ISSN 2277-4017

Journal of National Law University, Delhi

Volume 2
2014

॥ न्यायस्तत्र प्रमाणं स्यात् ॥
DELHI

NATIONAL LAW UNIVERSITY, DELHI

JOURNAL OF NATIONAL LAW UNIVERSITY, DELHI

Volume 2 **August 2014** **Number 1**

MODE OF CITATION
2 J. NLUD <pg. no.> (2014)

NATIONAL LAW UNIVERSITY, DELHI PRESS

Published by
National Law University, Delhi Press
Sector-14, Dwarka, New Delhi-110078
www.nludelhi.ac.in

Journal of National Law University Delhi is published annually
Print subscription price: Rs. 200/-

ISSN: 2277-4017

Disclaimer:
Views expressed in the Journal of National Law University, Delhi are those of the contributors. The Editors and NLUD Press do not necessarily subscribe to the views expressed by the contributors. The Editors and NLUD Press disclaim all liability and responsibility for any error of omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:

Editor,
Journal of National Law University, Delhi,
National Law University Delhi,
Sector-14, Dwarka, New Delhi- 110075
www.nludelhi.ac.in
email: jnlud@nludelhi.ac.in
Tel. No : 011-28034255
Fax No:011- 28034254

ISSN 2277-4017

JOURNAL OF NATIONAL LAW UNIVERSITY, DELHI

Volume 2 | August 2014 | Number 1

CONTENTS

LEGAL AND JUDICIAL REFORM IN INDIA: A CALL FOR SYSTEMIC AND EMPIRICAL APPROACHES

Sudhir Krishnaswamy, Sindhu K Sivakumar** & Shishir Bail****

Judicial delays and high pendency is a serious problem that has rule of law and fundamental rights implications. Law and judicial reform in India aimed at reducing judicial delays and pendency have met with limited success since they have been almost solely focused on increasing the number of courts and such other supply-driven mechanisms without ascertaining the causes of delay. This paper argues for re-orienting law and judicial reform by engaging in empirical methods. In so arguing, this paper also exposes the difficulties in using empirical methods in India owing to the unavailability of crucial data. It also suggests some non-conventional solutions for more effective and efficient civil and criminal justice systems.

It is argued by many that the General Election 2014 was a vote for development.[1] The election campaign witnessed heated rhetorical debates

*Professor of Law, Azim Premji University; and Visiting Dr. Ambedkar Chair Professor in Indian Constitutional Law, Columbia University.
** Graduate Fellow, Azim Premji University; Non-Practising Advocate, India; and Non-Practising Solicitor (England & Wales).
*** Graduate Fellow, Azim Premji University.

[1] Prakash Kaswan, *India's Elections and the Politics of Development,* THE WASHINGTON POST (May 20, 2014), *available at* http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/20/indias-elections-and-the-politics-of-development/; Frank Jack Daniel & Rajesh Kumar Singh, *The great Indian election: it's about jobs,* REUTERS (Mar. 28, 2014), http://in.reuters.com/article/2014/03/27/india-election-2014-youth-jobs-idINDEEA2Q0HT20140327.

about the appropriate model of economic development for India.[2] Despite the deeply divisive tenor of these debates, there was, and continues to be, a surprising alignment between the major parties on the place of legal and judicial reform as a critical ingredient of the development process. The 2014 Bharatiya Janata Party manifesto had a few overarching objectives in this regard: one, increasing access to justice; two, reducing delays and pendencies at the formal courts; and three, making the law more accessible to the common man. It proposes to achieve this objective through a predictable list of strategies: increase the number of judges; create more courts, including special courts for intellectual property and commercial matters, and fast track courts; encourage ADR, particularly arbitration, Lok Adalats and tribunals; and in relation to making the law more accessible, do away with old, unnecessary laws, simplify existing procedures and language, and increase legal awareness.[3] By contrast, the Congress Manifesto confined itself to broad and general principles: the 'protection of human rights', increasing diversity in judicial appointments, improving judicial accountability, increasing Gram Nyayalayas and legal aid.[4]

For those familiar with the thinking and policy debates on legal and judicial system reform, what is striking is how unchanging and unimaginative the strategies proposed to 'reform' the system are. Indian policy makers have over the years increased the supply of judges, diverted and dispersed cases to Alternative Dispute Resolution forums, special courts and tribunals with little or no improvement of the overall health of the legal system. Despite the litany of failures, our political and bureaucratic

---

[2] V.Sambandan & Bhagwati, *Sen and India's fight against poverty,* THE HINDU CENTRE FOR PUBLIC POLICY (Aug. 19, 2013), http://www.thehinducentre.com/the-arena/article5038021.ece; Lalita Panicker, *Two States: Kerala, Gujarat and their development,* HINDUSTAN TIMES, (Apr. 21, 2014), *available at* http://www.hindustantimes.com/elections2014/opinion/while-gujarat-is-investor-friendly-kerala-triumphs-in-social-indices/article1-1210341.aspx.

[3] In substance, the BJP's proposals on legal system reform for 2014 are mostly identical to what it proposed in 2009. *See* Bharatiya Janata Party, *Lok Sabha Election 2009 Manifesto*, *available at* http://www.bjp.org/images/pdf/election_manifesto_english.pdf (last visited Aug. 1, 2014). The only major additions we see in 2014 are one, the focus on making India into a global arbitration and legal process outsourcing hub, and two, the objectives related making legal information more accessible, including the popular promise to "undertake a comprehensive review of the legal system to simplify complex legislations – converge overlapping legislation, as well as remove contradictory and redundant laws."

[4] Indian National Congress, *Lok Sabha Election Manifesto 2014,* 45-46, *available at* http://inc.in/images/Pages/English%20Manifesto%20for%20Web.pdf (last visited Aug. 1, 2014).

discourse is unable to move beyond these 'tried and failed' strategies that are unsystematic or fragmented, unempirical and without a nuanced normative foundation. Moreover, there is no effort to develop any critical insight into the causes of failure. In this essay, we show why the current approach must be replaced with an empirically grounded, theoretically nuanced and systemic approach to legal and judicial system reform and demonstrate innovative solutions based on such an approach.

I. The Current Approach

Most current proposals for legal reform in India lack a *systemic* perspective. Isolated, disparate and potentially contradictory initiatives founded on inarticulate motivations and principles are assumed to add up to a program of reform for the legal system. For example, the proposal for "*...doubling the number of courts and judges in the subordinate judiciary*...."[5] may potentially reduce backlogs in the lower courts. However, there is no evidence that previous increases in judicial strength by themselves have indeed reduced backlog. Further, as the disposal of cases in the lower courts is intricately tied to the ease with which interlocutory orders may be reviewed and appealed in the High Court and Supreme Court, an expedient lower court may not improve the overall throughput of the system.

In 2002, the Bharatiya Janata Party led National Democratic Alliance central government made a number of amendments to the Civil Procedure Code, 1908 with a view to reducing delays in civil litigation. In particular they focused on the procedural rules set out in the Code that gave discretion to the court to condone delays and other excesses of the parties in conducting litigation. The court's discretion to grant extensions beyond 90 days for the filing of the statement of defence was removed (Order 8, Rule 1); the court's discretion to allow the late production of evidence was also removed (deletion of Order 18, Rule 17A); and in relation to adjournments, it was mandated that no more than three adjournments were to be granted to a party over the course of an individual suit (Order 17, Rule 1(1), Proviso), and that the court awards costs occasioned by the adjournment or such higher cost as the court may deem fit (Order 17, Rule 1(2)). In relation to

[5]Bharatiya Janata Party, *Election Manifesto 2014,* 12, http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf (last visited Jul. 30, 2014).

adjournments, the amendment left intact the Proviso at Rule 1(2) which prescribed the conditions under which a court could grant adjournments; this proviso provides for day-to-day hearing and also considerably limits the latitude granted to courts for this purpose.[6]

These amendments were extremely unpopular with the Bar and provoked public protests[7] and legal challenges. One of these legal challenges to the constitutional validity of these amendments came before the Supreme Court in *Salem Advocates Bar Association v. Union of India*[8] which upheld the validity of these amendments. However, in a follow-up decision in *Salem Advocates Bar Association (II) v. Union of India*,[9] the Supreme Court read down virtually all of these amendments: the proviso of Order 8, Rule 1 providing for the upper limit of 90 days to file written statement is now only directory, not mandatory, and courts are allowed to grant extensions beyond this time-limit; the deletion of Order 18, Rule 17A was made redundant as the power of the court to allow late evidence pre-dated Rule 17A; and with respect to adjournments, the 3-adjournment per hearing rule did not extend to circumstances where one of the conditions specified in the Proviso to Rule 1(2) were met.[10]

What can we learn from this legislative amendment and judicial rollback? It appears that the motivations of the legislators were not aligned with those of the various participants of the litigation system (i.e., parties, counsel and judges). We need to understand the incentives at play that might be behind the courts' reluctance to actively manage cases and hold lawyers to account. Significantly, even though the Code gave the courts the power to use costs sanctions (even before 2002), it is well known that courts hardly

[6] For an extensive overview of the problems with and attempts to reform civil litigation in India, *see* Hiram E. Chodosh *et al.*, *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process,* 30 N.Y.U J. INT'L L. & POL. 1 (1997-1998).

[7] J. Venkatesan, *SC Judge to head panel on CPC amendments,* THE HINDU, (Oct. 26, 2002), *available at* http://hindu.com/2002/10/26/stories/2002102603161300.htm; Janardan Singh, *Mixed Response to CPC amendments,* THE TIMES OF INDIA, (Jul. 22, 2002), *available at* http://timesofindia.indiatimes.com/city/lucknow/Mixed-response-to-CPC-amendments/articleshow/16706122.cms.

[8] Salem Advocates Bar Association v. Union of India, A.I.R. 2003 S.C. 189.

[9] Salem Advocates Bar Association (II) v. Union of India, A.I.R. 2005 S.C. 3353.

[10] It is a rather counter-intuitive interpretation of the Supreme Court that the Proviso was a limitation or exception to the three-adjournment rule in Rule 1(1); rather, the better interpretation would have been to say that the 2002 amendment left the Proviso intact in order to guide the court as to when it should exercise its discretion to grant any one of the three allowed adjournments to a party.

ever used this measure to urge litigants and lawyers to stick to a reasonable schedule. Moog explains that the courts' reluctance is due to the frequency of transfer of the judges, particularly in the subordinate judiciary, which means that a trial does not stay with a single judge over the course of its lifetime. Judges therefore do not have enough time in a court-room to plan and manage dockets, and the frequent transfer often makes judges 'outsiders' in a given court, making them practically unable to exercise sanction over the more entrenched lawyer community.[11]

Further, we need to understand the incentive structures within which litigating lawyers and clients operate and what they gain by seeking so many adjournments. Here again, Moog highlights how the litigation profession in India is quite starkly unequal in terms of work-loads – a small minority of lawyers attract large volumes of work, and these lawyers cannot manage their work-loads without being able to get adjournments when needed; further, the practice in the legal profession of charging 'per hearing' or 'per filing' incentivises them to file many (arguably) unnecessary applications and seek hearings on minor, frivolous points – essentially, the more applications and hearings there are in a single case, the more their financial rewards.

The point here is simple: symptomatic, piecemeal reforms will not work unless we pay attention to the incentives and motivations of all participants in the litigation system. An accurate sociology of the legal system is essential to inform and shape legal reform that corrects incentives and aligns motivations. For root and branch systemic reform, we need an empirically rigorous knowledge platform that allows for analytically sharp and theoretically nuanced reform measures to be designed.

Our second issue with the existing strategies for legal system reform in India is that they are advanced on little or no *empirical evidence* relating to institutions, their performances and the disposal of cases. Where any evidence is offered, it is far from rigorous, such as the evidence set out in the Annual Reports of the High Courts and Supreme Court,[12] or evidence that is personal and anecdotal in character. Unlike other areas of economic and

---

[11] Moog & Robert, *Delays in the Indian Courts: Why the Judges Don't Take Control,* 16 JUST. SYS J. 19 (1992-1994).

[12] The foremost sources of data on the performance of the judiciary are the reports provided

government policy, the legal and judicial system is still nested in an empirical black hole. As administrative control over the courts is divided between the executive and the judiciary,[13] there is no coherent centralised approach to data collection and dissemination. There is widespread variation in the quality and quantity of accessible court data across the different states in India, especially at the district level. Basic measures of court performance and of the state of litigation, such as institution rates, disposal rates, and pendency rates, are not easily available for several districts in India, leading one to wonder how policy makers even define the scope of the delay and pendency problems, let alone find ways to tackle them.[14]

Recent academic work has partially compensated for this administrative failure, through rigorous analysis of limited data sets. For example, Hazra and Micevska have[15] measured congestion rates for lower courts in India in the period 1995-99, and Nick Robinson's study of the Supreme Court suggests that there are major state-level variations in their contribution to the Supreme Court's case-load.[16] Nevertheless, both the major political parties, bureaucrats and senior judges continue to advocate

by the Supreme Court through the *Court News* publication. The data contained in this publication is no doubt useful but suffers from a few major problems. Firstly, it is released erratically; there has not been a single edition of this publication in the year 2014 till date. Second, the data is not presented in sufficient detail; we only receive a breakup of the institution, disposal and pendency of civil and criminal cases, without further details on what kinds of cases these are. This is more of a problem in the case of civil litigation, as the National Crime Records Bureau does a fair job of releasing data on the various stages of the criminal process. For a sample *Court News* publication, *see Court News,* SUPREME COURT OF INDIA (Oct.-Dec. 2013), *available at* http://www.supremecourtofindia.nic.in/courtnews/2013_issue_4.pdf.

[13] This division of administrative and financial control has long been a source of tension between the two branches of government. *See* Moog &Robert, *Elite-Court Relations in India: An Unsatisfactory Arrangement,* 38 ASIAN SURVEY 410 (1998).

[14] *E.g.*, while Karnataka's e-courts website (http://ecourts.gov.in/karnataka) allows users to access the "case status" of an individual case pending or disposed in any district court in Karnataka, it does not contain any useful aggregate information on institution, disposal or pendency rates by district that can be used by academics and policy analysts in understanding the litigation trends and judicial performance in these districts. The other available website, causelist.kar.nic.in/districtportal/dashboard.asp, does contain institutional performance data, but on a "per day" basis, leaving the user to make more meaningful monthly or yearly aggregations on their own. This is also available for a limited period of time, from late August 2009, to the third week of January 2014.

[15] Arnab Kumar Hazra & Maja B. Micevska, *The Problem of Court Congestion: Evidence from Indian Lower Courts, in* JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS (Arnab Hazra & Bibek Debroy, ed. 2007).

[16] Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload*, 10 J. EMPIRICAL LEGAL STUD. 570 (Sept. 2013).

'all India' reforms instead of 'localised' reform initiatives. No serious legal and judicial system reform is likely unless we take the facts seriously and engage in statistically sophisticated empirical analyses.

Apart from the need for a systemic perspective and empirical knowledge, advocates for legal and judicial system reform must tackle the *normative argument* for a strong, functional legal system. In India, there are certain common arguments that persist in public policy and intellectual discourse that push against a full-fledged effort to reform the Indian legal system. First, it is sometimes suggested that the central problem of the legal system in India is a cultural one; that the colonial origins of our legal system run against the grain of our cultural traditions and hence it is beyond reform and must be replaced.[17] The argument is misleading insofar as it suggests that there existed a functional legal 'system' before colonial times (historical evidence does not fully support this).[18] Further, the global academic literature on the relationship between the origin of a legal system and development suggests that one of India's biggest competitive advantage is its adoption of a common law legal system.[19] Perhaps it is relevant that our historical efforts to revitalize and revive so-called traditional and indigenous dispute resolution systems have met with little success,[20] and deliver a questionable quality of justice.[21] In this paper we do not review the argument of colonial origin comprehensively as both national parties embrace a modern economy at the centre of the development project and a modern legal system is essential to shape and regulate this economy.

---

[17] For an early analysis of this manner of criticism, *see* Marc Galanter, *The Displacement of Traditional Law in Modern India,* 24 J. SOC. ISSUES 65 (1968). The debate between the 'traditional' ostensibly consensual modes of dispute resolution and the adversarial formal legal system is still very much a live one. *See* Kalindi Kokal, *Hope for Justice: Importance of Informal Systems,* 68 ECON. & POL. WKLY. 22 (2013).

[18] For a nuanced account of the state of social regulation in India before the arrival of the British and the introduction of the Indian Legal System, *see* Graham Smith & Duncan Derrett, *Hindu Judicial Administration in Pre-British Times and its Lesson for Today,* 95 J. AM. ORIENTAL SOC. 417 (1975); Duncan Derrett, *Law and the Social Order in India Before the Muhamaddan Conquests,* 7 J. ECON. & SOC. HIST. ORIENT 73 (1964).

[19] *See* Rafael La Porta et al., *The Economic Consequences of Legal Origins,* 46 J. ECON. LITERATURE 285-332 (2008).

[20] *See* Catherine Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution, in* THE POLITICS OF INFORMAL JUSTICE: VOL 2 COMPARATIVE STUDIES 47-77 (Richard Abel ed.,1982).

[21] Lok Adalats are another iteration of an ostensibly traditional mode of dispute resolution. *See* Marc Galanter & Jayanth Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India,* 55 HASTINGS L. J. 789 (2003).

The second normative argument against legal system reform is that a more efficient legal system will merely enhance the oppressive power of the State – that where there is an unjust state with unfair laws, enhancing legal system capabilities will oppress more than it liberates. While there is a grain of truth to this argument, it is manifestly the case in India that a just state with fair laws but an inefficient legal system also oppresses its citizens. Further, legal system reform can itself act as a check against the continuance of an unfair state and unfair laws – as Dworkin argues, a legal system can 'work itself pure'.[22] We must note that legal system reform is not just about increasing state capacity (through recruitment of judges, police, prosecution staff, and the design of improved processes) to secure greater peace and social order; a normatively nuanced approach to legal system reform is also about reinvigorating institutions and making them accountable to the ordinary citizens of the country, thereby *limiting state power* by holding our officials to constitutional standards of probity and conduct.[23] Hence, legal and judicial system reform must create a modern legal system that enhances the capacity of citizens to hold the State to account.

So far in this section we have argued that a systemic, empirical and normatively nuanced approach to legal and judicial system reform is necessary to make a significant impact on development outcomes in India and improve our collective well-being. In the rest of this essay, we demonstrate how such an approach can inform and guide legal reform strategies in three areas: civil litigation; access to legal system information and the criminal process.

II. Civil Litigation Reform: Aligning Incentives

India has grappled with the problem of delays and arrears in its courts for a long time. This is particularly true of the civil side; a Civil Justice Committee (under Justice Rankin) was appointed as early as 1924-25 to tackle the problem of delays and arrears in civil litigation. The Rankin

[22] Ronald Dworkin, Law's Empire 407 (1986).
[23] For a more detailed argument *see* S Krishnaswamy, *Introduction*, *in* Indian Legal System Reform: Empirical Baselines and Normative Frameworks (Sudhir Krishnaswamy ed., forthcoming 2015).

Committee, and every committee and Law Commission subsequently,[24] has focused almost exclusively on increasing the *supply* of dispute resolution services. This is sought to be done by enhancing institutional capacity – augmenting and improving physical infrastructure with new courts, scaling up judicial strength, reducing judicial vacancies, and preventing the diversion of serving judges to other duties. If the new government draws exclusively from the menu set out in the manifesto, it too will persist with this model of reform. In this section of the essay, we argue that a new model of reform is the need of the hour – one that focuses on incentives of various actors in the civil justice system that promotes the *optimal use* of dispute resolution services.

Before we turn to what we mean by optimal use of dispute resolution services, we should acknowledge that the focus on supply (i.e., increasing institutional capacity) has yielded *some* results. The Supreme Court's *Court News* publication, which contains quarterly rates of institution, disposal and pendency of cases at the Supreme Court, High Courts and subordinate courts, shows that current disposal rates are more or less able to keep up with corresponding institution rates.[25] However, the supply-side approach has not been able to contend with the huge volume of "arrears" or "backlogs" of cases that have been pending before the courts for more than a year. The "percentage decrease in pendency", which is a key indicator of whether arrears are being tackled, is consistently low or negative.[26] To tackle the large volume of these arrears, what we need is systemic reform that addresses the skewed incentives driving unsustainably high pendency rates in our civil courts.

Every civil litigation system contains certain built-in incentive structures that impact litigation behaviour (litigant, lawyer and judge

---

[24] *E.g.,* Justice S.R. Das' High Courts Arrears Committee (1949); 14th Law Commission Report (1956), Vol. 1; High Court Arrears Committee Report (1972); 77th Law Commission Report (1978); 79th Law Commission Report (1979).

[25] For example, in the last quarter of 2013, the Supreme Court saw 17,036 fresh institutions and 17,920 disposals, the High Courts (in aggregate) saw 560889 institutions and 498202 disposals, and the lower courts 4736967 institutions and 4419310 disposals. *See Court News*, SUPREME COURT OF INDIA (Oct. - Dec. 2013), *available at* http://supremecourtofindia.nic.in/courtnews/2013_issue_4.pdf.

[26] *E.g.*, *Court News*, *supra* note 25. In the last quarter of 2013, the subordinate courts saw 27566425 pending cases and had a 1.17% *increase* in pendency from the previous quarter. Similarly, the High Courts had 4589920 cases pending and a 1.34% *increase* in pendency.

behaviour) in that jurisdiction. Litigation behaviour ultimately has a major impact on the pendency rates in that jurisdiction. For example, settlement rates can have a huge impact on overall pendency rates in civil disputes. In the other Commonwealth jurisdictions (that, like India, are based on an adversarial common law system), it is not uncommon for over 70% of civil cases (and sometimes going up to 90% or more) to settle before going to trial.[27] In India, on the other hand, settlement rates in civil disputes are shockingly low. One survey pegs the rate at around 5%. [28] What this means is that almost all the civil cases that enter the court system in India remain in the court system all the way until the very end, that is, until trial and judgment. It is no wonder that congestion rates in India are far higher than in more developed Commonwealth countries. Thus, a central challenge for civil justice reform in India is to design institutions and processes that incentivise settlement over the course of a case.

To incentivise settlement of cases on or before the first date of trial or at a later stage, we need to address the practice of civil litigation and create institutions that support a culture of settlement. One reason for the low or late settlement rates in India is that, unlike in the UK and other Commonwealth jurisdictions, the practice of having a "continuous trial" [29] is virtually non-existent.[30] "Continuous trial" refers to the practice that once a civil trial begins, it should proceed without interruption until its conclusion. In India, while the Civil Procedure Code 1908, does envisage that trials should proceed continuously once started,[31] in practice, trials typically tend to take place in a fragmented fashion, involving 4-5 fragmented stages, and with as many as 20-40 adjournments granted over the lifetime of a single trial.[32]

---

[27] *See* Barry Walsh, *Pursuing Best Practice Levels of Judicial Productivity* in JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS 186 (Arnab Hazra & Bibek Debroy eds., 2007). He reports that in Australia, the settlement rate is reported to be at 70%, and in Ontario (Canada), the settlement rate was consistently over 90% between 1978 and 2000.

[28] A listing survey conducted in 2005 placed the settlement rate at 5%. Walsh, *supra* note 27, at 176.

[29] *See generally* Walsh, *supra* note 27, at 181-82 on the continuous trial and its importance in achieving late settlements.

[30] This was pointed out an early as in 1925 by the Rankin Committee Report. *Cf.* Upendra Baxi, CRISIS IN THE INDIAN LEGAL SYSTEM 76 (1982).

[31] *E.g.,* Order 17, Rule 1, The Code of Civil Procedure (1908) ("...when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary...").

As Barry Walsh argues, the lack of a continuous civil trial process in India means that there is no certainty for the parties about the timing of the outcome (i.e., the judgment).[33] When parties cannot predict with reasonable certainty when a particular trial will be completed and the judgment or order given, there is no pressure on them to ever settle their dispute. Typically, in any civil dispute, one party will tend to have a stronger case on merits. This party already has no incentive to settle the case for any sum lesser than what he or she is likely to achieve through a judgment. However, the other side, which is the party with the weaker case, does have the incentive to push for settlement to mitigate the extent of his losses. Studies on litigant behaviour in relation to settlement have shown that litigants with a weaker case are most likely to feel the pressure to settle when they start to believe that the time of loss is not far off.[34] In the Indian context, unfortunately, since parties cannot predict when a trial is likely to conclude or how long it will take, they may never reach that frame of mind. Obviously, this does not impact cases where both sides believe that they have strong claims on merit; however, "outcome date certainty" can encourage settlement in the significant number of civil cases pending before the courts today that are not so finely balanced on merits. Reform promoting the continuous trial, and therefore, "outcome date certainty"[35] can thus positively influence the settlement and therefore reduce a number of cases pending before the courts.

Apart from incentivising settlement, it is also necessary that our court system denies advantages to litigants who procrastinate in reaching settlements and engage in other dilatory behaviours over the course of litigation. Cost sanctions are the most effective tool of the court in this regard. In England, for example, severe cost sanctions are imposed on parties who unreasonably reject settlement offers from the other side and then go on to lose the case; [36] cost sanctions may also be imposed on parties who behave unreasonably over the course of a case, whether they win or lose, and "unreasonable" behaviour could include anything from seeking unnecessary adjournments to unreasonably refusing to mediate where the

[32] Walsh, *supra* note 27, at 180.
[33] *See generally* Walsh, *supra* note 27.
[34] Walsh, *supra* note 27, at 177.
[35] Walsh, *supra* note 27, at 178.
[36] Part 36, Civil Procedure Rules (England and Wales) (1999).

court suggests mediation.[37] In India, while the CPC does give the courts the power to use costs sanctions in cases of adjournments, [38] it is well known that courts hardly ever use this measure to force litigants and lawyers to behave. Unless there is a concerted effort to inform and train the bar and the bench to adapt to these new protocols of practice, there is likely to be stubborn resistance to these changes.

Even with outcome date certainty and cost sanctions, it is unlikely that a settlement culture will develop in India without the support of institutions that promote settlement. The presence of strong ADR structures,[39] such as a strong court-annexed mediation program may encourage litigants to settle their disputes at the early stages of litigation. Mediation-based settlements may be especially appealing to those litigants who wish to preserve their relationships after the dispute, such as in family disputes, or where the case is evenly balanced and neither party is likely to win more in litigation than in settlement. When such disputes are taken out of the court system early, there will be a corresponding decrease in the number of cases pending before the courts.[40] Our research shows that the mediation process can settle up to 45-55% of the disputes referred within a period of 6 months at negligible costs to the parties and to the exchequer. In India, while court-annexed mediation is increasingly used, particularly in the urban centres, it is not widespread enough to have a significant impact on overall early settlement rates.

Similarly, a strong, functional arbitration system (with high quality arbitrators and arbitral institutions) can do much in keeping complex, commercial disputes out of the court system. In India however, it is becoming increasingly clear that *ad hoc* non-institutionalized arbitration has failed to reduce the burden on the courts. In fact, evidence suggests that arbitrations in India regularly break down and seek court assistance or interference at nearly every stage of the arbitration process. The almost

---

[37] *See Halsey v. Milton Keynes NHS Trust*, [2004] E.W.C.A. Civ. 576 (where the Court of Appeal said that a winning party (at trial) could be deprived of some or all of its costs on the grounds of any unreasonable refusal to mediate).

[38] Order 17, Rule 1(2), CPC.

[39] *See* Inessa Love, *Settling out of court: How Effective Is Alternative Dispute Resolution?* 4 (2011), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf, for a discussion on different studies that have measured the indirect effect of court-annexed and other ADR programs in reducing case-loads at the courts.

[40] *Id.*

routine manner in which arbitrator appointments (S.11, Arbitration & Conciliation Act, 1996) and arbitral awards (S.34, Arbitration & Conciliation Act, 1996) are challenged before the courts only serves to exacerbate the delays and backlogs at the already overburdened District and High Courts. Hence, what we need is a strong 'institutional' arbitration culturewhere we have institutions that can regulate the conduct of arbitration and disentangle arbitration and the courts.

The discussion in this section highlights only *some* of the many skewed incentives plaguing the civil litigation system in India. We need to correct the various inter-connected rules and infrastructures that constitute these perverse incentives in a holistic, systemic program of reform of the litigation system.We must be willing to experiment with each of these reform measures, iteratively review evidence and engage in a process of continuous reform and improvement based on periodic, reliable, well organized and granular evidence.

III. Access to Legal System Information

Despite some progress with computerisation and online access to court data in recent years, one of the major problems an academic or policy analyst faces is the lack of access to reliable data in usable formats that may be put to analysis. While this is true generally of legal system data, the problem aggravates as we move down from the apex Supreme Court to the Magistrate or District Courts. Access to such data is essential to evaluate reform strategies and review resource allocation through rigorous empirical research on congestion or judicial productivity rates.

Currently,'national-level' or 'all-India' solutions are proposed devoid of empirical foundations. One recent example in the BJP Manifesto is the proposal to double the strength of the courts and judges in the subordinate judiciary *across India.* The problem with such national-level solutions is that the data reveals that High Courts and District Courts across the different Indian states face widely varying rates of institution and pendency (on the civil and criminal side) and have widely varying rates of disposal.[41] What

[41] Arnab Kumar Hazra & Maja B. Micevska, *The Problem of Court Congestion: Evidence from Indian Lower Courts, in* Judicial Reforms in India: Issues and Aspects (Arnab Hazra & Bibek Debroy eds., 2007).

this means is that omnibus national solutions, like doubling the number of judges in *all states,* will have uneven effects on delay and pendency and court congestion across the different states. Accurate publicly available data will allow institutional reform proposals to be localised, built on accurate analysis of the nature and causes of delay and therefore will be more likely to yield results.[42]

The biggest challenge to developing such localised solutions lies in the unavailability of local-level data. For example, while the *Court News* data tells us that there are state-level differences in institution, disposal and pendency rates in the High Courts and subordinate courts, we do not know if there are any district-level differences within a particular state. The e-courts database, which is maintained by the High Courts (with the help of the District Courts) and Supreme Court, in collaboration with the Ministry of Communications and Information Technology's Department of Electronics & Information Technology, does contain information about cases handled by the district courts across India; however, the form in which the data is presented at the front-end (that is, in the website), does not render it useful in academic or policy related research.The motivation for the current Supreme Court, High Court and e-courts websites is to provide information to litigants and lawyers about the status of individual cases. It allows them to access the day's causelist as well as orders relating to a particular case. This case-level data cannot be aggregated to carry out institutional analysis of filing rates, disposal rates, or other indicators of court congestion and judicial productivity. Hence, we suggest that in addition to what is presently available on the e-court website, the government publish periodic (preferably monthly) reports on the courts in a format that allows for the assessment of both judicial productivity and congestion rates. This information will ground empirically driven, locally specific reform initiatives that will yield better results.

---

[42] Interestingly, the 120th Report of the Law Commission of India (1987) drew attention to the fact that the Government's setting of judicial strength (at each of the different tiers of the judiciary) did not seem to be based on any publicly articulated norms or principles. This Report goes on to consider the possible principles that the Government could potentially base its calculations on: on the basis of population, on the basis of litigation rates or the institution (of cases) rates. LAW COMMISSION OF INDIA, 120TH REPORT ON MANPOWER PLANNING IN THE JUDICIARY: A BLUEPRINT (1987), *available at* http://lawcommissionofindia.nic.in/101-169/Report120.pdf.

Apart from the lack of reliable local-level data on the performance and efficiency of the courts, there are larger information deficits that result in significant 'rule of law' costs and threaten the common law character of India's legal system. The irregular reporting and the unavailability of court decisions have resulted in the gradual erosion in the controlling power of precedent. A recent study of the Supreme Court[43] found that the number of regular hearing matters disposed by the Court in a year is higher than the number of reported judgments on the court websites as well as Indian law databases such as *Judis* or *Indian Kanoon* in that year. The data gap is significant even if we take into account the practise of clubbing together similar cases or issuing a single opinionfor multiple cases. If there are final judgments of the Supreme Court that effectively create no precedent, this results in significant 'rule of law' costs.[44] The principle of precedent preserves the rule of law as like cases should be decided alike, or consistently with each other. One of the major causes of the unsustainable number of appeals and review petitions in the higher courts is the breakdown of precedent rules. If litigants and lawyers do not know what the law of the land is, they will be likely to institute fresh appeals involving points of law that have already been decided by the higher courts. Further, since unpublished decisions also lead to inconsistent decisions by the higher courts on the same points of law, potential litigants will be tempted to always try their luck at the courts, even if their claims involve settled points of law.

In some ways, the lack of legal information, in relation to both judicial decisions and judicial performance, can be easily fixed. The ongoing computerisation programme of the judiciary already gathers the relevant information for their existing websites. On occasion we have been able to access significant and useful data on request from the backend servers and administrators of this data. We suggest that it should become the express mandate of the project to make all such legal information readily available to the public in a format capable of rigorous analysis. When one considers that taxpayers and litigants have funded this elaborate data gathering

---

[43] Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload*, 10 J. EMPIRICAL L. STUD. 570 (2013).

[44] Although the context of the discussion is different, *see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), for the importance of public litigation and public judgments in furthering the rule of law.

exercise, it is a travesty that such data is locked away in impenetrable data formats and servers. Nowhere is this information more relevant than to address the urgent need to overcome the logjam in our criminal justice system, which we turn to in the next section.

A second significant legal information barrier that imposes rule of law costs is the lack of a comprehensive repository of *the law* (all statutes and regulations) that has been arranged in a way that makes it easy for ordinary citizens, lawyers and judges to work out what the legal rights and obligations are in a given situation. As we have argued elsewhere,[45] what we need in this regard is a 3-step reorganisation of the statutory codes in India, consisting of collection, compilation and consolidation, whereby laws are re-arranged and consolidated by subject-matter, akin to the various Titles in the US Code. This process intrinsically overcomes desuetude and over-regulation, and unlike a plain vanilla repeal exercise of the type proposed by the government, this type of consolidation will resolve inconsistent laws, clarify ambiguities in the law on a particular subject, and restate the law subject using a consistent drafting style and consistent word choices, leaving no 'gaps' in the law.

IV. The Shadowy Figure of Criminal Justice

So far in this paper we have focused on approaches to civil justice reform and the legal system information gaps that make empirically grounded legal system reform proposals impossible. In this section we turn our attention to what is arguably the most critical area of reform: the criminal justice system. The Congress and BJP manifestos, while generally deficient on the subject of legal system reform, inadequately address reform of the criminal justice system. The BJP manifesto addresses the entire subject in a single line with the promise that they will "reform the criminal justice system to make the dispensation of justice simpler, quicker and more effective and after examining the recommendations of the earlier reports on this subject."[46] This is still more than is seen in the Congress manifesto, which does not discuss the issue at all. This perfunctory treatment is all the

[45] Sudhir Krishnaswamy & Sindhu Sivakumar, *Reforming the Statutory Codes*, The Hindu (Jul. 9, 2014), *available at* http://www.thehindu.com/opinion/op-ed/reforming-statutory-codes/article6190534.ece.

[46] Bharatiya Janata Party, *Election Manifesto 2014* 12 (2014), available at http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf.

more surprising as the volume of criminal litigation dwarfs civil litigation especially in the lower courts and the gravest threat to the legitimacy of the Indian legal and political system is its persistent inability to put in place a legitimate means of maintaining social peace, law and order.[47] Plainly stated, the only channel through which a majority of Indian citizens interact with the legal system is through the criminal law. As an illustrative example, at the starting of the quarter between July and September 2013, the total number of criminal cases pending before the High Courts and subordinate courts in the country was nearly 2 crores, while the number of civil cases was roughly 1.1 crores. At the end of the same quarter, the number of criminal cases pending was over 2 crores, while the number of civil cases was closer to 1.2 crores.[48] The lower courts of the country, which form the first (and, in most cases, only) point of contact between members of the general public and the judiciary, are almost overwhelmingly stocked with criminal rather than civil cases. The position is slightly different in the higher judiciary, which deals predominantly with civil rather than criminal cases.

There are three main components in the criminal justice machinery of the Indian State: the police, the courts, and the prison system.[49] Each component needs discrete but coordinated reform to enhance peace and security while protecting the liberty of accused persons. The Indian police establishment is still governed by the archaic Indian Police Act of 1861. A lot of ink has been spilt reviewing this legislation,[50] and proposing further changes to the structure of policing. The ineffectiveness of these earlier efforts to induce tangible changes in the structure and practice of policing led the Supreme Court to take the matter into its own hands in *Prakash*

---

[47] *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 101 (2014), http://worldjusticeproject.org/ sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf. The 2014 Rule of Law Index released by the World Justice Project places India at the 95th rank among 99 countries in terms of Order and Security.

[48] *Court News,* SUPREME COURT OF INDIA 7-8 (Oct.-Dec. 2013), *available at* http://sci.nic.in/courtnews/2013_issue_4.pdf.

[49] The Criminal Procedure Code (1973) includes prosecutors and defence counsel as distinct functionaries, however we do not mention them separately here.

[50] The National Police Commission established by the Central Government in 1977 submitted eight reports on the subject between 1979 and 1981. Subsequently various other high-powered committees have also revisited the subject of police reforms; notable among these are the Ribeiro Committee on Police Reforms (1998), the Padmanabhaiah Committee on Police Reforms (2000) and the Committee on Reforms of the Criminal Justice System (the Malimath Committee) (2003).

Singh v. Union of India.[51] In this case the Supreme Court issued comprehensive and concrete directions[52] to the State Governments to reform their police establishments by enhancing accountability and effectiveness by reducing political interference. Predictably, the response of the States to these directions has been lukewarm; these directions remain unfulfilled in most States in the country.[53] Moreover, we have increasing evidence that egregious forms of misconduct such as torture and extrajudicial killing by the police and paramilitary forces have only increased in the last decade.[54] While the structure and practice of policing deserves critical academic scrutiny, in this paper we focus our attention on another aspect of the Indian criminal justice system that is intransigent: unduly high levels of undertrial incarceration.

Let us begin with a basic understanding of the prison population in India. The first important point to note is that rates of incarceration in India (an average of 31 persons per 100,000 population between 2001-2010) [55] are exceptionally low by any international standard (the world rate was 144 prisoners per 100,000 in 2013).[56] The low incarceration rate in India is noteworthy but does not by itself suggest a faulty criminal justice system. What is a matter of concern, though, is that of these prisoners, 67 per cent

---

[51] Prakash Singh v. Union of India, (2006) 8 S.C.C. 1.

[52] The main objective of the reforms prescribed in *Prakash Singh* was the reduction of political pressure on the police. This was sought to be achieved by creating 'State Security Commissions' consisting of political as well as bureaucratic members to oversee police functions, stabilizing the tenure of senior police officers, separating the investigative and 'law and order' functions of the police *inter alia. See Prakash Singh*, *supra* note 51, at paras 14-16.

[53] The lack of implementation by most States has seen various contempt petitions filed by the original petitioners over the years against non-complying states. The Commonwealth Human Rights Initiative was a party to the original litigation, and has documented the implementation of the Court's orders over the years. For a State-by-State report on compliance with the Court's orders as of June 2010, *see* The Commonwealth Human Rights Initiative, *Police Reforms: State and UT Compliance with Supreme Court Directives* (2010), http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/chri_state_compliance_with_supreme_court_directives_chart.pdf (last visited Jul. 30, 2014).

[54] Jinee Lokaneeta, TRANSNATIONAL TORTURE: LAW, VIOLENCE AND STATE POWER IN INDIA AND THE US (2012); Human Rights Watch; *Broken System: Dysfunction, Abuse and Impunity in the India Police* (2009), http://www.hrw.org/reports/2009/08/04/broken-system (last visited Jul. 30, 2014).

[55] All data on prisons we use is drawn from the National Crime Records Bureau annual publication PRISON STATISTICS INDIA of 2001 to 2010. These reports are available at ncrb.gov.in.

[56] Roy Walmsley, *World Prison Population List* (10th ed.), INTERNATIONAL CENTRE FOR PRISON STUDIES (2011).

were undertrials, which is similar to the undertrial detention rates in neigh bouring countries like Bangladesh (68 per cent in 2007) and Pakistan (66 per cent) but vastly different from those of more developed countries such as the United States (21 per cent) or England and Wales (16.5 per cent).[57] As the latter group of countries have developed well-functioning criminal justice systems, we posit that a high percentage of undertrial incarceration is an indicator of stress in our criminal justice system.

Normatively, a threshold objection to high levels of undertrial incarceration is simply that the criminal justice system should not imprison people who have not been proven guilty by a court of law. Imprisonment involves a complete loss of liberty without the operation of the due process of the law, which no liberal democracy should accept.[58] Secondly, it has long been a concern in penology that undertrial prisoners, who may very well be innocent, run the risk of 'contamination' when placed in close contact with hardened criminals.[59] A third, but in no way less significant concern, is that individual undertrial prisoners lose valuable days and months of their lives and are forever stamped with the taint of being imprisoned, regardless of whether they are subsequently proved guilty. Since its inception, the Indian prison system has failed to separate convicted and undertrial prisoners.[60] Hence, we conclude that such a high percentage of undertrial prisoners in the prison population is a pathological feature of the Indian criminal justice system. Moreover, it is critical that we ensure that the criminal justice system is restored to achieving its primary objective: to punish people *guilty* of crime.

It may be argued that given India's low incarceration rate, we may

[57] This is not to suggest that these countries do not possess sizeable criminal justice concerns themselves. The United States in particular displays an astonishingly high rate of incarceration; close to 740 people per hundred thousand population. This is by a long way the highest rate of incarceration of any country in the world. To convey a sense of scale: in 2013 there were around 249,800 under trials in India – these formed roughly 70 per cent of the prison population. In the United States, in the same year there were 475,692 remand prisoners; these formed only 21.2 per cent of the prison population.

[58] For one of the sharpest analyses of the values inherent in the criminal process, *see* Herbert Packer, *Two Models of the Criminal Process,* 113 U. PENN. L. REV. 1 (1964).

[59] The Prisons Act § 27(2) (1894) prescribing that unconvicted criminal prisoners shall be kept away from convicted prisoners. Till date this is not the case in most prisons in the country.

[60] This problem was noted as early as 1919 by the Indian Jails Committee. *See* REPORT OF THE INDIAN JAILS COMMITTEE 244 (1919-1920).

restore a reasonable balance between undertrial and convict detention rates through a rapid and severe scaling up of the number of convicts in Indian prisons rather than a reduction in the undertrial population. While a comprehensive reform of the criminal justice system to ensure more convictions is urgent and necessary, the high absolute numbers of undertrial incarceration is nevertheless unacceptable for the normative reasons set out above. Moreover, reform that reduces undertrial incarceration may well reorient the criminal justice system to avoid using this as a substitute for incarceration after conviction.

While there are several systemic reasons for the high levels of undertrial incarceration in India, our primary focus must be on the dysfunctional system of bail in the country. Bail is a form of security provided by an accused person in a criminal trial in order for them to secure a release from custody during the trial. It is also the most common way of keeping people out of prison when imprisonment is not strictly necessary. This security is forfeited if the accused person subsequently fails to appear in court. Every decade or so we witness an impassioned criticism of the iniquitous nature of criminal justice in India: Kapila Hingorani in the 1970s, Upendra Baxi in the 1980s[61] and most recently Arvind Kejriwal[62] have argued that the system operates to exclude persons of limited means who, among other things, cannot afford to post bail, and therefore spend undue lengths of time in prison. A close look at data on persons in Indian prisons lends credence to this claim, as we demonstrate below.

Obtaining information regarding bail amounts and the financial means of accused persons is difficult as the Government does not release data on either question. Existing data provided by the National Crime Records Bureau, however, does give us other clues to better understand the prison population. Here we discuss two features of the undertrial population in

[61] For the earlier interventions by the Supreme Court on these matters, *see* Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1369; Upendra Baxi v. State of Uttar Pradesh, (1983) 2 S.C.C. 308; Kadra Pahadiya & Ors. v. State of Bihar, (1981) 3 S.C.C. 671.

[62] *Defamation case: Kejriwal refuses to give bail bond,* THE HINDU (May 21, 2014), available at http://www.thehindu.com/news/cities/Delhi/defamation-case-kejriwal-refuses-to-give-bail-bond/article6032723.ece; *see also* Rohan Venkataramakrishnan, *How AAP could turn Kejriwal's arrest into an argument for legal reform,* SCROLL.IN (May 23, 2014), http://www.scroll.in/article/665097/How-AAP-could-turn-Kejriwal's-arrest-into-an-argument-for-legal-reform.

India that allow us to place in context claims about dysfunction in the bail system. The first of these relates to the educational qualifications of undertrial prisoners, while the second relates to the composition of offences for which they are arrested. We discuss these features using simple averages (means) taken across the ten year period from 2001 to 2010.

In the absence of data on the financial capacity of undertrial prisoners, educational qualification gives us an alternate measure of their socio-economic condition. The picture painted by the data is not encouraging. On average between 2001 and 2010, 37 per cent of undertrials in the country were illiterate; while close to 42 per cent had not completed class ten. Together these categories formed an overwhelming majority of the prison population- close to 70 per cent. Illiterate people especially are disproportionately represented in the undertrial population. In 2001 the male literacy rate[63] was 75.3 per cent (Census 2001), while in 2011 this had gone up to close to 81 per cent (Census 2011). It is clear, then, that Indian prisoners, especially undertrials, generally possess little or no education and are from some of Indian society's most marginalized groups. These are people whose capacity to negotiate the legal process or access legal aid to vindicate their rights is severely compromised. The fact that our undertrial prisoners are drawn disproportionately from the most vulnerable parts of the Indian population is by itself a reason to rapidly reform the bail process.

Another way of assessing the impact of the bail process is to examine the offences for which undertrial prisoners are in jail. Almost 10 per cent of the under trial population in India was accused of bailable offences during the years under study. Bailable offences such as cheating, or offenses under the Arms[64] and Excise Acts,[65] or criminal defamation as in the Kejriwal case, are those for which bail is granted in the ordinary course unless the accused is unable to pay the price of the bond.[66] To this we may add the fact that the second largest percentage of under trials in the country (9 per cent) were

[63] Given that males formed over 96 per cent of both the convict and under trial population on average between 2001 and 2010, we compare the prison population to the male literacy rate here.

[64] Arms Act § 37 (1959). (All persons arrested under the Act must be brought before a magistrate and released on executing a bond with or without sureties).

[65] Om Prakash v. Union of India, A.I.R. 2012 S.C. 545 (all offences under the Central Excise Act (1944) held to be bailable).

[66] K. N. CHANDRASEKHARAN PILLAI, R.V. KELKAR'S LECTURES ON CRIMINAL PROCEDURE 143 (5th ed. 2013).

accused of 'theft', in many cases an instance of petty or non-serious crime.[67] Given an average annual under trial population during the ten year period of around 2,36,000 individuals, this means that over 23,000 persons were incarcerated each year for bailable offences on average during the period. Though these undertrials constitute a minority of all undertrials in detention, this is a significant number of people in detention despite being entitled to be released on bail as a matter of right.

The Law Commission of India in its 78th Report extensively examined the subject of bail and its relation to the ballooning undertrial population in the Country. It established that as a general rule, the severity of the offence influences both the grant of bail as well as the size of the bond.[68] Persons accused of serious offences (punishable with life imprisonment or death) are in the ordinary course not to be granted bail. Despite these normatively unimpeachable conclusions, it is puzzling why close to 20 per cent of undertrials in India on average between 2001 and 2010 were incarcerated for either bailable or non-serious crimes. As a majority of those detained are either illiterate or have limited educational qualifications it is reasonable to ask whether these persons have received fair treatment from the criminal justice system. Thus, Arvind Kejriwal and others before him have rightly drawn attention to the socially unjust and inequitable character of the bail process and undertrial detention.

The last legislative attempt to reform the bail system was the introduction of Section 436A of the Criminal Procedure Code in 2005. This section mandates that undertrials who have served at least half of the maximum period of imprisonment under the offences they have been accused of are entitled to release on a personal bond.[69] At the time, this provision was hailed as likely to result in a great reduction of the undertrial

---

[67] In describing this offence as such we follow the Law Commission of India's approach in its 78th report, of recommending the amendment of the criminal law to make offences punishable with imprisonment for three years or less bailable, as a general rule. *See* LAW COMMISSION OF INDIA, SEVENTY EIGHTH REPORT ON CONGESTION OF UNDER-TRIAL PRISONERS IN JAILS 17 (1979). Currently there are a number of offences under the Indian Penal Code punishable with a maximum sentence of three years or less which are non-bailable.

[68] LAW COMMISSION OF INDIA, *supra* note 67.

[69] As opposed to a bail bond which is a form of financial security, a personal bond is a written assurance by the accused that they will appear before the court during their trial.

population in the country.[70] However, the available data suggests that no such reduction happened. On the contrary, the undertrial population in fact increased, albeit marginally, from 2005 to 2010. The reason for this failure to make a significant dent in the country's undertrial population is best understood to be related to the relatively short average period of detention of most under-trials. Krishnan and Kumar, using prison data from 2007 and 2010, establish that length of detention is not as much of a problem as earlier imagined; most undertrials in Indian prisons spend less than 6 months in prison.[71] Examining data from a longer time period confirms this result. Between 2001 and 2010, on average more than 60 per cent of undertrials were incarcerated for periods of less than 6 months each year. Further, close to 80 per cent of undertrials were incarcerated for less than one year.[72] The often-heard refrain that undertrials in India spend years and years in prison, often longer than the time they would have spent if convicted, appears to be true in a relatively small number of cases. So while Section 436A introduced a valuable safeguard against excessively long undertrial detention it did not reduce numbers of undertrial prisoners significantly, as the law makers misdiagnosed the character of undertrial detention in India.

The failure of this legislative reform should not lead us to the conclusion that it is not possible to restore a healthy balance between convicts and undertrials in Indian prisons. Instead, we must embrace the possibility and potential of new institutional mechanisms and non-legislative modes of intervention. The creation of 'bail funds' at central, state and local levels is a promising institutional option. Bail funds are a relatively recent innovation across the world and provide a state supported, civil society managed mechanism to release undertrials of inadequate means or those whose social bonds do not allow them to post bail. These funds are used to pay the bail amount and secure the release of persons accused of minor offences. Bail funds have met with considerable success

[70] *E.g.,* Ritu Sarin, *Friday: Thousands of Undertrials will get right to walk free,* THE INDIAN EXPRESS (Jun. 21, 2006), *available at* http://archive.indianexpress.com/news/friday-thousands-of-undertrials-will-get-right-to-walk-free--------/7018/.

[71] Krishnan et al., *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trial in Comparative Perspective,* 42 GEO. J. INT'L. L. 764, 764 (2010).

[72] Limitations with the data however prevent us from unearthing the entire story; there might be significant numbers of undertrials accused of minor offences who indeed spend more than half of their potential sentences imprisoned without being convicted. In absolute terms however, the majority of undertrials in India do not appear to remain in prison for as long as is often argued.

in New York in both enabling the release of persons pending trial, as well as securing the attendance of such persons during hearings.[73] Given that the offence composition in Indian prisons reveals that up to 20% of undertrials are incarcerated for petty or non-serious offences, bail funds have the potential to significantly reduce the undertrial population in the country. Additionally, as opposed to legislative or judicial reform, which may take decades, bail funds offer the potential for almost immediately measurable results.[74] Some non-governmental organisations in India have already initiated steps to create funds of this type.[75] In the context of the grotesque imbalance in the pattern of incarceration in India, options such as these require wider exploration and potential adoption. Reforming the bail system will reinforce the fundamental purpose of the criminal justice system: the punishment of the guilty, and reorient policing and prosecution towards securing convictions rather than victimizing the accused through the criminal trial process.

As serious as it is, undertrial incarceration is only one aspect of the Indian criminal justice administration in need of reform. Problems of police accountability,[76] lengths of trial[77] and conditions in prison[78] among others, are all distinct and equally serious. As we have argued in the rest of this piece, the best way to approach these problems is through sustained, empirically driven research and interventions. The criminal justice system

---

[73] Between 2007 and 2009, the Bronx Freedom Fund supplied bail for 150 defendants in New York City, 93% of these defendants returned for every court date. *See* Julie Turkewitz, *Helping Poor Defendants Post Bail in Backlogged Bronx,* THE NEW YORK TIMES (Jan. 22, 2014), *available at http:*//nyti.ms/19P0IYV.

[74] There are however other important considerations to keep in mind when thinking of introducing bail funds; these funds depend on a significant level of engagement between the fund and the accused person once they are released in order to ensure that the latter regularly attends hearings. For an analysis of the working of the Bronx Defenders Freedom Fund, *see* Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business,* 19 J. L. & POL'Y. 307 (2010).

[75] Stanley Pinto, *Amnesty India mulls Bail fund to rescue undertrials,* THE TIMES OF INDIA, (Jan. 8, 2014), *available at* http://timesofindia.indiatimes.com/india/Amnesty-India-mulls-bail-fund-to-rescue-undertrials/articleshow/28528191.cms.

[76] National Crime Records Bureau, *supra* note 55; The Prisons Act, *supra* note 59.

[77] *Id.*

[78] *E.g.,* COMMONWEALTH HUMAN RIGHTS INITIATIVE, CONDITIONS OF DETENTION IN THE PRISONS OF KARNATAKA (2010), *available at* http://www.humanrightsinitiative.org/publications/prisons/conditions_of_detention_in_the_prisons_of_karnataka.pdf; PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, BEYOND THE PRISON GATES: A REPORT ON LIVING CONDITIONS IN TIHAR JAIL (2011), *available at* http://www.pudr.org/sites/default/files/Tihar%20final%20report.pdf.

is better off than the rest of the legal system in terms of data on its functioning. The National Crime Records Bureau does a commendable job in publishing national statistics both on crime as well as prisons on an annual basis.[79] There are some major problems with these data sources; cases of crimes against women, in particular, are suspected to be seriously under-reported in official crime statistics.[80] However, these data sources offer us the only credible base on which to evaluate and build strategies for reform. It is high time Indian policy makers took both the problems as well as the data as seriously as they deserve.

V. CONCLUSION

The renewed seriousness with which both major political parties approached the subject of legal and judicial system reform before the 2014 general election is a welcome development. In this article we have highlighted some of the persistent barriers to serious legal and judicial system reform in India: *ad hoc* piece-meal reform without adequate empirical understanding or a nuanced normative analysis of the challenges to such reform. We have proposed that a systemic, empirically grounded and normatively rigorous approach can yield significant and innovative reform. In this article we have sought to demonstrate what such reform would look like in three fields: civil justice system, legal system information and the criminal justice system. Legal system reform that stays close to the best empirical evidence available, and committed to creating state capacity that is at once accountable and limited, is our best chance to go beyond the current stasis in this field.

[79] *E.g., Crime in India 2013* and *Prisons Statistics India 2013*, *available at* http://ncrb.gov.in/ are illustrative examples of these.

[80] REPORT OF THE COMMITTEE ON CRIME STATISTICS (2011), *available at* http://mospi.nic.in/mospi_new/upload/Report_crime_stats_29june11.pdf.

EXHAUSTION OF RIGHTS AND PARALLEL IMPORTS WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY LAWS IN INDIA

Garima Budhiraja Arya & Tania Sebastian***

Exhaustion of Rights is a phenomenon which leads to explicit conflict between the provisions of intellectual property rights and principles of free trade. The doctrine of exhaustion addresses a situation at which the Intellectual Property Rights (hereinafter IPR) holder's control over the good or service ceases. This article explains the types of exhaustion, laying special emphasis on international exhaustion and consequent parallel imports. It argues that while consumers gain due to parallel exports, the rights of the IPR holder must be kept in mind as unregulated parallel imports may have serious economic repurcussions.

* Legal Team, Ibibo Group. LL.M., Indian Law Institute.
** Assistant Professor of Law, Gujarat National Law University.

I. INTRODUCTION

The exhaustion of rights is a most enigmatic phenomenon which stands at the crossroads of intellectual property rights and international trade. It is an interface between the free trade spirit of the nations and rights of the intellectual property holder. Although governed by the territorial laws of the country, it remains a very contentious and debatable concept in various international forums.

The article commences with an analysis of the meaning and scope of exhaustion of rights. It further deals with various kinds of exhaustion with special emphasis on international exhaustion, as it eventually leads to parallel imports, which left unregulated can create havoc in the economy of the state. The article, in the next part, examines the provision of Trade Related Intellectual Property Rights (TRIPS) Agreement pertaining to exhaustion of rights. This part gives a backdrop of the various debates in the international community against which the provision was drafted. The article subsequently attempts to examine the provisions in the European Union and the United States jurisdictions related to exhaustion of rights for a comparative analysis before examining the Indian regime in detail. Important case laws related to parallel imports of trademarked or patented products are also discussed in depth through studying their legislative provisions on exhaustion of rights. As India practices international exhaustion, the disadvantages of the same are clearly outlined in the following part. The concluding part of the article enlists some legal and non-legal suggestions towards a better regulated international exhaustion regime that emphasises on the proper role of states as well as companies. The same would enable the international regime to combat the ill-effects of unregulated international exhaustion.

Intellectual property is a national or territorial affair of each jurisdiction.[1] The Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter TRIPS) provides certain minimum standards to be maintained, but member states enjoy great autonomy.[2] On similar lines, Article 6 of TRIPS Agreement does not establish which level of exhaustion members shall adopt. Inspite of the liberal text of TRIPS on Article 6, the history of international law is replete with failed attempts to create a consensus on the issue of exhaustion.[3] The evasive text of Article 6 of TRIPS [4] is proof of the battles waged over exhaustion. The doctrine of exhaustion upholds the principles of free trade mentioned in WTO and the preamble of TRIPS. But what makes it controversial is its conflict with the interests of intellectual property owners. Thus, the ambiguity about balancing the interests of consumers through free trade and the rights of IPR holders on the other hand is a question which needs an immediate answer. This paper is an attempt to analyse this issue by critically analyzing the doctrine of exhaustion.

II. Exhaustion of Rights: its Definition and Scope

The principle of exhaustion, in general terms, is the rule of first sale, *i.e.*, after the first sale of distribution of a right–related product by the right-holder, or with his consent, his right comes to an end, and he will not be entitled to stop the further use or distribution of the protected product in the market.[5] For example, sale of the patented product, without any condition,

---

[1] There is no *international* trademark, copyright or patent law. The various treaties do provide certain minimum prescriptive guidelines for the members, but the members are free to provide protection over and above the minimum standards.

[2] TRIPS sets out the minimum standards of protection to be provided by each member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

[3] For detailed discussion, *see* Ryan L. Vinelli, *Bringing Down the Walls: How Technology is Being Used to Thwart Parallel Importers Amid International Confusion Concerning Exhaustion of Rights*, 17(1) Cardozo J. Int'l. & Comp. L. 145 (Mar. 2009).

[4] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). Its Preamble states, "Desiring to reduce distortions and impediments to international trade, and taking into account need to promote effective and adequate protection of intellectual property rights".

[5] S.K. Verma, *Exhaustion of Intellectual Property Rights and Free Trade – Article 6 of the TRIPS Agreement*, 29 (5) Int'l. Rev. of Indus. Prop. & Copyright L. 537 (1998).

by the patent holder exhausts his patent right. The purchaser is free to use, maintain and resell the patented product without any further claim by the original patent holder. The same is true for copyrights and trademarks. Once you pay for your iPod, you have a right to display and refer to its Apple trademark publicly. Thus, the right may be enforced only once in respect of the product *lawfully* made and marketed by the right owner in the enjoyment of that right. After the first act of introduction into the commercial circuit of the product incorporating the claimed invention, or bearing the protected distinctive signs, the rights in the intellectual property are exhausted. The only condition is that the introduction of the sale should be made by the right owner or with his/ her consent.[6]

Doctrine of exhaustion addresses the point at which IPR holder's interest in the goods and services cease to exist. Though exhaustion ceases exclusive rights associated with commercialisation only, this termination of control is of utmost significance in the contemporary scenario as it enables free movement of goods and services.[7] As trade barriers crumble, the first sale doctrine is applied internationally and that enables goods to be moved freely amongst nations.

A. Basic Legal and Economic Concepts and the Exhaustion Doctrine

Exhaustion is not a contractual issue; it limits the IPR owner's right to exclude others from the market.[8] It thus serves the purpose of setting a limit beyond which an intangible asset may not be exploited on its conversion

---

[6] NUNO PIRES DE CARVALHO, TRIPS REGIME OF ANTITRUST AND UNDISCLOSED INFORMATION 56 (2008). It should be further noted that exhaustion consumes exclusive rights associated with commercialization only. The patent owner, after selling the patented product, may not oppose the sale and the stocking of the product by the buyer. But it can oppose acts relating to the making of the patented product or use of the patented products in making products. Likewise exhaustion of trademarks does not allow parallel importer to engage in acts that may affect the quality and reputation of branded goods, i.e., he cannot remove or reaffix labels.

[7] *Exhaustion of Rights,* UNCTAD-TRIPS RESOURCE BOOK ON TRIPS AND DEVELOPMENT (2005), *available at* http://www.iprsonline.org/unctadictsd/docs/RB_Part1_Nov_1.4_update.pdf.

[8] Intellectual Property rights, i.e., patents, copyrights and trademarks are negative rights. They generally permit right-holders to exclude others from the markets. The owner of the patent may exclude others from making or selling her invention. A copyright entitles the author or the artist to prevent others from reproducing or distributing her expressive work. A trademark in the similar manner allows business owner to prevent others from using her distinctive sign in commerce.

into an economically marketable commodity. The legal justification behind the doctrine of exhaustion is based on the distinction between IPR and its subject matter. For example, a good may bear a distinctive name or a particular shape, but the right in the good (tangible) is different from the right in the (intangible) brand or design. Therefore when an article is sold, only the property rights in the tangible goods are transferred. The intellectual property rights do not accompany the article over which the buyer gains property rights. The intellectual property owner, thus, may not oppose any act the buyer may wish to practice as regards the article.[9]

Apart from the above, various other economic reasons also underlie and support the doctrine of exhaustion. An important one is that the intellectual property owner should not be allowed to extract monopoly revenue more than once.[10] Once the article bearing intellectual property has been sold, the owner of the intangible property is assumed to have been rewarded. There is no doubt that significant investment of capital and engineering is required to invent an intellectual asset. However once the fixed costs are paid and the good is ready for the market, the actual marginal production and distribution costs are comparatively small.[11] If the intellectual property owners were allowed to impose restrictions on the buyer's downstream acts of trade, the intellectual property right would expand beyond its purpose and its objectives. Given the economic reasoning behind exhaustion, it is important to stress on the fact that exhaustion is purely a legal concept and that the intellectual property owner may, or may not extend his influence to

---

[9] Ryan, *supra* note 3, at 57. The limited exception to this principle is the *droit de suite*, under Article 14(1) of the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, 1161 U.N.T.S. 30 (hereinafter Berne Convention), which reads:

> The author, or after his death, the person or institutions authorised by national legislation, shall, with respect to original works of arts and manuscripts of writers and composers, enjoy inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

Similar to the above provision, Section 53A of Indian Copyright (Amendment) Act, 1994 enumerates resale share rights of the author and his heirs in the original copies of the painting, sculpture or drawing, or of original manuscript of a literary or dramatic or musical work.

[10] Intellectual property, although are not strict monopolies. They confer exclusionary rights on the owners.

[11] MATTIAS GANSLANDT & KEITH E. MASKUS, FRONTIERS OF ECONOMICS AND GLOBALISATION – INTELLECTUAL PROPERTY, GROWTH AND TRADE 266 (2008). The marginal cost refers to cost incurred per unit. For example, drugs can be produced at a very low cost per unit, once the formulation is perfected. Similarly development of computer software incurs costly investments initially, but once developed, it may be electronically distributed at a low cost.

acts practiced by legitimate buyer stems from the contours of intellectual property rights.[12]

There is no international standard which defines the limits of the exhaustion doctrine. The main reason for this is the national and territorial character of intellectual property laws. Each country creates and enforces its own IPR laws exclusively within its jurisdiction. The creator of an intellectual product must seek protection and enforcement in each country individually.[13] This national character of IPR laws is the reason behind lack of uniformity in the exhaustion regime at the international level. Before analysing other reasons for the lack of international consensus on the treatment of exhaustion, it is important for our purpose to analyse the various types of exhaustion prevalent in different jurisdictions.

B. Kinds of Exhaustion and Dynamics of Parallel Trade

As mentioned above, different exhaustion doctrines (also called first sale doctrine) are followed across the globe. There are various reasons like production costs, purchasing power and government regulations prevailing in a jurisdiction which are the deciding factors.[14] From the standpoint of the international trading system, the focus of exhaustion is whether it operates on a national, regional or international basis.

1. National/ Domestic Exhaustion

This indicates that the internal distribution rights within the nation are exhausted at the first sale. This means that if the goods are sold for the first time in the domestic market or within the territory of the country in which IP is registered, the owner loses his rights over the goods and cannot prevent

---

[12] The amount of revenue the intellectual property owner is able to extract from the commercial exploitation of intangible asset is completely irrelevant as there is a legally defined scope of intellectual property rights.

[13] For detailed discussion, *see* Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L. L. 333 (1999-2000). The creator of intellectual property may hold a set of national IPRs covering the same IP in variety of jurisdictions.

[14] Bryan Baer *Price Controls through the Back Door: The Parallel Importation of Pharmaceuticals*, 9 J. INTELL. PROP. RTS. 109 (2001-2002). In addition to this factors like whether the state is an IP creator or an IP user and the trade policies of the country also affect decisions regarding exhaustion.

subsequent sales of the same in the domestic market.[15] Therefore if the goods are sold for the first time in a different country beyond the jurisdiction of the nation in which an intellectual property is registered, then the IP owner can invoke his rights to prevent importation of such goods into the domestic market.[16] National exhaustion can be viewed as most intuitive legally, since each country or nation, as a sovereign jurisdiction, creates the intellectual property and, therefore, the rights and obligations should only be affected by acts within that jurisdiction.[17]

2. Regional Exhaustion

This is also known as community exhaustion. This indicates that distribution rights within the particular economic community are exhausted at the first sale anywhere within the community. This removes the constraints from member states within the community.[18] The main objective behind regional exhaustion is market integration, i.e. to create a unified internal community market out of the national markets of the member states.[19] This practice is prevailing in European Union. There are other regional trading blocks also like NAFTA[20] and MERCOSUR,[21] whose

---

[15] Sneha Jain, *Parallel Imports and Trademark Law*, 14 J. INTELL. PROP. RTS. 14 (2009).

[16] National exhaustion has no effect on any other parallel IPR, all of which continues to be fully enforceable in their jurisdiction. As a result, the holder can separately invoke each parallel IPR in its jurisdiction against the import, use, or resale of even authorized products first sold in another jurisdiction.

[17] Ryan, *supra* 3, at 149. It is further stated that national exhaustion results in compartmentalizing intellectual property exhaustion by country with the result that in different countries, different rights exist. This compartmentalization results in giving the property owner large flexibility in terms of creating price disparities between countries and even excluding their products from certain areas.

[18] Michael R. R., *Gray Markets, Intellectual Property Rights, and Trade Agreements in the International Marketplace,* (2006) available at www.cherry.gatech.edu/t2s2006/papers/ryan-3003-2-T.pdf (last visited Aug. 20, 2014).

[19] In furtherance of the objective of market integration, Articles 34 and 36 of the Consolidated Version of the Treaty of the Functioning of the European Union, Dec. 13, 2007, 2008/C115/01, have been construed by the European Court of Justice in the manner as to make internal market a reality. Article 34 prohibits quantitative restrictions on imports and Article 36 allows the Member States to apply their domestic law for the protection of the intellectual property rights, so long it is not used as a "means of arbitrary discrimination or a disguised restriction on trade between the Member States."

[20] North American Free Trade Agreement: Dec. 17, 1991, 32 I.L.M. 289 (1993). The agreement came into force on January 1, 1994. Its members are Canada, United States and Mexico.

[21] Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26,

members address the exhaustion issue as a part of creating their common markets. Thus the exclusive rights of IP holders are exhausted when the article is lawfully, and with their consent, first sold within the member state. Community exhaustion allows for streamlined process between member states, but still does not solve the problem at the international level. Many of the complex issues created by national exhaustion remain under community exhaustion as the international trade between members and non-members is akin to national exhaustion.[22]

3. International/Global Exhaustion

Under international exhaustion, if the goods are put in the market by the IP holder, or with his consent, in any of the countries where his right is protected, that will exhaust his rights for other national jurisdictions as well as where he enjoys the similar right.[23] The international application of the exhaustion doctrine is extremely important in the contemporary scenario where the trade barriers are crumbling and there is emphasis on free trade. Many nations practice international exhaustion of rights to enable free movement of goods and services which in turn trigger economic growth and productivity. [24]

However, application of the exhaustion doctrine leads to parallel imports internationally. Due to difference in purchasing powers among nations, varying labour and other production costs, as well as governmental regulations, the same product is often priced differently in different countries. These price differentials create powerful incentives for the third party distributors to purchase products in low priced countries and resell them in the high priced countries, discounting the price routinely charged by the IPR holder.[25] For example, the price of a drug may be substantially lower in the UK than in Japan.[26] An independent trading company may

---

1991, 30 I.L.M. 1041 (1991). It is a regional trade agreement founded in 1991 between Argentina, Brazil, Paraguay, and Uruguay.

[22] Ryan, *supra* note 3, at 149.

[23] Verma, *supra* note 5, at 539. International exhaustion concerns affects the first sale on the holder's full collection of parallel national intellectual property rights.

[24] Japan practices international exhaustion. Similarly India also practices international exhaustion in case of trademarks and patents.

[25] Baer, *supra* note 14, at 111.

[26] The UK sets maximum limits on drug prices by law in order to protect the consumers.

notice the disparity and buy large quantities of drugs by the licensee in the UK and then import the drug into Japan for resale at less than the local market price of the company. This is called parallel importation which is the result of international exhaustion.[27] Unlike counterfeits that are fabricated by the imitators, all parallel imports are genuine and sourced from the manufacturer in the lower priced country through authorised dealers. [28] In this sense there is nothing 'gray' about the goods produced and sold legally as the English Patents Court in the *Deltamethrin* decision pointed out.[29] What is gray and mysterious are the distribution channels. Such goods create havoc in the importing country for entrepreneurs who sell the same goods, obtained via different distribution channels and more expensively. Thus the issue is not that of product legality, but legality of the means of distribution.[30]

Parallel imports conforms with the ideals of free trade embodied in the ideals of WTO and GATT. Inhibition of trade through strong intellectual property regimes is inconsistent with the ideas of open market and competition which in turn favours both the producers and the consumers. Before analysing the implications of international exhaustion, it is important for our purposes to examine the provisions related to TRIPS and other Conventions which deal with exhaustion.

III. History of The TRIPS Provision – Why did it Start and Where do we Stand Now?

Article 6 of the TRIPS that deals with the issue of 'exhaustion' states that "For the purposes of dispute settlement under this Agreement, subject to the provisions of Article 3 and Article 4, nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights."[31]

---

[27] The principle of exhaustion is exploited in the sense that the effect of exhaustion to deflate the monopolistic right and inherent territoriality are utilized to make profits by selling the goods of the similar quality at cheaper rates than what are domestically available.

[28] Reza Ahmadi & B. Rachel Yang, *Parallel Imports: Challenges from Unauthorized Distribution Channels*, 19(3) Marketing Sci. 279 (2000).

[29] Roussel Uclaf v. Hockley International, 113 (14) R.P.C. 441 (1996).

[30] Christopher Heath, *Parallel Imports and International Trade*, 28(5) Int'l. Rev. of Indus. Prop. & Copyright L. 623 (1997).

[31] Article 3 of TRIPS refers to the National Treatment clause and Article 4 refers to the Most Favoured Nation provision of the TRIPS. Article 3 states each member should accord to the nationals of other members treatment no less favourable than it accords to its own nationals

Article 6 as stated above is completely neutral and makes no commitment and gives no direction to the member states except that in carrying out the issue of exhaustion, Articles 3 (National Treatment) and 4 (Most favoured Nation) of the TRIPS are to be uniformly applied.[32] Thus each member is free to develop and interpret the doctrine of exhaustion in accordance with their own trade ideals and other government regulations. Such autonomy given to the members signifies their inability to agree to a uniform solution pertaining to exhaustion. It is important for us to understand the reasons for the failure of negotiations to arrive at a consensus on the homogenous regime for exhaustion globally.

With burgeoning international trade, the IP owners voiced their demands for stronger protection as they realised they were increasingly losing revenue to goods produced in low-protection jurisdictions. With the increased industry pressure, developed countries voiced their demand for increased intellectual property protection at the end of Tokyo Round of GATT negotiations. No agreement was reached in these negotiations.

Driven by continued pressure by the industry and the developed nations, the topic of exhaustion was revisited in the Uruguay Round of the GATT negotiations. The multilateral treaties, TRIPS and WTO, were thus the creation of the Uruguay Round Agreements.[33] The debate and negotiations on exhaustion and parallel imports however exhausted the members. The exhaustion proponents argued that international exhaustion and the resultant flow of parallel imports will ensure adequate level of price competition and efficiency gains throughout the international trading system. The advocates of exhaustion, primarily developing countries,

---

with regard to the protection of intellectual property. Similarly Article 4 states that with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

[32] Verma, *supra* note 5, at 535.

[33] TRIPS has become effective from 1st January, 1996. It has been explicitly made part of the WTO and all GATT/WTO members are bound by it. GATT's basic principles have been made applicable to the TRIPS Agreement. It should be further noted that TRIPS was the first multilateral agreement which led to the enforcement and harmonization of certain minimum substantive intellectual property rights. These minimum enforcement standards were applicable to WTO members as well which in turn led to a relationship between international trade and intellectual property.

argued that permitting parallel imports will protect consumers against artificially high prices through increased domestic competition.[34] The language of Article 6 reflects the deadlock and lack of consensus amongst the developed economies and the emerging economies and their inability to agree. [35]

Article 6 is silent on the question of which goods can be considered as legitimate goods.[36] Given the liberal wording of the article, WTO members are relatively free to determine as to what constitutes legitimate goods. Paragraph 5(d) of the Doha Declaration also confines the issue of exhaustion to public health and pharmaceuticals thereby reinforcing the liberal interpretation of Article 6. [37]

The above discussion leaves no doubt that Article 6 has turned out to be one of the most contentious provisions of TRIPS. It raises extremely complex legal and economic issues. It involves balancing of interests of IP owners on the one hand who demand strong protection and of the consumers on the other who benefit from free flow of goods and services as it provides more variety and lower costs. It may be recalled that rules of WTO emanate from one basic idea: that elimination of barriers to the movement of goods and services across and within the national boundaries

---

[34] Frederick M. Abbott, *First Report (Final) to the Committee of International Trade Law of the International Law Association on the subject of Parallel Importation*, 1 J. INT'L. ECON. L. 608 (1998). The proponents of international exhaustion further argued that parallel importation would encourage exports of low cost local production, thereby fostering efficient international resource allocation and thus leading to increased production investment.

[35] The core issue of the debate was the access to pharmaceutical drugs. The scope of Article 6 of the TRIPS agreement was changed, albeit in the narrow context of public health by Article 5(d) of the Declaration on the TRIPS Agreement and Public Health, Nov. 20, 2001, WT/MIN(01)/DEC/2 (hereinafter Doha Declaration). Developing countries championed an international exhaustion regime that would allow them to continue buying the cheapest drugs available, while developed countries argued for a standard that would allow rights holders to retain some control after the initial sale.

[36] DANIEL GERVAIS, THE TRIPS AGREEMENT – DRAFTING, HISTORY AND ANALYSIS 199 (4th ed. 2008). Some legal scholars interpret that only goods made with the consent of the right holder may be subject to parallel importation. Others also include under this ambit goods made under compulsory license.

[37] Paragraph 5(d) of the Doha Declaration reads: "The effect of the provisions in the TRIPS Agreement that are relevant to exhaustion of intellectual property rights is to leave each Member free to establish its own regime for exhaustion without challenge, subject to MFN and national treatment provisions of Articles 3 and 4." Thus the above provision states that no provision of TRIPS should stand in the way of exhaustion regimes to be adopted by WTO members in context of public health policies.

is beneficial to global economic welfare because this encourages specialisation and efficiency in production and distribution. The rules designed to reduce and eliminate the tariff and non-tariff barriers flow from this assumption. The Preamble of the TRIPS also confirms and reinforces this basic idea to reduce distortions and impediments to international trade. It is clearly stated in the Preamble that the measures and procedures to enforce intellectual property rights should not themselves become barriers to international trade. Thus the desire to protect "ownership" interests in the products and the desire to avoid having such protection become a barrier to international trade is what can be interpreted by the language. Thus, it is important for all nations to interpret the provision pertaining to exhaustion in such a manner as to maintain such a balance.

As we have discussed the general interpretation and controversy regarding Article 6, it is important for our purposes to understand the interpretation of this Article by different jurisdictions.

IV. Exhaustion of Rights Doctrine in Other Jurisdictions

A. European Union

The European Union (EU) position on exhaustion is different from other jurisdictions. It follows community–wide/ regional exhaustion in order to ensure that the internal markets remain barrier free. Its main objective is market integration, i.e., to create a unified internal community market out of national markets of the Member States.[38] Article 7(1) of the First Council Directive[39] (hereinafter FCD) was an attempt to harmonize the laws of Member States of the European Community relating to trademarks. As modified by Annex 17 of the European Economic Area Agreement (hereinafter EEA Trade), it provides that "the trade mark right shall not entitle the proprietor to prohibit use in relation to goods which have been put on the market in a Contracting Party under that trademark by the proprietor or with his consent."

[38] Verma, *supra* 5, at 546. Article 30 and 36 of the Rome Treaty has been so construed by the ECJ so as to remove obstacles in making internal market a reality.
[39] First Council Directive, Dec. 21, 1988, 89/104/EEC.

Article 28 of the Treaty Establishing the European Community[40] (hereinafter EC) incorporates the principle of free movement of goods, and it prohibits quantitative restrictions on imports between Member States and all other measures of equivalent effect.[41] Under Article 30 EC,[42] however, national laws may derogate from the principle of free movement of goods if the measure in question is justified and proportionate in relation to the impact of the *prima facie* contravention of Articles 28 and 29 of the EC and the specific objective the national rule seeks to accomplish. In relation to intellectual property cases, the European Court of Justice (hereinafter ECJ) has established that a violation of Article 28 of the EC may be justified only if the existence of the right is concerned, which was later specified so as to relate to the specific subject matter. The doctrine of exhaustion has been employed as to fortify these distinctions.[43]

The general mandate of community-wide exhaustion in the EU was recognised for the first time by the ECJ in *Deutsche Grammophon v. Metro*.[44] ECJ held in the case that copyrighted works must be distributed throughout the community without owners preventing distribution with their exclusive rights. The Hamburg court hearing the matter submitted to the ECJ the issue of whether it was contrary to Articles 5 and 85(1) of the

---

[40] *See* Treaty Establishing the European Community, Nov. 10, 1997 and, 1997 O.J. (C 340) 3.

[41] Article 28 of the EC Treaty states that "quantitative restriction on imports and all measures having equivalent effect shall be prohibited between Member States."

[42] Article 30 of EC Treaty states:

> The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[43] For detailed discussion, *see* Guido Westkamp, *Intellectual Property, Competition Rules, and Emerging Internal Market: Some Thoughts on European Exhaustion Doctrine*, 11 (2) MARQUETTE INTELL. PROP. L. REV. 291 (2007). He further argues that the history of the treatment of doctrine of exhaustion evidences a remarkably complex structure: the formulation of exhaustion rule under Article 30 EC was subsequently incorporated into secondary intellectual property legislation, and the European exhaustion rule was implemented into national laws.

[44] 1971 E.C.R. 487, 502. The facts of the case were that Deutsche Grammophon manufactured sound recordings in Germany which were marketed in France by its subsidiary Polydor. The records were in turn bought by the defendant, Metro, and re-imported into Germany where it tried to sell them at a lower price than set in Germany.

EC for a national law to be used to exclude the parallel trade in these circumstances. The court held that "[t]he exercise of the exclusive right referred to in the question might fall under the prohibition set out by Article 85(1) [of the EC] each time it manifests itself as the subject, the means, or the result of an agreement."[45] Thus it was reinforced in this case that once the goods have been sold anywhere within EU, right of the owner is deemed to be exhausted.

Similar to the above decision, a number of patent related cases involving parallel imports also explore the relationship between free movement of goods and territorial restrictions. *Merck v. Stephar*,[46] was the ECJ's extreme application of free movement of goods to patent rights.[47] The case extended the doctrine of community-wide exhaustion to products that had first been marketed in the member state where patent protection was not available. The Court thus held that the right holder could not use patent rights in other member states to block intra-community trade.[48] In the court's view, the right holder had to make marketing decision in the light of all circumstances and once marketing has occurred, the right holder has to accept the consequences of free movement of goods. [49] Although this case was decided with the goal of market integration in mind, the judgment was criticised on the ground that it focused exclusively on the right holder's consent and ignored economic and patent policy considerations.

In spite of criticisms by various commentators for ignoring the economic aspects of the market integration, the *Merck* judgment was followed in *Merck v. Primecrown*.[50] However a significant contribution of the *Primecrown* proceedings was Advocate General Fennelly's opinion to

---

[45] *Id.*

[46] 1981 E.C.R. 2063 (hereinafter *Merck*). In this case, a hypertension medicine, "Moduretic" was put on the market in Italy, and subsequently imported into Netherlands. The plaintiff had no patent for it in Italy, but did have one in Netherlands. The Court rejected the plaintiff's argument that since his patent was not protected in Italy, he had no chance to collect the reward for his invention.

[47] Andreas Reindl, *Intellectual Property and Intra-Community Trade*, 20 FORDHAM INT'L. L.J. 819 (1996-1997).

[48] *Id.* Merck could, therefore, no longer rely on its Dutch patent rights to prevent imports into Netherlands from Italy where it had first marketed the unpatented drug.

[49] Many commentators however criticized the *Merck* judgment as it could not reconcile with the principles of patent law that Court itself pronounced in other cases such as *Pharmon BV v. Hoechst AG,* [1986] F.S.R. 108.

[50] [1997] 1 C.M.L.R 83 (hereinafter *Primecrown*).

overrule the *Merck* judgment because it does not reconcile with general principles of patent law. He pointed out that applying the *Merck* rule encouraged market partitioning by right-holders that might refuse to sell a product in the markets where patent protection was not available. He further stated that the consent to the marketing (as stated in the *Merck* judgment) can only be relevant where the exclusive patent right accompanies it. Any other solution would deny the right holder's ability to exercise his patent rights. Inspite of these opinions, the Court almost mechanically repeated traditional doctrines and did not make an attempt to develop more persuasive reasons in support of its ruling.

The EU has adopted a regime of regional exhaustion under the Trade Marks Harmonization Directive.[51] In *Centrafarm v. Winthrop*,[52] it was held that a trademark encompasses only the right to place the trademarked good on the market for the first time. After the good is on the market, the right to stop resale exhausts since it divides the internal market and is unnecessary to protect the property right. Companies seeking to get around the community-wide exhaustion have tried to create multiple trademarks and use one per nation, thereby partitioning the internal market. In *American Home Products*,[53] the ECJ held that companies' use of a different mark in each country in order to divide the market was contrary to Article 28.

B. United States

The United States so far does not recognise international exhaustion, which has been manifested through judicial pronouncements as well as relevant statutes. This is more pronounced in the case of patents and copyright than in trademarks. [54]

The seminal patent case addressing international exhaustion is *Boesch v. Graff*, [55] decided by the U.S. Supreme Court in 1890. The plaintiff in this case owned parallel patents for lamp burners in the United States and

[51] The laws of the Member States relating trade marks were partially harmonised by Council Directive 89/104/EEC of 21 December 1988, codified as Directive 2008/95/EC.
[52] 1974 E.C.R.1183.
[53] Centrafarm v. American Home Products Corporation, 1978 E.C.R. 1823.
[54] Verma, *supra* note 5, at 543.
[55] 133 U.S. 697 (1890).

Germany. The Plaintiff sued to keep the lamps lawfully purchased in Germany from being sold in the United States. Under German law at that time, a third party could manufacture and sell the patented products as long as that party had done so prior to the patent owner's submission of the patent application. Consequently, the plaintiff could not prevent a third party from selling his patented lamp burners in Germany. Basing its decision on national sovereignty, the Court held that the plaintiff could prevent the third party from importing the lamps lawfully sold in Germany into United States.[56] Thus the case established the rule that an unauthorised sale overseas of the patent good does not exhaust U.S. patent rights.

However, the current U.S. patent law provides that, "whoever without authority . . . offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent."[57] While on its face, the statute appears to proscribe all parallel import, it is constrained by the exhaustion of rights principle which provides that the first lawful sale effectively exhausts the patentee's rights.[58]

The rule established by the *Boesch* case ignored the decision of the District Court of New York in *Holiday v. Mattheson*,[59] which had held that parallel importation of patented goods first sold overseas under the authority of the patent owner did not infringe the United States patent. In this case, inspite of the fact that the defendant did not have the plaintiff's permission to re-import the patented product in the US, the court refused to grant the plaintiff an injunction and reasoned that there was a presumption upon the sale of a good that the seller intends to part with all his rights in the thing sold. The decision thus supported the international exhaustion of

---

[56] It was further stated by the Supreme Court the right which the third party manufacturer had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights of the patentees under the United States patent. The sale of articles in the United States under the United States patent cannot be controlled by foreign laws.

[57] 35 U.S.C. § 271(a) (1994).

[58] For detailed discussion, see, Darren E. Donnelly, *Parallel Trade and International Harmonization of Exhaustion of Rights Doctrine*, 13 SANTA CLARA COMPUTER AND HIGH TECH. J. 445 (May 1997).

[59] 24 F. 185 (C.C.S.D.N.Y 1885). In this case, the owner of the patent sold his patented goods in England. The defendant acquired the goods in England and imported them back to the United States. The defendant in this case did not have the plaintiff's permission to import the patented product. Nevertheless the court refused to grant the plaintiff an injunction.

rights. But unfortunately the Supreme Court in the *Boesch* case chose to ignore the *Mattheson* decision and drifted from the international first sale doctrine regime.

The doctrine evolved by the *Boesch* case has been followed in a number of cases even now. In *Griffin v. Keystone Mushroom Farm*, *Inc.*,[60] the District Court of Pennsylvania held that the *Boesch* doctrine against exhaustion applied even when the overseas first sale was authorised by the patent owner and stuck to the basic principles of the patent law, i.e., allow patent owners to exclude others from making, using and selling the patented invention. Thus, it can summarised that the U.S. regime of exhaustion of rights wavers somewhere between international and national exhaustion. The rights of the patentee will only be considered exhausted in the U.S. if the sales are authorised by the U.S. patentee. The aforementioned position was reiterated and reinforced by the U.S. Supreme Court in the recent judgment of *Bowman v. Monsanto Co.*[61] (hereinafter *Bowman*) which further clarified the doctrine of patent exhaustion in the U.S. The Court explained that the doctrine of patent exhaustion limits the patentee's right to control what others can do with an article embodying or containing an

[60] 453 F. Supp. 1283 (E.D. Pa. 1978). In this case, the plaintiff held parallel patents on farm equipments in Italy and the United States. He licensed his Italian rights to a company he formed to produce the equipment. The defendant purchased the equipment in Italy and imported it into the United States. The defendant argued that allowing the plaintiff to stop the importation of the equipment would amount to a windfall "double recovery", since the plaintiff had already received a royalty for the equipment from the Italian licensing agreement.

[61] 569 U.S. ___ (2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-796_c07d.pdf. The matter is a certiorari filed to the United States Court of Appeals for the Federal Circuit. The matter was argued on 19th February, 2013 and decided on 13th May, 2013. The facts of the matter are as follows. The Respondent Monsanto invented and patented Roundup Ready soybean seeds, which contain genetic alteration that allows them to survive exposure to the herbicide glyphosate. It sells the seeds subject to a licensing agreement that permits farmers to plant the purchased seed in one, and only one, growing season. Growers may consume or sell the resulting crops, but may not save any of the harvested soybeans for replanting. Petitioner Bowman purchased Roundup Ready soybean seed for his first crop of each growing season from a company associated with Monsanto and followed the terms of the licensing agreement. But to reduce costs for his riskier late-season planting, Bowman purchased soybeans intended for consumption from a grain elevator; planted them; treated the plants with glyphosate, killing all plants without the Roundup Ready trait; harvested the resulting soybeans that contained that trait; and saved some of these harvested seeds to use in his late-season planting the next season. After discovering this practice, Monsanto sued Bowman for patent infringement. Bowman raised the defense of patent exhaustion, which gives the purchaser of a patented article, or any subsequent owner, the right to use or resell that article. The District Court rejected Bowman's defense and the Federal Circuit affirmed.

invention. Under the doctrine, "the initial authorized sale of a patented item terminates all patent rights to that item." The doctrine, however, "restricts a patentee's rights only as to the particular article sold; it leaves untouched the patentee's ability to prevent a buyer from making new copies of the patented item." [62] It was thus held by the Court that the patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission, thereby interpreting the exhaustion of rights of the patent holder strictly to the authorisation outlined under the Agreement between the patent holder and the buyer.

Unlike the patents regime, the trademark law in the U.S. regarding exhaustion is very explicit. The trademark rights are protected after first sale by two sources of law.[63] At the federal level the Lanham Act 1946[64] bars entry into the U.S., items which shall 'copy' or 'stimulate' the name of any domestic manufacturer. Similarly Section 526 of the U.S. Tariff Act 1930 (hereinafter Tariff Act) prohibits importation into the U.S. of any goods bearing a registered trademark owned by the U.S. citizen or corporation, or a person domiciled in the U.S. These laws have construed a national exhaustion regime for trademarks and have been backed by adequate case laws also.

In *K-Mart Corp. v. Cartier Inc.*,[65] the U.S. Supreme Court weighed various possibilities relating to gray goods. It was held by the Court that imports manufactured by an independent manufacturer under the authorisation of the U.S. trademark holder will be banned.[66] Although under the custom regulations, these goods could not be stopped from entering the U.S., the Supreme Court struck down the regulations as being inconsistent with the language of Section 526 of the Tariff Act.[67] The court, however, did

---

[62] *Id.*

[63] Donnelly, *supra* note 59, at 450.

[64] The Lanham and Act of 1946, also known as the Trademark Act (15 U.S.C.A 1051), is a Federal Statute that regulates the use of trade marks in commercial activity.

[65] 486 U.S. 281 (1987).

[66] The situation typically arose where the U.S. entity owned the same mark in United States and other countries and licensed use of the mark to a foreign manufacturer in the foreign countries.

[67] For detailed discussion, *see* Donnelly, *supra* note 59. The different contexts in which gray goods arose were explored by the Court. The court eventually held that where the foreign entity is not under common control with the U.S. mark holder, sales by a licensee of the U.S. mark owner do not exhaust the U.S. rights under § 526. However the Supreme Court left considerable room for parallel trade to continue under § 526.

not bar importation of goods when the American and foreign trade mark holders were the same or affiliated entities.

As discussed before, the Lanham Act also recognises the limitation of movement of goods by allowing for concurrent registration of the mark by different owners in separate parts of the country.[68] It gives the owner of a registered trademark the cause of action against unauthorized use of the likeness of a trade mark in a manner which can cause confusion to the customer. The United States Federal Circuit Court explained in *Bourdeau Bros. v. Int'l Trade Comm'n:*[69]

> Gray Market theory recognises both the territorial boundaries of trademarks and a trademark owner's right to control the qualities or characteristics associated with a trademark in a certain territorial region. As such, the basic question in gray market cases . . . [is] whether there are differences between the foreign and domestic product and if so whether the differences are material.

The *Lever Brothers*[70] case stipulated that the Lanham Act[71] bars foreign goods bearing a trademark identical to the valid U.S trademark but physically different, regardless of the trademarks' genuine character abroad or affiliation between the producing firms. The court held that affiliation (which is limitation to the Tariff Act)[72] will not be applicable if the goods are physically and materially different. On appeal, the Appellate Court upheld the judgment of the District Court and upheld that the affiliate exception is inconsistent with Section 42 of the Lanham Act and cannot be enforced as against foreign goods which bear mark identical to valid U.S. mark but are materially and physically different.

---

[68] Verma, *supra* note 5, at 544.
[69] 444 F. 3d 1317 (Fed. Cir. 2006).
[70] Lever Brothers Co. v. United States, 981 F. 2d 1330 (D.C.Cir. 1993).
[71] Section 42 of the Lanham Act clearly accentuates the principle of territoriality prevalent in the US and lays down that as long as customers are aware that the gray goods are not in fact originating from the US manufacturer but are imported, parallel imports are allowed. On its face, the section appears to aim at deceit and consumer confusion; when identical trademark has acquired different meanings in different countries, one who imports the foreign version to sell it under that trademark will cause confusion. The Congress sought to avoid the same through Lanham Act.
[72] Affiliation between firms in no way reduces the probability of the confusion (which the Lanham Act seeks to avoid) neither is it a constructive consent. Therefore it cannot be treated as an exception.

It is clear from the above cases that the trademark law in the United States incorporates judicial clarifications into the statutory framework to deal with exhaustion and parallel imports. [73] After examining the EU and the U.S. regimes, it is now appropriate to examine the Indian regime for exhaustion which is still at its nascent stage of development. However even, in the brief period of its existence, it has been a subject of debate and scrutiny owing to the amendments which in turn enable parallel imports. The paper will now attempt to examine the same.

C. India

The contemporary debate in India's legal and policy circles has centred around the desirability of liberalising the parallel imports regime in the country,[74] accredited to the opening up of the Indian economy.

The terms "parallel imports" and "exhaustion" have not been expressly used in the Patents Act (1970), however, these terms find mention in the Statement of Objects and Reasons appended to the Patents (Second Amendment) Bill 1999, which became the Patents (Amendment) Act, 2002.[75] The first statutory provision on parallel imports was introduced by the Patents (Amendment) Act (2002).[76] Section 107A(b) of the Act allowed for product patents in India provided the importer is duly authorised by the patentee to sell or distribute the product. This required the foreign exporter to be authorised by the patentee to sell and distribute the product. The law was based on the consent of the patentee and thus had potential scope for restrictive interpretation.[77] Thus the Parliament was prompt enough to identify the lacuna in the 2002 Amendment Act inhibiting international exhaustion and thus effectuated an amendment by the Patents (Amendment) Act (2005) which changed the law relating to parallel

---

[73] Ryan, *supra* note 3, at 154.

[74] Arghya Sengupta, *Parallel Imports in the Pharmaceutical Sector*, 12 J. INTELL. PROP. RTS. 400 (Jul. 2007).

[75] According to the 'Statement of Objects and Reasons' appended to the Patents (Amendment) Act § 107A(b) (2002) was introduced to ensure availability of the 'patented' product to the Indian market at minimum international market price.

[76] Shamnad Basheer & Mrinalini Kochupillai, *Exhausting Patent Rights in India: Parallel Imports and TRIPS compliance*, 13 J. INTELL. PROP. RTS. 489 (Sept. 2008).

[77] Sengupta, *supra* note 74, at 406. The law in India was similar to the community exhaustion doctrine in Europe. However, exceptions like compulsory licensing are absent from the Indian law.

imports drastically.

The handicap of restrictive nature of the 'exhaustion' provision was improved by amending Section 107A(b) to provide that there would be no infringement if there has been "importation of patented products by a person from any person who is duly authorised under the law to produce and sell or distribute the product".[78] It is clear from this provision that the law was no longer premised on consent of the patentee.[79] Through the above provision, consent was removed as a factor to be considered before the exhaustion of rights of the patentee is deemed, thus forming a more liberalised international exhaustion regime which will make parallel imports easier.

It is true that the latest amendments to the Patent Act implement the principles of the exhaustion in their true spirit, but there have been criticisms that they considerably erode the exclusive right of the patentee that outlines the Section 48 of the Patent Act. Also it will take away the rationale for patent protection, i.e., just rewards for creative innovations to the inventor.[80] It is more pertinent in the case of pharmaceutical industry where firms are investing in Research and Development. The liberal parallel importation might help in making abundant supply of drugs available to the public, but will gradually impede long term research and development. Also any move which detrimentally affects the financial capabilities of the patentee (like freeing parallel importation in drugs) will also have an adverse impact on Research and Development. Thus, balancing of interests is the key to solve the problems here. Easy and cheap access of patented products should be balanced with rights to the innovators.

After analysing the provisions of patent law, the exhaustion of

[78] Basheer & Kochupillai, *supra* note 76, at 490. The Parliamentary debates and the official press release preceding the passage of the Act made it clear that Section 107A(b) was aimed at permitting parallel imports and endorsing the principle of international exhaustion.

[79] The Patents (Amendment) Act, Act no. 15 of 2005, does not define the terms "consent" or "duly authorized" and provides no express guidance as to how the terms may be construed. The Act does not impose any limitations and qualifications as to the circumstances under which consent or due authorization might be deemed to be given or state any requirement of any special relationship that governs the application of the doctrine, whether by reason of organized corporate structure or by contract.

[80] Sengupta, *supra* note 74, at 405.

trademark rights also needs a closer examination. The general rule is that once trademarked goods are released anywhere in the world by or with the consent of the trademark proprietor, that proprietor cannot assert its trademark rights to prevent import of such goods into India, provided that such goods remained materially unaltered.[81] Indian law is quite liberal in permitting parallel imports of genuine goods bearing registered trademarks, provided that such goods have not been materially and physically altered. Section 107 of the Trade Marks Act (1999) allows a person to represent a trademark as foreign registered and operates the same in India as long as it is sufficiently indicated, in English, that trademark is registered not in India but in a foreign country. Thus the option available to the trademark proprietors under Section 140 to request the Controller of Customs to prohibit imports of genuine gray goods is negated.[82] In addition to these, Section 30(3) providing for the principle of exhaustion outlines that where the goods bearing a registered trade mark are lawfully acquired, further sale or other dealings in such goods by the person or by a person claiming to represent him is not considered an infringement.[83] Given all these provisions, parallel imports can be legitimately restricted by right holders.

In the first ever case involving parallel imports and trademarks, *CISCO Technologies v. Shrikanth*,[84] the plaintiffs employed Section 29(6)(c) read with Section 140 as a defence and were successful in getting an *ex parte* order directing the custom authorities to notify all ports to bar imports of the defendants' goods and also appointing a local Commissioner to cease all goods bearing the mark in issue. This case shows that we follow the English rule of territoriality of trademarks to restrict parallel imports. In *Samsung Electronics Company Ltd. v. G Choudhary & anr*,[85] the Delhi High Court inspite of indicating a pro parallel import tendency, granted injunction to the plaintiff thereby preventing the defendant from importing Samsung products into India from China.

---

[81] Sonia Baldia, *Exhaustion and Parallel Imports in India, in* PARALLEL IMPORTS IN ASIA 163 (Christopher Heath ed., 2004).
[82] Jain, *supra* note 15, at 23.
[83] It adds that such goods would have been kept in the market under the mark by the proprietor or with his consent. Such goods may not have been materially altered or impaired after they were put on the market.
[84] 2005 (31) P.T.C. 538 (Del).
[85] 2006 (33) P.T.C. 425 (Del).

After 2007, in compliance with TRIPS, much attention has been paid to parallel imports in India. In a case on parallel imports in *Xerox Corporation and Another v. Puneet Suri and Others*,[86] Justice Sanjay Kishen Kaul of the Delhi High Court held that the defendants engaged in the import of (second hand) Xerox machines having proper documentation is permissible under the Trademarks Act, provided that "there is no change or impairment in the machine." The above case laws and provisions seem to be in line with the European model where lack of consent and legitimate reasons on the part of the trademark owner protected his rights and did not exhaust them.

V. International Exhaustion – is it Always Beneficial?

International exhaustion has been the cause of much debate.[87] The general argument behind the debate is that given the differences in prices of patented or branded articles on different national markets, developing countries might benefit from those differences importing articles from those countries where prices are lower. International exhaustion promotes free trade and promotes healthy competition. But there are problems like free-riding and quality concerns in case of patented and trademarked goods which need closer examination.

International exhaustion stems from two types of market discrimination, i.e., price and quality discrimination. Price discrimination results naturally from market segmentation. Tariffs, government regulations, manufacturing and distribution costs are different for different countries. These factors dictate differences in prices for the same product among countries.[88] Quality discrimination is also very common especially in case of trade marked goods. The products of the same brand correspond to different qualities. Generally the cost in developing countries is lower than developed countries due to the various economic factors. Thus international exhaustion and parallel imports are a natural consequence of price and quality discriminations in the market. Thus it has different implications for patented and trademarked product.

---

[86] C.S. (OS) No. 2285/2006 (Feb 20, 2007).

[87] The debate has been particularly acute in the context of pharmaceutical companies.

[88] Carvalho, *supra* note 6, at 69. In addition to this there are other factors also which determine prices. When patent and trademark owners have a relevant market share, they tend to fix the prices according to the consumers' purchasing power, which ultimately corresponds to an allocation of R&D and quality control costs proportionate to consumers'

A. Myth of Lower Prices

International exhaustion is believed to be the solution for problems of high prices for patented or branded articles, particularly in the public health sector. The idea that international exhaustion will trigger an endless flow of cheap pharmaceuticals to poor countries is completely false. If in exporting countries, there is no patent protection, there is no exhaustion. The patent owner can thus prevent the importation of those unpatented drugs into the countries where patent protection is valid and enforceable. And when there is patent (or trademark) protection, the patent owner, if threatened by the risk of losing the ability of setting higher prices in countries where consumers can pay more, can always either promote international harmonisation of prices or secure exclusive channels of distribution.[89] International harmonisation will obviously have an adverse affect on consumers in poor countries.

B. Free Riding

International exhaustion often raises serious issues of unfair competition and 'piggy-backing'. The term 'piggy-backing' refers to the attempt by the parallel importer to encash the goodwill fostered by the owner to sell his goods.[90] This is also referred to as free riding and leads to tarnishing of the brand image. Goods are manufactured for different markets in accordance with the geographical area, taste of the consumers and demands. Also, the corresponding guarantees and after sales maintenance services attached to the goods may be different for different regions.[91] Parallel importers free ride on a brand image created by the manufacturer and adversely affect it.

C. Research and Development

---

capacity to pay.

[89] CARVALHO, *supra* note 6, at 70.

[90] In *Colgate-Palmolive Ltd. v. Markwell Finance Ltd.,* [1989] R.P.C. 497, parallel importation of the goods of inferior quality was barred by the court on the grounds of offence to the reputation of the same mark for the same goods of higher quality sold in the developed country.

[91] Jain, *supra* note 15, at 16.

International exhaustion may severely impede research and development especially in case of pharmaceutical patents. Financial revenues of the pharmaceutical firms will be adversely affected since international exhaustion leads to sale of generic products without the consent of the patent holder. This will lead to a negative impact on incremental innovation. The long term interest in the sector especially in emerging economies like India will be seriously imperilled. This is because smaller pharmaceutical firms will be more interested in seizing the profitable arbitrage opportunities provided by easier parallel imports rather than invest in long term research and development. Therefore in the long run, excessive reliance on imports and generics will shackle domestic research and prove to be counter productive. [92]

D. Disruption of Marketing Strategies and Profits

A company's marketing strategy and overall performance can be adversely affected by parallel imports. Forecasting accuracy, pricing strategies, merchandising plans, and other marketing efforts can be disrupted by an unexpected expansion of gray market imports. Therefore the movement of gray goods needs to be anticipated when the firms develop their marketing strategies.[93]

The above implications show that unregulated form of international exhaustion can do more harm than good and disturb the delicate balance between the consumers and the IP owners even more.

VI. Suggestions Towards A More Regulated International Exhaustion Regime

A. Strategies to combat unrestricted parallel imports

International exhaustion is seen by some WTO members as a mechanism to prevent anti-competitive practices[94] and uphold the true spirit of its principle of free movement of goods. But it does jeopardise the rights

[92] Sengupta, *supra* note 74, at 406.
[93] S. Tamer Cavusgil & Ed Sikora, *How Multinationals Can Counter Gray Market Imports*, 23(4) Colum. J. World Bus. 75 (1988).
[94] It inhibits the manufacturers' ability to practice price discrimination.

of the IP owners and has some extreme consequences on the R&D capacity of the countries practising international exhaustion. Thus, there is a need to regulate parallel imports so that it can balance the interests of the consumers and IP owners alike.

B. Role of the State – Selective International Exhaustion

Selective International Exhaustion can be a hybrid of national and international exhaustion. In this type of exhaustion, certain class of products will be subjected to international exhaustion, while others would be subjected to national exhaustion. Parallel importation should be allowed if its purpose is to remedy anti-competitive practices or undue abuse of intellectual property rights that are taking place. International exhaustion can also be allowed if there is an urgent need in the domestic market.

It is the national government which is best placed to decide whether the IP owner is unduly misusing his rights and not attending to the demands of the public.[95] The government has a role to play as it can regulate and control parallel channels of distribution. Besides, the government would have a chance to verify whether patent or trademark owner was making serious efforts to supply to local national markets, through local exploitation or through imports, at reasonable prices and conditions.[96]

C. Role of the Companies

There is no doubt that parallel imports pose a threat to manufacturer's profitability as cheaper goods in the market provide for fierce competition. Often parallel import markets grow unexpectedly to levels that require immediate attention. As legal protection remains limited, non-legal preventive options should be explored by the companies, manufacturers and managers.

Companies could make an attempt to reduce price differentials between

---

[95] CARVALHO, *supra* note 6, at 74. It may not necessarily be always in case of compulsory licenses that the IP owner misuses his rights. The trademarks are not subject of compulsory licensing.

[96] *Id.*

[97] Irvine Clark & Margaret Owens, *Trademark Rights in Gray Markets*, 17(3) INT'L. MARKETING REV. 284 (2000). There are other strategies like developing unique trademarks

markets, thereby reducing the incentive to imports.[97] Many weaker and unaggressive dealers are prime targets in case of a booming parallel market economy. These dealers should be made aware of the dynamics of the parallel market economy.[98] Advertising strategy is an effective way to promote selected dealer strengths against the weaknesses of the gray goods. It helps in building doubt in the customers' minds about warranties and guarantees associated with the product especially branded products. Manufacturers could support this effort by sharing dealer's expenses.[99]

Participation of manufacturers in marketing of products is also an effective way to combat unregulated parallel markets. The manufacturer should educate his customers that his goods are from the authorized source and come through the authorized channel. In addition to this, marketers could also alert the consumers of the difficulties associated with parallel imports.[100]

Therefore, though IP owners may be under threat because of parallel importation, they still possess a broad range of strategic possibilities to curb the ill effects of the parallel economy. A combination of legal and non-legal response alternatives is the best way to tackle the problem of unregulated parallel imports.

VII. Conclusion

The doctrine of exhaustion of rights is the epitome of free movement of goods across the globe. It involves balancing of rights of the IP owner and general consumers. International exhaustion has its pros and cons. But if practiced in a regulated manner, it can be beneficial for the economic growth of the country. Necessary steps are required on the part of the government and countries to refrain from unregulated international exhaustion. Not only will it lead to shaking the foundations of intellectual

---

for each country but this will lead to more confusion as distinctiveness associated with a global trademark will be diluted considerably.

[98] *Id*. Other ways like telemarketing and direct mail are also effective ways to promote dealer strengths.

[99] Clark & Owens, *supra* note 97.

[100] Clark & Owens, *supra* note 97, at 284. Goods are manufactured in accordance with the local needs, geographical area, and general economic and other regulatory circumstances in the country.

property laws, but will also have a negative impact on uninformed consumers. Thus harmonisation of exhaustion standards at the international level and coordination between distribution channels at the domestic level is the need of the hour. Implementation of the aforementioned strategies by the government and the companies can go a long way in regulating the growth of parallel imports to indefinite levels.

"FREE PRIOR INFORMED CONSENT" AS A RIGHT OF INDIGENOUS PEOPLES

*Rashwet Shrinkhal**

This article delves into the principle of free prior informed consent (FPIC) and its position in international law. FPIC of indigenous peoples in decision making is a fairly contested notion though it has seen acceptance in international instruments. It argues that FPIC flows directly from the right to self-determination of indigenous peoples and also seeks to emphasise that FPIC should be understood in light of the capabilities of the community in order to render it meaningful.

I. INTRODUCTION

Indigenous peoples have, through continuous struggle, been successful to carve out space, as subjects, in international law. As a result, any decision affecting indigenous peoples needs to be endorsed by them. This is an important development especially in the situation of licensing development project at site inhibited by indigenous peoples. The whole process of seeking consent of indigenous peoples is referred to as free prior informed consent (hereinafter FPIC). FPIC is seen as a tool for indigenous autonomy but highly contested by states and extractive industries both in terms of meaning and its scope.

*Assistant Professor, Centre for Tribal and Customary Law, Central University of Jharkhand.

In this article, I attempt to explain the concept of FPIC and critically analyse its significance as a tool for indigenous autonomy and justice. The article is divided into four parts. Part I explains the relation between FPIC and self-determination. Part II explores the concept of FPIC. Part III focuses on contentious issues related with FPIC while trying to define its scope and limitation. Part IV tests the relevance of FPIC in the context of indigenous people's capacity to exercise it.

II. Free Prior Informed Consent And The Right To Self-determination

The genesis of 'Indigenous Peoples' rights, under international law, springs from their right to self-determination.[1] Self-determination for all peoples seems to have become the catchphrase of international human rights law.[2] Earlier, the right to self-determination in the context of European decolonization was primarily conceived as an instrument of ending the colonial relationship by conferring freedom.[3] Therefore, notwithstanding the provisions of the UN Charter [4] and common article 1 of the two international covenants,[5] its applicability to indigenous peoples was contested by states.[6] As a corollary, the states were reluctant to recognize indigenous groups as "peoples" but referredto them as "population".[7] However, with the adoption of the United Nations Declaration on Rights of

---

[1] Paul J. Magnarella, *The Evolving Rights of Self-Determination of Indigenous Peoples*, 14 St. Thomas L. Rev. 425, 433-437 (2001-2002); Bartolome Clavero, *The Indigenous Rights of Participation and International Development Policies*, 22 Ariz. J. Int'l. & Comp. L. 41 (2005).

[2] Mark Bennett, *Indignity as Self-Determination*, 4 Indigenous L. J. 71, 94 (2005).

[3] Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples Claims in International and Comparative Law*, 34 N.Y.U.J. Int'l. L. & Pol. 189, 220 (2001).

[4] Article 1 provides "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

[5] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http:// www2.ohchr.org/english/law/ccpr.htm [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, *available at* http://www2.ohchr.org/english/law/cescr.htm [hereinafter ICESCR].

[6] Erica-Irene A. Daes, *Some Consideration on the Right of Indigenous Peoples to Self-determination*, 3 Transnat'l. L. & Contemp. Probs. 1, 3 - 4 (1993).

[7] The logic behind such nomenclature might be to prevent indigenous people's claim over their right to self-determination as "peoples" under international law. *See* Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 Tulsa. J.

Indigenous Peoples,[8] the discourse on the right to self-determination seems to settle down in favour of indigenous peoples.[9]

In this context, noted scholar Magnarella states that "self-determination consists of those processes and structures through which a people gain and maintain control over their destinies".[10] Explaining the concept of autonomy, Gerald Dworkin interprets self-determination as a theory about human "internal, psychological freedom".[11] Therefore, self-determination in a philosophical sense refers to the ability of a person to exercise liberty within justifiable limits that include the welfare and interests of a person.[12] In this regard the UNDRIP proclaims that "indigenous peoples have the right to participate in decision making in the matters which would affect their rights".[13]

FPIC appears to be a decisive factor in determining the future course of development projects based on the indigenous people's lands. It is in this sense that FPIC is often claimed as a 'social licence'[14] for such projects.

COMP. & INT'L. L. 129, 147-148 (1999-2000); Sharon O' Brien, *Tribes and Indians: With Whom Does the Unites States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1990-1991).

[8] United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, G.A. Res. 61/25, U.N. Doc. A/RES/61/295 (2007), 46 I.L.M. 1013 (2007) [hereinafter UNDRIP].

[9] Article 3 of the UNDRIP provides that "Indigenous Peoples have right to self-determination by virtue of that right they are freely determine their political status and freely pursue their economic, social and cultural development". However, Art. 46 of UNDRIP categorically lays down that "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of United Nations or construed as authorizing or encouraging any action which would dismember or, impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."

[10] Magneralla, *supra* note 1, at 433.

[11] MARINA OSHANA, PERSONAL AUTHONOMY IN SOCIETY 32 (2006).

[12] G. Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 107 (R.A. Wassserstrom ed. 1971) *cited in* Michael J. Bryant, *Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law,* 56 SASK. L. REV. 267, 271 (1992). The definition provided by Special Rapporteur of the Working Group on Indigenous Populations regarding right to indigenous self-determination is reflective enough of its broad horizon: "[self-determination] constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create a specific content of this principle, in both its internal and external expressions….This right may in fact be expressed in various form of autonomy within the State." J.M Cobo, *Study of the Problems of Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7 /Add.4 (1987).

[13] UNDRIP, *supra* note 8, at art. 18.

[14] Liebenthal *et al*., *Extractive Industries and Sustainable Development: An Evaluation of World Bank Group Experience* 50 (2003), *available at* http://ieg.worldbank.org/Data/reports/extractive_industries_evaluation_overview.pdf.

III. UNDERSTANDING THE CONCEPT OF FPIC

The concept of FPIC is similar to that of 'consent' in contract law and 'informed consent' in medical ethics. Consent plays a significant role in the law of contract. It justifies the autonomy[15] of contractual obligation and is a condition precedent for the creation of contractual obligation.[16] In the same way FPIC is the consent of indigenous peoples, for developmental projects based on their lands, in accordance with their customary laws and practices.[17] In this context Pufendorf explains in his classic work *De Jure Nature et Gentium* that consent must be an act of reason accompanied by due deliberation, the mind weighing, good and evil on each side.[18] This implies that the indigenous peoples should be informed[19] about the consequences[20] of their consent. Indigenous peoples must have adequate information related to the developmental projects so that they can make an informed decision.[21] In this regard, the Convention on Biological Diversity's *Ad Hoc* Inter-Sessional Working Group on Article 8(j) and Related Provisions states that the following list of information must be disclosed as part of the FPIC process:

---

[15] Autonomy is generally defined as "the ability of individual to be self-determining, to make choices according to their own views, and to determine for herself what is good". S*ee* RUTH R. FADEN *et al.*, A HISTORY AND THEORY OF INFORMED CONSENT 7-9 (1986) *cited in* Daniel P. Sulmasy, *Informed Consent Without Autonomy*, 30 FORDHAM URB. L.J. 207, 208 (2002-2003).

[16] Prince Saprai, *In Defence of Consent in Contract Law*, 18 K.L.J. 361, 370 (2007); Read v. Croydon Corporation, [1938] 4 All E.R. 631; Norweb plc v. Dixon, [1995] 1 W.L.R. 636.

[17] Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y. 43, 49 (2004).

[18] W. G. H. Cook, *Mental Deficiency and the English Law of Contract,* 21(5) COLUM. L. REV. 424 (1921).

[19] The word "informed" was appended to "consent" in landmark case of Salgo v. Leland Stanford Jr. University Board of Trustees, 317 P. 2d 170 (1957). The concept of "informed consent" in medical ethics was based upon individual autonomy and the same was verbalized by Benjamin Cardozo. He stated that "Every human being of adult years and sound mind has right to determine what shall be done with his own body; and a surgeon who performs an operations without his patient's consent commits an assault….". *See* Schloendroff v. Society of New York Hospital, 211 N.Y. 215 (1914).

[20] Major consequences include loss of lands and livelihoods, the weakening of the framework of their societies, cultural loss, fragmentation of political institutions, and breakdown of identity and violation of human rights. *See* Joji Carino, *Indigenous Peoples Rights to Free, Prior, Informed, Consent: Reflection on the Concept and Practise*, 22 ARIZ. J. INT'L. & COMP. L. 19, 21 (2005).

[21] Derek Krofat, *Informed Consent: A Comparative Analysis*, 6 J. INT'L. L. & PRAC. 457, 459 (1997).

- The nature, size, and scope of the proposed development or activity;
- The duration of the development (including the construction phase) or the activity;
- The locality of the areas that will be affected;
- A preliminary assessment of the likely impact of development;
- The reason/purpose for the development;
- Personnel likely to be involved in both construction and operational phase (including local people, research institutes, sponsors, commercial interests, and partners as possible third parties and beneficiaries) of the development processes;
- Specific procedures the development or activity would entail;
- Potential risk involved (e.g., entry into sacred areas, environmental pollution, partial or full destruction of significant site, disturbance of a breeding ground);
- The full implication that can reasonably be foreseen (e.g., commercial, economic, environmental, cultural);
- Conditions for third party involvement.[22]

The consent must be *free*[23] in order to gestate it into a contract and this element of *freedom* is a pre-condition for a valid contract.[24] Consent is said to be free when it is devoid of certain interfering circumstances.[25] Such interfering circumstances impair the process of obtaining consent which may lead to the frustration of contract.[26] In cases of FPIC, the stakes involved are higher than mere commercial interest. Therefore, in the interest of justice and dignity of the indigenous peoples any interfering circumstances should invalidate the consent *in toto*.

---

[22] *Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*. UNEP/CBD/WG8J/2/6/Add.1, 27 paras. 14-5 (2001) *cited in* MacKay, *supra* note 17, at 56.

[23] A person acts freely, observes Nozick, when "no other's motives or intentions are as closely connected to ...[his]...act" as his own, regardless of the pressure under which that person acts. *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 49 (1981).

[24] Saprai, *supra* note 16, at 370.

[25] Section 14 of the Indian Contract Act, 1876 provides that consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

[26] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duressand Epilogue on Lesion*, 50 LA. L. REV. 1, 6 (1989-1990).

IV. FPIC AND THE RIGHT TO VETO

There are certain questions, related to FPIC and indigenous peoples, which are often difficult to answer and continue to provoke debate.[27] One such question is whether it is possible for FPIC to act as a veto power in the hands of indigenous peoples on developmental projects and whether it extends to solitary veto. The process of adoption of the UNDRIP was evidence to this debate.[28] In 2001, the Report of the Workshop on Indigenous Peoples, Private Sector, Natural Resource, Energy and Mining Companies and Human Rights noted that indigenous peoples as land and resource owners have the right to say "no" to proposed development projects at any point during negotiation with governments and/or extractive industries.[29] Further, in 2005, the United Nations Permanent Forum on Indigenous Issues (UNPFII) conducted an international workshop, identifying the elements of a common understanding of FPIC and indigenous peoples and promoting better methodologies regarding FPIC and indigenous peoples. The workshop concluded, inter alia, that the process of FPIC may include the option of withholding the consent.[30]

However, in 2006, Australia, New Zealand and the United Stated issued a collective statement at the UNPFII refuting the idea of "common

---

[27] Carino, *supra note* 20, at 25.

[28] The UNDRIP was adopted by the UN General Assembly on 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Columbia, Georgia, Kenya, Nigeria, Russian Federation, Samao and Ukraine). *See supra* note 8. The summary of voting in United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, UNITED NATIONS BIBLIOGRAPHICAL INFORMATION SYSTEM (August, 8, 2014), http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295. A non-paper on behalf of permanent mission of Australia, Canada, New Zealand, the United States along with Russia, Surinam, Columbia and Guyana reflects the concerns of FPIC being used as a veto power by indigenous people: "The text currently includes an unqualified right of free, prior and informed consent of indigenous peoples on all matters that may affect them, which implies that indigenous people may exercise a right of veto over all matters of the state including the laws and reasonable administrative measures democratically enacted by the states". *See Non-Paper on United Nations Declaration on Rights of Indigenous Peoples: Summary of Key Areas of Concern*, DOCUMENTATION AND INFORMATION CENTER (July 23, 2007), http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH0197.dir/nonpaper-areaconcern_1.pdf.

[29] *Report of the Workshop on Indigenous Peoples, Private Sector, Natural Resource, Energy and Mining Companies and Human Rights*, UN Doc. E/CN.4/Sub.2/AC.4/2002/3, para 52.

[30] *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples,* UN Doc. E/C.19/2005/3, para 47.

understanding of FPIC" achieved at the workshop. Peter Vaughan speaking on behalf of these countries said that:

> [T]hat there are widely different views about the content and application of any such principle amongst states and indigenous peoples, and discussions about it at other international forums (such as WIPO and the CBD) are still ongoing. It is therefore premature to refer to the conclusions of the workshop as reflecting "a common understanding of free, prior informed consent", as stated in the report.[31]

Further, the idea of FPIC as an absolute right of indigenous peoples was rejected. He expressed that:

> [T]he recommendations of the workshop are expressed in non-mandatory language and recognizes that the consent process "may include the option of withholding the consent", rather than "must".... it is our firm position that there can be no absolute right of free, prior informed consent that is applicable unequally to indigenous peoples....in fact to extend such an overriding right to a specific subset of the national populace would be potentially discriminatory.[32]

However, it is argued that the pillars of any such argument are based on a wrong notion of equality.[33] Such a notion of equality shall breed more inequalities.[34] For equality to be reduced as a statement of justice,[35] it is necessary to give indigenous peoples their "dues".[36] For determination of "dues" in favour of indigenous peoples, following factors must be taken into

---

[31] Statement to the Permanent Forum on Indigenous Issues Regarding the Declaration on the Rights of Indigenous Peoples, (May 22, 2006) *available at* http://www.austlii.edu.au/au/journals/AILR/2006/41.txt/cgi-bin/download.cgi/download/au/journals/AILR/2006/41.pdf.

[32] *Id*.

[33] Diana Majury observed "While equality is place from which stereotypes and prejudices can be challenged, it is at the same time a place where stereotypes and prejudices can be reinforced and perpetuated". D. Majury, *Equality in Post Modern Time*, *in* CANADIAN CONSTITUTIONAL DELIMMAS REVISITED 45 (D. Magnusson & D. Soberman eds.,1997).

[34] Claire L' Heureux-Dube, *The Search for Equality: A Human Rights Issue*, 25 QUEEN'S L.J. 401, 403 (1999-2000).

[35] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 556-557 (1981-1982).

[36] Westen argues that in order to equate equality as justice, "consider first idea of justice:

account:

- Long history of their perpetual exploitation;
- Robbing of their identities, forced assimilation and stolen generations;
- Being victims of slavery, apartheid, war and conflict at the hands of non-indigenous peoples and States;
- The plundering and privatization of their traditional knowledge;
- Commitment to preserve their culture against all odds.

The point I want to make is that there is a need to understand the difference between formal equality and substantive equality. Arguing a case for substantive equality, Kelly Lopert aptly points out that:

> If evaluated according to a formal equality theory, special measures that constitute differential treatment based on racial classification could appear to contravene the equality principle. The ICERD's qualification of the definition of discrimination clarifies; however, that race based differentiation complying with special measure criteria is not discriminatory. In other words differential treatment is not the same as "discrimination".... because of the difference in power relation between groups, special measures targeted at the disadvantaged community are actually designed to "equalize" rather than raise one group above another.[37]

(I) To "give persons their dues" entails treatment they deserve;
(II) To give persons the treatment they deserve entails treating them according to moral rules;
(III) To treat persons in accord with moral rules entails: (a) determining whether they posses those criteria determined to be morally significant by the rules; and (b) according those who possess the criteria the treatment prescribed by the rules, while not according such treatment to those who do not possess the criteria;
(IV) To accord those who possess the criteria the treatment prescribed by the rules, while not according that treatment to those who do not possess the criteria, entails treating alike those who are alike in the morally significant respect while treating unalike those who are unalike in the morally significant respect; and
(V) To treat alike those who are alike in the morally significant respects while treating unalike those who are unalike in the morally significant respect entails "treating likes alike" and "treating unlikes unalike"
In short, to say that "every persons should be given his due" means " persons who are unalike should be treated unalike." *Id.*

[37] Kelly Lopert, *Substantive Equality in International Human Rights Law and its Relevance*

There is, however, a soft spot in the ICERD with respect to the 'special measures' clause. The proviso attached to Art. 1(4) of the ICERD put limits on the benefits of 'special measures' for indefinite period. Hence,[38] the 'special measures' clause falls short of the goal of protecting indigenous rights in a strong manner. One must keep in mind that shortcomings of legal provisions cannot become ground for rejection of what is 'due' to indigenous peoples. In this context, the remark of Thornberry is relevant as he argues that "[l]imited concession in the definition of discrimination in favour of disadvantaged groups should not be idealized into a substitute for the protection of minorities, which is a wider notion."[39]

It must be borne in mind that the qualification appended with the 'special measures' clause was done with the aim of preventing segregation of communities on racial lines. This must be distinguished from rights accepted and recognized by the international community to secure the identity of groups such as minorities and indigenous peoples.[40] Thus, in the light of the above discussion, it can be said that indigenous peoples have a right to say "no" to the proposed development project.

But the other part of the question, whether the right to FPIC extend to solitary veto is quite ambiguous and difficult to answer directly. The answer to such a question will depend upon the premises of self-determination

---

for the Resolution of Tibetan Autonomy Claims, 37 N.C. J. INT'L. L. & COM. REG. 1, 17 (2011-2012). Art.1(4) of International Convention on the Elimination of All Forms of Racial Discrimination provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*, provided, however, such measures do not, as a consequence, lead to the maintenance, of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination, Dec 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

[38] *Id.*

[39] PATRICK THORNBERRY, 266 INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991) *cited in* Lopert, *supra* note 37, at 18.

[40] U.N. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and the Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009).

taken as an individual right or a group right.[41] There seems to be a general understanding in international law that self-determination[42] is a collective right. Therefore, an individual might not have reparation for violation of right to self-determination. Let us assume a situation in which the question of solitary veto, in case of right to FPIC, may emerge wherein an entire community has given consent to a development project but one individual or a family unit refuses to part with their land. In such a situation it may be justified to overlook the interest of the individual, not with intention to undermine his concern, but to underline the interest of the state. Moreover, the unique culture of indigenous society which forms the basis of separate rights cannot stand on an individual's shoulder as culture is a group product.

On the other hand there is a possibility of another situation, for example in a country like India, wherein the law provides that an area could be acquired by the government, if eighty percent of the project affected people give their consent.[43] In a densely populated nation, it is highly probable that twenty percent constitutes a large population marginalised by State apathy. Consequently, they can be accorded with minority status and their right to culture shall not be infringed.

V. FPIC: Is Justice Done?

FPIC as a concept may appear to be, at first sight, an empowering instrument in the hand of indigenous peoples.[44] But for an optimum use of an instrument, its holder must possess necessary skills. Otherwise the instrument will have little practical relevance. Similarly, FPIC involves a

---

[41] Human Rights Committee, *General Comment No. 23: The Rights of Minorities*, U.N. Doc. HRI/GEN/1/Rev.1 (March 4, 1994).

[42] Mimak Tribal Society v. Canada, U.N. Doc. CCPR/C/43/D/205/1986 (1991), *cited in* Paul H. Brietzke, *Self-Determination, Or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 Wis. Int'l. L.J. 69, 78 (1995-1996).

[43] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (2013).

[44] Szasz observes that "contract ...is a process by which men shape their own destiny, weave their self interest into the fabric of society. Individual decision-making begins the process, individual decision making begins the process, individual decision making brings the authority of the State into the contract, and individual decision making can end the contract by mutual agreement. Contract and autonomy are inseparable. When the right to contract is severed from the individual, so is a large part of his humanity", *See* George Alexander & Thomas S. Szasz, *From Contract to Stratus Via Psychiatry*, 13 Santa Clara L. 537-538, *cited in* Peter G. Stillman, *Szasz on Contract, Liberty and Autonomy*, 42 (1) Am. J. Econ.

contract making process which requires necessary legal capacity.[45] Capacity, as generally understood, means the power to make decision which requires certain standard of cognitive functioning of brain.[46] Since indigenous peoples are, due to their unique lifestyle, not tutored in modern education, it is likely that they are also unable to understand socio, political and financial implications attached to a development project. This in turn, may adversely affect their decision making process.

Thus, the whole object of FPIC shall be thwarted if indigenous peoples are not made capable of understanding the nitty-gritties of the contract law. Eminent scholar Prof. Sen argues that capability approach aims at assessing people's well being and their positioning in society in terms of certain basic capabilities to achieve valuable functioning.[47] Contextualizing the argument in relation to FPIC, the consent of indigenous peoples can be equated as valuable functioning and control over one's environment as capability.[48] Hence to uphold sense of justice,[49] by which I mean realization of capacity of self government, as conceptualized by philosophers like Rousseau[50] and Kant,[51] it is the duty of the state to educate tribal peoples in

---

SOCIOL. 93, 94 (Jan. 1983).

[45] H.F.B, *Contract of Minors*, 2 CAPE L.J. 229 (1885).

[46] Michel Silberfeld, Derek Stevens, Susan Leiff, David Checkland, and Kevin Medigan, *Legal Standards and the Threshold of Competence*, 14 ADVOC. Q. 482, 483 (1992-1993).

[47] JOHN M. ALEXANDER, CAPABILITIES AND SOCIAL JUSTICE: THE POLITICAL PHILOSOPHY OF AMARTYA SEN AND MARTHA NUSSBAUM 54 (2008); FLAVIO COMIM, MOZAFFAR QIZILBASH & SABINA ALKIRE (ed.), THE CAPABILITY APPROACH: CONCEPTS, MEASURES AND APPLICATION 53-62 (2008); AMARTYA SEN, THE IDEA OF JUSTICE (2009); Stephanie Malon, *Amartya Sen's The Ideal of Justice: A Jurisprudence of Generosity?*, 34 AUSTL. FEMINIST L.J. 115, 121-123 (2011).

[48] Martha Nussabaum identified ten potential human capabilities, namely (a) Life, (b) Bodily Health, (c) Bodily Integrity, (d) Senses, Imagination and Thoughts, (e) Emotions, (f) Practical Reason, (g) Affiliation, (h) Other Species, (i) Play and (f) Control over one's Environment. Control over One's Environment has two components i.e. "A. Political: Being able to participate effectively in political choices that govern one's life; having the right of political participation and protection of free speech and association. B. Material: Being able to hold property (both land movable goods), and having property rights on equal basis with others". *See* Martha Nussabaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23 - 24 (2007); Robin West, *Human Capabilities and Human Authorities*: *A Comment on Martha Nussbaum's Women and Human Development*, 15 ST. THOMAS L. REV. 757 (2002-2003); Martha Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT'L. LAB. REV. 227 (1999); Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997-1998).

[49] Markus Dirk Dubber, *Making Sense of the Sense of Justice*, 53 BUFF. L. REV. 815, 826-827 (2005-2006).

[50] JAMES MACKINNON, THE GROWTH AND DECLINE OF THE FRENCH 740-741 (1902); THOMAS HILL GREEN, LECTURES ON PRINCIPLES OF OBLIGATION 82-84 (1927). Rousseau

issues critical to understanding of contract negotiation process.

VI. Conclusion

FPIC as a matter of right for indigenous peoples is a substantial achievement in the discourse of indigenous rights movement. However, having right is one thing and the capability to exercise it is a different ball game altogether. Providing FPIC to indigenous peoples without ensuring the conducive atmosphere along with inculcation of contractual cognitive ability in indigenous peoples is just like ensuring a child's entitlement to a library but the child is not able to read or write.

---

observes "we might add to the acquisitions of the civil state, moral freedom, which alone renders truly master of himself; for the impulse of mere appetite is slavery, while obedience to self prescribed law is freedom." *See* Jean-Jacques Rousseau, Discourse On Inequality (1754) *cited in* Westel Woodbury Willouhby, The Ethical Basis Of Authority 206 (1930).

[51] For Kant, categorical imperative is the base of morality which is the law of free will or 'autonomy'. *See* Christine M. Korsgaard, *Self Constitution in the Ethics of Plato and Kant*, 3(1) J. Ethics 1, 11 (1999); Kim Treiger-Bar-Am, *In Defence of Autonomy: An Ethic of Care*, 3 N.Y.U. J. L. & Liberty 548, 564-567 (2008); Nicholas Onuf, *Towards a Kantian*

EDUCATING LAWYERS FOR GENDER JUSTICE AND RACIAL EQUALITY: SETTING AN AGENDA FOR AUDIT AND ACTION

*Omoyemen Lucia Odigie- Emmanuel**

This article takes as its central puzzle the continued prevalence of gender and racial discrimination and inequality despite a long history of efforts, both domestic and international, to combat such forms of injustice. It argues that this phenomenon is explained by the fact that such inequalities arise due to stereotypes and learned values that are deeply entrenched within individual psyche through a process of socialization from childhood onwards. Laws, however well-intentioned and transformative in nature, have to be administered by persons who are embedded within the social constructs and stereotypes that give rise to the inequality in the first place.Therefore, in order to harness law's transformative potential and thus to combat social injustices, legal education has to be oriented towards value education that is predicated upon principles of equality and non-discrimination. The article explores potential components and possible trajectories of a justice-oriented legal pedagogy.

* Lecturer, Nigerian Law School.

I. INTRODUCTION

Despite a long history of international frameworks for promoting equality, non-discrimination and gender justice, issues of gender and racial inequalities, discrimination and injustices abound globally. Gender and racial inequality are shaped by stereotypes (the mental picture, image, opinion, attitude, judgment and belief that people have of men, women and people of other races which forms the basis of their bias) and learned values. These inequalities are evident in high rates of gender based violence,[1] discriminatory attitude towards female victims and persons of other racial origin, absence of gender perspectives in curriculum development and legal training, acceptance of gender and racial bias, hate crimes, and discriminatory socio-cultural patterns which persist because of lack attention to their root cause: the underlying stereotypes.

Law has been recognized as a means of controlling gender and racial discriminations and promoting a just outcome. Several international and domestic legal instruments have emerged that aim to change social attitudes by specifying socially unacceptable attitudes.[2] However, issues of gender and racial discrimination still persist because the successful and impactful interpretation and application of even the most specific gender and racial sensitive instrument depends on actors at all stages of the justice system including lawyers and judicial officers. In sum, gender stereotypes and learned values shape not just relations between men and women but also responses to issues of gender and racial bias, discrimination and inequalities.

---

[1] Gender based violence is different from other types of violence because it is rooted in prescribed behaviours, norms and attitudes based upon gender and sexuality. It is rooted in the construction of masculinity and femininity and how men and women are positioned *vis-a-vis* one another and other groups of men and women. These gender discourses allow for and encourage violent behavior within a context of assumed privileged and hierarchal power of certain groups of men. A World Health Organization study of 24,000 women in 10 countries found that the prevalence of violence by a partner varied from 15 percent in urban Japan to 71 percent in rural Ethiopia, with most areas being in the 30–60 percent range. WORLD HEALTH ORGANIZATION, MULTI COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN (2005). *See also* UNICEF Innocenti Research Centre, *Domestic Violence Against Women and Girls*, 6 INNOCENTI DIGEST (2000), *available at* http://www.unicef-irc.org/publications/pdf/digest6e.pdf (describing the prevalence and causes of domestic violence across the globe).

[2] *See, e.g., infra* note 27.

In view of the fact that values and perceptions relating to gender and race are dynamic, the role of law schools in educating lawyers regarding gender and racial sensitivity, non-discrimination and equality cannot be overemphasized. Legal education can be an effective tool for driving social change. Law schools can drive social change by integrating a gender and race perspective into legal education (curriculum, teaching and clinics) and promoting gender equality and non-discrimination as value components in every learning outcome.

This article explores strategies for teaching and integrating gender equality and non-discrimination values in school curriculum, learning in the classroom and law clinic, and in offering legal services. In particular, this paper seeks to stimulate the desire for self audit to enable articulation of the nature of gender and racial issues and their root causes, that arise in legal education and the justice sector; provide suggestive gender and race topics to be included in a clinical legal education program aimed at promoting gender equality and non discrimination; explore how gender and racial justice outcomes can be integrated as value components in law school curriculum and pedagogy; and advocate for the application of a practice based methodology and exercises for use by law schools in educating lawyers for equality, non-discrimination and gender justice.

Part II of the paper clarifies the conception of gender equality upon which the argument of the paper is based. Part III explores why mainstreaming gender into legal education is crucial for realizing the potential of law to promote just outcomes. Part IV and V discuss the role of law schools and the pedagogical tools available to make equality based value education a central feature of legal education. Part VI, the concluding segment, sets out an agenda for action.

II. Conceptual Clarifications

The concept of gender equality has been approached from different perspectives by writers and researchers. The approach to framing the gender equality and non discrimination problem, intervention strategy and vision for change has been influenced by their interpretation and standpoint. Three interesting schools of thought are worthy of note. The first school of thought, linked to the liberal tradition of feminism, sets a

vision of equality as sameness and advocates for equal opportunities and inclusion,[3] the second aims for gender mainstreaming as a strategy to reverse and transform established norms or stereotypes influencing and determining what is considered male or female,[4] while the third approach focuses on providing "…the theoretical and methodological framework for studying …diversity with the concept of gender equality through an in-depth analysis of the different dimensions of a policy discourse... ."[5] Verloo and Lambardo, for example, drawing from the theoretical notion of several social movement theorists,[6] adopt a critical frame analysis which starts from the assumption of multiple interpretations of gender equality and focuses on different representations about the problem of gender equality and solutions to the same.

This paper aligns itself with the second school of thought. It flows from the recognition that the underlying causes of gender and racial discrimination and their evidences are similar in developed and developing countries. There is a need to focus on how to address the root cause of gender equality instead of dealing only with its manifestations and their interpretations. The first approach mentioned above focuses on dealing with the physical manifestations of gender and racial discrimination and inequality without emphasis on changing the root causes, which was also the major basis of criticism of the Women in Development (WID) approach and the move towards the Gender in Development Approach (GAD).[7] The

[3] Mieke Verloo & Emanuela Lombardo, *Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach, in* MULTIPLE MEANINGS OF GENDER EQUALITY: A CRITICAL FRAME ANALYSIS OF GENDER POLICIES IN EUROPE (M. Verloo ed., 2007).

[4] TERESA REES, MAINSTREAMING EQUALITY IN THE EUROPEAN UNION: EDUCATION, TRAINING AND LABOUR MARKET POLICIES (1998); SYLVIA WALBY, THEORIZING PATRIARCHY (1990).

[5] Mieke Verloo & Emanuela Lombardo, *supra* note 3.

[6] David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, *in* FROM STRUCTURE TO ACTION: SOCIAL MOVEMENT PARTICIPATION ACROSS CULTURES (Bert Klandermans, Hanspeter Kriesi, & Sidney Tarrow eds., 1988); Snow *et al.*, *Frame Alignment Processes, Micromobilization, and Movement Participation,* 51 AM. SOC. REV. 464, 481 (1986); SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (1998); CAROL LEE BACCHI, WOMEN, POLICY AND POLITICS: THE CONSTRUCTION OF POLICY PROBLEMS (1999); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1984); SYLVIA WALBY, THEORIZING PATRIARCHY (1990); SYLVIA WALBY, GENDER TRANSFORMATIONS (1997); M. Verloo & C. Roggeband, *Gender Impact Assessment: The Development of a New Instrument in the Netherlands,*14 IMPACT ASSESSMENT (1996); RAEWYN CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS (1987).

focus of the third school of thought, commendable for its recognition of the role of marginalized people, lays too much emphasis on theoretical interpretations and representations of gender equality and their impact on gender equality policies without addressing the impact of underling stereotypes.

Also very interesting, instructive and worthy of note is the position of the Inter-American Court of Human Rights. In the case of *Karen Atala and Daughters v. Chile*,[8] the Inter-American Court of Human Rights highlighted two interesting aspects of the concept of the right to equality and non-discrimination, one relating to the prohibition of any "arbitrary difference in treatment (distinction, exclusion, restriction, or preference)," and the other as regards the obligation to create "conditions of real equality for groups that have historically been excluded and are at greater risk of suffering discrimination."[9]

The importance of articulating these two aspects is that they enable an understanding that gender equality does not always imply same treatment but focuses on real equality of outcome. To quote Nyamu-Musembi,

> Gender justice is about more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and equal; and it means 'a place in which women and men can be treated as fully human'. Moreover, it implies moving away from arbitrary to well-reasoned, justifiable and balanced—that is, fair—social relations.[10]

---

[7] Women in Development Approach (WID) recognizes that development has failed to improve the lives of women. Its approach to seeking gender equity is a focus on women specific programmes, policies and actions to compensate for inequalities. The GAD Approach emerged from socialist and feminist critiques of WID's focus on the relationship between men and women. The GAD Approach has been well articulated in terms of political, economic, and social relationships but not much in legal terms. This creates a huge problem because other spheres are dependent and intertwined with legal issues.

[8] Karen Atala and Daughters v. Chile, Report No.139/09, Case 12.502, ¶80, Inter American Court of Human Rights, (2010).

[9] *Id.*

[10] Nyamu-Musembi Celestine, *Addressing Formal and Substantive Citizenship: Gender Justice in Sub-Saharan Africa, in* GENDER JUSTICE, CITIZENSHIP AND DEVELOPMENT (Maitrayee Mukhopadhyay & Navsharan Singh eds., 2007).

Teaching for gender/racial equality, non-discrimination and justice therefore imposes upon educators the responsibility of making students appreciate the scope of equality and non discrimination, but not only as understood in *their* societies since these notions are shaped by prevailing values. Instead, these concepts should be appreciated against the background of international recommendations and judicial interpretations. The students' main learning outcome should be equality and equity. In this paper, the issue of gender/racial justice is about questioning the relationship between men and women which results in inequalities, and using legal education as a platform for intervention for changing the unconscious gender and racial biases and stereotypes resulting in discrimination. At the same time such transformative legal education also builds in students a value for real equality and non-discrimination with the outcome of creating change in the justice sector and in society at large.

III. Why Mainstream Gender in Legal Education and the Justice Sector?

Underlying every act of gender bias in the legal sector and at different stages of the justice system is a gender stereotype that influences perception, choice and action. Several studies have shown the existence of gender bias in the justice system. Nwanze opines that "bias is an attitude of leaning towards one side in an issue without legitimate evidence that justified such a course in a situation in which the actor is duty bound to remain impartial in his actions or decision on it as it affects all sides of the contest."[11] Further, the Judicial Council of California Advisory Committee on Gender Bias in the Courts defines gender bias as

> [B]ehavior or decision making of participants in the justice system that is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perception of their relative worth; or (3) myths and misconception about the social and economic realities encountered by both sexes.[12]

---

[11] O. Nwanze, Jurisprudence of Judicial Decision 166-167 (2009).

[12] Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in California Courts 27 (1996).

This implies that the values a person holds, shapes their perspective of justice and determines their intervention to stop injustices. The process of engendering begins from childhood. From childhood every boy and girl is influenced by gender bias inherent in communication and their environment (action of the caregiver and other people around them). In a research analyzing the effect of gender stereotype on language and communication, it was found that "at birth, we are linguistic clean slates—we will learn whatever language is spoken to us. We also learn more subtle rules about how and when to communicate."[13] Further, Abiodun articulated this more succinctly when he stated thus:

> As a child grows, he is socialized to fit into…societal expectations. This results into the categorization of roles, activities, responsibilities, and careers suitable for female or male. Thus, gender permeates every human endeavour. Indeed, it has led to what is described as stereotyping. Gender stereotyping refers to a collection of commonly held beliefs or opinions about behaviours and activities considered by society as appropriate for male and female.[14]

The impact of gender construction on legal writing and documentation has also been articulated by several researchers. Leslie Rose in *Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, claims that the language used in writing legal documents in most jurisdiction is male specific, using male pronouns, and teaches students that "male is the norm even in the world of law."[15] She opines that "the members of the Supreme Court should avoid the use of gendered generics because such language communicates subtle sexism, distracts the reader, and creates ambiguity."[16] The study also revealed that gendered generics can

---

[13] LEARNING SEED, GENDER AND COMMUNICATION (2009), (Nov. 2, 2013) www.focusintl.com/GD137-%20Gender_and_communication_guide.pdf.

[14] Alade Ibiwumi Abiodun, *Gender Stereotyping and Empowerment in Nigeria Society: Implications for Women Repositioning in Curriculum Delivery,* 1 AFR. REV. LALIGENS 32 (2012).

[15] Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?,* 17 DUKE J. GENDER L. & POL. 81 (2010).

[16] *Id.* Rose's analysis of the Court's use of gender-neutral language in 2006, 2007, and 2008 revealed that gender neutral language was used consistently by one justice; four justices consistently use generic male pronouns while others used language in between.

have a psychological impact on women and reinforce traditional gender stereotypes.

Gender bias, like any form of bias, is an impediment and a threat to justice and its dispensation. Evidence of gender bias in courts include "double victimization, negative attitude towards female victims, gender insensitive rules and procedures, trivializing gender crimes, gender stereotypes affecting court actions, legal discrimination, under-representation of women and sexist treatment of women in Court."[17] Further, scholars have recognized that, "another hurdle and pitfall that … beset and/or impede proper judicial comportment is the inability of a Judge to rise above passion, popular clamour and the politics of the moment."[18]

Gender bias in our legal system is dangerous because it is blind, not deliberate, and flows from gender values, learnt behavior and assessment of the role of men and women influenced by cultural and social perception and construction. Reflecting on gender bias in different stages of the judicial framework, Justice Azcuna, a former judge of the Supreme Court of the Philippines, argued that "prejudice about women is entrenched in the values, culture and perspective of an individual." Therefore, the removal of gender bias in courts is likely to be a long process since it requires "an over-all change in the perspective and culture of an individual."[19]

The legal system, courts in particular, is the hope of the common person in cases of gender inequalities and injustice. Where the justice system is fraught with bias, particularly gender bias, hope is lost. For instance, the BBC recently reported that a lawyer in a rape case before an Indian court argued that the "character" of the victim must have been flawed, and questioned what she was doing outside her home at a late hour of the night.[20] It becomes the responsibility of all actors in the justice system, particularly law teachers, to begin to question existing stereotypes, as well as to begin to

---

[17] UNIVERSITY CENTRE FOR WOMEN'S STUDIES, GENDER SENSITIVITY IN THE COURT SYSTEM (2002).

[18] Oputa Chukwudifu, *Judicial Ethics, Law, Justice and the Judiciary, in* JUDICIAL LECTURES: CONTINUING EDUCATION FOR THE JUDICIARY (1990).

[19] Justice Adolfo S. Azcuna, *Women in the Eyes of Justice: Gender Bias in the Justice Framework,* (Nov. 2, 2013), www.supremecourt.gov.pk/ijc/Articles/11/3.pdf.

[20] Joanna Jolly, *Outraged Modesty: India Struck in the Past on Sex Crimes*, (Nov. 6, 2013), http://www.bbc.co.uk/news/magazine-2523169?.

take proactive steps for the needed change. The issue to consider at this point is whether laws on equality, including gender specific laws, can control gender inequalities and promote gender justice without more? The situation is glaring and the question must be answered in the negative. The interactive force between these laws and gender stereotypes do not counterbalance each other. It seems right, therefore, to conclude that if law schools continue to ignore or attach little importance to issues of gender inequalities and gender discrimination, the task of eliminating gender prejudices will be significantly more difficult.

A situational analysis of the development of initiatives to promote gender sensitivity and activities to ensure gender equality in legal programmes revealed that improvements have occurred since the situation in 1899 when Harvard Law School rejected a female applicant because according to the Dean Christopher Langdell "the law is entirely unfit for the feminine mind—more so than any other subject."[21] The shift is evident in the number of female students enrolled in law programmes in universities across the world. However, in terms of integration of gender sensitivity in law school programmes, the situation has not improved as revealed in one of the findings of the Philippine Committee on Gender Responsiveness in the Judiciary which stated that "few law schools discuss gender and the law, and gender issues in the court system." [22]

So far, initiatives to ensure gender equality and equity have taken one or a combination of more than one of the following:

1. Joint degree programmes in law and women's studies
2. Law schools with a feminist law journal
3. Law schools with feminist legal clinics
4. Feminist Legal Advocacy organizations

Although all of the above initiatives have contributed to promoting gender equality, they are patterned after the WID approach. This article on the other hand calls for an approach that is inclusive, participatory and

[21] Bruce A. Kimball & Brian S. Shull, *The Ironical Exclusion of Women from Harvard Law School, 1870-1900*, 58 J. LEG. EDUC. 26 (2008) (Attribution of the quote to Christopher Langdell by Charles W. Elliot).

[22] UNIVERSITY CENTRE FOR WOMEN'S STUDIES, GENDER SENSITIVITY IN THE COURT SYSTEM (2002).

which deals with the underlying causes of gender inequalities and promotes gender justice.

IV. The Role of Law Schools in Controlling Gender and Racial Inequalities

Legal education plays a paramount role in society. Lawyers and judicial officers who are major players in the administration of justice and in achieving social justice, are products of law schools and legal education. Law schools have contributed immensely to the development of world leaders.[23] Responses provided by respondents to a consultation paper in a study undertaken in the United Kingdom by the Lord Chancellor's Advisory Committee on Legal Education and Conduct, on the requirements and aims of legal education and training, had a consensus that the university degree in law should be seen as a liberal discipline and an excellent preparation for many high-level careers.[24]

Gender and racial equality is rooted in the right to equality recognized in enactments at the international, national and regional level. The Universal Declaration of Human Rights recognizes that all human beings are free and equal in dignity and rights.[25] The International Covenant on Civil and Political Rights recognizes the right to equal enjoyment of rights 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; the equal right of men and women to enjoy all civil and political rights set forth in the Covenant; and equality before the law and equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[26] Other international instruments and resolutions have also recognized equality and non-discrimination.[27]

---

[23] 25 out of 43 Presidents of the United States have been lawyers.

[24] The Lord Chancellor's Advisory Committee on Legal Education and Conduct, Requirements and Aims of the System of Legal Education and Training, First Report on Legal Education and Training 19 (1996).

[25] The Universal Declaration of Human Rights (1948).

[26] International Covenant on Civil and Political Rights, art. 2(1) (1966).

[27] Charter of the United Nations (1945); Commission on the Status of Women (1946); Universal Declaration on Human Rights (1948); Convention Concerning Equal

In view of the recognition of law as an instrument of social control and the role and impact of law on economic and social development, it is imperative that the role of law schools moves beyond filling students with knowledge about the law and the practice of the law to actually focusing on building students with the right values to function as agents of social change. In the words of Martha Minow, "like law itself, law schools have the capacity to retain traditions and to enable change, to protect expectations and to inspire reform."[28]

V. Teaching Gender Equality and Non-discrimination as Values in Law School Programmes

In considering the value perspective and its integration into law school programmes, the starting point would be to assess perspectives on what value is and the need for value education in general and in legal education specifically; to situate advocacy on integration of gender and racial equality on the foundation of equality and non-discrimination; and to identify a common foundational basis for integrating them in legal curricula and pedagogy.

Remuneration for Men and Women Workers for Work of Equal Pay (1951); International Convention for the Political Rights of Women (1952); Convention on Maternity Protection (1952); Convention on the Nationality of Married Women (1957); Discrimination (Employment and Occupation) Convention (1958); Convention against Discrimination in Education (1960); Convention on Consent to Marriage (1962); Declaration on the Elimination of All Forms of Discrimination Against Women (1967); UN Security Council Resolution 1325 on Women, Peace and Security (2000); Convention No. 100 (Equal Remuneration) (1951); Convention No. 3 (Maternity Protection) (1919); Convention No. 89 (Women Night Work) (1948); Convention No. 111 Discrimination (Employment and Occupation) (1958); Convention No. 103 (Maternity Protection) (1952); Convention No. 122 (Employment Policy) (1964); Recommendation No. 90 on (Equal Remuneration) (1951); Recommendation No. 150 on Human Resources Development (Promotion of Equality of Opportunity of Women and Men in Training and Employment) (1975); Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts (1974); World Plan of Action, adopted by the International Women's Year Tribune (1975); Convention on the Elimination on all forms of Discrimination Against Women (1979); Second UN World Conference on Women, Copenhagen (1980); Forward Looking Strategies (FLS) for the Advancement of Women to the Year 2000, adopted at the Third World Conference on Women, Nairobi (1994); UN Fourth World Conference on Women, Beijing (1995). The UN declared 1975 as the International Year for Women, and 1976 -1985 as the UN Decade for Women. It established UN Development Fund for Women (UNIFEM) in 1976 (then named the United Nations Voluntary Fund for the UN Decade for Women) and the UN International Research and Training Institute for the Advancement of Women (INSTRAW). *See generally* The United Nations and the Advancement of Women 1945 -1995 (1995).

[28] Martha Minow, *Legal Education: Past, Present and Future*, *reprinted in* Steve Shepperd II, The History of Legal Education in the United States 687 (1999) (quoting

Value has been variously defined. Broadly, the term refers to the underlying standards, norms, assumptions, beliefs and philosophy that guides individual decision and action. Adeyoju defines values as, "beliefs or ideas which individuals consider dear and acceptable which are part of life from the period of infancy to adulthood. They are learned and provide the basis of deciding course of action upon which choices are made."[29] Esu opines that "values are principles and standards of a society which implies a society's judgement of what is desirable and important. Values are power drivers of how we think and behave. They are often a significant element of culture."[30] William Eckhardt defines a value as "any goal or standard of judgment which in a given culture is ordinarily referred to as if it were self-evidently desirable,"[31] while Richard Morris defines values as "either individual or commonly held conceptions of the desirable."[32]

Aquinas in his commentaries on Aristotle's *Nicomachean Ethics* opined that moral philosophy has to do with individuals and communities picking and choosing to act reasonably based on some sets of defendable concepts and propositions which have formed part of the individuals' or communities' principles and precepts of action. Individuals believe in the concepts and propositions, see their whole life as an opportunity to act based on them and are willing to defend their actions and beliefs against objections.[33] This set of defendable concepts and propositions shapes and forms their value system.

The definitions above accurately recognize that values are learnt from childhood and form the basis of choices and decisions, but fail to mention the dynamic nature of values. Axiology recognizes that individuals are subject to changes in their environment which results in changes in their value system. In other words, changes in the world's way of doing things

---

ROSCOE POUND, THE WORK OF THE AMERICAN LAW SCHOOL (1923)).

[29] T. A. Bolarin, *Values Disorientation in the Nigerian System*, *in* EDUCATION FOR VALUE 122 (2009).

[30] O. E. Esu, *Education for Humanistic Values*, *in* EDUCATION FOR VALUE 122 (2009).

[31] William Eckhardt, *The Values of Fascism,* 24 J. SOC. ISSUES 547 (1968), *cited from* Hutcheon, *Value Theory: Toward Conceptual Clarification*, 23 BRIT. J. SOC. 187 (1972).

[32] *Id.*

[33] John Finnis, *Aquinas' Moral, Political, and Legal Philosophy, in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY. (Edward N. Zalta ed., 2014), http://Plato.Stanford.Edu/Entries/Aquinas-Moral-Political/.

will reflect in changes in values, which ultimately reflect in choices, decisions and actions. This dynamic nature of values has resulted in the recommendation of value education.

According to Schwartz,

> [I]ndividual value priorities arise out of adaptation to life experiences. Adaptation may take the form of upgrading attainable values and downgrading thwarted values…Values influence most if not all motivated behavior… It makes clear that behavior entails a trade-off between competing values. Almost any behavior has positive implications for expressing, upholding, or attaining some values, but negative implications for the values across the structural circle in opposing positions. People tend to behave in ways that balance their opposing values. They choose alternatives that promote higher as against lower priority values. [34]

Based on this understanding, several theorists have proposed arguments in favour of education for morals and values. According to Rodriguez,

> Education is a political act that goes beyond the building, transmission, and assimilation of knowledge. It creates a climate for the construction, perpetuation and legitimization of power even as it creates possibilities to deconstruct and transform power structures…The teacher chooses to transmit a set of values, ideas, assumptions, experiences, perspectives, and information. In doing so, he or she excludes or omits another set of values, ideas, assumptions, experiences, perspectives, and information. Therefore, pedagogy, methods, and teaching techniques cannot be neutral in terms of values and aims, but rather exist in connection with certain objectives.[35]

Values education is the process by which people transmit values to

[34] Shalom Schwartz, *An Overview of the Schwartz Theory of Basic Values,* 2(1) ONLINE READINGS IN PSYCHOLOGY AND CULTURE (2012), http://scholarworks.gvsu.edu/orpc/vol2/iss1/11/

[35] Marcela V. Rodriguez, *Pedagogy and Law: Ideas for Integrating Gender into Legal Education*, 7 J. GENDER, SOC. POL'Y & L. 267 (1999).

others. A review of literature shows that it has become trite that legal education should include values.[36] Burridge and Webb have argued that "law school can be a place where moral judgment is developed and character formed."[37] It implies that new values can be acquired during the law school programme which will align stereotypes with gender justice and equality expectation. This is in line with The Bible, which also makes it clear that new information and new perspective that renews the mind can lead to transformation.[38]

I agree with the view propounded by Burridge and Webb. However, I disagree with Wes Pue's opinion that Burridge and Webb's view "undermines the neutrality principle and infring[es] on the autonomy of all members of ...[an] institution once institutional commitments go beyond liberal basics to advocacy of particular positions."[39] The basis of my argument is that rules of professional conduct have been developed by several jurisdictions and have also been integrated into legal training curriculum to ensure that lawyers leave law schools with certain values considered necessary to guide their conduct as professionals. This implicitly shows that legal institutions have already taken a stand on value education by integrating rules/codes of conduct into legal education. This defeats any argument for value neutrality.

The legal profession recognizes that law is about justice. Legal education must, therefore, focus on training students on ethical values needed for ensuring justice in the society. Should it then be justice according to legal provisions or actual justice? What values must students be taught that would awaken their consciousness for justice? Robert

---

[36] Annie Rochette, *Values in Canadian Legal Education,* 2 WEB J. CURRENT LEG. ISSUES (2011), www.webjcli.ncl.ac.uk/2011/issue2/rochette2.html; Anthony Bradney, *Elite Values in Twenty-First Century United Kingdom Law Schools,* 42(3) L. TCHR. 295 (2008); Fiona Cownie, *(Re)Evaluating Values: A Response to Burridge and Webb,* 42(3) L. TCHR. 302, 305 (2008).

[37] Roger Burridge & Julian Webb, *The Value of Common Law Legal Education*: *Rethinking Rules, Responsibilities, Relationships and Roles in the Law School,* 10 LEG. ETHICS 72 (2007).

[38] "And be not conformed to this world: but be ye transformed by the renewing of your mind, that ye may prove what is that good, and acceptable, and perfect, will of God," *Romans* 12:2 (King James); "Casting down imaginations, and every high thing that exalteth itself against the knowledge of God, and bringing into captivity every thought to the obedience of Christ," 2 *Corinthians* 10:5 (King James).

[39] Wes Pue, *Legal Education's Mission*, 42 (3) L. TCHR (2008).

French, Chief Justice of the High Court of Australia, has argued that "to say that the lawyer should be concerned with justice is to say something with which everybody will agree but according to their own conceptions of justice." However, he believes that all these conceptions contain some common elements including "the notions of equality before the law, redress for wrongs, protection of rights and freedoms, fairness and rationality and, more broadly, equality of opportunity."[40] For French, the one attribute that he would like to see in law graduates today is awareness of, and sensitivity to, ethical issues and the ability to respond ethically to them.[41]

Wrong gender values can be unlearned during law school training. This will take place if a consciousness of gender equality and non-discrimination as a value is reflected in handling legal issues. Training on gender equality should flow from the recognition of equality as an element of justice, and gender equality as true equality. Having traced the basis of gender equality as a value in legal education, another task on hand is to anchor my views on a foundational basis that cuts across legal education, both in developing and developed countries. Since gender and racial discriminations are basically about beliefs, perception and, ultimately, choices, which translate to specific conduct, my search for a common ground guiding foundational basis for gender equality as a value in legal education led me to rules/codes of professional conduct in the legal profession which contain some values which lawyers are expected to be taught and be guided by in their profession conduct.

An assessment of the rules/codes of professional conduct of the America Bar Association, Canadian Bar Association, Nigerian Bar Association, Netherlands Bar Association and the UK Guide to Professional Responsibility reveal that ethical values aimed at guiding the conduct of professionals form part of the content of legal education. However, only the Canadian Bar Association,[42] the UK Guide to Professional Responsibility[43] and the Nigerian Bar Association Rules of Professional Conduct[44] contain provisions touching on discrimination and

[40] Robert French, Legal Education in Australia – A Never Ending Story (2011) (unpublished manuscript, on file with author).
[41] *Id*.
[42] Canadian Bar Association, Code of Professional Conduct, Chapter XX (2006) (providing that:

equality as ethical values to guide professional behaviour.

In view of the recognition of the fact that rules of professional conduct already contain legal values which form part of the training curriculum of students, it seems to me that Anothny Bradney's argument that "a liberal education does not determine which values a person must choose but it does determine the method by which those values are chosen and defended"[45] seems to be the incorrect position, as there is no need for the dichotomy in view of the fact that legal education is already both an education *in* value and *about* value. My argument is that the training of law students in value is already happening in our classrooms and clinics, some institutionalized and founded in rules of professional conduct while other based on the bias of the educator or facilitator.

If we agree on the need, importance and already extant nature of value education, it becomes necessary to focus on which values should be part of legal education.[46] I quite agree that the range of values necessary to build the moral character needed by a lawyer are too numerous to contemplate or be integrated in any legal curriculum. However, certain values are paramount and must necessarily be taught to law students in order for them to function within the tenets of moral standards expected of a law student, and also to

---

The lawyer shall respect the requirements of human rights and constitutional laws in force in Canada, and in its provinces and territories. Except where differential treatment is permitted by law, the lawyer shall not discriminate with respect to partnership or professional employment of other lawyers, articled students or any other person, or in professional dealings with other members of the profession or any other person on grounds including, but not limited to, an individual's ancestry, colour, perceived race, nationality, national origin, ethnic background or origin, language, religion, creed or religious belief, religious association or activities, age, sex, gender, physical characteristics, pregnancy, sexual orientation, marital or family status, source of income, political belief, association or activity, or physical or mental disability.

[43] Rule 15 of the UK Guide to Professional Conduct of Advocates, 2008 is titled "On Discrimination," and provides that, "[a]dvocates should have due regard to (a) the need to eliminate unlawful discrimination; (b) the need to promote equality of opportunity; (c) the need to promote good relations between persons of different groups; and (d) any Faculty Code on Equality and Diversity." Guide To Professional Conduct of Advocates, Rule 15, (2008).

[44] The Nigerian Bar Association Rules of Professional Conduct provides that "lawyers shall observe among one another the rules of precedence as laid down by law, and subject to this, all lawyers are to be treated on the basis of equality of status." *See* Nigerian Bar Association, Rules of Professional Conduct*,* Rule 26 (2) (2007).

[45] Anthony Bradney, *supra* note 36.

[46] Annie Rochette, *supra* note 36.

function effectively in discharging their duty to uphold the rule of law and justice. One such value is equality and non-discrimination which cannot be dealt with adequately without a gender perspective. In addition, other factors to consider in determining what values to educate students on should be chosen after a situation analysis.

If gender equality, non discrimination, and setting a goal for gender justice is an inevitable but surmountable task flowing from the foundation of equality rooted in the very heart and essence of law and justice, our major focus should be on finding solutions to the question of how best to effectively teach gender equality and non discrimination as values in clinical legal education. Determining the strategies for teaching gender equality and non-discrimination as part of the ethics component of legal training cannot be discussed without regard to earlier work on teaching values.

Researchers like Alasdair MacIntyre and Clark Cunningham have advocated for a practice based method to teaching legal ethics. Alasdair MacIntyre states thus:

> When recurrently the tradition of the virtues is regenerated, it is always in everyday life, it is always through the engagement by plain persons in a variety of practices, including those of making and sustaining families and households, schools, clinics, and local forms of political community. And that regeneration enables such plain persons to put to the question the dominant modes of moral and social discourse and the institutions that find their expression in those modes.[47]

Clark Cunningham, while analyzing the implication of Alasdair MacIntyre's approach, suggests that legal education provides students with practical experience which develops in them the goal of achieving a collective social objective, instead of limiting themselves to self-advancement and individual gratification; and a practice based approach to teaching ethics will develop in them a moral compass which will enable the

[47] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY xv (2007).
[48] Clark Cunningham, *How Can We Give up Our Child? A Practice-Based Approach to Teaching Legal Ethics,* 42 (3) L. TCHR 312 (2008).

students to explore values.[48] Cunningham sets forth the practice based methodology he uses in teaching legal ethics which comprises of in-class simulated client meetings (role-plays) paired with real life stories relating to the same issues, and students' discussions and written analysis on the simulations. Students' analyses enable them to confront issues of conflict of interest, test knowledge of regulations, codes, and, problematize norms of the profession which conflict with beliefs, values and fears. These norms are evaluated through the lens of the five component models of ethical sensitivity, moral reasoning and judgment, moral motivation, professional identity and ethical implementation.[49]

While I totally agree with Alasdair MacIntyre and Clark Cunningham that a practice-based methodology is best for teaching legal ethics, and advocate for the same to be applied in teaching gender equality and non-discrimination as values in legal education, I will not limit the particular strategies to those they have suggested. Any agenda for teaching gender equality and non-discrimination must begin with a self-audit which enables students to identify stereotypes and bias (gender and racial) and their impact on the *de facto* situation of legal training and the justice system. This should be done under the supervision of facilitators or mentors whose main role is to create an encouraging environment for reflection, analysis and open discussions.

V. Conclusion and Agenda for Action

Gender inequalities, discrimination, and injustices are evident in all aspects of the justice sector and must be checked if the legal system and the justice sector are to live up to the expectation of the common person. For this purpose, education for gender equality and non discrimination is imperative and must form an aspect of value education and must reflect in all aspects of clinical legal education whether in class or clinics.[50] This is essential to shape new lawyers and to enable students to take an early stand

---

[49] *Id.*

[50] Suggestive gender topics to be included in a clinical education induction program are: definitions of gender/race terms; legal basis for equality and non-discrimination plus scope and schools of thought; social and legal construction of gender & race; gender/race and language; gender sensitivity of a document; practice exercise and discussions on gender and racial issues in various jurisdictions and implication for justice; gender & racial issues in interviewing & counseling; gender & racial issues in litigation; clinics with participatory

against discrimination, inequality and violence.

For an effective outcome, it is essential that rules of professional conduct contain provisions on gender equality and non-discrimination. In the face of its absence in the rules/codes of professional conduct of most jurisdictions, it is essential for law schools to take affirmative action by integrating topics on equality and non-discrimination in their induction programmes, clinic curricula and in ethics/value training components. In sum, any proactive agenda must include some of the following:

- A participatory agenda for action in order to ensure a broad perspective and ownership.
- A facilitated self-audit of faculty teaching law and clinical programmes, using questionnaires or interviews to test the understanding, attitudes, perceptions and behaviour of the faculty.
- A discussion forum to stimulate thinking and reflection on strengths and weaknesses of the law programme.
- A Strategic Action Plan focused on educating for gender and racial equality and changing underlying stereotypes, with details for institutional, policy, curriculum and programme reform (Class and Clinic teaching method), where necessary. Curriculum reform must use gender sensitive language and include an outline for teaching gender, especially through activities and practice exercises.
- Teaching Methodology for integrating gender and racial issues must include development of practical exercises which require students to analyze and debate gender/racial issues, such as asking students to write stories that reflect gender value/ethical dilemma that a lawyer may encounter; scripted or non scripted role plays; and, debates, etc.

---

exercise; gender audit participatory exercise; equality and non-discrimination; the social and legal construction of gender; gender issues in legal education; legal programme analysis; guidelines for determining gender sensitivity of a document; gender issues in supervision and assessment; ideal institutions; and agenda for action with priority recommendation.

LEGAL AND POLICY RESPONSE TO RIGHT TO EDUCATION FOR CHILDREN WITH DISABILITIES IN INDIA

*Rumi Ahmed**

Over the last few decades several legal and policy measures have been initiated for education of children with disabilities. This paper is a broad survey of various legislative and policy initiatives taken towards fulfilling the right to education of disablAd persons. It argues that the present framework is inadequate and that India needs to enact the proposed Rights of Persons with Disabilities Bill 2014 keeping in mind its obligations under the UN Convention on Rights of Persons with Disabilities (UNCRPD) to which it is a signatory.

I. INTRODUCTION

Education is an important instrument for acquiring and transmitting knowledge. It improves knowledge and skills for personal growth and development, which in turn improves relationships among individuals, groups and nations. One of the essential prerequisites for enabling an

* PhD, University of Gauhati. Former Assistant Project Coordinator (Disability Laws Unit) at Shishu Sarothi, Guwahati, Assam.

individual to seek himself at his best is education. Education ensures the integration of individuals into society. It enables people to develop a sense of their own worth and respect for others. The Dakar Framework for Action adopted at the 2000 World Education Forum, while re-affirming the vision of the World Declaration on Education for All, stated, "all children, young people and adults have the human right to benefit from an education that will meet their basic learning needs in the best and fullest sense of the term, an education that includes learning to know, to do, to live together and to be." Education is an enabling force in generating income, employment and self-respect for an individual.

As far as children with disabilities are concerned, education provides autonomy to fully engage and actively participate in society. A democratic society must create opportunities for education for all, including children with disabilities. Equality of educational opportunity requires removing physical barriers to access it. It requires additional resources for mitigating all kinds of disabilities of an individual in order to equalize his/her educational opportunities. It also requires us to think in terms of each individual's learning styles and requirements.

While recognizing the importance of right and access to education for children with disability, it is important to highlight that historically, such children have long been excluded from the right to participate in normal educational processes open to all other children; they were marginalized and excluded in ways that would not have been tolerated by any other social group.[1] Despite various efforts, education for children with disabilities remained marginalized and the exclusion of people with disabilities from and within the education system continues to be a cause of concern.[2] Negative attitudes to disability are still the major stumbling blocks for

---

[1] Fazal Rizvi & Carol Christensen, *Introduction, in* Disability and the Dilemma of Education and Justice 1-2 (Carol Christensen & Fazal Rizvi ed., 1996).

[2] Global estimates for the number of children (0–14 years) with disabilities range between 93 million and 150 million. *See* WORLD HEALTH ORGANIZATION, WORLD REPORT ON DISABILITY 2011, *available at* http://www.who.int/disabilities/world_report/2011/report.pdf [hereafter WRD]. As per the 2006 report of the UNESCO, of the 77 million children who are not in school, at least 25 million of them have a disability. *See* UNESCO, *The Implications of the Convention on the Rights of Persons with Disabilities (CRPD) for Education for All,* INCLUSION INTERNATIONAL, (March 21, 2013), *available at* http://ii.gmalik.com/pdfs/Implications CRPD_dr2_X.pdf. Less than 10 percent of disabled children in Africa attend primary school. *See* UNESCO, EFA GLOBAL MONITORING REPORT-2007 74, *available at* www.unesco.org/education/GMR/2007/Full_report.pdf. The

disabled children in accessing and benefiting from mainstream education.[3] Additionally, discrimination on the basis of gender further marginalizes the disabled girl child and her right to education.[4]

This paper first sets out the demographic profile of the disabled in India in order to understand the magnitude of the issue. It then undertakes a broad survey of the legislative and policy initiatives of the government of India. The paper then focuses on the Right to Education Act, and also the Rights of Persons with Disabilities Bill 2014 (RPDB) which seeks to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (PWD Act) and analyse their impact on the right to education of disabled persons.

II. Demographic and Educational Profile of the Disabled in India

The challenge presented by disability in India is enormous and needs concerted action to overcome the same. According to a World Bank Study,

---

proportion of disabled children receiving any form of education is as low as 1–3% in some developing countries. *See* United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (May 9, 2011), *available at* http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf.

[3] Negative attitudes to disability can be found at all levels: parents, community members, schools and teachers, government officials and even disabled children themselves. Fear, taboo, shame, lack of knowledge, misinformation and socio-economic values about human life, respect and dignity all encourage negative attitudes towards disability. The impact of such attitudes is evident in the home, school, community and at the level of national policy-making in terms of planning, budgeting and programming. At the household level, disabled children and their families often develop low self-esteem, hiding away and shunning social interaction, which can lead directly to their exclusion from education. *See Schools for All: Including Disabled Children in Education*-2002, Save the Children (Aug. 13, 2014) 27, *available at* http://www.savethechildren.org.uk/sites/default/files/docs/schools_for_all_1.pdf.

[4] As per analysis of 51 countries' data, 50.6% of males with disability have completed primary school, compared with 61.3% of males without disability. Females with disability report 41.7% primary school completion compared to 52.9% of females without disability. *See* WRD, *supra* note 2, at 206. In developing countries, it is estimated that literacy rates for disabled women are 1%, compared with about 3% for disabled people as a whole. *The Right to Education of Persons with Disabilities: Report of the Special Rapporteur on the Right to Education*, A/HRC/4/29 (Feb. 19, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/92/PDF/ G0710892.pdf?OpenElement. In case of India, the proportion of disabled females (age 5-18 years) enrolled in either ordinary or special schools were invariably lower than that of their male counterpart. Regarding reasons for non-enrolment in special schools, 32% identified disability itself as the main reason, another 15% were not aware of special schools and for another 14% parents were not interested, Ministry of Statistics and Programme Implementation, Disability in

there is growing evidence that people with disabilities comprise four to eight percent of the Indian population (*i.e.* around 40-90 million individuals).[5] Against this, according to the 2011 Census, the total population of disabled persons in India is 26,810,557 of which 14,986,202 are males and 11,824,355 are females. The country's disabled population has increased by 22.4% between 2001 and 2011. The number of disabled, which was 2.19 crore in 2001, rose to 2.68 crore in 2011. Rural areas have more disabled people than urban areas, *i.e.* 18,631,921 in rural and 8,178,636 in urban India. India's narrow definition of 'persons with disability' and wrong research methodology is responsible for lowering the actual number of peoples suffering from disabilities.[6] There are in fact a large number of hidden cases of disabilities which have not been accounted for.

Shifting our focus to the broad legal landscape, India is party to many international agreements recognizing the right to education, including education of the disabled children. It is a signatory to international declarations like the Salamanca Statement and Framework for Action on Special Needs Education (1994) and the Biwako Millennium Framework for Action (2002). It was one of the first countries to ratify the UN Convention on the Rights of Persons with Disabilities (2006) in October

---

INDIA – A STATISTICAL PROFILE 2011, (Aug.13, 2014), *available at* http://mospi.nic.in/mospi_new/upload/ disablity_india_statistical_ profile_17mar11.htm. There is a higher rate of blindness among women in India; 54 % of blind people are women and 46 % are men. Yet there are fewer schools for blind and visually-impaired girls. *See* SAVE THE CHILDREN, *supra* note 3, at 34.

[5] The World Bank, *People with Disabilities in India: From Commitments to Outcomes* (March 21, 2012), *available at* http://siteresources.worldbank.org/INDIAEXTN/Resources/295583117145632580 8/DISABILITY REPORTFINAL NOV 2007.pdf.

[6] PWD Act defines a person as 'disabled' if he/she suffers from not less than 40% of any disability as certified by a medical authority. The category of disabilities identified under the Act includes blindness, low vision, cerebral palsy, leprosy, leprosy cured, hearing impairment, locomotor disability, mental illness and mental retardation as well as multiple disabilities. The National Trust Act (1999) included some other categories of people as disabled; but legislature has failed to include various other categories such as people with speaking difficulty, people suffering from serious illness etc. The National Sample Survey Organization (NSSO) considered disability as "any restriction or lack of abilities to perform an activity in the manner or within the range considered normal for human being." It excludes illness/injury of recent origin (morbidity) resulting into temporary loss of ability to see, hear, speak or move. *See* Leni Chaudhuri, *Disability in India: Issues and Concerns*, APANG UTKARSH SEVA SANSTHA (March 27, 2012), http://www.apangutkarsh.com/pdf/disabilityinindia.pdf.

2007[7] which emphasises the need for fundamental educational policy shifts to enable general schools to include children with disabilities. Earlier, in 1981, the International Year for Disabled Persons (IYDP), the Government of India considered the education of the disabled as a human resource issue and brought education of children with disabilities under the purview of the Ministry of Human Resources Development. Prior to this, the education of the disabled, which was catered to largely in special schools, came under the purview of Department of Social Welfare.

The illiteracy levels of the disabled are still high across all categories of disability, and extremely so for children with visual, multiple and mental disabilities (and for children with severe disabilities across all the categories).[8] According to the 2001 Census, 51% persons with disabilities are illiterate. The gap in primary school attendance rates between disabled and non-disabled children is 10%.[9] Most of the special education facilities for the disabled are limited to urban areas.

III. Evolving the Right to Education for the Disabled in India

The traditional response to the question of education for the disabled in India has been the establishment of special schools in which the disabled were taught in segregation from other students.[10] However, special schools promote isolation, alienation and social exclusion; and, therefore, it was necessary to make adequate provisions for inclusive education. The pre-

[7] However, India is yet to make legislation in order to incorporate UNCRPD into its municipal law. In this regard, it is also important to note here that the Bombay High Court has, in the case of *Ranjit Kumar Rajak v. State Bank of India*, WP No. 576/2008, judgement order dated 8 May 2009 (Bombay High Court), held that although the UNCRPD has not been incorporated into municipal law, as long as it is not in conflict with municipal law and can be read to form part of right to life under Article 21, it is enforceable. In addition, since the Supreme Court held to that effect in *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011, it is a well-settled position of law that international conventions and norms are to be read into domestic laws in the absence of domestic law in that area as long such conventions and norms are consistent with the provisions of national law.

[8] Nidhi Singal, *Education of Children with Disabilities in India*, 2010/ED/EFA/MRT/PI/21, *available at http://wadhwani-foundation.org/wp-content/themes/wadhwani-new/img/ond/2009-Report-on-Education-among-Disabled-children.pdf* (last visited Aug. 1, 2014). This is a paper commissioned for the EFA Global Monitoring Report 2010.

[9] WRD, *supra* note 2, at 206-7.

[10] M. A.Wani, *Disabled Children's Right to Education*,in Rights of Persons with Disabilities 112 (S. Verma and S. Srivastava eds., 2002).

independence Sargent Report of 1944 and the Kothari Commission Report of 1966 recommended the adoption of a "dual approach" to meet the educational needs of these children.[11] These reports suggested that children with disabilities should not be segregated from normal children; rather, integrative education should be adopted. However, the Kothari Commission observed that "many handicapped children find it psychologically disturbing to be placed in an ordinary school"; and accordingly, suggested that in such cases the children should be sent to special schools. Rights of children with disability to education were included in 1968 National Policy on Education, based on the Kothari Commission recommendations. The National Policy on Education (NPE)[12] says in Article 4 that strenuous efforts should be made to equalize educational opportunity, including that the educational facilities for the physically and mentally handicapped children should be expanded and attempt should be made to develop integrated programmes enabling the handicapped children to study in regular schools.[13] The NPE was revisited in 1986 and included under the heading "The Handicapped" the following:[14] "where feasible, children with motor handicaps and other mild handicaps will be educated with others, while severely handicapped children will be provided for in special residential schools." The National Policy on Education of 1986 was further updated in 1992 and laid down that the objective of the education system "should be to integrate the physically and mentally handicapped with the general community as equal partners, to prepare them for normal growth and to enable them to face life with courage and confidence." NPE also recommended orientation and pre-service training for general teachers on disability management and provision of vocational training for the disabled.[15]

A. Legislative Framework

India has also brought in several important and significant legislations

[11] Singal, *supra* note 8.
[12] MINISTRY OF HUMAN RESOURCES DEVELOPMENT, NATIONAL POLICY ON EDUCATION 1986*, available at* http://education.nic.in/policy/npe86-mod92.pdf (last visited Aug. 1, 2014).
[13] Tanmoy Bhattacharya, *Re-examining Issue of Inclusion in Education*, XLV(16) ECON. & POL. WKLY. 18 (APR. 17, 2010).
[14] *Supra* note 12, at art. 4.9.
[15] *Supra* note 12, at art. 9.4.

for realizing the right to education, including education of children with disabilities – such as Rehabilitation Council of India Act (1995) which states that Children with Special Needs (CWSN) will be taught by a trained teacher; Persons with Disabilities Act (1995), which recognizes the educational entitlement for all CWSN up to eighteen years in an appropriate environment; the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act (1999) (commonly known as National Trust Act), which is intended to enable and empower persons with these disabilities to live as independently and as fully as possible within or close to the community to which they belong and to address the needs of those persons who do not have family support and provides for their care and protection; the eighty sixth constitutional amendment declaring the right to education a fundamental right and making education of children from the age of six to fourteen free and compulsory; the Right of Children to Free and Compulsory Education Act (2009) (RTE Act), which came into being from April 1, 2010; and the Right of Children to Free & Compulsory Education Rules (2010). The RTE Act was later amended in 2012 in order to address certain aspects of the right to education for the disabled children.

B. Specific Policies and Schemes for Education of Disabled in India

Although the 1944 Sergeant Report on educational development and the Kothari Commission (1964-66) recommended inclusive education for the handicapped/disabled people, till 1970s, the policy actually encouraged segregation as many educators believed that children with physical, sensory, or intellectual disabilities were so different that they could not participate in the activities of a common school.[16] Most of the educational initiatives for the disabled were started through voluntary efforts as welfare measures. Gradually, governments in post-independent India have come forward to support such welfare initiatives. Today, governments play a significant role in the realization of the right to education of the disabled children.

[16] National Council of Educational Research and Training, *National Focus Group on Education of Children with Special Needs-2006,* (Aug. 13, 2014) 1, http://www.ncert.nic.in/new_ncert/ncert/rightside/links/pdf/focus_group/special_ed_final 1.pdf.

Over the years, various programmes and schemes were launched to meet India's constitutional and international commitments towards the education of children with disabilities. Among the first of these efforts was the Integrated Education for Disabled Children (IEDC) Scheme, launched in 1974 by the Ministry of Welfare, Government of India, to promote the integration of students with mild to moderate disabilities into regular schools. The Scheme provided educational opportunities for disabled children in regular schools to facilitate their integration and retention in such regular school system. It contributed significantly in incorporating the special needs inputs for the teacher education curriculum for primary and secondary teachers.[17]

The IEDC scheme provided financial assistance for transport facilities, books and stationery, uniform, instructional material, assistive equipments, readers facilities for the visually handicapped, attendant facility for the orthopedically handicapped, special teacher facility, hostel facility for disabled children situated on school campus, removal of architectural barriers in schools, etc. The Scheme also included pre-school training and counselling for parents. In the initial stage of the launching of the Scheme, state governments were provided with 50% financial assistance to implement this program in regular schools. In order to overcome various operational shortcomings,[18] the IEDC Scheme was revised in 1992 and under the revised Scheme full assistance was made available to schools involved in the "integration" of students with disabilities.

During 1987-1994, the Ministry of Human Resource Development (MHRD), in association with UNICEF and the National Council of Educational Research and Training (NCERT) undertook the Project for Integrated Education for the Disabled (PIED) with the aim to strengthen the IEDC plan.[19] PIED adopted a "Composite Area Approach" that converted all regular schools within a specified area (referred to as a block) into

---

[17] *See* Umesh Sharma, *Integrated Education in India: Challenges and Prospects*, 25(1) DISABILITY STUD. Q., (Winter 2005), *available at* http://dsq-sds.org/article/view/524/701/.

[18] Some of the shortcomings of the IEDC Scheme included: (a) the non-availability of trained and experienced teachers, (b) lack of orientation among regular school staff about the problems of disabled children and their educational needs, (c) the non-availability of equipment and educational materials, and (d) lack of coordination among the various departments to implement the Scheme. *See* Sharma, *supra* note 17.

[19] Sharma, *supra* note 17.

integrated schools, which had to share resources such as specialized equipment, instructional materials and special education teachers. Teacher-training was one of the key aspects of the project.[20] The project was designed to provide education for all children with disabilities and to allow them and their families, neighbours and non-disabled children to interact in a normal setting. It aimed to develop competencies in children with disabilities in order to provide a natural basis for adult life experiences in a manner by which they can perceive themselves as contributing towards the socio-economic development of the society. As mentioned above, the IEDC scheme was revised in 1992, taking note of the outcomes and recommendations of the PIED.

Subsequently, the centrally sponsored scheme of District Primary Education Programme (DPEP) was launched in 1994 as a major initiative to revitalize the primary education system and to achieve the objective of universalisation of primary education. As a part of it, a large number of regular teachers were trained to impart special education inputs to children with special needs. The chief advantage of DPEP was that it took care of all areas from identification, assessment, enrolment and provision of appliances to total integration of disabled children in schools with resource support, teacher training and parental counselling.

'Janashala' is another programme, which is a community school aiming to support ongoing efforts of the Government of India towards universalisation of elementary education (UEE). This Joint Government of India-UN System Support for Community based Primary Education (SCOPE) programme, launched in 1998, specially focuses on educational needs of girls, scheduled castes and scheduled tribes, working children, children with special needs and children in marginalised and difficult groups. The programme aims at bringing the community closer to schools by empowering them and by making the formal school system more responsive to their needs and aspirations.[21]

Since UEE could not be achieved fully, the Government of India launched in the year 2001 the Sarva Shiksha Abhiyan (SSA), which also

---

[20] Sharma, *supra* note 17.

[21] Job Zachariah, *Education of the Disabled: Open the Door,* http://pib.nic.in/feature/feyr2000/fdec2000/f011220001.html (last visited Aug. 1, 2014).

made a special provision for serving children with disabilities. SSA has the goal of eight years of elementary schooling for all children including children with disabilities in the age group of 6-14 years. However, children with disabilities in the age group of 15-18 years were also to be provided with free education under the IEDC scheme. SSA pledges that all possible efforts would be made to ensure that every child with special needs, irrespective of the kind, category and degree of disability, is provided with education in an appropriate environment.[22]

The Sarva Siksha Abhiyan (into which DPEP was incorporated) extends the dualistic approach towards the education of children with disabilities, by propagating a "multi-optional delivery system". It categorically brings the concerns of children with disabilities, or those it terms as "children with special needs" (CWSN) under the framework of "inclusive education" (IE). SSA envisages that every child with special needs, irrespective of the kind, category and degree of disability, is provided education in an appropriate environment. It adopts zero rejection policy so that no child is left out of the education system. The main components of the SSA for inclusive education include identification and enrolment of children with special needs, assessment of children with special needs, provision of aids and appliances, teacher training, resource support and barrier-free access.[23] Under SSA, a continuum of educational options, learning aids and tools, mobility assistance, support services, etc. are being made available to students with disabilities. This includes education through an open learning system and open schools, alternative schooling, distance education, special schools, home based education wherever required, itinerant teacher model, remedial teaching, part time classes, Community Based Rehabilitation (CBR) and vocational education.

The SSA was followed by a comprehensive Action Plan for the Inclusive Education of Children and Youth with Disabilities (IECYD), which was formulated in 2005 with the fundamental objective of ensuring

---

[22] *Sarya Shiksha Abhiyan,* DEPARTMENT OF SCHOOL EDUCATION & LITERACY, http://mhrd.gov.in/schemes (last visited Aug. 1, 2014).

[23] *See Inclusive Education in RTE-SSA- An Overview,* SARVA SHIKSHA ABHIYAN, *available at* ssa.nic.in (last visited Aug. 1, 2014). *See also* A. Sarva Mukul, *Siksha for Special Children*, THE TIMES OF INDIA (Nov. 18, 2005), *available at* http://timesofindia.indiatimes.com/india/Sarva-Shiksha-for-special-children/articleshow/1299673.cms.

"the inclusion of children and youth with disabilities in all available mainstream educational settings, by providing them with a learning environment that is available, accessible, affordable and appropriate to help develop their learning and abilities."[24] It also focused on enrolment and retention of all children with disabilities in the mainstream education system, providing need based educational and other support in mainstream schools to children in order to develop their learning and abilities through appropriate curricula, organizational arrangements, teaching strategies, resource use and partnership with their communities, while supporting higher and vocational education through proper implementation of the existing reservation quota in all educational institutions and the creation of barrier-free learning environments, and disability focused research and interventions in universities and educational institutions. The goal of the Action Plan is "to ensure the inclusion of children and youth with disabilities in all available general educational settings, by providing them with a learning environment that is available, accessible, affordable and appropriate."[25] However, IECYD failed to translate itself into the RTE Act.[26]

With effect from 1.4.2009, the Scheme of Inclusive Education for the Disabled at Secondary Stage (IEDSS) was launched.[27] As mentioned above, eight years of elementary schooling for all children including children with disabilities in the age group of 6-14 years has already been covered under SSA. The objective of IEDSS is to enable disabled children who have completed eight years of elementary education to continue their education at the secondary stage in an inclusive environment in regular schools. The components of the scheme include: (i) assessment of educational needs, (ii) provisions of student specific facilities, (iii) development of learning material, (iv) provision of support services like special educators, (v) provision of resource rooms, (vi) training of general school teachers to improve their capacity to teach children with special needs in an inclusive

---

[24] Ministry of Human Resource Development: Government of India, *Action Plan for Inclusive Education of Children and Youth with Disabilities* (Aug. 20, 2005)*, available at* http://www.ncpedp.org/eductn/ed-isu2.htm#3.

[25] *Id.*

[26] Tanmoy Bhattacharya, *Re-examining Issue of Inclusion in Education*, XLV(16) ECON. & POL. WKLY.18 (2010).

[27] *Inclusive Education of the Disabled at Secondary Stage (IEDSS),* DEPARTMENT OF SCHOOL EDUCATION & LITERACY, http://mhrd.gov.in/inclusive_education (last visited Aug. 1, 2014).

environment, and (vii) making secondary schools barrier free.[28] The scheme covers children with one or more disabilities as defined under the Persons with Disabilities Act (1995) and the National Trust Act (1999). The scheme is centrally sponsored and is being implemented through the State Governments.[29]

The most ambitious initiatives as far as legislative reform is concerned has come in the form of the PWD Act as well as the RTE Act. The next parts of the paper will outline the rights of disabled persons as envisaged by the PWD Act, the RTE Act as well as the proposed changes to the PWD Act.

IV. Right to Education under PWD Act, 1995

India was among the first to sign and ratify the UN Convention on Disability, but it is yet to incorporate the provisions of the Convention within its domestic laws. The PWD Act is the only major legal instrument dedicated to persons with disabilities. It recognized, for the first time, certain basic rights and entitlement for the disabled in India. The PWD Act came to be an important legal tool for persons with disabilities and several cases were brought under it. For the judiciary, the Act formed an important basis in pronouncing judicial verdicts.[30] As far as the issue of education for children with disabilities is concerned, the PWD Act has stipulated some important provisions.

The PWD Act has, in fact, devoted a whole chapter (Chapter V) on education of the disabled children and youth. In addition, Section 39 provides that all government educational institutions and other aided educational institutions shall reserve not less than three per cent seats for persons with disabilities. However, this important provision has been erroneously placed in Chapter VI under the heading of 'Employment', leading to certain doubts whether reservation mentioned under this Section is meant for the purpose of admission in academic institutions or not. The doubt was explicitly and unequivocally clarified by the Supreme Court in its judgment in the case of *All Kerala Parents Assn. Hearing Imp. and Anr. v.*

---

[28] *Id.*
[29] *Supra* note 27.
[30] *e.g.*, Union of India v. National Federation for the Blind, (2013) 10 S.C.C. 772.

State of Kerala and Others[31] that the Section 39 is applicable in case of reservation in admission in academic institutions.

In brief, the PWD Act not only guarantees free education up to the age of eighteen in an appropriate environment but also casts a positive duty on the appropriate governments to promote integrated education as well as special schools. The Act recognizes that trained manpower must be made available for special schools and integrated schools for children with disabilities. It casts a duty on the appropriate governments to set up adequate number of teachers training institutions and assist national institutes and other voluntary organisations to develop teachers' training programmes specialising in disabilities so that requisite trained manpower is available for special schools and integrated schools for children with disabilities.

Similar to the PWD Act, the all-encompassing National Policy on Persons with Disabilities (2006)[32] has also incorporated a separate provision for education, recognizing that education as the "most effective vehicle of social and economic empowerment." In keeping with the spirit of Section 26 of the PWD Act, the National Policy reiterates its commitment to provide free and compulsory education for all children with disabilities up to the age of eighteen years. The Policy also underlines the need for mainstreaming of persons with disabilities in the general education system through inclusive education and has enlisted various measures (under Sections 20 to 27) to be taken for the realization of the same. The Policy recognizes that education is the most effective vehicle of social and economic empowerment. The Policy envisages that the Government provides "right kind of learning material and books to the children with disabilities, suitably trained and sensitized teachers and schools which are accessible and disabled friendly."[33] As per the National Policy, the Government of India envisages that every child with disability has access to appropriate pre-school, primary and secondary level education by 2020.[34]

---

[31] 2002 (7) SCALE 198.

[32] Ministry of Social Justice and Empowerment, *National Policy on Persons with Disabilities,* (Feb. 10, 2006), *available at* http://socialjustice.nic.in/nppde.php.

[33] *Id.*

[34] Govinda L. Rao, *Education of Persons with Intellectual Disabilities in India*, 50 (SUPP. 2) SALUD PUBLICA DE MEXICO (2008), *available at* http://www.scielosp.org/scielo.php?pid=S0036-36342008000800014 &script=sci_arttext.

A. Amending the PWD Act

Although the PWD Act catalogues a comprehensive range of measures necessary to allow equal participation in all aspects of an educational pursuit, many disabled children continue to face numerous obstacles in realization of their rights. According to Section 2(i) of PWD Act, disability is limited to (i) blindness; (ii) low vision; (iii) leprosy-cured; (iv) hearing impairment; (v) locomotor disability; (vi) mental retardation; and (vii) mental illness. The Act does not include many other significant forms of disability. It has no provision whatsoever about children with learning disabilities. While the PWD Act is a rights-based legislation, the guidance it offers in achieving the vision is very weak. The Act lacks a strong enforcement mechanism,[35] including the lack of public awareness.

The PWD Act was enacted in view of India's commitment to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region (to which India became a party). The international regime of the rights of disabled people has changed significantly since then, particularly with the adoption and entry into force of the UNCRPD. In keeping with its new international commitment for being party to the UNCRPD and other international instruments, it was felt necessary to amend the PWD Act. The National Policy for Persons with Disabilities, which was adopted in 2006, also envisages such amendments to the Act in consultation with the stakeholders. Accordingly, a Committee appointed by the Ministry of Social Justice and Empowerment came out with a draft Rights of Persons with Disabilities Bill (RPDB) (2011), which was drafted almost independent of the existing PWD Act. Clauses 34 to 55 of the draft Rights of Persons with Disabilities Bill (2011)[36] are the provisions relating to the right to education of the disabled. This draft Bill had also broadened the scope and definition of disability.[37] Section 35 on the right to education reads as

[35] The PWD Act contains a rights-based approach to basic education, consistent with India's international commitments on education of CWD. However, it lacks proper mechanism for delivery of education for CWD. There is no guidance as to who should take the decisions on the most appropriate form of education delivery for a specific child with a specific disability.

[36] Submitted by Committee appointed by the Ministry of Social Justice and Empowerment, Govt. of India on June 30, 2011.

[37] Under Schedule 1, the Bill lists the following 20 different categories of disabilities: Autism

follows:

(1) All persons with disabilities have a right to education to enable the full development of their human potential, sense of dignity and self-worth; to develop their personality, talents and creativity, mental and physical abilities to their fullest potential; and to enable their effective participation in an inclusive society;

(2) No persons with disabilities shall be excluded from the education system on the basis of disability, and the appropriate government shall ensure that all persons with disabilities, especially girls and women with disabilities, have access to education, without discrimination and on an equal basis with others, at all levels.

The draft RPDB 2011 was extensively debated at various levels involving various stakeholders and it accordingly went through various revisions in subsequent years. In its latest version (as introduced in Rajya Sabha in January 2014 by the Ministry of Social Justice and Empowerment), the Rights of Persons with Disabilities Bill (2014) seems to follow the same pattern of the PWD Act (1995), and it is the enlargement of some scopes and provisions of the PWD Act in line with the UNCRPD.[38] The RPDB 2014 has not taken into account many of the provisions made under the draft RPDB 2011. Section 2(k) of RPDB 2014 defines inclusive education as "a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities." Section 30 requires that disabled children are provided free education until the age of 18, thereby surpassing the benchmarks in the RTE Act. Section 16 requires the State to identify children with special needs,

---

Spectrum Conditions/Autism Spectrum Disorders, Blindness, Cerebral Palsy, Chronic neurological conditions, Deaf blindness, Dwarfism, Hemophilia, Hearing Impairment, Hard of Hearing, Intellectual Disability, Leprosy cured person, Locomotor Disability, Low-vision, Mental illness, Multiple disabilities, Muscular Dystrophy, Multiple Sclerosis, Specific Learning Disabilities (including perceptual disabilities, dyslexia, dysgraphia, dyscalculia, dyspraxia and developmental aphasia), Speech impairment, Thalassemia.

[38] Rights of Persons with Disabilities Bill § 2 (2014). "Person with disability" means a person with long term physical, mental, intellectual or sensory impairment which hinder his full and effective participation in society equally with others; and "person with benchmark disability" means a person with not less than forty per cent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.

establish adequate number of teacher training institutions,train and employ teachers with disability, provide books and other learning materials.

V. Right to Education Act (RTE Act)

The Right of Children to Free and Compulsory Education Act (2009), popularly known as the Right to Education (RTE) Act, came into being in India from April 1, 2010. The main purpose of the RTE Act is to provide free and compulsory education to children aged six to fourteen. Section 3(2) of the Act (2009) says that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education. It further provides that a child suffering from disability, as defined in clause (i) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (1996), shall have the right to pursue free and compulsory elementary education. For providing neighbourhood school facility, Section 6 of the Act makes it obligatory for the Government to establish a school within such areas or limits of neighbourhoods, as may be prescribed, where it is not so established, within three years from the commencement of the Act.

One of the most disappointing aspects of the Act is that it limits 'disability' to only those persons covered by the PWD Act. When the Act was enacted, there was an ambiguous interpretation of the phrase "child belonging to disadvantaged group" in sub-section (d) of Section 2. As defined in the pre-amendment Act "child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, and socially and educationally backward class or such other group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government by notification. The deliberate exclusion of children with disability from this group was justified by the provisions of the PWD Act and of Section 3(2) of the present Act, which takes care of children with disability. However, upon persistent demands, an amendment to the Act was made to include, among other things, children with disability within the meaning of "children belonging to disadvantaged group". Section 4 of the Act talks about special training for students who are deemed to be deficient and who deserve extra help. Section 6(7) of the Right of

Children to Free & Compulsory Education Rules (2010) says, in respect of children with disability, which prevents them from accessing the school, the Appropriate Government or the local authority shall endeavour to make appropriate and safe transportation arrangement to enable them to attend school and complete elementary education. Section 9 of the Rules provides that a child with disability shall be entitled also for free special learning and support material.

Although considered a landmark legislation, the RTE Act does little to encourage inclusive education;[39] and is silent on most of the facilities needed for education of children with disabilities. The amendment to the Right of Children to Free and Compulsory Education Bill (2010) was pending in the Parliament for two and a half years and it was only in 2012 that the amendment to the RTE Act was made. The new amended Act added a new clause (ee) in Section 2 which defines "child with disability". Accordingly, a child with disability means a child having any one disability mentioned in the Persons with Disability Act (1995) or any disability mentioned in the National Trust Act (1999). Section 3 of Right of Children to Free and Compulsory Education Amendment Act (2012) specifically allows children with 'severe disabilities' to receive home based education. The amendment also clarified that all disabled children will now get a fair chance to pursue free and compulsory education till the age of 18 years with all benefits/facilities as mentioned in Part V of the PWD Act.

VI. Conclusion

Numerous policy and legislative initiatives, as discussed above, have not been successful in ensuring that the disabled have access to education. The ground reality remains that disabled children continue to be neglected and marginalized.[40] It is clear that education policy in India has gradually increased the focus on children with disability and inclusive education in regular schools has become a primary policy objective. However, despite its importance, educational outcomes for children with disabilities are still not satisfactory, particularly in rural and remote areas.

---

[39] Bhattacharya, *supra* note 26.

[40] Joseph Gathia, *Education of Disabled Children in India*, Meri News (Aug. 14, 2014), http://www.merinews.com/article/education-of-disabled-children-in-india/136123.shtml (last visited Jul. 21, 2014).

As the RTE Act has been amended recently, the awareness about the Act is essential for the better implementation of the Act. Though the option of home based education for the disabled children has been added through amendment of the RTE Act, it should not be a standard rule as it is opposed to the basic philosophy of UNCRPD. Any rule that may encourage segregation of disabled children from other children and exclude them from access to mainstream schooling should be disavowed. The Rights of Persons with Disabilities Bill 2014 is welcome in light of its wider definition of disability and conforms to the spirit of UNCRPD. There is thus an urgent need to enact and implement the newly proposed disability legislation in order to fulfill India's obligations under international law, and also as the RTE Act also relies upon this mother legislation.

THE DISTRIBUTIVE DILEMMA IN INDIAN DISABILITY LAW: UNDERSTANDING THE SUPREME COURT'S DECISION IN *DEAF EMPLOYEES WELFARE ASSOCIATION v. UNION OF INDIA*

*Saptarshi Mandal**

In Deaf Employees Welfare Association v. Union of India*, the Supreme Court ordered the government to grant travel allowances to deaf and mute employees at the same rate as is currently given to those with visual and locomotor impairments. While this appears as a relatively mundane decision, it implicates basic questions of distributive justice in a welfare state. Employing the term "distributive dilemma" to capture the often competing bases for distribution of state aid, the author examines the Court's approach to distribution of state resources in the context of disability law. He argues that though courts in India have decided such distributive questions in relation to the disabled in the past,* Deaf Employees Welfare Association *marks a departure from previous cases because the Court has, for the first time, approached the question using the constitutional principles of equality and dignity.*

*Assistant Professor, Jindal Global Law School.

I. Introduction

On 12th December 2013, the Supreme Court of India delivered its judgment in the case of *Deaf Employees Welfare Association v. Union of India* ("*DEWA*").[1] The question before the Court was whether the government was justified in denying to its employees with hearing impairments, the same amount of transport allowance that it had been giving to the employees with visual and locomotor (movement related) impairments. This relatively mundane and non-sensational subject, especially when compared to the judgment re-criminalizing sodomy delivered by the Court just a day before,[2] is no less controversial, for it involves questions of distribution of resources by the state which, in many ways, are fundamental to the very notion of the welfare state: who deserves to receive social aid; on what basis; and, how much financial burden should be cast on the state? In this case commentary I use the phrase "distributive dilemma"[3] to characterize the wider process within which courts are called upon to decide or review the allocation of resources or privileges by the state. Part II of the comment uses Deborah Stone's work to flesh out the concept of the "distributive dilemma" in its relation to disability law. Although courts in India have decided such distributive questions in relation to the disabled in the past, as explained in Part III below, in *DEWA* the Supreme Court of India has for the first time approached the question using the constitutional principles of equality and dignity. Part IV explores the Supreme Court's distinct approach in *DEWA*, and on this basis in the concluding part I argue that the judgment is not only relevant for the petitioners in this case, but has implications for disability law, policy, and adjudication in general.

II. Distributive Dilemma

In her book, *The Disabled State*, Deborah Stone traces the emergence of the 'disabled' category in modern societies. Stone suggests that all societies have multiple criteria for the distribution of resources, and that

> [i]n addition to distribution according to labor, certain goods,

[1] Dead Employees Welfare Association v. Union of India, (2014) 3 S.C.C. 173.
[2] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1.
[3] Deborah Stone, The Disabled State (1985).

> services, opportunities, and privileges may be distributed on the basis of ascriptive characteristics (such as age, birth order, gender, or religion); blood relationships (as in special tax treatment of family gifts, or college admission preference to children of alumni); property ownership (as in tithes, rents, and stock dividends); or special kinds of arrangement (such as military service, fame and extraordinary talent).[4]

The primary criteria of distribution among these various parameters is that of work. In other words, the amount of resources one commands is primarily based on what one earns from one's labour power. In all societies however, there are some individuals who do not fit into any of the above criteria, and are taken care of by a parallel, but exceptional system of distribution, based on "needs." Stone argues that the tension between the work and the needs based systems, in terms of "when should need be allowed to supersede other rules as a principle for distribution,"[5] results in the "distributive dilemma."[6]

Based on her review of the origin and evolution of social security systems in England, Germany and the United States of America, Stone suggests that one of the ways in which modern societies resolve the distributive dilemma is by objectively defining the categories which should receive social aid. Instead of testing the means every individual has to determine their need, modern states set up regulatory mechanisms whereby individuals become eligible for social aid by virtue of belonging to one of these formally defined categories. Stone further notes that to provide successful resolution to the distributive dilemma, these categories must fulfill certain conditions. They should be based on culturally legitimate reasons for exemption from the work-based system (childhood, old age, sickness, disability and so on), they must be supported by an efficient validating mechanism (medical assessment and certification, for instance), and they must be defined restrictively to ensure that the work-based system always remains the primary one. Thus, in Stone's account, the 'disabled' is one such category that emerged from the categorical resolution, pursued by

---

[4] STONE, *supra* note 3, at18.
[5] *Id.*
[6] *Id.* at17.

modern bureaucratic states, to guard the boundaries of the need-based distributive systems.

While Stone is often criticized for the 'stateism' of her account of disability,[7] it is precisely this feature of her approach which is useful for explaining the basis and working of disability law in contemporary societies. When Stone wrote her book in 1985, disability was primarily the province of social security programs and workmen's compensation laws. Since then, it has emerged as a legitimate subject of civil rights legislations, targeting anti-discrimination and equal opportunities for the disabled. From the point of view of the distributive dilemma, this has not meant much of a paradigm shift, as most of these civil rights laws are more or less based on the categorical resolution that the social security programs of an earlier era relied on - defining through narrow clinical categories who constitute the disabled, and what rights, exemptions, and opportunities they are entitled to. In India, the Persons with Disabilities Act 1995 ("PWD Act") offers one type of categorical resolution to the distributive dilemma by identifying a needs-based group – "persons with disabilities" – comprising of seven categories: blindness, low vision, hearing impairment, locomotor impairment, mental illness, mental retardation and leprosy cured persons.[8]

However, the development that the civil rights regime has indeed fostered is that such questions are no longer the exclusive domain of administrative decision making. Courts have, over time, become part of the regulatory mechanism that monitors the boundaries between the primary work-based system and the needs-based distributive system. Elsewhere I have written about how claimants with conditions ranging from learning disabilities to heart ailments and cancer have approached the High Courts with petitions that they be included in the disabled category and granted the same rights and protections that are available to those covered by the PWD Act.[9] Similarly, there are instances such as the ones described later in this comment, where courts have been called upon to decide whether the manner in which the state distributed a benefit among those already

---

[7] *See* COLIN BARNES & GEOFF MERCER, EXPLORING DISABILITY 73 (2010); BRENDAN GLEESON, GEOGRAPHIES OF DISABILITY 65 (1999).
[8] Persons with Disabilities Act § 2(i)(1995).
[9] Saptarshi Mandal, *Adjudicating Disability: Some Emerging Questions*, 50 ECON. & POL. W'KLY. 22-25 (Dec. 4, 2010).

identified as disabled was justified or not. The former is an example of external boundary setting, while the latter is an example of internal boundary setting. When courts adjudicate on such claims, they participate in the process of resolving the distributive dilemma. The judgments discussed below give us a sense of the tools used by the courts in carrying out this function.

It remains a valid question, however, whether courts are at all equipped to address such questions. Who is to be placed in the needs-based system, which needs are to be met by the state and to what extent, are questions that depend on economic and political expediencies. Courts are very much aware of this and their awareness is reflected in the way they decide such claims, as we shall see below.

III. Judicial Approaches Prior to *DEWA*

In *Javed Abidi v. Union of India*[10] – the very first case under the PWD Act to be brought before the Supreme Court of India – the petitioner argued that concessional airfare, which the State run Indian Airlines had been offering to passengers with visual impairments, must be extended to all the seven categories of impairments recognized as "disabilities" under the newly enacted law. The petitioner, who was a wheelchair user, argued that those with locomotor impairments such as himself, had great difficulties in traveling long distances by train and that there was no reason why they should not be given concessional fares by a State run airline, which was being offered to another group of disabled persons. The airline on the other hand argued that the practice of offering concessional fare to the visually impaired predated the enactment of the PWD Act, and that the airline was considering withdrawing the concession in light of its dire financial situation. It argued that the Act itself stated that provision of services to the disabled was subject to the economic capacity of the State, and that services could not be provided to one category of the disabled and not to another, for it may be discriminatory. In such circumstances, the airline argued, the Court must not direct it to offer concessional fares to any new category of disabled persons and that the status quo should be maintained.

[10] Javed Abidi v. Union of India, (1999) 1 S.C.C. 467.

The Court held that the argument of economic capacity was indeed a valid consideration, though exceptions should be allowed. Since the objective of the Act was to create a barrier free environment for the disabled, at least those with locomotor impairments of a certain level of severity could be offered concessional fares for air travel. To get around the question of discrimination between different impairment categories, the Court reasoned that if one looked at the specific issue of long distance travel and difficulties faced by persons with different impairments, then those with locomotor impairments constituted a "separate class itself because of their immobility and the restriction of the limbs."[11] The specific difficulties faced by them were not faced by others. Hence the Court directed Indian Airlines to offer concessional fares to passengers with severe locomotor impairments (80% and above).

A few years later, the Delhi High Court was faced with a similar situation when petitioner Kaukab Naqvi challenged an Indian Railways circular as being discriminatory against the deaf and mute.[12] In the impugned circular, the Railways notified 75% concessional fares for passengers with visual impairment, intellectual disabilities ("mental retardation"), tuberculosis, cardiac illnesses and other such major illnesses, but only 50% concession for deaf and mute passengers. Further, while the attendants accompanying the former were offered concessional fares, the same was denied to the deaf and mute passengers. The Railways argued that the differential rates of concession was based on the extent of "affliction and disease"[13] and similarly, concession for the attendant was based on an assessment of which impairment or health condition created a greater need of attendants during train travel. The High Court upheld the action of the Railways, as it found it to be based on a reasonable assessment of the needs and difficulties faced by passengers with different impairments and health conditions. It was a "justifiable differentia"[14] in the words of the judge, because

> in the case of deaf and dumb person, he may be physically mobile and, therefore, in a position to board and alight from the train. This

[11] *Id.* at 4.
[12] Kaukab Naqvi v. Union of India, A.I.R. 2002 Del. 240.
[13] *Id.* at 5.
[14] *Id.* at 6.

> would not be possible in case of orthopaedic or paraplegics [*sic*], who would need assistance for physical movement. Similarly critically ill cardiac or other patients, or cancer patient and other categories specified would need physical help in their movement.[15]

Mindful that the Court's order should not involve "significant financial outflows"[16] for the Railways, the Judge dismissed the petition with some general directions to the Railways on how to address the difficulties of the deaf and mute passengers, even if they are not offered concessional fares or attendants.

There are several similarities in the approaches taken by the courts in the two judgments above. First, in both, the judges were careful not to impose any further financial obligations on the state. The courts made distributive decisions under the shadow of the argument of limited economic capacity of the state. Second, although in both cases the judges used the language of constitutional equal treatment analysis – "separate class" in *Javed Abidi* and "justifiable differentia" in *Kauqab Naqvi* – instead of scrutinizing the basis of such classification, the judges ultimately took the government's word for it and went with an intuitive understanding of the needs of the groups in questions. These two features, in my opinion, exemplify the unease of judges in deciding distributive questions, which they feel belong to the domain of the other branches of the state. To put it differently, the distributive dilemma that the courts seek to resolve is compounded by the dilemma over their own roles in such matters. Finally, as a combined effect of the first two features, the courts in both cases approached the distributive dilemma by deducing a hierarchy of need from a corresponding hierarchy of vulnerability between different categories of disabled people, and deciding their entitlements accordingly.The understanding of vulnerability in their approaches was firmly rooted in a medical conception of 'functionality' of body parts - "immobility and restriction of limbs" in *Javed Abidi* and "affliction and disease" in *Kauqab Naqvi*. Given this background, in the next section we will see in what respects the approach taken by the Supreme Court in *DEWA* stands out.

---

[15] *Id.*
[16] *Id.* at 8.

IV. THE *DEWA* JUDGMENT

DEWA involved two associations of deaf and mute employees petitioning the Supreme Court of India, asking it to direct the central and state governments to grant transport allowance to deaf and mute government employees at the same rate (which is double the regular rate) as was given to those with visual and locomotor impairments. The two latter categories had been receiving transport allowance since 1978. Ever since the enactment of the PWD Act in 1995, deaf and mute employees had been petitioning the Government of India that the same benefit should be extended to them as well, since they were "persons with disabilities" under the Act, just like those with visual and locomotor impairments. However, despite several representations made by the employees' associations to the government, and favorable recommendations by the Health, Transport and Social Justice Ministries, the Finance Ministry maintained that since the deaf and mute did not face as much difficulties in traveling as the other two categories, they were not entitled to receive transport allowance.[17]

The Supreme Court in its judgment rejected the argument of the Finance Ministry by pointing out that,

> [t]ravel undertaken by the deaf and hearing impaired employees is equally arduous and burdensome as compared to persons having other disabilities…. Hearing impaired persons cannot communicate with the bus conductors, auto and taxi drivers as a normal person can do. Invariably, they have to seek the assistance of a stranger. Time and effort required to reach a destination is considerably more as compared to normal persons. A hearing impaired person sometimes may end up spending more money in travelling as compared to normal persons….The hearing impaired person also would not be able to hear the sound of horn and passing vehicles and, at times,will have to seek the assistance of other co-passengers or strangers on the road.[18]

The Court could have stopped at this point and held that the manner in

[17] *DEWA, supra* note 1.
[18] *Id.* at 19, 20.

which the state assessed the needs of the deaf and mute employees was incorrect and could have directed the government to include them in the higher transport allowance bracket. Until this point, the approach of the Court was similar to that in the previous cases discussed above: asking what were the needs of an impairment category, comparing it with the needs of the other categories, and finally endorsing or revising the decision of the state to provide for the needs of one category but not the other. The approach centered on factual considerations, without enquiring if there were legal questions at stake. But the Supreme Court in this case went a step forward and looked at the question through the lens of two fundamental constitutional principles, that of equality and dignity.

A. The Equality Argument

The Court held that the action of the government violated the right to equality in Article 14 of the Constitution. They held that the legal category "persons with disabilities" that the PWD Act addresses, though comprising of different impairments, constitutes a "well-defined class" in itself.[19] According to the Court, the Act does not create or conceive of any preferential distinction between the seven categories of impairments that it covers.[20] The Court reasoned that the classification that the government made *within* this class, though based on an intelligible criterion, did not have any rational connection with the objective of main streaming and empowering the disabled. This is the fully articulated test for constitutional equal treatment which requires that for a classification to be constitutionally valid, it must have a rational nexus with the object sought to be achieved through that classification. This crucial part of the analysis was missing in the earlier instances where courts addressed such questions.

It is a fundamental principle of law that the State cannot discriminate among persons of the same legal status, such as 'juveniles,' 'workmen' or 'accused' in terms of the rights and immunities that attach to such legal statuses. In a similar vein, the Court in this case held that the state cannot

---

[19] *Id.* at 21.

[20] *But see* PWD Act §33(1995). This claim is factually incorrect. The Act provides job reservation for only three out of the seven categories of impairments that it covers. A logical extension of the reasoning in this case will be to challenge this clause of the PWD Act as being in violation of Article 14.

discriminate among persons belonging to the same legal category – in this case, disabled employees – with regard to allocation of benefits or opportunities. Thus, the essence of the Court's reasoning is that any distributive measure targeting a specific group of persons must be consistent with the non-discrimination principle.

B. The Dignity Argument

The Court also held that the action of the government was in violation of Article 21 of the Constitution, as it harmed the dignity of the deaf and mute employees. The Court reasoned that the inherent dignity of a deaf and mute person, which is protected by Article 21, is harmed when he/she is "marginalized, ignored or devalued" [21] on the ground that his/her disability is lesser than that of a visually impaired person. This argument speaks directly to the hierarchy of vulnerability approach used by the courts in previous instances. In rejecting that approach, the Court affirmed the view that the level of vulnerability of a disabled person cannot be deduced from a clinical understanding of 'functionality' of body parts or senses, and placed on a hierarchy. Deploying the dignity argument in this way also makes space for the view that the vulnerability of a disabled person is not a direct consequence of the physical fact of impairment, but that it depends on how the impairment is experienced socially. Not considering the social experience of impairment results in such a person being marginalized or devalued, which harms his/her dignity.

The use of dignity in human rights adjudication is a popular trend across the world, though the precise meaning and scope of dignity is contested.[22] So far in Indian constitutional law, the notion of human dignity has been used by courts in two contexts: (a) to craft an expansive understanding of the right to life, as including components of a number of other fundamental rights (right to life with dignity);[23] and, (b) to recognize discrimination on the basis of personal traits or characteristics, even if such characteristics are not enumerated as grounds for non-discrimination in the Constitution

[21] *DEWA, supra* note 1, at 22.
[22] Christopher Mc Crudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).
[23] *See, e.g.,* Francis Coraile Mullin v. Administrator, Union Territory of Delhi, (1981) 1 S.C.C. 308.

(dignity as self worth).[24] The use of the dignity argument by the Court in *DEWA* does not create a new conception of dignity, but illustrates an innovative application of the notion of dignity as self worth. It is important to clarify that hierarchization of vulnerability per se does not offend a person's self worth or human dignity, for that is the basis of any affirmative action program. The import of the Court's dignity argument is that hierarchization within the same group (disabled employees) with respect to a specific purpose (transport allowance) offends the dignity principle.

The Court thus allowed the petition and directed the central and state governments and "other establishments wherever such benefits have been extended" to employees with visual and locomotor impairments, to provide the same to the deaf and mute employees as well.

V. CONCLUSION

DEWA is not the best example of how courts can or should address distributive questions. The Supreme Court in *DEWA* did not have to worry about the economic burden that it placed on the state with its decision, since three central government ministries were already in favour of extending the benefit to deaf and mute employees. Additionally, the fact that two state governments (Kerala and Andhra Pradesh) were already providing transport allowance to the deaf and mute employees on par with other disabled employees must have weighed with the Court. Thus, it could be argued that the judgment of the Court was not strictly in pursuance of legal arguments or principles. However, while it is indeed a problematic proposition for courts to decide on what basis resources should be distributed by the state, it is perfectly legitimate for constitutional courts to oversee if the distribution of any benefit is consistent with the laws enacted by the state or principles laid down in the Constitution, and that is what the Court did in this case.

The judgment was a small but significant victory for deaf and mute

[24] *See, e.g.,* Naz Foundation v. National Capital Territory of Delhi, 160 DELHI L. TIMES 277 (2009).

[25] On February 19, 2014, the Finance Ministry, Government of India, issued an order stating that in furtherance of the Supreme Court judgment, deaf and mute employees are eligible for transport allowance at double the regular rate with immediate effect. *See* Department of Financial Services (Welfare), Ministry of Finance, Notification on Payment of Conveyance

employees.[25] But the implications of the case are not limited to the specific issues of transport allowance or deaf and mute employees alone. The reasoning of the Court in this case is likely to impact how the state distributes benefits among the disabled in future as well as how disabled individuals and groups approaching the courts with cases of discrimination, may strategize. Most importantly, the approach of the Court in this case is likely to impact the way other courts decide similar distributive questions in the future. Although highly litigated in appellate courts, disability law is still at a nascent stage in India, where most judgments contain a formulaic application of the law. The relevance of the *DEWA* judgment is in introducing constitutional principles in disability adjudication.

Allowance to Deaf and Dumb Employees at par with Blind and Orthopaedically Handicapped Employees, File No. 3/5/2007-SCT-B, April 11, 2014, *available at* http://financialservices.gov.in/download.asp?rec=298&NotificationType=C.

DECODING "PUBLIC AUTHORITY" UNDER THE RTI ACT: A COMMENT ON *SUBHASH CHANDRA AGGARWAL v. INDIAN NATIONAL CONGRESS*

*Mathew Idiculla**

The June, 2013 order of the Central Information Commission ("CIC") in Subhash Chandra Aggarwal v. Indian National Congress which brought political parties within the scope of the Right to Information ("RTI") Act, has highlighted some issues regarding the drafting and interpretation of the RTI Act. The CIC held that the six national political parties which were respondents in the case, have the ingredients that qualify them as "public authorities" within the meaning of section 2(h) of the RTI Act. In this comment the author argues that the reasoning for holding what constitutes substantial financing that makes a body a "public authority" is not clear and the interpretation of the definition of "public authority" is inconsistent.

I. INTRODUCTION

The Right to Information Act, 2005 ("RTI Act") has been, for very justifiable reasons, celebrated as one of the most revolutionary legislations passed by the Parliament in the recent past. The legislation, which was a result of a sustained public campaign by Mazdoor Kissan Shakti Sanghatan,

* Graduate Fellow, School of Policy and Governance, Azim Premji University, Bangalore.

went through many transformations at various stages. The Parliamentary Standing Committee Report alone recommended 153 amendments.[1] Therefore the RTI Act, unlike many other laws passed by the legislature, was extensively deliberated in both public and parliamentary fora before enactment. But does that mean it is a well-drafted piece of legislation?

The June 2013 order of the Central Information Commission ("CIC") in *Subhash Chandra Aggarwal v. Indian National Congress*[2] bringing political parties within the scope of the RTI has highlighted some of the issues regarding the drafting and interpretation of the RTI Act. The question before the CIC was whether the six national political parties - the respondents in the case - the Indian National Congress (INC); the Bharatiya Janata Party (BJP); the Communist Party of India (Marxist) (CPI(M)); the Communist Party of India (CPI); the Nationalist Congress Party (NCP); and the Bahujan Samaj Party (BSP) - have the ingredients that qualify them as "public authorities" within the meaning of section 2(h) of the RTI Act. The CIC bench, comprising Chief Information Commissioner Satyananda Mishra and Information Commissioners Annapurna Dixit and M.L. Sharma, held in the affirmative. However, as I argue in this comment, the Commission's reasoning for holding that political parties are "public authorities" followed an inconsistent logic. Its justification for holding what constitutes substantial financing that makes a body a public authority was not clear and more importantly its interpretation of the definition of "public authorities" was inconsistent.

II. The Definition of Public Authority

Section 2(f) defines right to information as the "right to information accessible under this Act which is held by or under the control of any public authority." Hence, the interpretation of what constitutes a "public authority" becomes key. Section 2(h) of the RTI Act, as modified up to February 1, 2011, and published by the Ministry of Law and Justice, Government of India, defines a public authority as follows:

(h) "public authority" means any authority or body or institution of

---

[1] V. Venkatesan, *Law and Graft*, Frontline, Sept. 10-23, 2011, at 28.

[2] Decision No. CIC/SM/C/2011/000838, File No. CIC/SM/C/2011/001386 and File No. CIC/SM/C/2011/000838 (June 3, 2013).

self-government established or constituted—
(a) by or under the Constitution;
(b) by any other law made by Parliament;
(c) by any other law made by State Legislature;
(d) by notification issued or order made by the appropriate Government, and includes any—
(i) body owned, controlled or substantially financed;
(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government…

Interestingly, if one closely compares the same clause with the version of the clause in the Act published in the Gazette of India on 21st June, 2005, there is a noticeable difference. Section 2(h) of the RTI Act as it appears in the Gazette is reproduced below:

(h) "public authority" means any authority or body or institution of self- government established or constituted—
(a) by or under the Constitution;
(b) by any other law made by Parliament;
(c) by any other law made by State Legislature;
(d) by notification issued or order made by the appropriate Government,
and includes any—
(i) body owned, controlled or substantially financed;
(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government…

The key difference, as observable from the clauses quoted above, is the placement of "and includes any... appropriate Government... ." While the Act published by the Ministry has placed "and includes any ... appropriate Government" in the same line as section 2(h)(d), the Act issued by the Gazette begins it in a different line and places it vertically below section 2(h). In the Ministry version, (i) and (ii) are sub-clauses to section 2(h)(d) as is clear from the text indention, but in the Gazette version, (i) and (ii) appear as clauses to section 2(h). Another difference is the placement of "directly or indirectly by funds provided by the appropriate Government" after sub-clause (ii).

The placement of (i) and (ii) is pertinent because it significantly alters the requirements necessary for a body to be a "public authority" under section 2(h). The placement of (i) and (ii) as sub-clauses to section 2(h)(d) implies that for a body to be a "public authority" it needs to be created under a notification issued or order made by the Government. The use of "and includes any" read in the context of the provision, enlarges the meaning of the words in section 2(h)(d). Even then, sub-clauses (i) and (ii), as per the Ministry's version, would still need to be read conjunctively with section 2(h)(d). However, if the sub-clauses (i) and (ii) are read independently of section 2(h)(d), as the Gazette version suggests, it would mean that any body or institution owned or substantially financed by the Government would be a "public authority."

III. Political Parties as Public Authorities: The Reasoning in *Subhash Chandra Aggarwal*

The CIC in *Subhash Chandra Aggarwal* seems to have interpreted the sub-clauses in section 2(h) as per its placement in the Act published in the Gazette. Paragraph 57 of the CIC's order states:[3]

> It is quite obvious that out of the many ways a public authority can be established or constituted, those provided in (a), (b), (c) and (d) above would not apply to these political parties. They have not been established or constituted by and under the Constitution; nor by any other law made by Parliament or the State Legislature; nor are these bodies owned or controlled by any appropriate government. We have to examine if these political parties would qualify under the remaining provisions. It is also true that these political parties have not been established or constituted by any specific notification issued or order made by an appropriate government as provided in (d) of this particular section.

Hence the order conclusively states that political parties cannot be classified as public authorities under the criteria specified in clauses (a), (b), (c) and (d) of section 2(h). However, subsequently the order very tepidly

[3] *Id.*

tries to claim that political parties may be construed as public authorities because they are registered and recognized by the Election Commission under the Representation of People's Act, which also entitles them to a common election symbol among other benefits. According to the CIC this implies, that although political parties do not fall within the textual scope of section 2(h)(d), "at least, in spirit, these political parties can be said to have been constituted by their registration by the Election Commission of India, a fact akin to the establishment or constitution of a body or institution by an appropriate government."[4] After clearly stating that political parties do not fit any of the first four criteria in section 2(h), including 2(h)(d), the order by suggesting through an inconclusive insinuation that it may be considered to meet the requirement of provision (d), unnecessarily muddled its own reasoning.

The order next examines whether political parties are public authorities under 2(h)(ii). In doing so it interprets this provision as requiring that "any nongovernmental organisation which is substantially financed, directly or indirectly, by funds provided by the appropriate government would become a public authority for the purpose of the Right to Information Act."[5] According to the CIC the question of whether a political party is a public authority is to be determined by the extent of financing under section 2(h)(ii), which also reveals a disjunctive interpretation of (i) and (ii) from section 2(h)(d).

The greater part of the CIC order deals with what constitutes substantial financing and whether the respondent political parties can be said to be substantially financed by the government. However, even after examining the legal precedents on the meaning of substantial financing and evidence of benefits received by the respondents from the government, the CIC order arrived at its decision without applying any distinctive or objective standards. Though the CIC provided various examples of how the political parties have received direct and indirect financial support from the government, it did not explain how such support may be construed as "substantial" financing. It did not make any attempt to arrive at any criteria to identify what level of funding from the state amounts to substantial financing. In a previous case - *Shri Shanmuga Patro v. Rajiv Gandhi*

[4] *Id.*
[5] *Id.*

Foundation[6]- on the question of whether the Rajiv Gandhi Foundation was substantially financed by the government, the CIC had explained that "the contribution of the Government is less than 4% of the total average income of RGF since its inception. It, therefore, cannot be said to be "substantially financed" by the Government."[7] However, in *Subhash Chandra Aggarwal* the CIC never attempted to discover what percentage of the political party's finance is funded by the government or to determine in any other way what level of government funding amounts to substantial funding. This is a crucial limitation since the only clearly expressed justification for holding political parties as public authorities is that they have been substantially financed. The absence of clear elucidation of what "substantial financing" means, amounts to implying that a whole host of bodies which receive paltry funding and benefits from the state could now be potentially considered as "public authorities."

After discussing the financial support extended to political parties by the government, the CIC concludes that the respondent political parties have been "substantially financed" by the Central Government and therefore meet the requirement of section 2(h)(ii) of the RTI Act.

A few key points emerge from the CIC order. One, according to the CIC, political parties cannot be held to be public authorities under sub-clauses (a), (b), (c) and (d) of section 2(h) and hence there is a need to examine if they "qualify under the remaining provisions." This would mean (i) and (ii) are interpreted disjunctively from 2(h)(d). The ultimate finding of the Commission that political parties are public authorities was based on 2(h)(ii), which again signals disjunctive interpretation. It should be noted however, that the CIC was not consistent in taking this approach. For example, paragraph 73 of the order states:

> However, the question remains whether the aforesaid financing can be held to be 'substantial financing' in terms of section 2(h)(d)(i) of the RTI Act.

Hence, in parts of the order, the CIC has held political parties to be public authorities as per section 2(h)(ii) and elsewhere as per section

[6] Decision No. 6010/IC(A)/2010, File. No. CIC/WB/C/2009/000424 (Oct. 15, 2010).

2(h)(d)(i). This reveals a lack of clarity in the CIC's own interpretation of whether (i) and (ii) are sub-clauses to section 2(h) or section 2(h)(d).

The confusion in comprehending the constituents of "public authorities" under section 2(h) of the RTI Act is not helped by the precedents of CIC and higher courts. In *Shri Shanmuga Patro v. Rajiv Gandhi Foundation,*[8] on the question whether the Rajiv Gandhi Foundation is a public authority, the full bench of CIC held that it was not a public authority under sub-clauses (a), (b) & (c) of clause (h), and that to qualify as public authority under sub-clause (d), "an entity should be owned, controlled or substantially financed, directly or indirectly, by the Government." It is clear from this reasoning that the court read clauses (i) and (ii) as sub-clauses to section 2(h)(d) and consequently interpreted the clauses conjunctively. Similarly, in *Krishak Bharti Cooperative Ltd. v. Ramesh Chander Bawa,*[9] a single bench of the Delhi High Court held that Krishak Bharti Co-operative Ltd. (KRIBHCO), National Cooperative Consumer Federation of India Ltd. (NCCF), and the National Agricultural Cooperative Federation of India Ltd. (NAFED) are public authorities. The Court's understanding of the scope of section 2(h)(d) is revealed by the following passage:

> [W]hat [is] require[d] to be examined is whether each of these entities is, in terms of Section 2(h) (d) (i), a body owned, controlled, or substantially financed by the appropriate government, or in terms of Section 2(h)(d)(ii), a non-government organisation substantially financed directly or indirectly by funds provided by the appropriate government?

However, in *Delhi Sikh Gurudwara Management v. Mohinder Singh Matharu,*[10] a division bench of the Delhi High Court read (i) and (ii) disjunctively from Clause (d). The Court briefly discussed the difference between the two versions of section 2(h), and favoured the one in the Official Gazette. The reason given was that the version in the Official Gazette is the "authenticated version." On the basis of the Official Gazette

---

[7] *Id.*
[8] *Id*
[9] W.P. (C) No. 6129/2007 (May 14, 2010).
[10] LPA No.606 and 607 of 2010 (Sept. 12, 2012).

version of the clause, the Court concluded that the phrase "and includes" is not part of Clause (d), but is placed "separately, independently and away from clause (d) of section 2(h) of the RTI Act."

One of the instances where the Act, as published in the Gazette, is better structured than the Ministry version is in the last part of section 2(h), which places the phrase "directly or indirectly by funds provided by the appropriate Government" in a manner that applies to both (i) and (ii) and not just (ii). However, what furthers the case that (i) and (ii) are sub-clauses under (d) is the fact that all instances where numbers in the form of (i), (ii), (iii) are used under section 2 of the Act, this form designates sub-clauses to a letter clause.[11]

However, even if (i) and (ii) are read conjunctively with (d), the court may find, as the Delhi High Court did in *Krishak Bharti Cooperative Ltd. v. Ramesh Chander Bawa,*[12] that "and includes" used in the provision clearly expands the meaning of section 2(d)(h) to include elements of (i) and (ii) even in the absence of a notification or order. Similarly, the Delhi High Court in *Indian Olympic Association v. Veeresh Malik*[13] read (i) and (ii) conjunctively with (d) to hold that a facial interpretation of section 2(h)(d) requires that apart from being substantially financed by the appropriate government,

(1) The body or institution be one of self government;
(2) Established by or constituted under a notification issued by the appropriate government.

However, the judgment reasoned that sub-clauses (i) and (ii) are to be interpreted so as to extend the scope of the section, since it would be anomalous to expect a "non-government organization" to be established by a government notification, and as the parliamentary intention was to expand the scope of the definition of "public authority" and not restrict it to the four categories, sub-clause (i) is a surplusage. Therefore, the Court held that "it is thus not necessary that the institutions falling under the inclusive part have to be constituted, or established under a notification issued in that regard." Hence the Delhi High Court judgments in *Indian Olympic Association v.*

[11] *See, e.g.*, RTI Act §§2 (a), 2 (e), 2 (j) (2005).
[12] W.P. (C) No. 6129/2007 (May 14, 2010).

Veeresh Malik[14] and *Krishak Bharti Cooperative Ltd. v. Ramesh Chander Bawa* [15] indicate that irrespective of the placement of "and includes any," for a body to be public authority under section 2(h)(d), a notification or order from the appropriate government is not to be considered as a condition precedent.

IV. Subsequent Events

In *Subhash Chandra Aggarwal,* the CIC directed the respondent political parties to appoint Central Public Information Officers within six weeks and to also make voluntary disclosures as per section 4(1)(b) of the RTI Act. Subsequently, the government decided to amend the RTI Act to keep political parties out of the purview of the Act and also give retrospective effect to the amendment from the date of the CIC order.[16]

Despite the ambiguity around the definition of public authority due to slight variations in the placement of words in the versions of the RTI Act as published by the Government of India and the Official Gazette, the new amendment proposed by the government does not address these concerns. It merely seeks to insert an explanation to section 2(h) which says,

> The expression "authority or body or institution of self-government established or constituted" by any law made by Parliament shall not include any association or body of individuals registered or recognised as political party under the Representation of the People Act, 1951.[17]

The amendment bill was introduced in the Lok Sabha and later referred to the Standing Committee on Personnel, Public Grievances, Law and Justice. However, since the 15th Lok Sabha dissolved without discussion or passing of the amendment bill, the government's efforts to override the CIC order has failed. But the lack of clarity in the definition of "public authority" continues to remain a major concern.

---

[13] WP(C) Nos. 876/2007, 1212/2007 & 1161/2008 (Jan. 7, 2010).
[14] *Id.*
[15] W.P. (C) No. 6129/2007, (May 14, 2010).
[16] Bill No. 112 of 2013 (*Lok Sabha*).
[17] *Id.*

A CAPRICIOUS NOOSE: A COMMENT ON THE TRIAL COURT SENTENCING ORDER IN THE DECEMBER 16 GANG RAPE CASE

*Aparna Chandra**

The December 16 gang rape in Delhi evoked outrage and protest across the country and led to far-reaching and much-needed reform in laws relating to sexual offences. However, in the aftermath of the incident, the legislature as well as the judiciary has articulated the need for capital punishment in cases of rape and murder. In this comment, the author looks at the sentencing order of the trial court in the December 16 case itself, to point out why this move is problematic.

* Assistant Professor of Law, National Law University, Delhi. A previous version of this

The sentencing order of the trial court in the December 16 gang rape case (*State v. Ram Singh and Ors.*, SC No. 114/2013) highlights the arbitrariness of the death penalty regime. In addition, the reasoning in the judgment raises questions about the theoretical rationales for awarding the death penalty. In this piece, I make and substantiate these claims by first describing the broad contours of, and debates within, India's death penalty jurisprudence. I then analyze the sentencing order in *Ram Singh* and argue that not only was the legal reasoning in the verdict flawed, but that the sentencing order serves as a window to larger concerns with the death penalty itself.

I. Hanging in the Balance: The Rarest of Rare Standard

Let me start with the legal landscape in which the question of the death penalty in *Ram Singh* came to be decided. Though *Bachan Singh v. State of Punjab*[1] was neither the first nor the last case where the constitutionality of the death penalty was challenged, it remains the controlling precedent on the issue and is the starting point of this analysis.

A. Rarest of Rare: Bachan Singh

In *Bachan Singh* the constitutionality of the death penalty was challenged on both substantive and procedural grounds. A 5-judge bench of the Supreme Court rejected the substantive challenge but was concerned about the procedural challenge that the sentencing regime under Section 354(3) invests courts with "unguided and untrammeled discretion and allows death sentence to be arbitrarily or freakishly imposed."[2] The Court reconciled the continuation of the death penalty with the potential for its arbitrary use by walking the tightrope between too much judicial discretion on the one hand and too little on the other, both of which could lead to arbitrariness and unfairness in sentencing.

---

comment appeared in Aparna Chandra, *A Capricious Noose - An Analysis of the December 16 Gang Rape Judgment,* Bar and Bench (Sept. 25, 2013, 16:02 PM), http://barandbench.com/content/212/capricious-noose-analysis-december-16-gang-rape-verdict#.U_zFBPmSx8E

[1] A.I.R. 1980 SC 898.

[2] *Bachan Singh*, *id*. at ¶17.

On the one hand, the Court refused to provide a list of rigid guidelines or categories of cases for the award of the capital punishment. It held that a mechanical approach which does not take into account "variations in culpability" even within a single type or category of offence would "sacrifice justice at the altar of blind uniformity" and would cease to be a *judicial* determination of the sentence, itself a pre-requisite for the due process requirement to be met.[3]

While eschewing a mechanical approach, the Court laid down the following principles to guide sentencing discretion in capital cases:

a. In a case of murder, life imprisonment would be the rule and the ***death penalty an exception***.

b. As an exceptional punishment, courts were required to calibrate the punishment such that "[t]he extreme penalty can be inflicted only in gravest cases of extreme culpability."[4] To do so, courts would examine the ***aggravating and mitigating circumstances*** in a case such that "in addition to the ***circumstances of the offence***, due regard must be paid to the ***circumstances of the offender***."[5] Recognizing that there was a danger of this individualized sentencing degenerating into an arbitrary system, the Court prescribed a process of ***principled sentencing***, whereby the determination of aggravating and mitigating factors would be controlled, not by the predilections of individual judges, but by a determinate set of standards created through the evolutionary process of judicial precedents.

c. Only if the analysis of aggravating and mitigating circumstances provided ***"exceptional reasons"*** for death, would death be awarded.[6] According to the Court, "[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the ***rarest of rare cases when the alternative option is unquestionably foreclosed***."[7]

---

[3] *Bachan Singh*, *id.* at ¶174. *See also* Mithu v. State, A.I.R. 1983 SC 473.
[4] *Bachan Singh*, *id.* at ¶195.
[5] *Id.*
[6] *Bachan Singh*, *id.* at ¶162.
[7] *Bachan Singh*, *id.* at ¶207.

B. Rarest of Rare Take-Two: Machhi Singh

In 1983, a 3-judge bench of the Supreme Court in *Machhi Singh v. State of Punjab*[8] elaborated upon the *Bachan Singh* "Rarest of Rare" formula. *Bachan Singh* had specifically refused to list out categories of cases which would fall within the ambit of rarest of rare. Instead, the Court had emphasized on individualized but principled determinations of whether each case fell within the rarest of rare category. *Machhi Singh* however listed out 5 categories of cases in which the community's "collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty."[9] Further, though *Machhi Singh* paid lip service to the *Bachan Singh* injunction to consider the circumstances of both the crime and the criminal, the *Machhi Singh* categories focused only on the crime and not on the criminal.[10]

Machhi Singh introduced an inconsistency that now lies at the heart of death penalty determinations by courts. By focusing only on the crime and not the criminal, the case spawned a death penalty jurisprudence where the nature, manner and motive of the crime took precedence over the possibility of reform of the criminal.[11]

A contrary line of cases referred back to the *Bachan Singh* injunction to give due weight to both the crime and the criminal, and to award the death penalty only when the alternative punishment of life was "unquestionably foreclosed." In *Swami Shardhananda v. State of Karnataka*[12] a 3-judge bench pointed to the inconsistency between the *Bachan Singh* and *Machhi Singh* formulations. The Court attempted reconciliation by stating that the *Machhi Singh* factors were a partial illustrative list of useful guidelines but were by no means "inflexible, absolute or immutable."[13] However, as was

---

[8] A.I.R. 1983 SC 957.

[9] *See* Shankar Khade v. State of Maharashtra ¶46, Cr. App. No. 362-363/2010 (April 25, 2013) (Lokur J. concurring) (listing out various cases where the Court has focused solely on the crime and not the circumstances of the offender).

[10] The *Machhi Singh* criteria were: manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime, and personality of the victim.

[11] *See Shankar Khade, supra* note 9, *id.*

[12] A.I.R. 2008 SC 3040.

[13] *Id.* at ¶28.

pointed out by the Court itself in *Santosh Bariyar v. State of Maharashtra,*[14] *Sangeet v. State of Haryana,*[15] and *Shankar Khade v. State of Maharashtra,*[16] many cases have focused only on the crime to the exclusion of the criminal in awarding the death penalty. *Bariyar* listed 6 cases and *Sangeet* mentioned an additional 5 where the *Bachan Singh* injunction to focus on both the crime and the criminal was violated.

C. The "Lethal Lottery"

Apart from a confusion of principles in the application of the rarest of rare formula, the Court has also expressed concern in cases like *Aloke Nath Dutta v. State of West Bengal,*[17] *Swamy Shradhananda v. State of Karnataka,*[18] *Santosh Bariyar v. State of Maharashtra*,[19] *Farooq Abdul Gafoor v. State of Maharashtra,*[20] and *Sangeet v. State of Haryana*,[21] that the application of the death penalty is arbitrary, judge-centric (as opposed to principled) and based on the "personal predilection of the judges constituting the bench."[22] These judgments and other writings have enumerated cases where different benches have reached diametrically opposite results even though the facts were similar.[23] As such, the Court has been concerned that the capital sentencing regime may violate the equal protection guarantee under Article 14 of the Indian Constitution.[24] In a remarkably candid opinion delivered last year, the Supreme Court admitted that because of the uncertainties in India's death penalty jurisprudence, the Court was unable to determine whether or not in the present case the option

---

[14] (2009) 6 S.C.C. 498.
[15] (2013) 2 S.C.C. 452.
[16] Cr. App. No. 362-363/2010 (April 25, 2013) (Lokur J. concurring).
[17] 2006 (13) S.C.A.L.E. 467.
[18] A.I.R. 2008 SC 3040.
[19] (2009) 6 S.C.C. 498.
[20] JT 2009 (11) SC 47.
[21] (2013) 2 S.C.C. 452.
[22] Swamy Shraddananda @ Murali Manohar Mishra v. State of Karantaka, 2008 (10) S.C.A.L.E. 669.
[23] Amnesty International India, Lethal Lottery - The Death Penalty in India (2008); S. Muralidhar, *India's Travails with the Death Penalty,* 40 J. Indian L. Inst. 143 (1998); V. Venkatesan, *Getting Judge-Centric*, Frontline, Jan. 25, 2013 (interview with Justice A. P. Shah).
[24] *Bariyar, supra* note 14 ("[The] extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle").

of punishment for life was unquestionably foreclosed.[25]

D. Bariyar *to the (Failed) Rescue*

In order to bring order to chaos, *Bariyar* in particular attempted to derive further guidelines from *Bachan Singh* on how capital sentencing ought to be conducted. The Court focused on the requirement that the alternative punishment of life has to be "unquestionably foreclosed," and drew upon the *Bachan Singh* endorsed standard that the state has to lead evidence to show that the convict cannot be reformed or rehabilitated and thus constitutes a continuing threat to society. Since the death penalty is to be awarded only in the rarest of rare cases, *Bariyar* also required judges to survey a pool of similar cases to determine whether this case was rarest of rare or not. The *Bariyar* approach thus places a burden on the state to justify, not only through arguments, but through evidence, that the exceptional penalty of death is the only option in the case. However, *Bariyar* has rarely been followed, which is itself a testament to the capricious nature of the death penalty jurisprudence in India.[26] Recently, in *Shankar Khade*, the Supreme Court again alluded to the need for evidence based death sentencing, and was concerned that the rarest of rare formulation is unworkable unless empirical evidence is made available which allows the Court to evaluate whether a particular case is "rarer" than a comparative pool of rare cases. In the absence of this data, the application of the rarest of rare formulation becomes "extremely delicate" and "subjective."[27]

E. Gurvail Singh's *"Procrustean Cruelty"*

A 2013 judgment of the Supreme Court provides a different take on the Rarest of Rare test. In *Gurvail Singh @ Gala v. State of Punjab,*[28] the Court acknowledged that due weight had to be given to the circumstances of the crime as well as to the criminal in determining the appropriate sentence in capital cases. However, in a bewildering move, the Court set out a two-step process to determine whether the death penalty ought to be awarded or not.

---

[25] *Sangeet*, *supra* note 15.
[26] *See Shankar Khade, supra* note 9, at ¶46 (listing out cases where no evidence was led on whether the possibility of reformation was "unquestionably foreclosed").
[27] *Id.* at ¶¶2-3.
[28] A.I.R. 2013 SC 1177.

Step 1 involves evaluating the aggravating and mitigating circumstances in the case. If the aggravating circumstances outweigh the mitigating circumstances then the sentencing court should proceed to Step 2. ***Step 2*** is the Rarest of Rare analysis, which according to the Court "depends on the perception of the society and is not 'judge-centric.'"[29] The Rarest of Rare test according to *Gurvail Singh* is "whether the society will approve the awarding of death sentence to certain ***types of crime*** or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes."[30]

In delinking the analysis of aggravating and mitigating circumstances from the Rarest of Rare analysis, *Gurvail Singh* fundamentally misunderstands and misapplies *Bachan Singh*. **First**, as per *Bachan Singh*, the Court has to take into account the circumstances of the crime as well as the criminal, and give due weight to both the aggravating and mitigating factors in the case. Upon doing this analysis if the Court finds that the case is of such an exceptional nature that the alternative of life is "unquestionably foreclosed" then, in such limited and exceptional circumstances, the case merits the death penalty. Therefore, evaluating the aggravating and mitigating circumstances of a case is the method of determining whether the case falls within the rarest of rare category. It is not an adjunct or a precursor to the Rarest of Rare analysis.

Second, *Bachan Singh* specifically and repeatedly refused to create categories of cases which would merit the death penalty. Each case, irrespective of the type of crime it dealt with, had to be evaluated on its own terms. The court rejected categorization of types of crime as the basis for the award of the death penalty in the following strident words,

> Even within a single-category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its

[29] *Id.* at ¶13.
[30] *Id.*

> peculiar combinations of events and its unique configuration of facts…. [A] standardisation of the sentencing process which leaves little room for judicial discretion to take account of ***variations in culpability within single-offence category ceases*** to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardization degenerating into a bed of procrustean cruelty.[31]

By focusing on the type of crime as the basis for the rarest of rare analysis, *Gurvail Singh* therefore flies in the face of the *Bachan Singh* standard.

Third, *Gurvail Singh* suggests that the problem of the "judge-centric" nature of the capital sentencing can be overcome by focusing on "society's abhorrence, extreme indignation and antipathy to certain types of crimes."[32] *Bachan Singh* clearly rejected this approach and exhorted that,

> Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion…. When Judges…take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large … that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge….Judges have no divining rod to divine accurately the will of the people.[33]

On all three counts therefore, *Gurvail Singh* was clearly decided *per incuriam*. It is particularly troubling therefore, that of the plethora of cases available to the judge in *Ram Singh*, he chose to rely on *Gurvail Singh* for his understanding of the rarest of rare formulation.

---

[31] *Bachan Singh, supra* note 1, at ¶174.
[32] *Gurvail Singh, supra* note 28, at ¶13.
[33] *Bachan Singh, supra* note 1, at ¶125.

II. *State v. Ram Singh*: A Flawed Judgment, A Flawed Jurisprudence

The application of the *Gurvail Singh* formulation in *Ram Singh* not only reveals problems with the legal analysis in *Ram Singh* itself, but is also an important window into the problems with Indian jurisprudence on the death penalty in general.

A. Balancing Without a Scale: The Aggravating/ Mitigating Analysis and the Problems of Judicial Incoherence

The defense presented the following mitigating circumstances to argue against the death penalty:

1. Life imprisonment is the rule and death is an exception. There are no special reasons to award the death sentence in this case.
2. The young age, socio-economic circumstances and clean antecedents of the convicts point towards the possibility of reform.
3. The presumption of innocence is in the favour of the convicts.
4. The convicts were convicted only on the ground of conspiracy and not for their individual acts.
5. Factors relating to individual culpability and circumstances. These were that (a) Mukesh and Pawan were drunk at the time of incident; (b) Mukesh was driving the bus throughout; (c) Mukesh had helped out the system by admitting that he was present inside the bus.

The Court rightly rejected the contention that any presumption of innocence exists in favour of the convicts after they have been found guilty. The judge also clarified that the convicts were found guilty not only of conspiracy but also for their own overt acts.

Beyond this however, the Court's analysis unravels. The Court never discusses the implications of life being the norm and death the exception. It provides no analysis, let alone the "exceptional reasons" as required by *Bachan Singh,* for whether and why the option of life was "unquestionably foreclosed." This lack of concern for the core aspect of the *Bachan Singh* test comes out most clearly in the Court's analysis of mitigating and aggravating circumstances.

The Court holds that each of the mitigating circumstances of young age, socio-economic conditions and clean antecedents were not determinative factors for deciding against the death penalty. It cites cases where the Supreme Court had awarded the death penalty despite these factors being present (but does not cite any of the plethora of cases where such factors were used to award life imprisonment).[34]

Since these factors were not individually determinative, the Court inexplicably decides that they did not have to be taken into consideration at all, either individually or cumulatively. That is, the Court equates the non-determinative nature of individual mitigating factors with their irrelevance to the entire analysis. For example, it does not consider whether or not in this specific case the young age of some or all of the accused points to the possibility of reform.[35] Even the case that the Court itself relies on, *Gurvail Singh*, had held that "[a]ge definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind."[36]

The Court fails to appreciate that aggravating and mitigating circumstances are not determinative factors but evaluative criteria. The judge has to give due consideration and weight to these factors, and has to analyse reasons for and against the death penalty by reference to these factors, which *Ram Singh* completely fails to do.

On the other hand, the Court mentions the following as aggravating factors:

1. The "exceptional depravity" and "extreme brutality" of the crime.
2. The manner of commission of the crime aroused "intense and extreme indignation of society."

---

[34] *See Shankar Khade*, *supra* note 9, at ¶46 (Lokur J. concurring) (listing out cases where these factors were taken into account in the death penalty evaluation).

[35] *Bachan Singh* had itself recognized the age of the accused as an "undoubtedly relevant circumstance... and must be given great weight in the determination of sentence." In fact, *Bachan Singh* had stated that "extreme youth can…be of compelling importance."*Supra* note 1, at ¶205.

[36] *Gurvail Singh, supra* note 28, at ¶13.

3. The "extreme misery" suffered by the prosecutrix.
4. "Grave impact" of the crime on the "social order."

The Court does not discuss any of these factors and engages in no analysis on how much weight, if any, ought to be accorded to each of these factors. Contrary to its approach to mitigating factors, the Court simply assumes the relevance of each of these aggravating factors.

However, just as any single mitigating factor is not determinative, so also each of these aggravating factors is not conclusive.[37] Each factor needs to be given due consideration and evaluated in light of possible mitigating factors, an analysis that the Court fails to undertake.

Since all the mitigating factors have been dismissed, the Court finds that the aggravating factors outweigh the mitigating factors. Completely absent from this analysis is any discussion on whether the option of life is "unquestionable foreclosed." When Mukesh raises the plea that he cooperated with the Court by admitting his presence on the bus, the judge rejects this as a mitigating factor by stating that Mukesh's admission was made "probably to seek misplaced mercy."[38] *Bachan Singh* had endorsed the standard that the State has to lead evidence to show that there is no possibility of reform. Rejecting a mitigating standard on a conjecture, when coupled with the dismissal of mitigating factors in general, and the unquestioning acceptance of aggravating factors, shows a disregard for this fundamental principle of death penalty jurisprudence.

Absent too is any discussion of the individual culpability or specific circumstances of each of the accused. The Court never addresses the points raised by some of the accused regarding their individual roles in the crime. Again, *Bachan Singh's* exhortation to calibrate the award of punishment so as to fit the degree of culpability is never considered.

My argument is not that if done properly the analysis would necessarily

[37] *See, e.g.,* Panchhi v. State of U.P., (1998) 7 S.C.C. 177, where the Court held that "[b]rutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases' as indicated in Bachan Singh case."

[38] Interestingly *Bachan Singh* had specifically stated that "post-murder remorse, penitence or repentance by the murderer" are relevant factors for sentencing in capital cases.

have pointed to a different result. Rather, I am concerned that in grave matters of life and death, the Court neither engages in the required analysis nor has the right guidance from superior courts for undertaking the analysis. Courts can pick and choose their law from a menu of competing formulations of the rarest of rare doctrine and contradictory standards of which factors are relevant and/or determinative aggravating and mitigating circumstances. It is these inconsistencies that foster the incoherence and "judge-centric" nature of India's death penalty jurisprudence. The capriciousness of the death penalty runs so deep that the same judge who in *Shradhananda* questioned *Machhi Singh's* departure from the *Bachan Singh* standard, used *Machhi Singh* to justify the death penalty for Ajmal Kasab.[39] The same judge who presided over the bench that handed down *Sangeet*, which questioned the crime-centric focus of many death penalty decisions, also handed down *Gurvail Singh* which re-inscribes such a crime centric focus upon capital sentencing.

B. Death Penalty and Disparate Impact

Apart from the problems of incoherence and inconsistencies in the death penalty jurisprudence in general and the specific analysis in *Ram Singh* in particular, the case also raises important concerns with the quality of legal representation received by convicts in death cases. Anyone with passing familiarity with death penalty jurisprudence will immediately observe the divergence between *Bachan Singh* and *Gurvail Singh*. I do not know if the application of the *Gurvail Singh* standard was ever challenged in the arguments before the Court, but it appears from the judgment that no reservations were expressed about the use of *Gurvail Singh* as precedent. Should irrevocable determinations of life and death be decided on the basis of which lawyer one can afford or are appointed? This concern highlights the likely disparate impact of death adjudication on the poor. In light of a very weak legal aid system, the criminal justice process is, as a whole, skewed against the poor. In the absence of clear guidance from the higher courts on capital sentencing, the award of the death penalty is also likely to discriminate against those who cannot afford adequate legal representation to make the best case for why the death penalty ought not to be awarded. This problem is likely to be compounded by an insistence on "fast tracking"

[39] Mohd. Ajmal Kasab v. State of Maharashtra, (2012) 9 S.C.C. 1.

cases where ill-trained and ill-prepared lawyers have to argue before inadequately guided judges on an incoherent area of law, without adequate time for preparation.

C. A Shock to the Community's Conscience: Public Opinion and the Death Penalty

Ram Singh also highlights other grave concerns with India's death penalty jurisprudence. The case follows a line of Supreme Court decisions, starting with *Machhi Singh*, which hold that "shock to the collective conscience of the community" and "society's cry for justice" are relevant factors in determining whether or not the death penalty should be awarded in a particular case. As a court of law, a sentencing court has neither the means nor the need to look to public opinion in determining the adequate sentence. A cohesive and coherent "public opinion" is not only a fiction, but also reflects whom a court considers its relevant public. The opinion of members of the public can both be capricious, and be dependent upon the information that the "public" is given. As *Bariyar* recognized, there is a "danger of capital sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media cannot be ruled out."[40]

A court is a court of law, not a court of public opinion. Of course judges are creatures of society and will be influenced by it, but the encoding of public opinion into the formal framework of capital sentencing gives it a prescriptive weight that is problematic. If the opinion of the public matters to questions of sentencing, then courts are the wrong institutions to be determining sentence. Parliament or lynch mobs are more apposite.

Public opinion can also be shaped by a variety of factors, not all of which are relevant for sentencing purposes. The December 16 gang rape resulted in a huge outcry for a variety of reasons which are still being debated. At the same time, many similar or arguably more grotesque gang rape and murder related incidents pass us by, buried in the inside pages of the newspaper. How does one decide, based only on dominant voices as amplified by a 24/7 media, which amongst these are the "rarest of rare" cases?

---

[40] *Bariyar, supra* note 14.

D. The Ostrich Move: Deterrence and Retribution

Beyond relying on public opinion, the Court provides deterrence and retribution as rationale for awarding the death penalty. However, equating deterrence with the death penalty and retribution with justice masks deeper questions that need to be asked of our legal and social set-up.

1. Death as Deterrence

There is no proof that the death penalty has any deterrent effect on crimes.[41] More than two-thirds of the countries in the world have abolished the death penalty, in whole or in part.[42] They do not report a rate of crime higher than those countries that retain the penalty. The US is a particularly telling example where some states retain the death penalty and others have abolished it. However, in otherwise comparable circumstances, the states that have abolished the death penalty actually show a lesser rate of capital crimes than those that continue with the punishment.[43] Further, countries that have abolished the death penalty have not witnessed a spike in capital crimes after abolition.[44]

Deterrence depends on the swiftness and certainty of punishment, not its severity. By equating deterrence with harsh punishment, we end up avoiding hard questions about policing, investigation, prosecution and adjudication of crimes. A recent survey found that of the 203 previous rape cases tried before the same judge who presided over *Ram Singh*, only 2 previous cases had ended in conviction.[45] The study and other works have highlighted a plethora of problems with the way the legal system deals with rape, including misogynistic police attitudes, shoddy investigation, use of

---

[41] *See generally* UN GENERAL ASSEMBLY RESOLUTION 62/149, *Moratorium on the Use of the Death Penalty*, 18 December, 2007 ("there is no conclusive evidence of the death penalty's deterrent value").

[42] *See Abolotionist and Retentionist Countries*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140 (last visited Aug. 23, 2014).

[43] *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates#stateswithvwithout (last visited Aug. 23, 2014).

[44] *See generally* UN GENERAL ASSEMBLY RESOLUTION 62/149, *Moratorium on the Use of the Death Penalty*, 18 December, 2007.

[45] S. Rukmini, *Delhi Rape Case Judge Convicted Rarely, But Fingers Point at Police*, THE

the two-finger test, problems with judicial attitudes towards rape and rape survivors, the hostile courtroom environment, and pressures for compromise, all of which cumulatively result in unsuccessful prosecutions.[46] In that sense the adjudication in *Ram Singh* had many positives, including good investigation and prosecution, along with the use of forensic evidence to build a strong case. Deterrence is more likely to be achieved by translating the methods applied in this case to every case, regardless of whether the society is outraged or the crime fits perfectly into all stereotypes and myths surrounding rape.

2. Retribution as Justice

Similarly, equating retribution and justice takes focus away from entrenched injustices in society which lead to sexual violence in the first place. Retributive theories of punishment work on the assumption that crime is a disruption of social harmony, and that this harmony will be restored and justice will be achieved by visiting an equally strong punishment on the offender. In restoring status quo ante, however, we often forget that such status quo is not necessarily harmonious or just.

i. Violence of the Status Quo

In the specific context of rape, this problem with equating retribution with justice comes through in *Ram Singh* which frequently refers to the convicts as "beasts" - deviants from the norm of human society. The convicts are "inhuman" - aberrations of nature rather than a part and parcel and reflection of society. Not only does the "beast" metaphor serve to de-humanize the convicts and make their 'extermination' by the State more palatable, it also helps create a cognitive distance between the convicts and the rest of society such that we can lose sight of our own complicity in creating and supporting a rape culture that tolerates, condones and often celebrates sexual violence.

Treating the convicts as deviants from the social norm allows shifting the blame for the violence squarely on them, such that justice is served

---

HINDU, Sept. 15, 2013, *available at* http://www.thehindu.com/news/national/delhi-rape-case-judge-convicted-rarely-but-fingers-point-at-police/ article5129701.

[46] *See generally* PRATIKSHA BAXI, PUBLIC SECRETS OF LAW (2014).

simply by exterminating them and restoring the even tempo of society. The reality is that sexual violence is endemic in society rather than an aberration of the norm. Reports suggest that the accused were out that night purportedly with the idea of having "fun." Sexual violence and brutalization was their idea of fun. Just as: we use the terminology of "*eve-teasing*" not harassment for the violence we perpetrate and tolerate on the streets. Just as: we condone the stalking and groping and leering in our movies as wooing and romance, as innocent "*ched-chad*." In these quotidian forms of sexual violence we routinely treat women not as autonomous human beings but primarily as sexual objects for male pleasure. Cumulatively, the objectification of women and the logic of male sexual entitlement lead to a culture of tolerance and justification for sexual violence.[47]

This violence is not the special preserve of inhuman and beastly creatures. Sexual violence is embedded within. 98% of rape cases are committed within homes, within families, by neighbours and other acquaintances.[48] This is not even counting spousal sexual violence which the law does not even recognize as rape, to talk once more about male sexual entitlement. Till we address our rape culture we are not going to get even close to addressing the problems of rape. In that sense, justice will not be served by restoring social order and harmony, but by questioning and disrupting the underlying dominant narratives of violence.

III. Conclusion

The rejection of the death penalty does not mean that the victim does not deserve justice. The argument against the death penalty is not an argument against punishment itself, but against equating justice with vengeance, and punishment with execution. Committing violence in the name of vengeance will not end violence. Others who kill often employ their own rationalizations ("fun") to justify and excuse their acts to themselves and their relevant audience. How then, are we better than those that we seek to condemn? As a popular anti-death penalty saying goes, "How does killing people who kill people show that killing people is wrong?"

[47] *See generally* Jean Kilbourne, Killing us Softly (2010) (documentary drawing linkages between the objectification of women and gender-based violence).

[48] National Crime Records Bureau, Crime in India 2012, *Offenders Relation & Nearness to Rape Victims (State, UT & City-wise), available at* www.ncrb.gov.in

GANDHI & THE STOICS: MODERN EXPERIMENTS ON ANCIENT VALUES

Richard Sorabji, Oxford University Press, U.K., 2012,
Pages – XIV+224, Rs. 995.

*Pratyush Kumar**

Gandhi and the Stoics: Modern Experiments on Ancient Values by Richard Sorabji is a one-of-a-kind work, a serious and unique attempt to compare Mahatma Gandhi's 'philosophy' with those of the Stoics, and thus explore the ideas which form the basis of both. Many comprehensive, and in many ways complete, biographies of Gandhi have been written by scholars like Louis Fisher,[1] Judith M. Brown,[2] D. G.Tendulkar[3] and, of course, Mahadev Desai's almost encyclopaedic work on him.[4] Gandhi as a man of action; Gandhi in history; Gandhi in politics and political memory have been written about prolifically but Gandhi as a philosopher and thinker, removed from the spiritual halo which surrounds him, is a relatively less explored terrain. Sorabji's work is a major breakthrough in this field,[5] and is a valuable addition to the host of serious works on Gandhi. Sorabji's serious engagement with philosophy for well over five decades makes him exceedingly well-equipped for such a work.[6]

Sorabji's is a work of convergence of Gandhian philosophy with those of the Stoics rather than any claim of a direct influence of Stoic philosophy on Gandhi's thinking because, as Gandhi's own written works indicate, he

---

* Research Associate, National Law University, Delhi.

[1] LOUIS FISHER, THE LIFE OF MAHATMA GANDHI (1983).

[2] JUDITH M. BROWN, GANDHI: PRISONER OF HOPE (1991).

[3] 1-8 D.G.TENDULKAR, MAHATMA: LIFE OF MOHANDAS KARAMCHAND GANDHI (1951).

[4] 1-9 MAHADEV DESAI, DAY TO DAY WITH GANDHI (1968).

[5] Another scholar who has explored Gandhi as a philosopher is Akeel Bilgrami. *See* Akeel Bilgrami, *Gandhi, the Philosopher*, ECON. & POL. W'KLY 4159 (Sept. 27, 2003).

[6] Richard Sorabji is presently an Honorary Fellow of Wolfson College, Oxford, and a Fellow and Emeritus Professor of King's College London. He has approximately a dozen important publications to his credit like ARISTOTLE ON MEMORY (1972); MATTER, SPACE AND MOTION (1988); EMOTION AND PEACE OF MIND: FROM STOIC AGITATION TO CHRISTIAN TEMPTATION (2002).

had only a cursory or superficial introduction to the Stoics. This fact makes the convergence even more remarkable. Further, even when Gandhi was influenced by any Western idea whether it was Plato's Socrates, or Christ and Christian writers like Ruskin and Tolstoy, he would always reinterpret them in his life and practice and alter them considerably and sometimes even beyond recognition.[7] Therefore the extent of convergence between his thinking and those of the Stoics is noteworthy.

According to Sorabji, Gandhi's emphasis on amity moved beyond the model of Socrates, who in his enthusiasm to reach an ideal, lost touch with it.[8] Love for all, even for one's adversary, through personal suffering and detachment, are some of the finer points of overlap between Gandhi and the Stoics. However, Gandhi's warm family love was bestowed only on his circle of closest workers, and often came at the cost of following a harsh discipline. Akeel Bilgrami, in his celebrated essay *Gandhi, the Philosopher,* has emphasized that Gandhi's political strategies in specific contexts flowed from ideas "integrated to the most abstract epistemological and methodological commitments."[9] These commitments were put into practice by Gandhi[10] which, as a byproduct, even made him a successful politician or "public man" as the Stoics would have called him.

Like a scientist has faith in previous scientific records, so is Gandhi's religious faith in God; only the nature of faith is different. A scientist's nature of faith is rational, whereas Gandhi's nature of faith is listening to the inner voice of God through training.[11] This inner voice or divine voice is

---

[7] RICHARD SORABJI, GANDHI & THE STOICS: MODERN EXPERIMENTS ON ANCIENT VALUES 5-12 (2012) (With his emphasis on *satyagraha* through non – violence and amity, Gandhi went a step ahead of Socrates in his move for empowerment of the masses and conflict resolution. Gandhi took the Christian idea of love and compassion as an intrinsic part of his political credo without the Christian theology of non – Christians living in darkness to be condemned to eternal hell after death. In Gandhi's view, no religion could have the monopoly over faith and every faith provided the path to spiritual fulfillment. Even though Gandhi agreed with Ruskin by acknowledging the influence of *Unto this Last,* at the same time he spoke of a village economy as against an economy based on factories and the modern economic verbiage used by Ruskin. Also, Gandhi disagreed and ignored Ruskin on the point of inherent superiority of some humans over the rest. Taking the issue of *personal cost* to its most logical extreme, he went a step ahead of Tolstoy as far as his politics of non – violent, civil – disobedience and non – cooperation were concerned).

[8] *Id.* at 10-12.

[9] *Id.*

[10] *Id.*

[11] *Supra* note 3, at 13-14. According to Sorabji this is where Gandhi corresponds with Plato's

indubitable and is connected with his attitude to faith as opposed to reason. In Gandhi's world-view, only when an individual performs his duties is he entitled to rights – duties well performed lead to rights. And even *moksha* can be attained only by serving the oppressed masses.[12]

Gandhi's ideas kept on evolving all through his life and the changes which he effected did not always involve retraction but an addition of another criterion to deal with a new situation. Though resolute in his everyday life, Gandhi was constantly growing in the realm of his ideas put into practice. This is what makes him both unique and relevant in human history as a philosopher.

There is a striking similarity in appearance and entire demeanour of Gandhi and the Stoics: dressed to the minimal. In drawing this comparison, Sorabji has invoked the cynic Diogenes who wore a coarse cloak and even slept in it and who famously refused any gift from Alexander of Macedon, other than "standing out of his light."[13] Similarly, Sorabji finds commonalities in the detachment espoused by the Stoics and Gandhi's idea, inspired by the *Bhagwat Gita,* of detachment and spirit of service without aspiring for the fruits of service.[14]

Sorabji defends the idea of "positive freedom" contained in Stoic philosophy with its two pronged emphasis on self-abnegation and self-realization, which frees a person from the outer world and brings the most ideal peace and tranquility. As against this is "negative freedom" with its non-interference by other humans specially the state, as espoused by Isaiah Berlin.[15] Berlin criticizes positive freedom as non-political freedom which cannot restrict a "tyrant" in continuing with his actions.[16] In this, according to Sorabji, the "perfect stoic" Gandhi proves Berlin wrong because he, like the Stoics, emphasized on positive freedom and freed himself from the actions of the outer world. Hence he could not be affected by any action of

representation of Socrates in his "Apology."
[12] *Id. at* 15-16.
[13] *Id.* at 21.
[14] *Id.* at 28-31.
[15] *Id.* at 56-58. *See* Issiah Berlin, *Two Concepts of Liberty, in* ISSIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).
[16] BERLIN, *id.*

even the "tyrant."[17] Even for Isaiah Berlin, the distance between positive freedom which he initially detested, and negative freedom to which he aspired, gradually diminished. He came to acknowledge the intrinsic value of Stoic positive freedom.[18]

Gandhi's ascetic side of emotional detachment has parallels to Christian monk Evagrius who believed that having bad thoughts is a common occurrence, but perpetuating them or taking delight in them is wrong. The emergence of bad thoughts, according to Gandhi, can be eliminated by *Bhakti* to God as sanctioned by the *Bhagwat Gita*.[19] However, Sorabji has laid too much stress on the possible parallel with the Christian ascetic in the Egyptian desert whereas closer home he has not really looked into the ascetic tradition among Jain monks who used to visit Gandhi's house on a regular basis during his childhood.[20] In fact, some of Gandhi's family members were Jains and Jain ascetics were received with great reverence in Gandhi's household by both his parents.[21] This aspect has been given some due in Professor Ramjee Singh's works.[22]

Gandhi went a step further than the Stoics in his emotional detachment, and sacrificed his own family to the point of appearing even harsh to them, as compared to the Stoic Epictetus who emphasized family obligations to a certain extent as a part of "seeking." Gandhi, in order to enforce and portray a "lived detachment" from his family, sometimes became unduly tough as we know through Harilal, his eldest son.[23] And the "poor child," in order to attract his famous father's attention and even affection, committed acts contrary to Gandhi's views. Perhaps this is where the Stoics could have been of some help to Gandhi, since their emphasis was on detached love which would never lead to hate, and which included fulfilling family obligations, though with a sense of detachment.

---

[17] *Id.*
[18] *Id.* at 56-58.
[19] *Id.* at 32-34.
[20] *Id.*
[21] M. K. GANDHI, THE STORY OF MY EXPERIMENTS WITH TRUTH: AN AUTOBIOGRAPHY 508 (1927).
[22] *See, e.g.,* RAMJEE SINGH, MAHATMA GANDHI: MAN OF THE MILLENIUM (2010); RAMJEE SINGH, JAINISM IN THE NEW MILLENIUM (2010).
[23] *Supra* note 8, at 36-40.

By the Stoics' own admission there was never a perfect Stoic philosopher.[24] Accordingly to Richard Sorabji, if there has ever been one near perfection, it is Mahatma Gandhi who comes from a different time, tradition, and civilization.

[24] *Id.* at 116.

IN THE NAME OF DELHI GANG RAPE: THE PROPOSED TOUGH JUVENILE JUSTICE LAW REFORM INITIATIVE

*B.B. Pande**

The incident of December 16, 2012 sparked a significant social and legal debate regarding the laws of sexual offences as well as subjecting juveniles to the criminal justice system. The Cabinet has proposed an amendment to the Juvenile Justice Act that would allow prosecution of juveniles between 16 and 18 years for heinous crimes. This essay reflects on the history of juvenile justice and cautions against hasty reforms that would alienate and punish rather than assimilate and reform juveniles who may offend the law.

* Criminal Law Chair Professor, National Law University Delhi; Former Professor of Law, Delhi University.

I. INTRODUCTION

The infamous Delhi Gang Rape, perpetrated by a gang of five adults and a juvenile on the streets of Delhi in a private public transport bus running through posh and well-guarded localities on 16th December, 2012 (hereinafter DGR16) has produced far-reaching social and political fall-outs. Restricting our focus only to the legal fall-outs, we can identify the following. First, it led to the enactment of the Criminal Law (Amendment) Act, 2013, that too in less than four months.[1] Second, the adult members of the gang were prosecuted for offences such as rape and murder by a special court and sentenced to death for the offences (one of the principal accused committed suicide inside the prison). The Delhi High Court confirmed the death sentences of all the four accused, but the Supreme Court has temporarily stayed the execution of sentences. Like the adult members, the juvenile member of the gang has also been convicted by the Delhi Juvenile Justice Board and awarded the maximum custodial sentence permissible under the juvenile justice law. Third, the newly formed Central Government has undertaken a serious legislative initiative to repeal the earlier juvenile justice law (that was perceived as having dealt with the juvenile member of the DGR16 leniently) and replace it with a harsher version of juvenile justice law to deal with the 16-18 age group involved in serious/heinous offences through the proposed Juvenile Justice Bill, 2014.

The Criminal Law (Amendment) Act, 2013 has substantially altered the normative landscape of the law of sexual offences. It not only makes changes to the rape offence, but attempts to provide a fool-proof and comprehensive list of sexual offences by criminalizing sexual harassment under Section 354A, intentional disrobing or making a woman naked under compulsion under Section 354B, voyeurism under Section 354C and stalking under Section 354D of the Indian Penal Code. Even well-intentioned legislations may not be enforced, or even perceived by the community in the same spirit that it was enacted. The norms asserted by

[1] On 23rd December, 2012 the Government of India appointed a Committee headed by Justice J.S. Verma to inquire about the incident and propose changes to the law with a view to ensure protection of women. The Committee gave its final Report on the 23rd January 2013, followed by the Government issuing an Ordinance on 3rd February 2013. The Ordinance was presented as a Bill which was discussed in the Parliament and approved by both the Houses. The President gave assent to it on 2nd April, which brought the Act into effect retrospectively from 3rd February 2013.

these new laws suffer considerable distortion, both at the level of the target population and the community, and the lack of gender sensitivity and justice perceptivity on the part of enforcement officials, *viz*. the police and the courts.

A recently conducted survey of the amended rape law by *The Hindu* revealed that of the rape prosecutions launched in the last six months in Delhi, as many as forty percent were filed by wiley parents to discipline their children for engaging in consensual teenage sex; inter-caste and inter-religious matrimonial alliances. Only a small percentage related to forcible or non-consensual sexual aggressions.[2] Equally disillusioning is the insensitivity and lack of awareness of the new law on the part of the enforcement officials that is reflected in the continued practices of non-registration or mis-registration of the F.I.R.s, delayed investigations and botched up or scanty collection of evidence in respect of such offences. At the level of judicial disposition of sexual offence cases, we find that the pendency rate seems to be rising, as rape trials continue to drag on for long periods for one reason or the other. Even at the appellate court level, there appears little urgency to render justice to the victims. In this context, the anxiety and the helplessness of the Apex Court reflected in Justice J.S. Kehar's following observation (Justice Chandramauli Kr. Prasad concurring), involving the rape and murder of a six year old girl, is very telling:

> As we discharge our responsibility in deciding the instant criminal appeal, we proceed to apply principles of law, and draw inferences. For that is our job. We are trained, not to be swayed by mercy or compassion. We are trained to adjudicate without taking sides, and without being mindful of consequences… <u>We have done all that… Despite thereof, we feel crestfallen, heartbroken and sorrowful. We could not serve the cause of justice to an innocent child.</u>[3] (emphasis supplied)

In this essay, we would focus mainly on the proposed Juvenile Justice

---

[2] *See Rape and Reality*, THE HINDU (Aug. 4, 2014), *available at* http://www.thehindu.com/opinion/editorial/rape-and-reality/article6277606.ece.

[3] State of Gujarat v. Kishanbhai, (2014) 5 S.C.C. 108, 136.

Bill, 2014 as introduced originally[4] and re-cast after the approval of the Union Cabinet.[5] Here we propose to focus mainly on four controversial issues of this harsher version of the juvenile justice law, namely:

(i) Unlimited powers of the Police to apprehend/arrest any category of offending children;

(ii) Singling out for harsh treatment children in the 16-18 age group involved in serious/heinous offences;

(iii) Juvenile Justice Board/Children's Court conferred special powers to decide about cases that would be adjudicated by the JJ Board/Children's Court or transferred to adult Courts; and

(iv) Trial and sentencing of children in the 16-18 age group by adult courts.

Before we take up a detailed analysis of the aforesaid four issues in the light of the proposed changes in the juvenile justice law, it may be useful to briefly review the outgoing juvenile justice law that had evolved over a period of nine decades (since the Indian Jails Committee Report of 1919-20 that categorically recommended evolving a different system of apprehension, investigation, adjudication and disposition/sentencing relating to 'child offenders'). In this period, several progressive and child-friendly changes were made to the system by means of legislations enacted by the provincial and state legislatures since 1920 and the Parliament (in 1986, 2000, 2006 and 2011). Also, though juvenile justice issues rarely reached the higher judiciary, the Supreme Court displayed appropriate sensitivity to the cause of juvenile justice whenever the opportunity arose. Notable examples are *Raghbir Singh v. State of Haryana,*[6] and the more recent *Salil Bali and ors. v. Union of India*[7] and *Subramaniam Swamy v. Raju, through the JJ Board, Delhi.*[8]

---

[4] Draft Juvenile Justice (Care and Protection of Children) Bill (2014), as published on the website by the Jt. Secretary, Ministry of Women and Child Development, Govt. of India on 18/6/2014 (hereinafter Bill14).

[5] The JJ Bill (2014) after the Cabinet approval has incorporated some very new concepts such as the introduction of the idea of petty offences, serious offences and heinous offences, JJ Board assuming extensive powers, introduction of the children's Court between JJ Board and adult Criminal Court and the power of diversion to the Police and JJ Board, etc., which would be deliberated in detail later. (hereinafter App.Bill14).

[6] (1981) 4 S.C.C. 210. *See* B.B. Pande, *Ruling for Juvenile's Right to Justify Treatment*, (1982) 1 S.C.C.(J) 1.

[7] (2013) 9 S.C.C. 705. *See* B.B.Pande, *Stilling the Turbulent Juvenile Justice Waters: The Apex Court's Precedented Response to an Unprecedented Challenge in Salil Bali v. Union of India*, (2013) 9 S.C.C. (J) 25.

II. The Outgoing Juvenile Justice System

A. Rationale of Juvenile Justice

The essence of a different or 'distinct' system of 'justicing' for juveniles lies in providing and dealing with children in accordance with a system that gives due regard to their abilities and mental capacities. Therefore, to treat children as adults either on the basis of their adult-like behavior or adult-like looks alone is to disregard their childhood and thus unfair and unjust. Again, 'justicing' in respect of children may be understood in two senses, namely (a) caring and protection of children; or (b) subjecting them to a system of accountability for their harmful/law breaking behavior with a view to their ultimate reform and rehabilitation. Thus, when we are referring to accountability of juveniles belonging to the age group of 16 to 18 involved in serious offending, we are essentially speaking of justicing system in the latter sense.[9] This kind of justice system is premised on two basic assumptions, namely: children below a certain age (18 years as per Article 1 of the Convention on the Rights of the Child, 1989) have lower cognitive capacities and decisional abilities; and children are more amenable to reform and corrective actions. The aforesaid assumptions are integrally interrelated, but they relate to two different aspects of justice, namely the moral basis for creating children's accountability and utilitarian justifications of the juvenile justice system.

1. Children's cognitive capabilities and decisional abilities

Law and social custom have long taken cognizance that children and young persons are not yet wholly formed, that they are in the process of growth and development, and therefore, their liability ought to be different. This approach is aimed at promoting rehabilitation and re-integration rather than permanent alienation from the society. Scholarship treating children as 'minors' and regarding their diminished legal capacities can be traced back to John Locke and other thinkers of the Enlightenment era. They argued for a protectionist stance; that children be treated with care as they have diminished capabilities in comparison to adults.

---

[8] A.I.R. 2014 S.C.1649.

[9] In common parlance the 'justice' system in this sense is described as 'juvenile justice system' that focuses mainly on all forms of deviation by children under 18 years.

Even ardent classicalists, who treated all human beings as rational calculating creatures, acknowledged that children were to be exempt from the demands of utilitarian principles and subjected to different standards of moral evaluation. Jeremy Bentham, in *An Introduction to the Principles of Morals and Legislation,* described infancy as a state during which an individual is not to be regarded as capable of calculating actions. However, with the moralization of criminal liability and its increased dependence upon the mental element, thought about the criminal liability of children underwent significant changes. Jerome Hall, writing in the context of culpability of children, in the mid-twentieth century stated:

> It is also pertinent to recall that the meaning of *mens rea* from its very inception to the present time has changed in important ways… This insight has been clarified and greatly deepened to distinguish a child's "intending" from an adult's and the psychotic's and grossly intoxicated person's impaired "intention" from that of a normal and sober person.[10]

The stock arguments for the lower cognitive abilities of children throughout the twentieth century came from the psychoanalytic and behaviorist theorists, who believed that children were mentally deficient, either because of insufficient socialization or lack of domestication. According to these psychological and behaviorist theorizations, the children develop their full cognitive abilities by the age of 16 to 18 years. However, the period of transition from childhood to adulthood proves difficult and problematic both to the children and to the community.

Research regarding neurology and brain science conducted in the U.S. led to a breakthrough in understanding about the cognitive and decision making abilities of children. This research revealed that the brain of a juvenile is different, and is developing. The frontal brain matures by the age of 16 years, while the hind brain may mature till the age of 22 years. These findings are important and have serious policy implications. Research by the MacArthur Foundation Research Network on Adolescent Development

[10] JERMONE HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 102 (2d ed. 1960).

conducted by a team of scholars led by Laurence Steinberg[11] has concluded that sensation-seeking increases in early adolescence but declines with age. Adolescents may also act impulsively and the presence of peers increases risky behavior. The aforesaid brain science insights have led Laurence Steinberg to sum up as follows:

> …the consensus to emerge from recent research on adolescent brain is that teenagers are not as mature in either brain structure or function as adults. This does not mean that adolescent brains are "defective", just as no one would say that newborns' muscular systems are defective because they are not capable or their language systems are defective because they can't yet carry conversation.[12]

2. Age as a basis of categorization of children

Childhood as a social construct may be sub-divided into Infancy (0 to 7 years), Early Childhood (7 to 12 years), Late Childhood (12 to 16/18 years) and Adolescence (16/18 to 21/22 years). In the 19th century, the Indian Penal Code (IPC) treated all children under 7 years as *doli incapax*[13] and children between 7 and 12 years were presumed innocent unless proven to the contrary.[14] Even under such a scheme, children between 7 to 16 years were be tried by the ordinary courts, but could be extended the benefit of serving their imprisonment in the reformatory schools.[15] Similarly, adolescents could serve imprisonment in the borstal schools as per the Borstal Schools Acts enacted in different provinces.

This landscape changed significantly post the report of the Indian Jails Committee of 1919-1920. The Report recommended establishment of a distinct and different apprehension, adjudication and custodial system for

---

[11] Laurence Steinberg, Alex Piquero, Elizabeth Cauffman, and Michael Corriero Judge, Findings from the MacAurthur Foundation Research Network on Adolescent Development and Juvenile Justice (June 2007) (unpublished paper). This paper was presented at the coalition for Juvenile Justice Annual Conference, Washington, D.C., June 2007.

[12] Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, ISSUES IN SCI. AND TECH. 67, 71 (Spring 2012).

[13] INDIAN PENAL CODE § 82 (1860).

[14] INDIAN PENAL CODE § 83 (1860).

[15] Reformatory Schools Act (1876); Reformatory Schools Act (1897) and CrPC § 562 (1898).

child offenders. The recommendations led to an amendment leading to the addition of Section 29B in the Criminal Procedure Code (CrPC) 1898, that provided for a separate trial for all offenders below the age of 15 years. As a sequel to these recommendations, an era of Provincial Children Act was ushered in with the enactment of the Madras Children Act, 1920, followed by the W.B. Children Act, 1922 and the Bombay Children Act, 1924 and so on. However, all the Provincial and later, the State Children Acts varied considerably in matters of age of children (in case of male children between 14 and 16 years; and 16 and 18 in case of female children). The subject matter of juvenile justice was shifted from the State List to the Concurrent List of the Constitution thereby allowing the Union Government to enact uniform and standardized juvenile justice law. This led to the enactment of the Juvenile Justice Act, 1986, followed by the Juvenile Justice (Care and Protection of Children) Act, 2000. In the process of making special laws for children, the 'adolescent' category got lost. Therefore, in the existing scheme of things all the persons below 18 are treated as children and those above 18 are to be treated as adults.

Raising the age of male child from 16 to 18 years under the Juvenile Justice Act, 2000 is in line with Article 1 of the United Nations Convention of the Rights of the Child, 1989 (UNCRC) (which was ratified by the Government of India in 1992) and the recommendations of the U.N. Committee on the Rights of the Child.[16] In analyzing categorization of age groups, Laurence Steinberg treats the age of 18 as "the presumptive age of majority".[17] According to Steinberg, the human neurobiological maturity is reached at different ages, as different brain systems mature along different time tables, and different individuals mature at different ages and different rates. The lower bound of the age is probably somewhere around 15, but the upper bound may probably be somewhere around 22. Steinberg opines that choosing either of the endpoints would be fraught with its own problems:

> If society were to choose either of these endpoints, it would be forced to accept many errors of classification, because granting adult status at age 15 would result in treating many immature individuals as adults, which is dangerous, whereas waiting until age 22 would result in treating many mature individuals as

[16] *See* Pande, *supra* note 7, at n.7.
[17] Steinberg, *supra* note 12.

children, which is unjust.[18]

According to Steinberg choosing the midpoint of 18 years has been preferred by the UNCRC and the majority of the countries throughout the world, which is described as the "presumptive age of majority".[19]

3. The 'criminal responsibility' confusion

The age issue under the juvenile justice law is often confused with the 'age of criminal responsibility'. Perhaps under such a confusion the *Justice for Children Briefing No. 4* jointly issued by the Penal Reform International and U.K. Aid, observed thus: "the minimum age of criminal responsibility set by different countries ranges hugely from as low as six up to 18 years of age. The median age of criminal responsibility world-wide is 12."[20]

It is most paradoxical that on the one hand we speak of a distinct juvenile justice/youth justice system, yet bring in the issue of criminal responsibility. Should the juvenile justice system not resolve the age issue as per the needs and standards of juvenile justice? Perhaps the reason for this paradox lies in the fact that world-over, the juvenile justice system continues to be heavily dependent upon the adult criminal justice system in matters of definition of delinquency, pre-trial processes, adjudication and punitive responses. As a consequence, though every system claims that they render juvenile justice through a distinct and exclusive system, the reality is that the juvenile justice system, is, at best, an entailed system. But the fact cannot be denied that over a period of past one hundred years the lower age of juvenile justice has progressively increased. For example in Europe, the minimum age has increased from 7 to 14 years.[21]

---

[18] *Supra* note 12, at 76.

[19] Steinberg opines that there could be three other options: First, to fix no age and decide on an issue by issue basis. Second, shift from binary classification system to three categories of child, adolescent and adult, and third, not to have any categorical age boundary and assess culpability on case to case basis. Steinberg, *supra* note 12.

[20] *The Minimum Age of Criminal Responsibility,* PENAL REFORM INTERNATIONAL, *available at* http://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf (last visited, Aug. 20, 2014).

[21] See in this context, Frieder Dunkel's following observation: "The minimum age of criminal responsibility in Europe varies between 10 (England and Wales, Northern Ireland and Switzerland), 12 (Netherland, Scotland and Turkey), 13 (France), 14 (Austria, Germany, Italy, Spain and numerous Central and Eastern European Countries), 15 (Greece and the

In India and other Asian countries, the minimum age remains to be that which has been fixed by the principles of capacity determined by the adult criminal justice system. The Indian Penal Code, 1860 had fixed the minimum age of 7 years for total exemption from criminal liability on grounds of *doli incapax* (incapable of having *mens rea*),[22] but accorded only partial exemption from criminal liability to the 7 to 12 years age group provided their *mens rea* is not proved.[23] The position of age in respect of total and partial exemption from criminal liability has remained unchanged over a period of nine decades during which the system of juvenile justice has slowly evolved on account of the enactment of the Provincial Children Acts, the State Children Acts, the Juvenile Justice Act, 1986 and the Juvenile Justice Act, 2000. In none of the aforesaid statutory measures was the lower age bar for instituting juvenile justice proceedings or the concept of 'age of innocence' ever debated. The focus remained on fixation of the upper age of 16 or 18 years for claiming exclusion from the adult criminal justice system. In the context of our comprehensive juvenile justice law that relates to both the 'juveniles in conflict with law' and 'children in need of care and protection', the minimum age becomes all the more important, because the age of care and protection is bound to be lower than the age of 'justicing' proceedings that involves a fair amount of interference with the liberty of the child.

The outgoing juvenile justice system has received blanket support and strongest validation of the Supreme Court of India in the *Subramaniam Swamy* case.[24] Justice Ranjan Gogoi's judgement in this case (Chief Justice P. Sathasivam and Justice Shiv Kirti Singh concurring) has marked a definite progression in the appreciation of a distinct and exclusive juvenile justice law that is open to the latest scientific research and studies on child and adolescent brain science. Justice Gogoi has laboured hard to categorically point out how the juvenile justice system is different from the

---

Scandinavian countries) and even 16 (for specific offences in Russia and other Eastern European countries) or 18 (Belgium). After the recent reforms in Central and Eastern Europe, the most common age of criminal responsibility is 14." Frieder Dunkel, Juvenile Justice Systems and Crime Policy in Europe 9 (unpublished) (on file with the author).

[22] Indian Penal Code § 82 (1860).

[23] Indian Penal Code § 83 (1860).

[24] *Supra* note 8.

adult justice system by identifying eight points of difference at the pre-trial and post trial stages.[25] It is vital to point out that in constructing a distinct and exclusive image of the juvenile justice, Justice Gogoi has not only relied upon the specific provisions of the JJ Act, 2000 and Amendment Act of 2006, but also gone to the Model Rules, 2007. In particular in laying down the very first point of difference the Court has underscored the limits placed on the police power to apprehend a juvenile by Rules 11(7) and 11(11). By the above, the Apex Court has endorsed the philosophy of narrower power of police in respect of children in conflict with the law. As a consequence, in contrast to the adult criminal justice premised on a belief that the unlawful behavior is the result of individual's malicious free-will, the juvenile justice jurisprudence de-emphasizes a child defendant's moral responsibility for the unlawful behaviour. Instead the said behaviour is seen more as a product of antecedent forces – biological, social, psychological and environmental – that need to be attended to in a system of individualized justice, aimed at the rehabilitation rather than punishment. Thus, such an individualized and rehabilitative system is premised on the following four elements:

(a) That the needs and circumstances of each individual juvenile may differ, which is why, the judging of juvenile cases and imposing sanctions requires vast degree of discretion for the Judge/Board
(b) That the proceedings in the juvenile Court/Board may not be conducted in the spirit of an open court in order to spare the juvenile the stigma associated with the criminal charges
(c) The juvenile Court/Board adjudication may not be conducted strictly on adversarial lines and the need to adhere to rules of evidence needs to be relaxed considerably
(d) The juvenile proceedings, being more of civil nature of inquiry, do not lead to any kind of defendant's criminal record.

The essence of the 'outgoing' juvenile justice law has been summed up Justice Altamas Kabir thus:

> The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the Courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of

[25] *Supra* note 8, at para 38.

enforcing the same, without which it will be impossible to achieve the objective of the Juvenile Justice Act, 2000.[26]

III. The Incoming Juvenile Justice Law

The Bill14 and App.Bill14 have come at a time very similar to what the American society and the law makers faced in the mid and late 1990s, when half of those arrested for seven FBI index offences were of the age 18 and under, when school shootouts involving children had created a strong revulsion to the trend of child crime trend and thrown the society into a state of moral panic.[27] Adverting to the definite shift away from the pro-child policy, Juan Alberto Arteaga observes:

> No longer content with waging their war on drugs and violent street gangs against criminal defendants, federal lawmakers have set their sights on the institutions of juvenile justice. Having adopted a "take no prisoners" to fight this war, members of the House and Senate have begun to undertake efforts to implement severely retributive reforms within the federal juvenile justice system. Federal law makers describing American children as "hardened criminals" and the "large(st) threat to public safety" rather than as "our future, our greatest resource and our hope for a better tomorrow" have sought to enact legislation that would facilitate prosecuting juvenile in criminal courts … House Bill 1501 proposed granting federal prosecutors the discretion to determine whether a juvenile offender should be charged and prosecuted in a criminal court rather than in the juvenile justice system.[28] (citations within the quote omitted)

---

[26] Hari Ram v. State of Rajasthan, (2009) 13 S.C.C. 211, 213.

[27] In contrast, in India, according to the official crime statistics available in the National Crime Record Bureau's *Crime in India*, between 2008 and 2013 the total number of juveniles (persons below 18 years) arrested has increased marginally from 1.1% to 1.2% of the total IPC crimes. Of these, juveniles of the 16-18 age group constituted 60.7% in 2005 and approximately 67% in 2013. The contribution of the 16-18 age group to serious/heinous crimes varied between 1.30% for murder to 3.29% of total arrests for rape. The total number of 16-18 juveniles arrested for serious/heinous offences targeting human body such as murder, attempt to murder, rape, kidnapping and abduction was 3273 in 2012. Of the total number of arrested juveniles in 2013, 50.24% belonged to families whose annual earning was below Rs. 25,000/- and another 27.31% who came from families whose annual earning was between Rs. 25,000/- and 50,000/- (viz. 77.5% of the juveniles belonged to families earning below Rs. 50,000/- p.a.).

[28] Juan Alberto Arteaga, *Juvenile (In) Justice: Congressional Attempts to Abrogate, the procedural Rights of Juvenile Defendants*, 102 Colum. L. Rev. 1051, 1051-53 (2002).

In India too the moral panic created by the DGR16, followed by the Mumbai Shakti Mill gang rape incident refuses to die down, ably provoked by the occasional print and visual media presentations about the gory facts depicting such incidents, which makes the Government feel morally bound to respond to the 'public outcry'. In the following pages the four thrust areas of the proposed new juvenile justice law are being critically discussed to show how the proposed law marks a definite departure from the traditional and universally recognized understanding of juvenile justice.

A. Unlimited Powers of Child Apprehension/Arrest

Apprehension/arrest of children constitutes the most serious encroachment on the liberties of the child citizens, including 'children in conflict with law'. This is because apprehension/arrest means the end to the protective custody of the parents, on the one hand, and complete submission to an impersonal and stranger's custody, on the other. Such an impersonal and stranger's custody is fraught with grave risks of torture, sexual abuse and indefinite incarceration.

The proposed new juvenile justice law, in its zeal to teach every child coming in conflict with law a lesson, has turned a blind eye to the woes of an arrested child by conferring a blanket power to apprehend/arrest every erring child under clause 9(1) of the Bill14, endorsed in Section 11(1) of the App.Bill14. Both clause 9 and Section 11 try to place safeguards of some kind by providing that after the arrest, the child will be placed in the charge of the special juvenile police unit/designated child welfare police officer; that children should not be placed in police lock-ups/jail; and that the arrested child should be produced before the Juvenile Justice Board within 24 hours of arrest. This is insufficient as once the child is weaned away from his social context he tends to become a 'fish out of water'. Keeping this ground level reality in mind the JJ Model Rules, 2007 had put a legal limitation on police power to apprehend juveniles by specifically enacting Rule 11(7) that laid down that the police shall have no power to apprehend the juvenile if the case relates to an offence that is punishable with less than 7 years imprisonment.

1. Implications of extensive powers of apprehension

(i) Child/juvenile apprehensions are likely to increase substantially by the addition of juveniles excluded from the total number of 43,506 arrested in 2013, because of the deletion of Rule 11(7) limitation;
(ii) The apprehending agency, *viz.* the police will assume a key role in the administration of juvenile justice;
(iii) More the power to the police, greater the possibilities of abuse of the power;
(iv) Instead of greater power to apprehend, the police could be given a bigger role in diversion of juveniles even before they come in conflict with the law by conferring on them powers to pass:
  (a) Compulsory education and training orders
  (b) Orders in respect of compulsory training in sports/adventure
  (c) Orders for the involvement of juveniles/children in community service, etc.

2. Singling out of juveniles in the 16-18 age group involved in serious/heinous offences

The most talked about and the most controversial issue of the proposed law is the targeting of juveniles in the 16-18 age group involved in serious/heinous offences.

The Age Aspect

The Bill14 and App. Bill 14 in clause 2(h), (i) and Section 2(12) and (13) define a 'child' or 'child in conflict with law' as any child alleged to be involved in offending when he was below 18 years of age. The age was raised to 17 years in order to ensure compliance with the UNCRC. The Committee on the Rights of the Child in making its concluding observations regarding India noted that the State was obliged to "ensure that persons under 18 are not tried as adults."[29]

After having defined 'child in conflict with law' as every child below the age of 18 years in line with JJ Act, 2000, the proposed law begins with the

[29] Committee on the Rights of the Child, 23rd session on Feb. 23, 2000.

discriminatory design in Section 3(i) when it creates an exception in the principle of presumption of innocence by adding "unless proved otherwise for children between the age group of sixteen to eighteen years". Similarly, the App.Bill14 discriminates against children in the 16-18 age group involved in heinous offences in matters of the time taken for inquiry (Section 15(5) (f) (ii)), preliminary inquiry (Section 16(1) & 19(3)), review by the Children's Court (Section 20(1) (i) and (ii)), and punishment (Section 22). Therefore, the first hurdle would be how to circumvent the selective lowering of age to 16 years? Such a lowering of age will fall foul of Article 2 of the UNCRC, as well as Article 1 that defines 'child' as those persons below the age of 18. It should be borne in mind that what cannot be done directly may also be prohibited if done indirectly.[30]

Implications of targeting 16-18 age group

(i) Limits the relevance of the juvenile justice law for the large majority of offending children;
(ii) Age of juvenility both for boys and girls will be reduced to below 16 years; and
(iii) Renders the age determination proceedings much more crucial and complicated.

The Conduct/Serious or Heinous Offending Aspect

Clause 14(i) and (ii) of the Bill14 has enumerated twenty two categories of offences as serious/heinous. But the App.Bill14 has dropped the specific enumeration of offences and classified all offences into three broad categories: petty offences, serious offences and heinous offences, as those entailing punishment of imprisonment upto 3 years, 7 years and above 7 years imprisonment respectively. The App.Bill14 has envisaged transfer proceedings only in respect of 'heinous offending', thus, leaving out 'serious offending' for trial before the Juvenile Justice Board, along with petty offending. Even the proposed move to single out only 16-18 age group involved in heinous offending may not be scientifically justifiable in the

[30] The U.N. Committee on Child Rights has been persistently exhorting the member States to comply with the age and non-discrimination clauses in 2000 and 2007, it may be difficult for it to condone the reversal back by one state alone. Therefore, if India goes ahead with the change in the age position, the 'political misadventure' may prove difficult to defend.

light of the findings of the brain science research and studies.[31] Furthermore, the issue of treating the 16-18 age group differently on the basis of the nature of offending has been resolved by the Supreme Court in *Raghbir Singh v. State*[32] and in *Salil Bali*.[33] The Court in *Salil Bali* was critically aware of the growing trend of 16-18 age group's involvement in heinous offences but the ruling of the Court delivered by the Chief Justice Altmas Kabir (Surinder Singh Niggar and J. Chelameshwar JJ concurring) had this to say in this regard:

> There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and reintegrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.[34]

Adverse treatment for heinous offending juvenile may also fall foul of Article 15(3) of the Constitution that enables the state to make "any special provision for women and children". Is the state would be justified in making any special provision 'against' children under Article 15(3)? The answer to this question would be in the negative, because this protective discrimination measure prohibits any unfavourable discrimination that is violative of the principle enshrined in Article 15(1) of the Constitution.

Implications of categorization of children on the basis of seriousness of offending

(i) Divides child offenders into categories of more vicious and less vicious, which is constitutionally impermissible and socially undesirable;

---

[31] *See supra* note 12.
[32] *See supra* note 6.
[33] *See supra* note 7.
[34] (2013) 9 S.C.C. 705, 724.

(ii) Requires different kinds of child custody, adjudication and rehabilitatory institutions;
(iii) Reduces the possibilities of re-socialization of children who go astray during childhood and adolescence.

3. Over-burdering the Juvenile Justice Board

The idea of a Juvenile Justice Board replacing the Juvenile Court under the JJ Act, 2000 was a major step in the direction of evolving a distinct adjudicatory agency for juveniles. Since the Board was constituted of one judicial member (to be designated as the Principal Magistrate) and two social work members, out of whom at least one to is to be a woman, the collective aim of the Board is yet to be achieved.

A perusal of the Bill14 and App.Bill14 shows that the Juvenile Justice Board (JJB) is envisaged to perform multiple tasks in the proposed scheme. Section 9(1) of the JJ Act lays down that the JJB "shall have the power to deal exclusively with all the proceedings under this Act." This would mean the following proceedings:

(a) Review of apprehension of every child
(b) Passing appropriate order in respect to pre-adjudication custody
(c) Conduct age proceedings of two types: (i) below 18 years, and (ii) above 16 years
(d) Bail proceedings
(e) Inquiry in respect to child involved in petty offences and serious offences
(f) Inquiry in respect of 16-18 year child involved in heinous offending and transfer the case to adult court. Apart from the aforesaid six proceedings, section 9(2) of the App.Bill14 has also assigned twelve/thirteen functions to the JJB. Here, the focus will be on the two most vital, functions/proceedings, assigned to the JJB, namely (i) age determination, and (ii) inquiry (preliminary and final) in respect of 16-18 age group and transfer to adult court.

Age determination inquiry/proceedings had even earlier proven to be one of the most contested issues in juvenile justice as it is necessary to have access to the juvenile justice system and its benefits. Now with the special

characterisation of 16-18 age group, determination of age is likely to be even more keenly contested.

Similarly, the Bill 14 and App. Bill 14 have made JJB the key agency for handling the heinous offence cases where juveniles of 16-18 age group are involved, which will require not only looking to the age, but also the nature of crime and the level of maturity of the concerned child. Again this will require the JJB to make categorical findings and clear rulings that are likely to be appealed against in the Sessions Court and the High Court. These factors are likely to seriously impact the non-adversarial, child-friendly and non-court like image and stature of the JJB. Furthermore, the growing technical nature of JJB proceedings is likely to go against the collective and social work oriented character of the JJB, which was an achievement of the JJ Act, 2000.

Implications of overloading JJ Board

(i) JJB will increasingly assume adversarial character, which is likely to decrease the social work input that may prove regressive
(ii) JJB proceedings would take much longer time, thereby increase the pendency in juvenile justice matters
(iii) Transfer to adult court would ultimately pass the proceedings to the children's court, which would lead to the demise of the JJB idea itself
(iv) JJB will turn into another power center after the police thereby increasing considerably chances of corruption and abuse of power.

4. Trial and sentencing of the 16-18 age group children by adult courts

The very fact of transfer of children to be tried by court after elaborate transfer proceedings is premised on an assumption that the child is to be equated with any adult criminal in matters of liability determination and sentencing. In this respect Section 22 of the proposed juvenile justice law that lays down that "no child in conflict with law shall be sentenced to death or life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code" appears to be slightly paradoxical. First, you transfer a child to an adult court, then continue to treat him as a 'child' in matters of sentence. Is Section 22 was inspired by Article 37(a) of the UNCRC or merely meant to

hoodwink the Convention? Even such a concession in matters of sentencing to the 16-18 aged child is limited to offences under the IPC and not under special laws such as the NDPS Act or the TADA. Sentencing issues with respect to transferred cases is likely to create greater complications in view of the judicially and legislatively determined term of the life imprisonment.

In matters of sentencing of ordinary juveniles, the proposed law by repeating the sentences in the earlier law under section 19, particularly section 19(1) (g) that provides for only three years custodial sentence, has belied the hopes for a meaningful rationalization of juvenile sentencing.

Implications of guilt-determination and sentencing in transferred cases

(i) Guilt determination in the adult court by the standards of children's impaired capacity and mental abilities would lead to greater chances of acquittal in transferred cases which may prove contrary to the retributive objective of the transfer.

(ii) Mere enhancement of severity or length of sentence without any individual reform programme would lead to greater brutalization of the juvenile and increase in the rate of recidivism.

IV. DISCUSSION OF THE PROPOSED AMENDMENTS

The discussion on the proposed new law can either focus on the technicalities of the law or on the underlying philosophy. This part attempts to discuss both.

A. Fine-tuning the Technical Aspects

1. As discussed earlier, the unlimited powers of apprehension are not only open to abuse, but are a source of great hardship to the children and their parents. I can vividly recall an NGO presentation about the operation of the juvenile arrest law in the course of a National Consultation on Juvenile Justice in early 2014. The child rights NGO operating in the State of Jammu & Kashmir gave a graphic account of how the police powers were exploited to extort huge sums of money from the parents of the children by the police in collusion with politicians and the State

bureaucracy. Therefore, reducing and rationalizing the powers of the police to arrest is the only solution with a view to securing freedom from arrest for the children. For doing this, the law can be amended on the lines of rationalization of the law of arrest under the Criminal Procedure (Amendment) Acts of 2008 and 2010, that has led to adding sections 41A, 41B, 41C and 41D in the Code, in addition to Section 60-A.

2. In respect to the creation of the 16-18 age group in the heinous offences category, the law may be re-considered in the light of the immensely small number and adverse conditions of such a small population. Official statistics released by the National Crime Records Bureau of 2013 show that out of the total number of apprehended children, only 3883 children of the 16-18 age group were arrested for human bodily offences such as murder (845), attempt to murder (717), rape (1388) and kidnapping and abduction (933). Similarly, all the 43,506 juveniles apprehended in 2013 belonged mostly to families whose annual earnings was below Rs. 25,000 (50.24%) and between Rs. 25,000 and 50,000 (27.31%). This means that 77.55% of the juvenile population apprehended came from families that were below the poverty line. This makes it clear that the population targeted by this new harsh law is very small in comparison to our total child population and belongs to that section which is already suffering on account of multiple deprivations. Instead of targeting these 3273 or more children punitively, it would be much more desirable to subject them to strict preventive programmes, which could protect the societal interest as well as the spirit of juvenile justice more effectively.

3. Instead of cluttering up the JJB with new and additional functions, some of the functions could be passed on to the Probation Officers, Child Protection Units and Child Welfare Committees that would be required to act pro-actively.

4. In respect of sentencing of transferred cases of juveniles, the proposed new law has limited its right to the traditional forms of punishments like

[35] *See* Aisha K. Gill & Karen Harrison, *Sentencing Sex-offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches*, 8(2) INT'L. J. CRIM. JUST. SCI. 166 (2013).

death penalty and life imprisonment, but some of the recent studies have shown that India too can follow the sex offender treatment programmes and restorative justice techniques that are already being put to use in the western societies.[35]

B. Changing the Philosophical Premise of Juvenile Justice

Though the proposed new law does contain a few child-friendly provisions and protection measures, e.g. Chapter II dedicated to 'Principles of Child Care and Protection' and carving out comprehensive 'Offences Against Children' in Chapter IX, these do not offset the anti-child nature of several provisions and the politically projected pretentions underlying the new law. The proposed amendment has met with deeply divided public opinion: one section of the society and media have hailed the introduction and Cabinet approval for the Bill,[36] while another have called it a retrograde step.[37]

There appears to be a head-on clash between two philosophical positions in respect to the deviating children. The first position sees children and childhood as nothing more than miniature adults: full of nasty, brutish and beastly attributes, who need to be handled as any adult criminal through a system that is only a sub-set of the adult criminal justice system, with a few select concessions for children involved in minor offences of non-vicious nature. The first position is premised on the argument that the true test of 'juvenility' lies not so much in the 'age', but on the level of mental maturity as reflected in the serious/heinous nature of the conduct indulged in. As against this philosophical position, the other pro-child position is premised on an understanding that children constitute a distinct social entity that lack mental capacities and decisional abilities, till the age of majority. Such

---

[36] *Judging Juveniles,* THE TIMES OF INDIA, Aug. 8, 2014, *available at* http://blogs.timesofindia.indiatimes.com/toi-editorials/judging-juveniles-punish-heinous-offenders-like-adults-and-protect-the-most-vulnerable/ comments: "The new juvenile justice Bill seeks to improve understandings of vulnerability and offence. This is a brave new step towards protecting the helpless and punishing those old enough to know than to commit appallingly violent crimes."

[37] *Amending Juvenile Law,* THE HINDU, Aug. 9, 2014, *available at* http://www.thehindu.com/opinion/editorial/amending-juvenile-law/article6296507.ece noted "The idea of carving out an exception in the Juvenile Justice Act for Children between ages 16 and 18 when they are accused of rape, murder, and other serious offences is completely retrograde."

children's offending requires to be addressed through a distinct and exclusive justicing system that is traditionally described as the juvenile justice system. The second position is premised on a thinking that believes in treating childhood as essentially different from adulthood.

It is perfectly legitimate for the government of the day to legislate and make any law, particularly the kind of law that the people are clamouring for. But in doing so, at least, three things need to be kept in mind. First, the *feasibility aspect* of the law, that will include its scientific tenability and social implementability. The example of the failure or near failure of the Criminal Law (Amendment) Act, 2013 is very relevant in this respect. Second, the *normative fidelity aspect* of the proposed law, that will include its consonance or dissonance with the international and national norms of juvenile justice. The most important source of international norms are the U.N. Conventions and Rules ratified by the Government of India. The Constitutional Rights, Directive Principles and Fundamental Duties relating to children would constitute the fundamental national norms. Third, the *social rootedness aspect* of the proposed law, that concerns India's ancient heterogenous traditions and culture. The Indian cultural ethos is dominated by the tradition of non-violence, preached by Gautam Buddha and Mohandas Karamchand Gandhi who taught us to "hate the sin and not the sinner." Will the proposed law that is premised mainly on hating the 16-18 age group sinners not constitute a clear deviation from this non-violent tradition? Will the proposed law not ultimately lead to an environment against all categories of children, including those who dare to report ragging at the hands of the senior toughies and growing incidents of caning and spanking in schools?

FORM – IV

1.	Place of Publication	New Delhi
2.	Periodicity of its Publication	Yearly/Half Yearly
3.	Printer's Name	Prof. Ranbir Singh, Editor-in-Chief
	Whether Citizen of India	Yes
4.	Publisher's Name	Prof. Ranbir Singh
	Whether Citizen of India	Yes
	Address	National Law University Delhi Sec-14, Dwarka, New Delhi-110078
5.	Editor's Name	Prof. Ranbir Singh, Editor-in-Chief
	Whether Citizen of India	Yes
	Address	National Law University Delhi Sec-14, Dwarka, New Delhi-110078
6.	Name & Address of Individuals who own the Newspaper/ Magazine and partners or Shareholders holding more than one percent of the total capital	National Law University Delhi Sec-14, Dwarka, New Delhi-110078

Sd/-
Prof. Ranbir Singh
Vice Chancellor,
National Law University Delhi
Sector-14, Dwarka,
New Delhi-110078