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AN INTRODUCTION TO PARIS AGREEMENT 2015

—Arup Kumar Poddar*

ABSTRACT

The Paris agreement of 2015 is very well connected with the United Nations framework convention on climate change 1992. The enhanced action was proposed on the Durban platform. The agreement has been formed keeping in mind the principle of equity and common but differentiated responsibilities along with respect to the national capabilities and circumstances. It is needless to say that we have to respond urgently to the very threat of climate change on the basis of scientific evidence. It has been observed that the parties of the developing countries are more vulnerable to these special circumstances created by climate change and this agreement will help to provide solutions to this crisis. It has also been observed that parties are not only affected because of climate change but there is a possibility of adverse impact when the measures are taken to provide solutions to climate change. The present article tries to give a review report in the form of introduction to the Paris agreement 2015.

Keywords: UNFCCC, common but differentiated responsibilities, developing countries, sustainable development, right to health, gender equality, sink for greenhouse gases.

* The author is a Professor in Law at the WB National University of Juridical Sciences, Kolkata, India. He can be reached at arup.poddar@nujs.edu. Mobile No. 9831338761.

INTRODUCTION

The enhanced action was established in the Durban platform by the conference of parties decision in 1/CP.17.[1] The Paris agreement[2] (hereinafter 'the agreement') become an added document for implementation phase of the promises made in the United Nations framework convention on climate change 1992 (hereinafter FCCC).[3] The agreement also comes forward for recognising the principle of equity[4] and common but differentiated responsibilities and respective capabilities because of different national issues and circumstances however the primary reason was to realise the objective of the FCCC.[5] The expression 'climate change'[6] has been defined in FCCC as a change of climate which is attributed directly or indirectly to human activity which alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[7] Therefore, in order to provide a comprehensive response to the threat of climate change as approved by scientific knowledge over the period of time the Paris agreement 2015 was established.[8] The debate between developed and developing countries that which parties would be more vulnerable to the threat of climate change is still going on and the Paris agreement recognises that the parties of the developing countries are extremely exposed to this climate change and therefore, requires special attention to be paid to these countries by way of fund and technology transfer.[9] It is also true that if climate change actions are not controlled then there will be adverse impact to the very concept of equitable access to sustainable development and eradication of poverty.[10] Climate change can also cause severe

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1 Lavanya Rajamani, *The Durban Platform for Enhanced Action and the Future of the Climate Regime*, 61 International and Comparative Law Quarterly, 501–518 (2012).

2 Alan Boyle, *Climate Change, the Paris Agreement and Human Rights*, 67 International and Comparative Law Quarterly, 759–777 (2018).

3 Joelle de Sepibus & Kateryna Holzer, *The UNFCCC at a Crossroads*, 2014 CCLR 23 (2014).; *See also*, *United Nations Framework Convention on Climate Change, 9 May 1992*, in Documents in International Environmental Law, 128–152 (Philippe Sands ed. & Paolo Galizzi ed. ed.).

4 *Equity and Justice in Polycentric Climate Governance*, in Governing Climate Change: Polycentricity in Action?, 320–337 (Chukwumerije Okereke).

5 Thomas Deleuil, *The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties*, 21 REV. EUR. COMP. & INT'l ENVTL. L. 271 (2012).

6 *Introduction: Climate Change/Changing Climates*, in The Cambridge Companion to Environmental HUMANITIES, 1–10 (Stephanie Foote, Jeffrey Jerome Cohen).

7 Charles F. Cooper, *What Might Man-Induced Climate Change Mean*, 56 FOREIGN AFF. 500 (1978).

8 Paul M. Radley et al., *Vulnerability of Megapodes (Megapodiidae, Aves) to Climate Change and Related Threats*, 45 Environmental Conservation , 396–406 (2018).

9 *Climate Change, Human Rights, and Technology Transfer*, *in* New Technologies for Human Rights Law and Practice, 46–70 (Dalindyebo Shabalala).

10 Alberto D. Cimadamore, *Global Justice, International Relations and the Sustainable Development Goals' Quest for Poverty Eradication*, 32 Journal of International and Comparative Social Policy , 131–148 (2016).

impairment in the food production system therefore in order to give priority for safeguarding food security the Paris agreement was needed of the hour.[11]

There is a change of the workforce because of climate change issues and thereby the country should provide the due attention for the creation of decent quality jobs keeping in mind about this transition introduced by the climate change.[12] The climate change measures should be in consonance with the proper recognition of right to health,[13] human rights,[14] rights of the indigenous people,[15] local communities, migrants, children, persons with disabilities and also recognise well the gender equality.[16]

The greenhouse gases[17] have been referred to in the FCCC and the Paris agreement tries to further enhance the capabilities of formation of sink and reservoirs of greenhouse gases as important for conservation of environment.[18]

The term 'climate justice' can be achieved while giving duty recognition to the cultures of mother Earth while understanding the connectivity of ecosystems, oceans, and protection of biodiversity[19].[20]

Climate change measures cannot be taken unless the public at large is given the proper awareness, training, education, participation and access to important information.[21] This will also need the participation from all the actors of the

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[11] Pete Smith & Peter J. Gregory, *Climate Change and Sustainable Food Production*, 72 Proceedings of the Nutrition Society, 21–28 (2013).

[12] *Climate Jobs at Two Minutes to Midnight*, in The Climate Crisis, The: South African and Global Democratic Eco-Socialist Alternatives, 272–292 (Brian Ashley).

[13] Mary Robinson, *Climate Change and the Right to the Highest Attainable Standard of Health*, in Human Rights and Climate CHANGE, 238–256 (Paul Hunt, Rajat Khosla).

[14] *Climate Justice: Climate Change and Human Rights*, in Denialism and Human RIGHTS, 403–418 (Zoi Aliozi).

[15] *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, in Adjudicating Climate Change: State, National, and International APPROACHES, 272–291 (Hari M. Osofsky).

[16] Christina Shaheen Moosa & Nancy Tuana, *Mapping a Research Agenda Concerning Gender and Climate Change: A Review of the Literature*, 29 HYPATIA, 677–694 (2014).

[17] *Kyoto Conference on Climate Change Reaches Agreement to Limit Emission of Greenhouse Gases*, 9 Foreign Policy BULLETIN, 58–77 (1998).

[18] John M. Deutch, Richard K. Lester, *Greenhouse Gases and Global Warming*, *in* Making Technology Work: Applications in Energy and the ENVIRONMENT, 81–108.

[19] David Dudgeon, *How Will Climate Change Affect Freshwater Biodiversity?*, *in* Freshwater Biodiversity: Status, Threats and Conservation , 291–331; *See also*. Phillipa C. McCormack, *Conservation Introductions for Biodiversity Adaptation under Climate Change*, 7 Transnational Environmental LAW, 323–345 (2018).

[20] Jennifer Hadden, *Climate Justice Activism*, *in* Networks in Contention: The Divisive Politics of Climate CHANGE, 114–141.

[21] Hans Oeschger, *The Awareness of Global Climatic and Environmental Change*, 2 European REVIEW, 99–115 (1994).

Government of different countries and also should make appropriate changes in their respective National laws for addressing climate change issues.[22]

The Paris agreement 2015 has been designed to promote sustainable lifestyle and sustainable patterns[23] of consumption and production and this is an obligation for the developed country parties who will have to play an important role and take lead in mitigating climate change.[24]

THE DEFINITION PART

The Paris agreement does not define separately any term and depends on the definitions provided under the FCCC. Under FCCC the expression 'greenhouse gases' has been defined as those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.[25] The examples of greenhouse gases have been provided in Annex-A of the Kyoto protocol 1997.[26] They are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.[27] The expression 'clean development mechanism' was mechanised for the purpose of developing countries for achieving sustainable development to achieve the objective of the FCCC.[28] This expression was also defined under article 12 of the Kyoto protocol 1997.

SUSTAINABLE DEVELOPMENT AND ERADICATION OF POVERTY

The Paris agreement has been established to implement the various phases of the FCCC and in order to mitigate the threat of climate change and to achieve sustainable development while eradicating poverty few measures have been adopted. Under article 2 of the Paris agreement, it has been proposed to hold the global mean temperature below 2 degrees centigrade and accordingly

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[22] Daniele Conversi, *The Ultimate Challenge: Nationalism and Climate Change*, 48 Nationalities PAPERS, 625–636 (2020).

[23] Dieter Helm, *Sustainable Consumption, Climate Change and Future Generations*, 69 Royal Institute of Philosophy SUPPLEMENT, 235–252 (2011).

[24] Antony Millner & Simon Dietz, *Adaptation to Climate Change and Economic Growth in Developing Countries*, 20 Environment and Development ECONOMICS, 380–406 (2015); *See also*, Nicholas Stern, *Costs of Climate Change in Developed Countries*, in The Economics of Climate Change: The Stern REVIEW, 138–160.

[25] *See supra* note 17.

[26] Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 American Journal of International LAW, 315–331 (1998).

[27] *See supra* note 18.

[28] Jean-Marc Montaud & Nicolas Pecastaing, *Does Mexico Benefit from the Clean Development Mechanism? A Model-based Scenario General Equilibrium Analysis*, 21 Environment and Development ECONOMICS, 226–248 (2016).

the temperature which can be increased upto 1.5 degree centigrade. Different data suggest that if it is being achieved then it will definitely reduce the risk of adverse impact of climate change. Another measure was suggested to adapt to the adverse impact of climate change and lower the emission of greenhouse gases so that it does not threaten food production. Another step to be taken to ensure climate resilience development and lower the greenhouse gas emission is that funding should be ensured from developed countries to developing countries. The main purpose of the Paris agreement is to implement the principle of common but differentiated responsibilities and respective capabilities in the line of equity principle.[29]

GLOBAL PEAKING OF GREENHOUSE GAS EMISSION

Reaching to the peak level of greenhouse gas emission will take longer by the developing countries as mentioned under article 4 of the agreement. And once the greenhouse gases reach its peak emission the parties will have to take specific measures for reducing the greenhouse gas emissions as well. For reduction of greenhouse gas emission, the parties will have to establish sinks of greenhouse gases and that should be done by the second half of the century and should be well equipped with the concept of equity and sustainable development for eradication of poverty.[30]

The domestic mitigation measures to be prepared by the parties in order to achieve the objective of the nationally determined contributions.[31] While achieving this goal did you wait it should be given to the very concept of common but differentiated responsibilities and respective capabilities in the light of different National circumstances.[32]

As per this agreement, it is an obligation for the parties of developed countries that they should adopt economy wide absolute emission reduction targets. Same time the responsibility of the developing country parties should be to continuously think of mitigation efforts of climate change and also should slowly add the economy-wide emission reduction targets while keeping in mind the respective National capabilities.[33]

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[29] Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 International and Comparative Law QUARTERLY, 493–514 (2016).

[30] Nicholas Stern, *Projecting the Growth of Greenhouse-Gas Emissions*, in The Economics of Climate Change: The Stern REVIEW, 193–215.

[31] Darrel Moellendorf, *Treaty Norms and Climate Change Mitigation*, 23 Ethics & International AFFAIRS, 247–266 (2009).

[32] W.J. Wouter Botzen, *Damage Mitigation Measures at the Household Level and Climate Change Adaptation*, in Managing Extreme Climate Change Risks through INSURANCE, 189–207.

[33] Madanmohan Ghosh & Manmohan Agarwal, *Production-based Versus Consumption-based Emission Targets: Implications for Developing and Developed Economies*, 19 Environment

Needless to say that the developing countries would receive assistance and support from the developed countries in achieving the targets of climate change mitigation. However, the application has also been extended to least developed countries and small Island developing states that should also prepare the strategies, plans and actions to mitigate climate change adverse impacts and make effort for low greenhouse gas emissions in their respective special circumstances. The economic diversification plans are also very important to adopt for mitigation prices due to climate change.[34]

It is important for each party to make specific communication on the nationally determined contributions[35] for the purpose of maintaining clarity, transparency and understanding in accordance with the convention and this agreement. The conference of parties to this agreement is also so we'll consider a common time frame for nationally determined contributions, subject to the discretion of the respective country to have some flexibility to fix the common time frame. The nationally determined contributions will definitely account for anthropogenic emissions and that contributions communication would be recorded in a public registry as maintained by the secretariat. For the purpose of recognising and implementing mitigation action under the nationally determined contributions the parties will definitely consult the existing methods and guidance as available under FCCC.[36]

In order to achieve the targets of reduction of global mean temperature it is required that the regional economic integration organisations and their member states will have to act jointly under this agreement. It is also observed under the agreement that there should be formulation and communication of long-term low greenhouse gas emission developmental strategies that must be added by all the parties supported and guided by the principle of common but differentiated responsibilities.[37]

SINKS AND RESERVOIRS OF GREENHOUSE GASES

Parties under this agreement are encouraged to take policy initiations with regard to providing incentives for activities relating to reducing emissions

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AND DEVELOPMENT ECONOMICS, 585–606 (2014).

[34] Johanna Choumert et al., *Climate Change Mitigation and Adaptation in Developing and Transition Countries: Introduction to the Special Issue*, 20 ENVIRONMENT AND DEVELOPMENT ECONOMICS, 425–433 (2015).

[35] Benoit Mayer, *International Law Obligations Arising in Relation to Nationally Determined Contributions*, 7 TRANSNATIONAL ENVIRONMENTAL LAW, 251–275 (2018).

[36] Søren Lütken, *Climate Change and Nationally Appropriate Mitigation Action*, in FINANCIAL ENGINEERING OF CLIMATE INVESTMENT IN DEVELOPING COUNTRIES: NATIONALLY APPROPRIATE MITIGATION ACTION AND HOW TO FINANCE IT, 9–24.

[37] *Requirements for Integrated Assessment Modelling at the Regional and National Levels in Africa to Address Climate Change*, in CLIMATE CHANGE AND AFRICA, 260–270 (Paul V. Desanker et al.).

from deforestation and forest degradation. Article 5 of the agreement specifically proposes sustainable management of forest and enhancement of forest carbon stocks in developing countries. In order to mitigate climate change it has also been proposed for having alternative policy approaches, for example, joint adaptation and mitigation approaches for integral sustainable management of forests.[38]

MITIGATION AND ADAPTATION ACTIONS

Article 6 of the agreement clarifies the situation that there should be cooperative approaches when there is use of internationally transferred mitigation outcomes as required for nationally determined contributions. This will definitely promote sustainable development and transparency including good governance. It is also true that at the time of implementation of the respective nationally determined contributions there will be the possibility of forming higher ambition by the respective Nations under their mitigation and adaptation actions. Although, the use of internationally transferred mitigation has been meant voluntarily to the parties and definitely with their discretion they can take a call regarding this mitigation approach.[39]

The conference of parties under this agreement shall have the authority to devise mechanisms for the purpose of mitigation of greenhouse gas emissions to achieve sustainable development. There are certain aims fixed by the conference of parties or any designated body by such parties, they are, promotion of mitigation of greenhouse gas emission should go along with sustainable development, the public and private entities should be incentivized for or acting mitigation of greenhouse gas emission policies, et cetera.[40]

There should be balanced non market approaches for the purpose of implementation of nationally determined contributions and parties must recognise the importance of this integration. The agreement suggests the promotion of mitigation and adaptation ambition, encouraging public and private sector participation and to have coordination between domestic instruments and relevant institutional arrangements.[41]

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[38] *Indigenous Forest Management as a Means for Climate Change Adaptation and Mitigation*, *in* INDIGENOUS KNOWLEDGE FOR CLIMATE CHANGE ASSESSMENT AND ADAPTATION, 93–105 (Wilfredo V. Alangui et al.).

[39] Brian Berkey, *Human rights, harm, and climate change mitigation*, 47 CANADIAN JOURNAL OF PHILOSOPHY, 416–435 (2017).

[40] Ayumi Onuma & Yosuke Arino, *Greenhouse Gas Emission, Mitigation and Innovation of Adaptation Technology in a North–South Economy*, 16 ENVIRONMENT AND DEVELOPMENT ECONOMICS, 639–656 (2011).

[41] Jessica F. Green, *Private Standards in the Climate Regime: The Greenhouse Gas Protocol*, 12 BUSINESS AND POLITICS, 1–37 (2010). *See also*, Bharat H. Desai, *Greenhouse Gas Mitigation*, 43 ENVTL. POL'Y & L. 238 (2013).

GLOBAL GOAL ON ADAPTATION OF ENHANCING ADAPTIVE CAPACITY

Climate change cannot be considered as a regional issue but as a global challenge faced by all with locals, sub nationals, National, regional and international dimensions.[42]

The conference of parties shall determine the modalities based on which the developing country party shall devise the adaptation efforts. In order to develop such adaptation policy parties must keep in mind that such policy should be country driven, gender responsive with transparent approach and must consider the importance of vulnerable groups, communities and ecosystems.[43]

ROLE OF SUSTAINABLE DEVELOPMENT IN REDUCING THE RISK OF LOSS AND DAMAGE

There is an institution called Warsaw international mechanism for loss and damage associated with climate change impacts and this should provide authority and guidance to the conference of parties and determine the steps of mitigations to reduce such loss and damage. There is specific need of cooperation and facilitation including proper understanding of various factors, such as, slow onset events, early warning systems, events that may involve irreversible and permanent loss and damage, emergency preparedness, comprehensive risk assessment and management, non economic losses, et cetera.[44]

FINANCIAL RESOURCES TO BE PROVIDED BY THE DEVELOPED COUNTRY PARTIES

As per the mandate of article 9 of this agreement it is an obligation of the developed country party to provide financial assistance to developing country parties to devise the mitigation of climate change actions. This has also been further provided that financial resources must aim to achieve the goal and balance between adaptation and mitigation that should be country driven strategies and priorities should be given to developing country parties particularly vulnerable to the adverse effects of climate change. The article for the essays

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[42] Andrew Dessler, Edward A. Parson, *Global Climate Change: A New Type of Environmental Problem*, in THE SCIENCE AND POLITICS OF GLOBAL CLIMATE CHANGE: A GUIDE TO THE DEBATE, 1–30.

[43] Brendan P. McGivern, *Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, 37 INTERNATIONAL LEGAL MATERIALS, 22–43 (1998).

[44] Benoit Mayer, *International Action on Climate Change Mitigation*, in THE INTERNATIONAL LAW ON CLIMATE CHANGE, 108–131.

from paragraph ate that financial mechanism of the FCCC, shall be adopted by this agreement as it is.[45]

TECHNOLOGY DEVELOPMENT FOR IMPROVEMENT OF RESILIENCE TO CLIMATE CHANGE

It is very important to note here that without technological support climate change mitigation cannot be achieved.[46] Therefore, to strengthen this technology development and transfer cooperation between the developed country and developing countries parties are of utmost importance. For effective and long-term global response to climate change there should be encouragement for bringing new technology and development and that technology mechanism should support the aim of sustainable development.[47]

CAPACITY BUILDING

The article 11 of this agreement makes it clear that the capacity building should be country driven, and foster country ownership of parties and responsive to National needs. Capacity building can be improved once the earlier lessons learnt are incorporated. Needless to say that the capacity building will be required to be adopted by the developing country parties at the highest possibility.[48]

THE TRANSPARENCY FRAMEWORK

The agreement through article 13 clearly proposes a transparency framework which will speak of flexibility in the implementation of the provisions of this agreement for the developing country parties and that should be done to their respective capacities.[49]

It is further proposed under the article that each partition regularly supplies information, such as, National inventory report of anthropogenic emissions by

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[45] *Bringing Climate Change Claims to the Accountability Mechanisms of International Financial Institutions*, in Adjudicating Climate Change: State, National, and International APPROACHES, 292–313 (Jennifer Gleason, David B. Hunter).

[46] Texts, Technologies, and Climate Change, 277–299.

[47] Bob Scholes et al., *How Resilient Are Ecosystems to Climate Change?*, in Climate Change: Briefings from Southern Africa , 53–55.

[48] *Climate Change Adaptive Capacity Assessments: Conceptual Approaches and Operational Process*, in Adaptiveness: Changing Earth System GOVERNANCE, 50–68 (Annie Montpetit et al.).

[49] Alexander Zahar et al., *Adaptation to Climate Change through Legal Frameworks*, in Australian Climate Law in Global CONTEXT, 373–409.

sources and information necessary to track progress made in implementing and achieving its nationally determined contributions.[50]

CONFERENCE OF PARTIES TO TAKE PERIODICAL STOCK OF THE IMPLEMENTATION

Article 14 of the agreement clarified the position of conference of parties and clearly provided the obligation that the parties shall take stock of the implementation periodically and was considered as global stocktake. It is also proposed from paragraph two of this article that the conference of parties shall undertake its first global stock take in 2023 and every five years thereafter.[51]

SUBSIDIARY BODIES

As per article 18 of the agreement the subsidiary body[52] for scientific and technological advice and the subsidiary body for implementation of the FCCC respectively will act as the subsidiary body for scientific and technological advice and implementation under this agreement and the provisions of the FCCC for determining the functionality of these two bodies shall apply *mutatis mutandis* to this agreement.[53]

CONCLUSION

The Paris agreement 2015 was kept open for signature at the United Nations headquarter in New York from 22nd April 2016 to 21st April 2017. It was also stated that any regional economic integration organisation is going to be part of this agreement; it shall be bound by all the obligations under this agreement. Also, any instruments which are inconsistent with the provisions of this agreement will be tuned towards the agreement with the help of ratification, alteration and amendment as the case may be.

It was also mentioned under article 21 that unless 55 parties to the convention ratify the agreement it will not come into force. Accordingly, 55 parties ratified the agreement on 5th October 2016 and the agreement came into force from 4th November 2016.

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[50] Alfred Greiner, *Anthropogenic Climate Change in a Descriptive Growth Model*, 9 Environment and Development ECONOMICS, 645–662 (2004).

[51] *Climate and Culture: Taking Stock and Moving Forward*, in Climate and Culture: Multidisciplinary Perspectives on a Warming WORLD, 1–18 (Giuseppe Feola ed. et al. ed.).

[52] *Intergenerational Justice in the Paris Agreement on Climate Change*, in Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National INSTITUTIONS, 731–753 (Marie-Claire Cordonier Segger).

[53] Julian Caldecott, *Adaptation and the Paris Agreement*, in Surviving Climate Chaos: by Strengthening Communities and ECOSYSTEMS, 3–24.

It was also mentioned in this agreement that articles 14, 15 and 16 from the FCCC shall be applicable to this agreement mutatis mutandis. Accordingly, the dispute settlement mechanism described under the FCCC shall automatically apply to this agreement for setting any disputes. Article 28 of the agreement suggests that a party who has ratified this agreement can walk out from the agreement 3 years from the date of coming into force of the agreement. However, such withdrawal shall take effect only after one year from the date of notice to the depository.

Overall, the Paris agreement focuses more on common but differentiated responsibilities to achieve sustainable development goals. Also, it is a further instrument to implement the provisions of FCCC, keeping in mind the principle of equity and poverty education while applying the principle of sustainable development.

It is true that the Paris agreement speaks of ambitious goals, lots of obligations and specific points for reconsideration for lowering the greenhouse gas emission. Factually, the goals are quite realistic and at the same time aspirational also. The agreement shows solidarity with most of the provisions of FCCC and it describes appropriately about mitigation, adaptation, finance, capacity building, technology transfer, et cetera.

The Durban conference of parties which enhances the possibilities of forming mitigation of climate change definitely makes a huge difference now in terms of implementation of the FCCC provisions.[54] Phase wise lowering the greenhouse gas emission is a welcome step and the document suggests that let there be peak emission of greenhouse gases thereafter the contracting parties will ensure the speedy reduction of greenhouse gases in sustainable manner while adopting the principle of economy wide approaches. The establishment of sinks and reservoirs of greenhouse gases are worth mentioning. The forest policies have been given attention and the agreement and also suggest how to enhance the forest carbon stocks in the developing countries. Mitigation and adaptation actions as prescribed under article 6 of the agreement definitely promote the sustainable development concept in a transparent form and that is required to be adopted by the good governance scheme. Finally, it can be said that this Paris agreement 2015 may not be a very comprehensive document but, in the phase-wise reduction of greenhouse gases, this document will prove to be an asset with the scope that in future many more documents to come in the line of FCCC for successful reduction of greenhouse gas emissions to achieve the objective of article 2 of the Paris agreement.

[54] Annalisa Savaresi, *Durban Platform for Enhances Action: Progress at Last*, 45 ENVTL. POL'Y & L. 50 (2015).

TEACHING CONFINEMENT LITERATURE AND INTELLECTUAL NOURISHMENT OF STUDENTS OF LAW

—Dr. Chinmayee Nanda*

ABSTRACT

I would deliberate on teaching Confinement Literature to the students of Law as it may serve as a locus of hope for reconsidering the role, purpose as well as basis of prisons in our society. Confinement Literature can be understood as any work of fiction or non-fiction concerning the underlying issue of human captivity. This coinage is highly suggestive as well as inclusive of not only the idea of modern day imprisonment but also different other setting like slave plantations and concentration camps, additionally imaginative and figurative spaces too. By portraying a broader canvas of confinement, English trainers find conducive to address issues concerning both modern day system of prison as well as other social, psychological, cultural and cognitive dimensions which might be a result of forced confinement.

Keywords: confinement, reformation, prison abolition, literature, law and literature.

Literature is a reflection of the society. Similarly, Confinement Literature too offers various dimensions of human life in connection with the society. As per the reformative theory, punishment should be curative and not deterrent. This theory explains crime to be a disease and the cure is not by killing the culprit or the individual involved but by helping them with medicine and the process of reformation. It puts forth an avenue where the intellect can be engaged for better alternative than mere stringent action. Whether it is individual imprisonment or mass detention, creates a crisis situation, and largely not the best possible solution. At such a crucial juncture, students of law should be exposed to political, personal, contemporary slave as well as non-carceral

* The author is an Assistant Professor of English at KIIT School of Law, Bhubaneswar, India. She can be reached at chinmayeenanda@kls.ac.in. mobile no. 9437501447.

confinement literature as it is put by[1] Marc Lamont in his paper. It creates a platform for debates, discussions relating to relevant issues of social justice and comprehending literature through new lenses. Not only that, the idea of prison abolition is another agenda which can be analyzed from a broader perspective.

Considering any crime in the society, imprisonment is the foremost idea to signify punishment.[2] Marc Lamont has talked about his idea of prison and the need to abolish this system of punishment for a better social order. However, he does not talk about prison reform. In his project relating to prison abolition, he has clearly stated the reformative attributes of literature and a possibility of prison abolition. There is always a wrong notion about prison abolition, often ridiculed, while associating the idea with too much leniency with the criminals and providing them with a scope of free movement. But in reality the supporters of abolition actually aspire for such a social fabric where solely prison is not the preliminary agency of punishing. Usually abolitionists have firm faith in building of an order which does not bracket punishment with fairness or justice. Rather they prefer a world which highlights the deep-rooted grounds of crime like destitution, inequity, emotional disorder, depression, nervous-breakdown and so on and so forth and not considering imprisonment as the last resort to tackle crime.[3] Abu-Jamal has asserted that it might sound like a long term project, which seems to be hard to realize, "but nonetheless governs our collective decision-making in ways that lead to a more fair, just and humane society."

First of all, to think of a place where abolition becomes both provident and viable, one must begin to problematize the individual as well as collective notion of candor, justice, retribution and agency. In addition to that, one must also re-examine the place of the most coveted and assumed social institutions like court, law enforcement, judiciary and the government itself. We also reassess and review the human concern relating to those who are at present confined or detained. This broader and inclusive vision actually speaks up the very essence of humanistic value in general and English Studies in particular. In a Law School, the English Curriculum has lot of scope to set this agenda which is intellectually stimulating, and also has its social, moral and civic dimension. Any individual believing in the idea of imprisonment as deterrent or may be for the good, an active involvement to explore confinement literature provides a space to evaluate the social, ethical and legal challenges of confinement. It also problematizes the unexplored presupposition about crime and a whole complete understanding of the intricacies of human predicament while in captivity.

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1 Marc Lamont Hill, *A World without Prisons: Teaching Confinement Literature and the Promise of Prison Abolition*, 102 English Journal 19–23 (2013).

2 *Id.*

3 M Abu Jamal ET. AL.,The Classroom and the Cell 60 (Anchor Books 2012).

To talk about the **Political Confinement Literature**, it mainly deals with writing of the political prisoners. This genre of confinement literature is quite expansive. But mostly it can refer to those pieces of literature which is the writing of those in the confinement due to their expressed beliefs, ideas and thoughts. Mostly the writings by them reflect the reason of their confinement or their experience in captivity. Texts of such genre may include "Letters from Birmingham Jail", by Martin Luther King Jr. after he got arrested while protesting racial segregation. Another piece "Long Walk to Freedom" by Nelson Mandela after his long term confinement for protesting apartheid- legalized racial segregation, in his own country. These writings would provide ample food for thought for the students of law as these would serve as case studies for them from a socio-political as well as legal perspective. Students would have an idea of these leaders that all behind the bars are really not criminals and some also fight for humanity. Another autobiography "Assata" by Black Panther Party member Assata Shakur had escaped imprisonment and was kept in the Political Asylum in Cuba. In addition to that, a similar one by George Jackson, "Soledad Brother" is a collection of letters. Basically, he was a Black Panther killed by the prison guards while trying to escape from San Quentin Prison. Likewise one more piece by Mohandas Karamchand Gandhi, a lawyer by profession and anti-colonialist, political ethicist, has also a brilliant piece of writing to offer which is autobiographical in nature- "My Experiment with Truth". It provides a broader canvas regarding his struggle to own freedom for India as well as to fight against discrimination in any form. The writing of political prisoner is not limited to the above mentioned texts, there are other varieties too. The array also includes a wide variety of religious and philosophical writings which can add a separate dimension to students' understanding of political confinement. Including teachings from religious texts might be limited but there is a plethora of philosophical writings of the same genre. Plato's writings like "Apology", "Crito" and so on, provides a detailed account of trial, prosecution and execution of Socrates for his innovative and non-traditional ideology. Such writings trigger the students to be more conscious of freedom of speech in the contemporary context.

By incorporating the writing of prison writers, the facilitators may allow the students to enrich their comprehension and analysis of the concessions among "the law", "the criminal," and "the state" as stated by Marc Lamont in his article. As per the usual psyche law is almost revered as the highest principle, but these narratives have a different story to tell that is, "the laws of the day violated a broader sense of fairness and justice".[4] (Marc Lament) It also opens an avenue for the students to reimaging the prison as not merely for "lawless villains" rather those who talk about humanity, justice and equity amongst all in the society. Also, it helps the students to develop

[4] Marc Lamont Hill, *A World without Prisons: Teaching Confinement Literature and the Promise of Prison Abolition*, 102 English Journal 19–23 (2013).

better critical analysis regarding the contemporary political scenario. Students are supposed to develop their moral and ethical judgments about the texts. They can be engaged in debates and discussions for supporting or criticizing Martin Luther's decision of violating law. Likewise, justification of Mandela and Sakur's act can also be a part of this play. Incorporation of texts like "The Scarlet Letter" by Howthorne, "To Kill a Mocking Bird" by Harper Lee or for that matter Shakespeare's "King Lear" can be interpreted in connection with the prison writings. In these texts students have the opportunity to explore literary themes of justice and fairness. Also, it gives a scope to further examine whether or not individuals are in charge of delivering justice and whether there is a possibility of a just world or it is a mirage.

The next genre of prison writing includes **Personal Confinement Literature** which is another major thrust area of the English Studies relating to the students of Law. These accounts usually showcase the individual's negotiations with the confines. Examples of personal confinement literature are, Oscar Wilde's "De Profundis". This text delves into the details of an experience relating to the spiritual, physical as well as psychological toll that took on the protagonist, as well as his own path of development. There are other variations in the content like personal crisis and change. Conversion narratives like, "Autobiography of Malcolm X" and "Makes me Wanna Holler" by Nathan McCall include similar essence. Also "The Bet" by Anton Chekov has a different flavor to offer which deals with not the prison rather a solitary confinement. In "Autobiography….", prison is a place where X is introduced to the teachings of Elijah Muhammad, subsequently he is found to be performing deep literary engagement and self-study. In "Makes…" also a similar story line is found. In line with the previous two texts discussed, "The Bet" has also shown a moral and intellectual development of the lawyer after serving a fifteen years confinement due to his indulgence in studies and music. These types of texts allow the students to discuss issues of variation, conversion, atonement as well as accountability of the individual. In addition to the above list, there are the poetic ways of expressing the same ethos and sentiments, those include, Beanie Sigel's "What Your Life Like" captures the horrors of day to day life behind the bars. A collaborative teaching can be possible with another text by Upton Sinclair's "The Jungle", which exposes the unhealthy conditions of the meatpacking industry in the USA. In line with the same Arthur Miller's "All My Sons" depicting the hollow American dream which pushes an innocent in the prison. Songs like "I Refuse Limitations" by Goodie M.O.B., talks about an in depth analytical portrayal of poverty and shrinking labor market to collective incarceration. "One Love" by Nas is a collection of letters to his friends in captivity, explaining the life outside prison and the experience he had inside prison. It basically deals with the various human emotions in relationship like faithfulness, courage and fidelity. This piece of writing can also be taught along with Alice Walker's "Color Purple" and Bram Stroker's "Dracula".

Personal narrative deliberates on creating a space for broadening the reader's notion of prisoners. This is because the writers allow the readers to operate within the framework of moral complex and an ethical dimension. The usual perception is merely a sweeping generalization that the prisoners have to be necessarily "bad" in nature and character. In this process, this very idea reduces largely. On the other hand, when students are allowed to be engaged in active reading of such literature, they can explore the individual strand more closely, which ultimately help them understand the whole societal fabric. Also other factors leading towards crime can be assessed rather than a narrow conclusion.

Slave Confinement Literature can be considered as one of the most powerful aspects of this genre. These narratives allow the students to be informed about the lives of individual slaves, and also the various forms of brutalization, oppression and maltreatment, mostly the idea of North American Slavery. Needless to mention, that the students of law should be taught these pieces of literature to develop more human concern towards the oppressed. Harriet Jacobs's "Incidents in the Life of a Slave Girl" is about the unexpected plight of female slaves as they lose their families, abused both physically and verbally, at the same time sexually exploited by the slave masters. "Narrative of the life of Fredrick Douglas" is a detailed account of the horror of slavery and the relevance of literacy in the journey to achieve freedom. These narratives serve as slate for putting slavery and modern-day imprisonment for drawing a parallel between these two. Michelle Alexander puts arguments that in the current age, number of prisoners are growing in the USA which is way more than the number of blacks enslaved in 1850.[5] Angela Davis has also asserted that the Thirteenth Amendment of the US constitution abolished forced servitude in the USA except in the case of prisoners, effectively allowing forms of slavery to remain legal within a prison. This comparative state is immensely helpful for the students to have enriching dialogues and engaging writing activities too. It provides them with the freedom to exercise their own determinations regarding the ethical and moral dimensions of prison and slavery. Scope for critical questions is undeniable, relating to the theme of confinement. The issues of slavery and American history are closely connected, so students get ample opportunity to research on this proximity. So this sentiment does not only disturb the black writers, the white literary genius too cannot slip away the fact.[6] Toni Morrison argues that these concerns are not only evident in the work of black writers but also haunt the "literary imagination" of white writers too like Allan Poe, Herman Melville and Earnest Hemmingway. She also argues that American literary themes of individualism, innocence and freedom can only be fully realized against the backdrop of the experiences of black slaves who were unable to access them. Such confrontation support students to identify various

[5] Angela Y. Davis, Are prisons obsolete 23(2003).

[6] Toni Morrison, The Playing in the Dark: Whiteness and Literary Imagination 45 (1992).

socio-cultural dimensions of America and that also helps to shape the imagination of the students in reaching towards a conclusion.

Just as importantly, **Non-carceral Confinement Literature** also aid in students learning process. It basically refers to those texts dealing with the issues of captivity without an explicit reference towards prison, or other such places of criminal incarceration. To name a few, a text like "I Know Why the Caged Bird Sings" by Maya Angelou, provides a scope to the students to look at the issues concerning captivity outside of the prison. Another piece "Captivity" by Amy Levy, stimulates a rich discussion regarding displacement and mislaying through the characters of bird and lion. Both the texts have a lot of scope for further exploration like slavery and the loss of the Jewish nation-state. It opens up an arena further of multiple existential issues related to confinement outside of a political sphere. Students are also encouraged to read texts prepared by individuals in captivity though those text might not directly be related to their experience of captivity. Hence, they can re-evaluate the texts and ponder over how the idea of incarceration is found in their work. Such activity usually allows students to broaden their horizon relating to the prisoners. By prioritizing classics and canons written in prison, but are indirectly related to prison life, students get an opportunity to identify the creative and intellectual ability of the prisoners.

To conclude, a serious academic engagement with the confinement literature would tremendously contribute towards the students' intellectual nourishment. Actually, this paper has examined few literatures in the said field, but eventually the teacher can do a bit of research and take the help of relevant materials. It certainly would help investigate the legitimacy of confinement as well as it would also enable students to pose critical questions. Confinement literature proves to provide different lenses to analyze literature among the students of law. These certainly serve as important and necessary objective in the area of teaching English for Specific Purpose.

IS SAFTA RELEVANT? A CRITICAL SCRUTINY OF ITS COMPETITIVE EDGE

—Kumarjeeb Pegu*

ABSTRACT

The present scenario of intra-regional trade in the South Asian context is dismal, although in the same light it also points towards the enormous potential that the region has in terms of facilitating trade and economic security of the SAARC nations. Herein, the fundamental agreement of trade in the region is done through the Agreement on South Asian Free Trade Area or SAFTA.

The paper critically examines some of the more pressing issues within SAFTA to assess the problem areas within the framework which has led to its stagnation. The paper also looks into the benefits that are accrued under the preferential trade agreements originating in the sub-continent and the Motor Vehicle Agreement of 2015 signed by the nations of Bangladesh, Bhutan, India and Nepal (BBIN). The compare and contrast is done to examine some of the solution mechanisms provided for freer regional trade in these agreements and to find their best practices and reflect on the applicability of such mechanisms within the framework of SAFTA.

The research herein applies, in the spirit of doctrinal and qualitative research a content analysis primarily focusing on the text of SAFTA along with observation of a few separate trade agreements among the SAFTA member states. Also, analysis of international and regional legal instruments relevant to the study has been examined under the paper. In addition, academic journals and secondary statistical data relatable to the study are also observed. Based on the research the author shall provide implications on the grey areas under the framework of SAFTA which needs a relook.

* Assistant Professor of Law National Law University, Odisha.

Keywords: SAFTA, MVA, Preferential Trade Agreements, SAARC, IBBN, GATT

I. INTRODUCTION

Kathuria and Arenas (2018) observed that the Regional trade agreements (Herein forth RTAs) have rapidly increased over the time and today accounts for majority of world's trade.[1] They further observed base on WTO's assessment that the European Union, the North American Free Trade Agreement (herein forth NAFTA), and the Association of Southeast Asian Nations (herein forth ASEAN), together, represented 56 percent of world exports and 60 percent of world imports in 2016, cumulative of a total worth of 18.2 trillion USD in trades.[2] While in 2015, regional trade in the European Union stood at 63 percent, under NAFTA at 50 percent and under ASEAN at 24 percent, trade in the South Asian Free Trade Area (SAFTA) remained abysmally low at about 5 percent.[3] The aspirations of free trade under SAFTA remain an unfulfilled dream. For instance, In South Asia the total potential merchandise trade may be valued at around US$67 billion, and since the region continues to be the most rapidly growing region in the world, the gap between current and potential trade may continue to widen.[4]

Under the banner of the South Asian Association for Regional Cooperation (Herein forth SAARC), the South Asian Preferential Trading Arrangement (herein forth SAPTA) was formed in 1995 as the precursor agreement to SAFTA with limited trade coverage. The SAARC nations would later go on to sign the framework agreement on SAFTA on 6th January 2004, at the 12th SAARC Summit with the same coming into force on 1st July 2006. The aim of SAFTA is to provide for the opening up of the national borders in the region for growth of free and intra regional trade among the SAARC Nations.

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1 Sanjay Kathuria & Guillermo Arenas, *Border Tax Distortions in South Asia: The Impact on Regional Integration*, in A GLASS HALF FULL: THEPROMISE OF REGIONAL TRADE IN SOUTH ASIA 87-104 (Sanjay Kathuria ed., World Bank 2018).

2 *Id.* at 87.

3 *Ibid*.

4 Sanjay Kathuria & Priya Mathur, South Asia: A Work in Progress in A GLASS HALF FULL: THEPROMISE OF REGIONAL TRADE IN SOUTH ASIA 28-32 (Sanjay Kathuria ed., World Bank 2018).

II. TARIFFS- REDUCTION AND ASPECTS

A. Differential treatment and the Sensitive List

The Tariff reductions under SAFTA was to be achieved gradually and in a phased manner as provided under Article of 7 (Trade Liberalization Programme) of the agreement. Article 7 also provides for differential treatment[5] as the contracting states are grouped into developing nations (India, Pakistan, Sri Lanka) and the least developing nations (Afghanistan, Bangladesh, Bhutan, Nepal, Maldives). The requirement of the phased wise reduction of tariffs were different for both the non-least developed nations (Herein forth NLDNs) with their commitment of reducing tariffs from 0-5 percent being December 2012 with Sri Lanka's being December 2013, and for the least developing nations (herein forth LDNs), on the same tariff line being December 2015. Presently, all member states under SAFTA have completed their respective Trade Liberalization Programme requirements under Phase I and II, excluding on those items mentioned in the respective Sensitive Lists of the states.

The deferential treatment provided to the LDN is a legitimate step taken for safeguarding the domestic markets by the LDNs from the threat of injury by the like products from the other SAFTA states. The measure is only required to remain till they have developed the basic infrastructural needs and amenities for their domestic industries to compete at the regional sphere. Furthermore, Article 11 (e) of SAFTA provides differential treatment to LDNs on customs, as it provides;

The Contracting States recognize that the Least Developed Contracting States may face loss of customs revenue due to the implementation of the Trade Liberalisation Programme under this Agreement. Until alternative domestic arrangements are formulated to address this situation, the Contracting States agree to establish an appropriate mechanism to compensate the Least Developed Contracting States for their loss of customs revenue.[6]

As such, since the requirements under Article 7 of SAFTA are already fulfilled, the focus now moves towards the 'sensitive lists'[7] of states under SAFTA.

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5 The WTO Agreements provides special and differential provisions to developing countries under which the developing countries are exempted from the same strict trade rules that is applied to more industrialized countries such as the Most Favoured Nation or National Treatment norms. The aim is to allow for the gradual liberalisation of markets of the developing nations and the development of their capacities to compete in global trade.

6 Agreement on South Asian Free Trade AREA (SAFTA), 2004, art. 11 (e).

7 A list submitted by every country under SAFTA, consisting of goods items for which a particular country does not include tariff concession, i.e. when it's like product is imported from another nation within SAFTA.

In fact, till 2015, 34.7 percent of intraregional trade under SAFTA was restricted under sensitive lists of the contracting nations.[8] Herein, the problem remains in the fact that the sensitive lists provided by the respective states under SAFTA is much broader and includes multiple items, while the same states under the preferential or the bi-lateral trade agreements with other SAARC states maintain a shorter sensitive list.[9] Since the sensitive list is regarded as part of protectionist policy framework of the respective state, the same curtails trade as mentioned earlier and also leads to lack of competition in the domestic market and further inflates the prices of goods.[10]

Also in regards to the current market trading practices, Pakistan is yet to grant the tag of 'most favored nation' status[11] on India. On a similar note India on 15th of February 2019 revoked its MFN Status to Pakistan following a meeting of the Central Government's Cabinet Committee on Security as a result of Pulwama terror attacks on Indian armed personnel. While Pakistan maintains preferential access on 82.1 per cent of tariff lines under SAFTA,[12] the same is partially restricted for India since Pakistan maintains a sensitive list of 1209 items banned from import to India. India on the other has included a list of 25 items which are not part of the preferential access granted under SAFTA to the SAARC states which in the case of Pakistan more than doubles at 64 items.[13] The above reflects that there is a lack of uniform commitments taken up by states under SAFTA.

Under General Exceptions as provided in Article 14 of SAFTA, individual states can adopt measures which are otherwise inconsistent with MFN or free trade and leads to discriminatory practice of increasing tariffs and of applying market restricting on a particular member state for measures considered necessary such as under national security, as was India's stance on Pakistan post the abovementioned terror attacks. However, other than the general exception clause, generally also and more so, the example of India and Pakistan shows that there remains a critical lack of uniformity in applying the preferential treatment by states under SAFTA.

B. Preferential Treatment

Preferential treatment has evolved as a tool for increasing trade among nations. The treatment is traced in the 'enabling clause' under the Tokyo Round of the General Agreement on Tariffs and Trade (Herein Forth GATT),

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8 *Supra* note 2, at 98.

9 Rizwanul Islam, *Constraints of the Agreement on South Asian Free Trade Area and SAARC Agreement on Trade in Services Militating Against Sub-Regional Trade Proliferation in South Asia*, 7 BYU INT'l L. & MGMT. R. 1, 3-8 (2010).

10 Marcin Przybyla and Moreno Roma, Does Product Market Competition Reduce Inflation? Evidence from EU Countries and Sectors, Working Paper Series No. 453 (pp. 4-43). (European Central Bank, March 2005), 4-43.

which was agreed upon on 28th November 1979. The 'enabling clause' provides for favorable treatment to developing countries, without according such treatment to other contracting parties and includes preferential tariff treatment. Hence, enabling clause was established as an exception to GATT principles on Most Favoured Nations (herein forth MFN) and National Treatment.[14] Furthermore, exception to the MFN principle is also provided in the GATT Article XXIV, particularly under paragraph 4 and 5, which allows for nations to enter in voluntary agreements for increasing trade and development, which helps in closer integration between the economies of the nations under such agreements. Accordingly, under such agreement, customs union or free-trade area may be created to facilitate trade between the constituent territories albeit without otherwise causing barriers to the trade of other contracting parties with such territories. Article XXIV allows for creation of regional alliances such as SAFTA and also of frontier trade such as the preferential agreements between the states. In fact, the very 'enabling clause' protects the PTAs among the neighboring states in south Asia.[15]

Moreover, Article 13 of SAFTA states;

> *Notwithstanding the measures as set out in this Agreement its provisions shall not apply in relation to preferences already granted or to be granted by any Contracting State to other Contracting States outside the framework of this Agreement, and to third countries through bilateral, plurilateral and multilateral trade agreements and similar arrangements.*[16]

The application of Article 13 of SAFTA, hence removes any notion that the contracting states under SAFTA may not join or create preferential agreements with each other and provide under such agreements preferences on aspects such as smaller sensitive list than what such nations have included under SAFTA, more competitive tariff rates on items than under SAFTA etc. While such PTAs are generally not in violation of GATT norms but there needs to be a critical assessment of whether such agreements causes barriers to the trade of other contracting parties with such territories in the context of region trade.

From the assessment, the author believes that by solely placing the blame on the mushrooming PTAs among the South Asian states for lack of trade under SAFTA, one may deviate from the very introspection that is required to

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[14] For the more on MFN, refer Article I and for National Treatment, refer Article III of GATT, 1994.

[15] WORLD TRADE ORGANIZATION, DIFFERENTIAL AND MORE FAVOURABLE TREATMENT: RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES, WTO DOC No.L/4903. (1979), available at https://www.jus.uio.no/lm/wto.gatt.developing.countries.enabling.clause.1979/landscape.a4.pdf.

[16] Agreement on South Asian Free Trade AREA (SAFTA), 2004, art. 13.

be placed on the defects of SAFTA. A critical assessment of SAFTA is vital since SAFTA's success also hinges on the geo-political current of the region. Furthermore, SAFTA do not provide for any concrete and institutional dispute settlement component for the member states to resolve disputes, particularly one which may arise due to the existence of PTAs among some of the states parties to the agreement.

C. Fault Lines under SAARC

From the perspective of a Geo-political paradigm it is hard to argue against the tumultuous journey that SAARC has undertaken so far and at the very center of it is the inclusion of Article X to the SAARC Charter. Building of unanimity as explained under Article X has always been a challenge as it leads to exclusion of bilateral and contentious issues among the member states and blocks any possibilities of a dispute resolution mechanism within the SAARC forum. Indeed for a peaceful functioning of SAARC the provisions of Article III were inserted into the Charter of SAARC which puts an obligation on the heads of member states to meet once a year. This obligation to an extent with certain degree of flexibility is conducted in the form of SAARC Summits within the interval of 2 years between the previously concluded and the present summits. However, today the trend of 'SAARC Summit cancellations' are very much part of the realities of a struggling SAARC.[17] While it is agreed that the presence of bilateral and contentious issues among the member states are the primary reason for the cancellation of the Summits, it is also observed that majority of these cancellations solely implies the phenomenon of 'India related issues'.[18] Also while the inter-state conflicts in the SAARC region is well documented, the fear of an Indian dominance in the region has led to the formation of political unanimity among SAARC states like Bangladesh, Nepal and Sri Lanka seeking security assistance outside of South Asia.[19]

Keeping in view of India's geographical positioning in the region and its political and economy might, a climate of tension particularly between India on one hand and Pakistan, Bangladesh and Sri Lanka on the other has led to the evolution of SAARC and hence on a practical ground the existence of SAARC itself never depends on a consensus for what consist of the ideals giving force to notions of regionalism. In support of this argument a strong case example is visible in Pakistan and Sri Lanka's long insistence on a mechanism to resolve

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[17] SAARC Summits in past have been canceled on the following dates -1989, 1992, 1994, 1996, 1999, 2000, 2001, 2003, 2006, 2009, 2012, 2013, 2016.

[18] Ugo Caruso, *Comprehensive Security in South Asia: SAARC and the Applicability of OSCE Standards*, in MINORITY RIGHTS IN SOUTH ASIA 177-179 (Rainer Hofmann & Ugo Caruso ed., Peter Lang 2011).

[19] Alyson J. K. Bailes, *Regionalism and security building*, in Regionalism in South Asian Diplomacy, Policy Paper No. 151 (Stockholm International Peace Research Institute, Feb 2007), 1-12, https://www.sipri.org/sites/default/files/files/PP/SIPRIPP15.pdf.

bilateral conflicts in the region via the SAARC forum which India has repeatedly objected to.[20]

Herein, it becomes pertinent to note that any agreement between the SAARC nations on matters of regional security and trade shall always depends on 'consensus through unanimity' of the member states under Article X paragraph 1. It was the consensus of the states that allowed the creation of SAPTA and later SAFTA.

However, the impact of geo-politics on SAFTA was clearly in display at the 18th SAARC Summit in November 2014, when the Indian proposal to establish a SAARC Motor Vehicle Agreement met objections from Pakistan, and hence under Article X of the Charter of SAARC no consensus was achieved. India would go on to pursue the idea with the BBIN[21] which resulted in the BBIN Motor Vehicles Agreement (herein forth MVA), signed on 15 June 2015 at Thimpu, Bhutan.

The inclusion of a SAARC motor vehicles agreement had the potential to address the structural problems regarding capacity and infrastructural building needs under SAFTA to further improve intra regional trade. However, a lack of trust between India and Pakistan not just cost the opportunity but also ended the hopes of the inclusion of Afghanistan in such an agreement.

D. Lack of Capacity Building under SAFTA

SAFTA does not provide for any concrete measures on capacity building of the nations within the grouping such as creation of infrastructure, human resource development, setting up of customs unions etc that facilitates trade. Annex II of the agreement on SAFTA ascertains list of areas where the NLDNs in the region could help the LDNs for capacity building. The list for instance consists of mutual recognition of technical regulations and standards, training and skill development, Product certification, testing laboratories, quality management, accreditation and certification of products, training and human resource development in trade related areas such as product development, marketing etc, trade procedures, documentation and computerization of trade data, development of trade related institutions and trade negotiating skills

[20] Kripa Sridharan, Organisations and Conflict Management: comparing ASEAN and SAARC, Working Paper Series 2: No. 33 (Crisis States Research Centre, London School of Economics London, March 2008), 12.

[21] The South Asian Growth Quadrangle (SAGQ) was launched in 1996 by the foreign ministers of Bangladesh, Bhutan, India and Nepal (BBIN) in 1996 followed by its formal endorsement at the 1997 SAARC Summit in Maldives. The SAGQ or as more popularly called the BBIN aims to increase trade between the above nations in the following sectors i.e. environment, energy and power, investment, transport and tourism.

etc. However, no mechanism or institutional frameworks for implementation of the above ascertained areas are provided.

Here, one may recall the example of the MVA under the BBIN network which aims at facilitating cross-border movement of cargo, passenger, and personal vehicles between the BBIN nations. The MVA provides a partial solution to some of the issues plaguing capacity building in the region although the agreement itself is not part of SAFTA and includes only Bangladesh, Bhutan, India and Nepal. Nonetheless, the BBIN nations could organically link the capacity building under the MVA with SAFTA to facilitate the trade flow in these nations. Such measure could not only lead to further acceleration of trade and national incomes of both India and Bangladesh but also provide greater potential of creating socio-economic progress in the region.[22]

Under the MVA for instance, Article VI (7) provides for mutual infrastructure assistance by the state parties in the form of the notification of particular Border Check Posts, Land Ports and Land Customs Stations by the concerned Contracting Parties for facilitation of entry and exit of cross-border vehicular movement. Similarly, Article VIII (7) provides for creation of a Customs subgroup with participation from all the Contracting Parties to formulate the required Customs and other procedures and safeguards with regard to entry and exit of vehicles. Also, Article XI provides for facilitation of cross border insurance claims and Article XII provides for business facilitation including opening of branch offices by institutions and operators of one contracting nation providing transport services in other contracting states. Moreover, the modalities for trans-boundary trade under MVA can further be developed through MoUs to be signed later by the state parties for initiation of plan of actions.

The MVA provides great scope for trans-boundary regulation of trade through vehicular traffic and for creation or up-gradation of infrastructural facilities. India had envisioned the MVA and surely will have a major rule to play in providing assistant to the other parties (LDNs) in their capacity building.

However, any integration of the steps of capacity building under MVA will technically not have benefits for Pakistan and Afghanistan as for instance; under the MVA any vehicular movement from Bangladesh to facilitate trade will only be allowed to enter the BBIN nations. Hence, it remains important to

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[22] Matías Herrera Dappe, Mathilde Lebrand, & Diana Van Patten, *Economic Gains and Losses from Integrating Road Transport between Bangladesh and India*, in *CONNECTING TO THRIVE: CHALLENGES AND OPPORTUNITIES OF TRANSPORT INTEGRATION IN EASTERN SOUTH ASIA*. INTERNATIONAL DEVELOPMENT IN FOCUS 84 (Matías Herrera Dappe & Charles Kunaka ed., World Bank 2021).

see how India moves forward for the BBIN initiative, i.e. whether India wish to divert its focus to the sub grouping or wish to keep the greater goal of South Asian free Trade alive. Similarly, Pakistan's consent in the same lines remains vital. According to a World Bank report the trade potential between India and Pakistan alone in the region stands at $37 billion though the same is hindered by the lack of trade followed by political distrust between the two nations.[23]

E. Issues of Non-tariff barriers

It is observed that while SAFTA does not have a binding provision for eliminating or reducing non-tariff barriers,[24] the bilateral PTAs is general and the ones' executed among the south Asian states does have specific provisions on elimination of non-tariff barriers.[25] Although there is a mention of non-tariff barriers under Article 6 under Agreement on SAFTA i.e. SAFTA nations can deliberate on the area, and paragraph 4 to Article 7 of the Agreement provides that non-tariff barriers should not be inconsistent with WTO compliance, the same cannot limit the issue of insistence by nations to continue with such measures while the same is avoided under the PTAs in the region. The issue remains vital, since such barrier not only restrict intra-regional trade but also divides the regions into multiple trade blocs without any organic connection to the identity of socio-economic regionalism.

III. CONCLUSION

In submission, the author maintains that SAFTA's long term health depends as much on political unification of the region as it is on the regional economy and trade. Furthermore, a concrete restructuring of SAFTA provisions particularly in the highlighted grey areas as provided in the paper remains the need. The problem areas under SAFTA such as the lack of provisions within the agreement to address the issues of non-tariff barriers, lack of capacity building mechanism for LDNs and the broader sensitive list maintained by nations requires a re-examination. Certainly, SAFTA members may refer to the more successful preferential agreements signed between some of the members in the grouping. The step will help in initiating deliberations on the process of improvising on the highlighted issues here, since any such agreements at a given point, shall consist of the representation of 2 members under SAFTA. This

[23] *Supra* note 1.

[24] Non-tariff barriers are measure, albeit a customs tariff, that provides barrier to international trade. Some of the examples are regulations within the territory that dictates a. how a product can be manufactured, handled, or advertised, b. rules of origin such as the proof of the country where goods were produced, c. rules of quotas, i.e. the quality of a certain product that can be sold in the territory, etc. Non- tariff barriers are generally restrictive of trans-boundary trade.

[25] *Supra* note 9, at 6-26.

involvement of the respective member states provides an organic approach for them to bring their technical expertise to the table on trade management and facilitation (facilitation of technical knowledge sharing) to initiate a true capacity building exchange of thoughts under SAFTA. Based on the mutual agreement of the states, such ideas could perhaps transpire into mutually beneficial regulations in the region.

JOINT CRIMINAL LIABILITY (JCL) - NOMENCLATURE VS LIABILITY CHALLENGE WITH REFERENCE TO PARASITIC CRIMINAL LIABILITY

—Dr Nandini CP*

ABSTRACT

Joint Criminal Liability (JCE), these days titled at times JCE is an issue that has continuously been tested in the courts of various countries. The law is well-established in principle, but in the recent developments taking place, the requirements to impose liability has been challenged in the higher court when the participation of the accomplice is in question. There are radical changes in imposing JCL. These changes have led to varied doctrines evolving, one such doctrine is the Parasitic Criminal Liability. The concept of Joint liability is overwhelming changing which has led to a kind of disarrayed judgments leading to appeals before the higher courts with a prayer to reduce the sentence or seek acquittal i.e. imposed against the accomplice, that too retrospectively seeking such relief. This paper is an attempt by the author to delve upon the development of this principles from the historical perspective and pursue the doctrines that shaped in different ways and imposed varied liability in different domestic laws, mainly the UK and US and few Common law countries with special reference to Indian Criminal Justice System. Other domestic laws and international law are also part of discussion in this paper.

Keywords- Joint Criminal Liability or Enterprise, Common Intention, Complicity, Principal & Accessory liability, Parasitic Criminal liability

* Associate Professor of Law, Damodaram Sanjivayya National Law University Visakhapatnam, India.

INTRODUCTION

According to Article 17 of Stephens Digest of the Criminal Law ('common purpose');

> "*When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its a commission"*[1]

As stated above; the language of Stephen states that: there can be Joint or Several liabilities for the acts done individually, when persons are acting with a common 'Criminal Purpose'. The word 'Common Purpose' also used as "Common Intention" "Common Object", "Common Design", that are the appellation, in various penal laws as terminologies or nomenclature that refers to "agreement in commission of crime". It also means 'participation in a crime'[2] otherwise a "particeps criminis."[3] The participant or the perpetrator may while acting so, do it directly, indirectly, remotely,[4] i.e., may be 'present in the scene of the crime' 'may be merely present with or without intending to be a party to the crime' 'or be 'absent', i.e., acting from remote place etc. In penal law language as defined in codes, the liability can be an act of aiding, abetting, assisting, procuring, or counselling etc. They are entitled to impose liability on the perpetrators who have participated or participating in the act, which is the

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1 L. F. Sturge (ed), J F Stephen: A Digest of the Criminal Law (Indictable Offences) Maxwell, 9th ed, 1950). The text is the same as in the 4th edition published by J F Stephan in 1887 (Emphasis added) see Citation F N 5 & 6 - Beatrice Krebs; Joint Criminal Enterprise ; The Modern Law Review JULY 2010, Vol. 73, No. 4 (JULY 2010), pp. 578-604.

2 Nandu Rastogi v. State of Bihar, (2002) 8 SCC 9 in para 17 it is stated…. "*They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 IPC, it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse...*".

3 Accomplice- One who takes part in a crime https://www.merriam-webster.com/legal (last visited Feb 7, 2021).

4 *Schneider* v. *State of New Jersey*, 1939 SCC OnLine US SC 134: 84 L Ed 155: 308 US 147 (1939), *"Remote encouragement should not be sufficient for grounding a conviction... who is not sufficiently connected to the end harm to warrant censure*". *R.* v. *Goldman*, 2001 EWCA Crim 1684 (for understanding when a liability of the pornographic videos of children between 7-13 Years as an encouragement or conspiracy, while also explaining the liability of the supplier as the one who encouraged through advertisement and not the buyer who encouraged) Read - Glanville Williams, Text Book of Criminal Law; Dennis J. Baker, Fourth Edition, Sweet and Maxwell.

basic requirement of the provisions fixing Joint liability. However, they require a minimum of two or more persons acting together, or group of people jointly acting in commission of crime, so as to charge them. At times law treats such joint act severely. Whatever may be the consequences, one of the major reasons for the law to be stringent in this area is the concern for the protection of law and order and thereby prohibiting persons acting together, as such togetherness by itself is a threat to the society and needs to be regulated.

The law relating to JCL is a well-established rule since ages. So, the basic question before the court is no more a concern for the legal fraternity to go for basic understanding, but the challenge before the courts these days is how to impose the liability, when variants of such joint liability arise in certain situations. In this paper, the author proposes to look into the development of such challenges that pose a problem in affixing liability and sentencing the accused for those acts that are committed jointly. So, before understanding the newer development a brief outline about the classification of the parties to a crime will become relevant for this study.

HISTORICAL CLASSIFICATION

Since centuries, the parties to crime are classified mainly into two categories such as 'Principals' and 'Accessories'. Further, classified into four as 'Principal offenders of First Degree' (POFD) and 'Principal offenders of Second Degree' (POSD - also known as Aiders and Abettor),[5] who are directly participating in the commission of crime. On the other hand, the Accessories[6] are classified as 'Accessories before the fact' (ABTF) and 'Accessories after the fact' (AATF),[7] who may be present before, during or after the commission of crime (Harbouring the Criminal). In various judgments, the court has also

[5] Indian Penal Code, 1860 has this classification ss. 107-120.

[6] "One who is in some way concerned or associated in commission of crime, a partaker of guilt, one who aids or assists, or is an accessory." Ramanatha Aiyar's, *"Law Dictionary"* defines 'accomplice' as: "There is some authority for using the word 'accomplice' to include all principals and all accessories, but the preferred usage is to include all principals and accessories before the fact, but to exclude accessories after the fact. If this limitation is adopted, the word 'accomplice' will embrace all perpetrators, abettors and inciters. The term in its fullness includes in its meaning all persons, who have been concerned in the commission of a crime, all *participles criminis*, whether they are considered in strict legal property as principals in the first or second degree or merely as accessories before or after the fact." Publisher Lexis Nexis, 5th Ed, 2016 See *Mahadeo* v. *R.*, 1936 SCC OnLine PC 40: (1936) 38 Bom LR 1101 (See Somasundaram @ Somu v State Rep. By Dy. Comm. of Police,2016 Latest Case Law 707 SC (((2016) 16 SCC 355)) Later Decided by SC Somasundaram v. State, (2020) 7 SCC 722 Visit https://lawessential.com/case-comments-1/f/somasundaram-somu-v-the-state-rep-by-the-deputy-commissioner (Also Refer http://tnsja.tn.gov.in/ejournals/ej_oct2020.pdf) last visited 29 March 2022).

[7] In some instances (Accessories at the Fact are also used in Supreme Court judgments).

titled the class of participants as "Accessories at the fact" (Rollin M. Perkins).[8] Generally, the POFD is the direct perpetrator or indirect participant in the commission of crime. The participant may act for himself or through another including innocent agent[9] (e.g., Innocent Agent (like child, insane, animal, etc.).[10] However, when the perpetrator is an aider or abettor and not physically present in the scene or either directly or indirectly does not participate in the commission of crime, he/she can still be liable for aiding, abetting, instigating or inducement caused. Many a times, the court are tested, while imposing liability on such participants due to difficulty in exactness of the role played by the perpetrator in the act.[11] Though, the law relating to joint liability is well settled for such criminal acts, there are newer challenges that needs to be answered from time on time.

There can be various issues relating to Joint liability, only a few of these are taken up for study by the author in this paper. *Firstly*, whether such participants can be made liable on par with that of POFD, *Secondly*, if their acts were before or after the commission of the act, will their liability differ from that of the POFD, even though they are part of the 'common purpose', but did not intent to commit the act, as committed by one of the accomplices. *Thirdly*, the newer challenge is, whether the existing and established principles have been protected in the lately evolved 'Parasitic Criminal liability' (PAL).[12]

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[8] Rollin M. Perkins; Parties to Crime, 89 U. Pa. L. Rev. 581 (1941). Available at: https://scholarship.law.upenn.edu/penn_law_review/vol89/iss5/2 Refer FN 2 (I HALE P. C. *437; 2 Stephen, History of The Criminal Law of England (1883) 230); Parties to Crime (upenn.edu) Available at: https://scholarship.law.upenn.edu/penn_law_review/vol89/iss5/2 (last visited June 9, 2021).

[9] Mouaid Al Qudah "*The Doctrine of Innocent Agent as a Form of Primary Criminal Liability*", European Journal of Social Sciences ISSN 1450-2267 vol. 59 No. 2 April, 2020, pp. 173-192 available at http://www.europeanjournalofsocialsciences.com (last visited June 8, 2021) Means -Doctrine of Innocent, when he or she exploits an innocent agent to commit an offence (doctrine of the innocent agent); See cases *White* v. *Ridley*, (1978) 140 CLR 342; *R.* v. *Cogan and Leak*, 1976 QB 217: (1975) 3 WLR 316: (1975) 2 ALL ER 1059; *R.* v. *Hewitt,* (1997) 1 VR 295.

[10] *"The mens rea requirement is meant to ensure that conduct that is punishable as a crime is appropriately ''connected'' to the agent of the act, and is not, say, something that was accidentally done by the agent, or forced on the agent, or done without the agent's understanding of what he or she was doing. We want to be sure, that is, that if agents are to be punished by law for their conduct, then they engaged in the conduct ''guiltily'' -- in central cases, knowingly and with malice. And so, the mens rea requirement is usually introduced to ensure that the evil that was done was done as a result of the agent's intention to bring it about. This is one reason why the negligently upturned rake does not suffice for criminal charges."* https://web.iitd.ac.in/~burra/teaching/burra18-2hul360consolidated-course-packet.pdf (last visited June 8, 2021).

[11] Physical presence not *sine quo non* as decided by the SC of India in *Shreekantiah Ramayya* v. *State of Bombay*, AIR 1955 SC 287; (for been virtually present); see *Suresh* v. *State of U.P.*, (2001) 3 SCC 673: AIR 2001 SC 1344.

[12] Guenael Mettraux, *Command Rewponsibility as a Sui Generis Form of Liability for Omission* in The Law of Command Responsibility: OUP (2009=03-19). https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199559329.001.0001/acprof-9780199559329-chapter-4 (last visited October 10, 2021).

An attempt to respond to these questions are made in this paper. The foremost task is to understand the word Joint Criminal Liability and attempt to understand different types of liability. The new name given at times is "Joint Criminal Enterprise" (JCE)[13] a doctrine most drawn to determine the liability of offenders for crimes of violence committed *en groupe that has* escalated to causing of death. So, the question that arises in most of the cases of this nature are, if there is a fatal act caused by one individual, can all the actors be liable for the killing/s, even if they did cause injury and did not intend to kill.

Few authors state such joint acts as 'Complicity',[14] which means 'responsibility for helping'.[15] Proving and convicting the accused for helping in commission of crime can be a challenge to the court in decision making (James G Stewart).[16] Generally, 'Complicity' can mean imposing, (a word) to include wider liability for all types of acts in helping the commission of crime, irrespective of causing death or not.[17] However, the 'Anglo-American Complicity Theory' assumes that the accomplice is always the person who assisted the physical perpetrator, and that the perpetrator was "whoever personally performed the requisite verb in crime". Complicity[18] does not just end here, it continues for the remainder of acts and responsibilities, that is committed

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[13] The principle appears to be discussed in *Anderson and Morris (1966)*, where Lord Parker CJ stated: "*Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise (including) liability for unusual consequences if they arise from the execution of the agreed joint enterprise.*"

[14] Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal: *National Coal Board* v. *Gamble,* (1959) 1 QB 11: (1958) 3 WLR 434, applied for example in *Attorney-General* v. *Able*, 1984 QB 795: (1983) 3 WLR 845, *Gillick* v. *West Norfolk and Wisbech Area Health Authority*, 1986 AC 112 and *Director of Public Prosecutions for Northern Ireland* v. *Maxwell*, (1978) 1 WLR 1350.

[15] Stark, F. (2016). *The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping*, The Cambridge Law Journal, 75(3), 550-579doi: 10.1017/S000819736000611.

[16] James G. Stewart; *Complicity* Chapter 24 Editors: Markus D. Dubber & Tatjana Hornele; The Oxford Handbook of Criminal Law; OUP 2016.

[17] Joint criminal enterprise Liability for joint criminal enterprise arises where a person agrees with at least one other to commit an offence and that offence (or an offence of the same type) is committed. We have recommended the retention of joint criminal enterprise liability as a separate head of liability to accessorial liability in order to deal effectively with situations involving group criminal activity. Importantly, it will allow for the aggregation of conduct that, taken together, would amount to an offence and will be especially useful in situations where the precise role of each of the parties to the criminal activity is not clear https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-129.pdf, last visited June 8, 2021.

[18] Indian courts also use this word while refereeing to joint criminal liability; See Somasundaram @ Somu v State Rep. By Dy. Comm. of Police,2016 Latest Case Law 707 SC (((2016) 16 SCC 355)) Later Decided by SC Somasundaram v. State, (2020) 7 SCC 722 Visit https://lawessential.com/case-comments-1/f/somasundaram-somu-v-the-state-rep-by-the-deputy-commissioner (Also Refer http://tnsja.tn.gov.in/ejournals/ej_oct2020.pdf) last visited 29 March 2022).

by participation, that is left-over once the act is completed.[19] In this line, the Continental Theorists[20] have attempted to develop an integrated concept of complicity that was sensitive, to a revised notion of perpetration that has gone beyond the 'objective theory' to that of 'subjective alternative'.[21] This has also fallen flat and later a 'Myriad Theory of 'Objective/Subjective Test' gained ascendency based on 'who has the hegemony or control over the criminal act' (James G Stewart).[22] Thereby, the complicity can be identified with parts of commission of crime in several phases and places. Traditionally, it allocates responsibility to the accomplice for the perpetrators consummated offence. In this meaning, complicity is a devise within the general part of the criminal code that matches the helper's agency with the crimes they assist. There are certain differences that are followed by many courts when they interpret JCE and Complicity. This concept and principles are followed by many Domestic and International Criminal law. However, fixing liability in JCL has led to uncertainties because, here the actions of the aid, can make him/her responsible for the murder, even though he/she did not personally commit i.e., "kill anyone". In this new nomenclature, it would also mean JCE, Indian courts have referred in many cases as 'Joint Criminal Venture'. JCE developed alongside the principle of complicity to extend liability of group conduct. The JCE is not only the part of English Law, but also followed in International Criminal Court through International Criminal Law, with an over expanding and loose terminology to mean "pursuing a common criminal purpose" and "being concerned in crime" making it more ambiguous to use it for agency liability. We can see various debates on the liability imposed under this doctrine. However, for an understanding of this law, there are few issues.[23]

(i) its broad foresight-test

(ii) its nature, and

(iii) its propensity to expand.[24]

In this paper, to a large extent (unless to explain some principle and ratio of the law needs explanation) has adopted the meaning of "common purpose" to mean JCE, but with a *caveat* that if the Joint Act, has caused death during the

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[19] The puppet-master even if in the background by using an innocent agent and in the criminal act calling him just as an accomplice when he was the really prime mover in the whole criminal affair based on the Objective Theory of perpetration' is criticized.

[20] Continental philosophy is a set of 19th and 20th century philosophical traditions from mainland Europe. This sense of the term originated among English-speaking philosophers in the second half of the 20th century, who used it to refer to a range of thinkers and traditions outside the analytic movement https://www.newworldencyclopedia.org/entry/Continental_philosophy, last visited August 5, 2021.

[21] In this, the perpetrator became someone who takes herself to be assisting "the act of another".

[22] James G. Stewart; *Complicity* Chapter 24 Editors: Markus D. Dubber & Tatjana Hornele; The Oxford Handbook of Criminal Law; OUP (Paperback) 2016.

[23] https://core.ac.uk/download/pdf/217701114.pdf, last visited February 8, 2021.

[24] *Ibid.*

commission of crime. The joint liability to be imposed also requires the prosecution to prove the mental element to convince the judge to convict the assistant with the perpetrator.[25] The complicity can take other forms, like in some cases making the offence an inchoate or treat complicit as a separate offence "like criminal facilitation."

Common illustration to know and understand how liability can be imposed can be read through Bank Robbery (Burglary) Case that are usually explained to understand JCE.[26] A Bank clerk provides the Safe code, goes on a holiday. His help in commission of crime would save time and avoid the alarm. These offences just compliment, rather than the traditional understanding of the participation. Even in such situation, there is mental element present and the *actus reus* to help the Burglar is proved, but there is absence of direct physical act during the commission of crime. The difficulty in punishing and sentencing changes, based on the domestic laws of each country. It is thereby clear that one basic requirement of the crime i.e. mental element must be proved to impose JCL including that of JCE, unless the statute has imposed a strict liability in the provision. The law of JCE is well settled pertaining to the presence of *actus reus* and *mens rea,*[27] but based on theories developing in the criminal law, proof of these elements require a transformed understanding of elements, that is challenge in the decision making, due to unprecedented development of domestic laws (Many domestic laws have been more specific in adapting the changes in Law relating to JCE and new reforms are embraced in the development of law making).[28] The domestic laws are enacting diverse legal doctrines for accomplice liability or have provision on liability that is different from that of the main perpetrator.[29] E.g., Offences Against

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[25] *Willie (William) Slaney* v. *State of M.P.,* AIR 1956 SC 116.

[26] Read further on the Unitary Theory of perpetrator, Functional Unitary Theory and other differentiated model including omission liability as explained by various authors. James G. Stewart, https://core.ac.uk/download/pdf/217701114.pdf (last visited Feb 8, 2021).

[27] Elements of Crime -*actus reus and mens rea* (Wrongful act and Guilty Mind) respectively.

[28] New South Wales; Law Reform Commission Report of 129 on Complicity; December 2010 www.lawlink.nsw.gov.au/lrc, last visited June 8, 2021; https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-129.pdf (last visited June 8, 2021); see also, the Law Commission Consultation Paper No. 131-Assisting and Encouraging Crime-A Consultation Paper; https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/No.131-Assisting-and-Encouraging-Crime-A-Consultation-Paper.pdf (last visited June 8, 2021).

[29] Read ss. 107-120 of the IPC and ss. 120A & B of IPC and s. 511 of the IPC for liability as an abettor, conspiracy and attempt respectively (all were titled as preliminary crimes in the earlier days and now most of the statute have independent lability for offences of such nature). But the statutes have provided them as an independent offence. The liability for these offences is provided for sometimes the punishment is on par with the POFD, sometimes it is half the punishment and sometimes 1/3rd or 1/4th of the punishment provided for the POFD.

the State[30] (Treason) and few more statutory offences,[31] where Joint liability can extend equally for intention, presence or for being party to a crime. The party is jointly liable either as POFD or can be liable in any of the four stages of crime, such as intention, preparation, attempt and act. The hardest struggle for the judges is to decide on the liability of the POFD and POSD, as the difference between them are very thin (at times) and many a times they overlap, causing practical complications during conviction and sentencing.[32] Whenever such cases are decided and the lower courts have imposed equal liability on the perpetrator, the accused/appellants challenge their conviction, and plead that their act was not equal to that of POFD and plead to be treated as secondary party and seek acquittal or revise sentence. If the joint liability of the POSD is to be understood, many a times they are held liable on par with POFD, as their agreement to commit is itself an offence, even if part played by the POSD be very little.[33] At times, if the perpetrator is present in the scene of crime, being aware, of such commission (foresee) or he knowingly or deliberately assist in its commission, he will be guilty as an accessory i.e., secondary party.[34] The only difficulty before the court would be, when they agree on to do an illegal act and in course of such conduct, i.e., during such encouraging act, if the POFD or any party acts beyond what was agreed and causes death, then to what extent the punishment should be imposed on the secondary party (POSD). There is a common argument on both side for fixing and claiming exemption from equal liability, and thereby complications intensify in deciding the liability (Jens David Ohlin).[35] But the law laid down by courts is very clear i.e., both in the common law, which is followed in many countries including India, as the punishment is either same as that of POFD or that prescribed in the law relating to abetment.[36] When the ingredients are of JCE, then the

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[30] S. 121, IPC, 1860, where even an abettor can be awarded a death penalty or life imprisonment. Also, refer ss. 107-120, IPC, Abetment Chapter to understand, what amounts to abetment of a thing and who is an abettor.

[31] See ss. 391-402, IPC, Offence of Dacoity.

[32] *Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216, where the sentence of the offender was reduced to that of an s. 326, IPC and not punished under s. 302, that was imposed on the principal offender. The reason was "as the wound that he caused was not sufficient to cause the death of the victim". (He had caused one wound on the head that had caused ½ inch of deep wound, but still the court opined that he could not be liable for 302).

[33] Ss. 120A & 120B, IPC.

[34] "*Secondary liability does not require the existence of an agreement between the principal and the secondary party to commit the offence. If a person sees an offence being committed or is aware that it is going to be committed, and deliberately assists its commission, he will be guilty as an accessory. But where two or more parties agree on an illegal course of conduct (or where one party encourages another to do something illegal), the question has often arisen as to the secondary party's liability where the principal has allegedly gone beyond the scope of what was agreed or encouraged*." https://www.supremecourt.uk/cases/docs/uksc-2015-0015-judgment.pdf, last visited February 8, 2021.

[35] Jens David Ohlin, *Joint Criminal Confusion*: New Criminal Law Review: *An International and Interdisciplinary Journal*, vol. 12, No. 3 (Summer 2009), pp. 406-419.

[36] Supreme Court of India in *Shreekantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 said: "*The antithesis is between the preliminary stages, the agreement, the preparation,*

rule laid down may not be same in all the Domestic Laws, because, there are occasions where the liability on the secondary parties are challenged by parties due to the different doctrines and principles adopted by the courts. One such being the JCE,[37] which has serious nomenclature challenge due the word 'Enterprise', and sounds like a casual usage of word to determine a criminal liability.[38] Mainly, in every criminal act, it can be understood that the party's intention matters, and court convict the accused based on mental element as per the statutes. When two or more persons are jointly involved in a criminal venture, the liability should also be common and equal. Here an attempt is made to continue the illustration taken in the earlier part of the paper relating to Burglary, A1 and A2 planned a Bank Robbery.[39] Now they are accomplices or associates of the crime. In the process of committing Robbery, A1 murdered a Security Guard who attempted to press the siren button. As associates they had no intention to kill, but A1 hit the guard with an iron rod on his head, and the guard later succumbed to the injuries caused. Now, as there was no mental element to kill during the planning of the crime, so can we make both liable for murder. As murder was not intended, there would be difficulty in holding them both equally liable for the Murder. After this act, they went further and when passing found another man, where they had an apprehension, that he would be troublesome to them. A1 who continued to carry the Iron Rod, hit him and killed him. Now the question is can both be liable for these murders.[40] Will the liability for the first murder and second murder differ? If in both the Murders, A1 was the perpetrator, what should be the liability of A2; as an aid, i.e., secondary party or be liable equally to that of A1.[41] In alternative, it is possible to understand the challenges that arise before the court, though, they did not plan the murder, it was incidental to the commission of crime. As per the common law, the question for their liability will be answered in affirmative as A2 was engaged in the JCE, as A2 even after realising that A1 may commit

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the planning, which is covered by section l09 (abetment), and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter".

[37] "*JCE includes the situation where a victim is killed in a group attack and it is not known who, among the group, was responsible for the fatal blow. For example, all members of a group are liable to be convicted of murder where they were engaged in a common plan of attacking someone with dangerous weapons with the shared intention of causing grievous bodily harm, regardless of which member of the group inflicted the fatal wound*", *Ramnath Mohan* v. *R.*, (1967) 2 AC 187, 191, 194) https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-129.pdf (last visited June 8, 2021).

[38] Group Liability.pdf, last visited January 15, 2021CRIMINAL - Group Liability.pdf - Criminal conspiracy s. 120A, A criminal conspiracy exists when two or more persons agree to do or cause to be done (An Course Hero (last visited October 10, 2021).

[39] Beatrice Krebs; MENS REA IN JOINT ENTERPRISE: A ROLE FOR ENDORSEMENT? The Cambridge Law Journal, vol. 74, No. 3 (November 2015), pp. 480-504.

[40] *R.* v. *Woollin*, (1999) 1 AC 82 (HL); See also *R.* v. *Cunningham*, 1982 AC 566 (HL) on Recklessness.

[41] S. 8 of the Accessories and Abettors Act 1861 "*Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.*"

murder in consequence of the act, continues to be an accomplice and thereby can be held liable. One major apprehension for the court to look far, would be if A2 have either known or foreseen such killing, only then he be made liable or should they have agreed for causing a personal injury only then both will be held liable. It can be observed that when A1 and A2 planned to commit robbery and incidentally committed murder, the imposition of liability on A2 for A1's crime of murder is known as Doctrine of JCE. This principle is well settled law in almost all domestic criminal law. In India, the law is provided in section 34 of IPC (the section can be better understood if read together Ss. 33-38).[42] In India, this principle is decided in the landmark judgments like *Barendra Kumar Ghosh* v. *King Emperor,*[43] *Mahbub M ahbub Shah* v. *King Emperor,*[44] *Pandurang* v. *State of Hyderabad,*[45] *Raju Pandurang Raju Raju Pandurang Mahale* v. *State of Maharashtra,*[46] *Willie (William) Slaney* v. *State of M.P.,*[47] etc. The principle does not need a thorough discussion in this paper as the law is well settled, other than as identifier or sentencing differences. So, there is need for understanding the position of law.

In English law, one of the well-known decisions relating to the understanding mental element and its variants are in *R.* v. *Miller*,[48] where the accused was liable for his reckless act of leaving the place on fire, knowing that the bed had caught fire, and when he woke up, he recklessly walked away to another place to sleep without putting-off the fire. The court observed that, his failure to intervene was sufficient mental element, to convict him for arson (Though, this was not a case of murder), the mental element was taken to be relevant for the understanding the state of mind.[49] In many such cases, the critics state that there is a change in the statutory law, so to bring certainty and the reading of mental element as in *Miller* is recommended.[50]

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42 IPC, 1860.

43 1924 SCC OnLine PC 49: AIR 1925 PC 1 (Popularly also known as *Shankari Tola Post Office Murder* Case) where the PC observed that "*Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself; for 'that act' in the latter part of the section must include the whole section covered by the criminal act, in the first part because they refer to it"*. The decisions have mostly centered round the significance of the expression, "in furtherance of the common intention of all", which was added in 1870. See Gopalan.R; Group Liability With Reference To Constructive Liability Under The Indian Penal Code 1860Shodhganga@INFLIBNET: Group Liability With Reference To Constructive Liability Under The Indian Penal Code 1860 available at http://hdl.handle.net/10603/256967 (last visited June 10, 2021) 1924 SCC OnLine PC 49: AIR 1925 PC 1.

44 1945 SCC OnLine PC 5: (1945) 47 Bom LR 941.

45 AIR 1955 SC 216.

46 (2004) 4 SCC 371.

47 AIR 1956 SC 116, *Ibid*.

48 (1983) 2 AC 161.

49 See s. 8 of Indian Evidence Act, 1872. Other relevant sections relating to relevancy.

50 *R.* v. *Jogee*, 2013 EWCA Crim 1433 (Here the appellant and his co-defendant were convicted of murder and sentenced to imprisonment for life, they were convicted under the JCE. Hirsi entered the house unasked. The appellant remained near the front door. Hirsi confronted Fyfe.

Further to this, the latest liability issues that are challenging in criminal law is the 'Parasitic Accessorial Liability'[51] (PAL),[52] which is part of the most discussed topic of JCE.[53] Has, JCE become the common parlance to denote a distinct doctrine separate from the principles governing "basic" accessorial liability (i.e., aiding, abetting, counselling, and procuring in a single crime), or can the term "PAL"[54] be used instead. The courts look into, as if there is no doctrine of JCE, which exits separately from the basic accessorial liability or that it merely is the application of those principles, that becomes tough for academia to take the point beyond practical application.[55] The main concern is when the decision of the courts are understood and found that the court was either too lenient or rigid in imposing liability for the killing during JCE.[56] Due to criticisms this doctrine was placed before the Law Commission[57] by the Ministry of Justice in 2008, to study and bring clarification on liability on complicity in the UK. The main reason for scrutiny and confusion was basically after the SC decision in *Gnango*,[58] a decision most discussed on 'PAL'.[59] It is stated to be a case taken

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He took a knife from the kitchen block and stabbed Fyfe in the chest. Fyfe was pronounced dead at 2.15 am. The appellant had remained outside the front door.) A recent landmark decision, by the UK Supreme Court in Jogee, that overruled 30 years of common law development on joint enterprise, stimulates farther discussions on whether JCE in its current form, fairly reflects the balance between culpability and corresponding liability of the defendant). See Natalia Perova, *Stretching the Joint Criminal Enterprise Doctrine to The Extreme: When Culpability and Liability Do Not Match*, 16 INT'L CRIM. L. REV. 761 (2016), https://www.bailii.org/ew/cases/EWCA/Crim/2013/1433.html (last visited 16 January 2021).

51 *R.* v. *Gnango*, (2012) 1 AC 827: 2011 UKSC 59.

52 Findlay Stark *'A Most Difficult Case': On the Ratio of Gnango*; vol 2: No 1 CAMBRIDGE J. INT'L & COMP. L. 60 (2013).

53 David Ormerod QC & Karl Laird, Smith and Hogan; TEXT CASES AND MATERIAL ON CRIMINAL LAW, OUP, 2014, 11 Ed.

54 The expression was coined by Professor Sir John Smith in a lecture later published in the LAW QUARTERLY REVIEW, *Criminal Liability of Accessories: Law and Law Reform*, (1997) 113 LQR 453. He used the expression to describe a doctrine which had been laid down by the Privy Council in *Chan Wing-Siu* v. *R.*, 1985 AC 168 and developed in later cases, including *R.* v. *Powell,* (1999) 1 AC 1, https://www.supremecourt.uk/cases/docs/uksc-2015-0015-judgment.pdf, last visited Feb. 8, 2021.

55 *Ibra Akanda* v. *Emperor*, 1944 SCC OnLine Cal 12: AIR 1944 Cal 339.

56 *R.* v. *Stringer.,* 2012 QB 160: (2011) 3 WLR 1243: 2011 EWCA Crim 1396, "… *Participation in JCE adventure involves mutual encouragement and assistance*". David Ormerod QC & Karl Laird, Smith and Hogan; TEXT CASES AND MATERIAL ON CRIMINAL LAW, OUP, 2014, 11 Ed pp. 256-276.

57 Also refer Law Commission Reports 304 and 305 (participating in crime 2007) recommending statutory changes, however no legislation was made. But the DPP has issued guidance on the use of JCE when charging. the guidance published in 2012 See http://www.lawcom.gov.uk/app/uploads/2015/03/lc305_Participating_in_Crime_report.pdf (last visited June 10 2021).

58 (2012) 1 AC 827: 2011 UKSC 59.

59 The SC in this case resurrected that "although *Gnango* had been the intended victim of Bandana Man, this basically did not prevent him from aiding and abetting the Bandana Man in his own attempted murder by agreeing to the shoot-out. The Court held that the 'victim rule', which prevents defendants from being party to a crime in respect of which they are the intended victim, did not apply in this case", and the court further stated that: *"We can see*

for brain teasers for a law examination in understanding group or joint liability.[60] Here the question was on the liability of the appellant and an opponent who were engaged in a street battle using guns and in this fight amongst themselves, the opponent had shot an innocent passer-by that killed the victim.[61] The question was whether they both can be liable for the murder based on the well-established principle of JCE. The question was also based on the "Doctrine of Transferred Malice"[62] and could the same be applied in JCE.[63]

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no reason why this court should consider extending the common law so as to protect from conviction any defendant who is, or is intended to be, harmed by the crime that he commits, or attempts to commit. Such an extension would defeat the intention of Parliament in circumscribing the victim rule in section 51 of the 2007 Act. In R. v. *Brown,* (1994) 1 AC 212 *sado-masochists were held to have been rightly convicted of causing injury to others who willingly consented to the injuries that they received. There would have been no bar to conviction of the latter of having aided and abetted the infliction of those injuries upon themselves."* Para 55. So, the judgment meant that if a participant in a gunfight (group)– survived – they could be convicted for their own attempted murder. At best, this seems somewhat counterintuitive.

60 *"On October 2, 2007 a 26-year-old woman, Magda Pniewska, was returning home through a car park in New Cross. She was killed during an exchange of fire between two gunmen, 'B' (also known as Bandana Man), and Gnango. Magda was killed by a bullet from Bandana Man's gun, but he was never apprehended. Gnango was charged and convicted of murder on the grounds of joint enterprise".* Jogee came before the Court of Appeal, the *Chan Wing-Siu* principle had been supported by the House of Lords not only in Powell and English, but also in *R.* v. *Rahman,* 2009 AC 129: (2008) 3 WLR 264: 2008 UKHL 45, Some judgments in the Supreme Court case of *R.* v. *Gnango,* (2012) 1 AC 827: 2011 UKSC 59 also mentioned the parasitic accessorial liability principle without disapproval.

61 Justice Committee, Joint Enterprise, Eleventh Report of Session 2010–12; Also see Justice Committee, Joint enterprise: follow up, Fourth Report of Session 2014 HC 310.

62 See s. 301 of the IPC, 1860.

63 Anita Davies Case Comment: *R.* v. *Gnango*, 2011 UKSC 59 available at Case Comment: *R.* v. *Gnango,* (2012) 1 AC 827: 2011 UKSC 59 – UKSC Blog (last visited June 9, 2021) "Parasitic accessorial liability" (PAL) allowed D1, a party sharing D2's purpose to commit Offence A (e.g., burglary), to be held liable as a secondary party for D2's further ("collateral") Offence B (e.g. murder). What (controversially) distinguished PAL from "ordinary" accessorial liability (i.e., aiding, abetting, counselling or procuring) was that D1 could be liable for Offence B without proof that she encouraged or assisted. 2 Its commission, let alone that she did so intentionally. 3 In its modern incarnation, PAL required only that D1 had foreseen the possibility that D2 might commit Offence B in furtherance of Offence A. The Privy Council confirmed this contemplation/foresight version of PAL in *Chan Wing-Siu* v. *R*. 1985 AC 168 (proper Citation). 4 a decision developed by the House of Lords in *R.* v. *Powell,* (1999) 1 AC 1. 5 The Supreme Court/Privy Council claimed in *R.* v. *Jogee,* 2013 EWCA Crim 1433 (hereafter Jogee) that Chan Wing-Siu represented a "wrong turn". Consistent with a paper written in 2013 by Lord Toulson, who co-authored the unanimous judgment in Jogee, it was contended that before Chan Wing-Siu secondary liability required intentional encouragement or assistance of each of the principal's crimes. Foresight that a particular offence might be committed, it was alleged, was evidence of the required intention to encourage or assist that particular offence, not an independent fault element as Chan Wing-Siu decided. The Supreme Court/Privy Council claimed they were thus merely "correcting" the error in Chan Wing-Siu. This response enabled them to largely sidestep the constitutional question of whether the courts, or instead Parliament, should be responsible for changing the law; https://www.gray-sinn.org.uk (last visited June 30, 2021) See also *R.* v. *Jogee*, 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7 (supremecourt.uk) (last visited October 10, 2021).

The prosecutor had argued for a PAL,[64] but this was rejected on the basis that the defendant could not be said to be on a Joint Venture, with the person attacking him. Each had been on their own separate, individual, and diametrically opposed enterprises. The case decision was immensely criticised, as it was considered to be decision based on policy rather than legal principle. And, there was a call for change in judicial application or statutory amendments that led to academic and judicial discussion. So, the question was, whether the perpetrator can be liable for abetment / attempt of his/her own murder and be convicted for the same in spite of the private defence been effectively present or take the "Victim Rule". The *Gnango* case was thought to understand the implications for the "scope of potential liability of those who are involved themselves in the public order offences". The decision was expected to raise a point of law of general public importance. While deciding *Jogee,*[65] the courts did not refer to *Gnango* as it was not a case that was ultimately on PAL. So, the Lords, did not think that *Gnango* principle would any way stand in the way to reject the *Chan Wing-Siu* decision.[66] In *Jogee,*[67] *the SC redefined the JCE and Secondary Liability. The ruling in this case overturned the 22 years of jurisprudence, that may lead to reopening of large number of murder convictions in which the courts were less stringent as for the requirements of mental element.*[68] *As until the decision of Jogee*[69] *it has been accepted from long time in English law, that if there was sufficient foresight of commission of crime or murder, the secondary party was also liable for murder, even with a lower*

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[64] "*The majority judgment was undoubtedly a policy led one. This was clearly indicated in the second paragraph, which stated that "In resolving the point of law it will be appropriate to have regard to policy*" and in Lord Brown's statement that *"The general public would be appalled if in those circumstances the law attached liability for the death only to the gunmen who actually fired the fatal shot*". The Supreme Court judgment reflects the understandable view that those who open fire in public places with disregard to the lives of those around them should be culpable for the resulting deaths, but the judgment sacrifices legal clarity and coherence in order to uphold the conviction. It is a legal cliché that hard cases make bad law, but the judgment in Gnango is one that unfortunately illustrates why such clichés exist". Available http://ukscblog.com/case-comment-r-v-gnango-2011-uksc-59/ (last visited Feb 8, 2021).

[65] *R.* v. *Jogee*, 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7.

[66] Here the court was trying to hear a matter with five judges, whereas the earlier was decided by seven. Lord Hughes and Lord Toulson's reason, which contains what must be an oblique reference to Gnango, was that '[t]he court has had the benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability than on past occasions. So, the question was can five overturn the seven.

[67] 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7.

[68] MCT Course; Available athttps://www.qlts.com/blog/supreme-court-ruling-overturns-criminal-law-of-parasitic-accessory-liability (last visited October 10, 2021).

[69] "Jogee and Hirsi had gone to the home of the victim (Fyfe) and behaved aggressively. Hirsi stabbed Fyfe who died of his wounds. Jogee had come beside Hirsi in the area where the stabbing took place, with a bottle raised in his hand, leaning towards Fyfe saying he wanted to smash the bottle over his head. Both were convicted for murder. The judge had directed the jury that Jogee was guilty of murder if he took part in the attack on Fyfe and realised that it was possible that Hirsi might use the knife with intent to cause serious harm. Foresight sufficed as intent for murder".

standard of mens rea or intent[70] that was adduced to the principal. Before *Jogee*, the Court of Appeal distinguished three categories of cases in which there is resort to JCE,[71] such as:

1. Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals ('plain vanilla' joint enterprise).[72]
2. Where D assists or encourages P to commit a single crime (accessorial liability).
3. Where P and D participate together in one crime (crime A) and in the course of it, P commits a second crime (crime B) which D had foreseen he might commit (PAL).

The *third* category in the above classification is the Collateral liability, that is presently taken up for discussion under PAL, with another leading case of *Chan Wing-Siu*[73] (the Law is no more applied in English Law, however, used in few circumstances).[74] Though, proving intent is necessary, the court found that "evidence of foresight may be led to prove intent" like that to cause serious harm to the victim, unless there is proof that he did not support the act of killing, then it may be insufficient to convict for murder.[75] But the thin line of difference in this area has been a test of understanding mental element through

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[70] https://www.supremecourt.uk/cases/docs/uksc-2015-0015-judgment.pdf, (last visited February 8, 2021).

[71] Anita Davies Case Comment: *R*. v. *Gnan*go, (2012) 1 AC 827: 2011 UKSC 59 available at Case Comment: *R*. v. *Gnango*, (2012) 1 AC 827: 2011 UKSC 59 – UKSCBlog (last visited June 9, 2021).

[72] "If A and B agree to kill their victim and proceed to attack him with that intention, they are both guilty of murder, irrespective of who struck the fatal blow. In Lord Hoffmann's words, they are engaged in a "plain vanilla" joint enterprise…It can, in my view, make no difference if A and B agree to kill their victim by beating him to death with baseball bats, but in the course of the attack A pulls out a gun and shoots him. B must still be guilty of murder: since he intended to bring about the death of the victim, B cannot escape guilt on the ground that he did not foresee that A would kill him by using a gun instead of a baseball bat. The unforeseen nature of the weapon is immaterial. If, instead of a baseball bat, in the course of the attack A unforeseeably used an explosive and killed people in addition to the intended victim, then B would still be guilty of the murder of their intended victim, but not, I would think, of the murder of anyone else who was killed by the explosive.". R. v. *Rahman*, 2009 AC 129: (2008) 3 WLR 264: 2008 UKHL 45 (See *R*. v. *Anderson; R*. v. *Morris; R*. v. *Uddin,* 1999 QB 431: (1998) 3 WLR 1000, https://www.parliament.uk/, Last visited June 30, 2021.

[73] *R*. v. *Dobson and Norris* Unreported, 4 January 2012 (application of the *Chan Wing-Siu* principle was to be applied, if there was foresight) Sometimes the situation demands and overlaps, where the principle of *Chan Wing- Siu* need to be applied. Read Henry Moore: "Does the Criminal Law of Joint Enterprise Cause Injustice?" Gray's Inn Student Law Journal Volume VIII; p 11.

[74] *Chan Wing-Siu*: laid down a 'wider principle'. The same was approved in *R*. v. *Hyde*, (1991) 1 QB 134: (1990) 3 WLR 1115,139C-E.

[75] *"…neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts"* see *R* v. *Coney*, (1882) 8 QBD 534, 540, 558", https://www.supremecourt.uk/cases/docs/uksc-2015-0015-judgment.pdf (last visited June 9 2021).

foreseeability. As per Henry Moore (2016), it is stated that currently, two forms of joint enterprise liability are applied in English law. The *first* is where the co-venturers are effectively Joint Principals, here the law is well-settled and relatively uncontroversial. Whereas in the *second,* liability essentially arises from the principles of basic accessorial liability that have caused infinite controversies and it has been challenged and has opened a pandora box on several occasions in fixing the liability and caused injustice to the accused. Among all types, the one that is most controversial type is *third* i.e., PAL.[76] The English law has removed it from its Law and in most cases filled it by fixing the liability for manslaughter in certain homicide cases.[77] So practically there may be an imposition of liability for manslaughter (In India Culpable Homicide)[78] that imposes an alternative punishment for secondary liability, which basically would mean to overturn the law, that manslaughter was not available as an alternative to murder for secondary participants. The reason for this doctrine to be applied are based on two principles that have been elucidated in JCE:

> *Firstly,* the extension of criminal liability operates as joint enterprise beyond their own contributions, so even to those acts that are committed by their associates i.e., inculpatory and *secondly,* restriction on liability (formerly to acts done in furtherance of the common criminal goal, now to acts done in furtherance of the common goal) for acts foreseen as a possible incident of the common goal and its pursuance i.e., exculpatory.[79] In the early days, five judges Court of Appeal in *R.* v. *Smith,*[80] upheld a jury direction that 'only he who intended that unlawful and bodily harm should be guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter, if death results. The principle underwent a drastic change, when the accessorial liability was either overdriven or under driven by court while imposing liability, that led to controversial development of law. In the present days, the second category of crimes where the individual contributes to the *actus reus,* in a given offence may not determine the extent of an individual's liability, as criminal acts are mutually attributed to all the actors, who act for their common pursuit as a Joint

[76] Popularly called the "Chan Wing-Siu Principle".

[77] Findlay Stark; The Demise of "Parasitic Accessorial Liability", Substantive Judicial Law Reform, Not Common Law Housekeeping, https://core.ac.uk/download/pdf/77414531.pdf, last visited June 30, 2021.

[78] S. 299, IPC - punishable under s. 304 Part I and Part II.

[79] Beatrice Krebs, *Joint Criminal Enterprise*, (2010) 73(4) MLR 578-404.

[80] (1963) 1 WLR 1200: (1963) 3 All ER 597.

Venture.[81] In such circumstances individual offenders are held accountable for the crime, rather than for what they can be held liable based on the olden days' liability of the POSD. It is as per this understanding, that the Doctrine of JCE, fulfils an inculpatory function. Few authors challenge this argument, i.e. to what extent can the court carry the complicity. Is there a necessity that only if the partner to the crime authorises, that he can be liable for the act?[82] or irrespective of his consent or authorisation, can he be made liable for the act of murder or manslaughter. The condition stated above was well answered in *Anderson and Morris,*[83] *where the court held that, before liability can be attached to an accused, for incidental act of killing by partner, the accused should have authorised such crimes as being within the scope of the enterprise.*[84] *However, in Roberts Case*, the Court observed that "The subject matter of a joint enterprise is not a state of mind or intention, but an objective act, which it is contemplated will or might be done". In Case of *Chan Wing-Siu* it was held and later approved and applied as a principle in *Powell,*[85] *English*[86] *and also in Rahman*".[87] The law laid down was:

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[81] http://eprints.whiterose.ac.uk/147726/, (last visited Feb 8, 2021); see also van Sliedregt, E orcid.org/0000-0003-1146-0638 (2020), Joint Criminal Confusion: Exploring the Merits and Demerits of Joint Enterprise Liability. In: Krebs, B., (ed.) Accessorial Liability after Jogee. Hart Publishing. ISBN 9781509918904.

[82] *R.* v. *Anderson*, (1966) 2 QB 110 (CA). Here the victim was stabbed by the POFD, when the secondary liability was in question, the court had the challenge to convict the accomplice for murder or not. As the use of knife was not agreed upon, the court held secondary party was liable as an accomplice to manslaughter, however, if the victim would have died due to punches that were given by the POFD, then he could be held for murder, even if he failed to physically act upon. The JCE was agreed till the punches and not to the extent of stabbing. Also See *R.* v. *Gilmour*, (2000) 2 Cr App R 407.

[83] *Ibid*.

[84] *R.* v. *Roberts,* 2001 EWCA Crim 1594 https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080702/rahman-2.htm (last visited June 30, 2021).

[85] House of Lords finally confirmed that 'participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise'.

[86] *Chan Wing-Siu* v. *R.*, 1985 AC 168: (1984) 3 WLR 677; see also *R.* v. *Powell*, (1999) 1 AC 1: (1997) 3 WLR 959 (HL) "that English should not be found guilty of manslaughter as he could not foresee Weddle's actions; The Singapore law, that is similar to IPC has its law laid down in (*Rex* v. *Vincent Banka*, (1936) 1 MLJ 53 (Chhui Yi - Banka formula - The test approved since 40 Years), The said test has seen a sudden change, overthrown by the case which can perhaps be described as the mother of all recent decisions on common intention – *Mimi Wong* v. *Public Prosecutor,* (1972) 2 MLJ 75), Where the Court of Appeal said that the intention of the actual doer must be distinguished from the common intention of all; similar line of argument are referred by the Supreme Court of India also. Where the two intentions need not be same, but they need to be consistent. (Though the use of words is criticised).

[87] *R.* v. *Rahman*, 2009 AC 129: (2008) 3 WLR 264: 2008 UKHL 45, see also *R.* v. *Carpenter*, (2012) 1 Cr App R 11; [33], per Lord Rodger: "[I]f A and B agree to kill their victim and

> *"If two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it*".

In most cases, the doctrine basically has two limbs, *first* it recognises that parties to JCE are liable for each act within the scope of the enterprise committed by their associates. However, the *second* provides that, if one party does something that is outside or unusual to the scope of the joint enterprise, that other parties will only be liable, if they foresee (foreseeability was an important element to impose liability) the conduct in question. So, if the act was outside the common pursuit, or could not be foreseen, then the liability would be restricted only to the act committed to the extent of commonality and not for the unforeseen acts. Should the law de-limit the liability from the 'excesses of the other partner'. This doctrine is based on the principle that the partner is acting on the *'assumption of risk'*, that he is ready to take on the fact that he will be liable for 'change of normative position' that has resulted from he been a partner of a crime from the initial criminal association. So, the question that arise in most cases is 'will it be enough to make the partner liable for acts that are foreseen just as a cognitive concept, or is it not relevant to take the base crime and incidental crime and their substantial connection, and thereby, just a tenuous reason of foreseeability into consideration can make any one liable for the JCE'. So, most of the discussion in this subject is, "whether the doctrine, viable to be followed as a legal principle or as a policy". It is stated that, there is a need to look at the law of complicity that would be more coherent, than just extending the liability based on a cognitive factor.[88] So, the doctrine has seen a paradigm shift from an 'objective test of liability' to that of 'subjective test of liability', by extending the 'scope of the enterprise' to that of 'scope of possible incidents to the enterprise' which, ultimately, extends the scope of a criminal liability of partner for foreseeable acts.[89] It is been observed in the following words (In *Barendra Kumar Ghosh* v. *King Emperor* Judgment):[90]

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proceed to attack him with that intention, they are both guilty of murder, irrespective of who struck the fatal blow. In Lord Hoffmann's words (*Brown* v. *State*, 2003 UKPC 10, para 13), they are engaged in a 'plain vanilla' joint enterprise". (Beatrice Krebs*; Mens Rea In Joint Enterprise: A Role For Endorsement?* The Cambridge Law Journal, vol. 74, No. 3 (November 2015), pp. 480-504).

88 Beatrice Krebs, *Joint Criminal Enterprise*, (2010) 73(4) MLR 578-404.

89 Kai Hamdorf, *The Concept of a Joint Criminal Enterprise, And Domestic Modes of Liability for Parties to A Crime*, 5 J. Int'l Crim. Just. 208 (2007).

90 1924 SCC OnLine PC 49: AIR 1925 PC 1.

> *"...No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial."*[91]

In relation to 'Assumption of Risk' the doctrine is based on foreseeability, the 'Enhancement of Risk' approach based on the 'Culpability Risk Model', where the partner should know that Crime 'A' agreed with the partner may lead to Crime 'B', thereby enhancing the risk that he is taking up with his partner while participating in the JCE.

However, the danger of extending the Doctrine of 'Assumption-based Risk' to omission-based liability would generally be another challenge for courts while determining the liability. Though, the decision of *Jogee*[92] has not succeeded in abolishing JCE in jurisdiction outside England and Wales, many other Jurisdiction like Australia and Hong Kong still follow, and the same undermines the persuasiveness of *Jogee*. Though, most common law countries have not abolished the JCE, the recent decision and legal framework seeks through the decision of *Jogee and Ruddock* that has tried to avoid injustice by basing the liability of secondary parties on principles of basic accessorial liability rather than JCE.[93] This controversy continues to haunt the criminal justice system since ages though relatively well settled in many countries.

Even the International Criminal Law and International Tribunals have taken up the concept for discussion (ICTY) in the Karadzic Case,[94] and found that it was not bound by the UKSC decision as the law relating to JCE is well established jurisprudence and the International Tribunal need not follow any

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91 https://www.jcpc.uk/cases/docs/jcpc-2015-0020-judgment.pdf, (last visited 16 January 2021).

92 *Jogee*, 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7.

93 Referring to *Jogee*, 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7 and *Ruddock* v. *R.*, 2017 AC 387: 2016 UKSC 8: 2016 UKPC 7.

94 Karadžić Radovan (IT-95-5/18) (Case tried by ICTY) See Official Website of United Nations International Residual Mechanism For Criminal Tribunals; available at https://www.irmct.org/en/cases/mict-13-55, last visited June 30, 2021.

changes in Domestic or International Law (ICTY Appeals Chamber On 20 March 2019),[95] as *Jogee's* decision is not followed in many of the common law countries. Following *Jogee* may bring the law relating to JCE in alignment to complicity. However, the International Criminal Law has continuously distinguished between JCE and Complicity / aiding and abetting liability (This is only to elucidate, that some authors bring the concept of JCE and Complicity in the same context- as expressed earlier).

While it comes to India, the application of this doctrine is quite clear. So, to be liable under S. 34 of IPC[96] the courts convicts accessory even in absence of an overt act.[97] In IPC, other than S. 34 (Michael Hor and Yew Meng),[98] which lay the principles of joint or constructive liability, clearly states the

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[95] Her the accused is alleged to have participated in the four related JCE… known as the "Overarching JCE…with a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory through the commission of crimes in municipalities throughout BiH; (ii) the "Sarajevo JCE" aimed at spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling; (iii) the "Hostages JCE" with the common purpose of taking UN personnel hostage in order to compel NATO to abstain from conducting air strikes against Bosnian Serb targets; and (iv) the "Srebrenica JCE" to eliminate the Bosnian Muslims from Srebrenica in July 1995" in BiH (Republic of Bosnia and Herzegovina) and charged under Articles 7(1) and (3) of ICTY Statute https://case-book.icrc.org/case-study/icty-prosecutor-v-radovan-karadzic, last visited June 30, 2021.

[96] In *Barendra Kumar Ghosh* v. *King Emperor*, 1924 SCC OnLine PC 49: AIR 1925 PC 1, the PC held that S 34 deals "with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself; for 'that act' in the latter part of the section must include the whole section covered by the criminal act 'in the first part because they refer to it". "…The case was the conviction under s 302 for the murder of the postmaster of Post Office that was committed by several persons. When the post master was counting money t, they entered from the backroom and demanded money. In this process, they shot the postmaster and ran away without taking any money. However, the accused alone was arrested, rest of the members escaped. He was caught with a pistol in his hand. He pleaded in his defence that he was only standing guard outside the post office; he did not have the intention to kill the postmaster as he was just compelled to stand guard. Despite this plea his conviction for murder under s. 302 read with s. 34, IPC was confirmed by the high court".

[97] In *Krishnan* v. *State,* (2003) 7 SCC 56, When the question before the court was whether an overt act is required? The court observed that "a charge under S 34 of IPC presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of the s. 34 the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in s. 34 the IPC. The existence of common intention is to be the basis of liability. That is why the prior concert and the prearranged plan is the foundation of common intention to establish liability and guilt. The Court pointed out that establishment of an overt act is not a requirement of law to allow s. 34 to operate. '… What is meant by common intention is the community of purpose or common intent. Therefore, it will not be wrong to interpret the words 'common intention' to mean "community of purpose, common design or common enterprise'.

[98] Michael Hor and Yew Meng, Common Intention and the Enterprise of Constructing Criminal Liability", Singapore Journal of Legal Studies, December 1999, 40th Anniversary Issue (December 1999), pp. 494-530.

liability of the parties in such cases and the landmark judgement have settled the principles of such liability both under S. 34[99] (Common Intention) and S. 149 (Common Object). Whenever the difficulty arises, it is clearly laid down that S. 34 is a rule of evidence and not a substantive offence, like that of S. 149; besides bringing in the concept of vicarious liability. It is clearly stated that *"S 34 is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The basic reason why the members of crimes are deemed guilty in such cases is, that mere presence of accomplices gives encouragement, support and protection to the person actually committing the act. The provision embodies the common-sense principle that if two or more persons intentionally do a thing jointly (criminal act), it is just the same as if each of them had done it individually*".[100]

Will the decision and change in law by the English Court anyway influence the Indian Courts, is a question and concern as a learner of law? Whether the SC while referring to S. 34, in *Raju Pandurang Mabale* v. *State of Maharashtra*[101] *stated that "The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them".*[102] *A person may be constructively liable for an offence, which he did not actually commit by reason of:*

1. his being a member of a conspiracy to commit such an offence (S. 120-B); and
2. the common intention of all to commit such an offence (S. 34);
3. his being a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed (S. 149).

Law is clear, however other challenges before the court either while a charge is framed and conviction, still continue to be an issue, as found, even in recent judgement, the SC upheld the principles established in all the above

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[99] *Ramaswami Ayyangar* v. *State of T.N.,* (1976) 3 SCC 779, "The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them…" See also *Surendra Chauhan* v. *State of M.P.,* (2000) 4 SCC 110, where it was noticed that absence of a positive act of assault was not a necessary ingredient to establish common intentionhttps://advocatetanmoy.com/2020/10/02/how-to-establish-common-intention/, last visited 16th January 2021.

[100] *Krishnan* v. *State*, (2003) 7 SCC 56.

[101] *Hari Ram* v. *State of U.P.,* (2004) 8 SCC 146; *Anil Sharma* v. *State of Jharkhand*, (2004) 5 SCC 679.

[102] "The presumption of constructive intent must not be pushed too far. It is obvious that mere fact that a man may think a thing likely to happen is vastly different from intending that the thing should happen. To attract S. 34 ... The latter part is a must to be proved".

landmarks judgments[103] relating to law established under SS. 34 and 149.[104] The scope of the operation of S 34 is well settled.[105]

> *"... it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, the liability for the crime may be imposed on any of the persons in the same manner as if the act was done by him alone... it should be proved that the criminal act was done in concert pursuant to the prearranged plan... it is difficult if not impossible to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case".*

In one of the recent judgments *Achyut Shinde* relating to Joint Criminal Venture the Apex Court observed that:[106]

> *"...the physical presence of the accused (in this case there were three accused and it included Appellant Nos. 1 and 3) at the site of the actual commission of the crime and the deposition of independent witnesses about their role, clearly establishes that it was for the purpose of facilitating the offence,*

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[103] Referring to the landmark judgment relating to when S. 149 and an altered to s 34 in *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204, held that: *"It is true that there is substantial difference between the two sections ....in Barendra Kumar Ghosh* v. *King Emperor... they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under S. 149 overlaps the ground covered by S. 34. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of S. 34 for S. 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under S. 149 would be the same if the charge were under S. 34, then the failure to charge the accused under S. 34 could not result in any prejudice and in such cases the substitution of S. 34 for S. 149 must be held to be a formal matter".*

[104] *Rohtas* v. *State of Haryana*, (2019) 10 SCC 554: 2020 Indlaw SC 593. The other decision relating to interpretation of section 34 are *Nand Kishore* v. *State of M.P.*, (2011) 12 SCC 120; In *Nandu Rastogi* v. *State of Bihar,* (2002) 8 SCC 9 the court stated that "…To attract S. 34, IPC it is not necessary that each one of the Accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse...." *in Surendra Chauhan* v. *State of M.P.,* (2000) 4 SCC 110.

[105] *Mahbub Shah* v. *King Emperor*, 1945 SCC OnLine PC 5: AIR 1945 PC 118 "both Sections 34 and 149 of the IPC are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds, Section 149 IPC assigns liability merely by membership of the unlawful assembly. In reality, such 'common intention' is usually indirectly inferred from conduct of the individuals and only seldom it is done through direct evidence".

[106] *Achyut Shinde* v. *State of Maharashtra,* 2021 SCC OnLine SC 247: 2021 Indlaw SC 127 (A Case of Murder); see also *Ramaswami Ayyangar* v. *State of T.N.*, (1976) 3 SCC 779.

> *the commission of which was the aim of the Joint Criminal Venture*".

In *Subed Ali* v. *State of Assam*[107] *the Apex Court ruled that:*

> *"Common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of a case based on the cumulative assessment of the nature of evidence available against the participants. The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility by which a person is held to be answerable for the acts of others with whom he shared the common intention. The presence of the mental element or the intention to commit the act if cogently established is sufficient for conviction, without actual participation in the assault. It is therefore not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault".*

So, referring back English law i.e., in *Jogee and Ruddock* and relying on *Reid,* the doctrine has created a greater degree of separation between the defendant's participation in the Joint Venture and their liability for the consequences. The abolition of *Chan Wing-Siu* and conclusion of the Law Commission now means that in non-homicide cases, there will generally be no liability for the unintended. The same is clear from SS. 44-46 of the Serious Crime Act 2007, that provides for inchoate offences, if any partner is encouraging or assisting, then such offences need to have intention as a mental element and not just as foresight.

PAL was exacerbated by its susceptibility to prosecutorial overcharging and was observed to be injustice as seen in *Chan Wing-Siu* with its two-crime structure. Basically, mental element can be considered to be a formulation of the conduct element, that can be considered to be vulnerable to the danger of uneven weight given to association or mere presence of the accused, which can at times be due to the superficial attraction of association principle underpinning liability as in *Gnango,* when the judges reasoned for the imposition of PAL, due to defendant's association in an act of foreseen murder and it was

[107] (2020) 10 SCC 517 (charges under ss. 302/34).

endorsed and purported by Virgo as 'Principle of association' as a supporting rationale for secondary liability.[108]

The cases and development of law has seen a see-saw on law relating to the JCE and PAL, making it worth for asking a question, whether the continued existence of a law i.e., basic accessorial liability is appropriate or is it preferable to adopt the recommendation of the Law Commission in the UK, where is observed that there is a need for abolition of the law of accessorial liability and its replacement with a comprehensive statutory scheme of inchoate offences. Now, that a complex inchoate offences scheme exists in the Serious Crime Act 2007, it may be fair to say that statutes do not always import the clarity expected of them to the judiciary (Spencer and Virgo).[109] However, when we look into the law in India, the Judiciary has not leaped into application of any extraordinary doctrines or taken any extreme steps in changing the basic concept and principles of law, keeping the Joint Liability principle simple and clear as given in the IPC and implemented effectively since Privy Council judgments till the present day.

CONCLUSION

The arguments for and against with regard to this JCL will continue, with the human rights activists and the accused fighting to reduce the accessorial liability on one side and the State/Prosecution on the other side. The law will continue to see ups and downs, but a sea change in the application of these doctrines in imposing liability may lead to opening the pandora box of appeal to re-hear the decided cases, that would wobble the Criminal Justice System in the UK and other countries, as observed through the abolition of PAL with retrospective effect and bringing in disbelief among the public regarding liability. Either JCE or the PAL may cause injustice either due to over criminalisation or under criminalisation. So, as to the title of the paper suggests, it can be understood that the challenge is majorly not just a nomenclature issue, but a liability issue that have led to varied doctrines either new once evolving or old once diminishing or vanishing, that brings the Criminal Justice System and its working into uncertainties. The Common Law principles set long time ago is still followed in many countries including India. In many of these countries and especially in India, these nomenclatures have not been used and rather we still simply use 'Joint Criminal Venture', Common Intention, Common Object, etc., that is more or less equivalent to JCE. But in India we do not find the courts referring to PAL as an extended principle and applied to impose liability

[108] Assisting and Encouraging Crime (1993) Law Commission Consultation Paper No. 131. Available at No.131o-Assisting-and-Encouraging-Crime-An-Overview.pdf (lawcom.gov.uk) (last visited October 20, 2021).

[109] Spencer and Virgo, *Encouraging and Assisting Crime – Legislate in Haste, Repent at Leisure* [2008] 9 Archbold News, 7-9.

for Joint Liability. Thereby not creating a tumult by human rights activists on accused rights to go vocal about liability. So, the nomenclature issue stays with the English Law and slowly disappearing due the courts and legislature interfering with the judicial interface of the Law. So, in this confusion, remembering Glanville Williams' lecture is as relevant as ever: 'There remains a pressing case for Parliament to consider, what the law should be and to put it on a statutory basis, so that the court do not arrive at new principles unless the law makers intent to make it as a policy'. If this is strictly followed, not many topsy-turvy judgments may arise creating chaotic environment in Justice Delivery System especially Criminal Justice.

To conclude, we can take Immanuel Kant's observations, "*consequences are never relevant in assessing the moral quality of an act because the consequences of an act are always beyond our direct volitional control. If, for example, two people shoot simultaneously at a third person such that each bullet will kill the latter, and one bullet hits the target while the other hits a bird that has flown into the path of the bullet, which is deflected harmlessly-except for the bird-to the ground, Kant claims they are both equally culpable and equally deserving of punishment."*[110] *However, in Gnango*, both were shooting intentionally, so they can be made liable under the principle of transferred malice, as both had control over themselves and their act and to determine the moral value of their act and moral worth cannot be based on factors of luck. He stated that "extrinsic features of an act-like its consequences are utterly irrelevant in determining its moral worth because such features are beyond the direct volitional control of the agent". Kant insisted that moral value of an act is determined by two characteristics, *firstly* it is the mental state of the agent that is involved in the performance of the act; and *secondly* the intrinsic character of the act itself. He insisted that to have positive moral worth, an agent must perform an intrinsically right act for the right reason. Thus, Kant rejects consequentialism and has a deontological approach that positions itself on the moral quality of an act and is determined entirely by features over which agents have complete control: the intrinsically right thing for the right reasons (Kenneth).[111] The argument at times cannot be applied in criminal law and especially when imposing liability for an offence (Murder) and imposing liability only based on moral worth of an act, as most statutes requires the mental element as mandated by statute.[112] So, practice or policy needs a dynamic approach, but with consistency in its application and without allowing

[110] This problematizes the common legal practice of punishing successful attempts more severely than unsuccessful attempts.

[111] Kenneth Einar Himma, *Toward A Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 San DIEGO L. REV. 1105 (2012).

[112] It is worth noting that, partly in consequence, Kant seems to believe that all rights and obligations are absolute in the sense that there are no exceptions or qualifications. See Immanuel Kant, "GROUNDING FOR THE METAPHYSICS OF MORALS", 63-67, James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785).

the accused an opportunity to retrospectively challenges the judgments of the courts which are disarrayed and call for regular changes on practice and affect the policy. It's not just about nomenclature, but about liability issues, which needs a cautious outline that the courts have to evolve within the well-established principles.

CHANGING PROVINCES AND DYNAMICS OF LEGAL METHODS IN THE MIDST OF COVID 19

—Soma Battacharjya*

ABSTRACT

The subject Legal Methods can be studied in the broad contours of What is Law? Its purpose and objective, relation between Law and Morality and Ethics. It further includes within its fold's sources of Law, Legal System and Legal Research Methodology. Through this article, I am contemplating to explore the impact of COVID 19 on the changing provinces and Dynamism of Legal Methods and extent of change that we as a teacher need to incorporate in the subject. Entire paper will be divided into four parts, where in the first part I will explore the 'changing provinces and dynamics of Legal Methods' in relation to the study of law, its purpose and objective, and the question of Law and Morality in the current scenario. This exploration will continue in the Part II with Sources of Law, Part III Legal System and Part IV with Legal Research Methodology followed by final comments.

Keywords: dynamics, exploration, Law, Morality, Legal Research Methodology, Legal System.

INTRODUCTION

In the conventional classroom and accustomed scenario, normally the subject Legal Methods will start with the discussion encompassing Law and the question like what and why of Law? We tell the students in the first class to 'learn to disagree' without agreeing to our thoughts. We want them to

* Working as Assistant Professor of Law at Damodaram Sanjivayya National Law University, Vishakhapatnam, India.

challenge and question their thinking. It is difficult sometimes because in certain occasion even though we thought we understand the facts but we underappreciate the law underlying that. This happens because we are unable to balance the previously existing law with present facts, which are nothing more than an incident. When I use the word facts, let me caution the reader that I am not talking about Social Change. It's a random fact, a piece of news telecasted in the news channel. But COVID 19 have changed many things. In my life I am witnessing or rather forced to witnessed a Socio-Legal Change, which has made us to redefine the meaning of life. Now in the class room which is shifted to online mode cannot start with What and Why of law theoretically but what and why of law practically. Pandemic no doubt is an unfortunate event but given us an opportunity to examine the effectiveness of Law and questioning its failure or success. Thus the subject 'Legal Methods' will give real Methodology to students, which they have already began in the classroom by questioning the functioning of Law. Thus let's start with discussing the Changing Provinces and Dynamics of Legal Methods dealing with Basics of Law.

PART- I

CHANGING PROVINCES AND DYNAMICS OF LEGAL METHODS DEALING WITH BASICS OF LAW.

The class of first year are basically introduced to different definitions of Law given by several jurists. Austin's, "making law as a command of sovereign backed by sanction."[1]

John Erskine, "Law is the command of a sovereign, containing a common rule of life for his subjects and obliging them to obedience."[2]

Salmond "the law may be defined as the body of principles recognized and applied by the state in the administration of Justice."[3]

Duguit adoption of Durkheim's idea of "social solidarity as a central principle for his ideas concerning the law and the state."[4]

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1 Bix, Brian, "John Austin", The Stanford Encyclopedia of Philosophy (Spring 2021 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2021/entries/austin-john/>.

2 The Principles of the Law of Scotland: in the order of Sir George Mackenzie's Institutions of that Law: 2 vols in 1. 8vo. Pp viii, 261; 265-509, (26).

3 Fitzgerald, P., 2021. Salmond, John W. (John William), Sir, 1862-1924 - LC Linked Data Service: Authorities and Vocabularies | Library of Congress. [online] Id.loc.gov. Available at: https://id.loc.gov/authorities/names/n50033205.html [Accessed 13 November 2021].

4 Duguit L., 2021. Rethinking the Masters of Comparative Law - PDF Free Download. [online] epdf.pub. Available at: https://epdf.pub/rethinking-the-masters-of-comparative-law.html.

Holmes J, "that the prophesies of what the courts will do, in fact and nothing more pretentions, are what I mean by law."[5]

In the online class mode, the attention of the students is one of the major factors. These definition needs to evaluated in the changing scenario. Often the question like 'whether lockdown can be compared with Austin's Command'. 'Can we compare lockdown with common rule of life obliging the subject for obedience.'

Take another instance, when the working hours of laborer is proposed to extend to 12 hours a day and 72 hours per week and the states (Rajasthan, Gujarat, Punjab and Himachal Pradesh) have drafted ordinance to suspends the operation of all labour laws applicable to factories and manufacturing establishments in the state for a period of three years, with the exception of the Bonded Labour System (Abolition) Act, 1976; Employees' Compensation Act, 1923, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and provisions in the labour laws relating to women and children.[6] Can it be called as Salmond "the body of principles recognized and applied by the state in the administration of Justice". Thus we can see the law in application and adjudge the old definition of law in the spectrum of new light. In fact, Duguit's 'Social Solidarity' is shown by people by serving those who lost everything in pandemic.

This is where the dynamism of the subject lies in the given changing socio legal scenario.

Does the purpose, objective and function of law is served during COVID 19 threats? A pertinent question, yet difficult to answer. Even our proactive judiciary also had to labor hard in the midst of the pandemic threat. Students who are made aware about the Judicial Activism and Judicial Overreach tend to question the role of judiciary during pandemic stage. Students can witness how the court administration reacted to various challenges thrown up by the COVID-19 crisis, particularly, in the period after lockdown. The manner in which Lok Adalats (People's Courts), the Supreme Court, the High Courts and the District and Subordinate Court, modified the manner of court functioning during COVID 19, accelerating the move towards e-Judiciary. In fact, we are witnessing the functioning of Legal body in new perspective.

[Accessed 13 November 2021].

5 Patterson C., 2021. Jurisprudence of Oliver Wendell Holmes, [online] Scholarship.law.umn.edu. Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1932&context=mlr. [Accessed 13 November 2021].

6 K.R. Shyam Sundar, 2021. Covid-19: How a 12-Hour Shift for Labourers will Impact their Lives?, [online] Business-standard.com. Available at: https://www.business-standard.com/article/current-affairs/covid-19-how-a-12-hour-shift-for-labourers-will-impact-their-lives-120042700687_1.html. [Accessed 13 November 2021].

Next, we conveniently move to the topic Law and Morality. The topics like Law and morality can be dealt by asking the students their opinion on moral shock to social order and to embark on a discussion, that whether we will undergo moral revolution, reform or drift.[7] If yes, then where lies the possibility in the current situation. In a virtual class of 120 students, it is better to conduct discussion in a small group on relevant topic for extra half an hour. Such discussions go beyond Hart and Fuller debate or adds to it. In a society, where a decision is imposed upon doctor or health worker specially in New York and Italy that in the midst of the scarcity of medical equipment preference to be given to young patient rather than old.[8] Will we ever be able to forgive ourselves for such decision. In the midst of lockdown many migrant workers lost their jobs and many have change their age old habit and adapt to new habit of working from home. At the stage of gradual reopening from lockdown, government has made a sharp distinction between essential and non-essential services, which creates a criticism among doubt mongers that it's a way telling that people belonging to non- essential services are unwanted in society. Thus law and morality takes different turn and new debate can be initiated on the governmental policies and decisions.

PART- II

CHANGING PROVINCES AND DYNAMICS OF LEGAL METHODS DEALING WITH SOURCES OF LAW

The Epidemic Disease Act, 1897 and Gibbon v Oregan, 1824 judgment of United States Supreme court about quarantine have become the live instances of sources of Law. The Epidemic Disaster Act, 1897 after 123 years has become the source of 'THE PUBLIC HEALTH (PREVENTION, CONTROL AND MANAGEMENT OF EPIDEMICS, BIO-TERRORISM AND DISASTERS) BILL, 2017'. Students group are required to find out such enactments and Judgments which though seems obsolete but revive in impending circumstances.

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7 Baker, R., 2019, The Structure of Moral Revolutions: Studies of Changes in the Morality of Abortion, Death, and the Bioethics Revolution, [online] Available at: <https://ndpr.nd.edu/reviews/the-structure-of-moral-revolutions-studies-of-changes-in-the-morality-of-abortion-death-and-the-bioethics-revolution/> [Accessed 13 November 2021].

8 Khazan, O., 2021. A Failure of Empathy Led to 200,000 Deaths. It has Deep Roots, [online] The Atlantic. Available at: <https://www.theatlantic.com/politics/archive/2020/09/covid-death-toll-us-empathy-elderly/616379/> [Accessed 13 November 2021].

PART- III

CHANGING PROVINCES AND DYNAMICS OF LEGAL METHODS DEALING WITH LEGAL SYSTEM

COVID 19 has made us to revamp our entire Legal System. Previous system of teaching Common law and Civil Law System is added by online system. The impact of pandemic can be seen in the Indian Courtrooms. The norms of social distancing and virtual Court rooms are introduced in India. Apart from postponement of hearing, the movement constraints have further created impediments in collection of evidence and examination of witnesses. Digitalization of Court and implementation of artificial intelligence will be the changing facets of new Legal System.[9] We have seen the introduction of online Justice delivery system and its evolution. How far it will be productive for litigants? Whether already staggering Court can minimize the cases of delay in trial? We should not forget that technical glitches are part and parcel of online system. The "presence" of both the parties in trial includes not only video but also they must be able to follow the course of trial. For this, continuous flow of internet is required. Interestingly when we will discuss about the online Justice Delivery System, we have to adopt the wait and watch policy and I am sure students will also experience the same and find out a way in due course.

PART- IV

CHANGING PROVINCES AND DYNAMICS OF LEGAL METHODS DEALING WITH LEGAL RESEARCH METHODOLOGY

We are living in the era of massive Social Change. Aristotle's Concept of 'Man is a social animal' is under consideration. The concept of Social distancing has introduced 'Man as an isolated animal'. Isolation by force not by choice. The same is necessary for our protection. Thus this present scenario gives immense scope to the people to adopt novel field for socio- legal study.

The empirical Legal Research is required to understand the 'Concept of Universal Minimum income' guarantee,[10] created for those who lost their job

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[9] Varij Sharma and Jyotika Thakur, India: Covid-19 and The Revamping of the Indian Legal System - Gravitas Legal, 2021. [online] Available at: https://www.onenewspage.com/n/Legal/1zn1t8u213/India-Covid-19-And-The-Revamping-Of-The.htm [Accessed 13 November 2021].

[10] Antony, A., 2020, It's Time For a Universal Basic Income Programme in India, [online] The Hindu. Available at: <https://www.thehindu.com/opinion/op-ed/its-time-for-a-universal-basic-income-programme-in India/article31717471.ece> [Accessed 13 November 2021].

and the scheme of welfare payment was also introduced. But is there any laxity shown while acting in favour of people? The same can be answered only through empirical Research.

Another interesting area of Legal Research is the Digital tracking of pandemic patient.[11] The reason being, the effective way in which pandemic can be control is by means of surveillance and control. For this regular test and recording of health care is necessary. Some states are using digital tracking and tracing of the patients as it convenient and scalable, but curtailing the privacy of an individual to great extent. The novelty in Socio Legal Research Area goes deep down and guides to further research in the issue of privacy and health.

The critical/ analytical study can also be done with respect to liability of State in the spreading of epidemic. How far China can be held liable? The WHO Constitution, International Health Regulation and overview of International humanitarian law will give insight in evaluating Chinese position.

In this student's research capabilities will also rise and they can prepare a write up on clinical drug trial done by different institutions and Universities to find vaccine against corona virus. They can connect it with the Guidelines given by Research Ethics Committee of WHO.

CONCLUDING REMARKS

The subject Legal Methods is very contemporary. Its provinces are changing daily but impact of COVID 19 is massive on the subject. It has challenged the very contours of the subject. It has made us to think, revise and incorporate the enormity of social change that we are witnessing. What already exist in the subject needs to be retained and portrayed the evolving elements in a systematic and analytical ways. It does not end here. Further the current scenario poses many questions, which will be hopefully answered in future. The answers to those questions will further redefine the provinces of the subject.

[11] Who.int. 2021, Tracking COVID-19: Contact Tracing in the Digital Age, [online] Available at: <https://www.who.int/news-room/feature-stories/detail/tracking-covid-19-contact-tracing-in-the-digital-age> [Accessed 13 November 2021].

LEGALIZING CANNABIS: AN OPINION BASED SURVEY AMONG THE MALE YOUTH IN ODISHA

—Susmita Priyadarshini Mishra[*] & Pramit Chandra Rout[**]

ABSTRACT

A number of countries has legalized the use of Cannabis for both medical as well as non-medical use, and in addition to this United Nation Commission on Narcotics Drugs (UNCND) has voted to remove cannabis and cannabis resin from the list of most dangerous drugs, which was actually suggested by World Health Organization (WHO). As this empirical research works deals with why it is a high time India, after voting in UN for the same, needs to decriminalize the recreational use of cannabis, in a controlled and regulated manner. Despite being criminalized Delhi in India is the 3rd and Mumbai is the 6th highest consumer of Cannabis substances in the world. Legalizing cannabis will be opening doors to better medical benefits, revenue generation and commercialization in India. However, there will be a need of systematic and proper regulation to avoid misuse of cannabis. This empirical research paper deals with medical benefits of cannabis, laws relating to cannabis and other substances and how benefits can be achieved by legalizing cannabis in India. The sampling is done by non-probability, through snow-ball sampling method among the male youth of the State of Odisha. Through the research, we could find that most of the respondents are in favor of legalization of use of cannabis, however, the results also show that there should be a control on quantity of cannabis sold to a specific age-grouped people. Moreover, through legalization, Governments can regulate the sale, transport and production of cannabis, which will generate revenue and help for the development of the Country through revenue generation. Cannabis can bring benefits

[*] LLM (Criminal and Security Law Specialization) School of Law, KIIT Deemed to be University, E-Mail: susmitapriyadarshinimishra27@gmail.com

[**] LLM (Corporate and Commercial Law Specialization School of Law, KIIT Deemed to be University, E-Mail: 2085015@kls.ac.in.

to both the Government and the youth, only if produced, sold and transported in a systematic and controlled manner. The quantity as well as quality needs to be maintained.

Keywords: Cannabis, Law Regarding Cannabis, Medicinal Use, Recreational Use of Cannabis.

I. INTRODUCTION

After the infamous suicide case of Sushant Singh Rajput, the use and possession of marijuana has come into spot light in India. Every now and then we keep hearing stories about how people are getting arrested for possession of Cannabis in their houses or consumption of so, but how deep we know about the beneficial values of a Hemp plant and the legislation attached to the use, transport, sale of the Cannabis. There has been an increased demand for legalization of cannabis in India after the hype made by the media in the said case. Weed, marijuana, bhang, charas, ganja etc are the various by products of Cannabis plant or the Hemp plant. Cannabis has been a part of Indian culture since a long time, in various religions as well as in mythology of India it has been considered as a pain-relieving substance to consume.[1] Cannabis is used for various purposes like recreational use, medical use, ceremonial use and even religious use. However, in the year 1985, the Rajiv Gandhi Sarkar criminalized it by introducing Narcotics Drugs and Psychotropic Substances Act, 1985.[2] However, the use of cannabis has not decreased even after being criminalized by the government. The sale, consumption, transportation, possession is done under the table. It is high time that India should consider legalizing cannabis for recreational use, as UN has recently moved Cannabis from the Schedule IV of most dangerous drugs and several countries, who are members of UN has also decriminalized the use and consumption of cannabis and its derivative products.[3] The Indian cannabis industry has recently attracted a lot of attention, with a number of activists and non-governmental organizations (NGOs) bringing court cases. The legalization of cannabis is being demanded in court filings. They say that cannabis' therapeutic advantages are difficult to dismiss, and that the optimum climatic conditions for cannabis growing have the potential to enhance the Indian economy and create millions of employments. The Great Legalization Movement (GLM) is one of these NGOs, which

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1 Prachi Darji, *Is Weed or Marijuana Legal in India?*, General Legal, 2020, at 1–4, https://www.myadvo.in/blog/is-weed-or-marijuana-legal-in-india/.

2 The Narcotic Drugs and Psychotropic Substances Act, 1985, (1985).

3 UN Commission on Drugs, *United Nation Commission on Narcotics Drugs*, United Nations 61 (1946), https://digitallibrary.un.org/record/861002?ln=en (last visited Oct. 17, 2022).

is working tirelessly to make cannabis use for medicinal and industrial uses legal in India.[4] After Goa Government, now Himachal Pradesh Government is also considering to legalize cannabis production and sale.[5] India's cannabis laws are archaic and in desperate need of revision. Although legalization is still a long way off, the growing number of cannabis and hemp start-up enterprises, as well as growing public support for the plant's legalization, are positive signs. Given the medicinal and economic arguments in favor of cannabis legalization, it may not be long before the Indian government realizes the full potential that legalization would offer.

II. CANNABIS- HISTORY, LEGISLATION, EFFECTS, MEDICAL USES AND LEGALIZATION

The term "cannabis" is used to describe "a wide range of psychoactive cannabis mixtures. Cannabis sativa, Cannabis indica, and, to a lesser extent, Cannabis ruderalis are the three types of cannabis plants". Cannabis resin, whether crude or refined, is "separated resin" obtained from the cannabis plant. Cannabinoids are a class of "chemical compounds" that connect to cannabinoid receptors in cells to regulate neurotransmitter release in the brain.[6] In terms of composition, bioavailability, pharmacokinetics, and pharmacodynamics, botanical cannabis varies from extracts of pure individual cannabinoids. Cannabinoids are sometimes utilized in medicine (for example, to treat stiffness in multiple sclerosis or nausea during cancer chemotherapy). Cannabinoids are derived from three sources[7]:

- "Phyto-cannabinoids" are "cannabinoid compounds produced by Cannabis sativa and Cannabis indica plants";
- "Endocannabinoids" are "neurotransmitters produced in the brain or peripheral tissues that act on cannabinoid receptors"; and
- "Synthetic cannabinoids" are cannabinoid compounds synthesized in the lab that are structurally similar to "phyto-cannabinoids" or "endo-cannabinoids" and act through similar biological mechanisms.

Cannabis is a green, brown or gray color dried or moist mixture of shredded leaves, stems, seeds and flowers of the hemp plant that is Cannabis sativa.

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4 Shantanu Sinha & Rohit Fogla, *Cannabis In India: Is the Country on the Precipice of a New Era of Treatment ?*, Lexology 12–14 (2020).

5 Gagandeep Singh Dhillon, *Explained: Why is Himachal Pradesh Planning to Legalise Cannabis Cultivation?*, The Indian Express, March 16, 2021, https://indianexpress.com/article/explained/explained-why-himachal-is-now-planning-to-legalise-cannabis-cultivation-7219802/.

6 World Health Organisation, *Cannabis Substance Profile and Its Health Impacy- The Health and Social Effects of Nonmedical Cannabis Use* (2016).

7 *Ibid.*

Cannabis is loosely known as hemp, marijuana, weed, or pot. The most usage of cannabis is done for its psychoactive effect i.e mind altering recreational drug. Under "Section 2(3) of NDPS Act, 1985",[8] Cannabis has been defined as;

a) *"Charas, crude or purified, is a separated resin obtained from the cannabis plant and includes concentrated preparation or resin called liquid or hashish oil."*

b) *"Ganja, the flowering or fruiting top that excludes seeds and leaves which do not form part of the top".*

c) *"Any mixture or drink made out of charas or ganja".*

However, this definition actually excludes bhang as a part of the plant; hence we can find government approved Bhang stores in India in a lot of parts in India. So, NDPS act prohibits sale and production of cannabis resin and flowers and it does not prohibit the use of seeds and leaves.

A. Effect And Impact of Cannabis

The main active chemicals in marijuana are THC which is delta-9-tetrahydrocannabinol, CBD i.e Cannabidiol. Marijuana contains over "60 different cannabinoid compounds and overall, 400 different compounds have been identified in marijuana". THC is found in maximum concentration in dried flowers or buds. Marijuana strength is correlated to the amount of THC it contains and the effects on the user and different types of strains contain different level of THC and depending upon the concentration of THC, the rate of Cannabis varies. When marijuana is smoked THC rapidly passes through lungs into the bloodstream and is carried to the brain and other body organs thoroughly. THC is received through a particular receptor in the brain called cannabinoid receptors (which are found in higher concentration in the area of hippocampus, cerebellum, basal ganglia and cerebral cortex of brain), which starts a chain of cellular reaction that finally led to a stage of Euphoria which is experienced by the user. For the first time user some may feel anxious, paranoid or even have panic attacks. However, the areas which have higher receptor of cannabinoid, influence memory, concentration, pleasure, coordination, sensory and time perception. However, early age use of cannabis can lead to depression and anxiety. Cannabis use in adolescent females predicts sadness and anxiety later in life, with daily users having the highest risk. Given the recent rise in cannabis usage, it appears that steps to minimize frequent and intense recreational use are necessary.[9]

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[8] The Narcotic Drugs And Psychotropic Substances Act, 1985, *supra* note 222.

[9] George C Patton et al., *Cannabis Use and Mental Health in Young People: Cohort Study*, 325 Br. Med. J. 1195–1198 (2002).

B. Procedure As to Usage of Cannabis

The most common cannabis formulations include marijuana, hashish, and hash oil. Marijuana is a cannabis-based herbal preparation manufactured from the dried flowering tops and leaves of the plant. Growing conditions, genetic features of the plant, the ratio of THC to other cannabinoids, and the plant component used all influence its potency. To boost THC production in cannabis plants, the "sinsemilla" method, in which only female plants are grown together, might be utilized.[10] Cannabis is used for smoking as a cigarette, commonly known as a joint or in a pipe or Pot (Bong). It can also be smoked in cigars as well after emptying the tobacco from it and be refilled with cannabis. Some users use it mixing into food or to brew tea. In the countries which have legalized the recreational use of cannabis, there cannabis is used in edible products like cookies, brownies, chocolates, cake rather than using it as smoke. Vaporizers are also popular among chain smokers where there is liquid marijuana stored inside the vaporizer where the users inhale the vapor. Here the THC concentration is really high.

C. Medical Usages of Cannabis

In ancient India the use of cannabis has been mentioned under 'Atharva Veda' where it has been mentioned that, "Cannabis is used for its medicinal benefits as a cure for illness as well to fight 'Demons'".[11] Use of medical marijuana is legalized in maximum countries. However, the patients must be diagnosed with conditions or diseases which are listed under the state's medical marijuana conditions and doctors need to certify the recommendation. Certain diseases are common for the use of cannabis for instance; cancer, glaucoma, HIV/AIDS, muscle spasms, seizures, severe pains, severe nausea,- Mental health conditions like schizophrenia and posttraumatic stress disorder (PTSD), Multiple sclerosis, Depression, anxiety, Pain, Seizures and muscle atrophy etc.'[12] The greatest amount of evidence for the therapeutic effects of cannabis relate to its ability to reduce chronic pain, nausea and vomiting which are caused due to the chemotherapy given to the cancer patients. The magical chemical in Cannabis i.e cannabinoid has proven to reduce the anxiety, reduce inflammation and relieve the pain, release chemicals which helps in slowing down the effect of Cancer cells and the growth of tumors.

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[10] Raul Gonzalez & James M. Swanson, *Long-term effects of adolescent-onset and persistent use of cannabis*, 109 Proc. Natl. Acad. Sci. U. S. A. 15970–15971 (2012).

[11] G.K Sharma, *Cannabis Folklore in Himalayas*, 25 Bot. Mus. Leafl. Harv. Univ. 203–215 (1977).

[12] Abhinav Srinivas, *It' s High Time that India Reclaimed Its Ganja*, The Wire, 2020, at 8, https://science.thewire.in/the- sciences/oshaughnessy-cannabis-ganja- mahal-lunatic-asylums-ndps-act/.

CBD oil is proven to use as a treatment for epilepsy known as 'Cannabis Treatment Epilepsy However, the use of CBD oil has been medically proved to reduce epilepsy attacks and hence is even allowed to be used for kids above the age of 1 year in two types of conditions; Lennox-Gastaut syndrome and Dravet syndrome. CBD oil is also proven to reduce the pain in arthritis patients as well as in AIDS and cancer patients.[13] In a recent study it is found that SARS-CoV-2 alpha variant B.1.1.7 and beta variant B.1.351 were similarly efficient against cannabigerolic acid and cannabidiolic acid. These cannabinoids, individually or in hemp extracts, are orally accessible and have a long history of safe human usage. They have the potential to prevent and cure SARS-CoV-2 infection.[14]

D. Legislation Dealing with Cannabis in India

Cannabis has been used in India in many forms for like thousands of years and even in mythological scriptures we can find that Lord Shiva is a recreational user of cannabis (Marijuana) and even used as medicinal purposes among the common citizens. However, when British Government started ruling India, it imposes tax on use of Bhang to collect revenue out of it. In the year 1961, the international treaty, 'Single Convention on Narcotic Drugs'[15] classified Cannabis as a hard drug, but at that time India was one of the countries who opposed this treaty considering the ancient recreational use of cannabis. Finally, in the definition of cannabis only flowering and fruiting tops were included and excluded seeds and leaves. Narcotic Drugs and Psychotropic Substances Act, 1985 was introduced prohibiting cultivation, sale, possession and transportation of cannabis in certain forms in India.

However, states are given power to draft their own laws regarding cannabis, hence UP and Rajasthan have their separate laws regarding 'Bhang' which is made out of seeds and leaves of Hemp plant. Recently, in an interview, a local Bhang-framer stated that he earns good amount of revenue by producing and selling illegal marijuana.[16] In the fiscal year 2020-21, Bihar confiscated 13,446 kg of ganja in 12 cases, Nagaland confiscated 9,001 kg in ten cases, and Uttar Pradesh confiscated 8,386 kg in six cases. In all, the DRI seized 45 MT of ganja across the country. Other states where significant amounts of ganja

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[13] Leigh Ann Anderson, *Marijuana: Effects, Medical Uses and Legalization*, Drugs.Com 15 (2019), https://www.drugs.com/illicit/marijuana.html.

[14] Richard B van Breemen et al., *Cannabinoids Block Cellular Entry of SARS-CoV-2 and the Emerging Variants.*, J. Nat. Prod. (2022), https://doi.org/10.1021/acs.jnatprod.1c00946.

[15] Adolf Lande, *The Single Convention on Narcotic Drugs, 1961*, 16 Int. Organ. 44 (1962), https://www.unodc.org/pdf/convention_1961_en.pdf.

[16] Debabrata Mohanty, *High Returns: Farmers in Maoist Belt Risk Jail to Grow Marijuana*, Hindustan Times, 2021, https://www.hindustantimes.com/india-news/high-returns-farmers-in-maoist-belt-risk-jail-to-grow-marijuana-101634063538847.html.

were discovered include Chhattisgarh, Telangana, Maharashtra, and Andhra Pradesh.[17]

Section 10 of NDPS[18] act allows, "State to permit and regulate the cultivation of cannabis plants, production, manufacture, possession, transport, import and export as well as sale, consumption and use of cannabis interstate". And under **Section 14** the production of cannabis is permitted only for "industrial purposes only to obtain fiber or seed or for horticulture process". **Section 10 of NDPS Act** deals not only with "offences for consumption but also for offences regarding cultivation, sale or purchase, import or export, transportation and possession of cannabis, except for authorized medical or scientific purposes". The punishment for small quantity is "up to six months imprisonment or fine which may extend to 10000/- or both, for greater than small quantity but less than commercial quantity the punishment is rigorous imprisonment which may extend to 10 years with fine extending up to 1 lakh rupees". For commercial quantity the punishment is "rigorous imprisonment which will not be less than 10 years but may extend to 20 years and fine not less than 1 lakh rs which may extend to 2 lakh rupees".[19]

III. OBJECTIVES OF THE STUDY

There are two main objectives of the study are;

a) To create awareness regarding legislation involved in usage, sale and transportation of Cannabis.

b) To circulate awareness about the medical and mental health impacts of consumption of cannabis among the adults, for both long term and short-term consumption of cannabis.

IV. METHODOLOGY

Primary data were collected through online mode of questionnaire, where the respondents were surveyed by filling up Google Form filled with relevant questionnaire dealing with tgheir opinion and knowledge as to usage, legislation implied and medical benefits of Cannabis and Cannabidiol substances.

The secondary data was collected from NDPS Act, 1985, journal articles, magazine article and newspaper articles roughly dealing with Cannabis legalization, usage of Cannabis and legislation regarding Cannabis, Wikipedia.

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[17] Anchal, *Bihar, Nagaland, UP top in Seizure of Ganja: DRI Report*, The Indian Express, December 7, 2021, https://indianexpress.com/article/india/bihar-nagaland-up-top-in-seizure-of-ganja-dri-report-7659933/.

[18] The Narcotic Drugs and Psychotropic Substances Act, 1985, *supra* note 222.

[19] *Ibid*.

The area of research is in Odisha, where the respondents are the youth of Male gender at birth, of ***30 in number***, varying from the age group of ***21 years of age to 28 years***, all of them were unmarried. The sampling technique used for the research is non-probability sampling with snow-ball sampling procedure, where the respondents' identities are kept anonymous to maintain ethics in the research.

V. EMPIRICAL FINDINGS

The primary data analysis can be done through the responses received, there were ***30 responses taken among the male youths***. When the respondents were asked whether they are comfortable talking about the recreational consumption of weed openly almost 15 of them i.e ***50%*** stated in affirmative and ***26.7%*** respondent in negative.

When they were asked among weed, alcohol, smoking, and tobacco which one they think to be more dangerous they responded with ***36.7%*** to tobacco and only ***13.3%*** to weed (cannabis), however it is ironic to see that when asked whether Youth should be consuming cannabis or not, ***36.7%*** responded in negative and ***30%*** were not sure.

According to ***63.3%*** of the respondent consumption of cannabis for long time has negative side effects, where ***43.3%*** of respondents stated that Cannabis substances are used for benefits. Where, ***46.7%*** respondents stated that they will not support any of the family members smoking or consuming weed for any sort of purpose. This is very shocking because when asked whether it should be legalized for adult or not ***61.9%*** opined in positive.

	YES	NO	MAY BE	CAN'T SAY
Benefit of hemp plant known to Youth	43.3%	43.3%		13.3%
Revenue generation to be increased	60%	23.3%	10%	6.2%
Support of culture, tradition and mythology for the use of cannabis	60%	16.7%	13.3%	10%
Idea about 'Cannabis Epilepsy Treatment'	40%	55.7%	-	3.3%
Knowledge about cannabis as painkiller, CBD oil, arthritis medicine and chemo therapy pain killer in cancer	73.3%	16.7%	6.7%	3.3%

	YES	NO	MAY BE	CAN'T SAY
Knowledge about legal punishment for consumption, sell and transportation of cannabis	83.3%	16.7%	-	-
Knowledge about Acts or Regulation dealing with this	56.7%	36.7%	-	6.7%
Opinion regarding legalization and control of sell and production of cannabis	50%	23.3%	20%	6.7%

Fig 1. Shows the questions and the opinions of the population regarding the same respectively

The findings from this research are quite unusual as we can see that almost majority of the people know the benefit of Legalization of cannabis both in medical sector as well in the economic sector, however when asked whether it should be legalized to control the quantity and quality of Cannabis, it seems the opinion of the population varied diversely. This seems people want a change but probably are unsure of the consequences it will bring with such change.

VI. DISCUSSION

The rapid evolution of the cannabis legislation throughout the globe and increased revenue genesis in market calls for a comprehensive, sustained monitoring of cannabis usage and production. Online survey methods are well established and easier method to acquire data while maintaining ethics. The majority of the respondent replied in favor of legalization of cannabis for adult i.e above the age of 18years and the next majority responded for legalization only for medical purposes. However, India has always favored in support of recreational use of cannabis. Recently in the UN convention, India has voted in favor of removal of Cannabis from most dangerous drugs list. So why not decriminalize the use of cannabis, looking at our customs, culture and ancient history.[20]

NDPS Act, if the cannabis is legalized then, needs to assess "types of products being used, how they are sourced and associations with patterns of use". Because ultimately, the impact of cannabis legalization will not be determined simply by whether cannabis is legalized, but it should be regulated and controlled in a proper legal framework. India could actually be benefitted from

[20] Sonali Acharjee, *What Un's Cannabis Decision Mean?*, India Today, September 19, 2020, at 2–5, https://www.indiatoday.in/news-analysis/story/will-india-legalise-cannabis-after-un-vote-1746631-2020-12-04.

legalization of cannabis revenue wised as legalization will include taxation implementation, minimum age restriction, marketing restriction, quality maintenance, and retail access. This way, the social stigma attached to the use of cannabis can be removed as well.

Moreover, the medical benefits proven from Cannabis, CBD oil and THC chemical treating several chronic diseases is really high. Like CBD oil has proven to lower down the attack in epilepsy, as well as in painkiller provide for chronic bodily pain during cancer treatments and muscle spasm. This can be used by the Pharmaceutical Companies to make proper medicines for the benefits of patients easily and while maintaining the quality as per government prescribed standard. It can generate huge revenue which can be used for development of the states.[21]

VII. CONCLUSION

Legalization of cannabis production and sale for non-medical use will represent one of the most revolutionary developments towards a better future. There are certain side effects of consumption of weed like getting addicted to it which is 9% which is actually lower than any other substances used for recreational purposes. Whereas, the chance of getting addicted to weed if smoked after the age of 25 years is almost nil. There is a possibility of withdrawal symptoms like trouble sleeping, irritability, loss of appetite and anxiety, however all these can be controlled within a few months. Beside this, if legalization is done then it will be great field for employment generation, establishing new industry dealing with cultivation, possessing, packing, and distributing cannabis would require immense man-power. This will as well lower down the illegal usage of weed among the teens as well as the trade related crimes relating to cannabis illegal transportation, sale, production and possession, which will actually unburden the law enforcement department to a greater extend. Legalization will open the gates to tons of new medical research, which is difficult to conduct when the drugs itself is illegal. We can't make marijuana go away but by legalizing it, we can probably make it surely safer and controlled for consumption.

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Anderson, supra note 13.

LAXMI BANK AND ITS MERGER WITH THE DBS BANK OVER THE CAPITAL CRISIS, SHAREHOLDERS INTEREST IN QUESTION.

—Biswadeep Dutta*

ABSTRACT

Laxmi Villas Bank a 94 year old bank having a capital of Rupees 25000 crore is currently undergoing shortage of capital adequate ratio. It felt nearly 0.17 % in June 2020 as against minimum 9 % creating a gross disturbance among the promoters (07% equity stake) and the public shareholders (93%). The Non-performing assets reached 25.39 % at that period as it was performing losses since 2017-18 period and then forth the Covid-19 pandemic put another overburdening stress over the under performing assets. Finally, the LVB bank under the prompt corrective action by RBI was on 17th November 2020 under the advice of RBI itself over the declining financial position of the LVB bank placed a one month moratorium, superseding the board members and capping a withdrawal limit off 25000 Rupees per depositors. Soon after that the RBI announced a Draft amalgamation scheme of the LVB with DBS bank India a big private lender stating that on and from the appointed date, the entire amount of the paid up share capital and reserves and surplus, including the balance in the share/securities premium account shall standoff written. It created a huge stress on the equity including shareholding of the banks which consists India bulls Housing Finance (4.99%), Srei Infrastructure Finance (3.44%),Capri Global 3.82%) and promoters ownership (6.8%) and the stakes held by retail investors, set to be extinguished. It means that the value of current shareholders holding has become zero overnight, and the shareholders will not have any say in the amalgamation decision in the general body meeting under the companies act as the banking regulation act and a special act will

* Student, LL.M, KIIT School of Law, Bhubaneswar, Odisha, E-Mail: 2085029@kls.ac.in KIIT School of Law, Bhubaneswar, Odisha 2085029@kls.ac.in.

override the provisions of a general act, also shareholders are looking to SEBI and the BSE/NSE to compensate their loss from the Investors Protection Fund. According to them, while the RBI has protected the depositors Capital, it is for SEBI to proactively help shareholders.

Keywords: Laxmi Villas Bank, DBS Bank India, RBI, SEBI, amalgamation, moratorium, shareholder.

Definitions-

- Laxmi Villas Bank
- DBS Bank
- Shareholder
- Investor
- Amalgamation
- Moratorium

Objective of the Study-

- The main objective is to learn about the Laxmi Villas and DBS acquisition deal and the implication over the Market & the economy in term of Capital and Securities Market
- The current position of the Shareholders and the rights available to them
- RBI and SEBI rules for the pre and Post Amalgamation
- Investor protection and the current rules and Regulation based on the Financial Market throughout the world
- Investors Literacy
- Governance and Transparency

Need and Importance of the Study-

- Insight overview over the Laxmi Villas DBS Deal and the In-depth analysis and discussion about the problems faced by the Shareholder and Investors (Minority)
- Valuation of the Shareholders after the Moratorium imposed
- Compensate The losses within the regulatory framework

Scope of the Study-

The Study explains about the Theoretical aspects of the Investor Protection, Shareholders and a descriptive case study through its various perspectives and a Proposed Conclusion. The study defines the various prospects of the LVB DBS Deal and its future.

Research Methodology-

Non Empirical, Descriptive Research

- **Primary Data-**Official data derived from Laxmi Villas Bank Website over its Amalgamation and the imposed Moratorium
- **Secondary Data-Da**ta from Websites, newspapers, Journals, books

LITERATURE REVIEW

I. PART ONE: BOOKS

Though books are the secondary sources in aid of legal research, nonetheless reviewing those kinds of literature is a very important aspect. In the area of my proposed thesis, the reviewed kinds of literature provided will help to explain the ongoing case of Laxmi Villas Bank over its capital crisis and the RBIs proposed draft amalgamation scheme to merge the bank with DBS Bank India. The historical aspects of the LVB bank and its journey in the banking sector will be explained firstly also the reason for the capital crisis mostly the NPA will be mentioned. Secondly, the validity of the credible plan to provide stability in the LVB Bank will be explained also there would be the comparison of the draft amendment scheme of the YES bank with the LVB bank, and lastly, as the shareholders of the Laxmi Villas Bank may not get anything out of the DBS deal as the shares of the LVB bank gets delisted the capital valuation of the LVB Bank is at perils the rights of the shareholders, promoters will be elaborated.

To that pursuit, the following books have been reviewed:

II. LIN LIN AND MICHAEL EWING, CHOW[1] THE "DOING BUSINESS" INDEX ON MINORITY INVESTOR PROTECTION: THE CASE OF SINGAPORE

The World Bank's Ease of Doing Business index has significantly affected regulations and policies regarding corporate matters around the world, and yet there has been scant academic attempt examining the use and implication of

[1] Lin, Lin, and Michael Ewing-Chow, *The "Doing Business" Index on Minority Investor Protection: The Case of Singapore,* Singapore Journal of Legal Studies, 2016, 46-69.

the index, especially in the area of investor protection, which is an essential element in doing business. In this paper, we examine in-depth the research methodologies employed by the Doing Business project in measuring the strength of investor protection, especially in light of the recent renaming of this indicator from Protecting Investors to Protecting Minority Investors in Doing Business 2015. Using Singapore as a case study, we argue that, notwithstanding the positive changes brought in by Doing Business 2015, the variables and components chosen in this indicator essentially fail to capture the salient features of minority investor protection. We argue that minority investor protection is an area that is inherently too context-specific to be evaluated based on a unified business assumption or by pure quantitative methods. Lastly, we also provide specific suggestions to improve the Protecting Minority Investors indicator.

III. LISA M. FAIRFAX, THE SECURITIES LAW IMPLICATIONS OF FINANCIAL ILLITERACY

Every financial literacy study conducted over the last few decades concurs: Americans, including American investors, are financially illiterate. This Article argues that America's financial illiteracy poses a significant, widespread, and long-term challenge for our federal securities regime because that regime is premised almost entirely on disclosure as the best form of investor protection and, by extension, on investors ability to understand the disclosure. By advancing a typology of investors and their disclosure needs, this Article further argues that we may have significantly underestimated the extent of the financial illiteracy problem based on at least two flawed assumptions.

First, we have presumed that the financial illiteracy problem is limited to retail investors—individuals (as opposed to institutions) who invest directly in the securities markets and who represent a small segment of the overall investor population. However, such a presumption fails to sufficiently account for the literacy concerns of individuals who invest indirectly in the market in the form of holdings in mutual funds, pension funds, and other institutions, and who comprise a substantial segment of the market.

The second flawed presumption relates to the notion that disclosure is not intended for the individual retail investor. Many insist that disclosure is intended for sophisticated institutional investors and financial intermediaries who provide signals to less sophisticated investors about suitable investment choices. However, the anecdotal and empirical evidence suggests not only that our presumptions about the sophistication of institutional investors and intermediaries are debatable, but also that such actors do not perform their signaling function as effectively or as consistently as we presumed.

Thus, the effort to minimize the financial literacy problem through reliance on these other investors is misguided. Finally, this Article contends that the very fact that regulators have sought to combat financial illiteracy for more than two decades without appreciable changes in financial literacy rates suggests that the problem may be long-term and that the reform of choice-investor education-may require supplementation. Based on these conclusions, this Article insists that we must grapple much more seriously with the financial literacy problem and offers suggestions about the best path forward.[2]

IV. KATHRYN JUDGEINFORMATION GAPS AND SHADOW BANKING VIRGINIA LAW REVIEW VOL. 103, NO. 3 (MAY 2017), PP. 411-480 (70 PAGES)[3]

This Article argues that information gaps—pockets of information that are pertinent and knowable but not currently known—are a by product of shadow banking and a meaningful source of systemic risk. It lays the foundation for this claim by juxtaposing the regulatory regime governing the shadow banking system with the incentives of the market participants who populate that system. Like banks, shadow banks rely heavily on short-term debt claims designed to obviate the need for the holder to engage in any meaningful information gathering or analysis. The securities laws that prevail in the capital markets, however, both presume and depend on providers of capital to perform these functions. In synthesizing insights from diverse bodies of literature and situating those understandings against the regulatory architecture, this Article provides one of the first comprehensive accounts of how the information-related incentives of equity and money claimants explain many core features of securities and banking regulation. The Article's main theoretical contribution is to provide a new explanation for the inherent fragility of institutions that rely on money claims. The existing literature typically focuses on either coordination problems among depositors or information asymmetries between depositors and bank managers to explain bank runs. This Article provides a third explanation for why reliance on short-term debt leads to fragility, one which complements the established paradigms. First, information gaps increase the probability of panic by increasing the range of signals that can cast doubt on whether short-term debt that market participants had been treating like "money" remains sufficiently information insensitive to merit such treatment. Second, information gaps impede the market and regulatory responses that can dampen the effects of a shock once panic takes hold. Evidence from the 2007–2009 financial crisis is consistent with the Article's claims regarding the

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[2] Fairfax, Lisa M. The Securities Law Implications of Financial Illiteracy. Virginia Law Review 104, No. 6 (2018): 1065-122.

[3] Judge, Kathryn, *Information Gaps and Shadow Banking,* Virginia Law Review 103, No. 3 (2017): 411-80.

ways shadow banking creates information gaps and how those gaps contribute to fragility.

V. CROSS-BORDER M&A: AVOIDING SURPRISES THROUGH DUE DILIGENCE WILSON CHU[4]

VI. SHAREHOLDER VOTING AND CORPORATE GOVERNANCE ANNUAL REVIEW OF FINANCIAL ECONOMICS[5] VOL. 2 (2010), PP. 103-125 (23 PAGES)

This article reviews recent research into corporate voting and elections. Regulatory reforms have given shareholders more voting power in the election of directors and in executive compensation issues. Shareholders use voting as a channel of communication with boards of directors, and protest voting can lead to significant changes in corporate governance and strategy. Some investors have embraced innovative empty voting strategies for decoupling voting rights from cash flow rights, enabling them to mount aggressive programs of shareholder activism. Market-based methods have been used by researchers to establish the value of voting rights and show how this value can vary in different settings.

VII. RAFAEL LA PORTA, FLORENCIO LOPEZ-DE-SILANES, ANDREI SHLEIFER, AND ROBERT VISHNY INVESTOR PROTECTION AND CORPORATE VALUATION THE JOURNAL OF FINANCE VOL. 57, NO. 3 (JUN., 2002), PP. 1147-1170 (24 PAGES)[6]

We present a model of the effects of the legal protection of minority shareholders and cash-flow ownership by a controlling shareholder on the valuation of firms. We then test this model using a sample of 539 large firms from 27 wealthy economies. Consistent with the model, we find evidence of higher valuation of firms in countries with better protection of minority shareholders and firms with higher cash-flow ownership by the controlling shareholder.

VIII. LUDAN A. BEBCHUK AND ZVIKA NEEMAN INVESTOR PROTECTION AND INTEREST GROUP POLITICS THE

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4 Chu, Wilson, *Cross-Border M&A: Avoiding Surprises through Due Diligence*, Business Law Today 6, No. 3 (1997.

5 Yermack, David, *Shareholder Voting and Corporate Governance*, Annual Review of Financial Economics 2 (2010): 103-25.

6 La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny. *Investor Protection and Corporate Valuation*. The Journal of Finance 57, No. 3 (2002): 1147-170.

REVIEW OF FINANCIAL STUDIES VOL. 23, NO. 3, CORPORATE GOVERNANCE (MARCH 2010), PP. 1089-1119 (31 PAGES)

We model how three groups—insiders in existing public companies, institutional investors, and entrepreneurs planning to take firms public—compete for influence over politicians setting the level of investor protection. We identify factors that push toward suboptimal investor protection, including corporate insiders' ability to use public firms' assets to influence politicians, and institutional investors' inability to capture fully the value of investor protection for outside investors. Entrepreneurs' and public firms' interest in raising equity capital does not fully eliminate the distortions arising from insiders seeking to extract rents from the capital in place. Our analysis produces many testable predictions concerning how investor protection varies over time and around the world.

IX. VAROTTIL, UMAKANTH. "CORPORATE GOVERNANCE IN M&A TRANSACTIONS." NATIONAL LAW SCHOOL OF INDIA REVIEW 24, NO. 2 (2013)[7]

The growing importance of M&A has coincided with a spurt in concerns over Corporate Governance issues. However, there has been little analysis of the clash between the two. In this essay, Mr. Varottil studies the anatomy of an M&A transaction through the lens of governance mechanisms, noting how pulls and pressures within a company affect the viability of a deal. He notes that 'mature and sophisticated' structures can minimize the risk of an M&A transaction. Further, he considers whether the existing legal framework in India allays fears of misgovernance, and suggests that several aspects require reconsideration from both the regulators and the corporate sector.

INTRODUCTION

Background-Laxmi Villas Bank 94 years Old KARUR Bank with a balance sheet of 25000 Crore Rupees is undergoing a shortage of Capital Adequate Ratio. It is falling with a percentage of 0.17 in June 2020 against the minimum of 9%. The promoters of the bank currently holds a 7% equity stake while public shareholders at large have a large 93%share distribution.

The Bank Gross Non Performing Assets reached 25.39 at last. The Bank has been making losses since the 2017-18 period for over an amount of Rs 585 Crore to 836 Crore during 2019-20. The Covid 19 Pandemic gave the last blow

[7] Varottil, Umakanth, *Corporate Governance in M&A Transactions,* National Law School of India Review 24, No. 2 (2013): 50-61. Accessed December 14, 2020. http://www.jstor.org/stable/44283761.

with creating overburden stress over the NPAs as the restructuring Process will likely last till 2 years period.

Board & Management-The Shareholders at large of the Banks are not pleased with the appointment of the Board of management. They voted against the reappointment of the 7 directors including MD and Chief Executive Officer (CEO) S Sundar. The shareholders also voted against the resolution of the appointment of Branch Auditors. The voting was carried out through a Video Conference at the Annual General Meeting of the Bank held on September 25th. Now the ongoing operation of the Bank is managed by a committee of directors consisting of three independent directors, the appointed committee dually exercises and operates the power of an MD & CEO currently.

Present LVB DBS Deal-Laxmi Villas Bank one of the oldest Private Sector Bank under RBIs prompt corrective action framework since September 2019. The bank's regular operations are now under the RBI scanner. On 17th November 2020 Government under the advice of the Reserve Bank of India over the growing concern of the health of the private sector lending was placed under a month of moratorium superseded by The Board Management of the Laxmi Villas Bank and capes with the withdrawals at Rs 25000 per depositors.

Currently, T N Manoharan is appointed as the Administrative Head of the Bank.

Draft Amalgamation Scheme-Central Bank or RBI has put the domain in public of draft amalgamation scheme of Laxmi Villas Bank with DBS Bank. The Draft Amalgamation scheme includes "the entire amount of the paid-up share capital and reserves and surplus, with the balances in the share and securities premium account of the transferor Bank" (In this case Laxmi Villas Bank), as stand wrote off, on and from the date of appointment.

The transferor Bank shall cease to exist by its operations as per the Scheme and the shares or debentures listed in any of the Stock exchanges shall be delisted and stand without any further action from the Transferor Bank (DBS Bank) or an order from an Authority competent.

INDIA CREDIT RATING AGENCIES OVERVIEW ON THE CASE

Current Valuation-Laxmi Villas Bank having a current holding of 566 Branches and a Valuation of 563 Crores with 970 ATMs installed over and a huge Customer base (Both Depositors and Borrowers) 20 Lac Depositors and lakhs of Borrowers, Also with a staff member constituting around 4000 people.

1. All the estimated valuations are offered to the DBS Bank of India without any cost.
2. It can be that the RBI is willing to transfer the assets to the foreign stakeholders and transfer the assets to the foreign Institutions. Before that, the domestic Institutions would play a major role in the recovery of the defaulters, whereas in the same case in the Private sector lending like in the case YES Bank was looked upon by RBI controlled SBI bank and other large Institutions to fill up the required Capital support.
3. S&P the Global Rating Agency as stated the swift resolution of Laxmi Villas Bank to keep the Bank afloat and maintain stability in the banking system.
4. The deal would bring positivity in the Banking Sector and will put the Laxmi Villas Bank a relief much needed for a lot of time.
5. However, the Fitch group stated that "the proposed takeover is not sufficiently large to immediately affect DBS credit ratings. However, what is significant is that the Banks Growth strategy could be shaped for its earning and risk capitalization over the medium tier and potential credit profile."
6. Moody's stated "The steps to strengthen DBS Business Position by addition of new Retail and Small & Medium-sized Customers. The loans mostly focused on the corporate and SME Sectors. The proposed acquisition will complement DBS with the traditional Physical Branch & Banking with the digital strategy in India."
7. On December 18, 2020, The Department of Finance through an official gazette Notification under sec 45 of the Banking Regulation Act 1949 due to an increase in the amount of NPAs and losses, to provide stability and safeguard the depositors and had been delisted.

Lakshmi Villas Bank and DBS merger Plea in Delhi High Court by the Shareholders of Laxmi Villas Bank-Recently a plea in the Delhi High Court has challenged the scheme of amalgamation of Laxmi Villas Bank with the Development Bank of Singapore (DBS)contended that the minority shareholders have been left in a lurch and the Centre and The RBI has failed to protect their rights and interests.

Discussion-In the appeal the main contention of the petitioners was that the investors' interest and protection have not been followed also the DBS was chosen erroneously as the merger was done without inviting any bids from other Banking Institutions and Financial Institutions. For the Defendants, DBS contended that the matters transferred to the Apex court.

The Centre-approved amalgamation scheme has not addressed any issues relating to bonds of the shareholders (Tier 2 bonds) The liabilities are being matured on the period of 2022-25 session and the regulators should not extinguish these bonds.

Laxmi Villas Bank shareholders were not kept informed of the write-off nor given a chance to redeem/withdraw their investment before the merger. The whole process was done without prior notification of the minority bondholders. This has caused immense mental and financial

Distress to those who had pooled their hard-earned money, saving in the Laxmi Villas Bank Capital through the period savings into Laxmi Villas Bonds. These were rated as per Basel Norms Compliant and the bank had a very strong immovable asset that could be liquidated to compensate the shareholders.

Failed Rescue Attempts-The Laxmi Villas Bank previously tried to cut a deal with Clix Group for a merger but it failed as both couldn't be able to come to a common solution of the scheme to talk to the discussion to The regulatory framework.

Again in 2019, LVB tried for a merger with India bulls, but the RBI didn't give its consent.

Financial prospects of the LVB were getting lower by that time and finances of the LVB bank got worst in the 2nd Quarter Where NPA(Gross)reached its highest of 24.45% where the boundary was 7.01%.

BASEL 3 NORM-As per the Basel 3 norms a tier1 Capital Ratio when turned negative score it was at negative at 2.85 %as of September 30. As the business was getting shrunk by the time. Business of bank was Rs 37,595 crore Total at the end September 2020, as 47,115 crores (Sept). The total net loss during that period was 357.18 crore

INVESTORS PROBLEMS: POOR FINANCIAL LITERACY, LACK OF RESEARCH AND BLIND FAITH

Investors have to be responsible for their actions. The tendency to act rather than due diligence is far more important. The bonds of the LVB Bank have the same fate as the RBI ordered the draft amalgamation of the draft scheme with DBS Bank the total Capital worth 318 Crore was wiped due to total write off the entire Capital Scheme. The Senior Citizens were looking for a higher yield irrespective of the market analysis and the Broker, financial Consultants and advisors were actively looking for the Bonds to grow.

They forgot to even check with the fact that LVB was prior making losses and even the Credit rating agencies CARE downgraded LVB shareholders bonds in October as Non Viability and risk of Principal. So, if there is no liquidity and the secondary market has kept it for losses why would anyone buy the share in that kind of financial status?

Yet also there were set of investors who are acting as it is an unfair act and the shares extinguished as part of amalgamation are in the bankruptcy process. Equity is always mentioned as risk capital and the investors should take a conscious decision before holding the shares of the companies sinking in bad financial troubles. The shareholders were expecting some kind of profit after the amalgamation and acquisition. but as the LVB shares reached the lowest price. It means the Investors had an opportunity before reaching the extinguished shares and had an exit opportunity prior.

In this case, it was a kind of gamble if the share would generate a huge profit if not it would have been extinguished and the Business gets acquired by a Large Company, in this case, it didn't happen Ex-Bhushan Steel and Electro steel, etc. in case of Laxmi Villas Bank. Investors need to be self-educated and should take tough stances

It can be based on two flawed assumptions-Firstly, there is a probable assumption on behalf of the retail investor that the individuals investing in the security market directly and represent the small segment of the investor population. It often gets failed as there is a lack of sufficient account of literacy to the concerned individual investors who invested indirectly through holding in the mutual funds, pension funds, and other institutions substantial segment of the market.

The second flawed presumption is that individual retail investors are not subject to disclosure as it is for the Institutional Investors and the financial market. Intermediaries are present to provide signals to small institutional investors about the choice suitable for investments. However, the studies derived from empirical studies suggest that the investors suitable for investments and the intermediaries are objectionable as the performance signaled are not efficient and consistent.[8] Hence in way address the issue of financial literacy is to abide by the principles of resilience on the investors but it's misguided.

Firstly, the election of Directors-As per the regulatory framework reform more voting power is given to the shareholders for the election of the directors and the executive for their compensation issues. Shareholders used the voting issue as the channel of communication among the board of directors and the

[8] Lisa M. Fairfax, *The Securities Law Implications of Financial Illiteracy***.**

protest voting leading to significant changes for the corporate governance and strategy.[9]

Secondly, Investor Protection and Interests groups-In the three groups Existing public companies insiders, Institutional investors, and entrepreneurs taking firm actions as such political interest in setting the investor protection. The case before the Karnataka Elections the Laxmi Villas Bank case came forward. Identifying that the factors that push forward sub optimal investor protection. Including the Institutional Investors' incapability to capture fully the value of investor protection from the investors[10] outside the security market.

INVESTOR PROTECTION AND CORPORATE VALUATION

The protection of the investors in a country legally is an important instrument for the development of the Countries Financial prospects and market. The laws protective of the outside Investors and big investor's willingness to finance firms, financial markets both have much broader and valuable prospects. In contrast, the laws not protecting the Investors, The development is stopped[11]. Better the protection for the outside investors among both (shareholders and creditors) in a way to promote the development of the financial market. The rights must need to be protected and better the outside investor's willingness to pay more for financial assets like equity and debt. It is better because the firms it would come in return and the interest and dividends generating profits.

GLOBALIZATION OF THE SECURITIES MARKET AND ITS EFFECT ON THE INVESTORS PROTECTION OF LAXMI VILLAS BANK

1. **Need of the Merger and Alliances**-Base on exchange rates where the money is based on the volume the international mergers are a lucrative business. It means easier access to Capital Markets resulting in substantial access to raise money.

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[9] David Yermack,Shareholder voting and corporate governance annual review of financial economics vol. 2 (2010), pp. 103-125 (23 pages).

[10] Ludan A. Bebchuk and Zvika Neeman *Investor Protection and Interest Group Politics*, The Review of Financial Studies vol. 23, No. 3, Corporate Governance (March 2010), pp. 1089-1119 (31 pages).

[11] La Porta and Shleifer are from Harvard University, Lopez-de-Silanes from Yale University, and Vishny from the University of Chicago. We thank Altan Sert and Ekaterina Trizlova for research assistance, Malcolm Baker, Simeon Djankov, Edward Glaeser, Simon Johnson, Rene Stulz, Daniel Wolfenzon, Jeff Wurgler, Luigi Zingales, and three anonymous referees for comments, the NSF for support of this research.

In case Merger & Acquisition does not go hand by hand Corporate Governance There had been little analysis of the clash between the Two the M&A puts pressure within the company and affects the viability of the deal the sophisticated structures can minimize the risks but the existing legal framework in India is struck by Misgovernance there is a need of reconsideration from the regulators and the corporate sectors.[12]

2. **Global competition among the Regulators-** One promise that would make the mergers possible through an agreement is that the exchanges will be proceeded by a separate regulatory entity.[13] The exchanges will be merged across borders but the sovereignty of the investor protection would not be merged. It means the merging companies would benefit out from international listing companies while avoiding the states regulation and state exchange norms.[14]

3. Permission of the companies who will be listed global exchanges would lead to global competition between the Regulators the very purpose of the regulation is to protect the investor's where the competition does not would lead to less protection of the public.[15]

4. Since the exchanges are involved in setting corporate governance and financial reporting as per standards. International mergers meant lowering the standards measured.[16]

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[12] Varottil, Umakanth. *Corporate Governance in M&A Transactions*. National Law School of India Review 24, No. 2, 2013.

[13] Anuj Gangahar, *Markets: NYSE and Euronext Recast an International Dynamic*, Fin. Times UK, Dec. 23, 2006.

[14] *Id*.; see also Anuj Gangahar, NYSE, Euronext Outline Regulatory Regime, Fin. Times Online, Sept. 22, 2006, available at 2006 WLNR 16536700 ("Euronext would have a Dutch foundation for its markets to prevent U.S. authorities from affecting rules and requirements for listing stock in European countries."); see also Jacob Zamansky, How an Exchange Merger can Create Big Losers, Fin. Times Asia, Aug. 24, 2006, at 9, available at 2006 WLNR 14655586 ("The [NYSE-Euronext] merger will most likely give less-than-pristine U.S. companiesa chance to play the game of regulatory arbitrage, shifting to national exchanges in Europe to escape tough U.S. regulations."); James Kanter, *Questions for Europe as Exchanges Combine: What Deal Helps the economy the most,. Economy the Most?*, Int'l Herald Trib., June 14, 2006, at 16, available at 2006 WLNR 10319862.

[15] In the case of capital markets, the regulators may be more motivated to attract issuers to their jurisdiction than to protect investor interests. Iris H-Y Chiù, *Delegated Regulatory Administration in Mandatory Disclosure - Some Observations from EU Securities Regulation*, 40 Int'l Law. 737, 767 (2006); see also Marc I. Steinberg, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 Mich. J. Int'l L. 207, 237 (1999) ("While regulatory competition can be beneficial to die extent that it encourages innovation and diversity in the securities arena, such competition must be kept within certain limits. Under such circumstances, competition may discourage regulators from adopting rules that are too stringent, while at the same time allowing market participants to select the most appropriate regulatory levels.").

[16] Steinberg, *supra* note 16, at 263 ("race to the bottom . . . may impair market integrity and provide insufficient investor protection"). It is important, however, to distinguish between multinational market- institutional investors and other investors. See infra, note 31.

5. **Globalization of Securities more Investors More will be Securities Fraud more Volatile market**

- The Capital market more gets merged the more companies seek Capital over the Globe, hence investors' vulnerability will increase.
- The act of one security fraud committed will cause a chain of reaction among the investor and will cause a huge loss.
- The instance of security fraud will also increase as the competition would reach globally and under the same pressure.
- Impact of one nation's market will impact as a whole and the rest of the world will suffered-International market volatility caused by the US credit crisis.
- Fairness is another reason If the globalization of the markets provides an increased ability to raise money then the investors from whom companies receive money should get the benefit of the protection as well.

6. **Lack of Corporate Governance reforms-**Corporate governance reforms and settlement in the way to protect defendant company shareholders in a way led to more favorable results for the investors. Important decisions such as executive compensation, independent auditors, company transparent and ethical social and environmental practices, improved shareholder voting mechanism and elections, company ethics, etc.

7. **Jurisdiction Issues-**Increases Litigation related to securities fraud and redress mechanism is much more needed.

- Personal Jurisdiction
- Subject Matter Jurisdiction
- Litigation outside of the state

CRITICAL ANALYSIS

1. The DBS Bank of India only had to do is change the name and command or authority of the Bank over the price of the retail shareholders.
2. Branch extensively valued at Rs 10 Crore as the total branch network of the Laxmi Villas Bank would not be less than Rs 5630 Crore.
3. The various immovable properties owned by the Laxmi villas Bank were funded by the shareholders and thus handling those properties to the DBS bank would create mistrust among the Shareholders as they didn't receive a penny despite the Hard Work.
4. It would erode the trust of the Equity Investment among the investors as they had invested in the bank's equity for such a long period.

5. The DBS Bank of India can go for Capital Reduction and fresh Investments of the equity (Acquiring Company)
6. The RBI decided to hand over Laxmi Villas Bank free of cost to DBS Bank India Laxmi Villas Bank is a listed Bank and the RBI should have called for a bid as there were several interested parties.
7. Laxmi Villas Bank and the DBS Bank amalgamation scheme proposed by the RBI the group of shareholders were not part of the Board.
8. Some Share Holders Stated that NPAs are not stable and they become standardized soon the economy revives.
9. The Central Bank of RBI should have the correct evaluative structure of the immovable assets as per the current market price.
10. Often Material value is underestimated for the bank has 563 branches spread over 16 states and 3 union territories and 974 functional ATMs

CONCLUSION

Globalization of the securities market will provide a more favorable place to the world of Investors but at the same time would seek a stronger redressed mechanism in case of Fraud. Securities Globalization will provide companies an opportunity to access the world as the markets avoid SEBI and RBI regulations. Increased merging of the markets and their capital will result in a more investor echoed environment but at the same time would lead to securities fraud in a more internationally independent market. Most importantly greater the risk of the investors lesser the integrity and stability in the Capital Markets.

Shareholders of the Laxmi Villas Bank not compatible with the Draft Amalgamation Scheme have submitted their feedback about the final amalgamation also the Bankers and the industry insiders have a different approach regarding the Write off of the entire amount of Capital as stated By RBI, Ultimately standing at Zero.[17]

Also, All India Bank Employees Associations stated that on their behalf for lack of transparency in the selection of DBS Bank for the Takeover "RBI knew about the problems in LVB for the last three years. When we have many Indian banks with financial capacity, why was a foreign bank selected? How were they selected? It's unfair to the Indian public. They are getting LVB for peanuts,"

[17] George Mathew, Sandeep Singh, *LVB Merger: Investors May Seek Legal Recourse, Unions Question DBS Bank Selection*. November 23, 2020.

Also stating "If they had decided to write down the equity value of LVB to zero, there would have been many banks that would have been interested in acquiring a bank like LVB that has over 500 branches. They could have called for bids from other banks giving them few days to do their due diligence "and "We have been demanding timely action by RBI on the deteriorating health of LVB and LVB to be merged with a public sector bank. Such proactive action was not taken. Now this announcement has come as a shock to the bank customers and the general public. This will create panic and doubt in the minds of people about the stability and dependability of banks because people keep their hard-earned savings in the banks, "and "The RBI which is responsible to maintain the stability of banks and financial sector cannot escape its responsibility for not taking timely action. Its role should be thoroughly probed," adding that some top management officials of LVB are responsible for the bank's huge bad loans and action should be taken against them "As presently the shareholders will get zero compensation as stated above The market capitalization also feel at record price from 500 to 303 crore.

DBS Bank till now established 21 new branches in India in 2019 as a total of 33 but the proposed transaction will add many as 563 branches, a greater number than that of all other foreign banks in India. While Laxmi Villas Bank a local bank of Karur was located in three states Tamil Nadu, Karnataka, and Andhra Pradesh.

It can be stated that the Laxmi Villas Bank branches were one of the most sought-after residual assets for a foreign buyer or Institutions a ready platform to enter the deeper market in the local banking such as branch and personal banking. Till now both the parties have approached the Honourable Supreme Court for a possible solution.

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18

A CONTEMPORARY PANORAMA OF THE STINKING LEGACY OF OPPRESSION AND SUFFOCATION VIA-A-VIS HUMAN RIGHTS OF MANUAL SCAVENGERS IN INDIA

—Anushka Sahu[*], Upasana Mohanty[**] & Prof. Dr. Arpita Mitra[***]

ABSTRACT

Manual scavengers are responsible for collecting and disposing of human waste from dry latrines across India. Scavengers face grave abuses of human dignity, grave health hazards, and social prejudice, all of which contribute to a generational cycle of poverty. The current study aimed to explore the approaches and course of action that have been taken via legislation and statutes to address the issue of manual scavenging in India. The paper also looks at the extent of international human rights actors' participation to take cognizance of the issue concerning the rights of manual scavengers. The study was conducted by analyzing various literature, government notifications, news reports, and case studies. According to the existing literature and case studies, one thing that has remained indisputable is that manual scavenging in India is one of the most heinous violations of human rights and dignity and the worst existing pattern of untouchability. Though this practice has been prohibited by the Indian legislation and international instruments, still lack of governmental support, poor education, least developed technologies, societal norms, and beliefs have remained persistent for perpetuating manual scavenging.

Keywords: Caste, Dalit, Human Rights, Manual scavenging, Scavenger.

[*] Student, KIIT School of Law, India. Email: anushkapiyu@gmail.com, Contact No: 8249691656.

[**] Student, KIIT School of Law, India, Email: upasana.mohanty2001@gmail.com Contact No.9124340678.

[***] Associate Professor, KIIT School of Law, India, Email: arpitamitra@kls.ac.in Contact No: 8093449552.

I. INTRODUCTION

Universally, freedom and liberty are essential virtue and must be valued by all. These democratic values form an intrinsic part of human dignity and are intimately connected to the notion of human rights. These values ensure the basic sustenance of a human being as well as are indispensable for the advancement of the society and human race at large. In the past years, the world has witnessed innumerable struggles for autonomy, freedom, liberty, and independence as a whole, aimed against enslavement, subjugation, apartheid, and several other manifestations of oppression and exploitation. Concurrently, various demonstrations are woven into the fabric of society where mass campaigns, human endurance, and crusades effectuated the elimination of various social evils. Yet, despite the consciousness of the notions of freedom and liberty, unfortunately, a certain segment of the society even in the present times continues to live through and tolerate abuse, oppression, and slavery in the guise of 'manual scavenging. Modern India is still witnessing the biggest social evil which is a reeking legacy of social stigma and suffocation. In the Indian subcontinent, this practice is regarded as the worst surviving sign of ostracization. People all around the globe might consider this to be an anathema and a nauseating task to do but this practice serves as a livelihood, even today, to thousands living in the subcontinent. Across the country, from septic tanks, dry latrines, and sewers to railway tracks and drains, the lower caste people amounting to more than half a million are carrying, cleaning, and disposing of the excreta that are flushed down from the toilets. They bear the stench of sewage while forcing themselves into the septic tanks and choked underground conduits, the sewers carrying the waste matters, to clean the filth. Annually, hundreds of manual scavengers lose their lives due to asphyxiation caused by the poisonous and fatal gases present in the sewers and lethal manholes. In India, this unabated practice is a form of social exclusion, based on caste and occupation. The notion of social exclusion encompasses a broad range of socio-economic aspects and whirls around certain segments of the population, especially, women, the indigenous Adivasis, Dalits, and the minorities. These groups fall prey to social exclusion and are victimized because of their religion, ethnicity, sex, and caste. In reality, this section of the society is the victim of isolation, discrimination, prejudice, severe deprivation of basic access to social opportunities, and economic securities. In the Indian context, the quintessence of social exclusion is denying equal opportunities by a particular social group that foists themselves over others leading to incapacitating an individual to engage in the rudimentary and fundamental social, economic and political functioning of the society. The manual scavengers constitute a class who are socially excluded and fall under the caste-based occupation groups. In our society, these groups constitute the marginalized and oppressed communities that are socio-economically, politically, psychologically neglected.

In modern India, the social, economic, and cultural realities disclose a sequence of paradoxes. Though this evil practice is banned legally, the hidden apartheid, the caste regime, poverty, and impoverishment have perpetuated manual scavenging. Babasaheb Ambedkar has rightly said, "In India, a man is not a scavenger because of his work. He is a scavenger because of his birth irrespective of the question of whether he does scavenging or not". For centuries, the human dignity and rights of the oppressed and marginalized people belonging to the lowest rungs of the caste regime have been polluted, rendering the majority of them tyrannized and depriving them the political, social, and economic rights. In the social fabric of India, division of labour is a critical aspect and is done based on caste status. The diabolical and callous practice of manual scavenging is often considered a "polluting task" and the people carrying out such tasks are regarded as untouchables. According to the data released by the Rehabilitation Research Initiative, in 2019, in the subcontinent, around 15 lakh people are practicing manual scavenging, even after legal measures banning the inhumane practice like the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013 was passed.[1] We often see headlines flashing in Indian newspaper- "Manual scavenging horror: Worker dies after inhaling toxic fumes while cleaning a sewage tank in Greater Noida"; "340 sewer cleaning deaths in past 5 years: Government", etc. The MSJE (Union Ministry of Social Justice and Empowerment) disclosed that around 282 sanitation workers have lost their lives while cleaning the septic tanks and choked sewage chambers between 2016 and 2019.[2] But these statistics form just the tip of the iceberg and the deaths continue unabated across the subcontinent. These groups tainted by their birth within a caste regime that regards them as less than human and impure, are put through severe physical suffering and mental agony. Additionally, they face inter-generational trauma which is embedded in caste-based discrimination.

II. DEFINING MANUAL SCAVENGING

In modern India, society even up to the present time witnesses the social evil of manual scavenging being extensively practiced. This disgraceful and filthy practice which is continuing in the subcontinent is deeply rooted in the caste system. The division of labour is controlled by the prevailing caste hierarchy, making the lives of these scavengers deplorable and odious with few morsels of daily bread and meager wages in exchange for their hard work. At multitudinous dimensions, this class of people often referred to as "Bhangi"

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1 Pragya Akhilesh, *Why does India Still not have a Database of Manual Scavengers?*, NEWSLAUNDRY (Mar. 15, 2021), https://www.newslaundry.com/2021/03/15/why-does-india-still-not-have-a-database-of-manual-scavengers.

2 Dhaval Desai, *282 Deaths in Last 4 Years: How Swachh Bharat Mission Failed India's Manual Scavengers,* THE PRINT (Jan. 27, 2020, 1:01 PM), https://theprint.in/india/282-deaths-in-last-4-years-how-swachh-bharat-mission-failed-indias-manual-scavengers/354116/.

literally meaning "one having a broken character and identity" faced humiliation, oppression, discrimination, and social exclusion. The Dalits and women are among the disadvantaged and marginalized sections of the community who usually perform this callous task of scavenging which is deemed to be unpleasant and too filthy by the upper castes and are relegated to the lowest level of the caste hierarchy in a caste regime. Indian society is divided into different classes and sectarian groups. Despite the flourishing civilization and cultural growth, the social stratification in the form of caste, even in the present times plays a predominant role in society. In the present society, it is the caste regime also known as "jati" that assigns the role of cleaning and waste disposal to a particular lower caste. The vile practice of manual scavenging is a form of slavery that is caste-based, perpetuating rampant discrimination as the society regards the scavengers as "untouchables".

According to United Nations in India, the term "manual scavenging" is defined as "the practice of manually cleaning, carrying, disposing or handling in any manner, human excreta from dry latrines and sewers."[3] Daily, the most basic tools such as metal troughs, buckets, cane baskets, shovels, and brooms are used for cleaning and disposal of human excrement. In the year 1993, this inhumane practice was banned by the Government of India by the enactment of the "Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993."[4] Yet, the 1993 Act had certain drawbacks and failed to achieve its true objectives. Intending to plug the loopholes, the Central Government after 20 years, in 2013 came up with recent landmark legislation known as the "Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013."[5] In the 2013 Act, Section 2(g) lays down the meaning of the term "manual scavenger" as "a person engaged or employed, at the commencement of this Act or at any time thereafter, by an individual or a local authority or an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises, as the Central Government or a State Government may notify before the excreta fully decomposes in such manner as may be prescribed, and the expression manual scavenging shall be construed accordingly". The occupation of scavenging is passed from one generation to the other and often women are forced to take up this profession due to caste and gender-based discrimination.

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3 *Breaking Free: Rehabilitating Manual Scavengers*, UNITED NATIONS IN INDIA, https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers/.

4 Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, No.46, Acts of Parliament, 1993 (India).

5 Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, No.25, Acts of Parliament, 2013(India).

III. UNDERSTANDING MANUAL SCAVENGING

In the entire globe, India despite possessing the highest population following China lags in the development of suitable waste management methods and techniques as a result of which the practice of employing manual scavengers continues unabated in various parts of the sub-continent. Due to an unhygienic working environment, these marginalized and disadvantaged people lead an unhealthy lifestyle surviving in deplorable living conditions. The class of people, especially the "Dalits" are subjected to oppression and are assigned the task of scavenging, thereby making them socially backward and economically poor.[6] The caste-based division of labour has resulted in a social divide that is so deep and big that for decades, the lower castes have been prevented from accessing basic public resources and public places, thereby making them suffer the brunt of social exclusion.[7]

It is an open secret that still the manholes, sewage chambers, septic tanks, sewage canals of India are cleaned manually despite the advancements made in the field of technology. Manual scavenging and its different forms have been made a "cultural occupation" and are only assigned to a particular lower caste which is occupying the bottom level in the caste hierarchy. The forms of manual scavenging have become the everyday affairs of the subcontinent's sanitation sector.[8]

In India, this vile practice has a long history and up to the present time continues to exist in different forms. In this contemporary era, manual scavenging practice is comprehended to violate the spirit and ideals of the supreme law of the land, violating the constitutional value i.e., the dignity of an individual, and contravening the right to life that is guaranteed under Article 21. This sanitation practice besides being obnoxious and improper violates the human rights with which an individual is bestowed. However, the process of eradicating this inhumane and callous practice has been slow and unprogressive.[9]

The manual scavengers are dying in huge numbers as a result of suffocation due to the presence of toxic and poisonous gases in lethal septic tanks and choked sewers. The miseries suffered by the sanitation workers are the exemplification of the interplay of the forms of social stratification namely the caste

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[6] Rajneesh Kumar Gautam et al., *Manual Scavenging In India- A Review*, 2 International Journal of Novel Research and Development 129–131 (2017).

[7] Narasimha Rao, *Employment of Manual Scavengers: A Curse on Human Dignity*, 2015 LAWASIA J. 77 (2015).

[8] Kanthi Swaroop, *India's Manual Scavengers: Ugly Truths of Unsanitary Sanitation Work an Open Secret, Law Needs Better Enforcement*, 12 First post 1–5 (2019).

[9] Sujith Koonan, *Manual Scavenging in India: State Apathy, Non-Implementation of Laws and Resistance by the Community*, INDIAN LAW REVIEW (2021).

and class in sustaining exploitation and enslavement and persisting cruelty and inhumanity towards the manual scavengers.[10]

In contemporary India, there are various dimensions associated with the practice of this social evil such as gender, class, caste, state of health, environment, etc. This paper tries to attempt to provide a holistic picture of this vile practice in modern India by identifying the loopholes lying in the enacted laws by the Central government, laying down a contemporary understanding with regards to this practice.[11]

A plethora of legislative attempts has been made by the Government to ensure a casteless and fairer, more egalitarian society. Yet the scavengers continue to lead a deplorable lifestyle and there is no end to their miseries. It is ironic that after decades of attaining independence, the government in 1993 came up with a law banning the degrading practice. Later in 2013 to rectify the defects in the 1993 Act, the government came up with a new law that, besides, banning the practice of employing manual scavengers, also ensured their rehabilitation. This paper attempts to deal with the genesis of this callous practice, analyzing the schemes adopted, legislative attempts, statutory frameworks, and the measures of rehabilitation and also focuses on the judicial pronouncements.[12]

Manual scavenging is not a form of employment; it is a sort of enslavement that adversely affects Dalit men and women. Despite domestic legislation prohibiting manual scavenging, India's constituent governments have hindered national efforts to curb the issue. The paper highlights and analyses India's specific treaty commitments to not just end this practice, but also to hold government officials accountable for continuing to violate human rights.[13]

Those who manually clean sewers and septic tanks in urban areas do not have the same rights under the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act of 2013. This is also manual labour, as it entails cleaning excreta with one's hands. Workers have to physically clean clogs in manholes. Government agencies have defiantly disobeyed court decisions requiring mechanization and prohibiting manual sewage pipe cleaning.

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[10] Sheeva Y. Dubey et al., *Manual Scavenging in Mumbai: The Systems of Oppression,* HUMANITY & SOCIETY (2020), https://journals.sagepub.com/doi/abs/10.1177/016059762096 4760.

[11] Harsh Maurya, *A Contemporary Outlook to Manual Scavenging in India*, 6 IJCRT, 353-358 (2018), https://ijcrt.org/papers/IJCRT1807036.pdf.

[12] Abhishek Gupta, *Manual Scavenging - A Case of Denied Rights*, SSRN Electronic Journal 36–58 (2018).

[13] Varun K. Aery, *Born into Bondage: Enforcing Human Rights of India's Manual Scavengers*, 2 INDON. J. INT'l & COMP. L. 719 (2015).

Regrettably, the much-anticipated new law also disregards the hardship of sewage cleaners.[14]

IV. METHODOLOGY ADOPTED

This is a conceptual paper and the researchers have adopted the method of reviewing secondary data collected from various published research articles, case studies, books, and online websites to understand the human rights violation of manual scavengers and the reasons underlying, which is consequently incorporated as a concept paper drafted by the researchers.

V. LEGISLATIVE ATTEMPTS TO PROHIBIT MANUAL SCAVENGING: A STEP TO PROTECT HUMAN RIGHTS AND BREAKING CASTE STEREOTYPES

A. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993: India's First Formal Cognizance of the Dehumanizing Practice

In 1993, the Central government validated and laid down the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993,[15] hereinafter (the 1993 Act) with an intent to construe the idea of fraternity which is basic for democracy into a positive declaration of human dignity linked to "right to life" which is enshrined in Article 21 of the Indian Constitution.[16] The long title of the Act provided for prohibiting the practice of employing manual scavengers and also outlawed the practice of constructing non-flush or dry latrines and rendered the above practices punishable with imprisonment and fine. The 1993 Act was of paramount importance as it was the first substantial legislative attempt that formally debarred the practice of employing manual scavengers as well as constructing dry latrines.

Nevertheless, the Act of 1993 accommodates some escape routes that leave scope for infraction and contravention of its ultimate and final objective accompanied by impunity. Rather than being absolute and definite, the language applied in the Act was liberal and non-restrictive. The Act by the use of permissive terminology and language offered immense scope to the state government not only to determine the appointment of 'Executive Authority' but also to decide regarding the rehabilitation of the people employed into scavenging. Moreover, permissive language was also used with regards to the selection

[14] Samuel Sathyaseelan, Neglect of Sewage Workers: Concerns about the New Act, 48 ECONOMIC & POLITICAL WEEKLEY (2013), https://www.jstor.org/stable/24478372.

[15] *Supra* note 4.

[16] INDIA CONST. art. 21.

of inspectors; formulation of schemes; the power of the court of law to take cognizance of the unlawful act; penalties being meagre, and sanctions for the prosecution. Additionally, under the 1993 Act, unless a complaint was filed within 3 months from the time when the commission of the alleged offence came to the complainant's knowledge, the courts were impeded to take cognizance of an unlawful or illegal act. Therefore, by the usage of permissive language and liberal terminology, the Act supported the creation of enormous escape routes, allowing the functionaries to circumvent their obligations. The Act also conferred discretionary powers which were more than necessary on the state governments, which had a negative impact on its implementation. The outcome was that this legislative attempt was a gross failure in attaining its desired objectives. Even after the enactment of the 1993 Act, the employment of manual scavengers and the existence of unsanitary and deleterious latrines subsisted unabated. Even after coming into force, the several loopholes in the Act gave a free hand to the public sector enterprises; railways; the army, and the military to employ manual scavengers. The rehabilitation schemes viz. the scholarship and self-employment schemes envisioned under the Act also failed to fulfill their purpose.

B. The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013: A Legislation in Quest of Human Dignity

The gross defeat of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 urged the Government of India to enact the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013,[17] hereinafter (the 2013 Act), to eradicate the dehumanizing and inhumane system of manual scavenging. This Act is the second major and significant attempt of the Central government that aimed to resolve and finish the callous practice of scavenging. The recently proposed law unlike the prevailing regulation on manual scavenging (the 1993 Act), provided for rehabilitation of the disadvantaged class of people. the 2013 Act sought to guarantee human dignity as cherished in the Preamble of the Indian Constitution. This recent legislative attempt aimed to protect the marginalized class of people from subjugation, oppression, discrimination, social inequality, and social injustice. The Act also intended to rectify the social injustice and degradation suffered by the manual scavengers in the past by rehabilitating and restoring them to a dignified life. The provisions contained in the new Act are of paramount importance. As a whole, the most notable aspect of the newly enacted regulation, on one hand, prohibits the inhumane practice and on the other hand lays down provisions with a vision to rehabilitate the manual scavengers and their household. The definitions of certain expressions

[17] *Supra* note 5.

such as "sewer", "hazardous cleaning", "manual scavenger", and "insanitary latrine" are included in the improved provisions of the 2013 Act. Additionally, the Act also contains provisions that identify and demolish insanitary latrines and intends to construct sanitary community latrines ensuring their continuous hygienic maintenance. The provisions oblige the local authorities to conduct surveys concerning the insanitary latrines and establishment of hygienic community latrines and their periodic upkeep.

The Act prohibits the practice of engaging manual scavengers and seeks to liberate every individual engaged in this inhumane practice. The regulation forbids the creation of insanitary latrines and obliges the occupants to convert and demolish such latrines within a specified period, failing which, the empowered local authorities can retrieve the costs of such demolition and conversion. Further, the declarations encompassed in the Act nullify any agreement or contract and other instruments concerning the engagement and employment of manual scavengers and enjoins the employer to retain the individual who has been employed without reduction of costs, subject to the willingness of such individual. The agencies and local authorities are prohibited to employ persons to clean the choked sewers and hazardous septic tanks. Punishments are also prescribed by the Act for contravening the fundamental provisions.

The Act lays down other provisions that require surveys to be conducted to identify manual scavengers in the rural and urban areas of the subcontinent and at the same time rehabilitate them and their families. The law seeks to constitute vigilance committees at multiple levels for performing specific tasks like monitoring the committees set up at the central and state levels. The functioning of the "National Commission for Safai Karamcharis" is regulated and monitored by the 2013 act to ensure proper implementation of the Act to its true spirit.

C. Overlooked Standards of Dignity and Discrimination

In the 2013 Act, the term "manual scavenger" is defined under Section 2(g). The Act though it seeks to prohibit the practice of engaging manual scavengers, it also leaves a possibility for the employment of manual scavengers. The explanation under Section 2(g) states that "a person engaged or employed to clean excreta with the help of such devices and using such protective gear, as the Central Government may notify in this behalf, shall not be deemed to be a manual scavenger" which means that this explanation exempts an individual employed to clean human excreta if he wears protective gears and other such devices as the Central government prescribes. The practice of cleaning excreta either by hand or with the help of protective gears and machines is against the dignity of an individual. Hence using mechanical devices to perform the

cleaning task does not render manual scavenging dignified. On that account subjecting a person to clean chocked sewer chambers, lethal septic tanks and excreta is against the very idea and intention of the Act. Such inhumane practice is against the fundamental rights that the Constitution guarantees to every individual.[18]

Another shortcoming of the 2013 Act is that it restricts the power of the courts of law to take cognizance of an unlawful act except the filing of the complaint within 3 months from the tie of commission of the alleged offence. Such time-barred provision allows the perpetrators to roam freely if for any reason the complaint could not be filed within the prescribed period. The impugned provisions cause great difficulty for complaints requiring evidence as the prescribed period is too short. The power of the courts is rendered inefficacious as the complaints have to obtain prior authorization and consent of the relevant state administrations.

Although rehabilitation of the manual scavengers is provided by the act, yet specific concrete rehabilitation measures are not prescribed in the Act. One major drawback of the Act is obscurity with regards to the formulation of schemes. The Act does not specify and is ambiguous as to who is responsible for the framing and implementation of the schemes. Additionally, the legislative attempt undertaken by the Central government is also unclear regarding the implementation of the Act.[19] The other drawback of the 2013 Act is that it prescribes meagre and inadequate penalties which is insufficient to eliminate the menace of scavenging. Further, the law is completely silent concerning the liability of the authorities implementing the Act in case of non-compliance or failure to fulfill its key provisions.

D. In Continuation of Protecting Human Rights of Manual Scavengers: Proposed Amendments by the Indian Government

Both the laws i.e. 1993 Act and the 2013 Act had different perspectives. The former was enacted from the perspective of public health and sanitation while the latter was proposed to restore human dignity, ensure rehabilitation and revive the dormant and lost human rights. In some aspects, the 2013 Act lacks teeth and coherence. The Ministry of Social Justice and Empowerment has released some recent data that has thrown light on the reality that in the last five years, the practice of manual scavenging has resulted in the death of 376 such scavengers.[20] The Indian government, to rectify the discrepancies in the law has proposed certain amendments to the 2013 Act. The government has

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[18] *Supra* note 7.

[19] *Ibid*.

[20] *Machine Hole*, The Indian Express (Nov. 21, 2020, 6:10 AM), https://indianexpress.com/article/opinion/editorials/machine-hole-7059558/.

proposed that the use of machines and instruments while cleaning the lethal septic tanks and hazardous sewer chambers should be made mandatory. It has been expounded that the term "machine-hole" would replace the expression "man-hole" in every official document of the government. Further, it has been proposed that there is a necessity of installing a "24x7 national helpline" to record infringements, helping the government to ensure compliance and effective supervision.[21] The proposed amendments should not only be merely symbolic, having hardly any practical effect but in reality, should be put into practice to achieve its true objectives.

VI. INTERNATIONAL HUMAN RIGHTS LAW: MEANS TO ADDRESS THE PLIGHT OF MANUAL SCAVENGING IN INDIA

There are several international legal covenants and international human rights bodies concerning the plight of manual scavenging. Beginning with the "Universal Declaration of Human Rights" (hereinafter UDHR), the honorable Supreme Court of India in 2014, in the case of *Safai Karamchari Andolan* v. *Union of India,*[22] acknowledged that the declaration places "a real, binding and legal obligation onto the states". The honorable Supreme Court examined the "International Convention on the Elimination of All Forms of Racial Discrimination", which also vilifies caste discrimination. Article 1 of UDHR proclaims that "All human beings are born free and equal in dignity and rights". The caste system in India is not just circumscribed to restricting the members of a particular caste to a determined occupation, rather this has become the sole basis of discrimination that has firmly ingrained in the Indian society which is socially and economically implemented as well. At the bottom of this caste hierarchy, Dalits have been customarily kept within the limits of performing the job that is considered "unclean" by the higher caste members, such as manual scavenging. As the practice of manual scavenging involves cleaning of human feces and filth, the members of the Dalit community are precluded from being a part of any social gatherings comprising of upper-caste Hindus in religious centers or sending their children to attending schools, or any sort of public places as they are thought of "polluting" the upper-caste Hindus. Thus, manual scavenging deprives the workers and their families of living a life of dignity and diminishes their sense of worth.

The Right to human dignity can also become the ground to condemn the health risks that are associated with manual scavenging. The "International Covenant on Economic, Social and Cultural Rights" (hereinafter ICESCR) codifies the right to health under Article 12. The amalgam of associated health

[21] *Ibid.*

[22] *Safai Karamchari Andolan* v. *Union of India*, (2014) 11 SCC 224.

risks with meagre pay forbids several scavengers from accessing proper medical treatments. Moreover, there have been overgrowing cases of deaths of manual scavengers across India while cleaning sewers or septic tanks. In the last five-year period (2016-2020), there have been over 500 fatalities due to drowning in sewers and septic tanks.[23] During this period the highest fatalities were recorded in 2019 with 110 deaths.[24] Since, 2013 the law that was passed in India, there has not been a single case where the death of manual scavengers has led to a conviction, rather the cases are registered as "accidental deaths" or "death by negligence."[25] Apart from sewer accidents, there are many other infections like "gastroenteritis", "intestinal parasitic infections" and "Pontiac fever" which are prevalent among sewage workers. In many cases, no formal training, safety measures, or information are provided by the employers to the scavengers about the hazardous work. The fact is that a sizable number of people are still engaged in this activity and deaths are still caused that is even more than the governmental statistics.

This despicable legacy of suffocation and disgrace is alarming as it denies the workers adequate pay, human dignity, and the highest accessible degree of health. The fact that women are also the primary victims of these inhuman practices is even more cause of concern. The provisions of "Convention for Elimination of all Forms of Discrimination Against Women" (hereinafter CEDAW) where Article 5(a) mentions that "States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women." There are very limited governmental statistical data regarding the number of women engaged in manual scavenging, however, estimates by various organizations proclaim that there is more than 75 percent of women scavengers. More often it has been reported by the Human Rights Watch Reports that women are involved in collecting excrement from residential dry latrines while men clean out sewage pipes. Thus, it can be seen that men continue to work outside the residence, and women are bonded to the home.

Article 6 of ICESCR guarantees an individual "the right to work". If manual scavenging falls under the ambit of "right to work", India has a legal obligation to uphold this right. The "Committee on Economic, Social, and Cultural

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[23] Bharat Kancharla, *Data: 340 Deaths of Manual Scavengers in Sewers & Septic Tanks Between 2016 & 2020*, FACTLY (Mar. 2, 2021) https://factly.in/data-340-deaths-of-manual-scavengers-in-sewers-septic-tanks-between-2016-2020/.

[24] *Ibid*.

[25] Radhika Bordia et al., *Manual Scavenging has Killed 400 Indian Since it was Banned- And Yet Nobody has been Convicted,* Scroll.in (Apr. 16, 2021, 2:00 PM), https://scroll.in/article/992294/manual-scavenging-has-killed-400-indians-since-it-was-banned-and-yet-nobody-has-been-convicted.

Rights" (CESCR), the authoritative interpretive body of the UN, interpreted that Article 6 secures the right to "decent work". The pre-requisite conditions necessary for decent work include i) "employees freely choosing and accepting the work", ii) "occupation respects worker safety", and iii) "employees receiving just remuneration supporting themselves and their families". Although scavenging is technically an occupation, it is evident from the aforementioned criteria's that manual scavenging does not fall under the ambit of "decent work."

VII. INDIA'S OBLIGATION AS A WELFARE STATE: BREAKING THE GLASS CEILING OF CASTE OPPRESSION

The Indian Constitution has set down the safety measures to be adopted for the workers and factory men working in both organized and unorganized sectors. The Economic and Social Principles and the Directive Principles of State Policy provide: a) "Securing suitable employment and healthy working conditions for men, women, and Children", b) "Guarding the children against exploitation and moral degradation", c) "Making provisions for securing just and humane conditions of work and for maternity relief", d) "Taking steps to secure the participation of workers in the management of undertaking, etc."

Supreme Court judgments have laid that "Right to Life" also includes employee's "Right to health". In the case of *Consumer Education & Research Centre* v. *Union of India,*[26] the Supreme Court held that "We hold that right to health, medical aid to protect the health and vigor to a worker while in service or post-retirement is a fundamental right under Article 21, read with Article 39 (e), 41, 43, 48 A and all related Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of the person."

Long ago, when the Indian Constitution was inaugurated, B.R. Ambedkar prophetically observed "we are going to enter into a life of contradictions. In politics, we will have equality and in social and economic life we will have inequality. In politics, we will be recognizing the principle of one-man one vote and one vote one value. In our social and economic life, we shall, because of our social and economic structure, continue to deny the principle of one man one value." In the case of *Metro Waste Handling* v. *Delhi Jal Board (hereinafter DBJ),*[27] a challenge was mounted against the eligibility conditions and the preferences laid down by DJB for mechanized sewer cleaning and

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[26] *Consumer Education & Research Centre* v. *Union of India*, (1995) 3 SCC 42.

[27] *Metro Waste Handling* v. *Delhi Jal Board*, 2018 SCC OnLine Del 9319 : 2018 Indlaw Del 1317.

transportation. The tender offered preference to bidders who are dependents of deceased manual scavengers, those who are manual scavengers themselves, and members of the Scheduled Castes (SCs) and Scheduled Tribes. The Court observed that "the tender and its system of preferences aims at improving the status and living condition of all those who have hitherto been vocationally stigmatized because of the caste roles they have been consigned into. Invisible and forgotten, those who have performed manual scavenging tasks have worked a day in and day out for a society, which has studiously turned away its face from them and denied their very existence. It is this class of citizens - more than anyone else, who deserves the fulfillment of the promise of dignity and equality." The court also referred to South Africa's Constitution that explicitly recognizes affirmative action. The Court referring to South Africa's Constitution stated that "Affirmative action enables equality, rather than being an exception to it."

Due to the social ostracization of the Dalit community, who are regarded as "untouchables", Article 17 of the Indian Constitution prohibits untouchability. Untouchability has become a punishable offense. The Constitution has even placed the Dalit under the Schedule Caste category that gives them reservation benefits in various fields. Particular attention is also given to protecting their rights. For instance, in the case of employing sewage, an offending employer is liable to get prosecuted under the "Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989."[28] However, this securing shield lacks its enforceability strength due to poor awareness and inadequate information flow amongst the workers and their community.

VIII. ADOPTION OF GOOD PRACTICES AND LAST THOUGHTS

Manual scavenging continues to stigmatize the lives of many Dalit communities, despite India's acceptance and ratification of significant human rights accords. While India's central government has failed to meet its human rights duties, state and local governments are equally responsible for many of the violations. The persistent building of dry latrines by constituent states, as well as the hiring of manual scavengers from Dalit communities, assures the denial of human dignity, work, remuneration, health, and freedom from gender and caste discrimination.

Manual scavenging will almost certainly require a two-pronged approach to be eliminated. To begin, domestic measures to protect the human rights of manual scavengers must be pursued. Indian officials, on the other hand, will

[28] Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India).

not prosecute public officials or private individuals if their citizens approve of the practice. While India has mostly focused on prohibiting manual scavenging on paper, the Parliament should allow citizens to bring their lawsuits against manual scavenging employers. In the field of environmental law, this has proven to be rather effective. If private persons could prosecute offenders without the involvement of the government, this practice might be phased out in the long run. Giving manual scavengers the ability to act independently has an additional benefit. India's civil society, unlike that of other countries, is still substantially segregated along caste lines. Non- governmental groups are encouraged to organize primarily on policies that benefit their shared caste as a result of this segmentation. Because the majority of Dalits are poor, they are less inclined to unite together to fight for their collective good. Encouraging scavengers to behave independently could obviate the necessity for civil society.

If legislators refuse to provide this right, the international community should hold them accountable for failing to safeguard the human rights of a historically disadvantaged social group. This illustrates the second strategy, which is to use international pressure to put an end to manual scavenging. As the law of last resort, international law fills gaps left open by domestic systems that have failed to enforce human rights. Human rights activists use a variety of non-judicial tactics to promote human rights respect. International media, especially social media, should, for example, increase awareness of not only this practice but also the government's refusal to end manual scavenging. In the presence of its people and other countries, the media can undermine a government's reputation and legitimacy, embarrassing it. When compared to typical domestic approaches, this can be more effective at getting the government to act. Furthermore, because India's civil society may not actively campaign on behalf of scavengers, having overseas players mobilize on their behalf is crucial.

TALIBAN GOVERNMENT: THROUGH THE LENS OF GENDER EQUALITY

—Dilafrid Azad*

ABSTRACT

Afghanistan, a country with a rich history, had gone through a significant change in governance over the past few decades. The Afghans are yet to witness a properly democratic and stable government. Afghanistan has always been a subject of concern for the United Nations and the international community as the unstable governments in Afghanistan turned the country into a breeding ground for illegal activities like terrorism and drugs trafficking.

The recent crisis in Afghanistan, which involves the hostile takeover of the Afghan government by the Taliban, only entails the tip of the iceberg. The formation of the Talibani government opened a wide array of issues like the refugee crisis, human rights violations, and curtailment of women's rights in Afghanistan. Taliban is a Deobandi Islamist religious and political movement and military organization in Afghanistan. In 1994, Mohammed Omar and Abdul Ghani Baradar, the founders of the Taliban, started this movement to form a government in pari materia with the Sharia Islamic Law based on Deobandi fundamentalism and militant Islamism, combined.

The Taliban established government in the year 1996 for the first time and held until 2001. Recently, the Taliban has once again reclaimed the governance of Afghanistan by overthrowing the government of the Islamic Republic of Afghanistan through aggressive militant action. Subsequently, the Taliban has been rooting for a patriarchal society in Afghanistan, curtailing the freedom and rights of women.

Gender equality is one of the most fundamental rights ensured to the citizens of most countries across the globe. The United Nations

* B.A. LLB, Section-A, Third Year ROLL NO. 1983052.

also advocate gender equality and is enshrined in the UN charter as one of the most significant parts of humanity and development.

In this article, I will critically analyse the Taliban government's stand on gender neutrality and highlight the plights of women in Afghanistan through extensive doctrinal research.

Keywords: Afghanistan-crisis, Taliban, gender-discrimination, Islamist, Sharia, fundamentalism, gender-neutrality.

BACKGROUND

Afghanistan is situated in central and south Asia. It borders Pakistan to the east and south, Iran to the west, Uzbekistan and Turkmenistan to the north, Tajikistan and China to the northeast. As of 2020, the population of Afghanistan is roughly 31.4 million (3 crores 14 lakhs). Pashtuns, Tajiks, Hazaras, and Uzbeks are some of the ethnic groups that comprise this state. Kabul is the capital of Afghanistan and is the largest city of this state.

Afghanistan became a democracy in the year 2004 and remained so until 2021. Recently, Taliban, an extremist insurgent military group in Afghanistan, overthrew the democratic government of Afghanistan- Islamic Republic of Afghanistan through aggressive military action with an aim to establish their tyrannical rule. Prior to the Taliban takeover, Afghanistan followed a presidential form of government. Afghanistan has a very rocky history attached to it. The Afghans had witnessed the despotic rule of the Taliban previously as well, from 1996 to 2001.

Taliban's takeover of the Afghan government opened Pandora's box for the people of Afghanistan. The social stigma of establishing a patriarchal society is very well attached in the minds of the Taliban leaders.

Ensuring gender equality has always been a central subject for the development of nations and strengthening the democratic roots of a nation. With the onset of the Taliban rule, the standing of the Taliban with regards to gender equality has been clear. Shortly after the fall of Kabul, the Taliban in early September clarified that women will not be permitted to work in high-ranking posts in the government and also ruled out women from the cabinet. The Taliban government also mandated the women in Afghanistan to wear Burqa in public.

Gender parity seems like a distant dream for Afghan women following the formation of the Taliban government. The rights of women in Afghanistan are grossly being violated on a daily basis. The women have been hitting the streets demanding their rights, however, they are being silenced with aggressive inhumane actions.

The actions of the Taliban and the humanitarian crisis in Afghanistan have raised serious concerns for the United Nations and the International community. At present, at least 18 million people (about half of the country's population) are affected[1].

Afghan peoples have been trying to escape the country following the Taliban takeover in search of a better livelihood and to escape the wrath of the Taliban government. The UN agencies have been working closely to aid the situation of the refugee crisis in Afghanistan.

BRIEF HISTORICAL ACCOUNT OF AFGHANISTAN'S STRUGGLE FOR DEMOCRACY

The modern state of Afghanistan was established by the Pashtun commander, Ahmed Shah Durrani. The capital of Afghanistan was in Kandahar. Kabul is now the capital of Afghanistan.

Afghanistan was never a part of the British Empire, however, on numerous occasions, the British troops tried to invade Afghanistan. Three wars were fought by Britain in Afghanistan with the aim to set up British Empire. In 1919, a treaty called Anglo-Afghan Treaty was signed between Britain and Afghanistan, it neutralized the relations between them. It also marked the independence of Afghanistan from Britain. Thereafter, Emir Amanullah Khan introduced Afghanistan's first constitution in 1923. It aimed to establish a monarchy limiting the powers of the tribal leaders. Subsequently, a lot of internal politics and changes of leaders played out in the state.

In Afghanistan, the historical account of a quasi-democracy started in the year 1964. Under the rule of King Zahir Shah, a new constitution was penned with an aim to transition Afghanistan into a democracy. The new constitution was also aimed at catalysing socio-economic modernization. The key elements of the constitution included the introduction of the two houses of parliament, among which, the lower house was to be elected through universal suffrage. Also, the laws which were to be enacted by the parliament were slated to

[1] *Afghanistan: World must Act on 'Make Or Break Moment'-UN Chief*, UN.ORG, https://news.un.org/en/story/2021/10/1102722 (last visited Oct. 21, 2021).

supersede the Sharia law. This new constitution existed for the subsequent eight years until Zahir Shah was overthrown.

During the period of 1996 to 2001, Afghanistan witnessed the tyranny of the Taliban for the first time. The Taliban brought Sharia law and enforced a strict interpretation of it as the law of the state. The Taliban's rule during the period of 1996 to 2001 was one of the most orthodox and harsh the Afghans had ever witnessed. The Taliban government was widely criticized and condemned for the harsh interpretation of the Sharia law by the international community, which in turn exaggerated the hardships of the Afghans. Afghan civilians were massacred in large numbers and were denied UN's food supplies to at least 1,60,000 starving civilians, thousands of homes were destroyed.

In 2001, the United States saw the deadliest terror attack in its history. Terrorists belonging to a terror group called 'Al Qaeda' hijacked four commercial airliners and crashed them into the World Trade Centre which was situated at the Pentagon, the United States, and a field in Pennsylvania, United States. The terror attack killed at least 3,000 people. The mastermind behind the attack, Osama Bin Laden was believed to be sheltered in Afghanistan. The U.S. and the British forces in a military coalition, invaded Afghanistan as the Taliban refused to hand over Osama Bin Laden. The Taliban government was toppled by the coalition forces by launching airstrikes and ground attacks.

In 2004, Afghanistan saw a ray of hope in the form of a new ambitious constitution that was adopted in the state. It envisioned a presidency form of government and enshrined equal rights for women. This was the first genuine attempt to bring the Afghan women to the forefront of society. The 2004 constitution was committed in recognizing the Universal Declaration of Human Rights. It also followed the separation of power principle. The power was divided between the President, the National Assembly, the Grand Assembly, and the Supreme Court.

Parliamentary elections were held for the people to democratically elect their leader. Hamid Karzai won the first-ever presidential election in Afghanistan's history with a vote percentage of 55.4. Around six million people voted in elections for the parliament and provincial councils. 27 percent of the members in parliament were women. From a democratic point of view, this has been the best phase for Afghanistan.

Taliban condemned the new form of governance and labelled it as western influenced. Thereafter, they reorganized their organization and launched multiple armed attacks against the Afghan civilians and the U.S. and NATO forces that were deployed to ensure peace and security in the country.

In 2021, the Taliban overthrew the democratic government of Afghanistan through aggressive military actions. Gradually they captured the whole of Afghanistan massacring whoever stood against them. The President fled the country and the U.S. troops were withdrawn by the United States.

For the people of Afghanistan, the joy of democracy lived very short.

WOMEN AND THE TALIBAN

Taliban's stand on women's rights and women empowerment had been clear from their very inception. They want to enforce a strict interpretation of Sharia Law in Afghanistan. Sharia, derived from the Quran, lays down the guiding principles for leading a good life in accordance with Islamic principles. Sharia law is known to be very strict and orthodox. The Sharia code is morally driven and not backed by the principles of natural justice, rationality, and scientific per se. It is directly derived and interpreted from the Quran. The jurisprudential developments that are of great significance and are incorporated in legal parlance across the world hold no value to this code. The punishments of Sharia law can be as harsh as amputating the hands of the offender for an offense like theft.

The fusion of religion and governance hinders the democratic and secular spirit of a nation. Historically, all the developed democratic nations restricted the subject of religion to an individual's personal affairs and not of the State's, as there's a rigid dichotomy between religion and government. The constitution and laws of secular nations are backed by jurisprudential developments and the notable works of eminent scholars.

Women face the maximum burnt under the Taliban regime's fire. During the initial Taliban regime in Afghanistan (1996-2001), the Taliban had imposed atrocious restrictions on women that were irrational and arbitrary on many fronts. Women were denied from all positions of employment, schools, and universities for girls, and women were eliminated. Women were not allowed to leave their homes until accompanied by a close male relative. Wearing Burqa was a must for the women during the Taliban regime.[2] The women were also banned from showing their skin in public, being involved in politics, or speaking publicly. They were also denied from accessing healthcare delivered by men. Upon disobeying these laws, the punishments were harsh. They were beaten for attempting to study or showing even an inch or two of skin and were stoned to death if found guilty of adultery.[3]

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[2] Charles Hirschkind & Saba Mahmood, *Feminism, the Taliban, and Politics of Counter-Insurgency,* 75 Anthropological Quarterly 339, 340 (2002).

[3] *Women's Rights in Afghanistan*, Amnesty.org, https://www.amnesty.org.uk/files/women_in_afghanistan_fact_sheet.pdf (last visited Oct. 26, 2021).

Some Islamic Fundamentalist argues, wearing Burqa cannot be labelled as oppression as it is an act of submission before god. However, it is very important to note, there's a stark difference between a woman voluntarily wearing a Burqa and a government forcing them to. Hence, this argument doesn't hold any ground in Afghanistan's context. Taliban forcefully instilling their code of morality and belief upon the women is a clear act of oppression and no otherwise inference can be drawn.

The reorganized Taliban that toppled the democratic Afghan government recently seems to possess the same DNA as that of the Taliban between 1996 and 2001. Shortly after they took control of Afghanistan in August 2021, the Taliban assured to allow women to work and study within the limits laid down by Sharia, however, in practice, it says otherwise. A senior leader of the Taliban, Waheedullah Hashimi stated, Afghan women would not be allowed to work alongside men, which if implemented would bar them from employment in government offices and other important sectors like banks, media companies, etc.[4] A cabinet has been appointed by the Taliban government, which have zero women representation. The Ministry for Women's Affairs has also been abolished. Hence, inference can be drawn, the approach towards women's rights and governance, in general, seems very similar to that of the Taliban's previous regime.

In a spine-chilling incident, a woman was allegedly set on fire after being accused of bad cooking for the Taliban fighters in northern Afghanistan. Young women were allegedly being shipped in neighbouring countries in coffins, they were to be used as sex slaves.[5] These reports are evidentiary of the deep-rooted misogyny of the Taliban.

The women under the Taliban regime have been oppressed, deprived of rights, and differentiated, historically and presently as well. Sharia law for the Taliban is just a 'Purdah' before the international community, in practice, they aim to establish a patriarchal society, oppress the women, curtail their rights, and exploit them.

RESPONSE OF THE INTERNATIONAL COMMUNITY

The aggressive takeover of the Taliban received a mixed bag of responses from the international community. China and Pakistan openly supported the

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[4] Alasdair Pal, *Afghan women should not work alongside men*, Reuters (Sep. 14, 2021), https://www.reuters.com/world/asia-pacific/exclusive-afghan-women-should-not-work-alongside-men-senior-taliban-figure-says-2021-09-13/.

[5] Sharangee Dutta, *Can the Taliban be Trusted with Women's Rights? What Recent Reports Say*, Hindustan Times (Aug. 24, 2021), https://www.hindustantimes.com/world-news/can-the-taliban-be-trusted-with-women-s-rights-what-recent-reports-say-101629828926184.html?.

militant government of the Taliban. China welcomed the Taliban government and termed it as a necessary step and an end to anarchy in Afghanistan.[6]

Britain assured to use all possible means at their disposal to hold the Taliban to account in Afghanistan.[7]

The General Secretary of the United Nations, Antonio Guterres stated, U.N. Security Council will use all tools at their disposal to suppress the global terrorist threat in Afghanistan and ensure that basic human rights are respected.[8]

United States, Iran, European Union, Qatar, Germany, and Australia expressed concern over the chain of events that took place in Afghanistan and assured to work towards restoring peace, stability, and security in Afghanistan.[9]

New Zealand's Prime Minister, Jacinda Ardern expressed grave concern over women's access to work and education.[10]

The United Nations, the body which is entrusted to maintain peace and security among nations had been constantly keeping the Afghanistan situation under their scanner. In September alone, UN agencies in coalition with NGOs provided food assistance to more than 3.8 million people, 21,000 children and 10,000 children received treatment for acute malnutrition. 32,000 people were provided with non-food items including blankets and warm clothes for winter.[11]

Immediately after the hostile takeover of the Taliban in Afghanistan, the members of the United Nations Security Council urged the Taliban to exercise utmost restraint to ensure lives aren't in danger and called for an immediate cessation of all hostilities.[12] The United Nations have also reiterated their determination to a peaceful settlement and promote the human rights of all Afghans.

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6 Anath Krishnan, *China welcomes Taliban Govt. as 'End to Anarchy'*, The Hindu (Sep. 8, 2021), https://www.thehindu.com/news/international/china-welcomes-taliban-govt-as-end-to-anarchy/article36367066.ece.

7 Andrew Cawthorne & Jane Merriman, *Global Reaction to Taliban Takeover of Afghanistan,* Reuters (Aug. 16, 2021), https://www.reuters.com/world/asia-pacific/reactions-taliban-takeover-afghanistan-2021-08-16/.

8 *Ibid*.

9 *Ibid*.

10 *Ibid*.

11 UN News, *supra* note 1 (plz chk not clear).

12 *UNAMA (United Nations Assistance Mission in Afghanistan)*, UNMissions.org, https://unama.unmissions.org/press-statement-afghanistan-members-security-council (last visited Oct. 22, 2021).

THE ROAD AHEAD

Afghanistan, a country that had the opportunity to excel on the global stage is now in a humanitarian crisis, with thousands trying to escape the country. Afghanistan is now one of the poorest nations in the world. According to the research of the United Nations Development Programme (UNDP), Afghanistan's 97% of the population is on the brink of sinking below the poverty line by 2022.[13]

Afghanistan became independent from the British in 1919, although it was never colonized by the British. In 1919, a treaty called Anglo-Afghan Treaty neutralized the relation between them as Britain fought three wars against Afghanistan with an aim to colonize them. Having achieved independence as early as 1919, before many other nations which are now excelling at the global stage, Afghanistan missed the opportunity.

In 2010, the U.S. military officials and geologists revealed, Afghanistan has a mineral deposit worth nearly $1 trillion. Mineral supplies like iron, gold, and copper are reportedly scattered across Afghanistan. It also has rare earth minerals including one of the world's biggest deposits of lithium.[14] These mineral resources have the potential to transform Afghanistan's economy if utilized.

Internal politics, wars, instability in the governments, and insurgency hindered the development in Afghanistan. The Afghans saw a ray of hope in 2004 in the form of a democratic government that was formed which aimed to ensure human rights to individuals, equal rights to women, and stability. However, the recent takeover of the Afghan government by the Taliban changed the narrative.

In Afghanistan, Muslims comprise 99.8% of the population.[15] However, the majority of the population rejects the idea of being governed by Sharia law. This is in principle for the fact that religion and governance can never be synonymous. Religion is a set of personal beliefs and its interpretation can vary from person to person. Furthermore, an individual cannot be made bound to follow a specific interpretation of religious texts or religion altogether. An individual cannot also be compelled to follow a religious life. As rightly said by

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[13] *97 Percent of the Afghans Could Plunge into Poverty by Mid-2022,* UNDP.ORG, https://www.undp.org/press-releases/97-percent-afghans-could-plunge-poverty-mid-2022-says-undp, (last visited Oct. 27, 2021).

[14] Julia Harowitz, *The Taliban are Sitting On $1 Trillion Worth of Minerals the World Desperately Needs,* CNN (Aug. 19, 2021), https://edition.cnn.com/2021/08/18/business/afghanistan-lithium-rare-earths-mining/index.html.

[15] PEW RESEARCH CENTRE, Retrieved from https://www.pewforum.org/2011/01/27/table-muslim-population-by-country/ (last visited Oct. 27, 2021).

Thomas Jefferson, 3rd U.S. President, "*The constitutional freedom of religion is the most inalienable and sacred of all human rights.*"

Historically, women across the world had suffered from patriarchal societies. For centuries, the feminists across the world struggled and fought for women's equal rights. The feminist movement first emerged in the 19th and early 20th centuries. The feminist movement's history is divided into four waves. The first wave aimed to promote women's right to vote. The second wave began in the early 1960s and campaigned for legal and social equality for women. Individuality and diversity were focused on the third wave. Around 2012, a fourth wave was identified, social media platforms were used to combat sexual harassment, rape culture, and violence against women.[16] Presently, the majority of the nations in the globe recognizes and respects the Right to Equality principle. Women have flourished and excelled in every field ever since.

Unfortunately, after all the struggles and sacrifices, women are still the victims of patriarchal societies in some parts of the world, specifically Afghanistan.

SUGGESTIONS AND CONCLUSION

The Taliban government in Afghanistan is a threat to the international security. Going down in history, Taliban safeguarded the Al Qaeda terrorists that launched the 9/11 terror attacks in the United States. Afghanistan possess a security threat to the world. Terror attacks in Pakistan have reportedly been increased by manifolds following the Taliban takeover in Afghanistan. An offshoot terror outfit of the Taliban in Pakistan called TTP (Tehreek-i-Taliban Pakistan) is believed to have been proactive and encouraged following the developments in Afghanistan.[17]

United Nations, being entrusted with maintaining international peace and security must play an effective role in easing the tension that unfolded in Afghanistan.

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[16] Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them,* Vox (Jul. 20, 2018), https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth.

[17] Joydeep Bose, *After Taliban Takeover of Afghanistan, terror attacks in Pakistan highest in 4 years*, Hindustan Times (Sep. 28, 2021), https://www.hindustantimes.com/world-news/after-taliban-takeover-of-afghanistan-terror-attacks-in-pakistan-highest-in-4-years-101632806928271.html.

Though the United Nations or any country cannot interfere directly in the Afghanistan crisis as under Article 2, sub-clause (4), "*no members can use force against the territorial integrity or political independence of any state.*"[18]

However, under Article 1, sub-clause (1), the purpose of the United Nations is to maintain international peace and security and to take collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression.[19] The United Nations, in coalition with its member states can enforce this article and pressure the Taliban government to ensure that the Afghan soil is not used for terror activities.

Article 2 of The Universal Declaration of Human Rights (UDHR) provides, no individual should be discriminated against on the basis of sex.[20] Article 23 of The Universal Declaration of Human Rights (UDHR) provides, everyone has the right to work and to freely choose any choice of employment without any discrimination.[21]

Though UDHR is not a treaty and is not a binding legal obligation, however, the fundamental rights enshrined in the UDHR are widely incorporated in the constitution and legal frameworks of major countries. It sets a common standard of human rights for the countries to incorporate and follow. Afghanistan, being a signatory of the UDHR, must respect the standards of human rights as enshrined in the UDHR and provide such rights to its citizens. The United Nations must take strong initiatives in enforcing it in Afghanistan.

The International Covenant on Civil and Political Rights (ICCPR) is an international treaty that lays down plethora of rights in order to preserve and protect the basic civil and political rights. It is an international treaty of great significance and is legally binding to the signatories of this treaty.

Article 2 of the ICCPR provides for the right to non-discrimination,[22] article 3 provides for equal rights of men and women in terms of employment,[23] and article 9 provides for the right to liberty of individuals.[24]

Afghanistan is a signatory of the ICCPR Treaty. The actions of the Taliban government at present in Afghanistan that prevents women to work, restrict them to move freely and subjecting them to cruelty and violence are in gross violation of the ICCPR Treaty. Human Rights Committee, an ad hoc body

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18 U.N. Charter art. 2.
19 U.N. Charter art. 1.
20 G.A. Res. 217 A (III), art. 2, U.N. Doc. A/RES/3/217A (December 10, 1948).
21 G.A. Res. 217 A (III), art. 23, U.N. Doc. A/RES/3/217A (December 10, 1948).
22 G.A. Res. 2200 A (XXI), art. 2, U.N. Doc. A/RES/21/2200A (December 16, 1966).
23 G.A. Res. 2200 A (XXI), art. 3, U.N. Doc. A/RES/21/2200A (December 16, 1966).
24 G.A. Res. 2200 A (XXI), art. 9, U.N. Doc. A/RES/21/2200A (December 16, 1966).

of the United Nations that is entrusted to oversee the implementation of the ICCPR, must act proactively for the effective implementation of the treaty.

Convention on Elimination of All Forms of Discrimination against Women (CEDAW) is another international treaty that obligates the signatories to uphold the equal rights of men and women and to eliminate any form of discrimination. This treaty is often known as Bill of rights for women as this treaty essentially addresses the rights of women.

The Committee on the Elimination of Discrimination against Women is the body that oversees the implementation of the commitments made by the signatories of the CEDAW Treaty. This body can pressurize the Taliban government to enforce the commitments made by Afghanistan through this treaty.

UN Women is another important body of the United Nations, dedicated to women empowerment and advocating gender equality. The UN Women body is empowered to hold United Nations accountable in case it fails to fulfil its commitments on gender equality. UN Women should put pressure on the United Nations to aid the situation of the women in Afghanistan.

In a nutshell, the United Nations, as the protector of the International peace and security, has a huge part to play in aiding the situation of Afghanistan. The United Nations must act in accordance to its charter and ease the rising tensions.

Furthermore, no country has formally recognized the government of Taliban and the Taliban government is desperately looking for international recognition as the economy of the country has been plunging into the abyss. Countries across the globe can pressurize the Taliban government to strictly adhere to the international laws and to enforce the international obligations and commitments in Afghanistan so as to consider De Facto recognition of the Taliban government.

United Nations and the international community should come together as a unit and put pressure on the Taliban to adhere to the international laws and human rights obligations. Desmond Tutu, an eminent human rights activist said, "*If you are neutral in situations of injustice, you've chosen the side of the oppressor".*

The inhumane episodes that unfolded in Afghanistan in the past few months are unscrupulous and arbitrary. People of Afghanistan, especially the women, are in complete darkness and waiting for the world to shed some light. The atrocious acts of the Taliban must be called out and condemned by the international community. The international laws can't be a mere signboard; the nations must adhere to it.

The Afghan crisis should serve as a precedent to other nations that religion and governance never blend well and also, the principles of democracy, equality, and secularism enhance and promote stability of governments. Every country should strive to protect and prevent any form of discrimination.

> *No country can ever truly flourish if it stifles the potential of its women and deprives itself of the contribution of half its citizens.*
>
> —Michelle Obama

BOOK REVIEW
NEIL CHAKRABORTI, JON GARLAND "HATE CRIME : IMPACT, CAUSES AND RESPONSES." EDITION :- 2ND, 2015

—Swati Mohapatra*

About the Authors :-

Professor Neil Chakraborti is the Director of the Centre for Hate Studies and a Professor of Criminology at the School of Criminology. He is also the Director of the Centre for Hate Studies, a world leading research centre whose core mission is to transform responses to hate and extremism through its research and evidence-based training programmes. Professor Jon Garland is Head of Department of Sociology in the University of Surrey. He is also currently a Trustee of StopHateUK, on the Board of the International Network for Hate Studies and on the Steering Committee of the British Society of Criminology Hate Crime Network.

The concept of Hate Crime has been widely debated, and yet there is no consensus when it comes to an uniform definition. But one thing that no one can object to is the ramifications that it has for the victims and the community in general. The Book "**Hate Crime : Impact , Causes And Responses**" is quite peculiar in the sense that the the authors have not wasted much time in giving us a definition, rather they have directed their research on the various categories of Victims, the offender and the relationship between them, the ramifications, the dynamics of hate Crime, and most important what the current legal systems can learn when they have to deal with it.

The peculiarity of Hate crime lies in the nature of the crime. Not only it affects the victims and created a shadow of fear looming with them forever, it creates a fear which seems to be very much imminent for the wider communities. The book examines the nature, extent and harms of hate crime, and the effectiveness of criminal justice responses to it. It covers racist, religiously

* Assistant Professor, KIIT School of Law, E-mail: swati.mohapatra@kls.ac.in.

motivated, homophobic, disablist and transphobic hate crime, as well as other forms of targeted victimisation such as gendered hostility, elder abuse, attacks upon alternative subcultures and violence against sex workers and the homeless. The book also assesses the complexities and controversies surrounding hate crime legislation and policy-making, as well as the continuing challenges associated with the policing of hate.

It is interesting how the Authors begin the first chapter 'Understanding hate crime' by citing illustrations from the past from the 1993 and 1999 instead of a plain straight conceptualisation of the term 'Hate Crime'. The Chapter then moves into categorising the definition into Academic Definition, Official Definition and legal framework in UK. The Authors also try to explain the categorisation of punishment in to simple and aggravated. The method of defining the term through categorising of the Victims of the crime is very comprehensive. The Chapter ends with a conclusion which is basically the takeaway from the same, a guide to further materials and online material. This is a common feature to all the chapters to the book.

Chapter II to VII deals with different kinds of Hate Crimes through different kinds of Prejudices: Racist Hate Crime , Religiously Motivated Hate Crime , Homophobic Hate Crime, Transphobic Hate Crime, Disablist Hate Crime , Vulnerability, 'Difference' and Gendered Violence. The Last category covers all those who suffer from hate, find themselves at the margins of the hate debate even though their victimisation appears to bear all of the hallmarks of that suffered by those groups officially accorded hate crime victim status by the criminal justice system.

Chapter II discusses about Racist Hate Crime, which is very much prevalent in majority of the Countries throughout the world, be it against Blacks, Asians etc. Race based Hate crimes are crimes where the prejudice is towards Victim's Ethnic Identity. This chapter seeks review the existing literature to have the reader a better understanding of one of the most prevalent Hate Crime. It takes the social and legal environment of the United Kingdom and begins by examining race within the context of UK, before moving on to in depth exploration of the same. The Authors have also highlighted how academic research has significantly contributed towards putting together a legal framework and shaping the paradigm of hate crime. For Example: Sir William Macpherson's report into the issues arising from the murder of Stephen Lawrence gave rise to an extensive package of reforms whose implications have been discussed extensively.

The third Chapter deals with Religion based Hate Crime. Religiously motivated hate crime has gained the academic and political eye because of its rapid growing trajectory. Thus the legal protection available to defend faith

communities from such attacks has also increased significantly over the past decade. Through this chapter, the author had tried to explore the underlying factors behind the introduction of this legislation prohibiting it (The Racial and Religious Hatred Act 2006,). The Author has tried to dissect it using two particular examples of religious intolerance – Islamophobia and antisemitism – to illustrate the escalating challenges posed by religiously motivated hate. The Authors have differentiated the Ethnic identity and religious identity, to provide a greater clarity.

The Authors have very interestingly put

> "Clearly, the problem of anti-Muslim prejudice should not be linked exclusively to the post 9/11 era, although the terrorist attacks of the past decade accelerated the process of what Werbner (2004: 464) terms the 'spiralling progressive alienation' of Muslims."

The Authors have also put that how things of religious significance has been systematically used to direct violence at the Muslim Community:-

> "Muslim women are disproportionately targeted as victims of anti-Muslim hate, often because of the way in which visual identifiers such as the hijab or niqab readily demarcate veil-wearers as 'different' and ostensibly anti-Western and act as a stimulant for the venting of anger towards Muslims (Allen et al., 2013)"

The Authors put a different narrative with respect to hate crimes against Jews. The Anti Semitism is not just a religion based hate crime, but it also signifies imposition of racial superiority.

Chapter III deals with homophobic hate crime. It examines nature, impact and extent of Homophobic Hate Crime. It discusses as to how censoring of gay relationship through excessive regulation and condemnation has harmed the relationship between Gay community and Law Enforcement Community. There is massive distrust, and reluctance of the homosexuals in general to approach police whenever they are a victim of Homophobia or a general crime. The Authors have warned that use of homophobic language within educational settings and via social media can be terribly impactful upon young people. Therefore the Education system have to be careful when it comes so to neutralize Homophobia.

Chapter V interestingly deals with transphobic hate crime as a separate category. The Authors believe that trans community have to face with a separate

kind of Hate Crimes which does not get its due attention. Concerns regarding transphobic victimisation have often been included with those relating to the targeting of lesbian, gay and bisexual communities under the 'LGBT' label, suggesting implicitly that the experiences of these groups are similar. The chapter challenges this assumption by untangling the differences between transphobic and homophobic hate crime. It outlines some of the key debates relevant to the analyses of the nature of transphobic victimisation. The Chapter has interestingly put up a fact that Trans people are marginalised by the Gay Community as they believe them to be parasites.

Chapter VI assesses the forms and impact of disablist victimisation, a type of hate crime that has only recently started to receive the attention it deserves from the criminal justice system and academics. Prior to this, disablist harassment and violence were routinely misunderstood by agencies within the criminal justice system, who misinterpreted these as 'motiveless' anti-social behaviour. Through its assessment of the nature of disablist hate crime and its impacts upon those with physical disabilities, learning difficulties and those who suffer mental ill health, the chapter notes that disablist hate crime has a number of distinguishing features that set it apart from other forms of hate victimisation.

In Chapter VII, the Authors shed light on a distinctive but significant feature of contemporary hate studies which is demanding attention because these forms of harassment and violence are motivated by hostility towards group identities but are not routinely viewed as hate crimes (domestic violence, elder abuse and attacks upon sex workers and the homeless). This chapter examines the factors behind why these victim groups find themselves at the margins of the hate debate even though their victimisation appears to bear all of the hallmarks of that suffered by those groups officially accorded hate crime victim status by the criminal justice system.

Chapter VIII assesses the profile, motivations and activities of hate crime perpetrators. The Authors have categorised a segment of the society which is typically underprivileged, and violent, mostly men. The Authors have stressed upon the role of the right wing extremists in fuelling the hate crimes.

Chapter IX deals with theoretical, social and operative difficulties that have affected the regulating of hate crime. The Authors have stressed upon the under and non reporting of incidents The chapter then considers responses to hate crime more broadly, and gives particular attention to the scope and limitations of existing retributive responses and to the need of alternate models of justice and ways of backing for victims. It is interesting to note that the Authors have referred to UK Action Plan entitled Challenge It, Report It, Stop It: The Government's Plan to Tackle Hate Crime which could be used as a reference by other Countries to set out Policy mechanisms to curb hate Crime.

Finally, the last Chapter deals with various International Perspectives of hate crime. The Authors have tried to fill up an important Gap here. The approach to Hate Crimes has always been isolated Country Specific but lacked a cross country analysis. They have analysed the Anti Hate Crime Action plans in different countries and have put forwards the hits and misses.

At the end, the book lays down a way forward by mentioning the Research Gaps, policy gaps by revisiting various concepts regarding hate crimes.

The Book is very much relevant especially for India. Our Indian society does face these evils. Religion and Race based Hate Crimes have become a news piece regularly. We need to understand the gravity of these offenses, so as to bring an effective regulating mechanism. This book serves as an excellent piece to learn, unlearn and build.

BOOK REVIEW
ARPITA MITRA: ICTS, POLICE AND METROPOLITAN CITIES: TOWARDS 21ST CENTURY POLICING IN INDIA, R. CAMBRAY AND CO., [ISBN NO. 978-81-89659-35-6]

—Maneesha Mishra*

The book under review aptly demonstrated the priorities and challenges of 21st century policing, discussing the facets of Police and Policing in India. The author establishes a link between police, Policing and Information and Communication Technologies trying to assess the inter relationship between ICTs and the Police. The book has been formulated on a study undertaken in the metropolitan cities in India with special reference to the Police Commissionerate of Kolkata. It further introduces the reader to different theoretical perspectives in Police, Policing and ICTs and traverses through the evolution of the Kolkata police. The author has assessed the impact of ICTs in modernization of Kolkata Police and elucidated on the impact of New Technology on Police Public relation. The book draws a clear picture regarding the priorities and challenges with respect to 21st Century Policing in India.

In Chapter I the author discusses on the dearth of research on Police , Policing and the intricate interrelations. Further on, the book has dealt with the 3 imperatives of ICTs with respect to Policing, the first one being the need to improve efficiency and effectiveness, secondly to satisfy the demands of external sources of information and finally to meet the demands of new forms of police management and accountability. As a portion of review of relevant literature, on police and policing in English speaking countries, the author has thoroughly discussed on man power planning in Police and Policing, Police Culture, and Police Discretion, Corruption, Police- Public Relation and Community Policing. In the quest for 21st century policing, it has been stressed however that Community policing cannot be easily implemented as there are multiple obstacles in the movement from traditional policing to community policing. It has been highlighted that there is paucity of relevant sociological

* Assistant Professor, KIIT School of Law, E-Mail: maneesha.mishra@kls.ac.in.

research on police and policing and the police is analyzed more at the administrative level as it is the arm of the state. The author has illustrated the various technologies to combat the recent trends in crime and to equip the police. Technologies like Mobile data computer, Mobile Printers, Mobile cameras, Electronic Breath Alcohol Test, GPS, Computer and Internet, Laser Radar, Photo Radar have been lucidly explained and pictorially represented in the context of New technologies.

The second chapter gives the reader an insight to the theoretical perspectives on Police, Policing and ICTs. The author has systematically emphasized on how the concept of police must not be confused with the concept of Policing. Elucidating further on the theoretical perspective on Police, the author has vividly described the evolution of police as an Institution, the characteristics which is particular to all Police Organization namely composition of individual and groups, orientation towards goals and methods used to obtain organizational goals. In elaboration on the theoretical perspective of Policing, the eras of policing have been lucidly illustrated by the author, namely the political era, reform era, community policing era and Twenty-first century community Policing. The illustration shows the journey from primary political leadership and close interaction with the community has come up to a level of Facilitative and partnership with the community. The book illustrates the difference between traditional and community policing in the chapter under discussion and also includes the discussion on Restorative policing which allows the community to establish norms and social boundaries, clearly explaining the behaviour that is unacceptable to the society. The theoretical discussion on Technology and society includes Technological determinism explaining technological change produces social and organizational change, Social shaping of technology, Social Construction of Technology and Actor Network Theory. Further, in the theoretical perspectives on New Technology in Police and Policing, the author draws reference to the previous highlighted three imperatives and stresses on how ICTs have been constrained by traditional structure of policing and police role. The author has also analysed the perspective of digital divide which evolves due to the inequality due to the Internet have and have-nots. The author has concluded the chapter by drawing reference to Social Shaping theory which is helpful for the study. Since the study is concerned with the impact of ICTs in police work in metropolitan cities, the author has deemed it more suitable for the study.

Chapter 3 includes the evolution of the Kolkata police form colonial to the present time. The author has tried to illustrate in the chapter, the multifarious transition of the Kolkata Police since its inception including redeeming itself with new technologies in accordance to the needs of the society. Relying on the theoretical approach, the author has indeed highlighted how the technologies are shaped and constructed according to the social environment to ensure

greater application and utility. The chapter has been classified into 3 parts for coherence namely analysis and evaluation of Kolkata police from its inception till it became a Commissionerate. The second part is about growth of the Kolkata Police Commissionerate to the year of Independence and the Third part is the Kolkata Police since Independence which also includes the guidelines to the Kolkata police as laid down by the Police Act 1861. The author takes the opportunity to delve into the new technologies introduced to aid the police and also analyse the crime structure in the metropolitan city. Such evaluation in the backdrop of community policing also highlights the challenges faced by the Kolkata police in the recent times.

In chapter 4, the reader comes across the assessment of the impact of ICTs in the modernization of the infrastructural and Hierarchical setup of the Kolkata Police. The author has explored the accessibility, aptitude and comfort level of the police Officers in operating ICTs. The Chapter has been divided into subthemes for lucidity and includes the methodology adopted, ICTs, Modernization and Police work and Training and Aptitude of Kolkata Police Officers in operating ICTs. The study is exploratory in nature and the author has incorporated multimethod approach to achieve the objective of the research. Adopting non probability sampling method to collect data through purposive and snowballing sampling, a sample of Police officers both IPS and non IPS was drawn who met the needs of the study. The book under review is a research where the area under Kolkata Police Jurisdiction comprises to be the field of the study and the unit of analysis were the Kolkata police personnel ranking from both IPS and Non IPS ranks to draw a comparison of the response of the officers on the basis of the rank structure. The author has highlighted how the Kolkata police has taken strides towards technological modernization. Through the empirical findings, it is validated that percolation of ICTs there is a deprivation of benefits at the lower ranks. The author has lucidly stated the drawbacks in the infrastructural and hierarchical level and impressed upon allocation of proper funds, infrastructure and a positive approach can aid in the police becoming a High-Tech force. Women police officers have been correctly assessed in the chapter, who have been marked to be deprived of new technology and also have inhibitions towards technology. The author has noted this is in addition to the other differences they have as compared to their male counterpart regarding proper restroom and in service training etc. This in essence affects their performance and as correctly pointed out by the author, the idea of hegemonic masculinity is strongly ingrained in their mental frame.

Kolkata Police, ICTs and Police Public Relations is titled as chapter 5 which deals with the impact of New Technology or ICTs on Police Public Relations. The author relates to how the inefficiency of traditional policing methods led to the redirection of Policing Strategies in order to combat crimes. More so,

without the cooperation of the community, solving crimes and favour of the public would be a difficult task to achieve by the police. In the chapter, the author has addressed the awareness level of the police with respect to ICTs and the view of the police officers whether ICTs can ascertain better police public relations including issues relating to women and children. The chapter highlights the continuation of the digital divide which causes the marginalization of the non IPS officers. Through empirical research, the author has come close to finding that use of ICTs has reduced the response time of the police as a result of increased accessibility. However, success of services is directly proportional to the response of the public. The author highlights the usual problem of unavailability of services to people who are unable to operate or are unaware of new technology driven equipment. The author has revealed that online facilities offered by the Kolkata Police have failed as they are inaccessible by widespread public.

The sixth chapter deals with priorities and challenges in 21st century policing in India where it has been expressed that the police today is a proactive wing of the government than a coercive force of the state. The author describes police force under the principle of new policing in the 21st century is the one which is accountable, well equipped and transparent in its policies and work. As aptly mentioned, police cannot be connoted as a force but suitably be explained as a social service agency sufficing to the needs of various sections of the society starting from maintenance of Law and order, tending to the needs of the vulnerable section of the society. Apart from discussing the priorities, the challenges in India have also been discussed where the author stresses on the growing concerns against the rise of crimes against women, children and senior citizens. Additionally, with the advent of Information and communication technology, the rise in cyber-crime has taken charge. Unreported incidents of cyber-crimes leading to abuse in cyber space coupled with lack of interest and awareness of the law enforcement officers has been described as a challenge. The author has aptly observed that each city has its own uniqueness, issues, demographic and environmental conditions which influence the lifestyle and crime trends. The 21st century police in India have to be pro-active, tech savvy to keep pace with the newer dimensions of crimes and combat them.

In the final chapter of the book, the author has indeed envisaged the unique comprehensive relationship between police, policing and New Technology. It has also been highlighted that new Technology may create marginalization and deprivation in addition to the benefits if it is not rationally used. The author has stressed on how ICTs can act as a handy tool in inculcating good relation and restoring peoples faith in the police force. The chapter acts as a summarization of the leading findings of the research conducted and the author has also recommended suitable measures for improvement of the quality of work of the police. It has been explained how the 80's saw a new era in Policing i.e

Community Policing which promised to restore the faith of the people in the police by making amends in the attitudinal amends in the police work.

The author through the study gives a view to the several reforms that need to be incorporated to overcome the drawbacks evident in implementation of ICTs. Access to Technologies like wireless handset, Computer and Internet and mobile telephones to all ranks and all police stations is deemed imperative. Updating of Intranet Network and Criminal Data banks for accessible information at the respective departments, Development of the Cyber Crime Police Station with skilled officers in the model of "Cybercops" of Andhra Pradesh has been suggested by the author. Furthermore, Cyber Crime Laboratory, Installation of Global Positioning System for vigilance, strengthening of E-Governance, Availability of Computerized cars by Metropolitan police with access of police stations are some recommendations. The suggestions have been systematically categorized under the Hierarchy and ICTs, Infrastructural Changes for pro active police force and Programmes to be initiated to make community policing a reality.

The author has showcased the wide array of information about the metropolitan police with special reference to Kolkata Police encouraging further research. The study engages in the functions of ICTS in the Metropolitan police organization and the new technologies that police officers wish to have incorporated in police work. Additionally, it takes into account the opinion of the police officers about their community relationship therefore leaving a scope for further research on Role of New technologies in specialized departments of Kolkata Police, views of people about the Kolkata Police to name a few.

This book strikes the right chord in explaining the advent of new technologies having influenced diverse functions, adding convenience yet the misuse of it also made the police act to a newer form of crime operating in cyber fora. The book under review provides the reader with valuable information regarding Police and Policing and implementation and effectiveness of ICTs by Metropolitan Police in the present time. The systematic explanation of the theoretical framework helps the reader with substantiate with Community Policing to understand the police as a proactive people friendly force rather than a traditional repressive force. Further, the author draws inference from Social Shaping of Technology to explain the implementation of ICTs for bringing significant changes in work culture to match up with the advancing society. The uniqueness of the book rests in the context that the study is exploratory in nature and the findings of the study are relatable and reach the reader. The author has coherently explained that in terms of policing, ICTs are deemed more accurate, effective resulting in better transparency and accountability of the police. On the contrary, the author has aptly highlighted the existence of digital divide which is often seen to be disadvantageous for the lower rank

officers. The systematic chapterization and categorization of the contents of the study undertaken draws a clear picture in the mind of the reader. The subject matter elaborated in detail in simplified language is immensely helpful for the students and researchers pursuing this field and police officers. This book is an enlightening read clearing the fact that ICTs/ New Technologies are an accessory in aiding the police and they should be utilized rationally and efficiently by the police organizations to bear fruitful results in 21st century policing.

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I, Prof. (Dr.) Bhavani Prasad Panda hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Prof. (Dr.) Bhavani Prasad Panda
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CALL FOR SUBMISSIONS: VOLUME 12 [2022]

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