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MESSAGE

It is my pleasure and privilege to place before readers a bunch of research articles authored by students on the multifaceted theme of human rights. 'Student Law Review' of KSLU is a forum for publication of quality articles written by students. Research-based critical legal writing is an essential skill of a law graduate that ought to be systematically developed. Sprouting of an idea with an intensive thinking and social exposure; developing of a theme in light of exhaustively collected data and expression of original views with logical coherence are the tasks to be done in writing research articles. The availability of this forum exclusively for students on competitive basis is a valuable facility in this context.

The present volume contains nine best research articles on human rights chosen from 74 submissions. It involved rigorous selection process and the labour of experts. The articles are on contemporary issues relating to human rights of the vulnerable sections, viz refugees, women, transgenders, victims of gas tragedy, victims of police violence and aboriginals. Protection of human rights is a central value of civilization and core principle of humanism. Human dignity is the core idea behind the human rights.

I hope that this volume will also be warmly received by the readers as in case of earlier volumes. I congratulate the editorial board for bringing-out the volume in an impressive manner.

(P. Ishwara Bhat)

EDITOR'S NOTE

The Karnataka State Law University's Student Law Review Journal is proud to complete its fifth year of publication. Over the past five years, the journal has strived to contribute to the academic discourse surrounding legal issues by publishing articles. By any measurable standard, our journal has been successful: we have seen a steady increase in readership, article submissions, and citations to our published articles. However, we have also grown in less quantifiable ways: our reputation and visibility in the academic community continues to broaden, and our editorial board constantly reassesses and revises the editorial process to ensure the most efficient and satisfying experience. It is great indeed pleasure to announce that we are publishing the FIFTH Volume of the Law Review on the theme of "HUMAN RIGHTS ISSUES". Concern for human rights is central to many of the contemporary world's most important challenges. Human rights need to be kept in spotlight throughout the world having regard to the developments taking place in all the sectors.

Most notably, we have received 74 articles for the present issue. Even though it was a very challenging task for selecting the best among the number of most appropriate articles, members of this editorial board dedicated countless hours to achieve the aim.

Turning to our current journal issue, we again present a diverse selection of stimulating articles from students. The journal covers wide range of Human Rights Issues throughout the world.

As always, we would like to thank our steadfast faculty advisors, Professors for their constant guidance, time, efforts and support which has made our journal possible, for which we are deeply indebted to them.

On a final note, the outgoing board would like to send its best wishes to next year's new board members. We hope that the incoming board will strive to honour the efforts of the past five years and pass down the work ethic and appreciation of academic scholarship to future Karnataka State Law University's Student Law Review Journal members.

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- Ms. Chetana A

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POLICE VIOLENCE IN INDIA – A grave violation of Human Rights.

- Swetha .G Deshpande

Introduction:

Human Rights are said to be available to each and every person in the world only because they being born as humans irrespective of any other consideration. Human rights are those basic and inherent rights without which a person cannot live as humans. Human rights not only includes mere existence of man but also his dignity. They are very much essential for a person to stay peacefully in this world.

"Power corrupts, absolute power corrupts absolutely". Human Rights are often violated because of arbitrary use of power by the state and its authorities. Due to such violations, all round development of personality of a person is hindered and both physical and mental health of a person is affected. A severe action must be taken against a violator of Human Rights may be by punishing him or by making him to pay compensation to the victim and thereby sending a message to society that Humanity is Supreme and nothing else.

Ancient India has believed in the principles like "Vasudhaiva kutumbakam" which means The World is one family and "Ahimsa paramo dharma" which means Non-violence is a topmost duty of a person. In modern days it is bound not only by those principles but also by its treaties and conventions with other countries for protection of human rights. The constitution of India has also ensured human rights in the name of fundamental rights and directive principles of state policy enshrined in part III & IV. The courts in India have interpreted these rights in such a way that widest of wide meaning is given and thereby making state liable for all these rights. Despite of these principles and laws existing, Is this Country free from violation of human rights?

Though the State is said to be guardian of human rights for its citizens, it has been through its machinery doing inhumane activities in the disguise of their duty to maintain law and order

in the State. They have not only indulged themselves in giving physical torture but also in giving mental distress to the Public. For example: Not taking FIR against an influential person, not providing proper information when required, Denying basic facilities to public. This is because of lack of transparency and accountability which leads to anarchy in the state where rights of its own citizens are at threat.

All human rights are equal in importance. The Universal Declaration of Human Rights did not categorize the different kinds of human rights, but subsequent developments in human rights makes it clear that Human Rights are of two kinds:
1. Civil and Political Rights [First Generation Rights]
2. Economic, Social and Cultural Rights [Second Generation Rights]

1. Civil and Political Rights [First Generation Rights]

Civil rights are those rights which refers to life and liberty of a person. Political rights are rights to participate in the government of a state. These rights may be termed as negative rights because a government is required to abstain from doing those activities that would violate them. These rights protect citizens from acts of murder, torture, cruel, unusual punishment, imprisonment without fair trail etc. These Rights arose from International covenant on Civil and Political Rights.

2. Economic, Social and Cultural Rights [Second Generation Rights]

In the absence of these rights, the existence of human being is endangered. Right to adequate standard of living, Right to Work, Right to Education, Right to Physical and Mental Health are some examples of these Rights. These rights are also called as positive Rights because they require active intervention of the state. These are derived from International Covenant on Economic, Social and Cultural Rights.

Protector Turning into Destructor

Human Rights of individuals are frequently violated by various authorities of the government, but the major one is Police Department. Police is said to be the protector of the society and this saying is becoming untrue because of various instances of inhumane activities by them against public. Law has given them power to police to prevent crimes and miss-happenings in the society but this power has been used arbitrarily. The use of physical force against ordinary people, threatening them in fixing false case, and receiving illegal gratification has become common instance.

A police who is supposed to act as government servant and do his duty towards public, but is now seen acting as a servant of politician or influential persons and hence protection is given to them and not to ordinary persons, the growing crime rate gives scope for such presumption. The inhumane acts of police may be categorized as following based on their situation of occurrence.

- Arbitrary arrest and detention
- Violence during Interrogation and Fake Encounters.
- Violence used against Public

Arbitrary Arrest and Detention:

There has been various circumstances where a Person is arrested unlawfully. The Arbitrary Arrest and Detention are violative of Art.21 & 22 of Constitution of India. Arrest and Detention are used as tools to take away a person from Society, who are threatening their exercise of unfettered power. Sec.41 of Criminal Procedure Code gives power to arrest any person without Warrant and the police has been continuously misusing this power.

In Rudal Shah v. State of Bihar,[1] the petitioner was made to undergo 14 years of imprisonment though he has been acquitted in the case. The Supreme Court has Awarded Rs. 30,000 as compensation for this grave violation of personal liberty. This is a clear example of the ignorance of human rights in the society.

In Bhim Singh v. State of J&K,[2] The MLA was arrested and detained to prevent him from attending the session of legislative assembly. This act has been done deliberately. The Court has awarded exemplary damage of Rs.50000 for violation of right to life and Personal liberty. This case shows, how the arresting power of police has been arbitrarily used.

In D.K.Basu v. State of W.B,[3] the court has gone a step ahead and issued guidelines to follow in the cases of arrest and Detentions, they are as following:

- The person carries out arrest or interrogation must have name tag and designation and his name must be recorded in the register.
- Memo must be prepared at time of arrest with two witnesses.
- Any related person must be informed as early as possible.
- The arrested person should be subjected to medical examination
- Arrestee must be permitted to meet his lawyer etc.

[1] (1983) 4 SCC 141.
[2] (1985) 4 SCC 677.
[3] AIR 1997 SC 610.

In Raghuvansh Dewachand Bhasin v. State of Maharastra,[4] the appellant was advocate and was accused of an offence u/s 324 of Indian Penal Code. The ACJM has issued warrant which has been later cancelled on his appearance before the court. The police arrested the appellant though he has said that the warrant has been cancelled. It was severe humiliation and degradation in front of others. The court held that executing a warrant just to humiliate a person was violation of his personal liberty. This case is an example to show that police may arrest any person with or without lawful warrant.

From the above decisions of the courts the arrested person have following rights under Ordinary Laws:

1. The right to be informed 'as soon as may be' the grounds of arrest.
2. The right to consult and be represented by a lawyer of his own choice.
3. The right to be produced before a Magistrate within 24 hours.
4. The freedom from detention beyond the said period except by the order of the Magistrate.

Article 9 of the International covenant on Civil and Political Rights:

Para 5 of Article 9 of ICCPR provides that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to Compensation".

Article 22of the Constitution of India and Art. 9 of the International covenant on Civil and Political Rights are consistent with each other.

Violence during Interrogation and Fake Encounters:

When the person has been accused of an offence, will be arrested in accordance with Criminal Procedure Code. He will be interrogated to discover the truth of the matter. For this reason the police are seen torturing the accused. The torture given by the police are categorized as 1st, 2nd & 3rd degree. The 3rd degree torture is of that sought, many have died because of it. In theory law presumes that every accused is innocent, but in practice punishment is given before he is convicted in the name of Interrogation. In this stage can we say that Human Rights are protected?

In Kishore Singh v. State of Rajasthan,[5] Supreme Court held that the use of third degree method by police is violative of Art.21 and directed the government to take necessary steps to educate them so as to inculcate a respect for the human beings.

[4] AIR 2011 SC 3393.

[5] AIR 1981 SC 625.

Chapter XII of Criminal Procedure Code deals with Information to police and their powers to investigate. It says how the FIR must be recorded, investigation should be conducted and statements to be obtained. There is a direct relation between self-incrimination and violence during interrogation. If police gives torture to accused, then he will be pressurized to give self-incriminating statement. Hence, confession made before has no evidential value. The torture given by police inflicts both physical and mental pains. With these pains can accused be having psychological wellness to present his case properly?

Art.20 (3) of Constitution of India rescues the person from compulsion giving evidence against himself. Here the compulsion means duress which includes threatening, beating or imprisoning of the wife, parent or child of a person. *In Nandini Satpathy v. P.L.Dani,*[6] the Supreme Court held that prohibitive scope of Art.20 (3) goes back to the stage of police interrogation not commencing from court only. The court went a step ahead and held that narcoanalysis, polygraphy and brain finger printing tests of accused violates Art.20 (3), as decided in the case of *Selvi v. State of Karnataka.*[7]

In *Jogindar Kumar v. State of U.P,*[8] the Supreme Court laid down the guidelines governing arrest of the persons during investigation. This was done to protect the human rights of citizens from being violated by law enforcing agencies. In *D. K. Basu v. State of W.B,*[9] Anand J., who delivered a judgment held that "Custodial death is perhaps one of the worst crimes in civilized society governed by the rule of law". And also held that any torture, cruel, inhuman or degrading treatment whether committed during investigation, interrogation or otherwise is violative of Art. 21.

The Police have also exercised their power to encounter arbitrarily. The fake encounters are raising in the Country. To kill a person encounter has been used as a tool. In *People's union for civil libertise v. Union of India,*[10] the Court awarded Rs. 1, 00,000 as compensation to victim and held that encounter is clear violation of Art.21.

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[6] AIR 1977 SC 1025.
[7] AIR 2010 SC 1974.
[8] (1994) 4 SCC 260.
[9] AIR 1997 SC 610.
[10] AIR 1997 SC 1203

State wise list of Fake Encounters in India during 2000-2017

Name of the State	No. of Fake Encounters
Jammu & Kashmir	22
Himanchal Pradesh	2
Punjab	46
Uttarakand	38
Haryana	38
Delhi	40
Rajasthan	25
Uttar Pradesh	794
Gujarath	26
Madhya Pradesh	60
Bihar	74
Jharkand	69
Chattisgarh	56
West Bengal	33
Meghalaya	11
Assam	69
Manipur	63
Tripura	4
Orissa	56
Maharastra	46
Telangana	35
Andra Pradesh	94
Karnataka	20
Tamil Nadu	53
Kerala	3

In Total National Human Rights Commission have registered 1,789 fake encounter cases. This definitely gives us the feeling that there is no value for a life of man and human rights. The Compensation cannot indemnify the life of the person or feelings of the family.

India and Convention against Torture:

India has signed this convention on 14th October 1997. Prevention of Torture Act, 2010 was passed by Legislature of India. It defines *torture* as "whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant intentionally does any act which causes (I) grievous hurt to any person; or (ii) danger to life, limb or health (whether mental or physical) of any person is said to inflict torture". It is in effective in curbing the act of torture.

Violence used against public:

Police has been torturing the ordinary man in one or the other way, though it be a traffic police beating a person violating traffic rules or doing a lati charge against people who were involved in movements for public good. It is nothing but stopping violence using violence. The police came to such position that people started to get fear not out of respect but because their torture. The reluctant behaviour of police when some wants to file an FIR gives rise to a doubt that whether there is a rule of law or not.

A recent incident in Karnataka, the protesters were involved in protest for drinking water in support of Mahadayi dispute in Yamanuru village. These protesters attacked various government offices and caused damage. The next day huge number of police entered the village and brutally beaten the villagers by dragging them from home. This was clear violation of human rights in the state. The State took responsibility for the act of police and awarded Rs. 200 for every beating given to them.

This move of a state sent a message that first beat the people inhumanly and then give them some petty sum.

Remedies available on Violation of Human Rights in India:

Under Protection of Human Rights Act, 1993, the various redressal agencies are constituted at various levels, they are:

1. National Human Rights Commission
2. State Human Rights Commission
3. Human Rights Court in District

Whenever there is a violation of human rights, the people can approach District Courts which are exercising the jurisdiction of Human Rights Court and such Court can award compensation if there is any violation of human rights. The National Human Rights Commission may also take suo moto complaint when there is a clear violation of human right. When the human right violated is also a fundamental right, then the affected person may approach Supreme Court under Art.32 or High Court under Art.226 of the Constitution of India. These courts are also empowered to award compensation to victim and it can also issue guidelines to prevent it from occurring again. The person may prosecute the accused for giving a torture or for misusing of the post etc. For this the FIR shall filed by the victim or the police may take a suo moto complaint against the accused. The accused will be punished on his charges being proved.

These above options actions are both civil and criminal in nature and these actions can run simultaneously, and hence the victim can prosecute under criminal law as well as claim compensation by approaching Human Rights Court or Supreme Court or High Court.

Conclusion:

The law governing human rights must be much having strong implementation and they have to be complied. The Human Rights Courts must be given with some criminal jurisdiction so that the offender is also punished in some grave cases. Prevention of Torture Act must be strengthened by defining properly what amounts to torture. The more and awareness must be created in the society to people can enforce their right whenever it is violated. Humanity should be the topmost principle and nothing else. The people should inculcate the habit of respecting each other's rights.

THE ROHINGYA CRISIS: A CONSTITUTIONAL RECOURSE

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ABSTRACT

The post-2015 world has evinced a resurgence in global refugee crises, touching the levels witnessed in the aftermath of the Second World War, with the extant number of refugees across the globe numbering about 66 million. As pertains to South-East Asia, the region has witnessed the Rohingya refugee crisis which has significantly affected Myanmar and Bangladesh and has recently touched India. Currently India's commitment to International Humanitarian Laws is tested through its approach towards the 40,000 Rohingyas residing in its territory. This paper seeks to scrutinize the various constitutional provisions as well as developments in *Mohammad Salimullah v. Union of India,* that might or might not enable the Rohingyas to seek refuge within Indian territory. Indian treatment of refugees in the past has also been discussed. The current policies of the Indian executive have been directed to gain a pedestal for India in the International fora, and effectively dealing with the Rohingya crisis will prove to be an opportunity for India to achieve the same. The paper also analyses the Indian Government's stand on the removal of Rohingyas on the grounds of national security. The stand on national security has been analyzed vis-à-vis the principle of non-refoulement, (an established principle of customary international law) recognized as a part of Article 21 which is also made available to non-citizens. The paper also highlights the lack of effective legal framework to deal with refugees. The efficacy of various national laws which are being used as makeshift mechanisms in lieu of specific refugee laws has also been scrutinized. The paper concludes by arguing the need for a reassessment of India's policy with regards to the rightful treatment of refugees.

Keywords: Refugee, International Humanitarian Laws, Constitution, national security, non-refoulement, Article 21.

1. INTRODUCTION

The present world bears testimony to the worst phase of refugee crisis. As per the data provided by the United Nations High Commissioner for Refugees (UNHCR), the world has 65.6 million forcibly displaced people in the world today. Of the 65.6 million, 22.5 million are refugees that the UNHCR is accountable for. The staggering figure of 28,300 people forced to flee their homes every day, mainly due to conflict and persecution is only proof of the sense of urgency that the entire refugee crisis has ushered in the international sphere today.

While, Africa and North East and North Africa lead the bandwagon by playing host to 56% of the refugees in the world, Asia and Pacific has only witnessed the refugee crisis of a much lesser magnitude. It is hosting only 11% of the refugees in the world today. The refugee crisis in Asia is led by the 2.5 million refugees from Afghanistan. Now, in 2017, a refugee crisis of a similar magnitude has emerged. The persecuted Rohingya Muslims from Myanmar have come to witness the textbook definition of "ethnic cleansing," as described by Zeid bin al-Hussein, the UN High Commissioner for Human Rights.

2. THE ROHINGYAS OF BURMA AND INDIA IN THE CONTEXT

2.1. Background:

Bearing the tag of being 'the most unwanted people', the Rohingyas are a Muslim ethnic group from Myanmar, erstwhile Burma.[1] A million strong in population, and confined to the state of Rakhine, many of the Rohingyas have been rendered Stateless due to persecution in the Buddhist-dominated nation of Myanmar.

Years of said persecution has led to a refugee crisis that has shook the South East Asian region and has accentuated the problems in a region which remains one of the most vulnerable in the world. The Rohingya refugee crisis, which though in existence for more than two decades now, has spiralled uncontrollably with a spate of recent events occurring in October 2016, and August 2017. The problem, labelled by Myanmar as a 'domestic issue', is anything but that, for an influx of refugees escaping persecution and violence by the security forces in nations such as Bangladesh, Thailand, Indonesia, and of course, India has made the issue a regional problem.

The executive of Myanmar and the Tatmadaw adopta veil of ignorance towards atrocities

[1] Centre on Foreign Relations, What forces are fuelling Myanmar's Rohingya Crisis? (December 7, 2017).

committed by Myanmar's security forcesand claim no wrongdoing on their part. This paper however maintains that there is reported persecution and violence committed by the security forces against the Rohingya people,[2] and that is an essential component to be established for international humanitarian law harps on state action and heeds it imperatively when it comes to refugee crises and the various consociated principles.

2.2. The challenge to Rohingyas in Myanmar:

Documentation of the presence of Rohingyas can be traced back to colonial times. There is abundant literature documenting the language and culture of Rohingyas as were present in the erstwhile colonial Burma. Rakhine, used to be an important trading hub then, and trade between the Arakan Muslims, as they were then, and the State of Bengal, encompassing current day West Bengal, Bangladesh, Assam, and a few other Indian States, has been elucidated upon by British observers. Communal clashes between the Rakhine, as the Buddhist community in the State of Rakhine is known, and the Rohingyas too have been documented since the late-nineteenth century. To suffice, there is considerable proof of the existence of Rohingyas in present day Myanmar.

All of this, however, remains the official position of Myanmar unmoved. After Independence, the claim that has reverberated throughout the statements of various governments and the Tatmadaw has been that the term 'Rohingya' is a misnomer, and the ethnic Muslim population of Rakhine is indeed illegal Bangladeshi immigrants, and the term through which they are to be recognized are hence 'Bengalis'. This de-recognition is not only of the linguistic existence of the term 'Rohingya,' but is symbolic of the lack of recognition granted by Myanmar to this populace hence enabling their statelessness and accentuating their problems.

After the spate of violence in 2012, the Rohingya refugee crisis came to the fore, shaking the conscience of the world.[3] The situation had barely been resolved when in 2016 and in 2017,

[2] Human Rights Watch, Massacre By the River: Burmese Army Crimes against Humanity in Tula Toli (December 19, 2017), also read Human Rights Watch, Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 25, 2017 (September 25, 2017).

[3] ANDREW R.C. MARSHALL, SPECIAL REPORT: PLIGHT OF MUSLIM MINORITY THREATENS MYANMAR SPRING, REUTERS (June 15, 2012), accessible at https://www.reuters.com/article/us-myanmar-rohingya/special-report-plight-of-muslim minority-threatens-myanmar-spring-idUSBRE85E06A20120615 (last verified at 16:35, 28/12/2017), also read, Burma violence: 20,000 displaced in Rakhine State, BBC NEWS, 28 October, 2012, accessible at http://www.bbc.com/news/world-asia-20114326 (last verified at 16:39, 25/12/2017).

conflagration further steeped the situation of the Rohingyas into despondency. In 2012, the violence had erupted primarily due to the gang-rape of a Buddhist woman by Rohingyas and the killing of ten Rohingyas by the Rakhines. In 2016, an attack on the Border Guard Police (BGP) by militant Rohingya group flamed a retaliation by the security agencies which unleashed unto the Rohingyas flagrant human rights abuses and exacerbated the refugee crisis. In 2017, another attack on security forces led to a crackdown which furthered the refugee crisis. All of this goes to show the fragile situation existing in Rakhine vis-à-vis the security forces and the communal nature of the Rohingyas vis-à-vis the Rakhines.[4]

2.3. The Refugee Crisis – In numbers:

The refugee crisis in its turn has compounded the problems in the region. There are an estimated 120,000 Internally Displaced Persons belonging to the Rohingya community within Myanmar, and in Bangladesh's Cox's Bazar alone the number of refugees is close to 846,000, 650,000 of whom had come after the August 2017 crackdown by Myanmar's security forces.[5] Many have fled to nations such as Thailand, Indonesia, Malaysia, and India, while many have also moved to the Gulf Countries. India houses 40,000 of the Rohingya refugees.

2.4. India's stance to Refugees

Traditionally, India's response to influx of refugees arising out of humanitarian crises has been a positive one. In the immediate aftermath of Independence and Partition, India underwent the largest migration of people in history. From both the eastern and the western borders, East Bengal, Punjab and Sindh refugees flooded into the newly independent state.

In line with its principles, India has in the past accepted Tibetan, Sri-Lankan, Bangladeshi and Afghani refugees. After the Chinese annexation of Tibet and the Tibetan uprising in 1959, the Dalai Lama escaped to Dharamshala with thousands of his followers, and today India houses 120,000 Tibetan refugees. India's response to these crises has been positive and various policies for their welfare have been initiated by India. India's dedication to these refugees comes at a cost to diplomacy with China occasionally, yet India remains resilient in its support to these refugees.

In the later part of the 20th Century, when there was rife militancy against Tamils in Sri Lanka, India provided refuge to more than 100,000 Tamils escaping war and militancy in Sri Lanka. Many of them have settled in South India.

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[4] ADVISORY COMMISSION ON RAKHINE STATE, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE: FINAL REPORT OF THE ADVISORY COMMISSION ON RAKHINE STATE (August 25, 2017).

[5] UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS. ROHINGYA REFUGEE CRISIS, accessible at https://www.unocha.org/rohingya-refugee-crisis (last visited at 16:45. 25/12/2017).

During the Bangladeshi Liberation War, an influx of refugees was again followed, with more than 10 Million refugees from erstwhile East Pakistan fleeing to India seeking refuge from violence. The Indira Gandhi Government, in spite of the financial hardships arising, provided them with refuge.

Recently, India gave citizenship status to the Chakma and Hajong refugees who have been settled in Arunachal Pradesh since the last fifty years.[6] In addition to these, India has allowed UNHCR to operate programs in its territory for Afghani refugees, even though India does not recognize them as refugees officially.

2.5. India's policy towards the Rohingyas

India is not a signatory to international refugee conventions and protocols. There is an absence of a domestic law on refugee too. However, India has not shied away from playing a role in terms of accommodating refugees. With regards the Rohingyas, though the Government regards them not as refugees but as illegal immigrants, and sees them as a threat to national security, laying grounds for preventing their settlement. There have been two assertions primarily on the part of the Government in the Supreme Court to liberate themselves of any obligations towards the Rohingyas:

1) That India is not a signatory to the 1951 UN Convention on the Status of Refugees and the following 1967 Protocol, and as such there is no legal obligation upon India to resettle the Rohingyas.[7]
2) That the Rohingyas represent a threat to the National Security of India and as such the principle of non-refoulement is inapplicable.[8]

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[6] Kanishka Singh, *Here is how various refugee communities have fared in India,* INDIAN EXPRESS, September 14, 2017, accessible at http://indianexpress.com/article/india /rohingya-muslims-refugee-myanmar-india-bangladesh-4843379/ (last visited at 16:52, 25/12/2017).

[7] LOK SABHA, UNSTARRED QUESTION NO. 2052 (14 March, 2017), accessible at http://mha1.nic.in/par2013/par2017-pdfs/ls-140317/2052.pdf (last visited at 16:58, 25/12/2017).

[8] SamanwayaRautray, Rohingyas *a threat to national security: Government draft,* THE ECONOMIC TIMES, September 14, 2017, accessible at https://economictimes. indiatimes.com/news/politics-and-nation/rohingyas-a-threat-to-national-security government-draft/articleshow/60519588.cm (last visited at 17:01, 25/12/2017), also read *Rohingya in India 'Illegal', a National Security Threat, Modi Government Says in Court Affidavit,* THE WIRE, 18 September, 2017, accessible athttps://thewire.in/178689/ rohingya-modi-government-affidavit/ (last visited on 25/12/2017).

In response to the first, it is settled that India is obliged by customary international law, and the principle of non-refoulement is an established principle of the same. Elaboration upon the same will be done later in the paper.

As regards the second, India has in the past set up various mechanisms for countering threats arising out of refugee influx, primarily when in the influx of Sri Lankan refugees, it had instituted screening measures to weed out the militants from amongst the refugees. Similarly, India has regular police verifications mandated for Afghani and Iraqi refugees. Hence, in the past too, India has balanced its national security concerns with humanitarian crises and provided protection to the refugees.[9]

3. PRINCIPAL OF NON-REFOULEMENT

The principle of *Non-Refoulement* is essentially a product of customary international law and forms the crux of Refugee Laws in the world. The principle of non-refoulementwas formally incorporated during the World War II. Article 33 of the 1951 Convention[10]:

> "(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
>
> "(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

It was included to ensure that the rights of the refugees are rightfully protected in a foreign land and that the treatment meted out by the State that is granting refugee should not be arbitrary in nature. Today, this principle has attained supreme importance, not in the least because of its exigent nature, with the number of displaced people around the world at an all-time high, crossing the 50 million mark for the very first time.

India is not a signatory to the 1951 Refugee Convention and the principle of non-refoulement is not binding upon it while treating refugees, however, the pattern of judicial interpretations and lack of a legally enforceable mechanism have resulted in a catch-situation.

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[9] Roshni Shanker, *India's Long-Standing Asylum Practices Contradict Modi Government's Stand on Rohingya,* September 21, 2017, accessible at https://thewire.in/179564/india refugee-asylum-practices-rohingya/ (last visited on 17:07 25/12/2017).

[10] *People's Union for Civil Liberties v. Union of India,* 1991 (1) SCC 301.

The principle has come to acquire the status of customary international law. In the case of *People's Union for Civil Liberties v. Union of India,*[10] the court adopted the liberalized rules by stating that the peremptory norms which have already adopted by the various states can be inculcated in the Indian municipal law if they are in conformity with the latter law.[11]

Again, in the case of *Gramophone Company of India Limited v. Birendra Pandey,*[12] it was observed by the court that international instruments must be respected provided they are not against the spirit of legislative enactments of the state.

As pointed out in these judgments, India can implement and incorporate international principles into its municipal law, as there is a lack of any legal mechanism that explicitly addresses the manner of treatment of refugees. The judgments are of immense importance as there is a dearth of a contradicting state law that would act as a hurdle in incorporating the principle. India is not a signatory to the 1951 Convention as well as the 1967 Protocol.

4. INDIA AND NON-REFOULEMENT

The Indian legal system does not explicitly talk about the principle of non-refoulement. However, as a very basic nature and characteristic of the Indian Constitution, it contains some rights that are guaranteed to all (citizens and non-citizens). In the given scenarios, the Rohingya Refugees are essentially non-citizens desperately in need of the preservation of their basic human rights that are guaranteed to them under Article 14 and Article 21 of the Indian Constitution.

Although non-refoulement does not find a place in neither of the legislations operating in India that deal with refugees (Foreigners Act, 1955 and Citizenship Act, 1955) the Indian judiciary has exercised its power of judgment to adjudicate matters both in High Courts and the Supreme Court to enforce the liberty of the refugees. In the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India &Ors.,*[13] the Gujarat High Court recognized non-refoulement under Article 21.

Articles 14 and 21 alongside Article 22 and Article 25 are also inalienable rights that are guaranteed to the refugees as they cannot be arrested arbitrarily and can practise their religion.

Apart from Fundamental Rights, the State is also bound by certain international obligations. Article 51 of the Constitution, also known as the Directive Principles of State Policies (DPSP) talks about India's duty towards international obligations. Although India

[11] *Apparel Export Promotion Council v. A.K. Chopra,* 1999 (1) SCC 756.

[12] *Gramophone Company of India Limited v. Birendra Pandey,* AIR 1984 SC 677, also read: *West Rand Central Gold Mining Company v. The King,* 1905 (2) KB 391.

[13] *Ktaer Abbas Habib Al Qutaifi v. Union of India &Ors.,* 1999 Cri.L.J. 919.

is not a signatory of the 1951 Convention or the 1967 Protocol, under Article 51 (C), 'the State shall aim to strengthen the international law and the treaties,' the Constitution talks about the

"Promotion of international laws and treaties." Thus, it can be rightfully established that the principle of non-refoulement that has come to acquire the status of customary international law ought to be followed by India in treatment of refugees for the sheer prominence that it commands in international jurisprudence.

The importance of non-refoulement and its existence in the Indian constitution and international jurisprudence is of an equal degree. Further, as one of the most distinguished principles in international law, under Article 253, the Parliament can exercise its legislative discretion in incorporating the principle into municipal law coupled with Entry 14 of List I.[14] This Entry throws light upon the legislative competence of the Parliament with regard to treaties, agreements and conventions with foreign countries.

5. NON-REFOULEMENT AND INDIAN JUDICIAL DECISIONS

The judiciary has always been the protector of rights to both citizens and non-citizens alike. It has always proven to be liberal in its interpretation of the law, taking into consideration the various ramifications that the wide or narrow interpretation of law might yield.

The case of *Ktaer Abbas Habib Al Qutaifi v. Union of India &Ors.*,[15] adjudicated in the Gujarat High Court in which two Iraqi refugees who revoked the principle of non-refoulement in order to preserve their basic rights. They were forced to flee their home country to prevent their forceful conscription in the armed forces of Iraq. The Court extensively dealt with the numerous provisions of the Indian Constitution as well as with the international instruments to shed light upon the importance of non-refoulement. The court spoke extensively about Article 33 of the Convention on Status of Refugees, 1951, Article 3 of Universal Declaration of Human Rights and Article 3 on the Convention against Torture to conclude that the return of the refugees to Iraq poses a clear danger to life and would be against the very crux of international jurisprudence. The court emphasised on the Constitution being the safeguard of rights of both citizens and non-citizens. As the Iraqis posed no conceivable threat to the security of India, the court rightfully established the principle of non-refoulement.

The Gujarat High Court judgment was soon to be used as a precedent in adjudicating matters of similar nature and furthering the role of non-refoulement under the Indian Constitution. In the case of *Khudiram Chakma v. State of Arunachal Pradesh,*[16] the Hon'ble

[14] CONSTITUTION OF INDIA, Entry 14, List I.
[15] *Ktaer Abbas Habib Al Qutaifi v. Union of India &Ors.*, 1999 Cri.L.J. 919.
[16] *Khudiram Chakma v. State of Arunachal Pradesh,* 1994 Supp (1) SCC 615.

Supreme Court laid emphasis on Article 14 of Universal Declaration of Human Rights, 1948. The court made it clear that no person can be sent back from a state to his/her home state where the risk of persecution is inevitable in the latter.

Another pressing issue in the matter of Rohingyas is the lack of a verified status or identification of the refugees in contention. Out of the 40,000 refugees seeking refuge in the territory of India, only 16,000 have been verified, i.e. have received refugee documentation.[17] A contention put forward by the Indian Government is an imminent threat posed by these refugees to the security of the nation. However, there seems to be no basis for the same and upon the completion of documentation procedure of the 24,000 remaining refugees, the Indian Government would have access to the backgrounds of each and every one of them.

In the case of *Dr. Malvika Karlekarv. Union of India,*[18] the Hon'ble Supreme Court ensured the non-refoulement of the Andaman Island Burmese refugees and asked for their status verification. This judgment sheds light on the indispensable nature of possessing status verification to seek refuge in India. However, the judgment also stresses on the fact that these very refugees in question cannot be sent back to their countries while their status verification is pending. This exact line of action was also given out in the Madras High Court judgment of *P. Nedumaran v. Union of India,*[19] where the court granted the Sri Lankan refugees residence in India until the completion of status determination by the UNHCR.

Apart from the International law, another very important aspect that is being put to test in the Rohingya Crisis is that of the Constitution culture in India. In the case of *NHRC v. State of Arunachal Pradesh,*[20] the Hon'ble Supreme Court drew a parallel between the protection of basic rights of the refugees and the preservation of constitutional culture in India. The court directed to not refoule the Chakma refugees from Bangladesh on the basis of non-refoulement. Reinforcing the importance of non-refoulement, the Bombay High Court in the case of *Syed Ata Mohammadi v. Union of India,*[21] said that the Iranian refugees cannot be sent back to their country which ensures their persecution.

These cases are a proof of the leeway that has been assured by the judiciary in preserving the rights of the refugees. The versatile approach to various issues and the holistic and wide

[17] Vijaita Singh, *No plan yet to deport Rohingya, says Kiren Rijiju,* THE HINDU, September 11, 2017, accessible at http://www.thehindu.com/news/national/no-plan-yet-to-deport rohingya-says-rijiju/article19664225.ece (last visited at 20:56, 25/12/2017).

[18] *Dr. Malvika Karlekar v. Union of India,* Criminal Writ Petition No. 583 of 1992.

[19] *P. Nedumaran v. Union of India,* 1993 (2) ALT 291.

[20] *NHRC v. State of Arunachal Pradesh,* 1996 SCC (1) 742.

[21] *Syed Ata Mohammadi v. Union of India,* Criminal writ petition no.7504/1994 (Bombay High Court).

interpretation of the factual matrix in various cases is evidence of the strong democratic build of India. These cases speak of the importance of merging both the Indian constitution, the supreme document of the land and the various International Instruments that ensure the preservation of rights of both citizens and non-citizens alike.

6. CONCLUSION

The crisis in contention is a test of India's tolerance and attitude in more ways than one. If the past is any means for setting a precedent to a country's attitude towards beleaguering issues, India's current action can be rightfully dubbed as an aberration. The past boasts a series of events when the nation opened its doors to various refugees and also exuded extended humanitarian protection while never compromising on the national security front.

As discussed India's approach towards the refugees from Sri Lanka, Afghanistan or Iraq has been extremely tolerant and patient. While the Sri Lankan's were put through a screening mechanism, the refugees from Afghanistan and Iraq were subjected to regular police verification. These refugees were subject to screening mechanism that dealt with them at an individual level rather than dubbing them as a threat to national security in its entirety.

The vehement discrimination that the Rohingyas are subjected to in India today cannot be disregarded. Politicians have filed petitions seeking deportation and houses have been set ablaze. Disregarding such treatment meted out to the vulnerable refugees is averse to India's interests, as such treatment only harms India's national security.[22] The Indian Executive needs to revaluate its position in light of the aspects highlighted in this paper and take a stance which is more in conformity with its own precedents, as well as international law.

[22] *Zakir Musa Threatens India Against Deportation Of Rohingyas,* REPUBLIC, September 19, 2017, accessible at http://www.republicworld.com/s/7633/zakir-musa-threatens-india against-deportation-of-rohingyas (last visited at 21:03, 27/12/2017).

THE CHALLENGES OF BEING WOMEN IN INDIA: A LEGAL PERSPECTIVE

- Shashank Kumar Dey[1]
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ABSTRACT

Vulnerable groups are those people who face difficulty in leading a satisfactory life and lack of development opportunity owing to their deprived positions. Despite constitutional safeguards women in India are the most disadvantaged group as they face double discrimination as being part of specific caste, class, ethnic or religious group and gender vulnerability. The present paper first goes through the history of women rights in India and how both women rights and oppressions evolved through the river of time. It critically examines the implementation of constitutional and legislative protection for women and the challenges for women in contemporary India. It goes through the flaws in the implementation of such laws and protections, as well the hegemony of personal laws as well as other legal issues like surrogacy etc. Before reaching the final conclusion the research paper has made a list of recommendations that it believes to be fruitful in the realisation of complete human right for women in India and would achieve the goal of not only the laws existing, but also will pave way for India to become a state that honours the dignity of women not only as a part of its laws but also in practicality. The recommendations are based on the ideology that implementation of laws is more important than enacting new laws as the legislators while drafting have a clear vision of the remedy which the law will provide, which however, becomes blurry due to the mist of faulty implementation.

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I. INTRODUCTION

Rights which are inherited by the reason of birth as a human are human rights and are immutable. They are basic rights that are essential for physical, emotional, spiritual growth of humans and are universal in nature. Human Rights are not derived from the state rather they are rights which belong to a man merely because he is a man.[3]

Defining Human Rights is both simple and complex, simple in the sense that it claims for the universal ethics which must be accepted and observed by everyone. While complex as the list of such rights cannot be confined international diversity and it is impossible to have a universal list of rights. Hence it can be concluded that any act which violate the dignity of a human being is violation of Human Right. The definition has been more crystalized by Dr. D.D. Basu "Human Rights are those rights which every individual must have against the State or Public Authority by virtue of his being a member of human family irrespective of any other consideration".[4]

Historical Background

The Indian ancient society had always been tolerant and respected the dignity of friends and foes. It can be evidenced in Rig Veda "No one is superior or inferior. All are brothers. All should strive for the interest of all and should progress collectively".[5] From time immemorial, Indians have called their culture as Manav Dharma/ Manav Sanskriti and tried to fulfil the need of every human being.

The history has seen that wherever the concept of human rights have come up, women have faced discrimination, dishonour and injustice in the name of religion, tradition and gender etc. Interestingly, these suppressions were socially justified to maintain balance in the society. Several instances of suppressions are -

- Devdasi - practice was prevalent in Hindu society of India in which a woman was married to a deity or the temple. She had to face illegal sexual exploitation and serve rest of her life.

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[3] MAURICE AND CRANTSON, HUMAN RIGHTS TODAY 16 (P.C. Manaktala and sons Pvt. Ltd. Bombay 1962).

[4] D.D. BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW 5 (Prentice Hall of India Pvt. Ltd 1994).

[5] KAPIL SIBAL, LAW, THE CONSTITUTION, WEAKER SECTIONS, WOMEN, MINORITIES, SCHEDULED CASTES AND THEIR DEVELOPMENT 7 (Quest for Human Rights, Rawat Publications New Delhi, 2005).

Such religious practice is still existent in south India.[6]

- Jauhar - was the practice of self- immolation of the Rajput wives to avoid seizure and molestation after the defeat of the warriors. These Rajput women were highly honoured for such.[7]
- Pardah - is practice which is prevalent in Hindu and Muslim religion in one way or another. In this custom women are supposed to cover their body and skin, it curtails the right to freely interact and causes subordination of women.[8]
- Sati - was another callous tradition where a widow woman was supposed to voluntarily emblaze herself alive on her husband's funeral pyre. But it is strongly believed that it was enforced on the widow.[9]

The modern Human Right movement evolved after the gross atrocities the World War II witnessed. Then US President, Franklin D. Roosevelt said "Freedom means the supremacy of human rights everywhere and our support goes to all those who struggle to gain those rights or keep them".[10] In India, the fundamental rights guaranteed are highly influenced and embedded by the universally accepted human rights.[11]

II. HUMAN RIGHTS OF WOMEN IN INDIA

Women are cradle of the civilization. They are the integral part of the society and their role cannot be underestimated. In Indian history, there has been rise and fall in the status of women. They had enjoyed equal status in ancient India but inferior position in the medieval period,[12] Even though their status have improved in modern India, equal status of women is still a distant dream.

The primary reason is literacy as literacy rate of female is less than male in India.

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[6] Sri Hanumanthappa D.G, *Constriction of Women Rights in the Historical and Current context of India,* 2 IJELLH, 327, 330 (2014).

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Thomas Pearcy & Mary Dickson, *"The Four Freedoms" Franklin D. Roosevelt's Address to Congress, January 6 1941, Chapter 36,* W.W NORTON & COMPANY (Nov. 13, 2017, 11:37 P.M), https://www. wwnorton.com/college/history/ralph/workbook/ralprs36b.htm.

[11] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[12] K. GILL, HINDU WOMEN'S RIGHT TO PROPERTY IN INDIA 17 (Deep & Deep, Delhi, 1986).

According to 2011 Census of India[13] Male literacy is 80.9% while women literacy is 64.6%. According to 1998 Report by US Department of Commerce the main obstacle to female education in India are insufficient school amenities (sanitary facility), scarcity of woman teachers and gender bias in curriculum.[14] 'The Preamble of the Indian Constitution seeks to secure to its citizens including woman's, folk, justice- (socio, economic & political) liberty of thought, expression, belief, faith, and worship, equality of status and opportunity, and promote fraternity assuring the dignity of the individual'.[15]

II (1) Rights of Women in India - Constitutional Framework

The Constitution of India came into existence when women were struggling in the society for status and respect. Dr B.R. Ambedkar, father of the Indian Constitution took positive and progressive steps in favour of women to liberate them and changed the image of women in the society. With several amendments, the Constitution provides remedy and strengthen their position.

The safeguards under Indian Constitution are –

- Article 14: It has two expressions 'equality before the law' and 'equal protection of the law' and have been extracted from the UDHR.[16] The first part provides no man is above law while the later part provides 'likes should be treated alike'; affirmative actions, special laws for women come under this part.
- Article 15: While Article 15(1) directs that state shall not discriminate against citizens on grounds only of religion, race, caste, sex, place of birth, under Article 15(3) the State has the authority to make special provisions for women and children. Supreme Court has explained: "The insertion of Clause (3) of Article 15 is a symbol that women had been economically and socially handicapped from generations, and in order to eliminate such backwardness, clause (3) has been placed in Article 15.[17]

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[13] MHRD, *Census of India 2011,* GOI (Nov. 10 2017) http://mhrd.gov.in/sites/ upload_ files/ mhrd/files/statistics/EAG2014.pdf.

[14] Victoria A. Velkoff *"Women of the World: Women Education in India. U.S., Department of Commerce, (International Program Center Oct. 1998),* GOI (Nov. 10 2017) https:// www.c en sus.gov/population/international/files/wid-9801.pdf.

[15] DR. S.K. AWASTHI AND R.P. KATARIA, LAW RELATING TO PROTECTION OF HUMAN RIGHTS 174 (Orient Publishing Company, Delhi, 2nd ed. 2005).

[16] *Supra Note* 11, at art. 7.

[17] Government of A.P. v P.B. Vijay Kumar, A.I.R. 1995 SC 1648.

The Apex Court also notes gender discriminatory laws. The Court declared Rule 8 (2) of the Indian Foreign Service (Recruitment, Seniority and Promotion) Rules 1961 as violation of Article 14[18] and in several cases has upheld the principle of equal pay for equal work without any distinction to sex. The employer must pay equal amount for equal work to men and women irrespective of the place working.[19]

- Article 16: Article 16 ensures equal employment opportunity to every citizen of India.
- Article 23: Slavery is not defined in Article 23, but it is included in the expression 'traffic' in human being.[20] So by the virtue of Article 23(1) slave trade, prostitution and human trafficking are punishable offences. This Article safeguards not only against state but also against private citizens. Article 23 (2) states the state can impose compulsory services forpublic purposes and in imposing such services the state shall not discriminate only on basis of race, sex, caste, class etc.
- Article 39: Article 39(a) directs the state to ensure that men and women equally have right to an adequate means of livelihood. Similarly Article 39(d) ensures equal pay for equal work without any gender bias. Article 39(e) ensures that the health and strength of workers should be protected and people should not be forced for economic necessity to adopt employment which do not suit their age and strength.

  To substantiate this, various laws Equal Remuneration Act 1976, The Mines Act 1952, The Factories Act 1948, The Bonded Labour System (Abolition) Act 1976 has been enacted.
- Article 42: This Article obliges the state to enact laws for ensuring just and human conditions of work and ensure maternity relief for women. In Air India v. Nargeesh Meerza,[21] the impuned clause provided an air hostess to resign on age of 35 or marriage or on first pregnancy whichever is earliest". It was held Unconstitutional and Justice 'Fazal Ali' stated that 'the clause to be callous and an open insult to Indian womanhood'.

II (2) Legislative provisions to safeguard the dignity of the Women

Post-independence in order to adhere to the constitutional provisions of women welfare, Parliament has also enacted various statutes to secure the dignity of the women. A women can be victim of any crime in society and not all crimes can be labelled as crimes against women but the ones which affects women largely. In India women have been wielded with statutory weapons which keep them in fight against male dominated country. Few crimes which are recognised as crime against women are:

[18] Miss C.B. Muthumma v Union of India, A.I.R. 1979 SC 1868.

[19] Mackinnon Mackenzie and Co. Ltd v Audrey D' Costa, A.I.R. 1987 SC 1281.

[20] Dubar Goala v. Union of India, A.I.R. 1952, Cal. 496.

[21] 1982 1 S.C.R. 438.

- Sexual Harassment at Work place - Several organisations have taken safety measures towards ensuring physical safety of the women employees such as providing safe transportation, accommodation, flexible working hours etc.,[22] however still a lot has to be done for securing safe environment for women. At 1993 I.L.O Seminar, Manila, it was recognised that sexual harassment of women at workplace was a form of "gender discrimination against women"[23].As the social menace of sexual harassment of women at workplace was rising, Supreme Court suggested guidelines in Vishaka v. State of Rajasthan[24] however they were never implemented uniformly across the country.

  Only after a decade, legislature felt need for a law against sexual harassment of women at workplace and it was made crime in Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. This Act mandates the employer to create a safe workplace for every female employee and has several clauses which must be mandatorily followed.
- Rape - Rape is a grim human rights violation of women, it is the invasion on the bodily integrity of the women and violates her inner private space. Rape is not sex, it is a crime. "It can be regarded as the highest torture inflicted upon virginity, motherhood and womanhood itself".[25]

  According to "National Crime Records Bureau 2015 Reports, the number of cases reported against rape in India are 34,651, while victims be 34,771[26]", this shows the pitiful condition of women in modern India. Section 375 of Indian Penal Code defines Rape, in common words rape means sexual intercourse with a woman without her consent by force, fear, or fraud.[27] However despite legislative enactment the goal of the law has not been fully achieved, as can be seen from the figures above.

- Immoral Traffic - The root causes for trafficking is socio- economic conditions, poverty

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[22] Deloitte India, Creating a safe work environment: Best practices to deal with sexual harassment at the work place, DELOITTE (Nov. 13, 2017) https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-anti-sexual-harassment-report noexp.pdf.

[23] *Supra* 6 at 12.

[24] 1997 6 S.C.C. 241.

[25] SELVAN, HUMAN RIGHTS EDUCATION: MODERN APPROACHES AND STRATEGIES, 62 (Concept Publishing Company 2010).

[26] NCRB, *Crime in India 2015 Compendium, NCRB (Nov 10 2017)* http://ncrb.nic.in /StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf.

[27] Bhupinder Sharma v State of Himachal Pradesh, 2003 *Supp* (4) SCR 792.

and other factors. The law for such must be framed with human rights perspective and victim at core. The suppression of Immoral Traffic in Women and Girls Act, 1956 now Immoral Traffic (Prevention) Act, 1986 was enacted to pursue with the India's commitment to eradicate human trafficking from its ground.[28]

The Act has been amended to fill the gaps which has been experienced from the previous Act, like, now State government can appoint special officers for dealing with offences under this Act in a specified area[29] and the appointment of trafficking officers who are empowered to investigate offences having inter- state ramification[30] has made the law compact.

There are numerous other crimes which affects women widely, they are molestation, eve-teasing, acid attack, dowry- death, forced surrogacy, exploitation etc.

III. FLAWS IN THE IMPLEMENTATION OF LAWS

No doubt the legal status of women has uplifted to a great extent since independence but still there are lot of loopholes which are to be filled. The first problem in India is not enactment of law rather lacunae in its implementation, the executive and Judiciary should equally be sensitized for women rights, as it can be evidenced as 3, 27,394 cases are lodged of crimes committed against women in 2015.[31] The faithful implementation of laws is the sign of good governance.

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013 is a landmark step but the structure needed for internal and Local Complains are yet to be done. According to Census 2011 the number of working women in India is 149.8 million, but their participation in formal economy is limited. Even in organized sector they face gender discrimination, working hours, safety at workplace etc. Also there is a question as how the law will address issue in the unorganized sector while the crux of the enactment is based on organized sector. The CEDAW Committee in its concluding remark on 4th and 5th Country Report has" recommended that state must evaluate the implementation, effectiveness and impact of the legislation to combat sexual violence and allocate enough resources to set upSpecial Courts, Complainants procedures and achieve the goal of the legislation".[32]

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[28] *Research Study on Human Right Violation of Victims of Trafficking Conducted by Social Action Forum for Manvaadhikar,* NATIONAL COMMISSION FOR WOMEN, (Nov. 10 2017)13http://ncw.nic.in/pdfreports/human_right_violation_of_victims_of_trafficking.pdf.

[29] Supra 6 at 13.

[30] *Id.* at 25.

[31] NCRB, Crime in India 2015 Compendium, NCRB (Nov 10 2017) http://ncrb.nic.in /StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf.

[32] Ministry of Women and Child Development, *Report of the High level committee on the status of women in India,* GOI (10 Nov. 2017) 40 http://wcd.nic.in/sites/default/files /Vol%20I.compressed.pdf.

Rape crime against women has been making headlines since quite period of time, public reaction varies with high and lows, be condemnation on social media platforms or candle light marches, and it depends on how the media highlight the crime. The situation is such that a daily newspaper without reports of rape cases across the country seems impossible. Since 1971 there has been increase of 873% rape related cases in India.[33] This alarming rise in cases may be due to two reasons, first there is an increased awareness in the society and hence cases are widely reported or secondly the crime has actually increased. The rape law has gone through evolution to reach the present Criminal Law Amendment of 2013.

The definition of rape was first overhauled by amendment in 1983 which was brought due to widespread criticism of judgment in Tukaram v. State of Maharastra[34] where accused was not held guilty on ground that victim gave tacit consent to the act. Also sexual intercourse meant only penetration of male genital organ in the female genital organ.

Later the court stressed that depth of penetration is immaterial.[35] It also stressed that no requirement of injuries to be present on private parts of woman to constitute rape.[36] The hymen need not be ruptured.[37]

Marital rape is defined as non-consensual sex with wife over age of fifteen[38] and it is an exception to rape. Recently in Independent Thought v. Union of India[39] Supreme Court held that sexual intercourse by a man with his minor wife is statutory rape and Exception 2 of Sec375 of IPC violates Art 15(3) and 21 of the Constitution. However Court did not dealt with the marital rape of adult wife which means a man get lifelong consent to sex just because a couple is married.

It is an explicit loophole which can be seen on the face of it but still the legislature is yet to take action on it. It is unfortunate that Delhi gang rape case, 2012[40] was required to trigger the

[33] *Id.* at 30.
[34] A.I.R 1979 SC 185.
[35] Wahid Khan v. State of Madhya Pradesh, (2010) 2 S.C.C. 9.
[36] Fateh Chand v. State of Haryana, (2009) 15 S.C.C. 543.
[37] Guddu v. State of Madhya Pradesh, (2007) 14 S.C.C. 454, 2006.
[38] The Indian Penal Code, 1860 (Exception 2, s. 375 IPC).
[39] (W.P. (c) No. 382 of 2013).
[40] State v. Ram Singh SC. NO. 114/2013.

preservation of rule of law and then only the government felt necessary to reform the existing criminal laws to provide swift and enhanced punishment to offenders accused of committing sexual assault against women. Justice J.S. Verma committee was constituted to recommend changes in the criminal law. The committee submitted its report on January 23, 2013.

The summary of the Justice Verma committee report[41]–

- Committee recommended stages of sexual offences should be retained in the IPC.
- Also rape is not mere crime of passion rather expression of power. It should not be limited to penetration of vagina, mouth or anus, rather any non-consensual sexual intercourse should be inclusive in the definition of rape.
- IPC distinguishes between rape within marriage and outside marriage. It prohibits non -consensual but non-consensual sexual intercourse by a husband upon a wife is exception. The committee recommended such exception should be removed as marriage cannot be a ground to justify non- consensual sex. Here marriage should not be a defence to the non-consensual intercourse.

Human trafficking as discussed earlier is the gross violation of human rights. Women and children are the main victims of such trafficking. The key objective for such trafficking is prostitution, bonded labour, pornography, sex-tourism etc. Women are forced into prostitution, and the brothels are the breeding ground for other crimes as well. According to National Crime Records Bureau 2015 report; 6,877 cases of human trafficking has been reported, in which 1048 persons were taken in police custody, also approx. 15000 cases were pending trial from the previous year. Immoral Traffic (Prevention) Act 1986 was enacted to supress and restrict trafficking, however the law has not been uniform in all states. ITPA[42] 1986 has failed to gain success because the focus has been to eliminate prostitution rather than terminating traffic in persons. The implementation of anti-trafficking has concentrated on area of raid, rescue, and rehabilitation of victims but absence in law enforcement in preventing trafficking to happen.

In Gaurav Jain v. Union of India,[43] Supreme Court stated "3 C's Counselling, Cajoling and coercion were needed to effectively enforce the various statutes. Court held women in flesh trade should not be considered as criminals rather victim of vicious circle of the society. Children of these fallen women should be given equality of opportunity, dignity and care. The society should make reparation to prevent trafficking in women".

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[41] *Justice Verma Committee Report Summary,* PRS LEGISLATIVE RESEARCH, (Nov. 10 2017) http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma committee-report-summary-2628/.

[42] Immoral Traffic Prevention Act 1986, No.44, Act of Parliament, 1986 (India).

[43] A.I.R. 1998 (4) 270.

In Prajwala v. Union of India,[44] "HRLN an anti- trafficking organization filed a Public Interest Litigation to force the government to create a 'victim protection protocol' with national guidelines to protect the rights of the victim of human trafficking". On the writ petition filed by the HRLN (NGO), NALSA[45] submitted its report to Supreme Court as how to effectively tackle the trafficking in women and children.

Summary of the Report:

- Shelter and protective homes under the ITPA are inadequate to facilitate the needs of the victim, also victim in the child care institution are dismissed upon age of 18 as due to absence of aftercare house.
- Also raid and rescue operations should not be ad-hoc basis as it leads to victim penalising.
- Committee also suggested change in legislation regarding the definition and ambit of 'sexual exploitation' and recommend to amend the ITPA.
- In order to combat the inter-state network of trafficking, Nodal agency, State agency, District agency should be created.

  Ministry of Home Affairs has issued guidelines to set up (central victim compensations Fund)[46] to implement compensation schemes, reduce disparity in compensation amount and continue financial support to victims of rape, acid attack, exploitation of children and human trafficking.

IV. LEGAL STATUS OF WOMEN IN CONTEMPORARY INDIA

IV (1) Hegemony of Personal laws

In April 2016, Shayara Bano of Uttarakhand approached Supreme Court to declare Triple Talaq illegal, as it violates her fundamental right guaranteed under Article 14 & 15 of the Indian Constitution. This upraised issue of the personal law ghostly overwhelming the rights and interest of the Muslim women.

Muslim law in India is not codified and the practice of triple talaq which is a typical customary practice has given Muslim men absolute, irrevocable right to deprive women of her economic security, marital status etc. within minutes. Triple talaq applies to Muslim men by pronouncing their intention 3 times. It is a human right issue as it discriminates the Muslim

[44] Writ Petition (C) 56 of 2004.

[45] National Legal Service Authority.

[46] *Central Victim Compensations Fund,* TAXHEAL (Nov. 10 2017) http://taxheal.com/wp content/uploads/2015/11/Download-Central-Victim-compensation-Fund-Scheme.pdf.

women against the Muslim men. Supreme Court through various verdicts has initiated to reform the personal law. In case of Dagdu Chhotu Pathan v. Rahimbi Dagdu Pathan[47] Bombay High Court took the view that a Muslim man can give talaq: (1) for reasonable cause/ grounds[48] & (2) He has to follow the provision of arbitration for reconciliation.[49]

In august, a 5 judge constitutional bench held that 'triple talaq is arbitrary because marital knot can be broken impulsively and fancifully by a Muslim man without any attempt to save it'.Hence it is violative of Art 14 of the Constitution. The court upheld the previous decision in Shamim Ara v. State of UP[50] where it held not in many words that 'triple talaq lacks legal sanctity'. Now it is upto legislature to give a formal character to the judgment and enact law for protection of muslim wife. After all religion is for the welfare of the masses and if fails in it certainly former remains futile.

IV (2) The Equality of Entry

When Dr Ambedkar was asked why he was so ardent to get temple entry for Dalit's, he replied "the question is not entry but equality". According to him restriction on temple entry was a powerful tool used by the unequal society to oppress the Dalit's and the women. Bombay High Court agreed upon his view on August 26, 2016 when it held the entry ban of women in the inner sanctum of the 'Hazi Ali Dargah'[51] as unconstitutional as it violated the right to equality and non-discrimination under the Constitution. Remarkably, women were permitted to enter the sanctum of the Haji Ali Dargah till (2011-12). The verdict should be applauded as it upheld the individual right of women. "No institution which derives its strength from religion or sanctioned by religious or personal law, may act or issue directions or opinions (such as fatwa) in violation of basic human rights".[52]

However the battle moves to the Supreme Court where it will be united by similar religious access issue "right of women to enter Sabarimala temple of Kerala". Similarly Bombay High Court on the PIL[53] filed, challenging the prohibition of women in entry to the shrine area of the Shani Shighnapur, asked the state government to allow women to visit the shrine area and provide security if needed because no law prevents women from entering a temple. The prohibition is arbitrary, illegal and violates fundamental right of women. In a

[47] (2002) 3 Mah L J, 602.

[48] Zeenat Fatema Rashid v. Md. Iqbal Anwar, 1993(2) Crimes 853.

[49] A.S Parveen Aaktar v. Union of India, 2003-1-LW (Crl) 115.

[50] A.I.R. 2002 S.C. 3551.

[51] Dr. Noorjehan Safia Niaz v. State of Maharastra, P.I.L. 106.14.

[52] Vishwa Lochan Madan v. Union of India, (2014) 7 S.C.C. 707.

[53] Smt. Vidya Bal v. State of Mahrastra, P.I.L. No. 55 of 2016.

recent move, the Supreme Court has referred the Sabrimala Temple case to a five-judge Constitutional Bench, with the questions being framed by CJI Hon'ble Justice Deepak Misra and Justices R. Banumathi and Ashok Bhushan, one of the important question being, can temple entry be restricted on the ground of a biological factor exclusive to the female gender.[54]

The religious exclusion should not be just looked from the view of sacred tradition rather a matter of civil rights and symbolic equality. The state is not just bound to respect fundamental right by not infringing them but also protect them actively when threated by others.

IV (3) Surrogate Motherhood- Ethical or Commercial

When either or both married partners are medically unfit to conceive, another woman is artificially inseminated with the sperm of the father. The child is then carried and delivered to the couple.[55] This is called surrogacy. It is a noble act to bless a couple with a baby which they are not capable to have their own. However in India it turns to be commercial hub as here surrogacy services are advertised, and surrogates are recruited and the agencies make huge profits out of it. In simple words it is the commodification and technological colonialization of the female body. It results in black marketing of baby selling and breeding farms. It is easy to hire a surrogate in India as the poor, lower middle class, uneducated women get lured of money and get ready to rent their womb. It is not just difficult to hire a surrogate in Western countries but also treatment is expensive.[56] Also illegality of surrogacy in some countries lead people to India.

Lack of any law on surrogacy and regulatory mechanism has caused exploitation of surrogate mother. Commercial surrogates are prone to the exploitation- risk of pregnancy that might affect her own health, miscarriage, deformity or least ensured that they receive the promised amount at the end of pregnancy. The loophole due to absence of any law has been hugely exploited by the agents, fertility clinics and childless couples. Even the Law Commission of India recommends "Need for Legislation to regulate assisted Reproductive

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[54] Krishnadas Rajagopal, *Supreme Court refers case of ban on women's entry into Sabarimala temple to Constitution Bench,* THE HINDU (Oct. 13 2017) http://www.thehindu.com/news/national/supreme-court-refers-ban-on-womens-entry-at-sabarimala-to-constitution bench/article19851755.ece.

[55] Express Web Desk, *What is surrogacy? Everything you need to know,* THE INDIAN EXPRESS (Nov. 13 2017) http://indianexpress.com/article/lifestyle/health/draft surrogacy-bill-2016-what-is-surrogacy-all-you-need-to-know-2994140/.

[56] Shuriah Niazi, *Surrogacy Boom,* BOLOJI.COM (Nov.10 2017) http://www.boloji.com/index.cfm?md=Content&sd=Articles&ArticleID=3056.

Technology Clinics as well as rights and obligation of parties to a surrogacy".[57] Unfortunately, The Surrogacy (Regulation) Bill, 2016 is pending which prohibits commercial surrogacy but allows altruistic surrogacy and provides offences and penalties for violation of the provisions. Under this pending bill the legality of surrogacy agreement would be determined by the Indian Contract Act and enforceable under Section 9 of the Code of Civil Procedure (CPC).[58]

It is clear laxity of the legislature that the bill is yet pending. There is exigent need of transparency and audit of the surrogacy centres so to stop the exploitation of poor women while infertile couples get a chance to have their own baby.

V. RECOMMENDATIONS

- Universal Declaration must be harmoniously interpreted so to implement it with the national laws. It is necessary that judicial construction must be such that in the absence of domestic law the International Conventions and norms should fill the gap on those issues. Also Human Rights in general must be dealt realistically.
- It is necessary to review the status of legislature, judicial decision and administrative authorities and a report should be made annually by a competent & appropriate authority. The authority must focus on the basic pillars of human rights empowerment i.e. education, health care, women based legislation, equal economic opportunity, judicial decisions should be favourable to women interest.
- Women issues should be prioritized and an effective monitoring body should make sure that women are given equal opportunity and promoted. NGO's and other women welfare organizations should be encouraged to act as watchdog and from time to time scrutinize the government policies, laws and suggest reforms favourable for women. Other than this it is the responsibility of these organizations to act on grass root level sincerely be it in urban, rural areas, municipalities etc.
- National Human Rights institutions are corollary to democratic government, they are symbol of empowerment to those who are fragile and disadvantaged. In India, it is the National Human Rights Commission (NHRC) which is considered as the guardian of human rights. It is the duty of the commission to work actively and ensure equal rights, legal empowerment for second gender and restrict discrimination and exploitation against them.

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[57] Law Commission of India, 228th Report on need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy, (August, 2009).

[58] *Surrogacy Regulation Bill,* PRS LEGISLATIVE RESEARCH (Nov. 10 2017) http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/.

- In rural, remote and tribal areas "special schemes" should be introduced so that parents can compulsory educate their girls and if they are not in position to educate then government to financially assist and encourage them through daughter scholarships and grants. No girls should remain uneducated in these areas and this must be guaranteed by the government.
- Women are not getting equal pay for equal work in private sector and they are exploited as they have no say in the private sector. Hence, "special mechanism" should be made to look after these violations and exploitation. Compulsory 'employ cell' should be there (comprising of women) in each of the private establishment where complains of unequal pay can be registered, and that cell on behalf of the complainant should take action.
- Apart from reforms in legislation, the law enforcement agencies should also be professionally trained for better understanding of the issue such that their attitude towards women matters modifies more positively. Women Police stations should be increased as it has been noticed that number of cases to these special cells has raised and the women who approach have more positive experience.
- There must be review of existing personal and customary laws in accord with the Constitution. This will bring home just, equitable and inclusive prerogatives for women. Presently, Supreme Court through its decisions has shown a picture that any personal law contrary to the human rights and fundamental rights must be reconsidered, and reformed by the legislation.
- With the technological advancement women are taking more recourse to the artificial reproductive techniques, effort should be made to ensure rights of women who adopt these techniques i.e. surrogate mothers, along with commissioning mother and child born out of surrogacy should be protected.

VI. CONCLUSION

Human Rights are the most basic right which a person gets by virtue of birth as human being. The concept of human rights is not new rather date back to antiquity. Mankind has always aimed to create a humane society. India is one of the fastest growing country of the world but still there exists a whole class of vulnerable groups who are deprived of the equal status, benefit in the society, and women in India tops the list. Although constitutional and legislature safeguards has been provided but still a lot has to be done at the grass root level. Mere implementation of the law is not adequate to eradicate the human rights crisis, rather proper implementation of the legislations to provide maximum benefit to women. Implementation of the existing laws is more needed than enactment of new laws. The laws

should be reformed and made women friendly. The executive should implement laws through local self- governments for better implementation of the law which benefits the poor, lower class, illiterate women who are prone to violation of human rights. Judiciary should act as guardian and interpret the laws such that it safeguards the rights of women. Most importantly, until the attitude of the society towards the women are not changed, the government attempts will be in futile. In this modern era of globalization, it is utmost necessary that men and women walk shoulder to shoulder as this is necessary for development of our country in true sense.

TRANSGENDERS AND THEIR HUMAN RIGHTS IN INDIA

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ABSTRACT

"Transgender discrimination is the civil rights issue of our time" – Joe Biden, 47th Vice President of the United States.

Human rights are the rights which are innate to every person for being human irrespective of sex, language, ethnicity, nationality or any other status. They include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Every individual in this world is entitled to the basic rights irrespective of any bias. This article examines the meaning of the human rights as defined by various international covenants from time to time and the meaning of transgender, being different from the binary gendersas the society perceives. The article throws light on the human rights of the transgender community, their rights as guaranteed by the Indian constitution, violation of their rights and the remedial measures as available under various laws and the decrees of the courts of law. An attempt has also been made to delve upon the ways to empower the transgender community to enable them to get an equal footing with the other binary genders.

Introduction

In most of the cultures, the gender has been defined in terms of two different realms, male and female. When a child is born, any of the two identities are assigned to it which is solely on the biological front and it dictates various aspects of one's life. One of the most prominent third gender is the transgender community known as Hijra's in India which does not fit into the

traditional notion of male or female. Though prominent and well known, they have suffered from deprivation of basic human rights and discrimination. Historically we find references to the transgender community in the mythologies and the acceptance they find in the society. Though the rights of the trans people have been protected by a range of national and international mechanisms, they have been pushed to the disenfranchised strata of the society.

In India there are a host of socio – cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually.[1] An effort has been made in this article to look into the human rights violation of transgender people in India and the legal mechanism available for redressal of such violations.

Let us first discuss, a few cases involving crimes against the transgender community that tantamount to violation of their human rights. This will help us to understand the nuances of how their human rights are violated, which connotes to them being considered as lesser mortals compared to other men and women.

A transgender who had underwent sex realignment surgery was denied a job in Air India as a cabin crew. Having faced discrimination all her life, she graduated as an engineer and worked in Sutherland Global Services in the airline sector and even at Air India's customer support, both domestic and international, at Chennai. Despite clearing the requisite exam, she was not considered for selection. Her representation to the civil aviation ministry and Prime Minister's office did not yield any result. Determined to assert her basic right for a dignified living by gainful employment, she has now approached the Supreme Court for justice.[2]

Four transgender individuals were arrested and sent to Bengaluru Central Prison, accused of abduction and attempted murder, among other things. One, Ishu, had undergone breast augmentation surgery in October 2016, and developed an infection in her silicone implants while she was in jail. Ishu, who was 19 at the time of her arrest, told the prison medical officer, but received only generic painkillers for a few days. Prison officials finally sent her to an outside hospital for treatment, but only after lawyers for the Centre for Law and Policy Research, who advocate on behalf of transgender inmates, intervened. It was a great lapse in medical treatment. They were made to stay with other inmates in the cells and subjected to physical abuse.[3]

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[1] https://harshsirohi.wordpress.com/2016/04/24/transgender-a-taboo-in-india/

[2] http://www.newindianexpress.com/pti-news/2017/nov/06/transgender-denied-job-as cabin-crew-in-air-india-moves-sc-1693755.html

[3] https://in.reuters.com/article/india-transgender-prison-health/transgender-prison-inmates face-abuse-neglect-in-bengaluru-idINKBN1570S9

Sonia, a transgender was beaten black and blue by her family for being what she was and abandoned. She was so dejected that she ran away and went on to stay with the transgender community. Later she was befriended by a guy named Nadeem, who demanded money from her and harassed her. Though Sonia contacted the police, no action was taken. Later she waskidnapped, physically assaulted and was threatened to be killed. She was gang raped anddoused with acid. They threw her from a moving car and drove away. She asked for help all around, but nobody came forward.[4]

The above instances are just a few cases of general apathy of the society towards transgender community. There is lack of sensitivity among the masses and acceptance of transgenders as people as normal as we all are. Their rights are not respected and are treated as less equals compared to others. To better understand the identity of the transgender people, their individuality, their human rights violation and redressal, we must delve on who the transgender people are, what are human rights in general and how they play an important role in the very existence of a being.

Concept and Scope of Human Rights

Human Rights are common to all people on all continents irrespective of their colour, sex, race, religionand language, cultural and economic differences. The United Nations General Assembly (1948) adopted Universal Declaration of Human Rights (UDHR) with a resolution to fight for human rights for the citizen of the member countries. UDHR urges member nations to promote a number of human, civil, economic and social rights, asserting these rights as part of the "foundation of freedom, justice and peace in the world.

The declaration states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.[5]

There are in all 30 Articles in this each dealing with certain important rights of the human beings ranging from right to life, no slavery and torture, right to privacy, right to trial, right to a nationality, freedom to move, social security among others.

[4] https://transgenderindia.com/help-sonia-transwomen-gang-rape-acid-attack-survivor/

[5] Excerpts from the Universal Declaration of Human Rights (UDHR) - http://www.un.org/en /universal-declaration-human-rights/

Vienna Declaration, 1993 reaffirmed the universality of human rights. 'The universal nature of these rights is beyond question,' says the final Declaration. The entire spectrum of human rights was endorsed without division. All human rights are universal, indivisible, and interdependent and interrelated' the Declaration says. Human rights were reaffirmed as including both civil and political rights and the broader range of economic, social and cultural rights, as well as the right to development. This full conception recognizes, in the words of the Final Declaration, that 'the human person is the center subject of development'.[6]

Human rights in Indian Context

India's heritage with regard to human rights concern and education predates the Western history, philosophy and law. Its national values of tolerance, non-violence, friendship for all, equality, respect for the human persons, human dignity and rights confirms this. These values are legacy of Buddhism. Buddha's messages of non-violence, non-hatred and friendliness to all were transformed into reality by Emperor Ashoka. As a devout follower of Buddha, Ashoka became a great champion of freedom and tolerance. It should be acknowledged that Gandhi was much ahead of times. Human rights came on national and international agenda only after the adoption of Universal Declaration of Human Rights in December 1948, whereas Gandhi has been all along fighting for human rights more than half a century prior to the adoption of this historic Declaration.

Constitution and Human rights

India's struggle for freedom basically was a struggle for self-determination, for freedom of equality, liberty and justice. These are the core values of the vision of Human Rights. In fact, even earlier social reformers have emphasized the values of civil liberties. The picture of human rights in India is a multifaceted one, due to its large size, diversity, secularism, sovereignty, democratic and republic nature.

The ideals that are sought to be achieved for the fullest development of citizens are found in the Preamble that states in precise and lucid terms that the Constitution of India aims to secure to all its citizens justice, social, economic and political, liberty of thought, expression, belief, faith and worship; equality of status and opportunity and to promote among all fraternity assuring the dignity of the individual.[7]

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[6] World Conference on Human Rights -https://www.un.org/en/ development/devagenda/ humanrights.shtml

[7] Excerpts from the Preamble – http://lawmin.nic.in/olwing/coi/coi-english/coi 4March2016.pdf

The Constitution of India provides the ethical foundations of human rights in the Preamble while the legal expressions of these are in Parts III and IV of the Constitution. It has provided six fundamental rights to the citizens of India. They can be described as follows:

1. Right to equality is an important right provided for in Articles 14, 15, 16, 17 and 18 of the constitution. It is the principal foundation of all other rights and liberties.
2. The articles 19, 20, 21 and 22 of the constitution of India provide a freedom of speech and expression in order to enable an individual to participate in public activities. The right to education as envisaged in the article 21-A came in to action since 2010. The right declares 4March2016.pdf that every child of 6-14 years age group has a right to get the basic or elementary education.
3. The rights against exploitation are mentioned in articles 23 and 24. The articles provide for elimination or abolition of trading of human beings as well as forcing them to work. It also abolishes employment of children (that is, child labour) below the age of 14 years in dangerous jobs like factories and mines.
4. The articles 25, 26, 27 and 28 declare that any citizens of India are free to adopt, practice and follow any religion thereby guaranteeing the Freedom of Religion.
5. Articles 29-30 guarantee the Cultural and Educational Rights which includes Protection of interests of minorities and Right of minorities to establish and administer educational institutions.
6. Right to constitutional remedies as mentioned in the article 32, is a step taken to preserve and safeguard the fundamental rights of its citizens in court and in front of law.

The Fundamental Rights are justiciable. For this Article 32 gives right to persons to appeal to courts- both Supreme Court and High Court- in cases of violation of any right. The Courts have been given powers to enforce rights by appropriate remedies. They can issue writs of habeas corpus (asking the detaining authority to bring a detained person to the court for trial); mandamus (ordering a government to do its duty); prohibition (stopping an authority from violating someone's right); quo warrant (asking an official body of the authority under which power has been exercised), and certiorari (taking over of a case from a lower court by a higher court).

Defining the term Transgender

In contemporary usage, "transgender" has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative and non-operative transsexual people (who strongly identify with the gender opposite to their biological sex); male and female 'cross-dressers' (sometimes referred to as

"transvestites", "drag queens", or "drag kings"); and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. A male-to-female transgender person is referred to as 'transgender woman' and a female-to-male transgender person, as 'transgender man'.

The terms 'transgender' or 'transgender populations/people', used in this brief, while more encompassing than transgender women, are used to refer to transwomen given this brief's focus. Sometimes, for brevity, the abbreviation 'TG' is used to denote transgender women.[8]

Trans people suffer from Gender identity disorder (GID) which is a situation where a person identifies himself with one gender, but identifies as belonging to another gender, or does not conform to the gender role their respective society prescribes to them.

The difference between being Lesbian, Gay, Bisexual and Transgender is that the lesbian, gay and bisexual are based on one's sexual orientation whereas transgender represents a dissonance between one's assigned and chosen gender identity.

Transgenders in India

Historically the trans community, known as Hijras find mention in the ancient texts with a recorded history of over 4,000 years. It is a testament to the sexual diversity that is integral yet often forgotten in Indian culture. The trans community finds mention in ancient texts like Kama Sutra, the Mahabharata and the Ramayana. One of the many forms of Shiva and Parvathi i.e. the androgynous Ardhanarishwara is the communion of the male and the female entities of nature. Hijras played important roles in the Mughal administration in India, from the 16th to 19th century. They are also considered auspicious and sought out for blessings, particularly during religious ceremonies.

The British administration instituted the colonial agenda of the 'reform' of native societies through several laws that targeted gendered or sexual practices. Prominent one is the criminalization of 'sodomy' i.e. non-heterosexual or even non-peno-vaginal sex, through Section 377 of the Indian Penal Code (IPC). The law prohibited all carnal intercourse "against the order of nature". IPC 377 never seems to have been enforced in a serious and consistent manner as a law but represents a psychological bias.

[8] The definition of Transgenders as per the United Nations Development rogramme(UNDP)- http://www.in.undp.org/content/india/en/home/library/health/hijras_transgenderinindiahvhumanrightsandsocialexclusion.html

Census in India did not recognize Transgenders as a separate category in population census. The 2011 census added a third column for Transgenders instead of including them in the "males" category as was being done earlier. Though the activists put the numbers much higher, the census data of 2011 puts the figure at 4.88 Lakh.[9]

Human Rights Violation of Transgenders

The constitution and the state have declared many rights fundamental to the very existence of citizens and they constitute the human rights as well. Though there are safeguards to guarantee the rights, there tend to be violations in the words and deeds of the society, administration and by the government itself. Given the lack of awareness and sensitivity towards the transgender community, prejudice, there are violations of rights of the Transgenders day in and day out. A few common instances of human rights violations of Trans people are discussed below.

Custodial Violence: An example of violation of human rights can be mapped out at the custodies and jails where the Trans people are humiliated, tortured and persecuted. The major concerns are the custody death, torture in custody, sexual violence and custodial rape. Since soliciting business and clients for sexual act is punishable and this is the most common means for trans people, the police harass them in lieu of sexual favours. Thought most of the cases does not come into light, the once that are recorded are harrowing in nature including extermination.

Denial of Property Rights: Since the leaning towards being a transgender is considered a taboo among the parents, the familial ties are forcefully cut off/boycotted or Trans people move away from their families due to humiliation by the society. This leaves them with no option to inherit properties from their parents. Added to this is the difficulty in registration of property in their names due to confusion in the status of gender. Due to lack of proper documentation to establish one's identity, the Trans people show least interest in accumulating immovable properties.

Human Trade: Transgenders are widely subjected to human trade by the middlemen and they are sold as sex slaves like women and young children. They are also confined as bonded labours and used for begging in public places and for commercial sexual exploitation. Many of them go missing and are not traced at all even in case of formal complaints being made.

Sexual Exploitation and Harassment: Sexual exploitation and gender-based violence is the

[9] Population data - http://www.livemint.com/Politics/ZB1HSCAmzzfNt3K4fscn FO/ Karnataka-approves-policy-to-safeguard-rights-of-transgender.html

most common form of exploitation that the Trans people face. They are coerced into sex or otherwise abused, usually by a family member or an acquaintance. Because of lack of employment opportunities, they are forced to take up prostitution or begging. They are exploited by their clients and police. There are instances of forceful sex, acid-throwing and rape and brutality by the police forces. Though they find employment, the complaints of physical and mental harassment have duly increased at the work places.

Homicide: Trans people are subjugated to violence day in and day out either by their clients, criminals or the police. Many of them die due to the violence and the cases are not reported at all as they do not have familial ties and the complaints by their fellow mates are not entertained. There was no mechanism to track crimes against transgenders and their unnatural death until 2015 when National Crime Records Bureau(NCRB) for the first-time recorded death of trans people because of both natural and unnatural accidents.[10]

Lack of employment opportunities: Right from the early childhood the majority of the trans people are separated from their families. They either indulge in menial acts to earn their living or prostitution. Due to lack of formal education and skills they do not find any employment opportunities to earn a dignified living. Though many civil society organizations are coming forward to impart employable skills to them, finding employment for them is a challenge as they are not easily accepted in workplaces.

Substandard Living Conditions: Since the Trans people do not find acceptance among the normal people, they are forced to live in conditions like substandard dwellings, slums or even by the side of the roads and public places. They are not even entitled to public food security schemes, health facilities and government welfare schemes as they are not enrolled for any of them. Since many are indulging in prostitution, they are susceptible to contracting sexually transmitted diseases, AIDS being the most prominent. With lack of social security, they will not have anybody to tend to during their old days.

Bullying: Owing to their dressing style and the behavior, Transgenders are seen as different and not identified one amongst us. They are bullied and teased in public and even in the schools if they attend any means of formal education. The minors too are not spared. The Transgenders are bullied by the police for money and in general the public and they are under reported due to stigma, shame and fear of reprisal.

Lack of identity: The lack of recognition of their gender identity curtails their access to education, health care and public places, and results in discrimination in the exercise of their

[10] http://www.deccanherald.com/content/490479/transgenders-find-mention-ncrb-data.html

right to vote and secure employment, driving licenses and other documentation where eligibility is contingent on declaring oneself as either male or female.

Legal Framework

Most of the Indian laws consider gender as binary i.e. the male and the female. Sections related to statutes on divorce, marriage, succession and even the Indian Penal Code are based on this maxim. Whereas the criminal law is mostly gender neutral with use of word "Person" to indicate the perpetrators.

In India the Human Right Act, 1993 is the Act which provides for the constitution of 'National Human Rights Commission, the State Human Rights Commission in States and Human Rights Courts' for better protection of Human Rights and for matters connected therewith or incidental thereto. This Act is called the Protection of Human Rights Act, 1993. It extends to the whole of India and the commission looks into violation of human rights and negligence in the prevention of such violation by a public servant. The commission possesses the power of a civil court and is also competent to award compensations to the victims and file cases in the court of law to protect their rights. Though not specifically, the commission also is entrusted with the duty of protecting rights of the transgender people.[11]

The is no concrete legal framework to protect and promote the interests of trans people like the Protection of Women against Sexual Harassment Act, Protection of Women from Domestic Violence Act, National Commission for Women Act etc. for women, The Juvenile Justice (Care and Protection of Children) Act, Protection of Children from Sexual Offences Act etc. for children, Disability Act for disabled among others. There is a need for a comprehensive law for protection of Transgender people and their rights.

Naz Foundation v. Govt. of NCT of Delhi is a landmark judgment of the Delhi High Court, which held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. The verdict resulted in the decriminalization of homosexual acts involving consenting adults throughout India.[12]

However, on December 11, 2013, the Supreme Court's two member bench of the Supreme Court overturned the decision of the Delhi High Court. It said that the 2009 order of the High Court is "constitutionally unsustainable as only Parliament can change a law, not courts".[13]

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[11] The functions and Constitution of the National Human Rights Commission - http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pf

[12] NAZ Foundation case in the Delhi High Court - http://lobis.nic.in/ddir/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf

[13] NAZ Foundation case in the Supreme Court - http://supremecourtofindia.nic.in/jonew/judis/41070.pdf

The National Human Rights Commission has appealed to the Government to urgently take all necessary legislative treatment based on sexual orientation or gender identity so that no individual or a group of people is deprived of their human rights. It has urged that section 377 of the IPC should be suitably modified to achieve the above object.[14]

Supreme court in a landmark public interest litigation judgment in National Legal Services Authority v. Union of India case held that the transgender people, also known as Aravanis, Shiv-Shakthis, Eunuchs, Hijras etc. are entitled to all the rights guaranteed under the constitution India like any other citizen and that their rights must be protected. The court relied on the various international covenants on Human rights and the Yogyakarta principles of 2006 which asserts the validity of human rights of sexual minorities irrespective of their sexual orientation.

The court giving the recognition to the Transgenders as the "third Gender" ruled that they have to be considered as economically and socially backward class and are entitled to all the facilities and social welfare benefits of the government. One more prominent feature of this judgment was, the court held that the choice of gender by self-identification and not on the gender assigned at the birth i.e. the psychology matters and not the biology. The court also directed the center and state governments to recognize them as the third gender and focus on their upliftment with various educational and welfare schemes. This was a move towards warding off stigma attached with Transgenders and ensuring social justice.

Drawing from the provisions of the Supreme Court judgment, the Government of India introduced The Transgender Persons (Protection of Rights) Bill, 2016 in the parliament to recognize the right to life and livelihood of the transgender community. The Bill defines a transgender person as one who is partly female or male; or a combination of female and male; or neither female nor male. In addition, the person's gender must not match the gender assigned at birth, and includes trans-men, trans-women, persons with intersex variations and gender-queers.

The bill has some of the progressive clauses which are worth mentioning. The bill along with recognizing and protecting the rights of the Transgender people has provisions for establishing national and State commissions for Transgenders. It also provides for

[14] http://nhrc.nic.in/dispArchive.asp?fno=13057

Transgenders rights courts for redressal of their grievances. The bill prohibits the discrimination against them in areas of education, employment, and healthcare among others. Offences like compelling a transgender person to beg, denial of access to a public place, physical and sexual abuse, etc. would attract up to two years' imprisonment and a fine. However, the issue of section 377 of the Indian Penal Code which criminalizes the sex between the same gender as against order of the nature is not dealt with till now.[15]

Present Status

Owing to growing sensitivity towards the Transgenders and the legal status given by the Supreme Court as the third gender, government, civil societies and the private organizations have working towards providing more acceptability to these people. A few instances are mentioned below.

The Aadhaar card has a column for marking the sex as transgender. The Election Commission has been organizing registration camps for marginalized sections, including transgender persons. Karnataka's state transport department has included an "others" box in the application for a driving license. Civil societies like Humsafar, NAZ India, 'Sangama' and 'Reach Law' are working to promote rights of sexual minorities.

Many state governments have started social security and pension schemes to Transgenders like the Maitri pension scheme of government of Karnataka. Tamil Nadu has set up the Aravanigal/Transgender Women Welfare Board in 2008 to undertake social welfare measures and the department of social welfare has also attempted to ensure counseling for families with transgender children and impart special training to schoolteachers.

Private companies have started skilling programmes for Transgenders under their corporate social responsibility funds and absorbing them into the organization wherever feasible. Governments of many states too are not lagging. States like Tamilnadu and others have made provisions for induction of Trans people into police forces. Kudumbashree, the flagship programme of the Kerala government which organizes women into Self-help groups through various entrepreneurial initiatives, is now gearing up to rehabilitate the transgender community in the state by forming an exclusive neighborhood groups for them.

Way Forward

Upholding human rights is key to ensuring citizens well-being and securing a society

[15] The Transgender Persons (Protection of Rights) Bill, 2016 - http://www.prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2016-4360/

where there is no discrimination and for enabling an active citizenry. The Supreme Court ruled in the National Legal Services Authority (NALSA) v/s Union of India judgment that Transgendercommunity be treated as socially and economically backward class. The National Commission for Backward Classes (NCBC) which recommends for inclusion of backward classes into the central list for providing reservation in education and government jobs can study the status of the transgender community by invoking articles 15(4) and 16(4) of the Constitution and can add them to the Other Backward Classes (OBC) list thereby making them eligible for affirmative actions of reservation in education and employment.

Provision for Sex realignment surgery's (SRS) be made in the Transgender Persons (Protection of Rights) Bill, 2016 as currently changing one's sex is not legal in India. This is an important step as it involves legal and health issues and helps the Trans people to assert their identity and a dignified living. Moreover, they restore to getting these surgeries done by uncertified medical practitioners since such surgeries are illegal. These unprotected medical procedures can lead to contraction of HIV/AIDS and other sexually transmitted diseases which might also lead to death in worst cases.Provision for Sex realignment surgery can be made in the healthcare schemes like the Arogya Karnataka and the proposed Ayushman Bharath by the union government.

The parliamentarians must look into abolishing section 377 of the Indian Penal Code (IPC) as it contradicts the very basis of securing human rights to the transgender community. Certain criminal and personal laws that are currently in force only recognize the genders of 'man' and 'woman'. It is not clear how such laws would apply to transgender persons who do not identify with the binary genders. Also, laws including the one's related to domestic violence which recognizes only wife as the one who can seek redressal should be amended to make them gender neutral.

There is a need for massive sensitization drive for the police forces and the government personnel as they are the hands and limbs of the governance system and are actively involved in policy making, its implementation and enforcement. Sensitization helps in formulating workable plans for the transgender community and helps the law enforcing agencies in rightly dealing with cases related to transgender people. It is also rightful to add comprehensive sex education programmes in the school curriculum and vocational training centers. This will bring in more acceptance that transgender people too are normal like everybody is. Sensitizationalso helps in reduction of cases of bullying at school level.

The government should adopt a rights-basedapproach i.e. keeping a person's rights at the centre of the development process. It is the process of realizing fundamental human rights and freedoms, thus expanding people's choices and capabilities to live the lives that they value. Rights-based approach integrates human rights concepts in the development process to

effectively target human freedom. Gender analysis is an intrinsic part of arights-based approach to development.Social inclusion is about supporting Transgender people to actively and meaningfully participate in decisions about their lives and their communities.

Conclusion

Although there are instances of securing human rights of the transgender people, much has not changed on the ground as the current approach is isolated, non-systemic, and insufficient. Trans people continue to live in extremely hostile conditions. There is a need for adopting the two-prongedstrategy i.e. the first is enacting and amending the laws making them favourable for the trans community and the second is bringing about change in the mindset of the people which has a long-lasting impact.

The adoption of Sustainable Development Goals (SDGs) by the United Nations (UN) should act as a catalyst for ensuring that the overall conditions of the community areimproved, and their basic rights are protected. As Gandhiji has stated, our future depends on what we do in the present. There is an endearing need to evolve an inclusive society where every individual is treated with dignity and their rights respected and protected.

GERMANY'S SOCIAL MEDIA LAW: STATUTE TO CONTROL HATE SPEECH OR STATE CENSORSHIP

- Mohd Arif Sayyed & Mayank Bhambri

Abstract

The German social media law, also known as NetzDG imposes liability upon the social media companies to remove online hate speech with 24 hours. The statute has been criticized widely by human rights activist from around the world on one hand while some believe that it is a step in the right direction to control hate speech which would promote more inclusive debate. Human rights watchdogs believe that the law could have chilling effect on free speech because of the broad defamation laws that exists in Germany. The law is devoid of international standards as the law does not provide judicial intervention through appeal. It remains to see what would be the impact of this law on society but certainly NetzDG has set precedent for certain countries who are in the process of formulating their domestic legislation on lines on NetzDG.

Keywords: NetzDG, free speech, social media, judicial and expression.

INTRODUCTION

Today's world can be aptly described as 'online world'. Our lives are shaped by social media which is increasinglybecoming the most common means through which people share and interact. Wider reach of internet has led to transfer of knowledge and ideas. People in one corner can interact with another person sitting in the remotest corner of the world without any physical means. But,the rise of social media has its own advantages and disadvantages.

The social media is flooded with hate comments and abusive language. We see ISIS posting videos of journalists being burnt alive or beheaded. This has led to radicalization of youth in different parts of the world. The Orlando shooting incident as well as recruitment of

ISIS from Kerala has raised concerns among the states. Thus, there's a line of thinking that has been developed which advocates that the internet should be regulated by states. However, it still remains unanswered whether the states should control internet and whether such state censorship of internet is required?

INTERNATIONAL STANDARDS OF FREEDOM OF SPEECH AND EXPRESSION

The right to freedom of speech and expression had been protected by Article 19 of Universal Declaration of Human Rights (UDHR)[1] as well as Article 19 of International Covenant on Civil and Political Rights (ICCPR).[2] Article 5(d) (viii) of ICESCR[3] affirms the freedom of speech and expression.

The scope of freedom of speech and expression is very broad in nature as declared by Article 19 of UDHR. The states are required to guarantee to all people the *freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.*[4] The UN Human Rights Commission (HR Committee) has affirmed that the scope of rights broadens to the expression of opinions and ideas which others may find offensive.

However, neither any legal system treats freedom of expression as an absolute right nor it is desirable. Most European countries, including the German Basic Law recognize that there are limits. Article 19(3) of the ICCPR provides the limitation that a state may impose upon freedom of speech and expression:

- Restrictions provided by law; as may be necessary must be formulated in such a way so as to enable a person to sufficiently regulate his/her conduct effectively;
- For the respect of legitimate interest of other individuals;
- For the protection of national security or of public order (order public), or of public health or morals.

The States which impose limitation on freedom of speech and expression, including 'hate speech' must confirm to the rigorous requirement of the three part test. Further, article 20(2) of ICCPR provides that *'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.*

At the European level, Article 10 of the European Convention of Human Rights (ECHR)

[1] Article 19, Universal Declaration of Human Rights, 1948.

[2] Article 19, International Covenant on Civil and Political Rights, 1966.

[3] Article 5(d)(viii) International Covenant on Economic, Social and Cultural Rights, 2015.

[4] *Ibid.*

protects the rights to freedom of expression in similar terms as that of Article 19 of ICCPR with permissible restrictions set out in Article 10(2). Article 11 of the Charter of Fundamental Rights of European Union protects the rights to freedom of speech and expression.

LIMITATIONS ON 'HATE SPEECH'

There is no definition of hate speech under international human rights law. Hate speech is defined 'the expression of hate towards an individual or group on the basis of certain attributes such as race, religion, ethnic origin, sexual orientation, disability or gender'.[5]

The States are required to prohibit severe form of hate speech through criminal, civil and administrative measures as well as under Article 20(2) of ICCPR. Under article 19(3) the States may prohibit hate speech to protect the rights of other from discriminatory or bias-motivated threats or harassment. Many countries have actually attempted to control and regulate the social media, the latest example been Germany. The German social media law or NetzDG is a recent legislation for the regulation of social media content.

RELEVANCE OF NETWORK ENFORCEMENT ACT IN GERMANY

In 2014, the German police registered 2,670 cases of incitement, and two years later, that figure more than doubled to 6,514 cases.[6] There is a remarkable increase in cases of incitement of hatred and defamation. Xenophobia, racism and anti-Europeanism have risen sharply in Germany at the height of global refugee crisis in 2015. The German authorities had to take some action to limit the racist tide, which to a great extent was expressed through online campaigns. The reasons being *firstly,* the *far right* propaganda is spread primarily on social media sites and *secondly* the political authorities in Germany are in doldrums with the current status of refugees.

In 2015, the Minister of Justice Heiko Maas, formulated a task force comprising representatives from Facebook, Google, twitter alongside numerous NGOs. The committee establisheda set of recommendations for dealing with online hatred.[7]

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[5] Human Rights Watch, Germany: Flawed Social Media Law, 2018,available athttps://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law , Last visited on- 22nd February, 2018.

[6] Denial Leisegang, 'No freedom to hate: Germany new law against online incitement' 2017,available athttps://www.eurozine.com/no-freedom-to-hate-germanys-new-law-on online-incitement. Last used on 24th February, 2018.

[7] *Ibid.*

ABOUT THE STATUTE

The German *GesetzzurVerbesserung der Rechtsdurchsetzung in sozialenNetzwerken (Netzwerkdurchsetzungsgesetz)* which literally means law on the improvement of law enforcement in social networks and known as 'NetzDG' has attracted much media attention, since fully entering into force on 1 January 2018.

The most striking feature of NetzDG is that it mandates social media giants to remove *prima facie* illegal content within 24 hours and in less severe cases it can be extended to 7 days, failing which these companies would be liable for fine which may be extend up to **50 million Euros.**[8] However, the law is applicable only for companies having more than 2 million users and platforms which provide email or messaging services, as well as platforms such as news websites, are explicitly excluded from the scope of the law (§ 1 NetzDG).

The definition of social media as provided under the statute is very broad and ambiguous. Social media is defined as '*internet platforms that seek to profit from providing users with the opportunity to share contents with other users and the broader public'.*

Section 2 prescribes that social media companies must compile a bi-annual report on complaint management activity.

The core obligation that the statute seeks to impose on the social media companies is setting up of a transparent and effective management infrastructure[9]. The reporting obligations are very detailed and include provisions that set out the training and management oversight requirements of the social media platform operators. The complaints management infrastructure must primarily ensure that the social networks delete or block illegal content within a specified time frame.

It is important to note that the obligation to delete or block is not novel. The NetzDG merely enforces an existing legal obligation under **§ 10 of the Telemedia Act (*Telemediengesetz* – TMG).** Under that provision, social media operators are liable for illegal content on their site under criminal and private law. The statute does little to define as to what may be construed as 'illegal'. It does not create independent/separate offence but makes reference to the existing criminal code. Thus, any content is designated illegal if it falls under the one of the enumerated provisions of the **German criminal code (*Strafgesetzbuch* –**

[8] Diana Lee, 'Germany's NetzDG and treat to online speech' 10 Oct, 2017,available at https://law.yale.edu/mfia/case-disclosed/germanys-netzdg-and-threat-online-free-speech

[9] Section 3 ofNetzDG.

StGB). The most important ones for the purposes of freedom of expression are incitement to hatred (§ 130), insult (§ 185), public incitement to crime (§ 111),defamation (§ 186 and § 187)and dissemination of depictions of violence (§ 131).

IMMEDIATE EFFECT OF THE STATUTE

Social media companies in Germany have increased surveillance and reporting mechanism. Google, which owns YouTube, has announced that over the next year, it would bring the increase the number of people to address content that might violate such policies to over 10,000. Facebook plans to employ about 10,000 content reviewers globally, either directly or via contractors, including from two centers in Germanyto monitor violations of its *'community standards'* but violations of NetzDG. Twitter in recent times announced stricter changes to their user policy, prohibition of hate speech and material that "incites fear, or reduces someone to less than human". Both of these companies, as well as Twitter, have reporting units/centre formed specifically for NetzDG, which helps them to assess potential violations of the law and to collect data for bi-annual report to be submitted.

However, what is significantly different is the reporting mechanism of the *'community standards'* and violation of NetzDG. In case a user violates community standards, there exists a right to appeal but not for violation of NetzDG. Facebook, YouTube, and Twitter all offer the chance for users to challenge a decision to block or remove content if in violation of community standards.[10] But, for violation of NetzDG, the law does not require the company to offer an appeals process and the companies have not provided either due to the time window prescribed.

CRITICISM OF THE STATUTE

The NetzDG has been widely criticized by the international community for fear of chilling effect that it would have on freedom of speech and expression. The international human rights watchdogs have asserted that the statute lacks the following mechanism as per international human rights law:

1. The law provides for private censorship by social media companies.
2. There exists no provision for appeal against the decision of such companies.

The human rights advocates fear that due to excessive finessocial media companies would adopt over-blocking policy, if reported. They further argue that social media companies are to deal with complaints of legality of content which requires sound understanding of legal principles and they would not be in a position to judge whether any content is illegal. The lack of judicial intervention in these matters is against international standards. There exists no right

[10] *Supra* 7.

to appeal against the decision of social media companies. This law can lead to unaccountable and over broad censorship.

HOW THE STATUTE IS VIOLATIVE OF FREEDOM OF SPEECH

Within German constitution law, there exists ambiguity whether the provision of the constitution would run afoul of freedom of expression. NetzDGis beyond incentivizing over enforcement, but may threaten online speech. The defamation laws in Germany are taken from pre-Nazi times andare violative of freedom of speech.

NetzDG requires social media to remove certain online content which may be illegal In accordance with the German Criminal Code. The laws of defamation in Germany seeks protect reputation in publicagainst insults which harms or injures individual's personal honor. The law of defamation holds people liable for false statement of fact that can cause harm to reputation of the others while the law of insult enables to sue for the harm made by true statements. In comparison to the laws of United States on defamation, only the false statement which violates and cause harm to the reputation of an individual or community/wrong allegations is punishable.[11] The argument advanced by critics that the statute may have chilling effect on free speech because of aggressive over blocking policy to be implemented by social media companies can be underpinned by two scenarios. First scenario mainly focuses on the social media platform operators and deletion of the illegal content available online. In this case, it is not violative offreedom of expression because posting illegal content will lead to diminishing of reputation of an individual. Under German Basic Law, freedom of expression does not cover insults and defamation, or incitement to hatred.[12]

On the contrary, in the second scenario the operator deletes content after mistakenly deeming it illegal. This is the sole discretion of the platform operator to make the deletion of the content which he seems not fit for the public to perceive in the social media websites. At this point, the issues become more complicated and severe. As the German Federal Constitutional Court has recognized that there is a presumption in of legality in freedom of expression whenever it is unclear whether the expression is illegal, at least on topics of public interest. Remarkably, the protection of social media extends to public forums, even where access to them is regulated through private law relationships and all the laws which govern such acts are made very clear. However, neither NetzDG notably does require censorship nor does it

[11] UK Human Right Blog, 2018,available athttps://ukhumanrightsblog.com/2018/02/19/the new-german-social-media-law-a-risk-worth-taking-an-extended-look-by-stefan-theil/, Last used on – 20th February, 2018.

[12] *Ibid.*

discriminate against specific content and it lead to a very worst situation which would generally be unconstitutional.

More or less, NetzDG primarily enforces legal obligations under § 10 TMG and the requirement to delete the content already illegal under criminal law provisions. The arguments alleging unconstitutionality rely primarily on the unsubstantiated contention that NetzDG will promote an overly aggressive deletion policy (so-called 'over blocking') that will have a 'chilling effect' on freedom of expression for users of social media platforms. If over blocking does take place as a result of NetzDG, then this would indeed be would be problematic under the German Basic Law and will be very difficult for the people who all are connected to social media.[13]

A LIMITED FREE SPEECH ENVIRONMENT

The main disagreement being advanced is that freedom of expression does not compulsorily equates or allow to a right access to any specific means of expression and it should be well within the proper conduct of the public. For instance, a person entitled to free transportation wanted to claim the receipt of transportation costs to travel to the area of protest meeting but he was not entitled to claim the amount because of restriction. Access to and expression on most social networks is already considerably limited through private law terms and conditions and which is making the social media very unpopular in the country. This allows the platform operators wide-ranging powers to delete content or even until further notice suspend accounts of users for actions that are unlikely to fall afoul of German criminal law. On the contrary, it is difficult to sustain an argument that the potential side effects of NetzDG are only one of its kinds or would on its own be sufficient to find it unconstitutional.

Social media platforms are barely a free speech delight where users already operate in an environment where they have to think before expressing their own thought and arbitrary limitations of are placed on freedom expression, where deletion and suspension of accounts may occur anytime without the possibility of appeal or redress to courts. Even the terms and conditions of participation can be changed at the sole prudence of the platform operators at any time. For illustration, the German comparable of "the middle finger"—i.e. the "tapping of the index finger on the forehead" (called "the bird")—is widely understood to be an illegal insult in Germany. A video or icon of "the bird" posted to another's Facebook profile could possibly be actionable under the NetzDG. As an added example, " it can be a criminal offense in Germany to call another individual a 'jerk,' or even to use the informal du, or 'thou,'" to exchange communicate a lack of respect for the recipient. German courts have penalized other similar

[13] Natasha Lomas, Germany's social media hate speech law is now in effect, 2017,available athttps://techcrunch.com/2017/10/02/germanys-social-media-hate-speech-law-is-now-in effect/ , last visited on – 15th 2018.

"offensive epithets," including "asshole," "bastard," "old goat, "fathead," "dope," and "whore".[14] Likewise, requirements to remove all illegal content within 7 days successfully give control of online content to the government and all the decisions of the content has been given to the platform operators and according to their discretion if they believe the content is offensive to the society or other individual they just strike off the content from that particular social website.

Platforms like Facebook already remove objectionable content, particularly if the content fallout in complaints. In reality, despite not necessarily wanting to be held legally or criminally liable for what is uploaded to their websites and they have made a lot of adjustments to avoid all the illegal content, all the social media platforms do certainly feel the pressure of this law and always try to avoid the legal proceeding against them.

German laws on hate speech are already stricter than in most other countries and which is why it is creating a lot of social problems in Germany to handle such kind of law, prohibiting defamation of religions and broadcasting of depictions of violence. NetzDG places the onus of monitoring and preventing such acts on the platforms on which the content has been uploaded and made known. This results in private censorship of content guided by the government for which the government cannot be held liable. While this may not blow companies like Facebook, who are likely be able to afford to pay the fines, or to employ legal counsel to challenge governmental interference and can easily accommodate people who can specially work on this laws and try avoid all the unnecessary problems. But, the smaller platforms may not have the capacity to contest overregulation and they will end up paying huge fines leading to closure of the company. There are a plethora of examples that Germany's new social media has created a lot of pressure on big as well as small social media platform to perform and upload content.

THE DOMINO EFFECT

The precedent that NetzDGhas set is dreadful for States which seek to restrict online content by forcing social media companies to censor online content. Countries such as Singapore which has record of using criminal lawis citing Germany'sNetzDG as a positive example for controlling online speech. In the Philippines,[15] a statute called *'The Act Penalizing*

[14] Diana lee, Germany's NetzDG and the Threat to Online Free Speech, 2017,available athttps://law.yale.edu/mfia/case-disclosed/germanys-netzdg-and-threat-online-free speech, last visited on – 19th February, 2018.

[15] Reza Majd, Social Media Regulation and Human Rights: the Impact of Germany's Network Enforcement Act, 2018,available athttp://blogs.ucl.ac.uk/ippr/social-media-regulation and-human-rights-the-impact-of-germanys-network-enforcement-act/#_ftnref1, Last visited on- 21st February, 2018.

the Malicious Distribution of False News and Other Related Violation' has been submitted to the Congress referencing German NetzDG. The bill proposes fine for social media companies that fail to remove sham news or information *"within a reasonable period"* and imprisonment for responsible individual.

In Russia, the ruling United Russia party submitted two draft laws to the State Duma to regulate online content. Based on the lines of NetzDG, the first one requires social media platforms with more than 2 million registered users and other *"organizers of information dissemination"* in Russia[16] to remove, within 24 hours of receiving a complaint, certain types of illegal content, such as information that propagates war; incites national, racial, or religious hatred; defames the honor, dignity, or reputation of another person; or is disseminated in violation of administrative or criminal law. The first bill has entered the first hearing stage and the second bill is still under review.

CRITICAL ASSESSMENT

NetzDG though is a novel legislation that aims to control hate speech on social media has the potential to have severe ramification on freedom of speech and expression. While many regards that it is a step in right direction, it goes against the international standards of human rights. As laid down in Article 19(3) of the ICCPR, the states have the power to limit freedom of speech and expression through legislative action but it should be founded on reasonable principles of international law. NetzDG seems to lack the accountability that it should be embodied with by the formulation of judicial intervention.

CONCLUSION

The fear of hate speech is driving many countries to formulate domestic legislation for permitting private censorship that it may lead to unreasonable restriction on freedom of speech and expression. If this is happens, we would usher in an era of state sponsoredcensorship where the individuals would think thrice before even posting, commenting, tweeting or sharing their opinion and certainly none of us would want that to happen.

[16] Mark Scott, Free speech vs. censorship in Germany, 2018,available athttps://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free speech/, Last visited on – 23rd February, 2018.

THE LEGACY OF DRONE WARFARE – A WANTON CASE FOR HUMANITARIAN CRISIS

- Alka Yadav, Netra Nair

I. INTRODUCTION

The purpose of this article is to examine the democratic permissibility of Unmanned Aerial Vehicle or UAV (commonly called "drone") practices employed in circumstances of extra judicial targeted killing; the United States stands at the center stage as a primordial employer of ambiguous drone practices. The efficacy of drone usage is questionable considering the innumerable psychological, mental human rights violations that have come to light as juxtaposed with the impeachable statistics of civilian deaths. The United States war on terror began in the aftermath of the September 11, 2001 attacks ("9/11"). According to several media reports, the United States developed two parallel drone programs: one operated by the military, and one operated in secrecy by the Central Intelligence Agency ("CIA").[1] But policies and statistics that govern these programs are supremely covert and ambiguous. This article attempts to examine legal and ethical justifications made by officials of the Obama administration supportedin support of targeted killings. Furthermore, the article shall dwell upon the legislation that governs such manner of targeted killings, the vagaries of its linguistic architecture, and their perceptible misalignment with the principles of humanitarian law. Furthermore, the article shall opine on the extent of human rights violations and conclude by contemplating on a potential peaceable solution whilst maintaining ample latitude while targeting terrorism.

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[1] Milena Sterio, *The United States' Use of Drones in the War on Terror,* 45, CWRJIL, 197,197,(2007).

Gubernatorial and public outrage after 9/11 sparked an increasing fervor towards adopting fervent protectionist mechanisms to prevent a recurrent terror attack. The attack prompted a formidable belief in the ineptitude of United State's protection services and 72 hours later, the U S Congress passed a law empowering the then President George Bush to wage a war on terrorism. The Law was known as the Authorization for the Use of Military Force ("AUMF"). It provided that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future act of international terrorism against the United States by such nations, organizations, or persons." The act was a meager sixty word text, however, the brevity of the language, conferredupon President Bush, a power to "use all necessary and appropriate force", to fight the war against terrorism.

The AUMF though a meager sixty words, would change the course of history for a long time to come, with critics lamenting its obsolete architecture, for conferring an all-encompassing power on the President of the United States. The stretch in the language shall be discussed in the forthcoming sections of the article. Hereafter, large scale Human Rights violations would be committed,with no evident source to test the authenticity of statistics, owing to the deeply insidious manner of counter terrorismoperations. The AUMF would now afford a license to the United States Government to transgress physical boundaries and numbingly dehumanize the way of life.

II. A DESOLATE JUSTIFICATION FOR PROPORTIONALITY

Since 2004, the United States has launched more than 400 covert drone strikes in Pakistan, Yemen and Somalia.[2] Almost 90 percent of these strikes have occurred under the Obama administration.[3] According to certain proponents of the drone stratagem, the campaign is underlined on a decapitation strategy which entails, cutting of the head of the body. It metaphorically implies that killing of leaders of terrorist organizations would weaken the concerned organization; legal scholarship has often dubbed it as a process of 'beheading the hydra'.[4] The efficacy of beheading the hydra has been hotly debated, that whether, killing one terrorist leader would in fact assist in legitimately decapitating a group, or would it necessarily

[2] Alexander B. Downes, *The Truth About Obama's Drone Campaign,* HUFFPOST (Jan 16, 2013, 11:44 A.M)https://www.huffingtonpost.com/alexander-b-downes/obama drones_b_2427030.htmll(last accessed on? And all the footnotes shall be according to bluebook 19th ed.)

[3] *Id.*

[4] Keith Patrick Dear, *Beheading the Hydra? Does Killing Terrorist or Insurgent Leaders Work?* 13 Defence studies 293 (2013)

herald a successor, who an absolute disregard for their freshly hurt legacy. However, according to critics in the media, available statistics point out that it is tantamount to an attrition campaign.[5] Although U.S. drones occasionally eliminate terrorist commanders, the bulk of those killed are rank-and-file militants or civilians.[6] In Pakistan, Mr. Obama had approved not only "personality" strikes aimed at named, high-value terrorists, but "signature" strikes that targeted training camps and suspicious compounds in areas controlled by militants. But some State Department officials have complained to the White House that the criteria used by the C.I.A. for identifying a terrorist "signature" were too lax..[7] According to a report by the International Human Rights clinic and Conflict Resolution Clinic and Global Justice Clinic, by the fifth anniversary of the Obama administration, over 2,400 individuals were killed, whereas administration reports affirmatively that there have been no or negligible civilian deaths. Whilst there are conflicting claims as to the true estimate of the number of civilian deaths, these signature strikes have killed, and could have killed more number of innocent people, than what the Obama administration statistics suggested. Therefore, efficacy of the drone program is not very clear to the public at large, even until date is not clear It would hence be pragmatic to propound, and which has been materially supported by estimates from a New York Times Report, that if there could be a one percent chance of killing a terrorist leader, it is almost always accompanied by chances of killing innumerable civilians. It is at this juncture, that the signature strike program had been finally realized as a brazenly expendable affair. The drone policy with its insidious signature strike policy, by 2012, expanded beyond Pakistan, into Yemen and Somalia. The report by the New York Times which has been cited as a source here before, provided that[8] the very first strike under Obama's watch in Yemen, on Dec. 17, 2009, offered a stark example of the difficulties of operating in what General Jones described as an "embryonic theater that we weren't really familiar with." It killed not only its intended target, but also two neighboring families, and left behind a trail of cluster bombs that subsequently killed more innocents. The Legal adviser to the state, Harold Koh, in a March 2010 speech[9] at the American Society of International Law Annual Meeting, laid down the notion of "self defense" as a trajectory for the implementation of the signature strike drone policy. Koh contended that the Bush administration's AUMF was also predicated on the concept of self defense.According to him, as a terrorist network, these do not possess conventional forces, but

[5] *Supra note 2.*

[6] *Ibid.*

[7] ConorFriedersdorf, *Obama's Weak Defense of His Record on Drone Killings,* THE ATLANTIC, (Dec 23, 2016), https://www.theatlantic.com/politics/archive/ 2016/12/ president-obamas-weak-defense-of-his-record-on-drone-strikes/511454/

[8] Jo Becker & Scott Shane, Secret *'Kill List' Proves a Test of Obama's Principles and Will,* NY TIMES, (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership in-war-on-al-qaeda.html

[9] Harold Hongju Koh, *Can the President Be Torturer in Chief?,* 81, ILJ, 1145.

infact operate from within civilian areas, thereby executing an attack against the United States and its allies. Koh also propounded to analyze the rule of proportionality, wherein, damage should not be such as may cause "excessive damage" to civilian life and property in comparison to the direct military advantage anticipated. The speech, however, was a surprising reversal from his scathing criticism of Bush administration, when the drone policy was at a nascent stage, where he infamously dubbed Bush as "torture - in - chief."[10] The justification fordamage that "shouldn't be excessive" leaves an open ended discussion on what exactly encompasses "excessive" and still causes unflinching discomfort as it failsto address several ethical and legal questions. In September 2011, in an unprecedented turn of events, Anwar al-Awlaki, an American citizen was killed by a CIA drone strike. Subsequently, it was revealed that al-Awlaki was placed on a hit list by the administration, for his alleged links with the Al Qaeda. Hence, for the very first time, an American citizen was killed abroad for a crime he had not even been charged for. On March 5, 2012, in a speech at Northwestern University, Attorney General Eric Holder claimed that targeted killings of American citizens are legal if the targeted citizen is located abroad, senior operational leader of Al Qaeda or associated forces, actively engaged in planning to kill Americans, poses an imminent threat of violent attack against the United States (as determined by the U.S. government), and cannot be captured; such operations must be conducted in a manner consistent with applicable law of war principles.[11]

Philip Alston, the Special Rapporteur of the United Nations, and a renowned human rights practitioner, submitted a 29-page report on extrajudicial, summary or arbitrary executions.[12] He opined that such lethal force was legal, if it was only strictly necessary to save life. He was concerned, as he later on told the BBC that the drones were being operated in a framework which may well violate international humanitarian law and international human rights law.[13]

III. RULES OF ENGAGEMENT FOR THE LETHAL DRONE STRIKE

Koh and Holder, or even the United States' Government have failed to answer tough questions that actually hold relevance, and have beaten about the Bush, engaging in a filibuster of law and a so-called necessity for the protection of human rights, wherefore meagerly contributing to the proportionality debate.

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[10] *Id.* at 1145.

[11] See Eric Holder, Attorney General., U.S. Dep't of Just., Speech at Northwestern University School of Law (Mar. 5, 2010), available at http://www.justice.gov/iso/opa/ag/ speeches/ 2012/ag-speech1203051.html

[12] http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf

[13] *US warned on deadly drone attacks,* BBC NEWS, (Oct 28, 2009, 10:28 A.M), http://news.bbc.co.uk/1/hi/8329412.stm

Kofi Annan, Secretary-General of the United Nations at the time of the 2003 Iraq conflict, has written: "No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4 .... Secretaries General confront many challenges in the course of their tenures but the challenge that tests them and defines them inevitably involves the use of force."[14] The Article was a product of exceptional dedication of the World community at large towards countering aggression, starting from the League of Nation's draft Treaty of mutual assistance. Albeit, the Treaty was rejected, the genesis of the anti war movement can be found in Article I of the treaty which provided that aggressive war is an international crime. Similarly the League's Geneva Protocol in 1924, provided for recognition of solidarity as between the international community and declared the war of aggression to be an international crime and violation of solidarity thereto. War of aggression was declared to constitute an international crime against the human species in a 1927 resolution passed by the League. The most resolute of all, the Kellogg Briand Pact ("Pact"), was an agreement that absolutely outlawed war. These initiatives were certainly worthy of veritable credits for the thoughtful international community, as would manifest later in 1929, with Kellogg, the then United States Secretary of State, winning the Nobel Peace Prize. However, there were some major deficiencies that were left unaddressed in the Pact, which serves as a basis for rectification in the United States Drone policy - the question of self defense. Article 51 of the United Nations Charter established new frontiers for self defense, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." While Koh, could contribute amply to pro drone debate by providing that the drone policy could work under the strict rigor of proportionality and necessity as provided under Article 51, reports and statistics, cited in the article here before, imply a blatant transgression of these principles, especially with the signature strike killings, and killing of, for example, Al-Awlaki sans proper trial. The AUMF provides for a recipe for a disastrous misuse of powers and disregard for human rights; all beyond the self defense premise that the United States has been banking on.

As a result, the subjective interpretation of the wordings of the AUMF, have significantly stretched out over the course of the years.

[14] RALPHZACKLIN, THE UNITED NATIONS SECRETARIAT AND THE USE OF FORCE IN A UNIPOLAR WORLD: POWER V. PRINCIPLE CAMBRIDGE UNIVERSITY PRESS 12-13 (2010).

The individuals in question are alternatively described as "terrorists,"[24] "suspected terrorists," "Islamic radicals," "insurgents," "members of Al Qaeda and its associates," "Taliban," "jihadists," "Muslim extremists," and "unlawful combatants" depending upon the source consulted.[25] This imprecise and vague terminology leaves it to the ultimate and arbitrary discretion of the administration to decide if the target meets whatever classified criterion they have in mind and kill whoever they think it proper.

At this juncture, it can be aptly remarked that the United States government must adopt measures to amend the AUMF to make it more amenable to humanitarian principles.

V. AN ETHICAL REVIEW OF HUMAN RIGHTS VIOLATIONS

The history of mankind is full of incidents of violence and violations. Pandemonium and violence reigns at one place or the other at any given point of time. Peace and security are as remote to certain sections as available to others. Right to peace and security is as fundamental to life as right to life, liberty and dignity. The world adopted the principle of maintaining peace and security and saving the succeeding generations from scourges of war, as has been evident by the League of Nations resolutions and the Kellogg – Briand Pact. The scourges of the two World Wars affirmatively set a trajectory for the World Community, wherein, maintaining peace became one of the primary concerns. There are two significant aspects that govern the peace movement viz. peacekeeping and peace enforcing. It is notable that the terms though have a common goal – that of achieving peace, the degree of the same is different in both of them.

Peacekeeping is not resorting to anything that would incite violence. The main aim is the protection of the individual rather that the principle itself. Peacekeeping implies the application of force only to the extent of self-defense and not more than that. But unlike peacekeeping, peace enforcing, as the terminology suggests is more drastic in its framework and workings. Herein, the aim is to enforce peace at any cost and the force involved is not barred by the principle of does self-defense; the at generally entails enforcing peace which includes overpowering of the opponent, this stands in ultimate polarity to the former concept wherefore peace is limited to protecting oneself and pacifying the opponent. Furthermore peacekeeping is done with the parties involved in the conflict and peace enforcing is done against the will of the parties involved. The former concept is an instrument for protection of the humans and their rights whilst the latter, is inclined to ignore the same in its crusade.

[24] Jo Becker & Scott Shane, Secret 'Kill List' Proves a Test of Obama's Principles and Will,.N.Y. TIMES, May 29, 2012, at Al.

[25] file:///C:/Users/dell/Downloads/LeilaNadyaSadalAmericasDr.pdf (please add a valid source)

The questions arisen as a matter of fact are unbridled and complex, which approach is the veritable; How successful has peace enforcing been as against peacekeeping; How far can one tread, in defending the concept of peace enforcing; And which one outweighs the other?

The United States has assumed responsibility of caretaker of the world community by itself, and it justifies all its actions on the same ground. But there is another side of the story as well, the side which is inaudible amongst the cries of wanton heroism of United States. The peace enforcing crusade of United States has rocked participant nations with horrors beyond pale. Their actions in Pakistan, Afghanistan, Libya, Yemen and Somalia are unjustifiable and indefensible.

The major part of this peace enforcement is dotted with ambiguous airstrikes and drone policies. They rely more heavily on air power rather than risking ground troops in overseas conflicts.

At the risk of repetition, it is to be noted that drones are operated with the technique of signature strikes, under which a particular kind is to be taken as the signature mark of militants. But what goes unattended here is that it's a machine and therefore, regular citizen behaviors can easily be mistaken for militant signatures. Lately, the CIA has heavily relied on target signature strikes which have resulted in heavy civilian casualties.

It took its course around 2002 and since then, the United States government has attacked thousands of targets in nd around Waziristan (Pakistan) using drones operated by the United States Air Force under the aegis of the CIA. Estimates for civilian deaths in Waziristan, range from 158 to965.[26] A study called "The Year of the Drone" published in February 2010 by the New America Foundation found that from a total of 114 drone strikes in Pakistan between 2004 and 2010 around 1,216 individuals had been killed. About two thirds of these were thought to be militants and one third was civilians.[27] It has been further reported that 160 children were killed by way of these drone attacks in Pakistanand over 1,000 civilians incurred injuries.[28] Moreover, additional reporting has found that known militant leaders have constituted only 2 percent of all drone-related fatalities. The year 2010 was the deadliest year so far regarding casualties resulting from drone attacks, with 134 strikes inflicting over 900 deaths. As for Pakistan, it has repeatedly protested that these attacks are an infringement of itssovereignty, but their grouses remain unheard.

[26] The Bureau's complete data sets on drone strikes in Pakistan, Yemen and Somalia, Bureau of Investigative Journalism, June 6, 2015, retrieved June 6, 2015.

[27] Drone Wars Pakistan: Analysis, New America Foundation..

[28] Woods, Chris, Over 160 children reported among drone deaths, The Bureau of Investigative Journalism, August 11, 2011, Retrieved, September 13, 2011.

An estimated 127 US drone attacks have been conducted in Yemen since 2002.[29] An attack by the US in December 2013 in Yemen, killed 12 men and wounded at least 15 other people. The drone mistook the wedding procession as a militant insurgency. Amongst the dead, were the unfortunate bride and bride groom.[30] According to the US official, the dead were members of the armed groupAl-Qaeda in the Arabian Peninsula(AQAP), an affiliate of the Al Qaeda. However, witnesses of the incident reported stated otherwise, they told Human Rights Watch, a that no members of AQAP were in the procession and provided information about those wounded and killed.[31] A few days after this incident, Yemeni MPs voted for a ban against the use of drones in Yemen, though it is unclear whether this had any effect on drone usage in Yemen or not.

The airstrikes across Libya in 2011 also add to the horrors of this crusade. Several surveys and medical reports found credible accounts of dozens of civilians killed by NATO in many distinct attacks. The victims, including at least 29 women or children, often had been asleep in homes when the ordinance hit.[32]

All these statistics for collateral victims of course starkly contrast Obama administration reports. What is even more devastating is that the United States is neither held accountable for any of these losses nor is it answerable to any authority. Identities of collateral victims are usually not investigated by US forces; the insidious program thereof is operated by employing a rather questionable method; it counts all military-age males in a strike zone as combatants. This gives explanation to the official claims of low collateral deaths partly and at the same time increases the number of militants or suspects killed in a particular strike. Amnesty International found that a number of victims were unarmed and that some strikes could actually amount to war crimes.[33]

In 2009, the United Nations Human Rights Council("UNHRC") condemned US military operations through a report. The report stated that the US government failed to keep track of civilian casualties of its military operations, including the drone attacks, and it further instructed that the country provide information about the casualties and any surrounding legal probes.[34] Whenever the US has been asked to provide accountability, and to make a clean

[29] New America Foundation, Drone Wars in Yemen, Retrieved February 4, 2016.
[30] Ali, Zaid, U.S. drone strike on Yemen wedding party kills 17, L. A. TIMES, December 13, 2013.
[31] The Aftermath of Drone Strikes on a Wedding Convoy in Yemen, N.Y. TIMES, December 23, 2013
[32] Counting civilian casualties in CIA's drone war, Archived , Way back Machine, Foreign Policy, June 12, 2012
[33] US drone strike killings in Pakistan and Yemen unlawful, BBC NEWS, October 22, 2013, retrieved October 13, 2013.
[34] U.N. envoy calls for probe into U.S. drone attacks, CNN, June 4, 2009.

breast of these strikes, information held by the U.S. military about the same is made inaccessible. The US Government bars accessibility to the public by citing the highly confidentiality nature of the drone attacks program. It is a travesty that with the women and children dead, a destroyed family has no doors to knock. There are times when there are no intended or veritable targets hit and the highest number of killed or all causalities are just the suspects.

Another factor that is to be noted here, every country that has fallen victim to the airstrikes at some point or the other, had opposed the attacks. However, every manner of condemnation has gone in vain, with the rate of attacks casualties growing higher.In 2013, the growing criticism of the drone policy pushed Obama to announce stricter conditions on executing drone strikes abroad, but how far would that be implemented?

The last but the most complex factor of these strikes is that it is in a way impossible to get correct figures of these attacks because the drone strikes are oft - conducted in areas that are inaccessible to general public, and the only sources are local officials and local media, neither of whom are typically reliable sources. The concern is not merely that it impedes the quality of life of the present generation but that it also certainly has repercussions in the nearby future Akin to any military technology; armed drones will kill people, combatants and innocents alike. Even if one remotely attempts to justify these surgical dronestrikes, the act will give further impetus to the United States to exploit this technology in the best of its capacity. While these drone attacks might actually prove instrumental in curbing militants and enforcing peace, we mustn't fail to look at the bigger picture. This could garner an unhindered license for other countries from launching similar attacks and on justifiably similar grounds as United States. The question of the umbrella authority's lack of control could be a tragic situation, owing to the fact that it has been poorly incapable to regulate actions of the United States.

VI. THEFUTURE: ACCOUNTING FOR TRANSPARENCY

The first mention of term "enemy combatant" was in the act passed after 9/11, "enemy combatants" were the targets of these air strikes. But it had a lot of statutory and common law definition.

The Military Commissions Act of 2009[35] abandoned the use of the term "enemy combatant" and replaced it with "unprivileged enemy belligerent," which was defined as: an individual (other than a privileged belligerent) who—
(A) has engaged in hostilities against the United States or its coalition partners;
(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

[35] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

(C) was part of al Qaeda at the time of the alleged offense.
There are two incidents to be brought to notice here: first is the US response to Pakistan Yemen and other countries on civil causalities and second is the response of US court on US causalities under the same law.

The United Nations has disapproved the drone attacks by US. But there was no concrete action by United Nations until Pakistan pressed for a resolution regulating the US airstrikes. UN adopted the resolution on drone strikes formulated by United Nations human rights council.

The most important substantive element in the Resolution is a provision on transparency and investigations, which
"Calls upon States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use"[36]

The resolution also lays emphasis on the urgent and imperative need to seek agreement between states on the legal questions pertaining to the use of drones.

However, experts say that the UN resolution against drones only has moral value unless the Security Council endorses it. However, such an endorsement has a low possibility of fructification, owing to the presence of United States as a permanent member in the Security Council. Furthermore there has further been no follow up on the implementation of the same. In the status quo, the United States has been denying any claims for inquiries on the grounds of national security.

On the other hand, it provides a different picture in the case of Al-Awlaki who was killed in a drone strike, as has been mentioned in the article earlier, which according to United States court was a "serious deprivation"—the ultimate deprivation. The risk of erroneous deprivation could not be higher because if he was targeted by mistake, the price was his life.[37] Similar to the sovereign execution of an innocent man, any mistake with these consequences is irreversible.

The above statement shows that the concern for a United States casualty is way higher than thousand civilian causalities in countries other than its own. It therefore, remains is unclear what factors are considered by the Obama Administration in determining whether an American is an enemy combatant or not for purposes of the kill list. What complements with it is that the president of United States has unlimited executive powers at the time of war or armed conflicts. Hence, there needs to be some amendment in the procedure and strict control over

[36] A/HRC/25/L.32
[37] Dreyfuss,Note 108, at 276.

CIA launched strikes. The United States finds no need of complying with the War Powers Resolution to obtain additional authorization for the use of force in the drone strikes as long as the operations does not "involve the presence of US ground troops, UScasualties or a serious threat to US."[38]

VII. CONCLUSION

While employing drones have definitely killed leaders of terrorist groups, it has also killed more number of civilians than one can possibly conjure. If the world community is indeed striving for peace and security, it doesn't make sense to cause unrest in other parts of the world. The AUMF must therefore, address these and other such problems.

The AUMF was passed merely 72 hours after 9/11. In the affrighted atmosphere, it is suggested that the Congress gave away unbridled powers to the President

Such carte blanche authority, as has been evidenced in the article causes great unrest and isn't necessarily efficacious in the longer run. Therefore, it is essential that to disentangle ambiguity from the texts of the AUMF, which can thereafter impose limitations on the actors on which the President can impose force and under what circumstances,

The authors propound that however great a threat may be, the world community mustn't cross the line to threaten the very existence of mankind. Deploying of war technologies must be governed by regulations and offer greater accountability; in essence, these measures must strive to achieve minimal violations of war peace resolutions. In the spirit of a hopefulness and wise concord, the authors divine that all these issues shall be appropriately deciphered in the nearby future.

[38] Peter Singer, Do Drones Undermine Democracy?, N. Y. TIMES, Jan. 22, 2012, at SR5

THEME- LAW

CONTEMPORARY HUMAN RIGHTS ISSUES IN INDIA
WOMEN'S RIGHTS IN ILLUMINATION UNDER HUMAN RIGHTS

- Rituvarna K. R, Nandini Tripati

ABSTRACT

All throughout the ages people have been governed by rulers who followed different system and forms of government and used their power and authority to suppress the common people. It was only in 1947 when India got its independence from the British rule and adopted democratic form of government which encouraged India to get its new face. Now even after 70 years of independence, India continues to suffer from significant human rights violations, despite framing many laws and policies and promising and making commitments to tackle the problems.

Human Rights in simple sense refers to the certain basic or fundamental rights which are universal for humanity and is entitled to each person of our society irrespective of caste, creed, colour, race, origin, sex, religion etc. The PRINCIPLE OBJECTIVE of human rights for protection of human life and liberty, to preserve the dignity of people, promoting healthy development, maintaining equality etc. In India the violations of human rights are equal to the violations of the democratic principles which is enshrined in the constitution of India. Human rights are no longer the concerned of any country and became an international issue. The United Nations has adopted a Charter of Human Rights for the respect of people and on 10th December 1948, the UN adopted the Universal Declaration of Human Rights for the protection of HUMAN RIGHTS. India was a signatory to the Universal Declaration of Human Rights, but the violations and atrocities are still prevalent. Due to this wide scale violation of human rights like extra-judicial killings, custodial deaths, and atrocities by the security force particularly in Kashmir, the Indian Government set up the NHRC (National Human Rights Commission) in 1993. Peoples' basic and fundamental rights are denied due to the economic and political interest of politicians, big industrialist and power-drunk people.

INTRODUCTION

Gender equality is at the very heart of human rights and United Nations values. A fundamental principle of the United Nations Charter adopted by world leaders in 1945 is "equal rights of men and women", and protecting and promoting women's human rights is the responsibility of all States. The High Commissioner for Human Rights recently pledged to be a Geneva Gender Champion committing to advance gender equality in OHCHR and in international forum. Yet millions of women around the world continue to experience discrimination:

- Laws and policies prohibit women from equal access to land, property, and housing
- Economic and social discrimination results in fewer and poorer life choices for women, rendering them vulnerable to trafficking
- Gender-based violence affects at least 30% of women globally
- Women are denied their sexual and reproductive health rights
- Women human rights defenders are ostracized by their communities and seen as a threat to religion, honor, or culture
- Women's crucial role in peace and security is often overlooked, as are the risks they face in conflict situations

Moreover, some groups of women face compounded forms of discrimination -- due to factors such as their age, ethnicity, disability, or socio-economic status -- in addition to their gender. Effectively ensuring women's human rights requires, firstly, a comprehensive understanding of the social structures and power relations that frame not only laws and politics but also the economy, social dynamics and family and community life. Harmful gender stereotypes must be dismantled, so that women are no longer viewed in the light of what women "should" do and are instead seen for who they are: unique individuals, with their own needs and desires.

Women around the world nevertheless regularly suffer violations of their human rights throughout their lives, and realizing women's human rights has not always been a priority.

The United Nations has a long history of addressing women's human rights and much progress has been made in securing women's rights across the world in recent decades. However, important gaps remain, and women's realities are constantly changing, with new manifestations of discrimination against them regularly emerging. Some groups of women face additional forms of discrimination based on their age, ethnicity, nationality, religion, health status, marital status, education, disability, and socioeconomic status, among other grounds. These intersecting forms of discrimination must be considered when developing measures and responses to combat discrimination against women. This publication introduces women's human rights, beginning with the main provisions in international human rights law and going on to explain particularly relevant concepts for fully understanding women's human

rights. Finally, selected areas of women's human rights are examined together with information on the main work of United Nations human rights mechanisms and others pertaining to these topics. The aim of the publication is to offer a basic understanding of the human rights of women, but because of the wide variety of issues relevant to women's human rights, it should not be considered exhaustive.

ANALYSIS OF WOMEN HUMAN RIGHT IN INDIA

With the rising crimes, violations, frauds, and scandals human rights are being violated and taken for granted and in the recent years conditions have become worst and deteriorated in India. Violence against women is increasing at an alarming rate and they are at a high risk of sexual harassment, trafficking, and forced labor including violations of equal participation in political, economic, and social life. In fact, the recent molestation case in Bengaluru was shocking and condemned by all sections of our society. Such horrifying incident took place on the night of 31 December 2016 where many people gathered on the streets and started molesting the women's. And just after the New Year incident another molestation case occurred in Bangalore which was triggered by two hooligans nearby East Bengaluru. The circumstances for women rights and their freedom seems to have deteriorated, with not only people committing women rights violations but also powerful politician and police who are easily compromising with the security of women. This unfortunate incident reminds about the Nirbhaya Case, one of the most heinous crime of gang rape of a young women which took place on 16th December 2012. Despite the various strong laws and Acts framed by the government, women across India continue to suffer from domestic violence, acid attacks, rape and murder, etc.

Violation of Human Rights of Women

Very often it is said that women in India are enjoying the rights equal to that of men. But, the women in India have been the sufferers from past. Not only in earlier times but even today women face discrimination, injustice and dishonour. The violations of human rights of women are evident in the past customary practices, which often proved to be against the notion of gender equality.

Violation of Human Rights of Women in Past

The following crimes were done against the women in the past times.

Devadasis- Devadasis was a religious practice in some parts of southern India, in which women were married to a deity or temple. In the later period, the illegitimate sexual exploitation of the devadasis became a norm in some parts of the country.

Jauhar- Jauhar refers to practice of the voluntary immolation of all wives and daughters of defeated warriors to avoid capture and consequent molestation by the enemy. The wives of Rajput rulers, who were known to place a high premium on honour, followed this practice.

Purdah- Purdah is a practice requiring women to cover their bodies, to cover their skin and conceal their form. It curtails their right to interact freely and it is a symbol of the subordination of women.

Sati- Sati is a custom in Indian society, in which widows were immolated alive on her husband's funeral pyre. Although the act was supposed to be voluntary on the widow's part, it is believed to have been sometimes forced on the widow.

Violation of Right to Equality-

Discrimination against the girl child starts from the mother's womb. The child is exposed to gender differences since birth and in recent times even before birth, in the form of sex – determination tests leading to foeticide and female infanticide. The home, which is supposed to be the most secured place, is where a woman is often exposed to violence. In India, men are always assumed to be superior to women and are given more preference. The World Human Rights Conference in Vienna first recognized gender – based violence as a human rights violation in 1993. United Nations Declaration declared the same in 1993. The recognition of women's rights as human rights became international law when UN General Assembly adopted the Convention on the Elimination of All forms of Discrimination Against Women.[1]

Violation of Right to Education-

Education is considered as a means of development of personality and awareness. Basic education is crucial to alleviating poverty, reducing inequality and deriving economic growth. Education is one of the most important human rights but the position of women's education in India is not at all satisfactory. Young girls are denied even to have basic education. Despite the improvement in the literacy rate after independence, there continues to be large gap between the literacy levels of men and women. Almost half the women population is even unable to recognize language characters. At least 60 million girls lack access to primary education in India and the gender gap in literacy persists. More than two thirds of the world's 960 million illiterates are women.[2] The exclusivist state policy of control over curriculum choices, misappropriation of funds, non-implementation of education incentives and ideologically driven reforms and pedagogy are significant contributed factors.[3] Due to large percentage of

[1] Adopted on On 18 December 1979

[2] Web.unfpa.org/intercenter/role4men/empower.htm

[3] Www.ijsrp.org/research-paper-1012/ijsrp-p1004.pdf

uneducated women in India, they are not even aware of their basic human rights and can never fight for them.

Violation of Political Right-

The political status of women in India is very unsatisfactory, particularly their representation in higher political institutions, Parliament and provincial Legislation. India ranks 109 in the world classification of Women in National Parliaments, with 11 per cent in the Lower House and 10.6 in the Upper House.[4] Thus it is clear that there is male domination in Indian politics and almost all the parties give very little support to women in election despite their vocal support for 33% reservation of seats for women in Parliament and Provincial Legislation. The Women's reservation Bill that was drafted in 1996 and introduced in Parliament in 2010 is forgotten text.

Violation of Right to Property-

The general law relating to the inheritance and succession can easily be referred to the Indian Succession Act, 1925. Under this Act every Indian is entitled to equal shares on inheriting the property on the death of a person. The exceptions are Hindus, Sikhs, Jains, Buddhists and Muslims as they are governed under separate laws of succession.[5] In most of the Indian families, women do not own property in their own names and do not get share of parental property. The personal laws govern them. Due to weak enforcement of laws protecting them, women continue to have little access to land and property. In fact, some of the laws discriminate against women, when it comes to land and property rights. Though, women have been given rights to inheritance, but the sons had an independent share in the ancestral property, while the daughter's shares were based on the share received by the father. Hence, father could anytime disinherit daughter by renouncing his share.

Violation of Right to Live with Dignity-

Right to Life as under Article 21 of the Constitution includes Right to live with dignity, which is equally available to women. Eve teasing is an act of terror that violates a woman's body, space and self – respect. It is one of the many ways through which a woman is systematically made to feel inferior, weak and afraid. Whether it is an obscene word whispered into a woman's ear; offensive remarks on her appearance; any intrusive way of touching any

[4] http://www.dailymail.co.uk/indiahome/indianews/article-2112426/India-ranks-105th world-womensrepresentation-politics.html

[5] JavedRazack, "Inheritance and Succession, Rights of Women and Daughters under Personal Laws", available at www.lexorates.com

part of women's body; a gesture which is perceived and intended to be vulgar: all these acts represent a violation of woman's person and her bodily integrity.

Thus, eve teasing denies a woman's fundamental right to move freely and carry herself with dignity, solely based on her sex.

Violation of Right to protection from society, state and family system-

a) Child Marriage- Child marriage has been traditionally prevalent in India and continues to this date. UNICEF defines child marriage as marriage before 18 years of age and considers this practise as a violation of human rights. But a girl child in India is taken as a burden on the family. Sometimes the marriages are settled even before the birth of the child. In southern parts of India, marriages between cousins are common, as they believe that a girl is secured as she has been marrying within the clan. Parents also believe that it is easy for the child – bride to adapt to new environment as well as it is easy for others to mould the child to suit their family environment. This shows that the reasons for child marriages in India are so baseless. Basically, this phenomenon of child marriage is linked to poverty, illiteracy, dowry, landlessness, and other social evils. The impact of child marriage is widowhood, inadequate socialization, education deprivation, lack of independence to select the life partner, lack of economic independence, low health/nutritional levels because of early/frequent pregnancies in an unprepared psychological state of young bride. However, the Indian boys must suffer less due to male dominated society. Around 40% child marriages occur in India. A study conducted by Family Planning Foundation showed that the mortality rates were higher among babies born to women under 18. Another study showed that around 56% girls from poorer families are married underage and became mothers.[6] So, all this indicated that immediate steps should be taken to stop the evil of Child Marriage.

b) Dowry harassment and Bride Burning- Bride burning is linked to the custom of dowry, the money, goods, or estate that a woman brings to her husband in marriage. Thousands of young married women in India are routinely tortured and murdered by husband and in-laws who want more dowries from the bride's parents. In spite of the Dowry Prohibition Act passed by the government, which has made dowry demands in wedding illegal, the dowry incidents are increasing day by day. According to survey, around 5000 women die each year due to dowry deaths and at least a dozen dies each day in kitchen fires.[7]

c) Rape- Young girls in India often are the victims of rape. Almost 255 of rapes are of girls under 16 years of age. In 2012, over 24,000 cases of rape were reported, though realistic

[6] Available at www.icrw.org, 'Child Marriage facts and figures'2007

[7] TaslimaNasreen' Bride Burning',Available at www.freethoughtblogs.com

statistics are likely to be much higher. The International Centre for Research on Women conducted a survey amongst New Delhi residents to determine their attitudes toward sexual violence, especially in the public sphere. Of the female respondents, an incredible 95% reported feeling unsafe in public, due to the perceived threat of sexual violence against women.[8] The National crimes record Bureau statistics reveal that there were 25,915 victims of rape out of 24,923 reported rape cases in the country during the year 2012. 12.5% of the total victims of rape were girls under 14 years of age while 23.9% were teenage girls of age between 14-18 years, 50.2% were women in the age group 18- 30 years. At the outset rape cases have increased by 46.8% from 267 cases in 2011 to 392 cases in 2012.[9] In rape cases, it is very torturing that the victim has to prove that she has been raped. The victim finds it difficult to undergo medical examination immediately after the trauma of assault.

WOMENS RIGHT MOVEMENT

The women's rights movement of the mid-nineteenth century unified women around a number of issues that were seen as fundamental rights for all citizens; they included: the right to own property, access to higher education, reproductive rights, and suffrage. Women's suffrage was the most controversial women's rights issue of the late nineteenth and early twentieth centuries and divided early feminists on ideological lines. After women secured the right to vote in 1917, the women's rights movement lost much of its momentum. World War I and II encouraged women to do their patriotic duty by entering the workforce to support the war effort. Many women assumed they would leave the working world when men returned from service, and many did. However, other women enjoyed the economic benefits of working outside the home and remained in the workforce permanently. After WWII, the women's rights movement had difficulty coming together on important issues. It was not until the socially explosive 1960s that the modern feminist movement would be re-energized. In the four decades since, the women's movement has tackled many issues that are considered discriminatory toward women including: sexism in advertising and the media, economic inequality issues that affect families, and violence against women. Two ongoing issues in which women seek social change are those having to do with wage discrimination and reproductive health.

[8] Ms. Meredith McBride, 'Violence against women in India' available at www.hu manright sasia.in

[9] Available at www.ncrb.org

Sex, Gender & Sexuality
Overview
Women's Rights

Like any almost every other modern social movement, the women's rights movement comprises diverse ideals. Feminist and American responses to the movement have generally fallen along three lines:

* Staunch opposition to change;
* Support of moderate and gradual change; and
* Demand for immediate radical change (Leone, 1996).

The women's rights movement rose during the nineteenth century in Europe and America in response to great inequalities between the legal statuses of women and men. During this time, advocates fought for suffrage, the right to own property, equal wages, and educational opportunities (Lorber, 2005).

In the United States, suffrage proved to be one of the driving issues behind the movement. However, when the movement first began, many moderate feminists saw the fight for voting rights as radical and feared that it would work against their efforts to reach less controversial goals such as property ownership, employment, equal wages, higher education, and access to birth control. The divide between moderate and radical feminists started early in America's history and continues to be present in the women's movement (Leone, 1996).

Suffrage

First proposed as a federal amendment in 1868, women's suffrage floundered for many years before the passage of the Nineteenth Amendment gave women the right to vote in 1920. It was 1917 when the National Woman's Party (NWP) met with President Woodrow Wilson and asked him to support women's suffrage. When the women were dismissed by Wilson, members of the party began a picket at the White House. Their protest lasted 18 months. Harriot Stanton Blatch, the daughter of Elizabeth Cady Stanton, and Alice Paul were among the first organizers of the picket. However, the picket was not supported by the older and more conservative women's rights group, the National American Women's Suffrage Association (NAWSA). Its members saw the picket as somewhat "militant" and sought to win suffrage State by State rather than through a federal amendment (Leone, 1996).

America's involvement in World War I during the spring of 1917 affected the women's suffrage movement in a number of ways. The NWP refused to support the war effort, while NAWSA saw support of the war as an act of patriotism and a way to further women's rights

issues. The differences between the two groups led to hostility that continued until August of 1919 when the Nineteenth Amendment was passed. Both the NWP and NAWSA claimed responsibility for the passage of the amendment. Historians disagree about which party was most influential. Many credit the combination of militant and moderate strategies that were employed by each group (Leone, 1996).

After the women's suffrage movement, some men and women considered the fight for women's rights to be over. Many of the organizations that had been so active in promoting suffrage disbanded after the Nineteenth Amendment was ratified. Though some women's suffrage groups did continue as organizations--namely, the League of Women Voters--the feminist movement sputtered without a unifying cause (Leone, 1996). The Great Depression of the 1930s further hurt the women's movement: most women simply did not have the time or energy to dedicate to feminist causes. With America's entry into World War II, many women entered the workforce for the first time. However, this entry was accompanied by the assumption that women would exit the workforce once American men returned from service. Post-war America saw a steep decline in participation in the women's rights movement. The numbers of women attending college dropped during the 1950s as women married earlier and had more children.

Applications

The women's rights movement re-formed during the 1960s as the women's liberation movement (Lorber, 2005). The period would mark the "revitalization of feminism" (Leone, 1996).

According to Judith Lorber, twentieth-century feminism was more fragmented than nineteenth-century feminism, perhaps as a result of deeper understandings of the sources of gender inequality (Lorber, 2005). In the twenty-first century, there are still many issues that challenge women's economic and political status in the world, and women of all kinds are fighting many battles on many fronts.

Challenges to gender equality occur in many ways. Some of the most commonly recognized issues are:

* Education: Men tend to have higher educational attainments, though in the US and Western world this gap is rapidly closing.
* Wages and Employment: Men occupying the same jobs as women tend to be paid more, promoted more frequently, and receive more recognition for their accomplishments.
* Health Care: In some countries, men have more access to and receive better health care than women.
* Violence and Exploitation: Women are subjected to violence and exploitation at greater rates than men.

* Social Inequality: Women still perform the majority of domestic duties such as housework and child care (Lorber, 2005).

Issues

Educational Attainment

Women's unimpeded access to educational opportunities is strongly supported by feminists. The gap in educational attainment is shrinking rapidly in the industrialized world, and the gap in the US is quite small. However, lack of education still hurts women in fundamental ways, the most obvious being economic. This essay will discuss in more detail the gender wage gap that exists in the US. While education does increase a women's earning potential, research suggests that a definite and pervasive gender wage gap exists at every level of the workforce.

Gender Pay Gap

A "gendered division of labor" exists across the globe. A 1980 United Nations report stated that women performed two thirds of the world's work, garnered 10% of wages worldwide, and owned 1% of the world's property (Lorber, 2005). Even in the early twenty-first century, the workplaces of industrialized nations continue to demonstrate a curious paradox. While research shows that companies that encourage diversity and promote women to leadership roles have higher levels of financial performance than companies with less diversity, women's earnings are still significantly less than men's (Compton, 2007).

Great Britain, like the US, has grappled with the existence of the gender pay gap for many years. The US passed the Equal Pay Act in 1963, and Great Britain instituted its own Equal Pay Act in 1970. Both of these acts "offered women a legitimate avenue to seek remuneration for unequal pay"(Compton, 2007, 1(20). In 1970, the pay differential in Great Britain between men and women's wages was 30%. Nearly five decades later, in 2008, the gender pay gap still hovered around 17% and was the highest of all EU countries (De Vita, 2008). Some project that the disparity in wages will not be eliminated until around the year 2030 (De Vita, 2008). The question remains, if women are legally guaranteed equal pay, and if promoting women is generally recognized as good for business, why do women still earn less than men? The causes of the gender wage gap are various and complex.

The fact that many women choose to leave their jobs in order to have children is often identified as one reason for the wage gap. Proponents of this theory argue that, statistically, women earn less than men because some women do not hold paying, full-time jobs, thus dragging down women's average wages. However, most studies of the wage gap only count the earnings of women who work full-time.

CONCLUSION

In India, more than 55 percent of the women suffer from Domestic Violence, especially in the states of Bihar, U.P., M.P. and other northern states.[10] But an Indian woman always tries to conceal it, as they are ashamed of talking about it. Interference of in – laws and extra marital affairs of the husbands are the cause of such violence. The pity women are unwilling to go to court because of lack of alternative support system.[11]

Thus, though India has made strides in equality gain for women, many patriarchal and outdated laws have yet to be adjusted to reflect the changing attitudes in India. Now it's time to think beyond ideology, a world of greater hardship for women, who sacrifice their identity, communication and hopes, in a society dominated by male values, Question always arises whether the laws and society's standards ensures that women get their rights? And that their human rights are protected? What is needed at present is the recognition of women's equal humanity and a continuing response to the persistent realities of the contemporary world. The right of every individual is to do what he/she values and becoming and being human is always more difficult for a woman in the present world.

[10] DHAWESH PAHUJA, ' Domestic Violence against Women in India', available at www.legalindia.in

[11] *Ibid,p. 5*

CASE COMMENT ON THE BHOPAL GAS TRAGEDY IN LIGHT OF PRIVATE INTERNATIONAL LAW AND HUMAN RIGHTS

- *Pallavi Khanna*

INTRODUCTION

The rapid emergence of multinational corporations (*hereinafter* MNCs) in developing nations has fuelled a debate about the responsibility of these entities to the host nations and its people. Some MNCs have even emerged as powerful as some states and hence are in a position to violate human rights. Hence they must be held accountable to the same extent as states for these violations. The increase in operation of MNCs in the developing countries has translated into more direct impact on the locals as well as the environment.[1] Relocating hazardous activities to developing countries has become a common trait of the multinational companies.[2]

The predicament lies in the governance gaps between the scope and effect of economic agents and the capability of societies to manage adverse consequences. This creates a permissive environment for MNCs to engage in wrongful acts due to lack of sanctioning and reparation. There is legal uncertainty in applying private international law (*hereinafter* PIL) principles given how complex their effects may be and it may lead to extended litigation. Moreover, since PIL doesn't clearly recognise any class of civil claims for violations of human rights and simple classifies them as tortuous or contractual it creates more problems since no special treatment is given. Jurisdiction is the most litigated and disputed area in PIL cases. The

[1] R. Kapur, *From Human Tragedy to Human Rights : Multinational Corporate Accountability for Human Rights Violations,* vol. 10 (1), BOSTON COLLEGE THIRD WORLD LAW JOURNAL 1,2 (1990).

[2] S. Baughen, *Multinationals and the Export of Hazard,* vol. 58(1), THE MODERN LAW REVIEW 54, 55 (1995).

question of territorial reach of legal systems is raised when non resident entities are engaged in harmful operations.

In case of MNCs, the PIL determines the competence of courts to adjudicate private matters as well as the law governing these disputes. Victims may face problems in establishing connecting factors between violations by a third world country subsidiary and jurisdiction of the home state when there is a high risk of denial of effective remedies in third world countries.[3]

Through this paper, the researcher seeks to examine the PIL issues arising with respect to MNCs. The author begins with discussing the liability of MNCs in the backdrop of corporate veil, tort law and policy issues as well. The author has attempted to focus on liability and jurisdiction issues alone, since they are relevant to PIL. The author then gives insights into the Bhopal Gas Tragedy in light of PIL matters. This involves a critical analysis of the approach of India and US. The paper is not exhaustive in nature given constraints of space.

MAKING MNCs LIABLE

In order to formulate a principle of liability required a high standard of moral and legal imagination alongwith creation of a standard which subjects creators of hazards to some standard of justice.[4] Baxiopines that this may cause problems as any error manifested by local subsidiaries would be laid before the multinationals. This is because the combination of power and knowledge that the MNC possesses creates a legal duty which is absolute and non-

[3] D. Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union,* SUBMITTED BY THE UNIVERSITY OF EDINBURGH, 55.

[4] The idea of absolute liability of an MNC, in the opinion of Baxi, suits a hazardous MNC which comprises of the certain characteristics.Firstly, the global organisation is such that is enabled to take decisions which have catastrophic implications such as mass disasters, especially when the MNC is engaged in hazardous activities. Secondly, the MNC has considerable power of the key personnel and it is not limited by domestic frontiers not curtailed by international law. Thirdly, the structure of the MNC is so complicated given the network of subsidiaries that it becomes hard to assign responsibility for the damage caused by the enterprise. Fourthly, the MNC functions through a systematic network of systems and personnel. Fifthly, the MNC carries out its global operations through its daily activities consisting of a number of agents. Sixthly, the victims are not able to identify the unit of the enterprise which caused harm. Seventhly, it's obvious that the MNC causing the harm is liable for it. [U. Baxi, VALIANT VICTIMS AND LETHAL LITIGATION- THE BHOPAL CASE, The Indian Law Institute, viii-ix.].

delegable in nature.[5] Hence this means that the MNC is responsible for conducting all hazardous activities in consonance with the requisite safety standards and provide all information about the activity in question.[6]

However the question which arises next is the standard of safety that must be complied with.[7] Is it the domestic legislation or the law of the country where the entity was incorporated or the best industry standard which is to be followed by all entities undertaking hazardous activities?[8] Unfortunately, the Indian courts in the Bhopal case did not enunciate on this issue properly.

The UCC tried to prove that it had no real liability in the event of mass disasters affected by omissions and commissions. In attempting to hold the MNCs liable, the Union of India argued that the key personnel of the MNCs exercise a power they hold closely and which is not limited by boundaries or regulated by international law. They recognise the fact that the complex structure makes it difficult to assign responsibility for damages that the enterprise causes to discrete individuals and corporate units. Thus it is opined that the MNC will have a

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[5] Parent companies are assumed to have superior knowledge of risks involved in the operations of its subsidiaries. Also, it would reflect poorly for major corporations to claim that only the subsidiary is responsible for accidents. [P.T.Muchlinski, *The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors,* vol. 50(5), THE MODERN LAW REVIEW, 585 (1987)].

[6] The knowledge refers to that possessed by a MNC about safety, hazards, mitigation and suffering and only an entity engaged in such hazardous activity will have such knowledge. However this is accompanied with a duty that the MNC has to be informed or to discover with reasonable prudence the possibility of dangers that may arise by its industrial operations. Hence the duty is of two kinds, one – two be informed and to ensure there is reasonable care to enquire into possibility of disasters. Both these duties are non-delegable in nature. [*Supra* note 4, at 187.].

[7] If the litigation was allowed to run its course, one would probably have answers to questions such as why the UCC could not be obligated to have a computerised equipment for safety like it had employed at the Virginia plant. The UCC instead relied on the argument that it is not just to arrive at a standard of safety post the catastrophe and expect the company to have met that standard.[*Supra* note 4, at x.]

[8] *Supra* note 4, at ix.

primary, non delegable and primary duty to those in whose country thy undertake the dangerous activity.[9]

The structure of MNCs is such that it transcends national boundaries and hence effective control over its activities would require cooperation of other sovereign states as well.[10] MNCs engaged in high profit making activities may try to avoid risk to themselves by setting subsidiaries in foreign host nations and invoking the doctrine of forum non conveniens to evade jurisdiction of American courts.[11]

The FNC doctrine has been criticised for giving the private convenience of the parties more importance than the plaintiff's legal right to seek remedies in the US and because of the high extent of discretion that comes with it. The doctrine of FNC can do severe injustice by denying claimants, who are inevitably the weaker parties, the choice of jurisdiction between

[9] They argue that in essence there is one single entity, i.e. the MNC which is responsible for the development of information world over through a network of personnel in different departments and in such a way it can be said that the MNC undertakes its global duties through its agents. Those harmed by the actions of the MNC are not able to isolate a specific unit of the enterprise which caused the and yet it is apparent that the MNC causing the harm is liable for it and hence it should assume responsibility since it has the resources to guard and discover the hazards and give warnings of future hazards. Hence, they say that the MNC has an inherent duty to caution and it is the only way safety can be ensured.[U. Baxi& T. Paul, MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE, Indian Law Institute, v.]

[10] Attempts have been made to regulate the behaviour of the MNCs, for instance the OECD Declaration on International Investment and Multinational Enterprises in June 1976 annexing certain guidelines for multinational enterprises, though not binding, prove as a reference point to evaluate and review the performance of the MNCs. The United Nations Intergovernmental Working Group has also been seeking to devise a code of conduct for MNCs.[*Supra* note 1, at 12]

[11] Irrespective of the idea whether liability can be established, the plaintiffs from developing countries while suing parent companies in developed countries for damages, face the issue of jurisdiction since the court has the discretion to refuse the jurisdiction on the basis of *forum non conveniens.* Given their transnational nature, the MNC is able to chose which legal regime will suit its interests. In order to deal with this, the host country may make laws incorporating the principle of strict liability to govern the functioning of the MNC in its country, and since this would require conscious effort of the government, it may not want to do so unless it faces a mass disaster. [*Supra* note 1, at 13].

host country where damage is caused and the home country where management of the MNC is located.[12]

LIABILITY ISSUES IN THE BHOPAL CASE

In the Bhopal case, though UCIL (Union Carbide India Limited) was the relevant entity responsible for running the plant and the UCC (Union Carbide Company) was merely a dominant shareholder, the control and direction of the UCIL was with the UCC. So as to make claims against the UCC and not the UCIL, India had to develop the idea of UCC being the mind and soul of the plant at Bhopal an UCIL was only acting as its arm and obeying orders of the UCC. Hence, India had argued that by virtue of being a multinational, the UCC was the driving force and directed the ways in which the UCIL carried out its operations and hence responsible for the Bhopal disaster. On a more general level, the UCC and the UCIL had a relationship in the nature of a parent and subsidiary. Moreover, since UCC controlled the majority of the UCIL it exercised control at all relevant times over the actions of the UCIL.[13] In fact the plaintiffs attempted to establish that the UCC's control over crucial areas of safety was only an aspect of the UCC's control over the management and direction of the UCIL's operation which was in consonance with the UCC's management principle of how it coordinated the operations of its subsidiaries to achieve the goals of the MNC. This was akin to a plea for ignoring the corporate veil.[14] The idea of unity of holding and subsidiary companies though established well worldwide were undeveloped in India as far as the issue of a toxic tort resulting in a mass disaster was concerned. Baxi opines that this argument had far reaching implications since if it were successful; no MNC which operated any hazardous industry in India would be easily able to install subsidiaries as shields. If the courts in India had in its final verdict upheld India's

[12] P. Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and The United Kingdom Asbestos Cases,* vol. 50, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 23 (2001).

[13] *Supra* note 4, at 176.

[14] Generally, subsidiaries are responsible for their own acts and omissions and the parent company is held liable on in exceptional cases by lifting the corporate veil to make the company liable directly for instances of corporate negligence. In DHN Food Distributors Ltd v. Tower Hamlets London Borough Council[1976] 1 WLR 852] it has been held that corporate veil should be lifted in cases of a single economic unit or group enterprise. In LIC of India v. Escorts Ltd. AIR 1986 SC 1370 also it was held that the veil should be lifted when the companies are so inextricably connected that they form a part of a single concern.[E. Singh, *Parent Company Liability for Environmental Disaster Caused by Subsidiary Company,* vol. 2(7), IMPERIAL JOURNAL OF INTERDISCIPLINARY RESEARCH, 2454, (2016).]

contention and if it were enforceable in the US then it would impact the American MNCs exporting hazardous materials to third world countries.[15]

THE AMERICAN NARRATIVE

While remanding the case to the Indian courts, Judge Keenan observed that the Indian legal system would be in a better position than the courts in America to determine the cause behind the tragedy, liability and compensation due to the greater access to information. However, the results of the litigation were not as desired.[16] The passing off of the burden to carry out justice was couched in terms that showed that the Indian courts were being given an opportunity by their American counterparts to prove to the world that they are no longer subjugated.[17]

The Bhopal case reflected an example of how the American legal system can be interrogated with respect to its ideology of due process and justice. The litigation raised

[15] *Supra* note 4, at vi-vii. In a study by the EC, it was revealed that most of the alleged human right and environment abuse by corporate were committed by contractors or subsidiaries of European corporations with the domicile or residence in countries where the violation has taken place and is subject o the domestic legal framework of that country. This means that the MNCs gain advantage from the operations of its third world subsidiaries but are not directly responsible for any human right and environment damage done during these operations. This becomes problematic if the subsidiaries are in countries with weak legal regimes with inadequate safeguards for human rights and environment protection than the home state of the MNC. Also [see *supra* note 3, at 29.]

[16] *Supra* note 4, at ii.

[17] Justice Keenan's observations have been called the 'Dow Jones jurisprudence' by some scholars such as Baxi and he opined that when no harm is occurring to Americans , it is hard to believe how the US public's interest is getting adversely affected. He goes on to state how Judge Keenan's approach trivialises the disaster by saying that the parent company would not be responsible for overseas operations. An unmindful application of American standards on the MNCs operations may be against the needs and policies of host nations. And this forms one of the key problems in formulating international codes of conduct to regulate transnational corporations. Also, disregarding any supervisory role of the parent company when ultra hazardous processes are exported to developing countries, encourages MNC to engage in those practices abroad that will not be tolerated in home countries and this when affirmed by the judiciary confirms the opinion that the lives of the people n the third world are considered to be cheap [J. Cassels, *The Uncertain Promise of Law: Lessons From Bhopal,* vol. 29 (1), OSGOODE HALL LAW JOURNAL, 18 (1991)].

considerable question on the ability of the American system to bring justice to those impacted by mass disasters triggered by MNCs operating from the US.[18]

The UCC argued that the case should not be heard by the courts in the US since it is not a convenient forum. While UCC tried to make Indian courts the convenient forum due to presence of parties, catastrophe, evidence, etc. in India, it also tried to evade the high costs and use of resources that would be imposed on America had the litigations been carried out there,[19] the UCC on the other hand tried to dismiss the proceedings on the ground of forum non convenience on the basis of the key presence of the UCC in Bhopal and its pervasiveness in decision making with respect to all matters.[20]

Interestingly, though the UCC insisted on India being the relevant forum, American courts have in the past in the case of *Gulf Oil Corp v Gilbert,*[21] observed that the doctrine presumes that there are two forums which the defendant may approach. However the forum chosen by the plaintiff should not be disturbed unless the balance of convenience strongly yields in favour of the defendant. Hence the onus is on the defendant to prove that the alternate

[18] *Supra* note 9, at iii.

[19] The principle of Forum Non Conveniens seeks to assist courts in resisting jurisdiction and it rests on the premise that the plaintiff's choice of forum should not be disturbed and that the court has complete discretion to invoke it. It seeks to facilitate enquiry when trial serves the convenience of parties and justice.[Supra note 9, at 40-46]. Also seeR.A.Brand, Challenges to Forum Non Conveniens, vol. 45, INTERNATIONAL LAW AND POLITICS, 1005-07 (2013).*Forum non conveniens* is a doctrine which permits courts having jurisdiction in a case to stay the matter or dismiss it on the grounds that it may be heard more appropriately by another court. In the US, even if the court has subject natter as weak as personal jurisdiction, it may rely on this doctrine to dismiss a case when an alternative forum having jurisdiction exists and the trial in the forum would cause oppressiveness to the defendant. A dismissal based on this doctrine is granted even if the foreign firm may apply a less favourable law to the plaintiff (Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).) Also, though Bhopal was based on a reconstruction of Piper in determining the Indian judiciary's capacity in dealing with mass tort litigations by MNCs. Piper had ruled that an unfavourable law regarding liability and damages cannot be urged in denying the chosen forum but in Bhopal this was ignored [U. Baxi, TOWARDS THE REVICTIMISATION OF THE BHOPAL VICTIMS, 13]

[20] It has been criticised that the doctrine is being utilised as an attempt to reduce the burden on American courts and this has been countered with arguments that the convenience of the parties and the need to serve the ends of justice that guides ruling on forum.[Supra note 9, at vii-ix]

[21] Gulf Oil Corp v Gilbert330 U.S. 501 (67 S.Ct. 839, 91 L.Ed. 1055)

forum is a sufficient forum. The case of *Amoco Cadiz*[22] is an example of when the corporate veil is lifted to make the parent company liable for environment disasters caused by its subsidiary.[23] In the case of *Shimoda*[24] the district courts in Tokyo had upheld the damages claimed against the US government for the radiation impact in the survivors of the Hiroshima and Nagasaki disasters. The *Lubbe case*[25] reflected the case of a parent company being liable for environmental torts of its subsidiaries where the parent company knew that exposure to asbestos will be injurious to health, failed to take appropriate measures to ensure safety standards were followed and it alleged that the defendant had breached a duty of care to its subsidiary

Hence it is seen that in some circumstances, parent company may be liable for the acts of the subsidiary irrespective of where the subsidiary is located. Hence, the parent company of MNCs can be held liable directly or derivatively for the acts of its subsidiaries. Derivative liability involves lifting of the corporate veil or imposing liability on the parent company if it is the dominant shareholder of the subsidiary. Unfortunately, the jurisprudence on lifting of the corporate veil is affected by arbitrariness alongwith uncertainty which makes it difficult to elucidate the legal principles governing the area given the controversial and contradictory stances adopted by the courts.[26]

Courts in developed countries have often held that they would have jurisdiction over MNCs guilty of human right violations and parent companies can be sued for these violations. It is interesting how the US institutes large extraterritorial powers in sectors such as antitrust, exports and trade sanctions in enemy states but is reluctant to address and prevent corporate malpractice in other states.[27]

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[22] In Re Oil Spill By "Amoco Cadiz" Off Coast of France 491 F. Supp. 161 (N.D. Ill. 1979

[23] A large oil spill occurred off the seas of Brittany when a super tanker broke apart. Though the damage was caused by the subsidiary, the parent company was made liable ad the courts in US did not hesitate in removing the corporate veil in this case. Interestingly, the American courts did not reflect the same degree of enthusiasm in te Bhopal case and refused to lift the corporate veil. [*Supra* note 14, at 2455]

[24] Ryuichi Shimoda et al. v. The State(Japanese Annual of International Law, No. 8 (1964), p. 212 (See *supra* note 4, at xi)

[25] Lubbe v Cape PLC [2000] UKHL 41

[26] *Supra* note 14, at 1361.

[27] M. Sornarajah, *Power and Justice: Third World Resistance in International Law,* SINGAPORE YEARBOOK OF INTERNATIONAL LAW AND CONTRIBUTORS, 46 (2006).

THE IMPACT ON THE VICTIMS

The plight of the victims did not get due recognition as well. The court went on to comparethe compensation to that awarded in motor accident and worker's compensation claims, both being weak analogies for such a grave disaster, have received severe criticism.[28] For the victims, the Bhopal case is like a dual catastrophe, one caused by the toxic implications and the other aggravated by the agonising litigations. It is difficult to understand why the Apex court in the country was not successful in securing information necessary to render justice to the victims during the settlement.[29]

The Bhopal disaster also left behind a lesson for other third world countries, that is imperative to understand the scientific implications of exposure to hazardous materials that may extrapolate from mass disasters and adequate technological safeguards need to be instituted to deal with the same,[30]

In order to hold MNCs liable for their activities, one must look at the impact of their actions without mandating any evidence of intention. The victims must have redressal in terms of punitive damages assessed according to the capacity of the defendants.[31] The punitive damages in the event of mass disasters should be adequate to deter the MNCs engaged in hazardous business activities from acting maliciously and in wilful disregard of the safety of the citizens.[32]

Tort law has gained significance in the international arena when addressing environment damage due to acts of MNCs in developing economies such as India.[33] The Bhopal tragedy

[28] In Bhopal, by denying the jurisdiction of American courts, the quantum of damages was also affected and the MNC was protected from any exposure to damages on a scale which the American courts may usually grant. The settlement in India was at an amount much below than that would have been obtained if the case was litigated in the US. [*Supra* note 4, at iii]

[29] The Indian judgement was appreciated for pushing the realms of tortuous liability in the event of mass disasters which are caused by multinationals. However the settlement lead to the culmination of the initiative of the judiciary. Baxi goes on to say that the settlement was indeed judicial fatigue disguised as judicial creativity. The judiciary should have also been more clear and forthcoming about its opinion on the issue of reaffirming absolute liability of the MNC. It's escape from doing so took away from potential contribution to the jurisprudence of MNC liability for mass disasters [Supra note 4, at xi.]

[30] *Supra* note 4, at xiii.

[31] *Supra* note 1, at 3.

[32] *Supra* note 4, at 195

[33] In India, the Public Liability Insurance Act 1991 comes into effect when accidents are triggered by escape of hazardous materials. The defendants are not only strictly liable butthey also have to give compensation in case of these accidents. The Act requires all

revealed that there was no law governing hazardous material and no regulation to determine how the MNC may be liable. The author opines that traditional tort law is insufficient to address mass disasters arising from hazardous activities of MNCs and incapable in censuring the disregard for human life in how the developing countries conducts its activities, but these weaknesses should not allow the MNCs an escape route from their liabilities when there is violation of human rights.[34] In the US as well, the law is inadequate to address mass torts due to a lack of a unifying standard in these situations and though there are a number of statues protecting individuals from exposure to toxic substances, only liabilities are imposed and compensation is not clearly defined.[35]

In the *Shriram case,*[36] a standard stricter than strict liability was devised and it was held that when toxic gases escape then the enterprise will be liable both strictly and absolutely to compensate those affected by the accident and this liability will not be subject to any exception operating vis-a-vis the principle of strict liability which operated in case of *Rylands v. Fletcher.*[37]

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industrial owners to make a contribution to the Public Environment Fund which acts as a statutory insurance fund and limited compensation is permitted to the victims of environment damage. [C. Sharma, *Civil Liability for Environmental Damage: An Assessment of Environmental Claims Under Private and Public Law in India,* MACQUARIE LAW SCHOOL PHD THESIS, at 32.]

[34] *Supra* note 1, at 9

[35] *Supra* note 1, at 8, 12.In the US though procedural innovations such as class actions, formation of trust funds and joinder of parties has helped addressed obstacles in mass disasters. In the US, the Alien Tort Claims Act permits suing of parent companies of transnational corporations for violating the international human rights even when breach happened outside the jurisdiction of the US. In Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002)it was held that an action for international human right violations may be brought against private corporations even if there is no role of the state. However, the contradictory was held in Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) where it was held that no corporation can be subject to liability under customary international law governing human rights. Hence, there has been a difference of opinion in the judiciary regarding the liability of transnational corporations. [I. Prihandono, *Barriers to Transnational Human Rights Litigation Against Transnational Corporations: The Need For Cooperation Between Home and Host Countries,* vol. 3(7), JOURNAL OF LAW AND CONFLICT RESOLUTION, 92 (2011)].

[36] M.C. Mehta v. Union of India 1987 SCR (1) 819

[37] The court went on to hold that the enterprise cannot take the defense that all reasonable care was taken and harm arose without negligence caused by it since the enterprise had the resources to guard against hazards of its activities. The idea of punitive damages was also put

CONCLUSION

Interestingly, western international law has created the fiction that only states have personality in international law, hence multinational corporations which even had greater financial power than nation states were shielded from any kind of liability. This gave rise to paradoxical circumstances where though these MNCs enjoyed rights, there were from any obligations or liabilities in international even though they were real actors. This created impunity for these MNCs in case of misconduct and shielded their leaders from being directly liable.[38] The Bhopal accident is a classic example of an MNC causing colossal damage and the lack of remedy for the loss caused. International law works on the assumption that investments in developing countries should be protected since they benefit economic development but it doesn't recognise the responsibility of MNCs for their conduct. Attempts to institute liability and responsibility on the MNCs has faced resistance based on the argument of absence of personality. The problem of accountability of MNCs can be address by creating codes that are non-binding in nature but contain exhortations for MNCs to comply with its prescriptions. Hence though there are a number of treaties protecting MNCs, those which seek to institute duties are often aborted. Hence this creates a situation where the principles of fair treatment initially intended to protect MNCs have been used as a tool for defending the misconduct of MNCs.[39]

Private international law is unable to accommodate these international actors since they treat them as private persons without accounting for the power with which they function and which is inspired by their international nature. The international community can devise general standards to assess tortuous acts of MNCs in hazardous activities but this may be only a voluntary act. The power imbalances may bar countries from effectively incorporating stringent actions against MNCs. However, if MNCs are compelled to act within the parameters of human rights, their conduct can be regulated in a more sensitive manner.[40]

Unfortunately, it is seen that home state courts showed reluctance to exercise jurisdiction over MNCs conduct that violate rights of those in developed countries while still affording protection to those in developed states. The author opines that it is legitimate for states to impose human right obligations on overseas conduct of corporations which are incorporated in its territory but also on the overseas activities of subsidiaries by enacting extraterritorial

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forth in this case and it was observed that mere actual damages were not sufficient to compensate for the violation of human rights and the damage should be deterrent in nature. [MC Mehta v Union of India AIR 1987 SC 1086.]

[38] *Supra* note 26, at 30.

[39] *Supra* note 26, at 32

[40] *Supra* note 1, at 15.

legislations. Though MNCs may be regulated internally or externally, internal regulation is often ineffective and hence external remedies are sought since they operate across boundaries and hence may act in connivance with states as well.[41] The best solution may be to have developing countries enter into an agreement regarding standards for MNCs in their territory.[42] If natural persons in charge of a company can be made liable then there should not be anything against holding the parent company also liable in similar cases. The author thus opines that MNCs should hence be made absolutely liable and this means that their culpability would be the same as if the violation was committed intentionally. Companies as juristic persons should be punished in like manner as natural persons.[43]

In cases of corporate human right infringements, when there is no remedy to make the transnational corporation liable directly in the international level, the transnational litigation in foreign countries has not been an easy process for the victims and hence what is needed is a specialised legal framework which guarantees not only the right to judicial mechanism but also effective remedies. This can be achieved by cooperation between the home state and host nation to permit jurisdiction of the court for increasing access to judicial remedy for the victims of transnational violence.[44]

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[41] S. Deva, *Acting Extraterritorially To Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat,* vol 5, MELBOURNE JOURNAL OF INTERNATIONAL LAW(2004)

[42] C.M. Vaquez, *Direct v. Indirect Obligations of Corporations under International Law,* GEORGETOWN PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER NO.12 078,959 (2005).

[43] N. Mugarura, *The Global AML Framework and Its Jurisdictional Limits,* THESIS SUBMITTED IN PARTIAL FULFILLMENT OF UNIVERSITY OF EAST LONDON FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, 269 (2012).

[44] It is often asserted that home state regulation of MNCs would reflect neo-colonialist characteristics and be violative of the sovereignty of host states. Moreover, host state regulations framed by developed countries will create competitive disadvantages since MNCs in developing countries are not subject to similar standards.[I. Prihandono, *Barriers to Transnational Human Rights Litigation Against Transnational Corporations: The Need For Cooperation Between Home and Host Countries,* vol. 3(7), JOURNAL OF LAW AND CONFLICT RESOLUTION, 89 (2011)].

INTERNATIONAL HUMAN RIGHTS VIOLATION OF ABORIGINAL PEOPLE IN AUSTRALIA

- Umang Gupta

Discrimination on the grounds of distinct cultures, identities and lifestyles and invasion or illegal occupation of the territories amount to some of the common injustices faced by the indigenous people belonging to the historically colonized countries. We can witness such kind of injustices imposed on the indigenous people of Australia as well in the form of the persisting racial discrimination and certain human rights violations in the country.

Contemporary Australia is the result of the high waves of immigration, particularly from Great Britain and Ireland. Presently existing sovereign state of Australia was a result of declaration of sovereignty by the British in the year 1788 under the doctrine of Terra Nullius.[1] Before the attempted genocide by the British of the Aboriginal people, Nungas[2] used to retain control over the said land. The 'great white men' named such violent invasion of the Nunga territory as a part of their discovery, like a virgin awaiting their penetration,[3] while conducting their civilization mission. They defended the violent imposition of their white laws on the Aboriginal people by rendering the life and laws of the Nungas to be primitive in nature i.e. pre-historic, invisible, un- evolved in time.[4] With the perception of establishing evolutionary laws, the whites brought and established the lawlessness of the Eurocentric idea of sovereignty over Nunga'sruwi.[5] The idea of State sovereignty perpetuates commodification of the land. While

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[1] Terra Nullius- Concept under Public International Law describing a piece of land(territory) which has never been subjected to the sovereignty of any state. (please add source of information with complete citation, and shall be according to bluebook 19th ed.)

[2] - Nungas mean the Aboriginal people of Australia (Indigenous people) (please add source of information with complete citation).

[3] Irene Watson, "Indigenous Peoples' Law-Ways: Survival Against the Colonial State," Australian Feminist Law Journal, 1 (1997), 39-58.

[4] *ibid.*

[5] Ruwi means land of the Nungas (please add source of information with complete citation).

for the Nungas, land could not be enslaved and traded as a consumable but was used to reflect their existence and laws, and to communicate with the natural world.

Imperial Britain established their colony on the Nungaruwi by imposing terra nullius. However, such a claim of terra nullius was rejected[6] in the *Advisory Opinion of Western Sahara*[7] by the I.C.J followed by the High Court of Australia in *Mabo.*[8] Even though the concept of terra nullius was held unlawful but in this decision, the High Court refrained itself from questioning the act of the Australian state of the violent invasion of the land and genocide of the Aboriginal people. This decision basically projected the sovereignty of the Australian State as challengeable.

This historical colonization process of Australia included episodes of mass killings and hangings of the Aboriginal people during the time periodof 1788 and the 1920s. It is estimated that the population of the Aboriginals dropped from 1 million to 0.1 million in the first century of such invasion. Through the imposition of martial law, the white soldiers arrested and shot any black person found in the settlers' vicinity. In this massacre, they abducted the Aborigines children and used them as forced laborers, tortured and raped Aborigines women and shot the Aborigines men. This mass murder spree was a result of the perceptions of the Aboriginal people in the minds of the white men as "loathsome" and "hideous to humanity". The murder of natives for them was equivalent to having killed some troublesome animal.[9] Such atrocious laws and policies of whites also resulted in what today is known as 'The Stolen Generation'. They came up with a policy to permanently resolve the *problem* of Aborigines. They constituted a policy under which they forcibly removed the Indigenous children and placed them in the 'first- class private homes'. They violated the right to life, property and family of the indigenous people and caused them intolerable sufferings:

> *"Our life pattern was created by the government policies and are forever with me, as though an invisible anchor around my neck. The moments that should be shared and rejoiced by a family unit, for [my brother] and mum and I are forever lost. The stolen years that are worth more than any treasure is irrecoverable."*[10]

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[6] NOTE- ICJ decided that terra nullius could no longer be used as a legitimate rule to acquire any territory which is inhabited by the people living as 'organized societies'.

[7] *Western Sahara Advisory Opinion,* 1975 I.C.J. 12

[8] *Mabo v. Queensland,* 66, ALJR, 408, 421-422 (1992)

[9] Colin Tatz, "Genocide in Australia", Australian Institute of Aboriginal and Torres Strait Islanders Studies AIATSIS, (November 8, 1999), https://aiatsis.gov.au/sites/default / files / products/discussion_paper/tatzc-dp08-genocide-in-australia.pdf.

[10] Michael Lavarch, "Bringing them home", Commonwealth of Australia, (August 2, 1995) https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (last accessed)

Such atrocities were then documented in the famous Australian Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in the year 1997, *Bringing Them Home.*[11] Due to the recognition and realization of thesufferings of the Aboriginals and indigenous people in the international community, the Australian government finally accepted the historic mistreatment of such people and issued a national apology for the same in the year 2008.[12] In 2007, UN Declaration of Indigenous Peoples was adopted by UN for the effective realization of the human rights of the indigenous people at the international level.[13] For achieving the aim of 'closing the gap' between the indigenous and non- indigenous people, the government of Australia also supported this declaration in 2009.

Australia has also ratified various core international human rights treaties such as International Convention on the Elimination of All Forms of Racial Discrimination 1969, International Covenant on Civil and Political Rights 1976, International Covenant on Economic, Social and Cultural Rights 1976 and Convention on the Elimination of All Forms of Discrimination against Women 1981 etc. For compliance with the provisions of such international human rights treaties i.e. for a treaty to become a 'direct source of individual rights and obligations' it is essential for it to be a reflected in the Australian domestic laws. One such instance of domestic legislation is the Racial Discrimination Act of 1975 which gives effect to Australia's international obligations under the ICERD.

After all these years of colonization, sufferings of the Indigenous people have not come to an end. The prevalent racial discrimination in Australia is the evidence of the same. In the

[11] Michael Lavarch, "Bringing them home", Commonwealth of Australia, (August 2, 1995) https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_t em_home_report.pdf (last accessed).

[12] "Apology to Australia's Indigenous peoples", Australian Government, https://www. australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous peoples (last accessed).

[13] NOTE- *"As an international instrument, the Declaration provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self determination and participation, to respect the rights and roles of Indigenous peoples within society. It is the instrument that contains the minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world"* - Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner.- "UN Declaration on the Rights of Indigenous Peoples." ANTar. N.p., n.d. Web. 12 May 2017. https://antar.org.au/campaigns/un declaration-rights-indigenous-peoples(last accessed) (please avoid elongated footnotes, just add the source of information with complete citation).

recent report by the UN Special Rapporteur,[14] Victoria Tauli- Corpuz stated that Australia requires a stronger legislative framework for the protection of the human rights of the Indigenous people. As per to her report, *"The non-recognition of the socio-economic exclusion and the inter-generational trauma of indigenous peoples sadly continues to undermine reconciliation efforts"*.

In another report of the Australian Human *Rights Commission, Human Rights and Aboriginal and Torres Strait Islander peoples,*[15] the failure of Australia to protect the basic human rights of the indigenous peoples is expressed. Presence of racial discrimination in their lives is also reported. Using all the information and statistics collected through census, it is stated that indigenous peoples experience lower standards of health, education, employment and housing. Concerns over their over- representation in the criminal justice system in comparison to the non- indigenous population is also expressed. The report suggests that there are limited protections available for the social, economic and cultural rights of indigenous peoples. For instance, no limitation with respect to human rights is imposed upon the Australian government from legislating the laws which might be discriminatory against the indigenous peoples. Moreover, there is no procedure established so as to involve the indigenous peoples with the government in the decision- making process which affects them. This has resulted in government forming discriminatory laws such the Northern Territory Emergency Response legislation of 2007. Australian Human Rights Commission (AHRC) is afraid that the said legislation might render racial discrimination and does not protect human rights of the indigenous people because of its certain provisions like that of suspension of the RDA 1975which can lead an official to racially discriminate and measures like income management which interferes in the right to privacy of a person.

In 2008, after the nationally apologising, the Australian government began a campaign- Closing the Gap through an agreement of the Council of Australian Governments (COAG). Under this campaign, targeted outcomes were identified to reduce the disadvantages faced by the indigenous peoples. Such identified targets were related to: early childhood, schooling, health, economic participation, housing, governance and leadership.[16]

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[14] "UN criticizes Australia's treatment of Aboriginals", Asia Pacific, (April 3, 2017), https://www.dailysabah.com/asia/2017/04/03/un-criticizes-australias-treatment-of aboriginals (last accessed).

[15] "Human Rights ad Aboriginal and Torres Strait Islander peoples", Australian Human Rights Commission, https://www.humanrights.gov.au/sites/default/ files/content/ letstalkaboutrights /downloads/HRA_ATSI.pdf (last accessed).

[16] James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development", Human Rights Council, (March 4, 2010), http://www2.ohchr.org/english/issues/ indigenous/rapporteur/ docs/

One of the targets of the respective campaign was to eliminate the disparity present between the life- expectancy rate (17 years of age gap) of the non- indigenous and indigenous peoples. However, lack of cultural- appropriate health services and lesser availability of indigenous physicians and other health care workers have acted as obstructions in the achievement of the same goal. Second target was to access to a good quality education to the children in the age - group of 4-16 and cover at least half the gap in the difference between the two populations till 2020. Also, it was desired to include cross- cultural perspectives in the national curriculum. However, there is a lack of trained teachers for imparting bilingual and culturally- appropriate education in schools. The curriculum used is also not culturally appropriate. Physical barriers to impart education have also been recognised while achieving such target. The remoteness of the indigenous communities also accounts for a challenge to meet such a target.

To lessen the gap by half in employment outcomes between the two is yet another identified target of the campaign. To achieve this National partnership on Indigenous Economic Participation provides opportunities to the indigenous peoples to engage in public and private sector jobs. However, the welfare reform programmes initiated by the government has led to abruptly cut the income and jobs of such indigenous peoples.

The above discussed challenges in achieving the targets so identified under Close the gap campaign is reported by the Special Rapporteur of the Human Rights Council.[17] As seen above, even though the Australian government has accepted the atrocities conducted in the past as part of their history book and have resorted to rectify the gap between the indigenous and the non-indigenous peoples- it is not successful as the intentions of the Australian government are still half- hearted. It seems as if in order to reflect a good- faith image of Australia, the government has ratified the international human rights treaties but do not facilitate such provisions in effect. It is evidenced from the very Constitution of the country. It permits the Parliament to legislate laws which might impose a negative treatment on the groups because of their race through Article 51(xxvi), commonly called the *race power.* Such powers rest in the constitution to *'regulate the affairs of the people of coloured or inferior races'* - as described by the first Prime Minister, Sir Edmund Barton. Also, through the Native Title Act established as under the case

ReportVisitAustralia.pdf (last accessed).

NOTE- Such identified targets were related to: early childhood, schooling, health, economic participation, housing, governance and leadership.

[17] James Anaya, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development", Human Rights Council, (March 4, 2010), http://www2.ohchr.org/english/issues/indigenous/ rapporteur/docs/ Report V isitAustralia.pdf (last accessed).

of Mabo No.2, it is seen how the government while maintaining a benevolent image is perpetuating racial discrimination. The respective Act does not in actuality grant any property entitlements to the indigenous people but in reality, lead to their extinguishment at the hands of the State and also instils whites with a feeling of insecurity for their lands and life as against the Aborigines.[18] Moreover, the support extended to the UN Declaration by Australia, as mentioned above, merely amounted to paper- work for them as it is non- binding in nature.

Also, as regards to its international obligations, the Australian State has violated its international human rights treaties such as ICCPR. For example- obligations relating right to life,[19] adequate standard of living (food, clothing and housing inclusive),[20] family,[21] highest attainable standards of physical and mental health, free and safe from violence,[22] self-determination,[23] right against torture,[24] privacy,[25] recognition and protection of traditional territories, to be treated equal before law[26] and have failed to extend civil and political rights of the indigenous peoples. As per the definition of racial discrimination laid down by the ICERD, Australian state is responsible for perpetuating discrimination on the basis of race as well.[27]

Despite apologising and articulating certain improvement campaigns for rectifying the disadvantages committed toindigenous people, Australian State is responsible for the violation

[18] NOTE- For Nungas to present their claim before this Act, they first need to establish the extent to which their native-ness has survived genocide. If it is not proven, then it is considered extinguished and if it is proven then it is open to extinguishment at the choice of the State. This extinguishment is a form of genocide. - Irene Watson, "Indigenous Peoples' Law-Ways: Survival Against the Colonial State," 8 *Australian Feminist Law Journal* 1 (1997), 39-58 (please avoid elongated footnotes, just add the source of information with complete citaton).

[19] Article 6(1) of ICCPR- Right to life

[20] Article 6(1) of ICCPR- Right to life is inclusive of adequate standard of living

[21] Article 23 of ICCPR- right to family

[22] Article 7 of ICCPR

[23] Article 1 of ICCPR- right to self- determination

[24] Article 7 of ICCPR- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

[25] Article 17 of ICCPR – right against unlawful interference with his privacy, family, home.

[26] Article 26 of ICCPR- equality before law

[27] Article 1 of ICERD- Racial discrimination- any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (avoid long citations).

of the core international human rights treaties, as being a signatory to them. However, no particular liability for such violations can be imposed upon the State except for internationally condemning the acts of the state as international human right treaties are not binding because of the concept of the sovereignty of a state.

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9. *Mabo v. Queensland, 66,* ALJR, 408, 421-422 (1992)
10. *Western Sahara Advisory Opinion,* 1975 I.C.J. 12
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