural persons live with natural persons only and not with legal persons. Wisely, in law or any field of knowledge, the information and intellect without emotions and feelings cannot be co-related by the humans.

Developing humanistic visions on the subject inspires the hope that human rights are respected and served by humans with fellow human beings on earth. This is precisely the appreciation of the norm of individual social responsibility, envisaging an intrinsic universal value. In the true sense of theological science, it is the noble *Principle of Universal Brotherhood* and *Sisterhood*.[3] This is

[3] The norm that all human beings are part of one family and community is well established in the field of epistemological sciences. In particular, the monotheistic faiths of the world clearly attest that the creation of humans into races, tribes and clans is only to enable them to identify each other and realize the unity among themselves. It is logically correct to say that without the elements of diversity in colour and structure the human beings would have found it highly difficult to co-exist, communicate, and foster inter-personal

abundantly seen in the case of the humans as social activists taking care of the humans in need. Thus, necessarily all kinds of legal approach must be in confirmation of the human nature and value based dictates. On the basis of field visits organized and co-ordinated and with the experience gained, the author will in detail present a comprehensive view on the realities of human life and that of the 'human caring' perspectives involved in teaching human rights law.

Section II: The Fundamentals

Teaching Human Nature and Trusting Human Nature

The contemporary educators in general and legal on the human rights quotient compete for the symbolization of rights or duties based approaches. Neither of them is correct. Nor appropriate measurement to understand the sensitive subject in the legal sense. Obviously, rights and duties are subset of freedoms. Freedoms originate from a given context and not in vacuum. Here, without doubt, *humanly* has to be the context. For example, right to drink water arises due to the human want to rely upon the water for existence and nourishment. Likewise, right to education is ignited by the human necessity to learn and educate. The element of want or necessity does not indicate the factors of right or duties but only the foundational nature or composition of human beings. Again, the right to marry is initiated by the human instinct and value requirement to live with companionship. These examples reveal that the HRL is rooted in humans and not from law.

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relationships. More significantly, without unity the idea and application of diversity may lead to intrinsic inconsistencies and aberrations.

Turning now to the other inter-related limitation in understanding the rights and duties based approach is that of the awakening about the human rights law which is purely reactionary to modern violence filled era. A major task before the current generation is how to stop the ever increasing population of victims. Rights and duties based approaches alone devoid of human virtues and values leads to intellectual stagnation. Contextually, the victimized and victimiser are humans. Therefore, it is only fair that the legal scope of human rights ought to work on the regulation of the ethical and moral life of human beings.[4] Above all, as the prime cause of all obscurity is egoistic human affairs, verily the solution has to be with reconciliation aimed at reviving the ideal human behaviour. Therefore, what is required is a proper conceptualization of human rights and duties (violenceless) on the basis of human design and purposes. Viewed from these preliminary restrictions the demand for true understanding of human nature becomes a necessity. The discipline of theology[5] and its off-shoot philosophy are the only

[4]The biography/auto biography of martyrs testifies the reality that the principles or virtues of ethics and moral although designed for the human beings, the actual application comes into existence only when it is lived and demonstrated by the humans. The example of the Algerian revolutionary and statesman Frantz Omar Fanon depicts the truth that even in the high times of oppression of the humans designated as blacks by the so called white racists, Professor Fanon appealed not to hate whites similarly cautioned the obsession for blackhood status. Fanon only prioritized humanity. Fanon serves as a universal ambassador for the convergence of virtues and human life. For a clear understanding, consult, Frantz Omar Fanon (1986), Black Skin White Masks, Pluto Press: United Kingdom.

[5]Theological science or religious studies in its essential sprit focalizes on the existence of God or Almighty and His creation plan and design in the universe. All religions in common reflect the principle of monotheism or one Creator. The basics of One Creator, One Humanity and Universe are established. The Creator (spirit) is considered to be the origin of all (matter). All mankind originates from and return unto Him. His attributes are, Oneness, Self-sufficient, neither begets nor begotten and Incomparable. He is the real Sovereign of the universe and all that exists. Creator is the sublime version of

fields of knowledge which have the patterns of knowledge on the creation of humans, their nature along with the aims and purposes. How to pursue such knowledge? Again drawing inspiration from theology, true concerns and methods are available.

Critically, three questions narrow down the highly complicated search for the element of human certainty. They are: (i) who is the Creator? (ii) what is the purpose of creation? (iii) how to understand the fellow creations? In terms of the methods,

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the *Principle of Universality* in all its appropriate and fullest sense. Moreover, the Creator is the Merciful and Compassionate Sovereign of both the worlds (this life and that of the hereafter). The threshold to understand the Creator is through the divine commandments, the scriptures demonstrated by the Noble Prophets. The inner realization of the human or self of the Creator's design is identified as spiritual life. The spiritual obligation is two-fold: service to Almighty and service to mankind. Clearly, good deeds constitute the central message in the tenets of all faith. The addressee or the beneficiary of the scripture is the entire mankind as it does not end with the believers. The mankind is bestowed with the element of freedom and challenge of limitations or test. The human is expected to reason nature and seek constant guidance from the scripture (Words of the Creator) and lives of Prophets in order to choose the right path to live on this earth and successfully return to the Creator. Any person who believes, submits, follows and fulfills the plan and will of the Creator is recognized as believer. Therefore, the true identity of human as the believer is based on the fulfillment of the divine command of submitting the affairs of the Creator and serving the cause of fellow human beings. Both are integrated. Significantly, the standard of allegiance and obedience is measured by the intention of the self. There are no intermediaries between the self as soul and Creator as the guardian. All the above is to be understood as the design and plan of the Creator. Understandably, it is not to be equated to the concepts of human ideologies, theories, school of thought, social facts, superstitions, human imaginations or innovations. In other words, minor premise can never ever compose the major premise. Common sensically, humans are the designed and not the designers. Resultantly, the legitimacy to compose a theory on the origin and creation of the humans as species is unrealistic. Consequentially, all research designs both scientific and social ought to be considered to be 'intermediary' and not original in nature. The Darwinian theorem also is responsive and intermediate. More importantly, the spectrum of research in both sciences and social sciences are not inclined to identify the truth about the human conditions and life on earth. They work relatively on partial truth (less objectivity). To say, the earth is explored, the necessity of studying the earth remains unexplored. 'What is' is searched and 'why is' is left due to the natural element of human limitations. Naturally, it can be recorded that in all value and knowledge based parameters theological wisdom alone orbits with the queries on the universal truth and realities of human life and beyond. This is precisely all about the Creator's design along with its plan and purposes.

the starting point is to study and understand the nature of human nature on the basis of contemplation of human nature (internal) and nature (external). The self as the seeker of truth constitutes the edifice of universal education. To be sure, theology cum philosophical dimensions encourage towards self-realisation of the human in the universe. A careful examination of the creation design of the humans indicates that the physiological and psychological factors are integrated. By nature, humans are interdependent on fellow humans and nature. They learn and live through senses, to see, to listen, to touch and to smell. This is precisely known as observation; the most natural and classical method to study, understand, interpret and implement any information. Functionally, the qualities of want or necessity, freedom, rights, duties and limitations or test are entrenched in humans. The humans are bestowed with the magnificent ideals of truth, love, affection, mercy, compassion, kindness, humility, tolerance, patience, perseverance, gratitude and thankfulness. Probably, it is due to such quintessential creation, humans inherently deserve to be respected.

Childhood is a state of purity, egoless stages of life. It is only due to attraction of the patterns of materialism, human thinking derails into the negatives of anger, greed, lust, jealous, enmity, self-pride, selfishness, blame culture, falsity, backbiting, violence and trends of hypocrisy. If the negatives are removed, humans will forever cease from egocentric self-culture and violence. Living outside the creation design and order of laws of nature is anti-self itself. To explain, the negatives of self-culture and anger are the lethal reason for all human misery on earth. Self-culture leads to the discriminatory or hate ideology; fueled by

anger it leads to destructive violence. The anti-dote is mutual acceptance and sharing amongst fellow beings and patience. These are the proper human virtues of ego management. Regrettably, the modern conceptions of the HRL[6] taught to the students are premised on the basis of societies, governance, law and justice and institution based legal personalities and counter-violence based perspectives.

All these related agencies ought to be preceded by the real element of humanness. The point therefore is that only a human nature based analysis of human rights law is best suitable to understand the challenges. It will also create visions and channels to enforce human rights. It is the only subject that students can easily learn by themselves and implement through the self-knowledge of the creation design. Regardless of the prevailing artificial hatred and divisions throughout the world, students of human rights law must be taught to realise their inherent human nature of true love and affection. Soulfully, if they trust the human virtues, it will lead to the progress of human well-being, dignity and a frictionless society will come into existence.

[6]To understand the problems of the modern HRL, the concern for addressing victims can be taken as a case analysis. The contemporary legal system and actors instead of dealing with an issue of why victims? We are struggling with that of what to do with victims? Even worse, the question of prevention of victims is taken for scrutinization only in the post-conflict phase. This can be more injuring for the mankind in instances of the evil known as genocide as it is about the denial of the right to existence of mankind. The HRL does not take into consideration the feelings and emotions of humans and the indispensable role of fellow human beings as care givers. In case of living victims, the healing process has to begin with the realization of the human societies to stand beside the victim and not to blame or create self-guilt upon the victim. The modern HRL registers the terminology 'hopelessness' so as to indicate the unpreparedness of the man-made laws and legal systems to heal the wounded (physical and psychological) victims. A victimless or nil victim society is not only a hope but must be a reality. Sensibly, the re-humanization process must begin on the basis of reviving, studying and promoting the human nature oriented approach to the HRL.

Section: III Preparing to the Realities

Testing Enforceability of Human Social Responsibility-Abled Reaching Disabled

In principle, the course coordinator of the human rights law is expected to sensitise the students with the aspect of victim oriented approach. As the subject though revolves around human beings in its evolutionary character squarely deals about the victims. To say, it is painful, emotional as well as expects rational responses. This implies that the course coordinator of human rights law has to be an individual possessing excellent human values and expert or experienced in multi-disciplinary approaches to human rights law. To recapitulate the above, human rights law students must fundamentally identify themselves with the laws of ethics and morals and try to refocus on the contemporary challenges. Again, to prove that human rights can be enforced by fellow human beings, the coordinator must carefully design the course work. Incredible eminence is to be given to human ethics and morals. Three fold angles ought to be developed. First, lecturing the basics of human nature, qualities and values on the basis of theological cum philosophical approach. Second, the teacher must teach the contemporary challenges of human rights. It includes the introduction of the European colonial discriminatory ideology and its related genocidal violence. The resultant culture of de-humanization of humans at national and international levels has to be disseminated. Agonizingly, the neo-colonial patterns of uniculture followed by many nations and states, the challenges of democratic governance, minority rights

and the concerns of human security have to be truthfully disseminated.

Constitution has to be projected as a social instrument with the ideals of representative governance, equality, secularism, social justice and dignity. The relevance of international organisations, especially, the role of the United Nations,[7] its Charter Law; the development of principles of international human rights law (especially the CRPD)[8] and humanitarian law; the efforts aimed at prevention of international crimes; the maintenance of international peace and security; the humanitarian assistance; the role of international civil societies have to be discussed. In all these phases, the tutor has to sensitise the students on the lines of the uniqueness and peculiarities of the discourse on human touch or psychological element involved in the topics. Also, ensure that the natural intention of the students to learn the themes is to stand for human solidarity in thinking about the concerns of victims and not for any kind of material incentive. Third, the best option for the coordinator is to utilize the internal project quotient to practically demonstrate and inculcate amongst the students the respect for human values and its implementation in all circumstances. Here, the original approach *vis-à-vis* enforceability of human relations acquires live propositions.

Undeniably, all those persons suffering from disability deserve human care and assistance. However due to the academic

[7]UN Enable is the UN Programme on Disability/Secretariat for the Convention on the Rights of Persons with Disabilities. It comes under the Division for Social Inclusive Social Development (DISD) of the UN Department of Economic and Social Affairs (UNDESA).For more information, refer https://www.un.org/development/desa/disabilities/, last referred on 7 July, 2022.
[8]Refer, generally, Ilias Bentakas et al (eds.) (2018), The UN Convention on the Rights of Persons with Disabilities – A Commentary, 1st edn.

limitations, apt topics have to be to be selected. The basic idea behind the human rights law project is to enable the students to visualize the spirit of humans as care takers of the persons with diversified special needs (care taken). By doing so, is to reinstate the notion that human rights are to be respected, revered and implemented between human beings. To really make it impactful, the centres of human welfare run by Non-Governmental Organisations (NGO's) can be chosen. From a purely human need and care point of view, the following subjects *inter alia* may be prioritized: (i) mental illness; (ii) mental retardation; (iii) old age; (iv) run away kids; (v) unattended or unclaimed dead bodies and their burial; (vi) terminally ill patients; (vii) leprosy affected persons; (viii) trans-genders; (ix) orphans; (x) HIV/AIDS infected and affected persons; (xi) drug and alcohol addicts; (xii) beggary; (xiii) persons affected by human trafficking; (xiv) hearing and speech impaired; (xv) visually impaired; (xvi) acid attack victims; (xvii) suicide related mental illness; (xviii) refugees and displaced. It must be admitted that the role of life savers such as social workers, psychiatrist, health care professionals and ambulance drivers are crucial to be observed. So, students may also be encouraged to solely concentrate on exemplary care givers.

As limitation is essential for any topic, on account of the challenges involved in the social welfare administration, the students shall be advised to initially take a pilot study on the chosen subject and related welfare home. The non-exhaustive factors that determine the feasibility of the project are as follows: (i) 5 to 10 years track record of the NGO; (ii) availability of the founder-trustee; (iii) legally established centres; (iv) number of inmates; (v) absence of socio-legal controversies; (vi) uniqueness

in terms of the care taken; (vii) education/vocational education cum social rehabilitation centres; (viii) spirituality based welfare homes; (ix) homes requiring socio-legal assistance; (x) government created or recognised special centres. In approving the project, the course coordinator must use all experience to carefully assess the veracity on a case by case approach. The workability in terms of time, space and cost, the mental frame of the students, the distinction as to male and female students and their participation in the topic are to be factored. This precisely enhances the awareness of the student *vis-à-vis* the subject matter of human rights.

Due to the intensity involved in every topic, two to three students may be allotted per case study. The methodology is purely based on the human observation or participant observation. The students will be taken to the field and instructed to observe the positioning of the care takers and care taken in the respective area of human concern. The coordinator due to the standing as the organizer will pose live questions to the care takers. In this process, students are required to actively take notes or if permitted record the sessions including taking pictures and video footages. Also, if needed, they should clarify with both the resource persons. The on-the-spot interview schedule prepared and executed by the coordinator is really the central tool in the data collection and process. For the true progress and to transform the exercise as a life time intellectual experience for the teacher and taught, the coordinator must exhibit clear visions on the subject. Such as posing meaningful questions and create angles that may bring out the human nature oriented as well socio-legal conceptions of the care taker on the care taken. To be sure, the coordinator has to

always remember the overall sensitivity involved. Try to gain information from the already sensitized (the care giver) and sensitise the students towards realities of HRL.

Equally, involvement based efforts may unearth the ever fruitful nature of human service itself. Indeed, it is a soulful human art as well as commitment at display on all sides. The essential questions to be posed are:

(1) Why, how and when the care taker got associated with the field of social service?

(2) How and in what level they are part of the care home? (3) What is the source of funding?

(4) Why and how they selected the specific subject for human service? Is there any specific challenge in assisting male or female disabled person?

(5) What is the educational background? If professional degree holder of social work, how far and in what mode it helps the attitude to serve humans? (6) Is there any connection between family background and social service? (7) Does spirituality influence human service? (8) Are they inspired by the virtue service to mankind is service to god? (9) If spirituality is the reason for social service, what is the source and purpose of it? (10) What are the human qualities required to be a care taker? (11) By human nature, is the feelings of love, kindness, affection, compassion, sympathy and empathy are essential for care taking? If so, which is the most essential, and what is its definition? (12) If love and compassion are the catalyst to human service, whether it is found in heart or mind? (13) Are they married? Whether family

life and social service be balanced? How to prioritise? (14) What is unique about the case of the care taken? (15) How better the normal abled can understand them? (16) Is there any special education to be studied for taking care of their respective care taken? If so how to acquire that training? (17) How to call the care taken is it by the label differently abled or disabled itself, what is the rationality? and how it helps the case of the care taken? (18) What are the personal and professional challenges faced? (19) How as a care taker you visualise the normal humans and what is the responsibility of them towards the disabled? (20) What is the myth surrounding the specific care taken? (21) How to spread the awareness of humanity and human care to general public and students? (22) What is the relevance of law in their field of service? Do they find any challenges or situations of lack of legislation or enforcement? (23) What are the kinds of practical difficulties in the intersection between their field and law? (24) Do they require legal assistance? (25) Is social service an obsession? (26) How far the persons with special needs can be reintegrated with the human society? (27) Are the care givers training the civilians with their acquired social service knowledge towards human service? (28) Whether the expertise and experience gained by the social activists are recorded through print format? (29) How far nature rehabilitates the disabled? (30) Is science and technology useful for the rehabilitation process? (31) In case of relapse or failed therapy towards rehabilitation, how to reconcile human recovery process? (32) As per the social worker which field of knowledge is highly useful for human service? (33) Whether students of law, in the past, have visited the care home? (34) Is there any mentor and role model for the care taker? If

available, why they are inspirational? (35) What is your advice or suggestion for the human rights law teacher and taught? Are they willing to render a lecture for the students? All these questions must be asked and responses collected by allotting more time for the care takers to explain. Repetition and imposition of questions and hasty intervention between responses ought to be avoided. The role of the coordinator is to basically listen to the views and information rather arguing or interrogation type of listening. The responses acquired constitute the real knowledge about the vision and mission of human social responsibility. The coordinator post field visit must instruct the students to prepare the project report on the basis of the vital and useful knowledge about the care taken. The compiled report must be discussed and rehearsed for final presentation. Every presentation ought to be cooperatively handled between the coordinator and students team for appropriate and expert information to be generated and disseminated to the fellow students.

Section IV: The Law of Life

Realizing the True Ability of Disability-the Success of Love, Compassion and Care

Truly the value of a course work on human rights law can be personally experienced in terms of field trips to the centres of human care. As mentioned elsewhere, humans can in broad day light visualize the strength of human love, affection, compassion and care and its impact in transforming lives of the suffering humans. Astonishingly, the disabled become abled and to an extent serve the requirements of the abled. Certainly, it proves the truth that human beings are not poor in love and affection. Mutual

acceptance, caring and sharing are the way forward. The prime realization is to shower it beyond the family bond; towards the laws of nature bond of humans. As will be shown here, the five case studies involving different beneficiaries of human service proved one vital consensus among all the care takers it is: The service rendered gives immense satisfaction, mental peace, positivity and purposefulness in their human journey. Blessed are those who live in giving care to the special humans and feel the caring experience.

The seminal projects, lessons learnt, human emotions and rational explanations in (a) Mental Illness Care Homes; (b) Mental Retardation Care Homes; (c) Pediatric Cancer Hospitals; (d) HIV AIDS Infected/Affected Persons Shelter Homes; (e) Palliative Care Hospitals/Centres are as follows:

(a) Mental Illness Care Homes: The care takers in most instances are inspired by the unique challenges offered in the mission of caring the persons suffering from mental illness. Commonly, individuals due to various failures or pressures of life flee from their natives to distant parts to find themselves in isolation. The pre-occupying mental stress along with lack of adequate life support systems of food, clothing and shelter, they are left shattered. Even worse, exposure to bullying and harassment leads to loss of basic mental stability. Unfortunate, they are found in public roads soaked with dirt, unbelievable long hairs, nails, skeletal frame with nuts, bolts, several rounds of wire or chains, plastic bottles and other waste materials attached to their bodies. Hopelessness prevails in its full throttle. The human activists survey and locate them. Take to the nearest police station to acquire the memo of possession. Rehabilitation starts with hair cut

followed by housing with chains. It has to be mentioned that recovery is the most difficult task, as they can also harm the activist. As often, they suffer from extreme dehydration and mental conflicts. Medical and Psychiatric assistance are extended. The human relation based treatment starts with the care taker as the guardian. Continuous psychiatric and spiritual care is provided. The care takers ensure that the environment of the care home is clean, spacious, and more importantly, includes a well maintained garden worth for small farming. Besides, different kinds of birds are nested. The beneficiaries are allotted small supervisory roles among themselves. The routine task is to attend to their daily needs and cater to the needs of farming. The care takers lay emphasis on the proposition that a confused mind exposed to the clean and natural environment will definitely revive itself. After months, the beneficiary starts to communicate to the guardian about the real identity, problems and family details with the sense of gratitude. It is not miracle but human touch matters. At this juncture, the care taker with the advice of the psychiatrist works personally towards family reunion. In most cases, it is successful and relapse is avoided with the follow up medicines and the love and affection shown by the relatives. Mental illness is curable due to human care. At this juncture, it is also pertinent to note that the present superstitious practices of chaining the persons with mental illness to trees, beating them, in the name of cure using the evil and sinful black magic techniques have to be prohibited. All such evil therapies[9] will only create post-traumatic stress disorder and anguish.

[9]For a brief account of the ill implications of superstitious and ritualistic healing techniques on mental illness, refer, Magnus Mfoafo-M'Carthy&Jeff Grischow

(b) Mental Retardation Care Homes: The field visits to mental retardation homes teach us the seminal lesson of improving our reflexive senses with fellow human beings. The humans suffering from intellectual delay need to be understood through the language of heart rather than the gestures. The special children with the intellectual delay basically suffer from distractions in mental communications. They find it difficult to correlate the internal and external happenings. Although, they are by age matured ones, their intellectual quotient is far behind. As we are aware it is not due to the fault of God or self. It is due to several human intervention based deficiencies in the early or during pregnancy stages or related. Regrettably, the institutions are running short of either funding or experts on special education. In majority, the parents of the beneficiaries have volunteered and in the due course of time have made themselves able teachers and caregivers.

The homes catering the children with intellectual delay have common patterns of rehabilitation. The class rooms are constructed to have small rooms within. If any child becomes uncomfortable, then the teacher takes the child to the separate room. The peace and staying away from the group ensures the child recovers. The homes also have different surfaces such as sand, green and cement. So that the child realizes the difference in the surface and better understands the communication of their senses in movement. It is the found that the children with intellectual delay are fond of water. Hence, they are trained with kitchen work. This exercise is effective because the colour of the vegetables is taught and preparing biscuits or snacks also enables them to learn vocational courses. In many homes, the children

(2017), Mental illness, stigma and disability rights in Ghana, PP.84-100.

make candles and incense sticks. It is said that the problems of intellectual delay can be overcome by systematic training of exposing them to constant instructions and conversations. The care giver in the spastic society also gave awareness of grooming mentally retarded girl children. The duty of the parents is to be careful in trusting the attenders in giving care to their kids. The concerns of good and bad touch along with the dressing habit must be taught. It is also understood that the persons with mental retardation under constant supervision get married. The level of retardation decides the nature of relief. In general, the observations indicate that the human reflections and care shown by care givers are the most important abilities to rehabilitate the child with intellectual delay. If properly understood[10] by the so called normals, such special children may peacefully and progressively carry their lives.

(c) Pediatric Cancer Homes: Doing a field visit to homes taking care of children suffering from cancer is clearly an eye opener about the blessing called as life on the planet earth. The sight of the children with tonsured head and hands along with the caring mothers touches the deepest of emotions within us. The children although are tired and worn out due to the testing treatment of cancer remain jubilant to receive their visitors. It clearly proved that children are innocent, pure and an institution of joy. The pediatric cancer homes maintain a unique school within the premises. The walls of the class room are filled with posters painted by the children with the message of 'never give up' or 'the spirit to see life at its best'. Undoubtedly, the ambience makes us

[10]For a basic awareness and preparations towards rehabilitating the mentally retarded, consult, Mental Retardation: A Manual for Psychologists (1989), National Institute for the Mentally Handicapped: Secunderabad.

to reevaluate our so called pressure or compelling life style and understand the beauty of living itself. The medical and social knowledge of the care givers plays a vital role in protecting the life interest of the children affected with cancer. The charity or donations given by earlier cancer affected families and civilians are clearly visible and truly inspire us towards noble cause.[11]

(d) HIV Infected/Affected Persons Shelter Homes: The field visit to the HIV Infected (tested positive) and Affected (parents were positive but children are negative but ostracized by the human societies) is again a life changing learning experience about the sensitive work done by civil societies rendering human social service and work. The care giver and the founder of the home in his interview explicitly touched the major issue of 'myths of HIV'.[12] Surprisingly, the care giver revealed that he himself was under the misconception that HIV/AIDS may spread through saliva or using the same toilet. Only with the awareness created by the Governmental authorities, supervising and rendering medical assistance to such homes, the care givers have broken the myth. The civilians without any understanding of the infection of HIV (untested blood transfusion, unsterile needles, unhealthy intercourse, and biological from positive parents) isolate the humans infected with HIV. Also, the children who are HIV negative stigmatized on the grounds of their parents positive status and are seen as potential carriers of the disease. Needless to say,

[11]For a general understanding of attending and curing child cancer, refer, WHO Global Initiative for Childhood Cancer: An Overview, World Health Organization.

[12]To have a basic awareness about the conditions of HIV/AIDS Infected Persons and Human Rights Standards, generally, refer, Handbook on HIV and Human Rights for National Human Rights Institutions (2007), Joint United Nations Programme on HIV/AIDS and Office of the United Nations High Commissioner for Human Rights, United Nations Publications: Geneva.

that the concept of stigma[13] is a proven evil in the field of anti-discriminatory studies. As a matter of truth, the social or public boycott demonstrated by the so called normals over the artificially labelled abnormals constitutes a major challenge in the implementation of the international human rights law. Vitally, it is all about understanding the special humans on earth.

The care giver also explained the significance of giving awareness to children and youth infected with HIV (positive) which may lead to saving of lives. For instance, if the HIV Positive youth whilst studying in the college may enter into love affair, if not properly awakened can also innocently infect the fellow human being. Likewise, children infected playing in the ground suffering open cut injuries may prevent others from exposing them to such situations. The care giver also requested to create awareness about the HIV/AIDS myth to the student community for ending the discriminatory practices implemented against the HIV/AIDS infected and affected humans.

(e) Palliative Care Hospitals/Centres: Palliative Care Centres, without a doubt, are monumental institutions delivering highest degree of human concern, care, love, affection and medical treatment to humans suffering from life threatening illnesses. Palliative Care ensures that the extremity in bearing the pain, mental agony, trauma, sadness, loneliness, anxiety, frustration, depression and related abnormalities are eased to the patient although a recovery or complete cure is impossible. Palliative care is given through many modes such as medical, physical,

[13]For a precise understanding on the concept of 'stigma' in the context of the disability studies, refer, Mark P. Mostert (2016), Stigma as Barrier to the Implementation of the Convention on the Rights of Persons with Disabilities in Africa, African Disability Rights Year Book, Volume No.4, PP. 3-24.

psychological, sociological and spiritual. Palliative care and service is an essential human right.[14]

The interview with the care giver and the director of the Palliative Care hospital indeed made us to realize the value of treating and understanding the feelings and emotions of fellow human beings, in particular, when the dear ones suffer from extreme illness. The care giver gave certain illustrations; all of them were hyper sensitive and made us to come closer to the humanitarian service rendered by such institutions. In illustration (a) the patient was a tsunami survivor (lost all her family) and was infected with cancer. She had maggots in her body. After weeks of treatment in the hospital, one day she requested the care giver to cater her fish curry. As the centre was serving only vegetarian food, she conveyed her longing. Moreover, she wanted her to meet her dearest friend. Both the requests were honoured. She had the fish curry and also slept in the lap of her friend for some time. The next day morning, she did not wake up, when examined, she had died. The palliative care giver truly explained the need to understand the wishes, emotions and feelings of the patients facing imminent or eventual death. It was a moving memory and experience. Illustration (b) again was about a cancer patient with maggots. In this case, he was a rich merchant and once he got infected, his sons deserted him. Sadly, the sons did not admit him in the hospital it was only requested through telephone. The palliative care givers found the patient in a rice godown behind the sacks and later he was retrieved and admitted. This narrative made us to realize the tendency of the materialistic world to abandon the

[14] For an overview on the nature and spirit of palliative care services, refer, Planning and implementing palliative care services: a guide for programme managers (2016), World Health Organization: Switzerland.

parents in the evening of their lives. It is this juncture of aging that the parents who attended us in our childhood days and groomed us are to be taken care faithfully. All these instances profusely underlined to all of us the base knowledge of respect for human emotions and feelings. Students of the HRL course work must visualize, study and learn the human nature centric laws of ethics and morals.

Section V: Conclusion

Human Care Givers are the True Implementers of Human Rights

Humanly, the field visit undertaken with the undergraduate HRL course students to various centres of social service truly re-humanized and re-ignited the spirit to serve the humanity. The students having witnessed the extra ordinary human spirit of compassion from the care givers and the human suffering from the victims or fellow human beings admitted that earlier they were not aware about the realities of human life and law. After completing the field works, most of the students felt the need to make their personal lives more harmonious and adjusting to their dear ones in the family and in the society. This precisely was the mission and vision of the course coordinator of the HRL programme that is to enable the learners to visualize the sensitive dimensions of human nature and the impact of human care givers approach towards the implementation of the object of HRL. The finer elements of compassion, mercy, unconditional love and affection, and dignity for all were directly experienced by the student fraternity.

The other idea is that the subject HRL is placed in the final semester of the final years so as to ensure that they all understand

that all laws are for the welfare of human beings and life forms. A field visit to the homes run by civil societies on human rights facilitates the students to have a deeper insight about the realities of the subject matter of human rights. The observational knowledge facilitates the students to originally apply the art of convergence of the HRL with that of the laws of ethics and morals. In result, in their public life, all the law students live and serve as ambassadors of humanity. The field visits also proves that the visualization and realization of human service enhances the learning spirit of the students of the HRL. Of utmost significance, the students learn and instill in their heart and mind that there is no division of abled and disabled, we are all part of the human community on earth. It is the most benevolent duty of the humans to take and give care to those who are in a disadvantageous position and help them to progress in life. Learning HRL in the human nature and value perspectives ensure the development of an egalitarian, harmonious and peaceful human society on the planet earth.

It is high time that a paradigm shift is needed in teaching and learning human rights law. The positive law inspired legislations, administrative decisions and decisional law insights on human rights have made the right to life, dignity, equality, liberty and ideals of social justice, a test of legality. It is all about State accepted or approved doctrine of fundamental rights (although fundamental rights are off shoot of human rights). Now, it is more numerical provisions of law either it is the lawyers arguments or judges functioning, the interpretation of law commands more respect than that of the requirements of human beings and life forms. The present generation of students and legal experts

appreciate more legalism rather humanistic visions. Human Rights are stigmatized as human rights without any correlation to the biological or psychological concerns of the human beings. As reiterated throughout this research study, the teachers and students start explaining about human rights from the contemporary legal movement, social facts, violence and problems. There is a complete ignorance or omission about the construction of human rights from human nature, qualities from life to death. For every teacher and student, the first identity is that of the human. Firstly, the human in human has to understand the human rights law and then ancillary is the equation of the student of law in the human learns. Only the foundational knowledge of correlating human nature with human rights may deliver the necessary pathway to universal peace and prosperity. With all the above basic insights and field visit based understanding, this study is another attempt to create an awakening that it is time the human heart and mind and texts of law/ human rights law incorporate the values of mercy, compassion, unconditional love and affection, humility, patience and sharing

Origin of Law of the Sea – An Historical Perspective

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Abstract

Since the beginning of time, the sea has been the primary source of revenue. As a result, there have been several disagreements among nations over who has the right to control the sea. Only in the 20th century did the law of the sea evolve into what it is today. But, even before then, many rules existed all across the world to govern nations in the event of a conflict over the sea's resources.

Though the law of sea is believed to be one important aspects of international law, it is actually "the core of international law". This is owing to the fact that only the use of the sea by nations resulted in the creation of laws based on behavior based on norms other than their own. The ties that formed between the States through the use of seas have established various ideas, practices, and rules.

The author of this paper examines the system that was used in the development of legislation governing matters of Sea. The topic discusses several principles that have been used by important powers to claim sovereignty over the sea at various

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times. Prior to UNCLOS, the primary concepts in use were recognized and discussed. The author attempted to examine the history of law of sea from antiquity to the founding of UNCLOS.

Keywords : "UNCLOS", "ITLOS", Dispute Settlement Methods, "International Sea Bed Authority"

INTRODUCTION

As the importance of the sea grew, many nations began to use the resources that the sea had to offer. It also caused a lot of unrest and disagreements among nations. Because there was no formal rule governing it, customs were given precedence, and laws were enacted and enforced by the powerful nations at the time. Later on, each country in the world came to rely on the oceans for political and economic purposes. Their reliance on ocean operations such as fishing, navigation, mineral extraction such as tin, oil, and hydrocarbons, as well as marine scientific research, has grown. The convergence of their interests, as well as the overlap in their distribution, has resulted in a rapid expansion of maritime claims, which has aided in the international system's increased regulation. Various theorists, such as Hugo Grotius and John Selden, formulated many concepts and phenomena, such as Mare Liberum and Mare Claussum, respectively, to counteract this. But, even before then, there were numerous rules in place in various regions of the world to facilitate an amicable settlement between nations who were at odds over the allocation of sea resources in accordance with the rule of sovereignty.

EARLIER CODES

Despite the fact that various legal codes existed before the actual codification of maritime law, the Byzantine Lex Rhodia is regarded as significant. The first law concerning the sea was legislated by Rhodians, who promoted the concept of marine jurisprudence, which was highly followed and deferred by the Romans and was considered as a Guide for their conduct in the sea and activities related to it, according to Park's words in the introduction to his work on Marine Insurance.[3]

Efforts have been made to codify maritime law throughout Europe in order to simplify trade and navigation. 'Rolls of Oleron' and 'Laws of Wisby' were two notable codes. The 'Rolls of Oleron' were the decisions of the maritime courts of Oleron that were codified and widely accepted in many parts of the world, particularly England, where there were no provisions for the same under Common Law[4] , The 'Rules of Wisby,' which were derived from 'Lex Rhodia,' were maritime laws in use on the island of Gothland in the late 14th century or early 15th century. The 'Laws of Wisby' could potentially be based on the 'Rolls of Oleron,[5]' which were adopted among the mercantile City-States of the 'Hanseatic League,' a covenant founded as a result of merchants'

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[3] Robert D.Bennedict "The Historical Position of the Rhodian Law", *The Yale Law Journal* Vol. 18, No. 4 (Feb., 1909), pp. 223

[4] Timothy J.Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England", The American Journey of Legal History, Vol. 19, No. 2 (Apr., 1975), Oxford University Press, pp.96

[5] John Ramsay Mc Culloch, A Dictionary, Practical, Theoretical, and Historical, of Commerce and Commercial Navigation Illustrated with Maps and Plans, Volume 1, Longman, Orme, Brown Green and Longmans, 1839, pp 789

collaboration and uniting to promote and facilitate their commerce in other regions[6].

Until the middle of the twentieth century, maritime law was mostly centred on Europe. This is due to the fact that European countries had a competitive advantage in terms of maritime technology and power[7]. Nature granted them this power because they were situated. between multiple navigation routes, including seas and rivers, making them more significant in trade and ocean traffic.

The 'Papal Bull' of Alexander VI, which in turn gave effect to the 'Treaty of Tordesillas' in 1494, ended the dispute between states over the use of the sea's riches. This treaty served to divide the entire world between two powers, namely, Portugal and Spain, in order to allow for the spread of territory across the seas without interfering with the possessions of others, so avoiding a dispute between the two countries.

King Ferdinand II of Aragon, Queen Isabella 1 of Castile, and King John II of Portugal signed the Treaty of Tordesillas. New demarcation lines were drawn between the two crowns that spanned 370 leagues west of Cape Verde Islands. Following various diplomatic negotiations between the embassies of both Kingdoms, the Treaty was finally signed. Brazil was formed as a result of a demarcation line that divided the entire world between

[6] The Hanseatic story. 400 years of exciting past https://www.hanse.org/en/hanse-historic/the-history-of-the-hanseatic-league / last visited on 05.04.2021
[7] Rothwell, Donald and Tim Stephens,The International Law of the Sea , Hart Publishing, 2016

Portugal and Spain, with the eastern end of the line falling under Portuguese control[8].

Hugo Grotius, a Dutch jurist and philosopher, wrote Mare Liberum (or the Freedom of the Seas), a Latin book on international law, which is regarded the primary source of sea freedom. It was published in 1609, amid increased rivalry among nations over trade on sea resources. Mare Liberum argued that the seas are unrestricted by anybody or any power, and that they are open to everybody, particularly in concerns of navigation and fishing[9].

In the year 1631, an English jurist named John Selden published Mare Clausum, which backed the notion that the country might exercise authority over the waters next to the coastline. John Selden's argument later set the path for the adoption of Territorial Waters, which has since become a hot topic in modern maritime law.[10]

When more nations realised the importance of the sea, they began to claim rights over it, which led to further wars over the open sea. As a result, many coastal states changed their minds and expanded their authority from the shore to the sea. The principle that marine lordship can be extended to the distance that can be

[8] Treaty of Tordesillas: United Nations Educational, Scientific and Cultural Organization http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-8/treaty-of-tordesillas/ last visited on 05.04.2021

[9] Davor Vidas, 2011 The Anthropocene and the international law of the sea *Phil. Trans. R. Soc. A.***369**909– pg 912 https://royalsocietypublishing.org/doi/full/10.1098/rsta.2010.0326 last visited on 06.04.2021

[10] "mare clausum" oxford reference https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100133533 /last visited on 12.04.2021

adequately secured by guns encouraged this even more. Cornelius Bynkershoek, a Dutch legal theorist, proposed the "Cannon Shot Rule" in his book "De-Dominio Maris" (1702). This rule differed from the belief that property rights could only be obtained by actual occupation. This was seen as a neutral position in comparison to Grotius' and Selden's Mare Liberum and Mare Clausum, which included both the rights of States to acquire resources from the High Seas and the rights of Coastal States to wide-ranging freedom in a limited territorial Sea[11]. After then, at the request of a military expert at the time, the distance was set at 3 nautical miles from the shore. Until the 19th century, the states all agreed on this distance.

Many governments were willing to advance their desire to expand their maritime jurisdiction over time, beginning in the early twentieth century, in order to have effective control over pollution, safeguard fish stocks, and harness natural resources present in the sea. The "League of Nations" convened a summit at 'The Hague' in 1930 to enhance these nations' interests, but no agreements were reached.

Thanks to scientific breakthroughs in fisheries and oil resources, the countries were able to identify and exploit resources for their development. In 1945, US President Harry S. Truman issued a proclamation expanding American jurisdiction over all natural resources on the continental shelf. "Where the continental shelf extends to the borders of other states or is shared with any other neighbouring State," the proclamation said, "the United

[11] Michael Widener, Freedom of the Seas, Part 8 , Lillian Goldman Law Library published on October 23, 2009 https://library.law.yale.edu/news/freedom-seas-part-8 last visited on 19.04.2021

States shall establish the boundary by the concerned State according to equitable principles."[12]

The oceans were utilized not just for fishing and navigation, but also for operations such as mineral mining, diamond exploration, and oil exploration, among others. Some countries had big fishing vessels that could travel parts of the oceans far from their coasts, and they were also capable of remaining away from land for months at a time in the hopes of catching more fish. Many types of fish stocks began to show signs of depletion as a result of these actions. Many nations used their enormous fishing vessels to target zones where fishing supplies were abundant, with no limits from any authority, because the coastal governments had no jurisdiction to regulate their activities, leading to exploitation because no limit had been set at the time. Despite the fact that it was regulated by the coastal states, the fishing states fought over the resources due to a legal void.

UNCLOS 1

Following repeated requests from nations to establish a uniform rule to regulate the conduct of Ocean affairs, the 'United Nations International Law Commission' was formed after World War II to codify the laws governing the sea and activities related to it. The Commission began preliminary work on codification in 1949, resulting in four draft conventions, namely the Geneva Conventions of 1958[13]. These conventions were later accepted at

[12] Truman Proclamation On The Continental Shelf , International Environmental Agreements (IEA) Database Project https://iea.uoregon.edu/treaty-text/3961 / last visited on 06.04.2021

[13] Http://Www.Continentalshelf.Org/About/1143.Aspx Last Visited On 29.04.2021

the "First United Nations Conference on Law of the Sea" (UNCLOS 1) in Geneva, Switzerland in 1958, which produced four treaties:

- "Convention on the Territorial Sea and Contiguous Zone", from the effect on: 10 September 1964
- "Convention on the Continental Shelf", from the effect on 10 June 1964
- "Convention on the High Seas", from the effect on: 30 September 1962
- "Convention on Fishing and Conservation of Living Resources of the High Seas", from the effect on: 20 March 1966
- "Optional Protocol of Signature concerning the Compulsory Settlement of Disputes' (OPSD)"[14]

Though the Geneva Conventions and Protocol were deemed the result of the First Conference on the Law of the Sea of the United Nations, the work actually began before the Geneva Conventions of 1958. These agreements and Protocols were the outcome of a long process that began with the Hague Conference in 1930, which was organized to codify international law under the leadership of the League of Nations.

The Territorial Waters were the main topic of discussion at this summit. Despite the lack of a concluding statement based on the "breadth of the territorial sea," a draft of 13 items was reported

[14] Tullio Treves Judge Of The International Tribunal For The Law Of The Sea, 1958 Geneva Conventions On The Law Of The Sea Https://Legal.Un.Org/Avl/Pdf/Ha/Gclos/Gclos_E.Pdf Last Visited On 02.02.2022

in order to establish a consensus platform on many elements of the subject. The draft's authors believe that these draft paragraphs should serve as a model for future work on the territorial sea. The "International Law Commission," working within the framework of the "United Nations," has stated that an orderly system is critical for matters concerning the "territorial Sea" and the "High Seas," and that now is the time to lead the road toward codification. The United Nations General Assembly and the International Law Commission debated different drafts on various issues of the Sea until 1956.

The final report was presented to the "United Nations General Assembly" in 1956, and it contained all of the essential laws relating to various parts of the Law of the Sea in a methodical manner. This final report served as the foundation for the Geneva Conference's work in 1958.[15]

Despite the fact that the "First United Nations Convention on the Law of the Sea" was deemed a success, no resolution to the major issue of the "breadth of territorial seas" has been reached.

UNCLOS II

Because the critical problem of 'width of territorial sea' was left unresolved in the first UNCLOS, the United Nations General Assembly requested that a "Second United Nations Convention on the Law of the Sea" be convened, with the primary themes of the

[15] 1958 Geneva Conventions on the Law of the Sea, Historic Archives, Audio Visual Library of International Law https://legal.un.org/avl/ha/gclos/gclos.html last visited on 5.02.2022

breadth of territorial sea and fisheries limitations. The "Second United Nations Convention on the Law of the Sea" was convened in Geneva in 1960 to address the aforementioned challenges. Even during this Conference, the territorial sea's breadth and fishing limits were pushed back.[16] The conference's Final Act did not produce any new agreements, although it did pass two resolutions.

The second UNCLOS concluded that, regardless of the conference's outcome, the conference records are more valuable for interpreting the work that has been done. This was backed up by a statement made by the Secretary-representative General's at the 2nd plenary session, who expressed concern about the possibility of publishing the text of the statements made at the conference in their original form and also recommended that the UN General Assembly approve the necessary budget appropriations for the publication of the record of statements and discussions made at the conference.

When discussing the issue of fishery limitations, the UNCLOS II recognized that a change in international fishing law could be detrimental to many governments. Many coastal states were concerned that the move would impact their economic development since they lacked contemporary equipment, advanced technology, and investments to boost their fishing business. Increased assistance from other rich countries was also suggested as a way to help them survive the transformation. The support provided by the United Nations and other specialized agencies was highlighted.

[16] Codification Division Publication, Office of Legal Affairs, United Nations https://legal.un.org/diplomaticconferences/1960_los/ last visited on 29.03.2021

The UN and specialized organizations such as the Food and Agricultural Organization, as well as the Technical Assistant Board, were asked to provide help to any member based on their requests for new advances and a full review of material aid programmes. It further stated that the UN General Assembly must receive a report from the UN Economic and Social Council on the resolution's implementation.[17]

UNCLOS III

Mr. Arvid Pardo of Malta raised the question of claim over the territorial sea and the resources under the seabed for its peaceful reservation in the United Nations General Assembly in 1967, when the key problem of fishing limits and territorial sea was still unclear. It was he who spoke about the concept of "common legacy of mankind," which implies that certain locations can be free of ownership, open for use and benefit to all, and with room for future generations to meet the needs of all countries. This approach included the concept of sustainable development in a roundabout way. Indeed, it was this incident that paved the way for UNCLOS III and subsequent modifications, earning him the title of "Father of the Law of the Sea."[18]

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[17] Final Act of the Second United Nations Conference on the Law of the Sea Extract from the Official Records of the Second United Nations Conference on the Law of the Sea (Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act) https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_conf19_l15.pdf dated 21.09.2021

[18] Prue Taylor, The Wealth of the Commons, The Common Heritage of Mankind: A B d Doctrine Kept Within Strict Boundaries | The Wealth of the Commons, http://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundariesol

Following that, an AdHoc Committee was formed to investigate "the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction." In 1968, the General Assembly evaluated the Adhoc Committee's findings and resolved to establish a "Committee on the Peaceful Uses of the Sea - Bed and Ocean Floor outside National Jurisdiction." In 1973, this Committee served as a preparatory committee for the 'Third United Nations Conference on Law of the Sea.'[19]

The United Nations General Assembly urged that the Secretary-General invite the States to reaffirm their participation in UNCLOS III after reviewing the Committee's extensive report. It was also decided that the Conference's major aim would be to draft a Convention with a broad scope that would include rules covering all aspects of law of sea.[20].

New York hosted the "Third United Nations Conference on the Law of the Sea" in 1973. Rather of using the concept of a majority vote, the conference chose a consensus approach to negotiators to eliminate the influence of groups of States. Governments organise ad hoc political groups or political parties in order to acknowledge their shared interests with other states and maximize their potential for influence by cooperating.[21] The Conference went until 1982, and the convention that resulted did not take effect until 1994.

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[19] Official Records of the Third United Nations Conference on the Law of the Sea, vol. V, A/CONF.62/SR.69 https://legal.un.org/avl/pdf/ha/uncls/uncls_ph_e.pdf last visited on 25.11.2021

[20] Diplomatic Conferences, Codification Division, United Nations, https://legal.un.org/diplomaticconferences/1973_los/ last visited on 28.12.2021

[21] Philip Allott ,"Power sharing in the Law of the Sea", The Americal Journal of International Law, Vol 77, 1983 pg 6

Various provisions with a broad scope over the affairs of the sea were included in the Convention, including setting of limits, navigational guidelines, state archipelagic status, transit regimes, rights over the Exclusive Economic Zone, Continental Shelf, Contiguous Zone, deep seabed mining, overall marine environment protection, and scientific research. Aside from these measures, the Convention also incorporated language for a peaceful resolution of conflicts in the event of national interest collusion.

The Convention established a jurisdictional limit for zones that were far from the state's coast line, such as the 'Internal Waters of the State,' 'Territorial Waters,' 'Archipelagic Water,' 'Contiguous Zone,' 'Continental Shelf,' and 'Exclusive Economic Zone.'

Aside from the requirements, the Convention established a significant legal framework, the "International Sea Bed Authority," to ensure effective control over activities based on mineral resource extraction in deep seabed areas outside national jurisdiction. The International Sea Bed Authority, formed under convention, will conduct activities in the area for the benefit of humanity as a whole. The Authority is responsible for ensuring that such benefits are distributed fairly.[22]

The agreement relating to the implementation of UNCLOS Part XI, 1982 was adopted by the 'United Nations General Assembly' in 1994. The Convention and the Agreement are to be

[22] The Law Of The Sea, International Law, Malcolm N.Shaw, 7th Edn, Cambridge University Press, 2016, Pg 456

construed and applied as a single instrument. The agreement modifies certain aspects of Part XI to address objections raised by the United States and other countries, who were concerned that the inclusion of the concept of "Common Heritage of Mankind" would interfere with their ability to acquire wealth through resource exploration in that area.[23]

Recognition and Enforcement of UNCLOS

The goal of adopting a Convention will be defeated unless provisions for its recognition and enforcement are included. Parts XI and XII of the UNCLOS established procedures for recognizing and enforcing UNCLOS provisions that served the Convention's objectives.

Part XI of the UNCLOS "recognized the need to establish a norm relating to the affairs of the seas that will assist in the proper usage of the resources available in the sea with a high degree of care for the research and protection of the marine environment in a healthy manner."[24]

The United Nations Convention on the Law of the Sea (UNCLOS) Part XII "stressed the role and obligation of States in maintaining the marine environment and therefore saving the resources from extinction."[25]

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[23] The Regime Of The High Seas, Law Of The Sea, 'I Am Brownlie' , Principles Of International Law, 7th Edn, Oxford University Press, 2008, Pg 243-245

[24] UNCLOS And Agreement On Part XI - Preamble And Frame Index, United Nations Https://Www.Un.Org/Depts/Los/Convention_Agreements/Texts/Unclos/Closindx.Htm Last Visited On 22.01.2021

[25] Preamble To The United Nations Convention On The Law Of The Sea, United Nations Https://Www.Un.Org/Depts/Los/Convention_Agreements/Texts/Unclos/Part12.

Part XV of the Convention is devoted solely to dispute resolution methods. States Parties are required by Article 279 to settle disputes by peaceful methods.[26]

The success of the Law of Sea Convention may be observed in how the systems for resolving disputes were set up. Part XV contains rules for the resolution of disputes, with mechanisms grouped into two categories based on their binding implications and other procedural accompaniments, namely non-compulsory procedures under Section 1 and compulsory settlement procedures under Section 2.

They are very well discussed in Sections 1 and 2 of Part XV of the Law of Sea Convention.

Primarily, Section 1 of Part XV deals with the non-compulsory procedures i.e., 1) the Negotiation, 2) the Mediation, and 3) the Conciliation.

Negotiation

Negotiation is considered as one of the flexible means of peaceful settlement of any bilateral or multilateral disputes in several aspects, including political, legal, or technical. In this process, the chances of avoiding the increase of intensity of the dispute are very much possible. The rate of success depends on the trust placed by the negotiating parties on one another.[27]

Htm Last Visited On 22.01.2021

[26] Dr.S.K.Kapoor, "International Law & Human Rights" Pg 301, Central Law Agency, 18th Edn,2011

[27] Abdualla Mohamed Hamza, Peaceful settlement of Disputes, Global Journal of Commerce and Management Perspective https://www.longdom.org/articles/peaceful-settlement-of-disputes.pdf last visited on 21.01.2022

Mediation

Mediation is a process that appears more friendly to the parties as the rules can be made flexible according to their terms of approval and a third party facilitates the parties to arrive at a settlement, by negotiating the terms and conditions towards the dispute**. The decisions can always be influenced by the parties by having control over the proposition towards settlements and provisions of any agreement**[28] Under Article 33, the convention provides the parties an opportunity to peacefully settle their disputes, when the chances of threat or danger towards international peace and security are apprehended.[29]

Conciliation

In a Conciliation proceeding, a third party is involved, whom the parties to the dispute delegate decision-making authority to, and whose decision is binding on the parties. Naturally, neither party will take the risk of losing the dispute if there is a chance of losing it. The parties to the dispute will select arbitration over conciliation since there is a chance to overturn the award on reasonable grounds, which is not possible with the latter[30]. When all of the techniques in Sec 1 of Part XV fail, Sec 2 of Part XV, which deals with compulsory settlement procedures, comes to our rescue.

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[28] Mediation - ICC - International Chamber of Commerce, https://iccwbo.org/dispute-resolution-services/mediation/

[29] https://www.mediate.com/articles/Sukhtankar-Kakani-peacekeeping.cfm

[30] Md. Monjur Hasan, He Jian, Md. Wahidul Alam & K M Azam Chowdhury (2019) Protracted maritime boundary disputes and maritime laws, Journal of International Maritime Safety, Environmental Affairs, and Shipping, 2:2, 89-96, DOI: 10.1080/25725084.2018.1564184

Article 287 of UNCLOS offers 4 dispute settlement mechanisms. As per Article 287(1), "when signing, ratifying, or acceding to UNCLOS, a state may make a declaration choosing one or more of settling such disputes as per the following means

a) "The International Tribunal for the Law of the Sea" ITLOS established in accordance with Annex VI
b) "The International Court of Justice"
c) "An Arbitral Tribunal" constituted in accordance with Annex VII
d) "A Special Arbitral Tribunal" constituted in accordance with Annex VIII".[31]

Since 1994, when the "United Nations Convention on the Law of the Sea," 1982 came into force[32], the Permanent Court of Arbitration has been registered with roughly 14 issues for arbitration under Annex VII. So far, the International Court of Justice has decided 13 cases before 1994, and 9 cases after 1994, i.e., even after the establishment of a separate tribunal dedicated solely to considering issues involving the Law of the Sea[33]. A total of 29 cases have been filed with the "International Tribunal for the Law of the Sea," with the nature of the disputes ranging from marine delimitation to arrest and detention of personnel and boats, timely release, an environmental obligation, and fisheries. A

[31] Preamble To The United Nations Convention On The Law Of The Sea, United Nations https://www.un.org/depts/los/convention_agreements/texts/unclos/part15.htm last visited on 23.11.2021
[32] Cases, Permanent Court of Arbitration, https://pca-cpa.org/cases/ last visited on 20.11.2021
[33] Cases, International Court of Justice, https://www.icj-cij.org/en/list-of-all-cases last visited on 20.10.2021

number of cases have also been presented for an advisory opinion.[34]

The ITLOS has special chambers in addition to the main tribunal for hearing cases about the law of the sea, such as the "Chamber of Summary Procedure, Chamber for Fisheries Disputes, Chamber for Marine Environment Disputes, Chamber for Maritime Delimitation Disputes, and Chambers under Article 15, paragraph 2 of the Statute, which provides a special provision and facilitates the Tribunal to set up a separate chamber to decide a specific dispute if the request was raised from a third party."[35]

Conclusion

The Law of the Sea Convention is sometimes referred to as the "Constitution of the Sea."[36] Among numerous conventions that have dealt with disputes over diverse topics, this is the only one that addressed affairs of sea, despite having some limitations on its applicability. When a state is not a party to the convention, it has no responsibility to follow its decisions and, on the other hand, these states will be deprived of the convention's benefits. Signatories to the Convention are free to enjoy the benefits of the convention while also being bound by its rulings.

The law of the sea has always been essential because it has served as a guide for nations' behaviour at sea since the dawn of time. The laws were constantly changing due to political influence

[34] https://www.itlos.org/en/main/cases/citations/ last visited on 22.11.2021
[35] Official website of ITLOS, https://www.itlos.org/en/main/the-tribunal/chambers/ last visited on 22.11.2021
[36] A constitution for the seas " World Ocean Review https://worldoceanreview.com/en/wor-1/law-of-the-sea/a-constitution-for-the-seas/ last visited on 19.11.2021

and the introduction of sophisticated technologies. Despite the fact that the rules were amended as a result of these causes, the international community recognized the norms because they aided in the maintenance of peaceful ties with other countries. States that had resisted at an earlier point were forced to comply owing to political pressure since they had no other option. Though influential nations mastered the law of sea in the beginning, the consensus of the States were given greater weight later on, rather than opening the way for influential nations to rule. Finally, the UNCLOS provided a general framework for activities related to the sea, albeit some elements were left as a skeletal work for the States to build according to necessity and justice principle.

NEW CHALLENGES IN APPLICATION OF WOMEN PROTECTION LAWS

M. Karthikeyan[1]

Abstract

Cruelty is a social evil wherein there is an infliction of physical or mental distress to a fellow being. The plight of a woman is worse when such cruelty is committed against her in her matrimonial home. The misery faced by her is unending. Various Laws were enacted to protect women from such unnecessary suffering and aimed at her emancipation. Some enactments like protection of women from Domestic Violence Act 2005, Dowry Prohibition Act 1961, Section 498A in IPC are few instances in this regard. It is anguishing that some unscrupulous women misuses these legal safeguards flagrantly for unleashing their personal vendetta. Laws that were enacted for her welfare now become counterproductive. In this background this study tries to identify the reasons for the misuse of law by women, suggestions for curbing it and role played by courts in response to women turning law other way round.

(**Keywords:** Legal Terrorism, misuse of law, Cruelty, matrimonial home, husband and in-laws, Institution of marriage, False allegations)

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Introduction:

Marriage is a social union between a man and woman creating a mental and physical relationship between them. It is a social institution. To some class of people it is sacred one and to others it is a contract. It is the foundation upon which two individuals and their family establish a relationship. The institution helps a person to bring a progeny to his family. It is said that the main object behind the institution of marriage is procreation but besides that it makes a person to have emotional attachment with someone and care for them. A man is civilized by entering in to relationship with others through marriage. People follow their customary practices in marriages. In olden days people believe marriages are fixed by their God and Godess in the heaven. But in reality the marriages are fixed by two family members with the consent of couples. Today man and woman fell in love with each other and get married without the consent of their parents and live independently on their own. In arranged marriages, in case if any problems arises between couples, it is resolved by their parents and elders on a fruitful conversation. If that is not possible, some times the disputes are referred to Court and settled there. Whereas in love marriages the couples are left alone and they themselves have to settle their problems on their own on mutual understanding, failing to arrive a solution the may seek legal remedies before court.

The problems in institution of marriage is due to various factors like misunderstanding between the couples, cruel and inhumane treatment by family members. Usually the victim of these problems are woman. In India Laws were enacted for the

protection of married woman and the courts usually take stand which is in favour of protecting her interest. some of the Laws enacted to protect the married women are as follows - Protection of women from Domestic Violence Act, 2005, Dowry Prohibition Act 1961, Section 498A of IPC, Hindu Marriage Act 1955, Dissolution of Muslim Marriages Act 1939, Indian Divorce Act 1869, Special Marriage Act 1954.

A married woman has all the rights to live with her husband peacefully with dignity and in the same life style as of her husband and his family. If it collapses there will be a break-down in married life. Some of the issues for break-down of marriages are - Cruel treatment and torture, Immoral contacts of husband after marriage, Immoral contracts of wife before marriage made known later, Love affairs and relationship with another man after marriage, Unlawful demand by husband and in-laws from wife's parents and brothers., Psychological factors like frustration out of emotional speech and exchange of filthy words in anger and emotion.

In all these cases approacing Court is the ultimate remedy. In India the majority of Law are in favour of women[2]. Most of the matrimonial cases are filed by wives with false allegations against their husband and in-laws intentionally with a vindictive motive and to vitimize them by sending them to jail and make husband to pay huge money to them on unreasonable grounds in the guise of compensation.

[2] Prof Ajay Kumar, "Institution of Marriage-Judicial Approach". All India Reporter, Jan.(2010)

In matrimonial issues, the cruelty not only happens to female but also to males[3]. If any kind of cruelty is shown against women it is viewed seriously by courts but on the other hand if the same happens to a male, it is neither viewed seriously nor considered as an offence against men in the eyes of law.

Legal Terrorism by Misuse of Law:

The Laws enacted to protect women in matrimonial issues now becomes a tool and weapon in the hands of aggrieved and frustrated women to vitimize their husband out of vengence. The existing Laws favouring only women are vulnerable and harmful to innocent men. In most cases the innocent husbands are falsely implicated and sentenced[4]. The prevailing laws are to curb the harrashment and exploitation of women by their counterparts. The good intention of Law makers is forgottten by women and they use laws just to satisfy their ego. The women humiliate men by giving false allegations chargeable under Sec.498A, 376 of IPC and Sec.125 of Cr.PC. This lead men to worst consequeces that end up in getting them to commit suicide. On receipt of a compliant with false allegations by women, the Police without properly enquiring the real facts and issues and the truthfulness, they simply register a FIR and arrest the innocent husband. The consequence is, the Husband loose his respect and reputation in the society, loose his employment and further their family members are also implicated in the case. It is all because of the women taking revenge by traping most relatives and put them

[3] P.K. Das, Law relating to cruelty to husband, (2008).p.1

[4] Kiran Singh, "Protection of 'Innocent Victims' of Matrimonial" Cri..LJ. Vol.116, September, p.243, (2012)

behind jail. Some times aged Parents and young sisters are also remanded for no reason except for the reason they being their blood relations. The gender biased laws like Sec.498A is misused by women by using it as a weapon against men. The Laws frequently misused by women are Sec.375, 376, 498A, Domestic Violence Act and Dowry Prohibition Act. These laws are misused for harrasing men and blackmailing them. Women by filing false compliant under these sections bargain money to withdraw their compliant in the Police Station thereby extract a huge amount from their husband and in-laws and settle into a new life.

Now the mentality of women has further more changed, the become violent upto the level of killing their husband and some times their family members with the help of Gangsters and through the persons to whom they are having immoral – illegal relationship mostly for want of money and aquire properties. This is very well evident from news papers and television news. Hence the Legislators and Honb'le Supreme court have to look into these matters and appropriate action should be taken to amend laws before situation becomes further worsened.

Why Women Use Law as Weapon:

Some women misuse law to take revenge on members of her matrimonial home with whom she get a bitter experience. Educated women generally cannot tolerate any domination, if they feel their wishes are not fulfilled they enter into fight with her husband and in laws and get them convinced and subjugated and make them to act as per her wish. She makes her husband a puppet for satisfaction of all her desires. Several cases filed by women by exaggerating the facts to implicate the in laws and to give pressure

on them to come to compromise and settle the matter as per her wish. When Husband or in laws finds wrong with her conduct like having a illicit relationship with some other man and when she is advised to refrain from such conduct, she gives a compliant against them stating false allegations like she was harassed by her husband and in laws and they were demanding dowry from her parents. Today frequently we can come across in newspaper some incidents like women hides her previous marriage and again marries another person for money and after getting all the money on one fine night she escapes from the newly married husband. Sometimes these women don't hesitate to kill their husband if his survival is hurdle towards achieving their unlawful ends. If husband files a complaint against the women for her acts like cheating and theft, she in return files a counter complaint against the husband accusing him of demand of Dowry and cruelty. The popular stage, when the false compliant is filed by wife against her husband is - the husband files a petition seeking for the relief of Restitution of conjugal rights, then the wife files a case against husband for Harassment. Thus the growing trend of filing of flase cases by wife against their husbands creates a feeling of insecurity in minds of men to enter into the social institution of marriage.

Remedies for Men from Legal Terrorism:

The Supreme Court of India has noticed and observed the recent misuse of Women Protection Acts and in particular false allegation under Section 498A of IPC implicating husband and in-laws, the consequences faced by them and the irreparable loss.

The Supreme Court of India has issued an Order recently on the above issue and certain guidelines. It reads as -

"Every complaint under Section 498A received by the police or the Magistrate be referred to and looked into by such committee. Such a committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication. Report of such committee is given to the Authority by whom the complaint is referred to it the latest within one month from the date of receipt of the complaint. The committee may give its brief report about the factual aspects and its opinion on the matter. Till report of the committee is received, no arrest should normally be effected. The report may be then considered by the Investigating Officer or the Magistrate on its own merit."

The guidelines issued by the Honb'le Supreme Court to the Law enforcement authorities for dealing with 498A are as follows:

- In every district, 1 or more Family Welfare Committees must be established by the District Legal Services Authorities to deal with cases filed under Section 498A.
- All complaints under Section 498A IPC received by the police or Magistrate must be sent to the committee.
- The committee must look into the matter and send a report on it within 30 days to the authority that referred the complaint.
- No arrest must be made until a report is sent by the committee.
- If an anticipatory bail for 498A is filled with one day's notice, it must be decided within that time frame only.

- Personal appearance of all family members may not be required in court and appearance by video conferencing must be allowed for outstation family members.

Besides the directions of Hon. Supreme Court of India, other precautionary measures to be taken by the innocent men victim to protect themselves against section 498 A are as follows:

1. Confidentially collect evidence against wife and her relatives recording conversations, any letters and electronic evidences if any.
2. Collects evidences to eradicate if any compliant is given on Dowry demand.
3. Collect and keep on record for your wife having left the matrimonial home with Jewells if any.
4. Subsequently move for Anticipatory Bail in the appropriate Court for you and your family members suspected to be implicated in the false case.
5. Do the needful to get the FIR under Sec.498A be get quashed.
6. File a compliant against your wife for threatening to file false case.
7. File a case under Sec. 9 of Hindu Marriage Act for restitution of conjugal rights.

Judicial Response to Misuse of Legal Protection by Women

The instances of false compliant by women against their husbands are numerous. There is a tendency of belief in indian courts that women are always the victims of crimes committed by men. This belief is basically a fallacy. Courts have to very vigilant

while handling matrimonial cases so that no unnecessary prejudice is caused to husband. If at the later stage of the case ,after trial and proper appreciation of evidence, it is found that no fault on the side of husband the trauma that might have been faced by him till that stage cannot be expressed in words. The reputation of husband and his family is badly damaged. Even when husbands come forward to give complaint on the wife when they are the victims of crimes like cruelty, cheating, defamation courts are treating those cases very lightly and when the same complaint is given by husband the courts deal it with iron hands.

When courts are hearing about the quantum of maintenance, Courts usually take stand in favour of women as courts thinks women are financially weak despite the proof that she earns sufficiently for maintaining herself. Even when husband manages to get the case registered against wife, since charge is against the women and women are generally considered as weaker and innocent. To negate this presumption he has to take more pains to prove his side So its high time that atitude of courts has to shift from the view of having undue concern over women to the view where the people from either gender can be victim.Women can also indulge in criminal act and men can also be victimized by women.

But it is not at all times judiciary is closing their eyes in situations of injustice caused by women to their husbands. There are also few cases where courts have expressed their concern over the situations where women victimizing their husbands with false allegations against them. In Sushil Kumar vs. Union of India[5], the

[5] AIR 2005 SC 3100

Hon'ble supreme court held that the main aim of parliament in passsing Dowry prohibition Act is to prevent the menace of Dowry in our society. After hearing submissions made before it, it observed that many dowry cases are found to be false after trying the case based on false complaint of wives They file these case with mala fide intention for unleashing their personal vendetta over her husband or to get unreasonable monetary benefits.

Similarly the Hon'ble supreme court in Malavi Hussain Haji Abraham umarji Vs. State of Gujarat[6] expressed its helplessness in avoiding interpreting laws in favour of women. It stated that it is the duty of the parliament to enact laws which is gender neutral. The courts can only interpret laws enacted by parliament. So, the parliament has reconsider its atitude towards enacting laws which are in favour of women.

The Delhi High court in Savitri Devi vs. Ramesh Chand[7] had the opportunity of suggesting some measures in matrimonial disputes in order to avoid men being victimized in case of any allegations made against them by their wives,

- The matrmonial offences should be made as a bailable offenes
- Such offences should be made as compoundable by parties
- Investigation of matrimonial cases must be made by civil authorities.

The court has further directed the law makers to consider the prevailing situation of women in the society and enact laws that meet the needs of the society.

[6] AIR 2004 SC 1334
[7] 2003, Cri..LJ 2759 (Delhi)

In Sushil Kumar Sharma vs. Union of India[8], Hon'ble Supreme court has insisted subordiante courts not to approach matrimonial cases with some pre -concived idea. It also advised that courts should not adopt any straitjacket formula in matrimonial cases.

The Hon'ble supreme court of india Preeti Gupta vs. State of Jharkhand [9] expressed its concern about hasty approach in registering of case against husbands under s.498A Complaints under this section is filed against husband even for a minor misunderstanding. The court also advised the law enforcing agency and lawyers to approach the case under this section on humanitarian approach and they must leave no stones unturned to the effect of achieving amicable settlement between husband and wife. It also insisted that complaint made long after the alleged occurrence must be approached with great care since even aquittal at the later stage of the case will not get back the reputation that husband has lost in the society. Therefore its time that parliament must make laws consistent with the prevailing situation in the society.

Findings of the Study

The findings of this study are as follows:

1. The provisions in laws relating to matrimonial issues aimed at protecting women from harrashment, cruel tratment and torture by men and their relatives.
2. The Indian Penal Code is being totally misused in matrimonial cases by filing false cases and implicating innocents with ulterior motive and to blackmail for money.

[8] AIR 2005 SC 3100
[9] AIR 2010 SC 3363

Some times to vitimize husband, his parents and in-laws wife's give false compliant against them and misuse the laws like Sec. 498A as a weapon.

3. The Supreme Court has laid down certain guidelines on Legal Terrorism in Shushil Kumar Sharma vs. Union of India case.

Suggestions

The following are the suggestions and recommendations to curb the misuse of women protection laws:-

- The Courts concerned and law enforcement authorities should clearly follow the guidelines while accusing persons under Sec.498A of IPC.
- Expediate the trial of criminal cases of serious in nature.
- Investigation of matrimonial cases should be done only by civil authorities and on finding prima face to establish the individual's crime, thereafter the policeman should proceed further as per the provisions of law.
- Amendment of Sec.498A Indian Penal Code 1860 needs to be amended.
- In every District Court it should be made mandatory to establish a Mediation Center with professionals to mediate family issues.
- The District Social Welfare department should organize periodic campaign to hear the cases of matrimonial issues and should forward their findings and suggestion to get the matter peacefully and amicably settled.
- Sec.498 A cases should be made bailable taking into account the retrospective effect on innocent victims.

- The Court should view seriously the false compliants and allegations on the innocent. If it is found the court should immediately punish the compliantant.
- The corrupted officers in matrimonal cases needs to be suspended immediately if found guilty and on having proved they must be dismissed from service instead of small punishment like cut in increment, transfer, etc.
- Offences under Sec. 498A should be made compoundable.

Conclusion

The institution of marriage is no longer considered a sacred union of two hearts but has rather become more of a civil contract between two individuals. In the literal sense of the term where one is obligated to another to perform conjugal rights.

Section 498A was primarily incorporated to combat the evil practices of dowry and dowry deaths but a recent study shows that over the years it has changed its colour and has become a weapon of notoriety.

The inclusion of Section 498A in IPC 1860 though seemed fruitful and effective in the early years. Although the judiciary has failed miserably in curbing the gross abuse of Section 498A the very provision calls for an immediate redressal to the sufferings of the real victims of dowry harassment. The protection should also be extended to male members of society as a recent study shows countless innocent husbands and their families have been affected by these stringent provisions. Since the Section provides shelter only to women it is biased, discriminatory, and unconstitutional.

From the inception of Section 498A of IPC, 1860 has been heavily misused, dragging innocent men and women into Police Stations, lock-ups and courts, thus depriving young children of a happy childhood, and many senior citizens of mental peace in the last leg of their lives.

Many women, who really need protection from domestic violence, do not know existence of Sec.408A. This law will be yet another weapon in the hands of unscrupulous women who may misuse it at the slightest opportunity. When a man is thrown out of his house under false allegations of domestic violence or cruelty, everyone who is dependent on him is bound to suffer. It is unfair enough to penalize an entire family even if an accused man is truly abusive. Unfair is a subtle word to describe a situation in which an innocent man along with his family is tortured by misuse of law.

The study revealed that Section 498A was brought forth for the protection of women from the cruelty of her husband and their relatives and now it is being misused. Women are turning the law other way round by being cruel to their husband and his relatives and getting them tried under Section 498A IPC, provisions of Protection of Women from Domestic Violence Act 2005 and Dowry Protection Act 1960. Henceforth certain legal actions should be taken as soon as possible to curtail growth of "legal terrorism" by misuse of provisions of law. It is the time and urgent to bring appropriate amendments in the existing Law in force to safeguard men.

Official Trustee's Obligation on Bona Vacantia

Dr.P.Brinda[1]

Abstract:

The concept of property went on expanding gradually to bring in certain rules of acquiring and holding with the notion of holding property. It transfers inter-vivos and its devolution on death was also evolved and as the civilization advanced the concept of property embraced within itself not only the subjects like ownership, transfer and inheritance but also rules pertaining to contracts, civil wrongs (torts) and crimes in respect to property. Law of inheritance of different religion people are governed under their personal law. In the absence of such laws, the Indian Succession Act, 1925 will be applicable. No conflict or complication would arise as long as there is/are legal heirs exists to claim the property of the person dies intestate or beneficiary mentioned under the Testament/Will of the deceased. If a person dies leaving behind no legal heirs or testament then the authorities under the Administrators-General Act and Official Trustees Act will hold and take care of the property of the deceased. The property shall be vested with the Administrator-General if the asset worth more than 10 lakhs rupees. His responsibility is similar to that of an Administrator appointed under the letter of administration or executor of a Will. If there is no application for

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payment have been made and granted by the Administrator-General against all assets in his custody for twelve years or more, he shall transfer to the account and credit of the Government. The Official Trustee will hold the property unclaimed by any person on behalf of the Government. This paper is an attempt to analyse the powers, functions and responsibilities of the Administrator-General and Official Trustee.

Key words: law of succession, inheritance, letter of administration, probate, official trustee, administrator-general.

Introduction:

The concept of property appears as old as humanity. The instinct to have property is natural in human beings, though the term property was quite vague in the early phases of human civilization. The assertion of right to private property was prevalent even among the primitive man when he lived and roamed about mostly single in search of food, water and sex. Gradually, when the number increased, a sort of group comes into existence and they started living in herds and roaming about for the same pursuit of food and water. Gradually, when the class consisting of a cluster of families came into being the concept of co-ownership also came along. The social groups of class gathered their daily needs and tried to preserve it for future needs. With the advent of civilization, the concept of property became firm and more comprehensive.

Law of succession:

Law of succession is the law regulating the inheritance of the property. The two kinds of succession are testamentary and

intestate. In which intestate succession is succession by operation of law i.e. when a person dies without leaving a testament/Will, his property shall devolve upon the legal heirs as per the succession laws of different religion. When a person dies leaving a Will, his estate shall devolve upon the legatee specified in the Testament. When the question arises with regard to the execution of the Will, the executor's role is vital. The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is the executor.[2] After the property has ceased to be estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf.

Probate:

Section 2 (f) of the Indian Succession Act, 1925 "Probate" refers to a copy of the will that is certified by the seal of a court of competent jurisdiction. Generally, an executor under a Will can apply for the grant of probate to claim the through Probate, rights pertaining administration of an estate. Grant of probate is a judicial process through which the validity and authenticity of a will is determined in a court of law. While granting probate, the executor of the will, beneficiaries, and value of the estate are determined. Indeed, probate helps the executor to receive a certification from the court that he is duly authorized to administer the estate of the testator under the will. Even a beneficiary can be appointed as an executor under the will.

[2] Estate Of Late Sri Vr.Rm.S. ... vs The Commissioner Of Income-Tax, (1960) 2 MLJ 577

Letter of Administration:

Normally, there is a major difference between Probate and Letter of Administration. It is that Probate is granted to an executor nominated under the Will and if a Will does not nominate an executor, the beneficiaries of the deceased will have to file an application for Letter of Administration. The letter of administration confers the same administrative rights to the beneficiaries that an executor would have enjoyed. If a person dies intestate, then also an applicant seeking administrative rights pertaining to the deceased estate can file for Letter of Administration. So, letter of administration facilitate the administration of the estate of the deceased if no executor is nominated in the Will of under the circumstances where a person dies intestate.

Grant of Letter of Administration:

The beneficiaries can apply for the grant of Letter of Administration before the Court of competent jurisdiction. On the grant of Letter of Administration the administrator is entitled to all rights belonging to the intestate as the grant is effected from the moment after the death of the person.

Universal or residuary legatee:

The grant of administration to universal or residuary legatee is dealt under Section 232 of Indian Succession Act, 1925. Accordingly, the universal or residuary legatee may be admitted to prove the Will and may be granted letter of administration in the following circumstances viz.,

(i) The testator has failed to appoint an executor in the Will or

(ii) The deceased/testator has appointed an executor who is legally incapable, or refuse to accept/act or died before the testator or before proving the Will or

(iii) The executor died before he has administered all the estates of the deceased though he dies after having proved the Will

Residuary legatee[3] is a person mentioned in the Will without specifying the definite property of the deceased. It is sufficient, if the intention of the testator be plainly expressed in the Will, that surplus of his estate after payments of debts and legacies shall be taken by a person there designed.[4]

A residuary legatee is a person designated by the testator as one who will take the surplus or residue of the property and residue bequest implies that the legatee is entitled to all the property belonging to the testator at the time of his death for which no other testamentary disposition made which is capable of taking effect. So whatever is not effectively disposed of goes to the residuary Legatee.[5]

Universal Legatee:

A universal legatee is undoubtedly one who by virtue of the Will is entitled to the whole of the testator's estate.

Section 234 of the Indian Succession Act provides that the person who would have been entitled to administer the estate in case of

[3] Section 102 of Indian Succession Act, 1925: Constitution of residuary legatee.—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

[4] Manorama v. Kaly charan, 31 cal 166 also see Fanindra v. Administrator General, 6 C.W.N. 321.

[5] Ram Rani v. Indrani, A.I.R. 1924

the deceased dying intestate would be entitled to file an application for the Letter of Administration in the circumstances viz

(a) if the executor, residuary legatee or representative of the residuary legatee doesn't exist or
(b) he declines or
(c) is incapable to act or
(d) cannot be found.

The section also provides that any other legatee having a beneficial interest or a creditor to file an application for the Letter of Administration as the case may be.

Where there is no executor or universal legatee or residuary legatee in the Will, probate cannot be granted but letter of administration can be granted to the legatee, with the Will Annexed.[6]

To whom Letter of Administration cannot be granted

Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by notification in the Official Gazette by the State Government in this behalf.

Administrator General:

Section 7 of the Administrators General Act, 1963 lays down that "any letters of administration granted by the High Court shall be granted to the Administrator-General of the State unless they are

[6] Soundararaja Peter v. Horenee Chelliah, A.I.R. 1975 Mad. 194 DB

granted to the next-of-kin of the deceased". According to sec 8 of the Act, The Administrator-General of the State shall be deemed by all the courts in the State to have a right to letters of administration other than letters pendente lite in preference to that of-

(a) a creditor; or (b) a legatee, other than a universal legatee or a residuary legatee or the representative of a residuary legatee; or (c) a friend of the deceased.

Right of Administrator-General to apply for administration of estates:-

The administrator-general shall take proceedings to apply for administration of the estates of any deceased who has died leaving any State assets exceeding rupees ten lakhs if no person has applied for probate or letter of administration within one month after his death or has not taken other proceedings for the protection of the estate of the deceased (in cases where the obtaining of such probate or letter of administration is not obligatory).[7] However, the Administrator-General can take proceedings only when there is an apprehension of misappropriation, deterioration or waste of such assets and it is necessary for such proceedings for the protection of the assets.[8]

In *Mrs. G. Gordon vs Administrator General, U.P.*[9], it was decided positively against the issue whether the High Court can grant Letters of Administration to the Administrator General under the Administrator General's Act, 1913 where the deceased was an

[7] Section 9(1) of the Administrators General Act, 1963
[8] Section 9(2) of the Administrators General Act, 1963
[9] AIR 1970 All 224

Indian Christian (and not an Anglo Indian). It was held that there is no exempted person under the Act.

Once the letter of administration is granted to the Administrator-general he is empowered to (i) take to possession of the assets of the deceased[10] and (ii) either with the directions of the High Court or according to the provisions of this Act can hold, deposit, realise, invest or sell the assets.[11] In addition to that he is entitled (a) to initiate any suit or proceedings of the recovery of the assets; (b) can retain the assets of the estate for any fees chargeable and (c) can reimburse himself for all the payments made by him as that of a private administrator might lawfully have made.[12]

For the grant of any letter of administration to the Administrator-General he shall not be required to enter into any bond or to furnish any security to the Court.[13]

In the course of proceedings taken by the Administrator-General if any person establishes his claim to probate the Will of the deceased or any person next-of –kin of the deceased establishes to letter of administration and gives such security which is required by law or in cases where the probate or letter of administration is not obligatory then the High Court shall grant probate or letter of administration accordingly. When any person satisfies the High Court that he has taken all the reasonable steps prosecuting with due diligence or if the High Court is satisfied that there is no apprehension of misappropriation, deterioration, or waste of the assets and that the grant of letters of administration in such

[10] Section 10(1)(a) of the Administrators General Act, 1963
[11] Section 10(1)(b) of the Administrators General Act, 1963
[12] Section 10(2) of the Administrators General Act, 1963
[13] Section 26 of the Administrators General Act, 1963

proceedings is not otherwise necessary for the protection of the assets then the High Court shall drop the proceedings and award the cost to be paid out of the estate as part of the testamentary or interstate expenses to the Administrator-General for any proceedings taken by him.[14]

Revocation of grants:

If an executor or next-of-kin of the deceased who had no notice of the time to appear for the proceedings to get probate or letter of administration, subsequently established to the satisfaction of the High court that for the claim of probate or letter of administration make the application within six months after the grant to the Administrator-General, the grant shall be revoked.[15] However, acts done by the Administrator-General or all the payments made by him is valid is spite of the revocation.[16]

Impact of probate or letters granted to Administrator-General:

Once the probate or letter of administration is granted to the Administrator-General by the High Court, it shall have the effect over all the assets of the deceased throughout India. It is a conclusive as to the representative title against all the debtors of the deceased throughout the country and affords indemnity against them. Whenever, probate or letter of administration is grated to the Administrator-General by one High Court it shall send certificate to that effect to all the other High Courts.[17]

Grant of certificate by the Administrator-General:

[14] Section 11 of the Administrators General Act, 1963
[15] Section 14 of the Administrators General Act, 1963
[16] Section 17 of the Administrators General Act, 1963
[17] Section 20 of the Administrators General Act, 1963

At the date of death of the person if his assets have not exceed ten lakh rupees excluding the sum of money deposited in the Government Savings Bank or in any Provident fund, then the Administrator-General may grant certificate under his hand to any person claiming to be the creditor of the decease to receive the assets left by the deceased. [18] Conversely before the lapse of one month from the death if the executor, widow or any other person claims, then the Administrator-General shall not grant certificate to such creditors.

Revocation of certificate granted by the Administrator-General:

If the certificate was obtained by fraud or misrepresentation or by means of untrue allegation of a fact essential in law it may be revoked. But no revocation shall be made without given a reasonable opportunity of showing cause why the certificate should not be revoked.[19]

Duty to surrender the revoked certificate:

When any certificate of administration is revoked under section 33 of the Act, on requisition of the Administrator-General, the holder shall be liable to deliver it up failing with he shall be punishable with imprisonment which may extend to three months or with fine upto one thousand rupees or with both.[20]

Suit by creditor against the Administrator-General:

Before instituting a suit against the Administrator-General, a creditor shall state the amount and other particulars of his claim in

[18] Section 29 of the Administrators General Act, 1963
[19] Section 33 of the Administrators General Act, 1963
[20] Section 34 of the Administrators General Act, 1963

writing with supportive evidence failing which the creditor shall be liable to pay the costs of the suit.[21] No notice under section 80 of the civil procedure code is required if there is no relief claimed against him personally.[22]

If there is no application for payment have been made and granted by the Administrator-General against all assets in his custody for twelve years or more, he shall transfer to the account and credit of the Government. However, if any suit or proceeding is pending with regard to such assets then he shall not be authorized to transfer. [23]

Appointment of Official Trustee:

When all the liabilities are discharged by the Administrator – General upon the estate administered by him he shall notify the fact in the official gazette. With the consent of the Official Trusteeand subject to the rules made by the State Government he shall appoint the Official trustee, by an instrument in writing, to be the trustee of the remaining assets in his hands in in accordance with the provisions of the Official Trustees Act, 1913.[24]

Appointment, Powers and Duties of Official Trustee:

The Government shall appoint an Official Trustee for a state or for two or more states.[25] Any person who has been an advocate for atleast 7 years or attorney of a High Court for atleast 7 years or member of the judicial service of a State for atleast 10 years of a Deputy Official Trustee for atleast 5 years shall be eligible to be

[21] Section 39 of the Administrators General Act, 1963
[22] Section 40 of the Administrators General Act, 1963
[23] Section 51 of the Administrators General Act, 1963
[24] Section 24 of the Administrators General Act, 1963
[25] Section 4 of the Official Trustees Act, 1913

appoint as an official trustee.[26] The Government shall appoint as many deputy trustees to assist the Official Trustee provided he shall possess either of the qualification of atleast three years viz., an advocate or attorney of the High Court or a member of the Judicial service of a State.[27]

The Official Trustee shall not be appointed with any other person.[28] He shall always be sole trustee. The Official Trustee shall not be appointed as an executor unless he is appointed as a sole executor under the Will of a person or sole trustee; he shall not administer the estate of the deceased.[29]

Trust – with the consent of the Official Trustee:

If any person wishes to create a Trust for the benefit of the public, can appoint the Official Trustee with his consent but the instrument shall be duly executed by the Official Trustee by reciting his consent in the instrument itself provided the trust is other than one prohibited from accepting under the Act.[30]

Trustee by Will:

When the Official Trustee has been appointed as trustee under the Will of a person, the executor after obtaining probate or the administrator after obtaining the letter of administration shall notify the contents of such Will to the official trustee. Once he accepts, the property shall be transferred and vested with the official trustee. However, the consent of the Official Trustee shall

[26] Ibid
[27] Section 5 of the Official Trustees Act, 1913
[28] Section 7 (7) of the Official Trustees Act, 1913
[29] Section 7 (6) of the Official Trustees Act, 1913
[30] Section 8 of the Official Trustees Act, 1913

be recited in the instrument and shall be duly executed by the official assignee.[31]

Transfer of unclaimed money:

When any person entitled to receive a sum of money in the hands of the Official Trustee is not traceable for a period of 12 years or more, the Official Trustee shall transfer the amount to the account and credit of the Government. Nevertheless such money shall not be transferred during the pendency of any suit or proceedings in any court.[32]

If any person have claim against the money transferred to the Government by the official trustee, he shall be paid the amount if he established the claim to the satisfaction of the prescribed authority.[33] When the claimant could not establish to the satisfaction of the prescribed authority, he may apply by petition to the High Court. After taking evidence, if the court thinks fit, pass such order which shall be binding on all the parties to the proceedings. The High Court makes such orders in respect of any trust property vested in the official trustee, or the income or produce thereof as it thinks fit.[34]

General power of administration of the official trustee:

In addition to the other powers of expenditure lawfully exercisable by an Official Trustee he may incur expenditure on such acts which may be necessary for the proper care and management of any property administered by him and he may incur expenditure on such religious, charitable and other objected and on such

[31] Section 9 of the Official Trustees Act, 1913
[32] Section 23 of the Official Trustees Act, 1913
[33] Section 24 of the Official Trustees Act, 1913
[34] Section 25 of the Official Trustees Act, 1913

improvements of the property with the sanction of the High Court.[35]

Conclusion:

Doctrine of escheat is the right of the State to own unclaimed property or assets generally. The doctrine is invoked when a person dies without any legal heir or Will. When a property left unclaimed for a period of time or if no executor is appointed by the Will to dispose the property of the deceased the property shall be taken care of by the Administrator General for a period of time and finally it shall be vested with the Official Trustee on behalf of the Government.

[35] Section 28 of the Official Trustees Act, 1913

Analysing the Confluence of International Environmental Obligations and Intellectual Property Rights Under the Bilateral Investment Treaties With Special Reference to The Indian Model BIT

- **Mahindra Prabu M**[1]

Abstract:

At present, the discussions surrounding investor-state dispute settlement (ISDS) have typically focused on how to protect investments in the context of the environment due to climate change and sustainable development issues. References to environmental commitments are included in newer-generation Bilateral Investment Treaties (BITs) and their models, raising concerns about the national government's capacity to independently regulate environment-related matters in the context of public interest. This research attempts to examine how bilateral investment treaties affect national governments' environmental laws and policies in addition to analysing the legal relationships between bilateral investment treaties, intellectual property rights, and environmental law. It also provides insight into environment-related disputes under investor-state arbitration, the concerns of developing countries and in particular examined the Indian Model BIT in that context.

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Keywords: Environment, Investment, Green Technology, Intellectual Property Rights, Bilateral Investment Treaties, Natural Resources, Climate Change, Sustainable Development, Investor- State Dispute Settlement and Indian Model BIT.

Introduction:

It is customary to think of international trade, investment, intellectual property, and environmental regimes as distinct entities with each having its international organisation and policy domains. However, the new generation of bilateral treaties integrates all of this under the umbrella of investments. Concerning the environment, though there exist numerous Multilateral Environmental Agreements (MEAs), they are criticised due to the lack of effective dispute settlement mechanisms like the "World Trade Organisation (WTO) - Dispute Settlement Board (DSB)". But the recent developments in the Investor-State Arbitrations and the bilateral engagements of developed countries have interestingly suggested a mechanism to fill this gap by means of International Investment Agreements (IIAs), such as "Bilateral Investment Treaties" (BITs), "Free Trade Agreements" (FTAs), "Regional Trade Agreements" (RTAs), and sector- specific treaties like the "Energy Charter Treaty" (ECT), which aim to ensure favourable conditions for investments as well as impose binding environmental agenda on the host state by including a provision on the Investor-State Dispute Settlement (ISDS).[2] Due to this

[2] *See* generally, Climate Change And Sustainability Disputes Between Foreign Investors And States,Https://Www.Nortonrosefulbright.Com/En-

inclusion, foreign investors may use international arbitration to resolve their problems with host countries. The more recent IIA system places duties on States to advance sustainable development, climate- positive trade, or the sharing of green technologies, particularly in BITs and FTAs negotiated after the 1990s. Whereas the older regime of IIAs does not require the State parties to uphold environmental concerns in its treaty text.

For example, the draft model BIT of India (2016) has a general exception for the acts of the Indian Government to protect and conserve the environment.[3] Whereas the Morroco-Nigeria BIT (2016) stipulates that the investors or their investments shall comply with applicable environmental assessment screening and assessment processes.[4] Similarly in Rwanda and the United States of America BIT (2008), states that the investment activity in the host state is to be undertaken in a manner sensitive to environmental concerns.[5] Investors must therefore carefully evaluate the risk profile of new and existing investments over assets in the context of BITs and shall adopt mitigation

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Cn/Knowledge/Publications/3b74447b/Climate-Change-And-Sustainability-disputes-between-foreign-investors-and-states (last visited Jun 1, 2022).

[3] *See* Article 32 of the Model Text for the Indian BilateralInvestment Treaty, 2016, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (last visited Jun 1, 2022).

[4] *See* Article 14 of Morocco - Nigeria BIT (2016) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016- (last visited Jun 28, 2022).

[5] *See* Article 12 - Investment and Environment under Rwanda - United States of America BIT (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/2870/rwanda---united-states-of-america-bit-2008- (last visited Jun 28, 2022).

measures, including dispute resolution strategies. At present, it appears that countries are exploring options to protect both environment and investments. Uncertainty persists on how much these clauses actually advance environmental goals or work to safeguard host state policies.

Thus, it is important to analyse the IIAs from the perspective of environment-related provisions. And in furtherance of this, the research paper employed content analysis of the terms like "environment, environmental, sustainable development, climate change, conservation or preservation of natural resources, animal and plant health, and prevention of diseases and pests in animals or plants" on a random basis in the treaty text of Bilateral Investment Treaties, Investment Chapters in FTAs of various countries and in particular Indian Model BIT, 2016.

The linkage between Investment and Environment under BITs:

The first agreement to mention environmental law in its Preamble was the 1971 bilateral investment agreement between the Netherlands and Morocco.[6] Gradually from the 1990s onwards most of the BITs mention environmental concerns in the preamble of the treaty text.[7] It is to be noted that the United States of America (USA) is a leading player in concluding BITs

[6] See Timothy J. Webster, *The evolving language of environmental protection in bilateral investment treaties, free trade agreements, and trade promotion agreements.*, 12 LINGUISTICS & THE HUMAN SCIENCES 204 (2016).

[7] *See* Georgia—United States of America BIT (1994) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, , https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1676/georgia---united-states-of-america-bit-1994- (last visited May 28, 2022).

with environment-related provisions. Concerning the USA, the provisions to advance environmental protection appeared in both the 2004 and 2012 U.S. Model BITs. Despite criticism, the model BIT of 2012 significantly expanded its scope. Unlike the United States, the European Union didn't conclude any BIT but do include provisions on the environment in "Treaties with Investment Provisions" and "Investment-related Instruments".[8] But the member countries of the European Union do conclude BITs in their individual capacity and they include environment-related provisions. For example, the Columbia – France BIT (2014) stipulates that investment activities are to be carried out in compliance with the right of the environment in the host state. These examples show that environment-related provisions are found in many BITs and it is well known there is no standard format of BITs uniformly adopted by every country in the world. Each BIT is a kind of sui-generis that evolves based on the outcome of discussions between two countries. Hence the researcher herein generalises the most common environment-related provisions found in various BITs and characterises them as follows

A.The general exception to investments:

Any act of the contracting party "*to protect human, animal, or plant life or health*"[9] and "*to conserve living or non-living*

[8] *See* generally International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/237/european-union (last visited Jun 28, 2022).

[9] *See* Article 10 of Canada—Venezuela, Bolivarian Republic of BIT (1996) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/809/canada---venezuela-bolivarian-republic-of-bit-1996- (last visited May 30, 2022); *See* also Canada—Ecuador BIT (1996) | International

exhaustible natural resources"[10] "*if such measures are made effective in conjunction with restrictions on domestic production or consumption*"[11] should not be considered as factors affecting the investment and were considered as general exceptions.

B. Definition of the term "Environmental Legislation":

According to some BITs, the term "Environmental Legislation"[12] refers to the laws and regulations in the contracting parties, or any provision in those laws and regulations, that is primarily intended to protect the environment or prevent any danger to the life or health of people, animals, or plants. It means and includes the protection or conservation of wild flora and fauna, including endangered species, their habitat, and natural areas specifically protected in the territory of the contracting parties in addition to prevention, reduction, or control of discharges, spills, or emissions of polluting substances or contaminants for the

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Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/783/canada---ecuador-bit-1996- (last visited May 31, 2022); *See* also United States of America—Uruguay BIT (2005) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/3069/united-states-of-america---uruguay-bit-2005- (last visited May 31, 2022).

[10] *See* Canada—Venezuela, Bolivarian Republic of BIT (1996), *Id*. *See* also United States of America—Uruguay BIT (2005) *Id.*

[11] *See* Canada—Croatia BIT (1997) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/780/canada---croatia-bit-1997- (last visited May 30, 2022).

[12] *See* Article 1.5 of BLEU (Belgium-Luxembourg Economic Union)—Madagascar BIT (2005) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/506/bleu-belgium-luxembourg-economic-union---madagascar-bit-2005- (last visited May 31, 2022

environment as well as control of hazardous chemicals, substances, materials, and wastes or toxic to the environment and dissemination of information relating thereto.

C. No discrimination between the protection of the Environment and Investment:

The treaty text of certain BITs places equal importance on the protection of Investments and the Environment. Sustainable Development assumes greater importance in modern-day BITs.[13] Some treaty texts do emphasize that foreign investors can protect their investments without compromising environmental protection in the host state.[14]

D. Priority to Domestic Measures to Protect Environment:

Some agreements recognise the independent policy space of contracting parties to formulate and implement the policies and priorities for environmental development and protection, as well as provide the necessary flexibility to enact new or modify existing environmental laws and regulations in their national interest.[15]

E. Say 'No' to the dilution of Domestic Environmental Laws:

Certain agreements made it very clear that any act of the contracting party to relax or weaken or reduce the protections afforded by domestic environmental laws to encourage

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[13] *See* Preamble of Model Text for the Indian Bilateral Investment Treaty, 2016, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (last visited May 31, 2022).

[14] See Article 3 of BLEU (Belgium-Luxembourg Economic Union) - Madagascar BIT (2005) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, *supra* note 12.

[15] *See* Article 5 of *Id.*

investment is inappropriate.[16] And if a party considers that the other party has offered such an encouragement, it may request consultations with the other party and the two parties shall consult to avoid any such encouragement.[17]

F. Commitment to International Environmental Agreements:

Certain U.S. and E.U. BITs and FTAs emphasize contracting parties to the agreement shall reaffirm the commitments under the international environmental agreements, which they have accepted, and shall strive to ensure that such commitments are fully recognized and implemented by their domestic legislation.[18] The European Union based treaties with investment chapters include a commitment to effectively implement multilateral environment agreements like the "Montreal Protocol" (1987), the "Basel Convention" (1989), the "Stockholm Convention" (2001), CITES (1973), the "CBD", the "Cartagena Protocol" (2000), the "Kyoto Protocol" to the UNFCCC (1997), the "Rotterdam Convention" (1998) etc.[19] Whereas the US BITs and FTAs specifically include the "Ramsar Convention", the 1978 Protocol to the "International Convention for the Prevention of Pollution from Ships", the "International Convention for the Regulation of Whaling", the "Convention on the Conservation of Antarctic

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[16] *See* Article 5 of *Id. See* also United States of America—Uruguay BIT (2005) *supra* note 9.

[17] *See* United States of America—Uruguay BIT (2005), *supra* note 9. *See also* Webster, *supra* note 6.

[18] *See* Article 5 of BLEU (Belgium-Luxembourg Economic Union)—Madagascar BIT (2005) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub, *supra* note 12. *See also* Webster, *supra* note

[19] *See* The EU Free Trade Agreement with Colombia and Peru, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:354:TOC (last visited Mar 31, 2022).

Marine Living Resources" and the "Inter-American Tropical Tuna Commission Convention" etc.[20]

G. Formation of Supranational Institution with public and NGOs Participation:

To encourages cooperation between parties to improve environmental protection standards certain BITs and FTAs provide an option to hold expert consultations upon request by any one of the Contracting Party.[21] Whereas in some agreements, an "Environment Affairs Council is constituted by cabinet-level or equivalent representatives of the parties, to discuss the implementation and progress of the environmental provisions included in the agreement"[22] or "a supranational institution i.e., Commission for Environmental Cooperation, which consists of a Council, a Secretariat, and a Joint Public Advisory Committee made up of members of the public and NGOs can be formed".[23] Thus there exists the "opportunities for public participation" in the matters of environmental protection.[24]

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[20] *See* U.S. - Peru Trade Promotion Agreement, United States Trade Representative, Http://Ustr.Gov/Trade- Agreements/Free-Trade-Agreements/Peru-Tpa (Last Visited Jun 1, 2022).

[21] See United States Of America - Uruguay Bit (2005) | International Investment Agreements Navigator | Unctad Investment Policy Hub, *Supra* Note 9.

[22] *See* Cafta-Dr (Dominican Republic-Central America Fta), United States Trade Representative, Http://Ustr.Gov/Trade-Agreements/Free-Trade-Agreements/Cafta-Dr-Dominican-Republic-Central-America-Fta/Final-Text (Last Visited Mar 31, 2022). *See* Also U.S. - Chile Fta, United States Trade Representative

[23] Environment And Climate Change, *Canada-Chile Agreement On Environmental Cooperation* (2015), Https://Www.Canada.Ca/En/Environment-Climate-Change/Corporate/International-Affairs/Partnerships-Countries- Regions/Latin-America-Caribbean/Canada-Chile-Environmental-Cooperation.Html (Last Visited May 31, 2022).

[24] *See* U.S. - Oman Free Trade Agreement, United States Trade Representative, Http://Ustr.Gov/Trade- Agreements/Free-Trade-Agreements/Oman-Fta (Last Visited May 31, 2022). *See* Also U.S. - Peru

H. Provisions to secure Sovereign Interest:

"To affirm the sovereign role of the state' insofar as it does not allow for either party to challenge the domestic environmental laws of the other"[25] certain agreements creates "committee to oversee the implementation of the environment chapter of the trade agreement with neither penalty for violation nor subject obligations to dispute settlement"[26]. There also exists "State to state consultations to resolve disputes and in failure of the same, it may be brought in front of a panel of environmental experts, who issue a non-binding report with recommendations."[27] Some BITs even remove the environment-related disputes entirely from investor-state dispute resolution."[28]

Thus, from the above, it is crystal clear that the BITs are tailor-made kind of international instruments that reflects the interests of the parties. Not all indicators concerning the environment stated above are present uniformly across these bilateral engagements between countries but provide an idea of how a BIT was constructed with environment-related provisions. At this

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Trade Promotion Agreement, United States Trade Representative, http://ustr.gov/trade-agreements/free-trade-agreements/peru- tpa (last visited May 31, 2022).

[25] *See* U.S. - Australia Free Trade Agreement, United States Trade Representative,

[26] *See* Korea—China Fta | China Fta Network, Http://Fta.Mofcom.Gov.Cn/Topic/Enkorea.Shtml (Last Visited May 30, 2022).

[27] See The Eu Free Trade Agreement With Colombia And Peru, *Supra* Note 19.

[28] *See* Bleu (Belgium-Luxembourg Economic Union)—Colombia Bit (2009) | International Investment Agreements Navigator | Unctad Investment Policy Hub, Https://Investmentpolicy.Unctad.Org/International- Investment-Agreements/Treaties/Bilateral-Investment-Treaties/473/Bleu-Belgium-Luxembourg-Economic-Union--- Colombia-Bit-2009-

juncture, it is pertinent to note that when a government planned to initiate environmental protection measures it may harm the investments of foreign investors, and that leads to investor-state disputes before international arbitral forums.

ISDS and Environment Litigations – An Overview:

In short, the Investor-State Dispute Settlement (ISDS) mechanism allows foreign investors to directly sue the sovereign governments before the International Arbitral Tribunals for certain state actions which affect their investment in the host state and claim remedy. In the absence of the ISDS process, foreign investors had to resolve disputes locally through the National Courts of the host state wherein they experience obstacles like the absence of adequate protection under the local law, sovereign or crown immunity rules, and lack of judicial independence to adjudicate issues between the private investors and government. It is to be noted that the diplomatic intervention, to the extent available, was inconsistent and usually ineffective given the politicization in direct discussions between sovereigns. This led to the emergence of the ISDS clause in BITs and FTAs. And the resultant arbitral decisions play important role in international business and economic relations. Thus, Investor-state claims can be brought by foreign investors for breach of investment protections such as the "fair and equitable treatment standards", "Indirect expropriation" without adequate compensation and "capital control regulations", etc. In the past two decades, these arbitral forums witnessed a handful of environment-based litigations and some of them are discussed hereunder.

a. Crystallex *v.* Venezuela:[29]

A Venezuelan governmental entity and a Canadian mining company named Crystallex entered into a contract in 2002 to conduct gold mining inside Venezuela's Imataca National Forest Reserve in the context of the Canada - Venezuela, Bolivarian Republic of BIT (1996). Later, the Ministry of Environment of Venezuela refused to issue Crystallex an environmental permit, and Hugo Chavez, Venezuela's then-President, openly stated in public that the country intended to nationalise gold mines without providing compensation. Upon hearing the matter, the arbitral tribunal ruled that Venezuela had a legitimate right to express concerns about environmental issues involving the Imataca Reserve and its biodiversity. However, it concluded that Venezuela had violated the Treaty by denying the Claimant's investments fair and equitable treatment, as well as expropriating the Claimant's investments in Venezuela without providing any compensation.

b. Tecmed v. Mexico:[30]

A claim was filed against Mexico by Tecmed, a Spanish company, alleging several violations related to its investment in a waste landfill under the Spain-Mexico BIT. It claimed that

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[29] *See* Crystallex v. Venezuela | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/403/crystallex-v-venezuela (last visited May 31, 2022). *See* also Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2 | italaw, , https://www.italaw.com/cases/1530 (last visited May 31, 2022).

[30] *See* Tecmed v. Mexico (2000) | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/45/tecmed-v-mexico (last visited Jun 28, 2022).

Mexico's failure to renew a permit required to run a landfill for hazardous industrial waste amounts to expropriation. The Tribunal concluded that Mexico's acts did, in fact, amount to expropriation and also violated its commitment to provide "fair and equitable treatment" of Tecmed Investments. And granted compensation of US$5.5 million to Tecmed along with 6% compounded interest on this amount, to be calculated from the date of expropriation until the date of payment. The tribunal referred to an ICSID award which stated that even though a regulatory measure is good for society as a whole, it will still constitute a violation if it impacts the economic interests of investors.[31] Thus, it highlighted that when an investor's property is expropriated due to environmental concerns, the state must pay compensation.

c. Adel A Hamadi Al Tamimi *v.* Sultanate of Oman:[32]

In this case, the Oman government was accused of harassing and interfering with the operations of the claimant investor's mining firms in Oman, which led to the police action of seizing the mining facilities and terminating the related lease agreements. The Tribunal ruled in favour of the State and required the Claimant to pay 75% of the Respondent States' overall costs. The tribunal relied upon the Preamble and the Chapter devoted to the environment under the Oman - US FTA (2006) and that

[31] *See* Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1 | italaw, https://www.italaw.com/cases/3413

[32] *See* Al Tamimi v. Oman | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/444/al-tamimi-v-oman (last visited May 30, 2022).

influenced its decision-making in favour of environmental protection.

d. Clayton/Bilcon *v.* Government of Canada:[33]

Following the negative environmental assessment process, the government rejected the investors' project to operate a quarry and marine terminal in the Canadian province of Nova Scotia, whichled to the dispute before the International Arbitral Tribunal. The project is located in a region with an exceptionally productive ecology, and Canada stated that its rejection was appropriate since it aims to preserve the local biodiversity.[34] However, the tribunal concluded that Canada breached the principles of "national treatment", and "fair and equitable treatment" as well as failed to provide "full protection and security" to the investments.[35]

e. Vattenfall v. Germany (II):[36]

Germany passed legislation after the Fukushima nuclear accident mandating the phase-out of all nuclear power plants in the country by 2022. This aggrieved Vattenfall, a Swedish investor who holds the majority of shares in two nuclear power facilities in Germany. Vattenfall initiated investment arbitration

[33] *See* Clayton/Bilcon v. Canada | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/304/clayton-bilcon-v-canada (last visited May 31, 2022).
[34] *See* Lee Rarrick, *Biodiversity Impacts of Investment and Free Trade Agreements*, 37 PACE ENVIRONMENTAL LAW REVIEW 67 (2020).
[35] *Id.*
[36] *See* Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12) | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/467/vattenfall-v-germany-ii- (last visited Jul 24, 2022).

proceedings against Germany under the Energy Charter Treaty signed between Germany and Sweden in 1994. Finally, the German government agreed to compensate Sweden's Vattenfall with a settlement payment of €7 billion.[37]

f. Allard v. Barbados:[38]

In 2010, a Canadian investor claimed that the Barbados Government had indirectly expropriated his Barbados wildlife sanctuary, the Graeme Hall Nature Sanctuary, causing environmental harm based on the Canada-Barbados Bilateral Investment Treaty (BIT). He claimed that his $35 million investment in an ecotourism project on 34.25 acres of natural wetlands on Barbados' south coast had been rendered worthless because Barbados failed to enforce its environmental laws and comply with its commitments under international treaties. Despite the fact that the international arbitral tribunal ruled in favour of the state and held that the claim cannot be considered under indirect expropriation, this issue demonstrates how investment agreements could be used to protect the environment.

g. Burlington v. Ecuador:[39]

In an intriguing turn of events, the host state "Ecuador" filed a counterclaim against the investor "Burlington" on account of the

[37] *See* Germany settles with Vattenfall, https://globalarbitrationreview.com/article/germany-agrees-settle-vattenfall-case

[38] *See* Allard v. Barbados | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/505/allard-v-barbados (last visited Jun 28,2022).

[39] *See* Burlington v. Ecuador – Investment Treaty News, https://www.iisd.org/itn/en/2018/10/18/burlington-v-ecuador/ (last visited Jun 28, 2022).

alleged violation of its domestic environmental rules and regulations while carrying out exploration and exploitation of oil in its region. The tribunal concluded in favour of the state, finding the investor liable for environmental degradation, and fined the investor USD 42 million as compensation towards the costs of restoring the environment. Through this counterclaim, Ecuador has shown how BITs might aid in climate change efforts by holding investors accountable for environmentally detrimental behaviour.

Thus, the government's decisions to phase out nuclear power, prohibit the use or extraction of fossil fuels (particularly coal), ban mining of rare earth materials, or deny permits or licenses to allow the construction of oil and gas pipelines has also the potential to attract ISDS. Similarly, through counterclaims, the host state also can bring action against investors for environmental degradation. It is still unclear, as a result of conflicting judgments, whether the current Bilateral Investment Regime is beneficial or detrimental to the preservation of the environment worldwide.

Developing Countries Perspective:

Even though the UNFCCC Paris Agreement made it very clear that the contribution of developing countries in tackling climate change is still voluntary, the approach of the west in particular the U.S. and E.U. appears to legally bind the developing nations on environmental concerns through BITs and FTAs. In the background of climate change and sustainable development, the European FTAs have recently incorporated binding

commitments, with references to crucial MEAs such as the Kyoto Protocol and the Paris Agreement.[40] But they prefer consultations and (non-binding) panel reports as a preferred dispute settlement mechanism, unlike the American approach which generally refers to ISDS.[41] Developing countries are deeply concerned that they will be forced to apply rules that are inappropriate for their level of development, and they wish to continue the existing framework on environmental laws as per their national interest and development goals. They may consider re-writing their environmental legislation as per the Paris Agreement once they have the financial means to do so. Therefore, to bring a change, what is required here is continuous financial and technical support from the developed to developing world.

At this juncture, it is pertinent to note the two main theories regarding the effect of liberalized trade on the environment i.e., the Environmental Kuznets Curve ("EKC") and the pollution haven hypothesis.[42] According to the theory of the pollution haven hypothesis, developing countries that want to grow their exports may, in the short term, compromise their local environment by allowing the development of industries that are unsustainable. It is to be noted that environmental deterioration could result from both domestic and international investment in

[40] *See* RAFAEL LEAL-ARCAS ET AL., *The Contribution of Free Trade Agreements and Bilateral Investment Treaties to a Sustainable Future*, (2019), https://papers.ssrn.com/abstract=3502978 (last visited Jun 1, 2022).
[41] *See* generally *Id.*
[42] *See* Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, Virginia Environmental Law Journal Pp.102.

polluting local industry also. This theory assumes that developing countries may permit polluting industries by retaining lower environmental regulations in order to lure foreign investment and strengthen their economy. Thus, if a country performs poorly in the Environment Performance Index[43], one can assume that it follows the pollution haven hypothesis.

According to EKC, richer countries (like the United States) can afford to prioritize environmental protection.[44] It is a fact that richer countries do own greener technologies and their economy can afford the green transformation. In that process, polluting industry from their territory may shift to a developing or least developing country as it is cheaper to operate industry (and pollute) in a country that lacks environmental regulation in the name of foreign direct investment.[45] As a result, there is an economic incentive for carbon-intensive industries to flee from rich countries to poor countries once trade barriers are diluted.[46] This shows the very fundamental difference in the needs and demands of the developed and developing world. That's why there exists a notion that the BITs of the developing world appear to be based on the pollution haven hypothesis. Some of

[43] The 2022 Environmental Performance Index (EPI) provides a data-driven summary of the state of sustainability around the world. Using 40 performance indicators across 11 issue categories, the EPI ranks 180 countries on climate change performance, environmental health, and ecosystem vitality. *See* WOLF, M. J, EMERSON, J. W., ESTY, D. C., DE SHERBININ, A., & WENDLING, Z. A., ET AL., *Environmental Performance Index - 2022*, https://epi.yale.edu/(last visited Jun 28, 2022).
[44] Condon, *supra* note 42.
[45] *See* The Greening Of World Trade Issues, (Kym Anderson & Richard Blackhurst eds., 1992).
[46] *Id.*

the recent activities of the developing world to explore the option of renegotiating their existing BITs to exclude ISDS and to secure their sovereign interests with an option of attracting more FDI may be related to the pollution haven hypothesis. The reason is as they don't want to be sued before International Arbitral Tribunals for violation of BITs after allowing the pollutant industries and later wish to transform greener.

Green Technology and Intellectual Property Rights:

Green technology means technology that is used to lessen or undo the environmental damage caused by human activity. Green technologies and green financing are essential for mitigating climate change and achieving sustainable development. It must be accessible to emerging nations, that want to phase out polluting industries and turn their traditional economies into climate- friendly ones. But the usage and distribution of green technology may be hampered by Intellectual Property Rights (IPRs). It is a fact that inventors of green technology demand Intellectual Property (IP) protection globally and denying them adequate protection may negatively impact its research and development progress. Balancing Intellectual Property Rights and Climate Action is the key to a greener and more sustainable future. But acquiring a licence for green technology safeguarded by Intellectual property laws comes at a price. Such challenges may arise, in particular, for poor nations when they attempt to migrate to a green economy. As a result, it is crucial to develop a framework for inexpensive global green technology access through international trade, investments and intellectual property laws. Including provisions on Technology transfer and green investment under BITs and FTAs are not revolutionary, but

they should be designed to help governments explore strategies to discourage international funding of carbon-intensive fossil fuel- based energy while simultaneously promoting sustainable development, respect for intellectual property rights and green recovery.

A critical analysis of Indian Model BIT from the perspective of environmental concerns:

In the context of the adverse arbitral award awarded in the White Industries case ten years ago, India had a bitter experience with its BIT programme. As a response, it unilaterally terminated all BITs signed prior to 2015 and established a new Indian model BIT in 2016 on the recommendation of the Law Commission of India. This research study specifically searched for the terms like "environment, environmental, sustainable development, green technology, green investment, pollutant industries, climate change, conservation or preservation of natural resources, animal and plant health, prevention of diseases and pests in animal or plant" in the Indian Model BIT, 2016. in order to determine whether the Indian Model BIT could be classified under the "Pollution Haven Hypothesis". The researcher made the following observations which are as follows:

i. Sustainable development:

The Preamble of the Indian Model BIT recognizes the promotion and the protection of investments of investors of one Party in the territory of the other Party intending to promote sustainable development.[47] It appears to be a general sustainable

[47] *See* Preamble of Model Text for the Indian Bilateral Investment Treaty, 2016, *supra* note

development provision like other IIAs rather than a specific one.[48]

ii. Natural resources are recognised as assets under the definition of investment:

The definition of the term investment, based on the enterprise meaning, includes the rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party as assets under enterprise investment.[49] Hence the investment in natural resources is recognised as assets under the Indian Model BIT.

iii. Exclusion from Expropriation:

Expropriation, in general, is the illegal act of the state taking property from a foreign investor in violation of the treaty's commitments. And for such a breach, the state is required to pay damages or compensation to the foreign investor. But the Indian Model BIT states that any action of the host state whether legislative, judicial or administrative in the matters of public health, safety, and the environment shall not constitute expropriation provided they are non-discriminatory and intended to protect the legitimate public interest or public purpose objectives.[50] Thus, an act of the Indian government to safeguard the environment shall not amount to an expropriation of assets belonging to foreign investors.

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[48] *See* UN.ESCAP Asia-Pacific Research and Training Network on Trade (ARTNeT), *Sustainable development provisions in investment treaties* (2018), https://hdl.handle.net/20.500.12870/973.
[49] *See* Article 1.4.e of Model Text for the Indian Bilateral Investment Treaty, 2016, *supra* note 3.
[50] *See* Article 5.5 *Id.*

iv. Corporate Social Responsibility:

According to the Indian Model BIT, international investors and their businesses operating in the host state must voluntarily adopt widely accepted principles of corporate social responsibility to address concerns including labour, the environment, human rights, community relations, and anti- corruption.[51]

v. Reference to ISDS:

Even though the Indian Model BIT mentions ISDS to resolve disputes with foreign investors, it mandatorily requires that any investor who has a grievance should first exhaust all local remedies before the Indian courts or administrative bodies for any alleged breach by the host state. After exhausting such local or domestic remedies, the foreign investor can initiate ISDS proceedings before an international arbitral in a country that is a party to the New York Convention, chosen in accordance with the ICSID Convention, ICSID Additional Facility Rules, or UNCITRAL Arbitration Rules.[52] Thus exhaustion of local remedy is necessary to initiate ISDS proceedings under the Indian Model BIT.

vi. Appointment of Experts:

The Indian Model BIT prefers expert consultation on environmental matters in addition to the appointment of other types of experts as applicable under the arbitration rules, provided both parties to the dispute agree. This contrasts with the constitution of supranational institutions or an inter-government

[51] *See* Article 12 *Id.*
[52] *See* Article 15.1 & 20.1 *Id.*

committee in matters of environmental issues as seen in U.S. BITs and E.U. FTAs. Subject to the terms and conditions that the disputing parties may agree upon, such experts shall report on factual issues concerning the environment, health, safety, technological, or other scientific topics.[53] But it is silent upon NGOs and Public participation in such a process.

vii. Consideration of environmental damages:

The Indian Model BIT states that "for the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors. The term "mitigating factors" can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, and any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor".[54] Thus, this provision enables the Indian government to file a counterclaim against foreign investors for payment of environmental damages.

viii. General Exceptions:

Just like other BITs, the Indian Model BIT also states that any action taken by the host state to protect the life of humans, animals or plants, conserve the environment and maintain public order etc. applied on a non-discriminatory basis are to be

[53] *See* Article 25 *Id.*
[54] *See* Article 26.3 *Id.*

considered as general exceptions.[55]

What is not covered under the Indian Model BIT?

The following are not mentioned expressly in the Indian Model BIT,

a. Measures to tackle climate change
b. Transfer of Green Technology
c. Green Investments and Intellectual Property Rights
d. Neither restriction on pollutant industries nor promotion of climate-friendly industrial eco-system
e. Prevention of diseases and pests in animals or plant
f. Neither the relaxation of protections afforded in domestic environmental laws norconsidering the same as inappropriate activity.
g. Commitment to effectively implement multilateral environment agreements.
h. No dedicated chapter for environmental concerns.
i. No separate committee or council or supranational institution on environmental matters.
j. No public participation in environmental proceedings

In light of the above, it appears that the Indian Government adopted a particularly protective stance toward environmental issues in relation to its Model BIT from the perspective of a developing country, focusing entirely on securing sovereign interest and seemingly embracing the "Pollution Haven Hypothesis" subtly. India is ranked lowest in the Environmental Performance Index (EPI) for the year 2022. A country's EPI score indicates the quality of its environment and ecosystem

[55] *See* Article 32 *Id.*

vitality. Whereas the lower score indicates the existence of the "Pollution Haven Hypothesis". This view is further supported by the absence of any clauses addressing climate action, green technology, technological transfer, restrictions on polluting sectors, and the promotion of climate- friendly companies in the Indian Model BIT. Though there is no explicit mention of Multilateral Environmental Agreements (MEAs), the Indian model BIT made it quite clear that it does not want any of its obligations under the MEAs to fall under the purview and jurisdiction of the ISDSsystem.

Conclusion:

Though many BITs do mention environmental protection including the Indian Model BIT, there exist no uniform standards. All BITs and FTAs are tailor-made to suit business and political interests that exists at a particular point in time. The dispute arises when a political climate goes against the secured business interest promised through BITs or FTAs. Similarly, shifting pollutant industries to the developing world and transforming the developed world into climate-friendly industries on the basis of the pollution haven hypothesis won't change the net outcome as environmental degradation continue to happen.

At this juncture, it is pertinent to note that the United Nations Human Rights Council recognized the "*clean, healthy and sustainable environment"* as a human right only in 2021.[56] But way back in 2016 itself, in the matter of Urbaser SA & Ors *v.*

[56]*See* Right to healthy environment, OHCHR , https://www.ohchr.org/en/statements-and-speeches/2022/04/right-healthy-environment (last visited May 29, 2022).

Argentina,[57] the Government of Argentina made a counterclaim against the investors that they had violated international human rights obligations (i.e., the asserted right to water) in the context of the investor-state dispute under the Spain-Argentina BIT. The tribunal in this specific dispute also declared that it had jurisdiction over the counterclaim and that consideration of international human rights obligations was within its competence.[58] Developments like this will encourage further claims of this sort in the future concerning human rights, environmental protection, and investments in the context of ISDS. The question remains unanswered as to how ISDS will interpret human rights obligations. Will that be based on the investor's individual human rights in her property or the environment as a collective human right is yet to be explored? Modern BITs specifically do not address the obligations of investors and host countries with regard to human rights. The existing policy space only allows the investor to sue the sovereign governments for any violations before the arbitral tribunals. Neither the NGOs nor any interested public can bring any action against the host nation or foreign investors for environmental degradation before ISDS. Thus, the research concludes that the presence of environmental-related provisions under the existing BIT regime is in the nascent stage of its development though the treaty text has honourable mentions of

[57] *See* Urbaser and CABB v. Argentina | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, , https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/263/urbaser-and-cabb-v-argentina

[58] *See* Climate Change And Sustainability Disputes Between Foreign Investors And States, *Supra* Note 2.

sustainable development and other environment-related terms, the very dominant intention is to secure the sovereign interest of the host nation of the investments.

Jurisprudential Dissection of Equatorial Guinea V. France-The Status of Embassy Relocation in International Law: A Case Analysis

Subash P[1]

Abstract:

The international law on diplomacy is complex due to its strong connection with international relations. Any disputes regarding diplomacy need to be resolved at the earliest to avoid aggravation of dispute to the highest level. Since, diplomacy is an age old and time tested institution in international conflict management and resolution, we must ensure maximum vigil in quickly resolving conflicts or disputes relating to diplomatic law. There are handful of cases filed in the International Court of Justice, all were withdrawn in some stages of the case except the case between Equatorial Guinea and France. Thus, it becomes imperative to understand the background dispute to avoid similar future disputes between two sovereign States. This paper follows case study as its methodology.

Keywords:

Premise of the mission, privileges and immunities, search and seizures, prior consent.

1. Introduction:

The Case Concerning Immunities and Criminal Activities between Equatorial Guinea and France is one of the few cases relating to

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diplomatic dispute filed before the International Court of Justice (**Hereinafter referred to as the 'ICJ'**). Mostly, diplomatic disputes are negotiated and settled, exceptionally few cases are resorted to the ICJ for judicial settlement.[2]

The Republic of Equatorial Guinea filed a case against the France concerning a dispute relating to immunity from criminal jurisdiction and status of its embassy building. The criminal case was initiated against the Second Vice President Mr. Teodoro Niguema Obiang Mangue for his alleged corruption in Equatorial Guinea and disproportionate assets in France. The Applicant invoked the jurisdiction of the ICJ through the United Nations Convention against Transnational Organised Crime, 15 November 2000 (**Hereinafter referred to as the 'Palermo Convention'**) and Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, 1961.

2. Factual background of the Case:

In 2008, the Association Transparency International France filed a serious of complaints against number of African leaders and their family members for alleged corruption and for investing the criminal proceeds in France. The French Court held that it has jurisdiction on the ground of criminal misappropriation of public funds, breach of trust, money laundering and misuse of corporate

[2] Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America) (Application instituting Proceedings) [2018] ICJ, p. 1-10; Certain Question Concerning Diplomatic Relations (Honduras v. Brazil) (Application instituting Proceedings) [2009] ICJ, p. 1-4; Status vis-a-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland) (Application instituting Proceedings) [2006] ICJ, p. 1-9; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) (Judgment) [1980] ICJ Rep. 3, p. 1-48.

assets. One of such individual is Mr. Teodoro Niguema Obiang Mangue who was at the time of alleged offence was the Minister of Agriculture and Forestry. Also, he is the son of the President of Equatorial Guinea. He bought several properties of considerable value and a building in 42 avenue Foch, Paris.

In 28 September 2011, his property at 42 avenue Foch was searched and luxury vehicles belonged to Mr. Mangue were seized by the French authorities. On 4 October 2011, the Equatorial Guinea sent note *verbale* that the building at 42 avenue Foch is used by the Embassy for diplomatic missions. On 11 October 2011, the French Protocol Department categorically stated that the building is not part of diplomatic missions, it falls under private domain and thus subjected to the laws and regulations of France. This communication was forwarded to the Paris *Tribunal de grande instance*.

Now, the Applicant stated that the building 40-42 are used by the Permanent delegate to the UNESCO and forms part of the mission. But, the French reiterated that the building was not recognised as such in any point of time. So, it never attained the status of diplomatic premise and subjected to the laws of France. Further, searches were done and additional items were seized from the building. In responses to this seizure, Equatorial Guinea claimed diplomatic privileges and immunities under the VCDR. On 28 March 2012, the French referring to its constant practice of recognition of diplomatic premise, could not recognise the building in 42 avenue Foch as ‘diplomatic premise’. Thus, this

constant non-recognition amounts to ‘persistent objector rule in international law'.

France raised preliminary objection and admissibility of the Application.[3] As per Article 79 (5) of the Rules of the Court, 1978, the merits proceedings were suspended. France raised three preliminary objections. They are as follows:

(1) The Court lacks jurisdiction on the basis of Article 35 of the Palermo Convention;
(2) No jurisdiction of the basis of Optional Protocol of the VCDR and
(3) Abuse of process or abuse of rights.

Even though, the Court upheld the first preliminary objection under Palermo Convention, it rejected the second objection. Thus, the Court has jurisdiction to adjudicate the dispute regarding the status of building situated at 42 avenue Foch, Paris.

Equatorial Guinea claimed in its plea that France violated its sovereignty by invoking its criminal jurisdiction against the second Vice-President. In consequence of its exercising criminal jurisdiction, France violated the the principle of sovereign equality of States and interfered in its internal affairs which are the basic principles of international law and recognised in the Friendly Declaration as such.[4] Even if, the Vice President committed the alleged crime, it is essential within the criminal jurisdiction of

[3] Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Preliminary Objection) [2018] ICJ Rep. 292, p. 1-52.
[4] UN General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), GAOR, UN Doc A/RES/2625(XXV) (Oct 24, 1970)

Equatorial Guinea and not the French Court. The second plea is that the French action of entering, searching, attaching the said building and seizure of properties from the premise violated the VCDR provisions and also claimed that building as a 'State property' of Equatorial Guinea. Finally, it claimed reparation in the form of monetary compensation amount of which shall be determined in latter stage.

The French contended that the building was wholly or partly paid from the corruption proceeds and it belongs to Mr. Mangue in his private capacity. On 19 July 2012, the Judge ordered to attach the building in order to preserve it for potential confiscation. This Order was upheld in the appeal stages too. Equatorial Guinea informed the Protocol Department that from 27 July 2012, the building at 42 avenue Foch will be the diplomatic premise for the purpose of conducting diplomatic functions. Further, the applicant shifted chancellery to the claimed premise of the mission. The French replied that the building is under attachment order and registered in the mortgage registry. So, it is unable to recognise the seat of chancellery.

The investigation on alleged offences of Mr. Mangue was completed on 23 May 2016. The financial prosecutor recommended to try Mr. Mangue for money laundering and offences he committed in France between 1997 and 2011 by investing in assets through criminals proceeds. On 2 January 2017, the President of the Paris Tribunal *Correctionnel* noted the filing of case before the ICJ and held that the attachment cannot be made until final adjudication by the ICJ. However, the Paris

Tribunal c*orrectionnel* found Mangue as guilty of money laundering. The Court attached all the movable assets and building at 42 avenue Foch. Referring to the ICJ's provisional measures, the Tribunal held that there is restriction in the execution of attachment Order and not in pronouncing the penalty.

3. **VCDR Framework and diplomatic premise:**

The Applicant argued that assigning and notifying the premise is the prerogative of the sending State. It duly recognises that it is not clear from which exact moment the building attains the status of a premise. It claims from the text, object and purpose of the VCDR, it is on the sending State to identify the 'premise of the mission'. It is shocking to hear the arguments of the Applicant that diplomatic immunity must be respected and not on the condition of evaluation, verification or approval by the host State from the very beginning.[5] The foundational base of the VCDR is to promote the friendly relations between Sovereign States. There is a high possibility of mistrust, misapprehension, deep concern of possible abuse by the sending State in the receiving State. This can be seen throughout the VCDR framework to balance the interest of both the sending and the receiving States.

The Court noted that there is little help from the VCDR text. So, it turns to contextual approach in saving the dispute. The Court noted the special duty on the receiving State to safeguard the premise and its personnels. This special duty is a weighty obligation and should not over burden or place the receiving State in a disadvantageous position. So, logically, there shall be mutual

[5] Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Judgment) [2020] ICJ Rep. 300, p.16, para. 43.

agreement between the States regarding the designation of premise. The unilateral designation may affect the friendly relations and as an extreme last resort, diplomatic relations can be called off between them. Even, this breaking off relations cannot relinquish the protection regime of the diplomatic premise.[6] To note, the conventional framework is rest on the balancing of interest between both the receiving and sending States. This unilateral designation creates off-balance in the VCDR conventional structure. Since, the VCDR is a self-contained regime, violations or potential abuse need to be countered within the conventional remedies available.[7] The Court held that the unilateral designation of choice of premise is not consistent with the VCDR's aims and objective.[8]

Article 1(i) defines the 'premises of the mission' as follows:

"The 'premise of the mission' are the building or parts of buildings and the land ancillary thereto, irrespective of ownership; used for the purpose of the mission including the residence of the head of the mission".[9]

We can deduce four components from this definition. They are as follows: (1) The premise is a building or part of the building and the land ancillary thereto; (2) The ownership of the premise is not relevant (3) The building must be used for the purpose of the mission and (4) It included the residence of the head of the mission. Therefore, the question of ownership is not relevant to consider. The primary test to identify whether the building

[6] Vienna Convention on Diplomatic Relations, 1961, art.45.
[7] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, ICJ Rep 1980, p. 40, para. 86.
[8] *Supra* Note at 4, p. 5.
[9] *supra* Note at 5, art. 1 (i).

attained the status of 'premise of the mission' is to find whether that building is 'used for the mission functioning'. The functions of the mission can be seen under Article 3 of the VCDR.[10]

The process of designation of premise and from which exact moment the premise attains the inviolability status under Article 22 is not provided in the VCDR and even in the preparatory works. So, the Court needs to interpret the VCDR as a whole in its proper context to answer this conventional gap.[11] The Applicant argued there is no express or implied need to obtain consent. If there is any such necessary stipulation, the drafters would have clearly mentioned such requirement. There are provisions in the VCDR which demands prior consent from the receiving State.

Article 12 talks about shifting of embassy to other location:
"The sending States may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established".[12]

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[10] Vienna Convention on Diplomatic Relations, 1961, art. 3 states the functions of a diplomatic missions but not exhaustively. It listed 5 functions as follows: (1) representing the sending States in the receiving States; (2) protecting in the receiving States the interest of the sending State and of its nationals, within the limits permitted by international law; (3) negotiating with he Government of the receiving State; (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State and (e) promoting friendly relations between the sending States and the receiving State, and developing their economic, cultural and scientific relations. Also, consular functions are conducted by the diplomatic mission.

[11] This conventional gap need to be interpreted by using the tenant of customary principles of treaty interpretation under Article 31 and 32 of the VCLT, 1969. Refer, J*adhav (India v. Pakistan) (Judgment)* [2019] ICJ Rep 418, p. 23, para.71 and *Avena and others Mexican Nationals (Mexico v. United States of America) (Judgment)* [2004] ICJ Rep 12, p.48, para. 83.

[12] Vienna Convention on Diplomatic Relations, 1961, art. 12.

A contrario interpretation gives a leeway for the Applicant to argue that there is no need to obtain prior permission for designating a premise within the same locality.[13] This contrary interpretation "is only warranted, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty".[14] Thus, this interpretation is not consistent with the object and purpose of the VCDR. Also, there is no definition of 'locality'.

The French argue that there is a need to get implied consent, even to shift or designate a premise in the same locality. The Applicant counter argued that the 'implied consent' place a sending State in a vulnerable seat for not exactly knowing when and whether that premise enjoys the regime of immunity and inviolability. Also, it points that there are States practices including national legislation or policy guidelines stipulating that relocation of premise must be prior informed and approved. This process shall be reasonable and non-discriminatory. The receiving State objection in the choice of mission premise must be reasonable, non-discriminatory and consistent in good faith.[15] The French put forth that there exist a "regime based on agreement" between the Parties for the designation of premise or simply consensual designation of premise.[16]

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[13] Supra Note at 4, p. 16, para. 45.
[14] Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objection, ICJ Rep. 2016 (II) p. 19, para. 37.
[15] *Supra* Note at 4, p. 17-18, para. 51. Merit. Also refer, Vienna Convention on Diplomatic Relations, 1961, art. 47.
[16] This practices of states need not to be consolidated and codified in instrument form. Any state practices along with *opinio juris sive necessitate* amounts to

The Applicant claimed that the criterion of 'actual assignment' or 'effective used' of a building to attain the status of premise of the mission is fulfilled from the moment of making necessary renovation in that building. However, the term 'used' in the phraseology 'used for the purpose of the mission' denotes the past usage of the building for diplomatic functioning.[17] But, 'effective occupation' and 'complete use' is not mandatory for the purpose of enjoying diplomatic powers because the receiving State may potentially intervene during the transition period into the new premise. Thus, once a building is notified and assigned for the purpose of mission use, it must have to enjoy the regime of inviolability under Article 22.

The French rebutted the 'presumption of validity of designation of premise' by reserving its right to call into question such unilateral designation. To note, there is no clear understanding on the term 'used'.[18] The French objected the 'complete freedom' or 'unilateral choice of mission premise' in designating the building on two cumulative grounds. They are as follows: (1) The receiving State should not expressly object to the choice of building in question and (2) That building must 'actually assigned' for the purposes of the mission.[19] They acknowledged that there is no clear procedure as to the 'choice of premise'. The

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customary international law. This CIL can be identified from the work of the International Law Commission. Refer, Draft Conclusion on Identification of Customary International Law, With Commentaries, 2018, accessible at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (last accessed on 15/03/2022).

[17] Vienna Convention on Diplomatic Relations, 1961, art. 1 (i)

[18] Eileen denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations (Clarendon Press, Oxford, 2nd ed, 1998).

[19] *Supra* Note at 4, p. 18, para. 52.

French relied on the phrase 'essentially consensual letter and spirit of the Vienna Convention' to effective argue its contention.

Article 2 of the VCDR states:
"The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent".[20]

The term 'diplomatic relations' and 'permanent diplomatic mission' is not clarifying the dispute in hand. The French noted the significant restriction on its territorial sovereignty due to the special regime of inviolability of premise and its personnel. Therefore, the conduct under this *lex speciales* must be based on good faith or bond of trust between them. Through, this *ratio legis*, there is no exclusive power on the sending State to designate a building as 'its premise'. There shall be consultation between the States in determining the mission premise.

The preambular part stated that the people recognised the status of diplomatic agents from ancient times. There is a strong connection between diplomatic law and principles of sovereign equality of States, maintenance of peace and security and the promotion of friendly relations among nations. The real purpose of diplomatic privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.[21] it is essential to note that the areas not expressly governed by the Convention is regulated by the customary international law.

[20] *Supra* note at 16, art. 2.
[21] Vienna Convention on Diplomatic Relations, 1961, Preambular recital 4.

The establishment of diplomatic relations between States takes place by mutual consent. Article 11 talks about the size of the mission which can be fixed by specific agreement. Otherwise, the size may be kept within the reasonable and normal limit vis-a-vis the circumstances and conditions in the receiving states and the needs of the particular missions.

Article 21 mandates the receiving States to facilitate the acquisition of land for the purpose of the mission premise or to assist in finding accommodation in other ways, subjected to its internal laws.[22] Thus, rental or purchasing the land or building for the purpose of diplomatic functioning in the receiving States is allowed. Sometime, land property may be acquired by the sending State in the receiving state for the purpose of constructing the embassy building or premise. It may also attain the status of 'state property' of the sending State.

Article 22 provides the concept of violability of diplomatic premise. The phrase 'the agent may not enter the premise', particularly the word 'may not' provides certain discretionary power on the receiving State to enter the premise on exceptional situations. The conventional discretionary power must be exercised reasonably and in good faith.[23] But this interpretation is extremely dangerous because every state is a receiving State as well as a sending State.[24] Any adverse treatment made to the

[22] I*bid*, art. 21.
[23] Rights of Nationals of the United States of America in Morocco (France v. United States of America) (Judgment) [1952] ICJ Rep. 176, p. 40 and Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (Judgment) [2008] ICJ Rep 117, p. 56, para. 145.
[24] Supra Note at 17, p. 2.

premise or personnel will be reciprocated in the receiving State's embassy in the sending State. To note, the receiving States is under a special duty to take all measures to protect the mission premise against any interaction, damage, disturbance or impairment of its dignity. Also, the premise, its furnishing, other properties and transport means shall be immune from search, requisition, attachment or execution.[25] Article 25, the receiving States shall accord full facilities for the performances of the functions of the mission.

4. Characterisation of France's Objection:

The Court scrutinised the diplomatic exchanges between the Parties from 4 October 2011 to 6 August 2012, to find out whether French objected timely and indiscriminately. Since, this case is based on OP, the status of building prior to 4 October 2011 was excluded because the Applicant expressly agreed that it claimed protection under the Palermo Convention before 4 October, 2011. During the initial searches luxury vehicles belonging to Mr. Mangue were seized. Suddenly, on 4 October 2011, the Equatorial Guinea claimed that the building is being used for mission purposes for the past few years. This fact is not notified to the concerned Ministry of the receiving State. Officially, it started to claim diplomatic status for that building by placing paper sign indicating 'Republic of Equatorial Guinea- Embassy Premises'. However, on 11 October 2011, the Protocol department denied the claim of the Applicant and held that it falls within the scope of private property and subjected to the internal laws and regulations of the receiving States.

[25] Vienna Convention on Diplomatic Relations, art. 22 (3).

The Equatorial Guinea notified to the French authorities that the residence of Permanent Delegate of the UNESCO is at the diplomatic mission at 40-42 avenue Foch, Paris and Permanent delegate was appointed as the *Chargé d'affaires*. But, it was refused by the French authorities and held the appointment as contrary to Article 19 of the VCDR. Further, the change in address should have been notified to the UNESCO's Protocol Department and not to the French Ministry. Further, searching and seizures were made, even after the appointment of *Chargé d'affaires* in the above said premise. This infuriated the Applicant and sent Note *Verbale* claiming inviolability of the mission premise. The French notified to the Applicant that it must follow two conditions for the recognition of status of the building as a premise of the mission. They are as follow:

1. The end of occupancy of the previous premise and new premise along with sale or end of rental agreement.[26]
2. The date of moving into the new premise.

On 27 July 2012, the Applicant notified to France that they are moving into the new premise and effectively transferred into the new premise at 42 avenue Foch. On 2 August 2012, the embassy notified to the French Ministry that its chancellery is located at 42 avenue Foch. To note, the French still unable to official recognise the diplomatic status of the building due to ongoing criminal proceedings, attachment and confiscation order by the national Court of France. The French promptly objected the premise status to the building located at 42 avenue Foch. This objection is

[26] Supra Note at 4, p. 26, para. 83.

consistent and timely. Also, France consistently asserting that to acquired the premise status, the receiving State should not object and the sending State actually assign the premise for diplomatic use.

To find out the whether France arbitrarily and discriminatorily acted against the Applicant, the Court noted that there is no deprivation of premise for the Applicant. It still retains its old premise at 29 *boulevard de coucelles* as its premise of the mission. Further, there are no comparable cases of this kind. The Court held that there is no arbitrariness and discrimination made against the Applicant.

On 11 October 2011, the French notified the investigating Judge, Paris *Tribunal de Grande Instance* that for a building to attain the status of a premise, it should follow the following four procedures: (1) Effective use; (2) notification; (3) verification and (4) recognition.[27] However, on 28 March 2012, the French notified the Applicant for a building to attain the status of premise of the mission, certain procedure to be followed. They are as follows:

1. The French authorities must be notified of the intention to establish or to relocate the premise;
2. Followed by acquisition of property,
3. Actual use for the diplomatic functioning; and
4. Recognition of premise under Article 22 of the VCDR.[28]

[27] Supra Note at 4, p. 29, para. 97.
[28] *Supra* Note at 26.

5. Tacit Recognition:

The Applicant argued the tacit recognition of premise status by France based on the following grounds:

1. France obtained visa from the embassy located at 42 avenue Foch;
2. During 2015 demonstration, France provided protection to the premise;
3. During presidential poll of the Applicant state, France allowed voting in 42 avenue Foch and
4. France submitted four documents addressing the embassy located at 42 avenue Foch.

However, the French countered the tacit recognition arguments by stating that these above mentioned grounds were pragmatic measures to allow diplomatic functioning in the receiving State out of good will. Still, the French is not able to recognise the said premise as 'premise of the mission'. Further, the documents addressed to 42 avenue Foch was done mistakenly which do not amounts to tacit recognition.

6. Conclusion:

The fundamental objective of international institutional law is to maintain international peace and security. It is also the main purpose of the United Nations. Other purposes of the UN can be achieved, only if, we are able to maintain international peace and security. This phrase international peace and security is a combination of two separate phrases i.e. International peace and international security. Both are mutually and directly connected. The diplomatic law or institution is one of the ways and means to achieve and maintain this prime objective of international law.

This case should have been avoided by mutual consultation between the two sovereign States. Since, the France as a receiving State have stronger interest in deciding the location of the sending State's embassy premise because it has special duty to safeguard the premise and all diplomatic personnel at all times. So definitely, France will have its part in determining the location of the sending State mission premise. Further, the receiving State has a special interest in punishing all criminal activities in the territory of France. Since, the building was bought using the criminal proceeds, the French has legitimate rights in objecting the relocation to the new building to save the attachment followed by confiscation. Further, confiscation will not render the Applicant without the premise but merely changing the ownership of title to France.

Since, the Court decided that the mission never acquired the status of 'premise of the mission'. There is no question of breaches of article 22 i.e. regime of inviolability and immunity of the premise. It is justifiable that the mission failed to attain the status because the acts of the Applicant are to shield the disputed property from being confiscated by the French authorities from the criminal proceeding against its Vice-President.

Access to Financial Services: A Study of Households in the Resettlement Colonies in Chennai

Ms.Anjaly Baby[1]

Abstract

The developing world is getting urbanised rapidly leading to a rise in the percentage of urban population. Though the urbanisation process helped to reduce the overall poverty, it resulted in an increase in the poverty level in urban areas. This shifting of poverty from rural areas to the urban pockets pose a new challenge to the entire development process. The increased migration of people from rural areas to urban areas in search of better livelihood opportunities is worsening the living condition of the urban poor. It is assumed that since the urban poor are living in city centres, they are able to access all the basic services without any difficulties. But geographical proximity to services alone will not ensure accessibility to these services and its quality. A better access to various financial services such as credits, savings, insurance etc will help the urban poor to have a quality access to basic amenities. Various financial inclusion polices were implemented over a period of time to increase the accessibility of the financially excluded low income to provide access to credit and other facilities. But unfortunately, many of these policies could not succeed in positively impacting the quality of access to various financial services and basic amenities to the expected extent. Some of these initiatives has even pushed the poor households into a longer debt trap and increased their financial burden. Thus, these policies ended up in financialising the poor rather than improving their financial wellbeing. There are a whole set of factors that determine the urban poor's accessibility to basic services. Hence, this particular study aims at understanding the factors that determines the ability of the urban poor to access basic services and the impact of financial inclusion policies on the lives of urban poor, particularly in the context of slum resettlement.

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Informal financial institutions play a major role in tapping the savings of poor households both from rural and urban areas who may or may not have regular incomes (Ojo, 1992a,1992b, 1994,1995 and Bouman, 1978). These financial organisations are more common and accessible and can handle small savings with less administrative and transaction costs (Miracle et al, 1980). The formal financial institutions have lots of procedures and require proper documents which is considered to be a complicated process by the common people. But formal institutions are required for mobilising savings among the poor households because it has got a positive impact on the poor families by increasing their willingness to take risks and to delay gratification (Carvalho, 2016).

There exist five types of constraints on savings in poor countries which are transaction costs, lack of trusts, information gap, social barriers and a range of behavioural biases (Jäntti, Kanbur, & Pirttilä (2014). These factors will act as deterrents to access the benefits of formal institutions and other policy benefits (Karlan D, March 2014). For instance, why poor people are not ready to open bank accounts? According to the rational model they are provided with the perfect information and hence they should definitely open bank account for getting the benefits from the government. But they fail to do so and depend on the local money lenders for borrowing at a high interest rate. One explanation for the argument is that it happens because the culture of poverty invokes a negative attitude towards formal institutions. Hence, they will not understand the benefits of the formal institutions and simply distrust those (Mullainathan et al., 2004). On the other hand, from the supply side, more complex the procedure is, it is

less likely to be effective. Know Your Customer (KYC) rules of banks is an example for this where the institutions ask for specific identification documents and hence there is a need for simplifying the programmes for increasing its effectiveness (Karlan D, March 2014). The lower limit of many financial services such as gold loans are too high for the low-income group. This will push them to depend on informal institutions. The existence of large number of pawn brokers and money lenders in the urban pockets show the increased dependency on these institutions for meeting emergencies.

Informal credit including credits provided by the money lenders, pawn brokers and relatives are the major sources of cash flow for the poor but it traps them further in a longer debt period. Hence microfinance was introduced to facilitate better access to credit for the poor. Microfinance initiatives help in addressing the issues of lack of credit availability by providing small loans to the borrowers which should be repaid at frequent regular intervals along with the interest (Kar,2018). MFIs focused mainly in rural areas and gave less emphasis to urban areas with better production and marketing facility and high consumption capacity (Basher and Rashid, 2012). But the dynamics and challenges in the urban environment is different from its rural counterpart (Mohapatra,2015).

The urban poor is facing negligence here and hence their credit requirements and need for financial assistance remain unaddressed. Though microcredit has been identified as the most effective tool to fight against poverty (Sen, 2001; Rahman, 2000; Khandker, 1999; Zaman; 1999; Husain, 1998; Wood and Sharif, 1997; Montgomery et al., 1996), it faces certain challenges too.

For instance, micro credit has increased the dependency of the poor leading to disempowerment in the case of urban poverty in Bangladesh which can be defined as debt trap and debt burden syndrome (Mohammed 2010, Ahmad,2007). Also, it resulted in indebtedness and thereby created poverty traps for women (Shillabeer, 2008). This led to the selling of personal belongings instead of owning more assets to repay debts.

Loans have become an unavoidable factor in the lives of the poor and the state reduced its role in providing basic services. Another major issue is women face more spousal verbal aggression after they started taking loans and had to face verbal and physical violence (Ali and Hatta, 2012) and verbal aggression from fellow members and bank workers when they fail to repay (Rahman, 1999). Das and Pulla (2014) have conducted a detailed review of microcredit in urban poverty in the context of Bangladesh and found that micro credit failed to explore the inner strength of the poor and hence self-directed transformation of the poor is not possible with these initiatives. They argue that for a country like Bangladesh human rights and empowerment perspectives along with strength-based model of social work practice would be more effective to deal with the urban poverty.

Basargekar (2009) has done a study of Annapurna Mahila Mandal, an urban finance institution in India for the empowerment of women in the urban areas of Maharashtra. The study reveals the fact that there is only a marginal increase in the economic empowerment of members in terms of income generation, asset creation and monthly expenditure. But it played a significant role in terms of savings. Also, the study observed a significant rise in self-esteem, self-respect and leadership qualities. Social capital

and social empowerment are positively connected and, in many cases, microfinance has helped in creating and sustaining positive social capital (Basargekar,2010).

Group meetings are an integral part of microfinance model. In a randomized experiment conducted among 174 microfinance groups in India, it is observed that social capital gains increase with more frequent meetings across multiple lending cycles but the effects is less if the borrowing history of the group members are different (Feigenberg, Field, Pande, Rigol, & Sarkar,2014). On the negative side, default in repayment by one family will lead to penalties for the entire group and hence the peer group members have to police each other very closely and make good out of the amount defaulted collectively (Maringanti, 2009). Hence, an emphasis on microfinance at the cost of structural investments in employment generation can prove detrimental to poverty-reduction strategies (Perkins, 2008).

The bottom-of-pyramid is assumed as an unexploited market of consumers. The current policy level shift to create social entrepreneurs who are considered as the source of development facilitated this exploitation (Kar, 2018). The loan officers are committed to the real creditors for loan repayment. It is their job to ensure that the capital invested by the global financiers is always in circulation. This is how microfinance with the direct motive of bringing development becomes profit makers in the global financial markets. The credit worthiness of the borrower is determined by the subjective observations of the loan officers that are influenced by the age-old discriminatory factors including caste and religion. The social practices and informal relationships which were considered as hinderances for economic development

are now used as a resource by global markets to achieve growth. Gender inequality is reinforced while calculating the credit worthiness. Women who are not married and those who are old are less likely to get loans due to the assumption that debt recovery will be problematic in these cases. The loan application of a woman should be guaranteed by a male member of the family to get a loan which again endorse the elements of patriarchy in the society (Kar, 2018).

Microfinance loans should be given for entrepreneurial purposes. But majority of the borrowers seek loans for accessing basic services such as health, education, housing etc reflecting the impact of withdrawal of the state from providing these services. The gradual reduction of social expenditure makes poverty alleviation individual's responsibility by undermining the role of state. This will not help the poor to overcome their vulnerabilities created by the structural and institutional constraints. Hence a rethinking about the role of state in the development process and its responsibility to provide access to basic services is inevitable (Kar, 2018). Hence financial inclusion programmes made poverty reduction an individual task and not the governments or social sector's subject matter.

Constraints to Financial Inclusion

Financial inclusion plays a pivotal role to enable an inclusive and sustainable growth of the developing countries (Bhattacharyay, 2016). He argues that urgent attention is required to understand urban financial inclusion in the context of rapid urbanisation, the unique requirements of the urban population, increasing poor and low-income population in the urban areas. Direct benefits can be provided through financial inclusion to the

low-income households through savings, spending and reduction in transaction costs (Agarwal et al,2017). Access to bank accounts helps the customers to earn interest for their savings and provides incentives to save further. It helps to overcome the behavioural biases that cause them to spend money (Benartzi and Thaler, 2004, Ashraf et al .2006). Allowing access to bank account will result in a reduction in the transaction costs of transferring money to meet the subsistence and savings needs of the family (Agarwal et al,2017).

Though India's economy is showing tremendous growth, a major section of the society remained excluded from all this growth process because of various socio-economic factors (Chakraborthy,2013). Chakraborty (2013) further argues that financial exclusion in the large pockets of urban centres is significant enough but is conveniently ignored. Majority of the people living in these urban pockets have migrated from rural areas to find better employment opportunities and a better life. They mainly engage with non-contractual and temporary jobs that includes vendors, porters, hawkers, construction workers, domestic workers, rickshaw pullers etc. Hence according to him what is required is "fast low cost convenient and safe avenues of savings, credit and remittances to meet their needs" (Chakraborty, 2013). However, the temporary nature of the jobs resulting in the frequent shifting of base within cities and to outside makes the formal financial institutions reluctant to provide financial services.

The Committee on Financial Inclusion, Reserve Bank of India (RBI) (2008) defined Financial Inclusion as *the "process of ensuring access to appropriate financial products and services needed by all sections of the society in general and vulnerable*

groups such as weaker section and low- income groups in particular at an affordable cost, in a fair and transparent manner, by regulated mainstream institutional players". It aims at providing benefits to the poor and to stabilise the economy. Financial inclusion has been made possible in the country with the help of brick-and-mortar branches, Business Correspondents (BC) and other modes and could cover nearly 204800 villages as of 2013. From 2011 to 2013, 96.25 million Basic Savings Deposit Accounts (including erstwhile No-Frills Account) have been opened. The major focus of the financial inclusion policies were the rural inhabitants since majority of the villagers were still unbanked. An assumed notion behind this approach is that the reach of banking networks in urban areas is quite high and the banking services are accessible and available for everybody. But in contradiction to this assumed notion, the problem of exclusion is widespread in urban areas especially among the disadvantaged and the low-income groups despite the fact that there is no unavailability of bank branches.

Distribution of Households by Availing of Banking Services Facility-2011 (In lakhs)

Area	**Total Households***	**Total Number of Households Availing Banking Services**	**Total Number of Households not availing banking services**
Urban	788.7	534.4 (67.8%)	25.4(32.2%)
Slum	137.5	73.1 (53.2%) *:	64.4(46.8%)

Excluding Institutional Households *
Source: Census of India 2011: Tables on Housing Stock, Amenities and Assets in Slums.

Many of the urban poor still do not have access to formal financial products and services like savings, credit, remittance and insurance and thereby forcing them to depend on usurious

informal sources to meet their personal, health, and livelihood-related needs. Also, they struggle to repay such borrowings and finally end up in the vicious circle of poverty (Chakraborty, 2013). For instance, in the case of migrant workers, they prefer to minimise their expense in all possible ways so that they can save a good portion of their earnings for having a better life. Hence, they need a safe place to keep their savings and to remit small amount of money at frequent intervals because majority of them have outstanding loans in their native place which are mostly taken from informal institutions. Therefore, Chakraborty, (2013) argues that remittances are one major source of loan repayment.

The main factors that keep the urban poor out of the financial inclusion policies are their low and irregular earnings, migrant nature of the population, inability to produce adequate documents, bigger family size with single earning member and financial illiteracy resulting in poor money management skills. Other problems faced by them are difficulty in understanding the language, inconvenience related to travelling and waiting time and other conditions that come with the formal financial system. There exists a huge information gap and unawareness also about the remittance facilities offered by the banks and those who possess bank account do not use it in a productive manner. Majority of the population do not have insurance coverages. This will lead to the situation in which they prefer to keep their money at home or depend on informal institutions such as chit funds.

Pradhan Mantri Jan Dhan Yojana was introduced as a massive financial inclusion programme in India (Agarwal *et al*. 2017). The scheme not only focuses on opening of a bank account but also provides other benefits such as a zero-balance bank

account with RuPay debit card, an accidental insurance cover of Rs 1 lakh (Kumar and Venkatesha,2014). The first part of the policy could achieve its objective to an extent, enormous number of accounts were opened at a single instance. But the second part, which aims at inculcating a habit of saving, should be viewed little skeptically because majority of the newly opened accounts are remaining dormant or the frequency of use is almost negligible. So how far the program was a success should be reviewed further.

Financial literacy is important to help and enhance financial decision making by the households. It helps to increase individual participation in formal financial management system. Also, it helps to improve the ability to undertake meaningful transactions (Hogarth and O'Donnell, 1999). People with robust financial skills are able to plan better and save more for retirement (Lusardi and Mitchell,2014). A lot of savings and investment products are required for the creation of wealth which in turn depends on the level of financial literacy and perception on risk (Rajan, 2009). Gunther and Ghosh (2018) have done multivariate regressions and show that there exists large and statistically significant gender, location, employment, education, technology and debt driven differences in financial literacy. Much of the observed regional divergence persist, even after controlling for cohort effects. People with access to savings, credit, insurance and other financial services are more resilient and better able to cope with everyday crisis.

In the case of microfinance outreach in India, rural areas account for 95% whereas the cities remain unserved. Also lack of access to trading spaces for the vendors and inadequate livelihood training further push the urban poor deeply into the poverty trap

(Mohapatra, 2015). Bhattacharyay (2016) suggested certain policy measures for enhancing financial inclusion. This includes building low-cost personalised distribution network, creating asset linked and collateral free credit schemes, leveraging Aadhar platform, creating targeted product and service offering, strengthening business corresponding cells and setting up urban financial inclusion centres.

Various financial inclusion policies were implemented to provide access to financial services to the poor. How far these policies have impacted the lives of the poor and thereby helped in poverty alleviation should be studied in detail for having better policy framework. This will help to understand the constraints to the financial inclusion process. The cost incurred such as transportation cost, lack of information, time constraint and other opportunity costs are not accounted in any of the theoretical models for understanding the financial behaviour. The intrahousehold dynamics of the urban area is completely different from the rural context. Also, proximity to the infrastructure facilities alone cannot completely determine access to the various financial and other services provided for the welfare of the poor especially in the urban context. Hence comprehensive approach to understand the financial behaviour of the people who are in the vulnerable spaces of the urban domain is required. Also, the role of gender and other social networks based on caste, religion etc in determining the accessibility to financial products and savings should be studied in detail. Without accounting these structural issues and the day-to-day experience of the poor in confronting poverty particularly in the urban context, the analysis of the

financial behaviour of low-income households will remain incomplete.

Problem Statement and Background

The key objective of this paper is to understand the extent of financial exclusion among the low-income households, particularly in the context of the slum dwellers who were evicted and were shifted to the resettlement colonies. The background of the study can be linked to the motive of the Tamil Nadu Government to provide housing for the houseless and thus creating slum free city. The motive is visualised by Tamil Nadu Urban Habitat Development Board (TNUHDB) which was earlier named as Tamil Nadu Slum Clearance Board (TNSCB). The name change is directly implying the shift in focus from merely clearing slums to the idea of providing habitat to those who does not have it. The larger question which arises here is whether the process of change in name lead to a change in the lives and livelihood of the people who have undergone through this process. Does the motive of providing housing means only to provide a shelter or does it have got an impact on the development indicators which include, health, education, sanitation, employment, etc. Access to financial products and services are equally important for the growth of the development indicators of the people who are affected.

The Data Source

The study is conducted among the resettled households in the ward 195 and 196 of the Sholinganallur zone of the Okkiyum Thoraipakkam regions. This area is known as Kannagi Nagar.

Resettlement has happened under three schemes – Kannagi Nagar, Ezhil Nagar (Annex to Kannagi Nagar) and Emergency Tsunami Reconstruction Project (ETRP). The area is selected based on purposive sampling as it is the largest resettlement colony in Tamil Nadu. Households are selected based on random sampling. The following table gives the sampling design of the study.

Scheme	Total no of Tenements	Sample size for the Pilot Study (10% of the total number sample)	Sample size (1% of the total number of tenements)
Kannagi Nagar	15656	15	156
Ezhil Nagar	6000	6	60
ETRP	2048	2	20
Total	**23704**	**23**	**236**

The research scholar conducted personal interview with the 236 households using a structured interview schedule. The reference period for the data collected from the field is from June 2020 to May 2021. Along with the personal interviews with the households, I talked to the officials from TNUHDB to understand the idea of resettlement on which they are based on. To understand the dynamics of the relationship of formal financial institutions with the low-income households, I interacted with some banking staffs who works in the Indian Bank which is a nationalised formal financial institution.

1. Data Analysis – Socio Economic Profile

1.1 Possession of Ration Card

	Frequency	Percent
Yes	170	72.0
No	66	28.0
Total	236	100.0

Around 28 percent of the household reported that they donot possess ration card. The main reason is that many people who are staying here face issues related with address proof. Those who are staying for rent reported that due to the lack of documents they are unable to apply for ration card. Hence, they struggled severely to survive through the waves of the pandemic.

1.2 Social group wise Distribution

SG	Frequency	Percent
BC	62	26.3
MBC/DNC	74	31.4
BC (m)	28	11.9
SC	72	30.5
Total	236	100.0

Among the 236 households interviewed, 30.5% constituted scheduled caste population followed by Most Backward Caste which is around 31.4%. Muslims together constituted around 12% of the households interviewed.

1.3. Gender

	Frequency	Percent
Male	181	76.7
Female	55	23.3
Total	236	100.0

Female headed households constituted around 23 percentage.

2. Status of Financial Inclusion

2.1 Usage of Bank Accounts

	Frequency	**Percent**
Yes	170	72.0
No	66	28.0
Total	236	100.0

Gender Wise Usage

Gender-*Bank Account of Head of the Household (BAHH) Cross tabulation

Count

		BAHH		Total
		yes	no	
GENDER	Male	129	52	181
	Female	41	14	55
Total		170	66	236

Among male headed households, 71.27% of them possess bank accounts and 28.7% do not have no account in any banks. In the case of females, 74.5% of them possess bank accounts and 25.5% of them do not have accounts. The major reasons for not having accounts are, KYC related issues, illiteracy, lack of income, etc. Though the data shows that a significant percentage of people possess accounts, most of the accounts are remaining

dormant. Those who receive salary through bank accounts are only using these services in a regular frequency. But they constitute only a small percentage of the total sample. In the ETRP project area, when houses where allotted, under the scheme bank accounts were also opened for transferring the financial assistance of worth Rs 5000/- to the households. But later they are not interested in using these accounts. The main reason for this is lack of regular and adequate income and hence the subsistence income they receive is kept with them a liquid money for meeting there daily financial requirements.

Preferred form of Saving

Options	Frequency	Percent
Keep at home	100	42.4
Deposit in Bank	38	16.1
Never have excess Money	98	41.5
Total	236	100.0

Most of the households (42.4%) prefer to keep their savings at home. Only 16 percentage reported that they deposit excess money in bank and 42% percentage of the households reported that they never had excess money to keep in bank. They spent their income for meeting regular expenditure. Many women members reported that they participated in small savings programme like Magalir Thittam. But during the time of pandemic, most of the households were not having any source of income and hence their participation in these kinds of associations. Lack of income during this time has also resulted in a drastic increase in the debt burden and made them unable to participate in

these activities. Most of the women members reported that they used to participate earlier but now they are unable to do so.

Social Group (SG) * Preferred form of Saving (PFSA)
Cross tabulation (in percentage)

		PFSA			total
		1	2	8	
SG	General	36.4	50	13.6	100
	BC	37.3	17.6	45.1	100
	MBC	37.7	14.3	49.2	100
	BC(M)	42.9	25	32.1	100
	SC	48.6	13.9	37.5	100

Across the social groups, around 49% of the households belongs to SC who prefer to keep money at home and 38 percentage reported that they never had excess money to keep in banks. 49% of the households belonging to the MBC category also reported that their income is not sufficient enough to use formal financial services. People belonging to these groups face more instability of income and lack of employment opportunities. This in turn makes them more vulnerable while facing unforeseen contingencies.

2.3 Physical Access (in % of responses)

	Near	**far**	**Don't know**	**Total**
ATMS	22.4	63.6	14	**100**
Post office	9.7	72	18.2	**100**
banks	39.3	49.2	11.5	**100**
Micro financier	21	19.3	59.7	**100**
Pawn Broker	78	12.2	9.8	**100**

The above table shows the awareness about the proximity of ATMS, Post Office, Banks, Micro Financier, Pawn Brokers etc. Based on the responses it can be understood that only a very few percentages of people are aware about post office. it indicates the lack of awareness and access to the services offered by post office which is cheaper and accessible at the grass root level. Majority are not aware about the services offered by it. There are hardly any information points available for them to know more about these services and facilities. Another interesting point is that they are not much familiar with the proximity of the microfinancier since the representatives of the MFIs are directly going to them and providing credit facilities and for collecting the repayments. So, in this case, the point of contact is only the correspondents from the respective institutions. The mode of operation and less complications in getting loans induce the people to take loans from MFIs. But though the interest rate is less than private money lenders, it is much higher when compared with that banks are offering. Hence most of the respondents said that they face huge

issues while repaying and their debt burden has increased drastically.

3. Access to Digital Payment Services

3.1 Use of Digital Payment Wallets for Financial Transactions

Responses	Frequency	Percent
Yes	88	37.3
No	148	62.7
Total	236	100.0

Regarding the question on usage of digital payment wallets, only 37.3 percentage of the people responded that they use digital payment wallets. The others are neither using nor aware about how to use. The following table shows how the use of Digital Payment wallets varies between genders.

GENDER * DPWFT cross tabulation**

		DPWFT		Total
		1	2	
GENDER	Male	78	103	181
	Female	13	42	55
Total		88	148	236

** DPWFT – Digital Payment Wallets for Financial Transactions

	Frequency	Percent
Manually Withdrawing	109	46.2
ATM	118	50.0
Pay Wallet	9	3.8
Total	236	100.0

Among Male headed households, 33.05 percentage of them use digital payment wallets and others are not using it. Among the female headed households, only 23.64 percentage of them are using it. Others are not able to use these services. Main reason is the lack of availability of smart phones. Generally, the only one smart phone available will be with the male member. Hence access to a Smart phone and other services like OTP etc are essential for using the Digital Payment Wallets.

3.2 Best mode of Financial Transaction

Based on the responses, it can be observed that the best mode of financial transaction is using ATMs followed by manually withdrawing from banks. Only a very few percentage of the respondents argued for pay wallets as the best mode of transactions. The main reason for this is there are certain things required for availing the facilities of digital payment services. The first and foremost thing is to have money in the account. Another important requirement is the availability of smart phone with services like OTP and proper internet connection. So, for meeting immediate and urgent requirements they prefer withdrawing money from banks and ATMs over using the digital payment wallets.

4. Status of Financial Inclusion among Women

4.1 Status of participation in Household Decision Making on Financial Matters

Response	Frequency	Percentage
Yes	85	36.0
No	113	47.9
No Definite Answer	38	16.1
Total	**236**	100

The above table says that 36% of women (including both employed and unemployed) responded that they take part equally in the household decision making process. Around 48% of the women members reported that they do not have a equal role in household decision making process. Either husband or elder family members will be taking the decisions. Another 16 % of the women members surveyed were not ready to give definite answer to this question.

4.2 Managing Financial Transactions

SL. No	Financial Transaction	Yes (%)	No (%)	total
1.	ATM Card	62.5	37.5	100
2.	Bank Passbook	41.6	58.4	100
3.	Visiting Banks	46.8	53.2	100

The above table shows how much the women members of the households are aware about using ATM Cards, bank passbook and visiting banks for any purposes. According to the table 37.5 %

of the women are not aware about using ATM cards. They generally take help from any random person whom they meet at the ATM counter or they will send somebody (can be relatives, neighbours or known person) for withdrawing money. This also led to one time withdrawal of money that comes to the account to reduce transportation cost and other difficulties. 58.4 % of them are not aware about the purpose of bank passbooks. Only 46.8% of the women members are only able to visit banks alone. 53.2 % of them said that they take someone along with them. The main reasons are illiteracy, lack of knowledge about KYC procedures, fear about various procedures, language issues, etc.

4.3 Participation in Kulus

Responses	Frequency	Percent
Yes	158	66. 95
No	78	33.05
Total	**236**	**100**

Regarding participation in Kulus, around 67 percentage of the women members are participating. But 33.05 % are not participating now. They are withdrawing for the time being because of the inability to make regular payments. Those who are participating also mentioned that they are struggling to make regular payments because of unemployment, lack of adequate income to meet the ends. Their struggles have aggravated in the post pandemic period. Hence a reluctance to participate in these programmes was observed.

5. Impact of Resettlement

Shift in the occupational Pattern

	OSPP*		**COS****	
	Frequency	**Percent**	**Frequency**	**Percent**
Casual wage worker	108	45.8	125	53
Contract worker	33	14	11	4.7
Self employed	75	31.8	58	24.6
unemployed	20	8.5	33	14
Corporation Sanitary workers	0		9	3.8
Total	**236**	**100**	**236**	**100**

* Occupational Status while staying at the previous place.
** Current Occupational Status

The above table shows the change in the employment status after shifting to the resettlement colony from the respective native places where they lived earlier. There is a 7.2% increase in the casual labourers. Around 32% of people were self-employed earlier but after shifting to the new place, the percentage of self-employed people got reduced to 25 percentage. Self-employment includes running small tailoring shops, food carts, snacks selling, driving etc. Many of them after shifting to the new colony, are not being able to continue their jobs as they are very far from their possible buyers. It is not so profitable to continue with the same job since the nature of the crowd is very different. This has affected the self-employment options of the poor households, especially women. This led to gradual shift from self- employment jobs to casual labour. Women were mostly affected in this context than men. Many women have to now go for housekeeping jobs and some became unemployed. Regarding the unemployment

status, the unemployment status has increased to 14 percentage from 8.5 % after shifting. 3.8% of the people reported to be working as corporation sanitary labourers. Those who are working as the sanitary labourers are hired for contract by the Urbaser company. The contract for the company runs for 8 years. The job security of the people who are working with the company should be ensured.

Conclusion

Through this study an attempt is made to understand the status of access to financial services of the people who are evicted and got resettled. They struggle for housing and livelihood and to get the promises made by the respective governments on rehabilitation and resettlement. Their struggles include loss of employment and livelihood option resulting in the further deterioration of their life and they are unable to come out of the poverty trap. The consequences are severe including rise in criminal activities and instabilities. The role of financial inclusion is critical here. A better access to credit and other financial products can help them to meet unforeseen contingencies provided the fact that access to basic services such as health, education, sanitation, financial services etc are guaranteed. Hence a study about access of the poor people living in the urban slums of Tamil Nadu to various financial services can give better understanding about the financial behaviour of the urban poor given the constraints they had to encounter because of poverty and the new challenges they have to face because of development initiatives.

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Global /International Harmonization of Cooperative Laws to Promote Cooperative Identity and Social Solidarity Economy

By

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Abstract

ILO Convention No 182 is the first to be ratified by all the countries universally. The harmonization of labour laws with ILO during its 100 years' journey helped to achieve this effort. It is the high time to explore the possibilities and probabilities of harmonising the cooperative laws at all levels with ICA 's Revised Statement and ILO Recommendation 193 to protect the identity of cooperatives and to promote solidarity economy. When Social Justice has become the aim of ILO, the recommendations and legal obligations created by Conventions helped the world to know the importance of human cost rather than labour cost. In the pandemic crisis the SDG 8th goal is the elixir of human lives. The decent work and employment during and post –covid will be a great challenge to the human kind. The IMF World Economic Outlook in its latest report warned a larger circle of people would invisibly slip to hunger and poverty without work and income. At this juncture the efforts of ICA and harmonization of cooperative laws will leave no room in realising the ICA revised Statement and ILO R -193 for economic justice and SDG 8th goal. The Universal definition of cooperatives and its interpretation will be made clear to co-operators at all levels. Intersection with other laws will be clarified and simplified. They will get expert help to improve the cooperative economy at local level, and can cooperate with all

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cross –border cooperatives to disseminate the cooperative identity. The education and technical training will be shared among all cooperatives set up. This article will analyse the technicalities in the harmonization of Cooperative laws.

KEY WORDS: cooperative identity, convention, harmonization, legal obligation, recommendation.

INTRODUCTION

It is a historic event that the ILO Convention 182 has been ratified by all the countries but the eradication of child labour is a million-dollar question. The ratification is a commitment made by the countries to eradicate child labour. A long battle is awaiting to get rid of child labour. The Statistics by IPEC(International Programme on the Elimination of Child Labour) says in its latest report ,2017[2]Nearly 152 million are working as child labourers and 73 million are working in hazardous fields.[3] The Conventions and Recommendations of ILO have been harmonizing International Labour Standards(ILS)with National laws to achieve Social Justice since 1919.The journey of excellence is continuing. The pursuit of only profit during the first industrial revolution period brought misery and suffering in the lives of many. Every combination /union of people considered a threat to owners of factories[4]. The workers and their powerlessness status against the

[2] International Labour Organization. (2017). Global estimates of child labour: Results and trends, 2012–2016.

[3]Seedetails https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf

[4]http://collections.mun.ca/PDFs/radical/AShortHistoryofBritishTradeUnionism.pdf

employers were brought into limelight only with the ideology "concern for the community". The concern for the workers by Karl Marx with the company of Engels and the idea of labour union by Robert Owen, Rochdale Pioneers' idea of cooperatives and Raiffeisen' s idea of cooperative banks gave a strong foundation to Cooperative Identity among people of different countries including India. Even though initially the cooperative ideas gained momentum, later on the idea of cooperatives not grown at national and international but settled at local level with minimum and not so with greater knowledge. The perseverance of ICA and ILO COOP has been maintaining the hope for promoting a cooperative economy to complement the mainstream capitalistic economy of any country to protect the dignity of people and labourers. The Statute for European Cooperative Society,2003, ILO R 193, UN 2012 INTERNATIONAL YEAR FOR COOPERATIVES, ICA 2012 blueprint[5] for decades wanted the world to opt for a structured and systematic framework for cooperatives. The academic debates for legal and regulatory framework for the cooperatives are now gaining momentum around the world. The smooth additional efforts to promote cooperative economies in many countries are suddenly interrupted by COVID 19. The intervention and the impact of COVID -19 shattered Agenda 2030 and sustainable goals which aim for socio-economic justice at a larger perspective for which the cooperatives are no doubt a helping hand. The developing and under-developed nations are invisibly slipping to further poverty and hunger without work and income due to the pandemic brutal lockdown.

[5] Mills, C., & Davies, W. (2013). Blueprint for a Co-operative Decade. *International Co-operative Alliance*.

The IMF World Economic Outlook Report [6] warned there could be more severe economic fallout[7] than expected. When migrant workers in India stranded during the lockdown without food, shelter the degradation of human lives at the lowest[8]. Every country faces this crisis. A threat to human lives and the fear created in the minds of billions by COVID -19 is a great challenge to human beings and humanity. UN Report on March 2020 aims for "Shared Responsibility and Global Solidarity"[9] to counter COVID consequences. How do we achieve? First of all, we have to reverse the worst effects of Covid-19. A need of short term and long term recovery is needed to overcome the effects of covid and try to take the world to the next level of sustainability. In the current scenario, what do people want to stabilise their lives? SDG 8th Goal can be the panacea for all current crisis, this can only be achieved when the cooperative economy at all level get promoted. When human lives affected during I &II World wars, it was the ILO stood against all odds and created legal obligations through its conventions. Now it's the high time to realise ICA statements as a legal obligations and harmonize globally so that even an individual at any corner of the world would get benefit. Harmonization would give us the universal meaning of cooperatives and related concepts, also to make it simple and effective in promoting cooperative economy. If cooperative economy is to be made a permanent along with capitalistic

[6] IMF, J. (2020). A crisis like no other, an uncertain recovery. *World Economic Outlook Update*.

[7]https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020

[8]Details available at https://www.thehindu.com/news/national/coronavirus-lockdown-26-lakh-migrant-workers-in-halfway-houses-says-official-data/article31751222.ece

[9] https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf

economy flow for sustainable development, then the global harmonization is a must. The global harmonization will reduce the complications and confusions at the national and local level and educate and train the cooperative rules and legislations. Academic debates and discussions to revive and promote the cooperative economy and social capital for sustainable development is the need of the hour. The economic justice or as said by Dr.B.R. Ambedkar ,drafting Committee Chairman of Indian Constitution(who crafted Indian Constitution with his wide wisdom) “economics is crucial for social justice”, though it is very difficult, can be achieved through participation and inclusion of people around the world through cooperatives is a proved fact over a period of time. Nevertheless, it involves a lot of technicalities in harmonizing to realise the cooperative identities set by ICA. This article tries to give answers,

- What is a harmony?
- Why do we need harmonisation/What is the purpose?
- How to harmonise? /Process of harmonising
- What are all the challenges during harmonization?
- What are the effects of harmonization?

THE PURPOSE OF GLOBAL HARMONIZATION

The purpose of Cooperative legislation and harmonisation is to achieve two things,

1. To promote Cooperative principles for sustainable development and Cooperative economy for social capital at all level.

2. To support technically to modernize and to infuse expert guidance to achieve the above at all level in par with international organisations and instruments

Predominant legal spirit as Prof. A.V. Dicey said is necessary to avoid arbitrariness. The reforms can be infused only through Cooperative identity and should be member centric. In India though cooperatives are based on Gandhian ideology now in the grip of bureaucratic set up and not by member themselves except a few. The 'mutual' in cooperative principle for the growth of community will be protected only with a strong principle based on harmonisation of regulatory framework and legislation. This has been harmonised just as the regulation of the Statute for a European Cooperative Society (2003)[10] aims to facilitate cooperatives cross-border and trans-national activities. a legal entity that allows its members to carry out common activities, while preserving their independence,

- its principal object is to satisfy its members' needs and not the return of capital investment
- members benefit proportionally to their profit and not to their capital contribution.
- The statute also provides a legal instrument for other companies wishing to group together to access markets, achieve economies of scale, or undertake research and development activities.[11]

[10] https://ec.europa.eu/growth/sectors/proximity-and-social-economy/social-economy-eu/cooperatives/european-cooperative-society-sce_en
[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R1435

The role of cooperative legislation is huge in regulating the cooperatives to grow along with the principles mentioned by ICA and to promote the cooperative economy. Cooperative economy is a public profit economy where not a handful of industrialists realise the profit but the entire community can own it, that's why it is called as social solidarity economy. The Cooperative legislation helps the co-operators to organize themselves in a systematic way and Global harmonisation will help them to true to the cooperative statements laid by ICA.The specific Cooperative legislations with laws, by-laws, rules provide guidelines to the co-operators to function without losing the cooperative identity and they should not lose it out of arbitrariness. It is the legal framework reminds the man the sense of cooperation for a sustainable economy. When it gets harmonized internationally, the economy and the principles will be strengthened forever. When UNESCO in 2016 made cooperatives as one of the intangible cultural heritage of humanity[12] the global harmony of people participation has become obvious.

Why Cooperative legislations are important for Cooperative identity?

Prof.Antonio Fici in his article in 2014 clearly stated the 'essential role of cooperative law"[13]. The 'mutual' purpose and public profit were systematically crafted by Rochdale's ideology is principle based. Only when the legal instrument gets effectively implemented the principles of cooperatives will be realised as

[12] Details available at https://ich.unesco.org/en/lists#2016
[13] See at https://www.elevenjournals.com/tijdschrift/doqu/2014/4/DQ_2211-9981_2014_002_004_003_

Prof. Fici said in the same article. Even after continuous effort of promoting cooperatives over 100 years, still not growing as expected to reduce poverty and unemployment at domestic level of developing and under –developed nations.

Problem -1

At the domestic level either there is no specific legislation for cooperatives or poorly enacted or implemented.

Problem -2

Though in countries like India, they do have fine legislations but not effective and contributing considerably to cooperative economy.

Problem -3

Not effective technical or expert support to monitor, regulate or promote when cooperatives often go wrong. The level of compromising with domestic rules is always a problem while sustaining the cooperative identity.

Problem-4

Either no strong laws or intersections of many laws to complicate the functions for cooperatives.

Problem-5

Future of work. Emerging new form of industries and employment will create a temporary vacuum.

The above are the major problems which can be eliminated by harmonising globally.

HARMONY

What is a harmony? /What to harmonize?

A pleasant combination of different things for good.

Legal harmonisation is a process not,

- A transfer as such from one document to another
- A copying idea from one law to another
- A just unification

Rather it is a systematic process of what and how to harmonise. Global harmony of cooperative legislations involves certain complex factors as follows,

1.Global harmonisation needs an adjustment with the national legislation and by-laws at municipal level[14].It involves a complex process of integrating the national legislations with global instruments. Global harmonising is not to give a global identity but to harmonise the principles and values which has been proved good globally for the cooperatives and solidarity economy.

2. Global harmonisation gives an opportunity to modernise the various legislation by synchronising with the principles and values of global legal instruments[15].Harmonisation certainly reduces uncertainty and risks any legally.[16]

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[14] Barbu, D. (2014). THE PROCESS OF HARMONIZATION FOR NATIONAL LEGISLATION WITH COMMUNITY LAW. *Legal and Administrative Studies= Studii Juridice si Administrative*, *13*(1), 64.

[15] Details available at : http://hdl.handle.net/11245/1.274007

[16] Haentjens, M. (2007). *Harmonisation of securities law: custody and transfer of securities in European private law* (Doctoral dissertation).

3.While harmonising care should be taken not to disturb the legal tradition which is rooted at the local level[17]

4.In the process of Globalisation the world gets united whether its pandemic or production. All new things travel international and transnational. This journey has to be harnessed by legal framework for the benefit of humanity. This can be done only through harmonisation, so that every part of the world will utilise every part of innovations and modernity for their prosperity especially in the field of Cooperatives.[18]

WHAT AND HOW TO HARMONIZE?

Over 100 years of cooperatives and cooperative legislations, the probable results for improving solidarity economy and people participation has not been realised as expected. Work is the source of income, cooperatives can generate work at domestic level and can help to achieve SDG 8th goal. According to a report by World Watch Institute[19] there are over 1 billion people in cooperative economy. The second Global Report's quantitative information[20] is rather promising that cooperative economy and the employment from it will help for sustainable development goals .Now, the corona pandemic grim situation needs this cooperative economy to be taken care of, for the survival and revival of economy at all level. It will certainly take time to rebuild but while doing it, considering for harmonisation be a right choice for SDG 8th goal

[17] Fontaine, M. (2013). Law harmonization and local specificities–a case study: OHADA and the law of contracts. *Uniform Law Review*, *18*(1), 50-64.
[18] https://www.spacelegalissues.com/what-is-unidroit/
[19] Details available at:https://cdi.coop/new-report-highlights-role-of-cooperatives-worldwide/
[20]https://www.ica.coop/sites/default/files/publication-files/cooperatives-and-employment-second-global-report-625518825.pdf.

and overall sustainable development of every nation whether it's a developed, developing or under-developed.

The harmonisation starts with concrete principles which is lay down in documents as follows,

FOR CO-OPERATIVE IDENTITY

- Revised Statement of ICA, 1995.The tools to harmonize are,
    1. Guidance notes to the Cooperative Principles by ICA[21]
    2. Blueprint for a cooperative decade[22]

FOR SUPPORTING COOPERATIVES AT GRASS- ROOT LEVEL

- Sustainability Report for Co-operatives-a guidebook[23]

FOR SOCIO-ECONOMIC JUSTICE

- ILO Recommendation –no-193[24]-Promotion of cooperatives.
- COPAC's-Transforming our world-A Cooperative - 2030[25],Cooperative contributions to SDG -16[26] and 8[27] among SDG -17[28] is primary and vital.

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[21] Rodgers, D. (2015). Guidance notes to the co-operative principles. *International Co-operative Alliance. Retrieved from http://ica. coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900. pdf (accessed on 4 March 2017)*.

[22] Mills, C., & Davies, W. (2013). Blueprint for a Co-operative Decade. *International Co-operative Alliance*.

[23]Available at: https://www.ica.coop/sites/default/files/publication-files/ica-sustainability-reporting-guidebook-1575997496.pdf

[24]Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193

[25]http://www.coopsfor2030.coop/en

FOR SUSTAINABLE DEVELOPMENT

- Resolution adopted by the General Assembly on 17 December 2015 [on the report of the Third Committee (A/70/481)] 70/128. Cooperatives in social development[29]
- Draft guidelines aimed at creating a supportive environment for the development of cooperatives[30]

FOR PROMOTING COOPERATIVE BUSINESS AND SOCIAL AND SOLIDARITY ECONOMY

- ICA-EU partnership(#coops4dev) "Cooperatives in development – people-centered businesses in action"[31]

HARMONY FOR PROMOTING CO-OPERATIVE IDENTITY

The revised statement of cooperative identity by ICA in 1995 is the universal document for upholding cooperative principles and values. The tools to implement the Cooperative statement by ICA as identity are,

1. The guidelines of cooperative identity[32]which has given the details of the seven cooperative principles of ICA to be incorporated in any cooperative form of set up. It includes the

[26]http://www.copac.coop/wp-content/uploads/2019/06/COPAC-SDG16-Final.pdf
[27]http://www.copac.coop/wp-content/uploads/2018/04/COPAC_TransformBrief_SDG8.pdf.
[28]http://www.copac.coop/wpcontent/uploads/2020/06/COPAC_TransformBrief_SDG17.1.pdf.
[29] https://undocs.org/A/RES/70/128
[30] https://www.un.org/esa/socdev/social/documents/AnnexE200168.pdf
[31] https://coopseurope.coop/development/
[32]Files available at: https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf.

universal definition and principles to be followed in a cooperative set up. "Jean-Louis Bancel, Chair, Principles Committee for the guidelines of cooperative committee stated that cooperative identity is two dimensional, the first is that a co-operative is an association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations. The second is that these needs and aspirations are met through a jointly owned and democratically controlled enterprise."[33]The committee comprised as follows,

"Members of Principles Committee responsible for considering drafts and overseeing the editing and production of these Guidance Notes

Jean-Louis Bancel, France (Chair)

Akira Banzai, Japan.

Suleman Chambo, Tanzania.

Dante Cracogna, Argentina.

Ramón Imperial Zúñiga, Mexico.

Akira Kurimoto, Japan.

Jan Anders Lago, Sweden.

Mervyn Wilson, United Kingdom"[34].

To promote the Cooperative identity the seven principles which are to be harmonised in Cooperatives at all levels are as follows[35]

[33]See details at: https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf
[34] Ibid.,

1. VOLUNTARY AND OPEN MEMBERSHIP

Cooperative definition and interpretation, absolute and unconditionally voluntary, open to all, freedom of association, formed for specific purpose (even if it is a multi-purpose cooperative), accepting the responsibilities of a cooperative member, without any discrimination. The above should not frustrated by any law, administrative procedures or taxation and also provides a space for scope of modernity and accommodating non-members.

2. DEMOCRATIC MEMBER CONTROL

Democracy in participating, voting and governing. It is necessary to consider affirmative action to represent the diversity at all levels especially at domestic level. Transparency and accountability are the pillars of good governance in any democracy, that is soul principle of cooperatives. Checks and balances in the form of auditing, accounting, evaluating, monitoring, etc. to be done by committees, board, ombudsman and others effectively. It is better to have a SOP, standard of procedures related to members and membership. A mandatory Natural Justice to be applied in case of any discrepancies instead of an arbitrary approach.

3. MEMBER ECONOMIC PARTICIPATION

Aiming for social solidarity economy which is just opposite to market and profit based economy. In fact, it is very complex in nature. It encourages collectivism rather than individualism.

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[35] Rodgers, D. (2015). Guidance notes to the co-operative principles. *International Co-operative Alliance. Retrieved from http://ica. coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900. pdf (accessed on 4 March 2017).*

When commercial world promoting competition for the benefit of consumers, the cooperative philosophy leads the society otherwise, here consumers are producers, competition is an accord to earn profit of solidarity. In a world of competition and individualism, the "capital" used in cooperative is complex. In a cooperative set up even while promoting commercial business two things to be taken care of,

- Capital of a cooperative entity is not the master but the servant of it unlike commercial company or business.
- In a cooperative set up capital collected to serve the labour and people or the labour of people but not vice-versa.[36]

In an article "Co-operative capital: An essential combination of science (management) and conscience (Co-operative Principles)" Jean-Louis Bancel[37] made it clear that the technicality in cooperatives is the relationship of investment and return as the member economic participation in cooperatives is for solidarity unlike a shareholders profit in any commercial company.

The concept "capital" in cooperatives is completely different from corporate business. Here the capital turns to social solidarity capital results in sustainable development.

How?

Through indivisible reserves, these are accumulated profit pass on to the next generation.[38],unlike the commercial companies utilised among shareholders.

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[36]https://www.ica.coop/sites/default/files/publication-files/ica-the-capital-conundrum-for-co-operatives-en-1892359719.pdf
[37] Ibid.,
[38]https://www.ica.coop/sites/default/files/publication-files/ica-the-capital-conundrum-for-co-operatives-en-1892359719.pdf

The same above reiterated as guidance to the third important principle by ICA as follows,

- At least part of the cooperative capital is usually the common property of the cooperative and that is indivisible .This indivisible property is the social solidarity capital which passes on to the next generation to safeguard the cooperative and members.[39]
- It is a voluntary acceptance to receive limited compensation on the capital they invested.
- Members are entrusted to use the surplus for building a reserve, a part of which is indivisible for the sake of the development of cooperatives
- The capital here is not tradeable unlike the shares of commercial business ,the shares of the former involves collective ownership and for solidarity ,the latter is from individual ownership and is easily tradeable[40]
- As Rochdale Pioneers, "self –help and reliance", the capital should be from members of their own howsoever little.
- All members have voting rights.
- There can be a restriction in withdrawing non- voting capital because it may affect the financial stability of carrying the cooperatives
- The social responsibility of the members in case of loss to make it up is an important feature of cooperatives unlike commercial business this gives them the democratic control in their hands.

[39] Ibid.,
[40] Ibid.,

- The surplus created from cooperatives, a part of it saved as surplus for the sake of cooperatives in future
- The future cooperative laws should be made simple and flexible in dealing with tax or tax exemption, involving external players to assist them in regulating capital and in case of bankruptcy if any.
- Personal liability to be made limited and capital is the common property of the cooperatives.
- Capital to be raised internally, from social financial institutions and with a lot of care from external commercial players. The domestic and national laws and regulating mechanism play a vital role in favour of cooperatives

4. AUTONOMY AND INDEPENDENCE

UN Resolution 56/114 [41]and ILO Recommendation 193[42] strongly in favour of ICA cooperative identity of autonomy and self - organisation.

- A strong legal framework to safeguard the distinctive characteristics of cooperatives and to flourish autonomously and independently.
- The appropriate government at domestic level should try to incorporate cooperative identity of ICA without interfering the cooperative democracy
- The government should have a clear legal and regulatory framework when the cooperative business intersects with the other national laws like Taxation, Competition Law, Bankruptcy laws etc.,

[41] :https://undocs.org/en/A/RES/56/114 (last visited 19th Oct,2020)
[42]https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193 ,(last visited 19th Oct ,2020)

- Cooperative management is the democratic management when it comes to the business it will be difficult to run independently.
- Support by the government and control by the members is the key principle to harmonize by all cooperatives.
- Cooperatives should not be treated as an agency or instrument of the State.
- ILO and ICA ensure that from the beginning of the incorporation of any cooperative, it should get the guidance for their autonomous association as ILO definition mentioned from the policy makers, legislators of domestic level to international cooperation with ILO or ICA.
- The danger in this principle sometimes failure, bad governance and bankruptcy may be resulted as most of the cooperatives are run by not experts, this can be avoided by teaching and training the co-operators how to withstand the challenges. Again harmonising purpose is to educate all the members to withstand the challenges to promote social solidarity economy.

5. EDUCATION, TRAINING AND INFORMATION

The very first Rochdale Principles emphasised to educate the cooperative principles. Many magazines, periodicals, labour reviews continuously disseminated this idea of cooperative education. One among the interesting periodical which propagate this cooperative education as follows,

"COOPERATIVE MOVEMENT IN THE UNITED STATES IN 1933. Reprint from Handbook of Labor Statistics, Bulletin No. 616. 1936, pp. 57-69.

(Address: Bureau of Labor Statistics, U. S. Department of Labor, Washington, D. C. Free.)

"Gives comparative statistics on consumers' cooperatives, workers' productive organizations, credit societies for the years, 1920, 1925, 1929, and 1933. Reproduces the text of the Wisconsin law providing for the teaching of cooperation in the public schools."[43][(Cooperative Book shelf -1937,Topics Consumer cooperatives Bibliography, Consumption (Economics) Bibliography [Washington], [U.S. Govt. Print. Off.],

From the inception of the idea of cooperatives, it has been well structured and implemented by the cooperative mentors. This was very well received by the community only because of the education and training. Even after 100 years when we harmonising still is as fresh as ever not to be missed. Some of the major things for harmonising this education, training and information principles as per ICA guidelines are as follows,

- Rochdale pioneers themselves very clear about even a portion for a profit would spend for education.
- What to educate, whom to give the training, what to provide as information and with whom? is important.
- The Co-operators, members and the people associate with the cooperative are to be educated and trained first.
- They have to be educated on the cooperative principles, nature and benefit of the cooperatives as per ICA blue print, the management techniques for good governance and skills to be imparted. They should know how to run a cooperatives based

[43]Thanks to National Digital library, India, available at: https://archive.org/details/CAT31366504 (last visited 1st Nov,2020)

on its principles for the benefit of the community and should not incur any loss.

- The information is to general public regarding cooperatives, benefit and function and how they can relate or associate to them.
- ICA and ILO COOP are the international bodies give the expert support to do this along with the Nations, 8the harmonising aims for this.
- ILO Recommendation 193 an information guide asserts the importance of education[44]. . Article 8,(d)(e),(f) of the recommendation says as follows and important for harmonisation,

  "(d) promote measures to ensure that best labour practices are followed in cooperatives, including access to relevant information;

  (e) develop the technical and vocational skills, entrepreneurial and managerial abilities, knowledge of business potential, and general economic and social policy skills, of members, workers and managers, and improve their access to information and communication technologies;

  (f) promote education and training in cooperative principles and practices, at all appropriate levels of the national education and training systems, and in the wider society.[45]
- Harmonising will promote cooperative studies at school and higher education level, like Cooperative Management, Cooperative Social Responsibility, at higher education level

[44] Smith, S. (2014). Promoting cooperatives: An information guide to ILO Recommendation No. 193. ILO.

[45] Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193 (last visited,1st Nov,2020)

would help for the further growth of cooperatives world – wide.

6th PRINCIPLE COOPERATION AMONG COOPERATIVES

Global harmonisation of laws and rules is very important for this principle as sustainable development mostly rely on this. Sustainable development is not for particular region or people it is for the whole of taking the generation safely to the next generation without depleting the natural resources and the nature. Any one cooperative is successful is not enough, every single cooperative to run successfully. To promote the solidarity economy, we need cooperation among cooperatives so that to save the existing one and promote more of them in future. Many countries with a lot of cooperatives including India struggling to take to the next level of aiming and promoting solidarity economy. Some of the things to harmonise are as follows,

- Social solidarity economy and cooperation among cooperatives are inter related.
- The concept note of ILO [46] and ICA guidelines are to harmonise is a must
- In the concept note has given the vital information about "coop to coop",

1. Inclusive development

2...Maintaining supply-value chains

[46] Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---coop/documents/meeting document/wcms_632539.pdf (last visited 3rd Nov ,2020)

3. Sustainability of different forms of cooperatives at all levels by providing support

4. Long term trade opportunities

5. Solidarity economy will be sustained

6. Financial cooperation and stability

- ICA,ILO,CSEND in its 5th Global review of aid for trade [47]emphasized the promotion of cooperative through coop to coop.The sustainable development 8th goal which is a base for social solidarity economy was reiterated in the event strongly ,this can be done only by harmonisation .
- Promoting the above decent work goal in global supply chains can be done by cooperatives but by a structured harmonisation to disseminate the technology and infrastructure among all cooperatives at all level[48].This article very specifically mention certain terms which is important harmonisation and cooperative future "Cooperatives in alternative trade" "Cooperative-to-business trade(c2b)" "fair trade" "Cooperative –to-Cooperative trade(c2c)" further it is said clearly in the article we need more research and training for the above and harmonisation will help to achieve with more knowledge sharing "C2C trade can help to advance decent work within the cooperatives, as there is a high demand for better trade practices on both the consumers and producers sides, and create shorter and more transparent supply chains. Besides

[47] The event aims available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---coop/documents/genericdocument/wcms_377978.pdf (last visited 3rd Nov,2020)

[48] Möller, A., Davila, A., & Esim, S. (2019). What Role for Cooperatives for Advancing Decent Work in Global Supply Chains?.

establishing commercial links between cooperatives, knowledge sharing can help to advance the opportunities of cooperatives in supply chains.[49]

- ICA guidelines on its statement explain the essence of "shared cooperative identity"[50] as Cooperation among cooperatives, this will be effective with harmonising.

7th PRINCIPLE "CONCERN FOR COMMUNITY"

Gandhian Economics by J.C.Kumarappa[51] will be a right one to quote here.Mahatma Gandhi "father of nation"[52] inspired the whole world with his ideology in rural development, cooperative enterprises,non-violence,"satyagraha"etc.,the only intention behind his ideology is concern for community, whether it is India, South Africa or any .His first experiment with community development started in South Africa in the name of Phoenix and Tolstoy farm[53] .The settlement and its success in South Africa paved the way for concern for community and promotion of cooperatives[54].This was elaborated by Dr.J.C.Kumarappa as ""Economy of Gregation as the Economy of Permanence"[55]-the honey bee economy is the cooperative economy which is the

[49]See at: https://ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---coop/documents/ genericdocument/ wcms_714278.pdf (last visited 3rd Nov 2020)

[50] Kurimoto, A. K. I. R. A., Draperi, J. F., Bancel, J., Novkovic, S. O. N. J. A., Shaw, L., Wilson, M., & Cracogna, D. (2015). Guidance Notes to the Co-operative Principles. *Consult. Em*, *10*, 2016.

[51] Centre of Science for Villages, available at: http://csvportal.csvtech.in/biography/ (accessed on 5th Nov 2020)

[52] Gandhi, M. (1940). *An Autobiography or the Story of my Experiment with Truth*. Navajivan Publishing House.

[53] Details available at: https://www.mkgandhi.org/museum/phoenix-settlement-tolstoy-farm.html (accessed on 5th Nov 2020

[54] Bhana, S. (1975). The Tolstoy Farm: Gandhi's experiment in "Co-operative Commonwealth". *South African Historical Journal*, *7*(1), 88-100.

[55] Kumarappa, J. C. (1948). *The Economy of Permanence:(a Quest for a Social Order Based on Non-violence)*. Maganvadi.

prominent method of safeguarding the community or what do we call now is the sustainable development. The harmonisation will help to achieve this as the cooperative ideology so that it will reach nook and corner to promote the solidarity economy through cooperatives. Some of the ICA guidelines for harmonisation are,

- Balancing the self and community interest
- To achieve sustainable development goals
- The impact of cooperative enterprises /trade/economy is positive and sustainable against individualistic and materialistic ones.
- Social and environmental impact of cooperative economy
- Expert committee support will be available in achieving while harmonising cooperative principles.

If harmonisation realised and promoted more cooperatives and solidarity economy, the world will not see a pandemic ill effect once again. Community will be saved and also families. In India there is still "Joint Family System"[56],the system is responsible for the social security of the whole family and the government gives tax benefits to encourage the system. The collective system creates cohesion ,interdependence, mutual help etc. which is good to human race and civilisation either in the form of family or cooperatives [57].This scientific article claims the collectivism as a therapy for both mental and physical being of a human being.[58]This .Likewise cooperatives will be a joint family system

[56] Singh, J. P. (2010). Problems of India's changing family and state intervention. *The Eastern Anthropologist*, *63*(1), 17-40.
[57] Chadda, R. K., & Deb, K. S. (2013). Indian family systems, collectivistic society and psychotherapy. *Indian journal of psychiatry*, *55*(Suppl 2), S299.
[58]The psychiatry article available at:
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3705700/ (accessed on 5th Nov 2020).

of the world if properly and timely harmonised and promoted effectively and efficiently.

THE OTHER VITAL DOCUMENTS FOR HARMONISATION TO PROMOTE COOPERATIVES AND SOLIDARITY ECONOMY.

1.**"Sustainability Report for Cooperatives-A guidebook"**[59] While harmonizing the cooperative principles as per ICA Statement on the Cooperative identity as per Blue print, to see that the cooperative enterprises will function to achieve sustainable development goals. ICA has taken a lot of care that future cooperatives aim for sustainable business this should be considered at all level. Harmonising will disseminate the model cooperative behaviours for sustainability at all level. The report of the ILO and ICA on cooperatives and sustainable development goals to be considered.[60].Another report in 2016 on cooperative sustainability also taken into account "Sustainability Report for Cooperatives-A guidebook". This report clearly gives a model frame work for any cooperative to achieve sustainable goals while successfully running a cooperative.

2.**ILO Recommendation 193**-It comprehensively gives the policy and a legal frame work in its guidelines for promoting cooperatives. It includes, universality, self-sufficiency. identity, legal-framework, human resources, self-governance, basic values and principles, role of employers' and workers' organisation,

[59] Herbert, Y., Foon, R., & Duguid, F. (2016). Sustainability Reporting for Co-operatives: A Guidebook

[60] ILO, I. (2015). Cooperatives and the sustainable development goals: A contribution to the post-2015 development debate: A policy brief. *ILO, ICA*.

cooperatives should not undermine the workers' rights[61].ILO did not stop its effort only with its recommendation ,it has given a detailed model statutes and legal frame work[62] for the countries to smoothly implement them. Harmonisation process should consider these guidelines documents of the ILO for clarity. Some successful examples also there like OHADA[63],Mercosur Common Cooperative Statute, Woccu Modem Cooperative Law[64] to have an idea of legal framework.

3.**COPAC-Transforming Our World: A Cooperative 2030 Series**, this important series explore the connection among cooperatives, sustainable development and transformation of the world by 2030.An extraordinary vision that too with pandemic can only be realised by great effort, mere harmonisation is not enough the world leaders and organisation should push hard to achieve this. Though series aimed on 17 SDG, but the brief on SDG-16[65] and 8[66] are rather vital for the current situation.SDG-16- "Promoting peaceful and inclusive societies", even though it aimed mostly for disturbed countries with war, internal conflicts, under-developed etc., now the whole of the world is disintegrated with pandemic and this SDG -16 through cooperatives can be a great solution for current situation. The next vital is SDG -8th goal

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[61] Smith, S. (2014). *Promoting cooperatives: An information guide to ILO Recommendation No. 193*. ILO.

[62] Henrÿ, H. (2005). Guidelines for Cooperative Legislation.

[63] Hiez, D., & Tadjudje, W. (2013). The OHADA cooperative regulation. In *International handbook of cooperative law* (pp. 89-113). Springer, Berlin, Heidelberg.

[64] Details available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_195533.pdf (accessed on 6th Nov 2020).

[65] Available at http://www.copac.coop/wp-content/uploads/2019/06/COPAC-SDG16-Final.pdf (accessed on 7th Nov 2020)

[66] SDG-8 Brief available at: http://www.copac.coop/wp-content/uploads/2018/04/COPAC_TransformBrief_SDG8.pdf. (accessed on 7th Nov 2020)

brief which is rather a future of work, as economy and public finances are rather critical in condition due to pandemic[67] and work itself a scarcity everywhere. Although promising decent work with all comfort and creating employment will be a herculean task, at least these both to be addressed to see the work and workers will not suffer a lot. The harmony of these both the goals in the legal framework of cooperatives at all level should give the result of successful implementation of all SDG.

4**.UN support to the cooperatives at all level including its resolution and guidance**[68] are needed to be considered for harmonisation, also it gives a complete guidance for cooperative legislation which interacts with inter-governmental and international levels[69]. This can be materialised only by harmonising effectively.

5**.Coops4Dev**-The final important to harmonise how to promote cooperative/solidarity economy. The ICA-EU cooperation[70] for making the cooperative business a profitable one is an exemplary one to be followed. Its activities include all training, youth entrepreneur development, film project, capacity building, publication resources etc.,

[67]UN Monthly Briefing on economy available at https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-october-2020-briefing-no-142

[68]Draft Policy for legislative framework by UN available at: https://www.un.org/esa/socdev/social/documents/AnnexE200168.pdf. (accessed on 7th Nov 2020)

[69] Henrÿ, H., & Legislative, C. (2002, May). The creation of a supportive environment in theory and practice: cooperative law. Is it necessary, is it sufficient for cooperatives to prosper. In *Paper for Expert Group meeting, UN Division for Social Policy and Development*.

[70] Website exclusively for cooperative business available at https://coops4dev.coop/en/coops4dev#coops4dev

6.Two particularly other valuable documents were approved by the ICA General Assembly just after ICA Kigali Conference:

- ICA Resolution on Cooperatives for Development, and,
- The ICA Declaration on Positive Peace through Cooperatives, emblematically approved in Rwanda, which experienced a tragic genocide and where cooperatives played a fundamental part in positive peace, particularly during the reconstruction period[71]

CONCLUSION

The research on legal harmonization of cooperative laws in Globalisation era is an exciting work in an ordinary situation which has now significantly changed to a herculean task due to Pandemic. The effect of Pandemic is continuing with second/ third wave of COVID everywhere. The whole of economy is trailing all over the world. The highly populated countries like India is still reeling under pressure. In some states of India, Government has decided to relax the labour laws for boosting the economy which is not good for the worker community and social justice as well. During the lockdown the workers and migrants in India left unattended brutally without food, shelter and water. The hardship has led to many deaths during the lock down. In India the precarious condition is around 90% of workers are unorganised without any social or employment security. The condition is not unique to India due to pandemic In the name of huge population

[71] https://www.ica.coop/sites/default/files/publication-files/annual-report-2019def-792964148.pdf

and a real difficulty in managing resources for them leaving millions of people around the world in streets do not serve the purpose of taking the world to sustainability with humanity and dignity (even in case of pandemic humanity values more).In India new Cooperative ministry has created, Prime Minister Shri Narendra Modi has given the mantra, "Sahakar se Samridhi", and he has set a goal of a US $ five trillion economy, the cooperative sector will also contribute to fulfil this goal.[72]But the real challenge is cooperative identity and its high time to harmonise and get the expert advice to revamp the regulatory and legal framework like EU unlike leaving with the bureaucrats instead of members themselves. . The world organisations, leaders and world companies should join together as a social responsibility to save the world by promoting cooperatives and social solidarity economy for the sustainable development to give the world to the next generation with upgraded environment not a depleted one. The harmony of the cooperative legislations at all level with global instruments and its effect, though be the toughest, are needed for the human race and sustainable development.

[72] https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1758124

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INTERNATIONAL SURROGACY AND STATELESSNESS : A LEGAL ANALYSIS

-Dr Dakshina Saraswathy[1]

Abstract

Surrogacy is becoming more popular as an infertility treatment in India and around the world. Surrogacy's unregulated conduct has resulted in misuse, medical malpractice under the pretext of surrogacy, resulting in criminal actions for vested interests, profiteering, and putting stakeholders in a legally vulnerable position, resulting in abridgment and deprivation of rights. Due to the lack of surrogacy regulation in India, these challenges remain unaddressed. As a result, there is a perceived need to regulate the same by developing a legal framework that addresses the implications related to and arising from surrogacy, laying down permissible codes of conduct to be followed for infertility or ART clinics, ART banks in the conduct of surrogacy, enumerating legal rights and safeguards for stakeholders, addressing legal inconsistencies, gaps by providing for legal issues on establishment of parentage, related civil rights, or the child born out of Surrogacy. In such a situation , this research is very much essential and a needful one over the grey areas of legal complexities in Surrogacy.

Keywords : Assisted Reproductive Technology, Surrogacy, Surrogate, Intended Parents, Commissioning Parents ,Statelessness , Commercial Surrogacy.

Introduction

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International surrogacy-induced statelessness is a relatively new situation that has evolved as a result of improvements in Artificial Reproductive Technology (ART). The majority of births of children produced by medically assisted reproductive technologies do not raise any issues in terms of nationality regulations. However, in circumstances of international surrogacy, there is a real possibility of infants becoming stateless if the surrogacy regime and the nationality rules of the surrogate mother's and commissioning parents' countries of nationality clash. In some cases, this means that the child's nationality cannot be determined.[2]

Surrogacy, particularly international surrogacy, is forbidden, heavily regulated, or actively discouraged in most nations by legal and regulatory organisations. The goals of such restrictive legislation are to prevent exploitation of vulnerable women and children, as well as mothers and babies being trafficked and international adoption processes being circumvented. These laws and regulations, however, are causing statelessness among infants born through foreign surrogacy arrangements in some cases.[3]

Being a citizen is an important advantage for a person since it forms the basis of his civil and political rights. The term "citizenship" is frequently used to describe a person's connection to the state. It has to do with how they deal with local law. An individual has full civil and political rights. Therefore, acquiring citizenship is crucial for everyone. A complex issue in the

[2] Kenneth.R.Niswander , Surrogacy And Law,299 (2nd Ed., 1985)
[3] I*d*

surrogacy world is the acquisition of citizenship for a surrogate child in the case of cross-border surrogacy.[4]

This Article deals with the concept of international surrogacy and statelessness , in this chapter major aspect related to the abandonment of child born out of surrogacy and other various aspects were been put for study. The main objective and purpose of every surrogacy arrangement is to be get a child . But that child when been abandoned , its state of citizenship arises and been a major concern for the well being of Child.

Surrogacy

In a legally binding arrangement known as surrogacy, a surrogate or birth mother consents to carry a child in exchange for permanently ceding custody of the child to another individual or couple, known as the intending parents. The intended parents contribute genetic material and the surrogate carries the child in the majority of surrogacy arrangements. In some cases, the surrogate woman may contribute genetic material, and in extremely rare occasions, both the egg and sperm from donors are extracted and placed in the surrogate. Both formal and informal surrogacy agreements might be based on a contract between the parties.[5]

Surrogacy agreements can either be charitable or commercial. A charitable surrogacy is one in which the birth mother does not profit financially or materially from the arrangement. Contrarily, in commercial surrogacy, a surrogacy

[4] David P. Forsythe, Human Rights In International Relations, 41,(2nd Ed.,2000)
[5] I*d*

broker who receives payment for coordinating the surrogacy is present and the birth mother is compensated financially or otherwise for serving as the surrogate. Although not in its current form, surrogacy has been practised since ancient times, and there are several historical instances of family members or servants filling in for women who were unable to conceive.[6]

Because of technological improvements, this method has become more common and easy for both sides. Surrogacy has not only provided comfort to infertile married couples, but it has also allowed a larger population of socially infertile persons to have a child. Previously, only childless couples turned to surrogacy for aid, and only during their peak child-bearing years. However, this approach is now being used by single and even postmenopausal women who want to start a family.[7]

Surrogacy was once limited to close relatives, family, or friends, and was usually done as a good act. Since the addition of financial considerations to the process, surrogacy has grown beyond the boundaries of the family, neighbourhood, state, and even the entire country. In recent years, celebrities including Deidre Hall and Joan Lunden, Michael Jackson, Angela Bassett, Kelsey Grammer, Amir Khan, and others have used surrogacy, which has led to an increase in its acceptance.

Definition of surrogacy and different types of surrogacies

Surrogacy is the act of one person bearing and delivering a child on behalf of another. Medical issues such as womb absence or deformity, recurrent pregnancy loss, or repeated in-vitro

[6] Bryer Rosamund.M ,Theory For Midwifery Practice , 59-87 (1st Ed., 1995)
[7] Carmel Shalev ,Birth Power: The Case For Surrogacy, 255 (4th Ed., 2008)

fertilisation implantation failures in the genetic mother are among the causes for such arrangements. There are non-medical reasons for employing a surrogate mother, such as aesthetic or other practical considerations..[8]

Surrogacy is classified based on the nature of the contract and the stakeholder relationship. Traditional surrogacy is the original kind of surrogacy, in which the surrogate mother's egg is fertilised with the sperm of either the commissioning father or a donor; needless to say, the kid is genetically connected to the surrogate mother in these circumstances. Surrogate mothers' roles have been restricted in recent years as scientific and medical technology has evolved, to carrying the embryo in her womb during pregnancy and delivering the child. The egg is obtained from the commissioning mother or an egg donor, fertilised in vitro (IVF), and put in the surrogate's womb in this type of surrogacy known as "gestational surrogacy." As a result, the surrogate mother is not genetically connected to the infant in gestational surrogacy.[9]

The amount of money involved in the surrogacy contract can be used to further categorise gestational surrogacy. The surrogate receives no financial compensation for her pregnancy other than medical and dietary expenses incurred throughout the pregnancy in altruistic surrogacy. In commercial surrogacy, the

[8] Alice Ely Yamin, *Defining Questions: Situating Issues of Power in the Formulation of a Right to Health Under International Law*, 18 HUM. RTS. Q.,28 (1996)
[9] I*d*

surrogate receives a monetary reward in addition to the usual expenses.[10]

Legal Response to Surrogacy in India

In Chennai in 1994, the nation of India witnessed its first surrogacy. In 1997, an Indian woman performed a surrogacy for payment, marking the first documented instance of commercial surrogacy in India. In India, the number of children born through surrogacy has increased significantly during the past ten years. It's important to remember that the first instance of commercial surrogacy in India took place in 1997, which ignited a contentious discussion over the legality of surrogacy. Nirmala, the surrogate, agreed to serve as a surrogate for a Chandigarh couple because of financial restrictions.[11] This incident received a lot of media coverage and generated a lot of conversation regarding the issues with surrogacy. The legal system has been hesitant to address the surrogacy issue, though. On the other side, the Indian Council for Medical Research has published a set of guidelines.[12]

Ethical Rules for Biomedical Research on Human Participants were created by the International Committee on Medical Research (ICMR) in 2000, and they contained detailed instructions for handling ART in general. It's important to note that the majority of publications, articles, and websites state that India legalised commercial surrogacy in 2002. However, in 2002 there was no judicial recognition of commercial surrogacy, no official government statement, and no legislative action. Instead,

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[11] Chamberlain Geoffry Et Al , Obstetrics By Ten Teachers, 322. (16TH ed., 1996)

[12] http://www.cii.in/ (Visited on 25.01.2022, 10.30AM)

the ICMR just forwarded the Union of India's Ministry of Health a Draft Guideline for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology Clinics, and it appears that this action was viewed as legalising commercial surrogacy.

These 2002 Guidelines were updated and approved by the International Committee on Medical Research (ICMR) in 2005. These laws include guidelines pertaining exclusively to Indian surrogacy practises. The only regulatory framework in India that addresses surrogacy practises is now this ICMR guideline. However, the adoption and application of this policy are purely voluntary and are not required by law. Additionally, it is silent on a number of issues brought up by surrogacy practises. Additionally, the Indian government's 2008 Assisted Reproductive Technology (Regulation) Bill and Rules have not yet been formally recognised as an Act.[13]

The necessity and requirement for a woman to serve as a surrogate mother, which is at the core of the practise, is the fundamental legal barrier to surrogacy. A number of academics have criticised surrogate motherhood for subjecting women to intolerable risks, including physical, psychological, and symbolic threats including objectification and commodification. According to Carl Schneider, some surrogate mothers will deteriorate or even pass away. Some commentators contend that the process will have a psychological impact on the surrogate, equating it to the psychological harms suffered by birth mothers who place their

[13] I*d*

children for adoption. Some surrogates regret having carried a child for another couple, as evidenced by their choice.[14]

In addition, a lot of surrogacy opponents claim that these contracts reduce women to the value of their wombs. Similar cautions regarding the risk of reproductive technologies fragmenting the reproductive process and separating women from their own reproductive potential were issued by the Royal Commission and the Quebec Council for the Status of Women in Canada, respectively. This is because surrogacy makes a distinction between intended motherhood, gestational motherhood, and genetic motherhood. A woman who accepts the role of a surrogate mother is also required to abide by the contract's terms and conditions throughout the procedure and to give up all parental rights once the child is born. It is claimed that having children and the entire reproductive process are inextricably linked to a woman's existence.[15]

The symbolic harm that surrogacy poses to society is that it could be mistaken for infant selling, a behaviour that is totally wrong in a civilised society. Some scholars believe that surrogacy treats children like commodities that can be purchased or sold for a charge. Others contend that selling organs for transplantation should also be unlawful, which is why surrogacy should be prohibited. It's also said that accepting a surrogacy arrangement is equivalent to engaging in prostitution, adultery, or slavery.

[14] Sundar Rao , An Introduction To Biostatistics – A Manual For Students In Health Service,121-129 (10th Ed.,1987)
[15] http://www.prsindia.org/ (Visited on 24.11.2021, 07.30PM)

Additionally, it is claimed that surrogacy will diminish a woman's basic human dignity.[16]

Surrogacy and the Legal Responses in Foreign Countries

It is widely believed that surrogacy should be supervised and controlled by some kind of policy or set of laws because to the numerous moral, ethical, religious, and legal issues it has produced. However, there is no universal agreement on the legislative measures that ought to be put in place to manage and control surrogacy. Many nations have passed various laws and regulations as a result of their social, economic, cultural, and religious needs and legal requirements.[17]

As a first step in regulating surrogacy, numerous governments organised committees to identify the various issues raised by the practise. The Warnock Committee in Israel, the Ministerial Committee on Assisted Reproductive Technology in New Zealand, and the Law Commission of India, among others, have all looked into surrogacy. Due to legal issues that have developed as a result of surrogacy practises in various countries, surrogacy has led to the creation of laws and regulations for the management and administration of surrogacy in many nations.[18]

Israel

The first nation to adopt specific legislation regarding surrogacy is Israel. Based on the recommendations of the Aloni Commission, Israel established the Surrogate Motherhood agreements Law in 1996. Because of this, Israel has pioneered in

[16] I*d*
[17] Derek Morgan , Surrogacy And The Moral Economy,133 (4th Ed., 2008)
[18] Https://Www.Cdc.Gov/Nchs/Nsfg/Index.Htm (Visited On 11.01.2022 , 2.45pm)

the regulation and facilitation of commercial surrogacy relationships. The Surrogate Motherhood Agreements Law expressly forbids traditional surrogacy and only permits gestational surrogacy. The Surrogate Motherhood Agreements Law also mandates that sperm from the intended father be utilised.[19]

Furthermore, the biological mother has no legal rights under the Surrogate Motherhood Agreements Law when the child is born. The intended parents almost immediately assume legal parental responsibility. The intended parents are responsible for raising the child from the time of birth, in accordance with the Surrogate Motherhood Agreements Law, and they have all the duties and obligations that parents have to their children. As soon as practical following the birth of the child, the birth mother must give the infant into the custody of the intended parents in the presence of a Welfare Officer. A parentage order must be requested by the intended parents within seven days of the baby's birth. Unless the court deems that doing so will jeopardise the welfare of the child after reviewing a report from the Welfare Officer, the court automatically grants the parentage order to the intended parents. The child will be handed custody and full parental rights immediately after birth to the intended parents, who are the default parents unless there are exceptional circumstances.[20]

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[19] Kenneth.R.Niswander , Surrogacy And Law,299 (2nd Ed., 1985)
[20] Gail Dutton , A Matter Of Trust: The Guide To Gestational Surrogacy, 611 (19th Ed.,2008)

Canada

In Canada, the Assisted Human Reproduction Act was adopted in 2004. However, it makes no mention of who may or may not participate in a surrogacy partnership. It is against the law to give a surrogate mother's consenting woman a remuneration. In Section 2(f), it is claimed that "trading in women's reproductive potential and economic exploitation of women raises health and ethical problems that demand their ban." This is in keeping with that idea. The Act forbids paying someone else to make arrangements for a surrogate mother's services. A surrogate mother may get payment for costs associated with her surrogacy if a receipt is provided. She might also get paid back for any lost wages she incurred during her pregnancy if certain requirements are met. It is prohibited to counsel, induce, or administer any medical procedure to a female under the age of 21 in order to help her become a surrogate.[21]

United Kingdom

The Surrogacy Arrangements Act of 1985 and the Human Fertilization and Embryology Act of 1990 both make surrogacy lawful in the United Kingdom. No matter how legitimate or enforceable a surrogacy arrangement may be, it is nonetheless subject to the Surrogacy Arrangements Act. Any agreement about a surrogacy cannot be enforced by or against the parties who make it. The Act defines a surrogate mother as a woman who carries a child in accordance with a contract that was made before she became pregnant with the goal of giving the child to another person or people who will (as far as is reasonably possible)

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exercise parental rights. Section 2 addresses the issue of payment (1). No one is allowed to start or participate in discussions on a business basis, according to this clause.[22]

However, the intended parent and potential surrogate mother are exempt from the rule. The Act prohibits payments made to or for the benefit of surrogate mothers or potential surrogate mothers. There is some restriction even if the Act leaves it unclear what kind of "payment" may be given to a surrogate or prospective surrogate mother because any money received by her would be taken into account when parental or adoption orders are requested. The HFE Act addresses the question of parentage.

According to Section 27, a woman is to be treated as the child's mother if she is carrying or has previously borne a child as a result of sperm and eggs being placed in her womb. Even if the embryo was not made with his sperm, if the woman is married and her husband consents to the procedure, he is regarded as the child's father. The man is regarded as the child's father if the lady is not married but has used treatment services with a guy and his sperm was not used. Section 30 of the HFE Act creates a system where the commissioning parents are regarded as the child's parents. They can be given a parental order by the court. The commissioning couple may be required to adopt the child under the Adoption and Children Act of 2002 if the Act does not apply (for instance, if the commissioning couple is not married or neither of them is genetically related to the child)[23]

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[22] B. Talmud, Tractate Yevamot , Pamela Laufer-Ukeles ,*Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, Volume 9:91, Duke Journal Of Gender Law & Policy, 45 (2002)

[23] Bobak Irene Et Al ,Maternity Nursing , 78-93 (4th Ed., 1998)

United States of America

Because there is no federal legislation governing surrogacy, it is forbidden in the United States. However, surrogacy legislation has been approved by numerous states. Different states approach the same issue in different ways. Some state statutes forbid, declare illegal, or render unenforceable surrogacy contracts. Others have formally legalised and controlled surrogacy partnerships. Altruistic agreements that aren't for profit may be approved. In some states, the distinction between traditional and gestational surrogacy is not always clear. In jurisdictions without pertinent laws, there may be case law on specific issues of surrogacy, particularly when it comes to the issue of parentage.[24]

As a result, laws governing surrogacy differ widely amongst states. To guarantee this consistency, the American Bar Association developed the American Bar Association Model Act Governing Assisted Reproductive Technology. Gestational surrogacy is covered in detail in Article 7 of this Act, which also provides a number of choices for establishing the circumstances in which gestational arrangements may be enforced. Article 8 permits the surrogate to be compensated appropriately and obtain reimbursement for expenses. Additionally, Article 8 of the Uniform Parentage Act of 2000 addresses parentage issues, gestational agreements, and their legal legitimacy.[25]

Nationality of surrogate children

Children typically share their parents' nationality, which is based on where they were born. However, because different

[24] Dawn.C.S ,Textbook Of Obstetrics Including Perinatology And Contraception , 45. (3rd Ed., 2000).
[25] http://www.icmr.nic.in (Visited on 15.02.2022, 04.00PM)

jurisdictions have different methods, determining nationality can be hard as well. Determining legal parenthood in circumstances of international surrogacy can be difficult. As a result, it is more challenging to determine nationality because it is determined by parentage and/or location of birth. Nationality laws are commonly interpreted so that commissioning parents are prevented from becoming the legal parents of a child born overseas via surrogacy unless the government has allowed commercial surrogacy. Based on their surrogacy laws, the nations have been categorised for easier understanding.[26]

Category A: Legal acceptance of commercial surrogacy	**Category B: While altruistic surrogacy is typically permitted, commercial surrogacy is generally prohibited.**	**Category C: Surrogacy is categorically illegal.**
India1, Ukraine, Russia, Panama, Thailand and some states in the USA such as California and Florida.	Canada, UK, Australia, New Zealand, Israel, and the Netherlands.	France, Italy, Germany, China, Japan, Switzerland, Greece, Spain, and Norway.
These countries have adopted laws to enable a surrogate-born child to get	In these countries, altruistic surrogacy is allowed, but commercial surrogacy is prohibited. In Australia,	In the case of countries that have passed anti-surrogacy laws to control their

[26] http://lawcommissionofindia.nic.in (Visited on 01.11.2021, 05.45PM)

citizenship from the commissioning parents. For example, India and Ukraine issue birth certificates in the commissioning parents' names bestowing parentage on the commissioning couple and severing the claims of the surrogate mother and her husband to parentage. In such cases surrogate-born children are not automatically citizens of their country of birth. However in a considerable number of cases the countries of the receiving commissioning parents, have	commercial surrogacy is banned except in the Northern Territory. Britain has substantively similar rules regarding citizenship and illegalizes payment for surrogacy beyond reasonable expenses. Canada and New Zealand both passed laws in 2004 prohibiting commercial surrogacy (e.g Section 6). Israel's Surrogacy Law was passed in 1996 and is highly controlled through a Board of Approval for Surrogacy Agreements. Commercial surrogacy needs to be approved by the Board. Same sex commissioning arrangements are not allowed, and there is no mention of international surrogacy	nationals on moral and policy grounds, there has been a refusal to grant nationality to surrogate-born children. This is applicable even when the child is the genetic offspring of a national. For example, in France, surrogacy is illegal (Art. 16-7), and France refuses to recognize parentage or to give nationality to around 400 children born each year as a result of French nationals entering into surrogacy arrangements with surrogate mothers in the United

denied recognizing children born to surrogate mothers outside their borders as citizens; and thus issues of statelessness have arisen for surrogate-born children.	arrangements.	States, Ukraine or India. However, most of these countries with prohibitive or restrictive surrogacy laws have provided parentage certificates or nationality to surrogate children on an ad hoc basis on the principle that it is in the child's best interest. [27]

Legal challenges

When the commissioning parents are from a country where commissioning commercial surrogacy in another country is forbidden, statelessness difficulties arise in international surrogacy arrangements. Parentage and nationality regulations normally prevent the commissioning parents from becoming the legal parents of a child born via surrogacy in a foreign country.[28]

[27] http://lawcommissionofindia.nic.in (Visited on 01.11.2021, 05.45PM)
[28] American Society for reproductive medicine, *Recommendations for practices utilizing gestational carriers : A committee opinion fertility society* ,Vol 103, AISAT, No. 1, (2015)

The kid will become stateless if the surrogate mother's country declines to recognise her as the biological mother because surrogacy is a legal act, and if unconditional jus soli rules are not in place. Surrogacy-related statelessness might also be caused by other factors. Surrogacy-related statelessness can result from a combination of any two or more of the situations listed below, according to an analysis of cases from various jurisdictions.: [29]

Denial of nationality of children by the Commissioning parents' country because of laws prohibiting or restricting surrogacy.

Commissioning parents from a country where surrogacy or commercial surrogacy are limited or forbidden (Categories B and C above, respectively) commission a baby in another country under this category. They then attempt to return to their country with the kid, but are denied due to severe anti-surrogacy regulations. If the surrogate mother's country likewise denies the child nationality because surrogacy is legal there, the surrogate child becomes stateless. Many cases, such as Jan Balaz v Anand Municipality, Re: L(A minor) UK, and the Mennesson Case, show this predicament. The Le Roches Case and the Volden Case. [30]

Denial of nationality by the surrogate mother's country, because of acceptance of surrogacy as legal.

The surrogate mother's country recognises the surrogate born kid as the commissioning parents' legitimate child and a national of the commissioning parents' country in this category. This

[29] Janet L. Dolgin: *The Evolution of the Patient: Shifts in Attitudes About Consent, Genetic Information, and Commercialization in Health Care*, 34 Hofstra L. Rev. (2004).
[30] I*d*

assumption occurs as a result of those countries' pro-surrogacy policies, and thus falls under Category A, as described above. If the surrogate kid cannot be transferred to the commissioning parents' country for various reasons, the child becomes stateless. Such cases include the Jan Balaz case, the Baby Manji case[31], Re: IJ (A Child) and Re: X&Y (Foreign Surrogacy), the Volden Case (India-Norway), and the Le Roches Case (France-Ukraine). [32]

Refusal by the commissioning parents to take the child back to their country.

The commissioning parents, or one of them, have occasionally neglected to take custody of the surrogate children. Divorce, genetic mix-ups, anomalies in the surrogate kid, and other factors can all contribute to this. Baby Manji Yamada v Union of India[33], The Canadian Twins Case, and The Gammy Case are all examples. In such cases, the kid will likely remain stateless in the surrogate mother's country if that nation has surrogacy enabling laws that recognise the commissioning parents as the child's legal parents rather than the surrogate mother.[34]

Denial of consent by the surrogate mother, even though there is no genetic relationship.

Surrogate moms are sometimes hesitant to offer their approval to hand over the child to the commissioning parents. If the child remains in the surrogate mother's country, she or he will be stateless until the government legalises surrogacy as described in

[31] A.I.R. 2009 S.C. 84
[32] Allison Morse, *Searching for the Holy Grail: The Human Genome Project and Its Implications*, 13 J.L. & HEALTH , 699(2000)
[33] A.I.R. 2009 S.C. 84
[34] T Adrian, Chromosomes Organization And Function, 145-156, (5th ed.,2003)

Category A above. Even six weeks after the surrogate child's birth, the commissioning parents in D and L (Minors) (Surrogacy) (an Indian case) were unable to obtain consent from the surrogate mother.[35]

Specific legal prohibitions on surrogacy arrangements for same-sex couples.

The Goldberg Twins case was a one-of-a-kind Israeli case in which a lower court refused to conduct paternity tests on twins born to a lesbian couple, stating that the court was not allowed to do so. The judge stated that the court could not render a decision on children who were not in Israel and whose Jewish ancestry had not been established. Later, the situation was resolved with the help of the higher court and the Knesset.[36]

Statelessness resulting from international surrogacy agreements happens when the commissioning parent(s) from a country that has outlawed or restricted surrogacy enter into a contract with a surrogate mother from a country that has permitted surrogacy, as discussed above. In such circumstances, the surrogate child's nationality may be denied by the commissioning parents' country for the following reasons:[37]

The country's anti-surrogacy laws clearly restrict acknowledgment of the surrogate parents as the child's parents as a deterrent to discourage surrogacy. Due to the principles of jus sangunis and jus soli, these children are not eligible for citizenship because they were not born to the commissioning mother or in her country's

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[36] G.Padmanabhan, Surrogacy Research: Emerging Ethical .Legal Social And Economic Issues, 18-36, (3rd Ed.,2003).

[37] Linda.J , How Far Surrogacy Is Valid Under Law?, 49-87 (8th Ed.,1990)

territory (or the countries in question do not apply jus soli). When there is no genetic link between the surrogate child and the commissioning parent(s), the situation becomes even worse.In very rare cases it may be due to other legal issues such as restrictions on homosexual relationships or the requirements for valid marriages. [38]

The surrogate mother's country may also refuse citizenship because: the country's legal surrogacy regime assumes and accords parentage only to the commissioning parents, not to the surrogate mother; the surrogate mother's country may lack a nationality law provision for granting citizenship to children abandoned by the commissioning parents or who become trapped in the surrogate mother's country for other reasons.[39]

International law provisions relevant to surrogacy related Statelessness

Article 15 of the Universal Declaration of Human Rights (UDHR), Article 24 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 9 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 7 and 8 of the Convention on the (CRC).[40]

[38] I*d*
[39] Dr S.P Kalantri: *Informed Consent and Ethical Trials*, Indian Journal of Anaesth. (2004)
[40] I*d*

These instruments, however, may not give all of the answers in terms of preventing statelessness among children born through international surrogacy partnerships right away. Article 24(3) of the ICCPR, for example, solely provides the right to acquire nationality, with no time limit on when that right must be exercised. The right of a child to acquire a nationality is clearly stated in Articles 7 and 8 of the CRC; nevertheless, the CRC neither specifies which nationality a child may have a right to nor guarantees that nationality is acquired at birth. Despite the fact that the Committee on the Rights of the Child has provided important guidance in this area, it has yet to address the obligations of states parties in the case of international surrogacy in depth.[41]

Further, the provisions of the 1961 Convention, are also not fully attuned to preventing statelessness arising out of international surrogacy arrangements. For example:

If the child is born on the territory of the surrogate mother's state, Articles 1(1) and (2) (indirectly) provide for the child's nationality to be that of the surrogate mother's state. In practise, if the country in which the kid is born recognises surrogacy, it recognises the commissioning parents as the child's legal parents and may (incorrectly, in some situations) assume that the child acquires a nationality jus sanguinis and fail to apply this precaution;[42]

A child who is otherwise stateless and is born in wedlock in the territory of a Contracting State acquires that nationality at birth through the mother, according to Article 1(3). The convention

[41] http://lawcommissionofindia.nic.in (Visited on 01.11.2021, 05.45PM)
[42] I*d*

does not specify whose wedlock it refers to - the surrogate's or the commissioning parents' – resulting in ambiguity.

Articles 1(4) and (5), as well as Article 4, state that a Contracting State must grant nationality to a child if one of the child's parents had the nationality of the Contracting State indicated above at the time of the child's birth. This protects the child if the surrogate's country rejects the child (for the reasons stated above), and the commissioning parents' nationality can then be bestowed. However, in many countries, to be defined as the child's parent, one must give birth to the child or have a genetic relationship to the child born - which is not always the case in surrogacy. If the commissioning parents' country prohibits surrogacy, the chances of them being granted nationality are slim.

Special efforts for international regulations on surrogacy

In April 2010, the Hague Conference on Private International Law's Council on General Affairs and Policy requested a report from the Permanent Bureau, the Hague Conference's Secretariat responsible for studying matters for the Conference. Through its Parentage/Surrogacy Project, the Permanent Bureau of the Hague Conference on Private International Law is currently researching private international law issues arising from legal parentage or ‘filiation' of children, as well as more specific issues in connection with international surrogacy arrangements. The project is still not complete and will take more time to come up with concrete solutions for surrogacy-induced statelessness. Some commentators

independent to this issue also suggest that an international convention be modelled on The Hague Adoption Convention.[43]

Conclusion

The Foreign Conventions have proven ineffective in preventing statelessness resulting from international surrogacy arrangements, and such examples of statelessness continue to occur. The causes of statelessness, on the other hand, can be traced back to both nationality acquisition laws in different countries and a lack of clear direction from international law.

There are two practical strategies for preventing statelessness as a result of international surrogacy. To prevent statelessness as a result of international surrogacy, the first step is to regulate international surrogacy arrangements under international law. However, because it involves states' sovereign authority to choose nationality, this is a lengthy procedure that requires nations' commitment.

The second step is to improve national regulation of international surrogacy arrangements in order to avoid children born in this situation from becoming stateless. Some countries, such as India, have taken a dramatic move in this direction by fully banning commercial surrogacy involving foreigners in order to avoid the issues that come with statelessness. Commercial surrogacy opportunities for Indian citizens and persons of Indian origin are kept where statelessness difficulties are unlikely to emerge because they are automatically granted Indian citizenship.

[43] http://indiansurrogacylaw.com (Visited on 21.11.2021, 06.30AM)

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