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VOLUME 10 **ISSN 2229-5542** **2015**

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SHOULD WE BE AFRAID OF DESIGNER MAN

Katrin Nyman-Metcalf & Sven Kõllamets

Abstract

Modern technology and medicine increasingly allows scientists to influence, mould, and design the future, destiny and opportunities of individuals. By improving cures for illnesses, creating spare parts for the human body or supporting its functionality, life is prolonged, the functionality of the human body is improved and its characteristics are influenced or changed in different ways. Science even allows for intervention in the creation of new life. This raises many philosophical, ethical and legal questions. Does mankind intervene too much in "natural selection" or is this process and progress part of the natural selection? Should creating life and influencing its characteristics be allowed and to what extent? Do we know enough about the possible consequences of these practices; by what means should law intervene? Furthermore – should information of such manipulations, improvements and creation be considered private and sensitive data and if so, how can privacy actually be maintained since the technology of detection also constantly improves and more and more information is collected "in the interest of the individual and society"? Last but not least – is technical intervention in the creation and functioning of the human body already, or will it become, simply business for profit?

Keywords: Bioethics, genetic eningeering, data protection

Katrin Nyman-Metcalf

~ Department of Law, School of Business and Governance, Tallinn University of Technology, Estonia: katrin.nyman-metcalf@ttu.ee

Katrin Nyman-Metcalf has a Ph.D. in public international law from Uppsala University, Sweden. She is Professor of Law, in the Department of Law, School of Business and Governance, Tallinn University of Technology, in Estonia. Her research focuses on law and modern technology.

Sven Kõllamets

~ Department of Law, School of Business and Governance, Tallinn University of Technology, Estonia: sven.kollamets@ttu.ee

Sven Kõllamets is pursuing Masters in Law & Technology and Gene Technology in in the Department of Law, School of Business and Governance, Tallinn University of Technology, in Estonia.

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INTRODUCTION

Due to religion, culture, tradition or political movements, states have different viewpoints on ethical issues. This can be seen globally but even in the relatively homogenous European area. In Europe, many questions related to biotechnology are a shared competence between the European Union (EU) and its Member States. In addition, the European Convention on Human Rights (ECHR) as applied by the European Court on Human Rights (ECtHR) have an impact on the understanding of the ethical questions that arise in all kinds of sometimes unexpected ways.

The present paper discusses some of the many ethical and legal questions posed by biotechnological and related developments linked to intervention in biological processes, as well as examines the approach taken by the ECtHR and the EU. As this is a rapidly developing area, what legal scholars can hope to do is not to solve problems but rather to raise questions and highlight the issues that must be considered when planning new interventions. Like in most areas of rapid technological development, the question arises whether legal regulation or technical development should come first? Should technology

be allowed to develop first, which may lead to situations that are very difficult to reverse, or should instead legal regulation presume future developments, which may hamper development? In many ways this is a "chicken-or-egg" question – unanswerable but very challenging. It is very hard or even impossible to regulate technology before it and its consequences are well known, but it may be just as hard to change an established situation. Ideally, technology and law should go hand-in-hand with a lot of interaction between specialists from different fields. Interdisciplinarity has become a necessity and no longer an academic choice. Legislators and regulators have always fitted new phenomena into existing legislation and regulation, created for a different situation.[1] This in itself is nothing new, but with rapidly evolving technology the situations to be accommodated are more complex. We may soon stand face-to-face with Designer Man and as lawyers we need to be prepared to answer his questions. However, this paper does not purport to give any final answers, but as said above, what is most relevant is to open our minds to the questions: to highlight what it is in "designing men" that requires ethical and legal reflection.

1. NATURAL OR UNNATURAL SELECTION

As a background to the discussion, it is important to define what is national selection and its relation to the Designer Man. This discussion starts from the very creation of life, with in vitro fertilization (IVF). After that it will touch upon the changes the Designer Man makes to the natural selection and how Designer Man himself, in return, changes.

When discussing natural selection, it is essential to start with Charles Darwin. He defines natural selection as preservation of favourable variations and the rejection of injurious variations. Darwin explains that natural selection almost inevitably causes much extinction of the less improved forms of life and determines how far new arising characteristics shall be preserved. Variations neither useful nor injurious would not be affected by natural selection, and would be left a fluctuating element.[2] Natural selection actually ignores the vast majority of inherited traits and genes, acting as a policeman that removes only very big differences from accepted norms. Inherited differences in survival are less important than traits associated with mating ability and fertility.[3] Darwin was convinced that natural selection has been the

[1] Brownsword, R. and Goodwin, M. (2012). *Law and the technologies of the twenty-first Century,* 19–21

[2] Darwin, C. R. (1859). *On the origin of species by means of natural selection, or the preservation of favoured races in the struggle for life*.

[3] Endler J.A. (1986). *Natural selection in the world,* 336.

main but not exclusive means of modification of species. It is sometimes forgotten that Darwin talked a lot about variety of characteristics and traits, about adapting to changed conditions, claiming that dominant species vary the most. Traits that better adapt individuals to altered conditions would tend to be preserved. From that Darwin concluded that creations of nature should and would logically be infinitely better adapted to the most complex conditions of life, than creations of man.[4] However, what could be slightly disadvantageous in one set of conditions may prove to be a critical success factor in changed conditions. When evaluating what Darwin claimed, it must be borne in mind that in 1859 mankind did not possess such a wide range of technical means to manipulate human (DNA) traits as what exists today, so it could be claimed that nowadays man's production has a much better starting position and may better compete with nature.

During history there have always been a small number of people who are naturally immune to plagues or other illnesses, which has enabled mankind to ultimately survive even the deadliest of diseases. Even in relation to the modern time plague – HIV/AIDS – there is a group of people who have natural resistance to the disease due to certain mutations in cell surface markers.[5] What exactly causes such immunity and why it is found in particular individuals is not known. These kinds of mutations could potentially cause other disadvantages, discomforts or lower life quality, but would result in survival in case of HIV or other pandemic outbreaks of illnesses. It has been shown that resistance to HIV-1 infection in Caucasian individuals bearing mutations of the CCR-5 is most likely associated also to the resistance of smallpox. Another group of scientists have shown similar resistance among prostitutes in Nairobi, Kenya.[6] Some of this resistance may be dependent on continuous exposure to HIV, but it is intriguing why some persons through exposure develop such resistance instead of the disease.

Furthermore, there is a notably strong natural selection on genetic variants that affect the time between the HIV infection and the onset of AIDS. The genetic variety (polymorphisms) will therefore be subjected to considerable natural selection, because the increased survival time and possibility to be fertile during the peak of fertility period of the infected person.[7] In South Africa, Botswana,

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[4] Darwin, *Supra n.* 2, section 2.

[5] Marmor, M., Hertzmark, K., Thomas, S. M., Halkitis, P. N. and Vogler, M. (2006). "Resistance to HIV infection", *Journal of Urban Health,* 83(1), 5-17, at 6.

[6] *Ibidem,* 10. Also Samson, M; Libert, F; Doranz, B.J; Rucker, J; Liesnard, C (1996) "Resistance to HIV-1 infection in Caucasian individuals bearing mutant alleles of the CCR-5 chemokine receptor gene" *Nature* 22:382(6593):722-725.

[7] Schliekelman, P., Garner, C., Slatkin, M. (2001). "Natural selection and resistance to HIV." *Nature* 411, 545-546 (31 May 2001) | doi:10.1038/35079176

Zimbabwe and Zambia, the delay between post-infection progression to AIDS is 2–4 years and it has increased by one year in the last decade.[8] Here natural selection appears to achieve a useful result for human survival, something the Designer Man might emulate.

Another interesting aspect is the phenomenon of altruism in the context of national selection. Can this enforce fertility and survival, should this be one of the aims of Designer Man to preserve or even reinforce? Kin selection is based on 'inclusive fitness', the idea that, for example, sterile workers can accrue reproductive benefits by helping their relatives, as is shown e.g. by bees as well as some ants and termites. In doing so, they help shared genes to survive and get passed on to the next generation. This provides a route for eusociality[9] to evolve. Scientists found that a gene for eusociality could spread readily as long as the advantages it confers — in this case increasing the lifespan and reproductive success of the queen — kick in even for small colonies. Notably, eusociality evolves with difficulty but is very stable once it is established. Nowak argues that eusociality implies that offspring stay with their parents and help them to reproduce, and so relatedness is in his opinion merely a consequence of eusociality and does not necessarily mean that relatedness is also a cause.[10] It may be that human altruism could be shown to everyone that is believed to possess important traits in survival of the population and must be helped to be able reproduce.

Taking into account the previous, we could argue that diversity and even altruism are keys to survival, because they ensure better adaption to different changes every individual encounters during his or her life cycle. Such adaption must lead to better procreativity (children, grandchildren). Even in case of chronic diseases, natural selection aims to provide a longer fertility period. Is there a need for the legal system to take an interest in such selection, just because it is not only created by nature but nature is given a helping hand?

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8 *Ibidem.*

9 *Eusocial:* living in a cooperative group in which usually one female and several males are reproductively active and the nonbreeding individuals care for the young or protect and provide for the group <*eusocial* termites, ants, and naked mole rats>; http://www.merriam-webster.com/dictionary/eusocial

10 Gilbert, N. (2010) "Altruism can be explained by natural selection" *Nature (*Published online 25 August 2010 doi:10.1038/news.2010.427); Nowak, M. A., Tarnita, C. E. & Wilson, E. O. (2010) "A two-part mathematical analysis" *Nature* doi:10.1038/nature09205

2. GIVING NATURE A HELPING HAND

It is important in order to have a dispassionate debate to keep apart different approaches to the issue of creating or altering life using technology (test tube babies). A conceptually strict scientific discussion in order to claim that such technologies disturb natural selection must show that the methods could somehow decrease diversity or ability to adapt and multiply in numbers or vitality. Ethical, legal and other related question marks are different matters.

Before moving on to IVF issues, which is the main tool the Designer Man uses, in the legal and ethical context it may be worthwhile to stress that many things modern science can do, it has learnt from nature: science mimics nature. Twins are basically clones; mutations are a natural part of the life cycle, with fatal mutations resulting in death. Characteristics like different eye and hair colour would be traits of insignificance unless it improves the individuals´ chances of getting a mate and carrying on his/her genes – a process, which involves "natural" combining and changing (mutations) of genes, traits and characteristics. At this point we cannot clearly claim that science would create more errors than nature, nor can we claim the opposite.

But Designer Man still has to overcome fears and resistance. The stronger ethical and legal debate about IVF begun with the birth of the first IVF child Louise Brown in July 1978,[11] but the history of legal challenges on the subject started even before her birth with a tort liability case concerning destroyed in vitro embryos.[12] At this time, the way embryos as an element of an IVF process should be regarded and whether such process was legal and ethical in the first place was undetermined, which led to a hospital worker deliberately destroying the culture for ethical reasons. The court found in favour of the plaintiff on some issues (recognising their emotional distress) and for the defendant on others, (the destruction of property)[13] indicating that the way an IVF embryo should be regarded by the legal system was far from clear. Neither the US nor the European legal systems have taken a clear and consistent approach to the issue of assisted fertilization, but rather case law as well as legal instruments have appeared *ad hoc*. Today, issues of implants like ICT implants and the question whether they are part of a human and part of the bodily integrity of the person similarly raise

[11] Turkmendag, I.; Dingwall, R.; Murphy, T. (2008) "The removal of donor anonymity in the UK: The silencing of claims from would-be parents" *International Journal of Law, Policy and the Family* 22, 283–310, at 285.

[12] *Del Zio v. Presbyterian Hosp. in the City of N.Y.*, No. 74 Civ. 3588 (S.D.N.Y. Nov. 9, 1978)

[13] *Ibidem.*

questions when previous understandings of what the human being is are challenged.[14]

It is necessary to make a brief historic exposé in the context of this issue that went from theoretical basis to practical implementation more than 35 years ago. Like with many other issues that combine law and technology, the legal issues are only dealt with once the new development or invention is already made. This may be the only logical way to do it – this comment here is not intended as a criticism – but nevertheless it means that the legal profession has to play catch-up. In the case of IVF, several scholars at the time stressed the need to modernize the legal framework and the status of sperm and egg donors, surrogate mothers, the procedure and consequences of how to designate the father in birth certificate, and so on. Krever even implied in 1975 that the advances in technology (IVF and development in an artificial uterus) "may result in the "birth" of one who, though having human attributes, may not, in law, be a human being."[15] He writes about a "creature who, for the purposes of the law, especially the criminal law, which defines when a child becomes a human being in terms of "old-fashioned" motherhood, may not be a human being, so that putting him to death may not be homicide."[16] Today few people would make such radical statements about children born using various techniques to assist pregnancy, but the point may still have some relevance if certain legislation is drafted in such a way that such dramatic consequences may be argued.

Clearly a number of practical legal consequences arise much before the issue of possibly killing a person born with the help of different technologies.[17] The legal status of a frozen embryo is still not clear in many jurisdictions. This leads to the

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[14] Roosendaal, A. (2012). "Implants and human rights, in particular bodily integrity", 81-96, in : Gasson, M.; Kosta, E.; Bowman, D. M. (eds.). *Human ICT implants: Technical, legal and ethical considerations,* at 83-84

[15] Krever, H. (1975). "Some legal implications of advances in human genetics" *Canadian Journal of Genetics and Cytology* 17(3), 283-296

[16] *Ibidem.*

[17] The more part-machine we become, the more issues of responsibility and liability will arise. This article does not permit to explore these in more detail and it also would lead a bit away from the main topic, but as just one interesting example from Gasson, there has already been a case about a man with a mind-controlled arm prosthesis who could obtain a driving licence – but who later was tragically killed in a car accident while driving. What if he has killed someone else and would argue the reason was a malfunction in his prosthesis? Gasson, M.N. (2012) "Human ICT implants: From restorative application to human enhancement", 11-28 : in Gasson, Kosta, Bowman, D. M. *Supra n.* 14, at 15.

question of who retains custody of any such embryos.[18] If one person wants to bring the frozen embryos to term and the other does not, who has the right to say yes or no? Should someone be forced to become a parent against their will because of decisions they may have taken much earlier under perhaps very different circumstances? This was the question the ECtHR had to determine in the *Evans case* in 2007.[19] If the frozen embryo is thus brought to term against the wishes of one of the persons involved, is the person seen to have full parental rights and obligations? In the case of signed contracts required by clinics, will they be upheld in courts?[20] Although there is case law on these matters, both the case law and treatment in legislation is still just developing, even if the potential situations are already real.[21]

In trying to understand the historical reasons and dilemmas, it is interesting to see that many scholars, when they talk about "test tube babies" and IVF, point out that mankind´s historical drive to invent new safe ways of birth control is closely tied to the subject and historically precedes it. In other words, people first learned effectively how to stop making babies and then how to start making them by other technological means. Both subjects have been associated to individual freedoms, especially the freedom, autonomy and self-determination of women to choose when to have babies, to cancel pregnancies and to have children on their own terms. This is an issue that is often mentioned as an example of a question on which EU Member States cannot reach a common understanding and regarding which both the EU Court of Justice[22] and the ECtHR[23] must show restraint in trying to create a common basis. The courts rather deal with the right to have information than the right to abortion. Such issues raise the question of what role ethics may have when there is a question of exercising free choice.[24]

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[18] *Kate Jane Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 (White J). "Commentary" (2012) *Medical Law Review,* 20, 227–245, at 230-232.

[19] ECtHR: *Evans v. United Kingdom,* no. 6339/05, Judgment Apr. 10, 2007.

[20] *Jonathan Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, [45](f)(i). "Commentary", *Supra n.* 18, at 226.

[21] As an example of the kind of traditional legal issues that have to be seen in a new light because of new technologies, see Gibson, A. Zafirova, E.; Boesch, S.; Michaels, M. (2013) "Assisted reproductive technology and inheritance law: Differing jurisdictional approaches to determining heirship in the world of modern reproduction" *Trusts & Trustees* 19 (2): 190-214.

[22] Case C- 159/90, *Society for the Protection of the Unborn Child - Grogan.*

[23] *A, B and C v. Ireland,* no 25579/05, Judgement of 16 December 2010 stated that people have the right to find information on abortion.

[24] Ethics is not a question of just a personal preference, but something wider than that – opinions and views of a community. Papaux; A. and Wyler, E. (1997) *L´éthique du Droit International,* 12.

3. THE ETHICS OF "HELPING NATURE"

It is clear that birth control and ability to cure or save unborn babies is perceived as more "normal" or "ethical" by society than various means of assisted pregnancies. This is to a large extent due to the fact that people have got used to such phenomena, which when they were first invented also caused a fair amount of ethical discussions. IVF is newer and as it is more "intrusive" than birth control or pre-natal care, people needed more time to get used to it. The perceived abnormality is reflected even in the used terms – abnormal reproduction in Australia, unnatural reproduction (in UK), or artificial reproduction in US.[25] Therefore, insemination can be artificial, but the expressions "artificial birth control" or "artificial medicine" are generally not used. Yet IVF is as "natural" as medicine, as was pointed out by Singer and Wells already 30 years ago.[26]

It seems as if the lawyers and scholars who wrote about the juridical and ethical challenges already in the 1970s and 1980s[27] were very insightful despite the technologies they analysed being so new. This is shown by the fact that the first court case for damage preceded the actual successful use of the technology.[28] What there still are no answers to are questions about what decision would be ethical, should there be room for pity in the legal cases and should the courts play God: give more fuel and opportunities to Designer Man, support commercial use of genetic information and manipulation?

In practice, there have been cases in which the courts have had a hard time to determine the legal status of a designed test tube baby. The juridical system and courts nowadays in reality indeed have difficulties deciding the legal status and rights of human beings conceived by the help of IVF and surrogate mothers.[29] Flannery, Weisman and others already in the 1970s highlighted some of the legal issues. They examined issues that IVF raised in the end of the 1970s about procreation and pure research; potential tort liability for injuries that might occur. It can be observed from their article how big a role the relevant ethics commissions had in addressing these issues.[30] Other issues included the problem of visitation

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[25] Annas, G. J. (1984) "Making babies without sex: the law and the profits" *American Journal of Public Health*, 74(12), 1415–1417.

[26] Singer P.; Wells D. (1983). "In vitro fertilisation: The major issues" *Journal of medical ethics*, 9, 192-195

[27] Flannery, D. M., Weisman, C. D., Lipsett, C. R. and Braverman, A. N. (1978-79) "Test tube babies: Legal issues raised by in vitro fertilization", *Georgetown Law Journal* 67, 1295.

[28] *Supra n.* 12.

[29] Gibson *et al.*, *Supra n.* 21.

[30] Flannery *et al.* (1978-1979).

rights, alimony and other family law issues – what should courts decide, if a couple that has previously frozen embryos, decide to get a divorce? Even if the in vitro baby is adopted by the father and bears the fathers' name, the mother could try to argue that he is not the father.[31] In more recent times, the ECtHR has had the occasion to determine if a woman has the right to insist on using stored embryos if her ex-partner withdrew his consent, finding that there was no such right. The ECtHR stated that IVF treatment "gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientiûc developments"[32] and the courts must be sensitive to different interest and not interpret rights too widely if there is no legislative support for them.[33]

Recognising ethical questions that will be seen differently in different cultures, the ECtHR has been sympathetic to the right of its member states to decide on assisted pregnancy issues although it expects the states to be open and receptive to technological developments. As they state in *S. and H. Case* : "Nevertheless the Court observes that the Austrian parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society noted above. The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8 § 2 of the Convention, added that the principle adopted by the legislature to permit homologous methods of artificial procreation as a rule and insemination using donor sperm as an exception reflected the then current state of medical science and the consensus in society. This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future."[34]

The way the thinking around IVF and its relationship to "regular" conception changes can be illustrated by the developments on anonymity or not of sperm donors. In the early days of use of such donations, on purpose a mix of donors per cycle were deliberately used to preserve anonymity. From this, the development has gone to legislation in many counties giving children a right to find out who the donor is.[35]

When determining the ethical issues, it must be borne in mind that every change

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31 *Ibidem.*

32 ECtHR: *Evans v. United Kingdom,* no. 6339/05, Judgment Apr. 10, 2007, at 81. See also Thornton, R. (2008). "European court of human rights: Consent to IVF treatment" *I-Con* 6: 2, 317-330, at 321.

33 Thornton, *Ibidem*.

34 ECtHR: *S. and H. and others v. Austria* no. 57813/00, Judgement, 3 November 2011, 117.

35 Turkmendag, *Supra n.* 11*,* 283.

man has introduced through treatment or manipulation in a "test tube" will thereafter start living its own life, be subjected to numerous other changes and mutations during its life-cycle that could never be predicted. This could potentially in the end, after many generations, result in the positive characteristic introduced to ensure vitality to become the opposite. This (DNA) could be compared to a computer system, which has its file and operating system. We have changed some nucleotides (files, bites) and it improves the work of the system until it encounters new stimulus (update, installation, damage) making the entire system first operating slower and then completely crash all of the sudden.[36]

4. GOOD OR BAD DESIGN – OR A MATTER OF TASTE?

If it is very hard to predict or control whether a technologically made mutation will remain beneficial even after many generations, it is equally difficult to estimate whether the changed traits might in fact become desirable in a later changed cultural and social environment. With enough patience, people's values might change over time and generations. Or, on the other hand, history also shows that humankind reacts to rare and uncommon traits in two main ways. The deficit characteristic is either perceived as valuable and desirable or frightening, alien and repulsive (witches, demons).

The temporal as well as geographical variations in what human characteristics are regarded as desirable can easily be observed through very simple, everyday reflections. Just moving from an art gallery with voluptuous nudes painted by Rubens to a modern fashion show with near-anorectic models can be on such example! Another example is how in medieval times, being tanned and muscular was perceived as the signs of being repulsive and poor as only poor peasants needed to be out in the sun working, not having the rare and desired luxury available to the rich to stay inside, be pale and eat themselves fat. Nowadays in increasingly many parts of the world a majority of people have sitting office jobs, not having time to eat right, work-out or be outside. Therefore, many are pale and fat and only the rich can afford to take the time to take the sun, visit solariums or gyms to train and be fit and desirable! Designer Man like any design needs to be trend sensitive.

Yet we could argue that the value of genetic traits can change according to how much of these traits we can find in society, how rare they are or how used to certain traits we are. Defining "good or bad" traits is very hard if not impossible,

[36] Skoudis, E. (2009). "Information technology and biotech revolution", Kramer, F. D., Starr, S. H., and Wentz, L. K. (ed.). *Cyberpower and national security*.

describing challenges that the revolution of biotechnology and future technological advancements could bring. Individuals have only perceptions of what traits are "good" or "bad" or "desirable" and what could be so in the perceived future, based on cultural, historic and sociological criteria more than on scientifically relevant characteristics. The perceptions may or may not become a reality. This is the case for most characteristics apart from the very basic elements that determine survival. But as physical appearance in most species is an important determinant for reproduction success, such traits are not evolutionary irrelevant. Given the necessary element of "taste", law really cannot regulate this very well and can define only a wide general frame. Mankind must be vigilant and remember it is never all-knowing.

If the idea of altering unborn babies appears uncomfortable when one thinks about altering appearances just to fit today´s "design", other possible actions can directly target defects that threaten life or the quality of life.[37] With the help of gene therapy it is in theory possible to cure genetic illnesses by patching up mutations already in the test-tube or inside the uterus ("patches" and "updates" are just inserted to cells using harmless virus-vectors that bring the necessary data to the right place of the genetic programme of the cell).[38] Having ethical reservations to creating a prettier baby by modifications to a foetus do not necessarily translate to having the same reservations to enabling an unborn baby to be healthier – even if the methods used to obtain the result may be similar. Similarly, certain implanted devices like cochlear implants for hearing problems or pace-makers exist and are generally accepted without having posed much of an ethical dilemma. However, with the same kind of technology all kinds of implants may be made, to enhance or improve rather than to deal with a specific problem.[39] What is it that determines if something should be allowed or not? This illustrates why legal regulation can be difficult: law likes to be able to set clear limits based on objective criteria.

5. READ ME LIKE AN OPEN BOOK

This brings us to the next group of questions concerning privacy and protection of sensitive information. If we have such an extensive information about the way life has been created, diseases cured and characteristics changed (modifications of DNA) and we intrude so much into the very "building plans and architecture" of

[37] Pray, L. A. (2008) "Embryo screening and the ethics of human genetic engineering". *Nature education* 1(1):207 http://www.nature.com/scitable/topicpage/embryo-screening-and-the-ethics-of-human-60561

[38] http://www.cell.com/retrieve/pii/0092867476901331

[39] Gasson, M.N., Kosta, E. and Bowman, D.E. (2012) "Human ICT implants: From invasive to pervasive", 1-8, in: Gasson, *et al, Supra n.* 14, 2.

a human being, as a consequence a lot of information gets revealed, collected and stored. Potential leakage of this information can be very unpleasant and even potentially harmful to individuals and society as a whole, which means that the information must be protected from violations.

The more information about the grand design – DNA – we acquire, the more important it becomes to safeguard and protect this information. ECtHR has held in numerous cases that the private life, family life and sensitive information must be protected.[40] It is the obligation of the state to take measures that this is ensured and that the state has necessary legal framework. If it becomes known what kind of "design changes" have been made with the individual or what kind of medical incidences have happened, it could create unnecessary and disproportionate intolerance and attitude change from others, which can have serious consequences for the private life of the individual including making it impossible for them to lead their private lives in a normal fashion. Knowledge of genetic information would reveal characteristics that could influence anything from the chances to meet a partner and have children to cost and availability of insurance, including affecting employment prospects or leading to ridicule or mental stress. The ECtHR has held in case 28957/95[41] that Christine Goodwin's need to change the sex in birth certificate was necessary and proportionate, there was no sensible reason or threat to public safety and democracy to refuse this as this information could bring suffering and discomfort.[42]

The EU has several different Directives concerning the collection of biomaterial and data. These include Directive 2001/20/EC concerning clinical trials[43] and Directive 2004/23/EC which introduced common standards for donors, acquiring, testing, processing and preserving cells and tissue.[44] The aim of the last Directive was to assure the protection of human health, but it only regulates questions of inserting organ or tissue in the human body and not any other areas of use (in vitro

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[40] Some examples include *S. and Marper v. the United Kingdom* No. 30562/04 and 30566/04, Judgement December 4, 2008 and *Avilikina and others v. Russia* No. 1585/09, Judgement June 6, 2013, related to DNA and/or genetic information.

[41] *Christine Goodwin v the United Kingdom* No. 28957/95, Judgement of 11 July 2002.

[42] *Ibidem,* 91.

[43] Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use

[44] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells

research and animal experiments).[45] There are other legal issues as well – for example, a biobank must ask permission and give information about which way and for what aim any samples are going to be used: this is not unproblematic as the technology changes so fast it might be impossible to predict new ways in which biological material could be used to benefit mankind. The EU data protection legal framework is in the process of change generally.

When it comes to implantable ICT devices that emit signals, the data protection issue takes on an extra dimension. Not only is it then possible to track people through devices we carry like mobile telephones but the device is actual part of the body. This is not science fiction, as implantable devices that emit signals are already used in medicine, where the ability to communicate with the device is an important characteristic of it.[46] In 2009 in the course of an experiment on implantable ICT devices, the first instance of a person infected with a computer virus occurred.[47] On a more positive note, in 2006 the first recorded life-saving incident thanks to implanted ICT devices happened when a policeman with severe head trauma could be rescued largely thanks to the quick access to his medical records through an implanted chip.[48]

The move away from anonymity of sperm donors led to shortage of donors and "reproductive tourism" to places where it was still possible to have anonymity,[49] as the interest in having the information available or not is normally very different from the viewpoint of different actors. Donors will in most cases likely not want their names and details to be known, as their role in "making the baby" is from the social and emotional viewpoint very limited. The parents that bring up the child may also prefer that their child regards them as parents rather than the donor whose role was limited to donation of genetic material. If the child has a right to know or whether it would be more ethical to permit anonymity is not an easy question to answer and the fact that legislators in many countries have answered it by preventing anonymity[50] does not deal with the ethical and other consequences of the issue. It rather looks like an attempt to deal with a complex new situation by finding an apparent straight-forward solution, avoiding rather than confronting

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[45] *Ibidem.*

[46] Gasson, *Supra n.* 14, 12.

[47] *Ibidem,* 24.

[48] Rotter, P., Daskala, B., Companó, R., Anrig, B. and Fuhrer, C. (2012). "Potential areas for RFID implants", 29-39 in Gasson, *et al, Supra n.* 14, 31.

[49] Turkmendag *et al., Supra n.* 11, 284.

[50] *Ibidem.* There is no European standard on this issue and it is within EU Member State competence rather than that of the EU. The ECtHR has not taken a stand on this matter.

the various ethical questions. As with so many legal questions related to new technologies, the main instinct is to make the new situation as similar as possible to existing situations, regardless of whether it actually compares well with the "old" situation.

Another issue related to access to information is the "right to be forgotten" and the "right not to know". Is it ethical to tell the person he/she or a family member is going to be sick, if it cannot be prevented? Is it better to give the person a possibility to take it into account or allow the peace of mind of not knowing? Should there be liability if the Designer Man, possessing that knowledge, has created mental suffering by giving this information about future illness? How should Designer Man act? The answer is that a balance must be found by assessing the possible negative results of both releasing and not releasing the information, replying on the principle of proportionality. Information must not be released if it creates unnecessary suffering to a person and his family, unless this information can be used to treat the person or to prevent or avoid possible health risks and conditions. This general pronouncement however, may not be enough to deal with the future technical capabilities and knowledge base.

6. PRICE OF GOOD DESIGN

When discussing Designer Man, the cost of good design cannot be forgotten! The question is what role profit should have when determining the framework in which genetic experiments and biotechnology operates. Many biobanks, hospitals and research centres are privatized, with the public sector being unable to fund cutting-edge research or non-necessary medical procedures. It is very hard to answer the question how much money it is ethical to make for IVF and other treatments?

Richard Tittmuss suggested[51] that outlawing the purchase and sale of blood contributes to altruism in society by refusing to put a price on a priceless "gift", and that this is a good thing for all concerned, even if it would likely lead to under-supply and inferior product. His ideas had an important impact on the debate that in the 1970s was quite new. The argument now concerns selling embryos and leasing of wombs of surrogate mothers.[52] Surrogate motherhood is already leading to commercializing childbirth in the sense that the unrelated surrogate mother is "paid" for her services by contract; and since the baby is given up, this could

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[51] Titmuss, R. (1970). *The gift relationship: From human blood to social policy*.
[52] An example from the popular press: "Faut-il remunerer le don d´ovocytes?" *Marie Claire,* 2014, 60

constitute as “baby selling”. According to Annas[53], some courts in the US have held that giving money to surrogate mothers to carry a child is not permitted, but paying for relinquish of parental rights is allowed. The rental service of a wombs ranged from $ 10 000 to $ 125 000, if the womb belonged to a person with exceptional health, beauty and genetic background. Furthermore, the medical procedure which allows faster surrogate embryo transfer is patent protected. To prevent misuse, the UK stipulated according to Annas, that no ownership of embryos should be established and sperm donors should not be paid money; Australia had regulated to destroy the embryos after the donor´s death to prevent them to be used as the third party sees fit.[54]

The move away from anonymity for sperm donors led to the profile of the donors changing, as shown by studies in Sweden – one of the first countries to move away from anonymity in 1984. Instead of students and men in military establishments whose main motivation for donating sperm was presumably monetary, without anonymity the donors were rather somewhat older married men with children who wanted to help childless couples out of altruism, attracted by new principles of recruitment of donors.[55] From the medical viewpoint the chance of success with the sperm of younger donors is greater and anecdotal evidence would also indicate that women would often prefer characteristics such as virility and youthfulness. However, it appears as if many states have a problem with allowing the design for Designer Man to be purchased based on just the taste of the purchaser. Instead the state recognises a right to have views, in a way in which it does not interfere with how people make choices who to make babies with in the “natural” way.

Opposition to the market forces operating in the “human design” market may also be affected by the increased use of ICT solutions in this context. Developments in implantable technologies are redefining the relationship we have with technology.[56] This influences ethical, cultural and social issues – the very understanding of who we are.

7. STEPS TOO FAR

Even if the law may not be suited to determining in detail what genetic modifications may be permitted, the law in any case has a role to play in setting limits that in any case should not be transgressed. In this context, the law should contribute to

[53] Annas, *Supra n.* 25, 1415-1417.
[54] *Ibid.* “Commentary”, *Supra n.* 18, 227-245.
[55] Turkmendag, *Supra n.* 11, 288.
[56] Gasson, Kosta and Bowman, *Supra n.* 14, 5.

preventing that people try to make copies of themselves, their children or pets, or if it is done, ensure these "copies" the right to be unique. Since the "copied" individual would grow in time to having a completely new set of knowledge and experiences, it should have the right by law not to be seen as someone's copy. The choice of words here – that law should "contribute to preventing" – is deliberate, as law can only be a part of measures to determine what experiments are made and where the limits are. Just a legal ban would not by itself end scientific experiments, it has never managed to do so with other new and potentially dangerous technologies, but at the same time law has a crucial role to play in setting the limits and signalling routes to follow.

Where man-made law struggles to deal with the ethical dilemmas concerning Designer Man, the representatives of God (the ultimate designer of man!) enter the debate both through the voice of God written to and by human representatives (Pope, Church, Mosque, Temple, Bible, Koran and so on) and the voice of nature itself because, as shown above, it is safe to state that nature and the natural selection mainly concerns itself with fertility, i.e. ability to attract mates and have descendants who themselves will have the ability to attract mates and procreate. Voices recalling the role of religion in ethical dilemmas connected to the creation of man are not at all uniform.

As one of many examples, at the Christian web-site *chastity.com*,[57] debating about church teachings about IVF, artificial insemination and fertility drugs the collective anonymous authors base their opinion on Archbishop Charles Chaput of Denver or Pope John Paul II among others to find that medical technology exists to promote the proper functioning of our bodies and therefore fertility drugs promote the healthy functioning of the reproductive system and are morally acceptable. However, under this theory reproductive technology may assist the sexual act, it must never replace it. This consequently means that artificial insemination, IVF and other conception through a means other than intercourse by replacing the sexual act is not ethically permissible. John Paul II words could be interpreter that IVF makes man the product of his technology, not the master of his technology and must therefore be forbidden.[58]

Taking issue with this rather simplified classification of different medical methods, it appears as if the very act of making a baby is overemphasized rather than the conditions around it – the loving act and decision of the parents for example. Furthermore, it is a human doctor who uses IVF and other technology, being

57 http://chastity.com/chastity-qa/birth-control/morality/what-does-church-teach-ab
58 *Ibid.*

therefore “in charge” of the technology. person is the one who decides, whether the technology is used. Although all this processes mainly mimic what happens in nature, resulting the same natural processes – creation of life, sometimes twins or triplets (clones), that are able to get fertile children (natural selection) – it is still perceived more artificial than the decision to give/take drugs or use birth control.

In Islam, just like in Christianity there are many different opinions on the issue. Traditionally it was forbidden for any third party to meddle between couples in fertility issues, which are private matters. However, many religious leaders are incline to permit IVF. There is a debate about whether third party donations or cloning should be allowed. In some areas third party donations are allowed, but it is quite common belief that using IVF by unmarred women must be prohibited.[59] In general, Islam appears more accommodating that Roman Catholicism to the issues of assisted reproduction.

Religion is offended by hollow arguments of the normal versus the abnormal, as God as a “designer of man” or “nature” also plays with natural selection. Looking to the history of man-representation of God, many things we enjoy today as “normal and logical”, including modern medicine and drugs, ethical and human rights, freedoms and rights would at some point in history have been understood as against religion. Religion is an important factor in development of ethical principles in society, but for most people as well as most societies, religion is only one element of many based on which we try to make sense of new developments in society.

CONCLUSION

In conclusion, it seems that mankind as a collective Designer of Man seem to contribute more and more to the national selection, as long as the result is more fertile and more desirable to the individuals of future generations. As demonstrated above by the findings of Charles Darwin, the elongation of HIV onset, the characteristics and influence of the “altruistic gene” in populations of ants, natural selection really does not care about genetics as much as people believe. Therefore, it could be stated that mankind does not yet intervene too much to the natural selection, since the progress is a natural part of it.

Yet it is a sword with two blades in a sense that the more characteristics Designer Man starts to change, the more he might be tempted to use the information for profit and start rendering it as a service as customer orders, not as proportionally

[59] Inhorn, M.C. and Treymayne, S. (ed.) (2012). *Islam and assisted reproductive technologies: Sunni and shia perspectives*

needed for health. Although it could be argued this too is compatible with natural selection, if it makes you more desirable to partners, it must be remembered that new technology gives us much more information and data than we need. Before, it was possible to find a mate "not knowing" all the hidden dangers in the partner´s genetic information, which in turn allowed these dangers to become beneficial in future generations in different environments – it is essential that future partners do not know everything there is to know.

Although we do not yet know enough about the possible consequences and may never know, the minds of human kind tend to create an illusion about all-knowing and all-seeing. History shows how sure we have been whether planet earth is round or flat; even now we are using science and religion which provide us all the concepts of right or wrong, natural and artificial. We claim that we are more open-minded – yet, as sure as the religion cannot see or remember all the dogmas, values and certainties history has overturned, in the same way science will ridicule and destroy everyone who would try to change the fundamental beliefs of scientists, as it did when Earth was proposed round or Einstein proposed the theory of relativity. If new Jesus or Messiah would arise, he would be ridiculed and possibly killed. In saying so, how infinitely simpler it would be for the future Designer Man, in his "enlightened" mind, to become and remain "all knowing" in the flood of all the new information technology provides. Would genetic variations that are neither useful nor injurious be left alone or does the Man know the best? Yes, this enlightened generation would say the previous generations were not as enlightened, forgetting that we today think we are. So it is clear that information must be protected by the Designer Man and since information that have been obtained cannot be really fully forgotten, we must remember, that natural selection always wins but not in the way eugenics, religion thinks, or Darwin though, or we now think.

Finally, if the Designer Man makes our genome "too clean" of hidden variations and too much controlled, if our partners like that and allow only reproduction of such individuals, mankind itself becomes an abnormality; as dinosaurs were tossed away, but lizards and crocodiles remained – life and the grand design will continue. And then, it is not a question of ethics, it is a questions of choices left to adapt to new environmental conditions. After all, as Darwin postulated, dominant species vary the most.

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(2015) 10 Universitas 23-47

SUFFRAGE HISTORY AND AN ELECTION LAW PROJECT

Joanne Katz and David Tushaus

Abstract

Education can play an important role in developing an understanding that participation in decision making is key to achieving a rule of law governance. Persons and institutions must be accountable to publicly promulgated laws, which are equally enforced and independently adjudicated. In a democracy, the rule of law reflects the will of the people who have elected the governing bodies from which the judiciary is confirmed. Without the right to vote, freely and openly, the rule of law loses its legitimacy and runs a greater risk of being arbitrary, capricious, and inconsistent with human rights standards. This paper focuses on how faculty can use the history of suffrage and service learning in an election law class as an effective way to encourage civic engagement, while teaching the importance of the rule of law, and the disparity in the criminal justice system that occurs when suffrage is not universal.

Keyword: Protest against discrimination; Civil rights movement; Academic learning

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JOANNE KATZ

~ Department of Criminal Justice, Legal Studies and Social Work, Missouri Western State University, United States: katz@missouriwestern.edu

Joanne Katz has a Juris Doctor from the University of Missouri-Kamses City, the United States. She is Professor of Legal Studies, in the Department of Criminal Justice, Legal Studies and Social Work, Missouri Western State University, at Missouri in the United States. Her research focuses on human rights, mediation and restorative justice.

DAVID TUSHAUS

~ Department of Criminal Justice, Legal

Studies and Social Work, Missouri Western State University, United States:
tushaus@missouriwestern.edu

David Tushaus has a Juris Doctor from the University of Iowa, Iowa City, the United States. He is Professor of Law, in the Department of Criminal Justice, Legal Studies and Social Work, Missouri Western State University, at Missouri in the United States. His research focuses on crisis intervention by law clinics, law clinic formation and improvement.

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INTRODUCTION

Human rights are at risk in all societies, especially where there is a perceived threat of violence. Oppression and the violation of civil rights do not necessarily result in a safer or more peaceful society. While a government may label a group as a "terrorist organization" with which it will not negotiate, this is not always the best strategy to take to make the nation safer. Certainly long term resolutions for peace when dealing with terrorist groups have happened with dialogue. In fact, it has been difficult for nations or academics to come up with a consensus definition of terrorism. The State Department's definition from 1984 is helpful for our purposes: "Terrorism means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience"[1]. Given this definition, some groups labeled as terrorist may legitimately claim they have not engaged in terrorist activities.

This paper aims at look at Northern Ireland and South Africa for lessons to be learned from these governments' reactions to violent conflicts within their

[1] Schmid, A. (2004), "Terrorism – The definitional problem", *Case Western Reserve Journal of International Law*, 36, 377.

countries,[2] when these actions are conceived as liberation movements. It will also examine the peace processes that came out of these conflicts. The people of Nazi Germany, the US, Northern Ireland and South Africa have experienced similar histories of invasion, civil rights violations through legislation and police actions, and working through difficult negotiations to achieve peace. Northern Ireland has even looked to South Africa's violent past and peace process to deal with its own post-conflict issues[3]. In another case study, Nazi Germany, the US, Northern Ireland and South Africa have been compared to look at non-governmental organizations engaged in conflict resolution, in part because the countries experienced such similar, protracted conflicts[4]. This paper, compares South Africa and Northern Ireland to gain some understanding of terrorism, human rights, and conflict resolution.

The Nazi party created the Nuremberg Laws in the early part of the 20th Century. The first of the Nuremberg Laws, the Law for the protection of German blood and German honor was enacted in September 1935. It made it clear that marriages between Jews and German citizens were outlawed. The second of the Nuremberg Laws, enacted at the same time, was the Reich Citizenship Law, which stripped Jews of their German citizenship. Later, in November of the same year the First Supplemental Decree followed the Reich Citizenship Law. It stated: "ARTICLE 4 (1) A Jew cannot be a citizen of the Reich. He cannot exercise the right to vote; he cannot hold public office. (2) Jewish officials will be retired as of December 31, 1935…" The events of the holocaust, and what occurred after these laws took effect are well known to all. However, it was first taking away the citizenship and the right to vote which lead the way to the further deterioration of the civil rights of the Jews.

In the US, the 14th and 15th Amendments were disregarded for almost a century in disenfranchising African-Americans. Southern Senators blocked legislation to enforce African-American's constitutional right to vote. In 1957, the percent of blacks registered to vote in Mississippi was 4.4% and in Alabama only 5.2%. Dallas County Alabama had 15,000 blacks living there with only 156 registered

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[2] *Northern Ireland will be referred to as a country in this paper; however, it is actually a part of the United Kingdom.*

[3] *Crooke, E. (2005), "Dealing with the past: Museum and heritage in Northern Ireland and Cape Town, South Africa", International Journal of Heritage Studies" 11(2), 131-142*

[4] *Gidron, B., Katz, S., Meyer, M. Hasenfeld, Y. Schwartz, R. and Crane, J. (2005), "Peace and Conflict resolution organization in three protracted conflicts; Structures, resources and ideology", International Journal of Voluntary and Nonprofit Organization, 10(4), 275-298.*

voters. There are four ways to suppress "citizenship." One way is the violent control by local government. This occurred across the country, as it did in Selma where there were more arrested marchers than registered voters. Other ways to suppress citizenship are the use of local and state laws to prevent registration.

1. CIVIL RIGHTS VIOLATION IN SOUTH AFRICA

(A) Invasion and Early Oppression

Slavery and oppression of the indigenous population and other non-whites were part of the early settlement period in South Africa. Europeans first started to settle the southern tip of Africa in the 17th Century. The Dutch East India Company was given sovereign rights over the territory. It first used the southern tip of Africa as a place for ships to refuel with fresh food and water on their way to and from their eastern empire. In less than 10 years, the settlement had taken on an independent nature. Because of labor needs and difficulty with many of the indigenous population, slaves were imported from areas other than Africa. By 1793 there were 14,747 slaves in the Cape Colony, slightly more than the 13,830 free citizens. While a few slaves given their freedom originally had the same legal rights as white settlers, this soon changed. Laws discriminating against non-whites began in 1760. By the 1790's, non-whites were required to carry passes.[5] Pass law requirements would later become a central tool in the repressive apartheid era, and in the movement to overthrow the apartheid government. In 1795, the British captured the Cape. In 1807, the British abolished the slave trade, causing slave owners to demand more work from their remaining slaves. The British outlawed slavery in 1833 when laws to protect slaves proved ineffective.[6]

During the early colonial government stage when limited suffrage was available to non-whites, whites still controlled politics through control of the press, voter registration and elections. Though they would have made up a majority of the overall population, non-whites never made up more than 15% of the voting population.[7] Then, in the first half of the 20th Century, key legislation was passed to control non-whites by limiting their civil rights. Movement was severely restricted during this period.

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[5] Thompson, L. (2000). *A history of South Africa.* (New Heven, Connecticut: Yale University Press.

[6] *Ibidem*

[7] The first official census in 1865 showed the Cape Colony to have 180,000 "Europeans" while there were 200,000 Coloureds and 100,000 Africans.

(B) Beginning of Apartheid Era

In 1948, the National Party ran on a platform of even stricter controls over the majority of the population. The National Party was a conservative party made up primarily of settlers of Dutch origin who called themselves "Afrikaners" instead of Boers. Its promise to keep Africans on farms as cheap labor helped it carry rural areas of the Union. The party of Afrikaners won control of the country, though they made up only 12% of the population. The irony seemed lost on their leader, D. F. Malan: In the past we felt like strangers in our own country, but today South Africa belongs to us once more. For the first time since Union [in 1910], South Africa is our own. May God grant that it always remains our own"[8].

Sharpeville became a pivotal moment in South Africa's movement for equal rights. The Pan-African Congress (PAC), a relatively new group in 1960 that rejected white allies, organized a nationwide protest against pass laws on 21 March 1960. The turnout was generally low across the country. However, in Sharpeville several thousand gathered outside the police station. A scuffle at the front gate triggered police to raise their submachine guns and pistols and fire into the crowd. Humphrey Tyler, a reporter at the scene, who also studied photos that were taken there, said the crowd did not appear to be armed (non-whites could not legally carry arms)[9]. "When the shooting started it did not stop until there was no living thing on the huge compound in front of the police station," Tyler stated[10]. A senior police official told a New York Times reporter "I don't know how many we've shot, but if they do these things, they must learn the hard way."[11] 69 persons were killed, 86 injured, including 40 women and 8 children. Most victims were shot in the back. The South African government's claim the police were attacked with a variety of weapons before firing was not credible; but the international response through the UN was merely a slap on the wrist, in part because of opposition to sanctions by the British Government under Margaret Thatcher. The South African economy, however, began to experience a flight of capital.

The African National Congress (ANC) responded in several ways. Its leaders publicly burned their passes and called on others to do so, to observe a day of mourning and a stay-at-home protest. Several hundred thousand observed the ANC's call[12]. The government responded in kind, and amongst other things passed

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[8] Thompson, *Supra n.* 5, 186

[9] Massie, R. (1997), *Loosing the bonds.* (New York: Doubledey)

[10] *Ibidem,* 64

[11] *Ibid*

[12] Mandela, N. (1995) *Long walk to freedom* (New York: Little, Brown & Company)

the Unlawful Organizations Act on 9 April and instantly banned the ANC and the PAC. Mandela and others were rounded up for their treason trial[13].

The ANC defense at the Treason Trial that year claimed nonviolence was a central tenet of the organization. This had been true for nearly 50 years. Just over a year after the Sharpeville Massacre, however, Mandela argued with ANC leaders for a change in policy. Mandela's argument was based on an old African saying "The attacks of the wild beast cannot be averted with only bare hands"[14]. He argued that the ANC was no longer a legal organization, which could work within proper legal channels. He said it would be immoral for the ANC to ask the people to be subjected to the state's violence without some alternative. Since others were likely to take up arms, the ANC should "guide the violence" away from innocent civilians[15]. The 1955 Freedom Charter would be an important policy statement for the ANC in this situation. African, Indian, Coloured, and white groups had adopted the Freedom Charter, which "proclaimed that 'South Africa belongs to all who live in it, black and white." This rejected a Black Nationalist view of the future for a freed South Africa. Fredrickson claimed

> "[This] meant that the enemy could not be defined as the white race and that liberation would have to be something other than victory in a race war. A commitment to the ultimate reconciliation and democratic coexistence of whites and blacks in South Africa prevented [the ANC] from endorsing terrorism and the indiscriminate killing of whites even after it went underground and began to engage in sabotage.[16]

The government would not consider negotiating with the ANC throughout most of the first half of the 20th Century, and for another nearly 40 years of apartheid. "The government asserted over and over that we were a terrorist organization of Communists, and that they would never talk to terrorists or Communists. This was National Party dogma"[17]. The government cracked down hard on the opposition in response to its move towards violence. The Sabotage Act of 1962, the General Law Amendment Act of 1966, the Terrorism Act of 1967, and the Internal Security Act of 1976 were added to the Riotous Assemblies Act of 1956 and the Unlawful Organizations Act of 1960 to increase the government's ability to control non-whites. The government could arrest people under these acts and

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[13] Massie, *Supra n.* 9

[14] Mandela, *Supra n.* 12, 271

[15] *Ibidem*

[16] Fredrickson, G. (1995), *Black liberation* (New York: Oxford University Press), 251-252

[17] Mandela, *Supra n.* 12, 525

hold them without trial or access to other people or a lawyer. In addition to banning organizations, the government could prevent meetings from being held or funding from being sent in from abroad[18].

"For years the government had claimed it was only the ANC's commitment to violent struggle that had led to its banning, and that if it would renounce that Mandela could go free and talks begin," wrote a South African journalist[19]. Mandela admits that "Both sides regarded discussions as a sign of weakness and betrayal. Neither would come to the table until the other made significant concessions"[20]. Yet, Mandela reached out to negotiate with the government in 1985. In February 1986, the "Eminent Persons Group" of British Commonwealth leaders arrived to bring the South African government and ANC to negotiations. The Group negotiated an agreement wherein the ANC would abandon the armed struggle and negotiate in turn for the release of Mandela, the elimination of apartheid, and the allowance of free political activity. The ANC provisionally accepted. The Botha cabinet was split on whether to negotiate. In the end, it chose to bomb purported ANC bases in Lusaka instead of negotiating[21]. Mandela continued talks with government officials over the next several years. Botha eventually met with Mandela, but the true negotiations would be left to Botha's successor, F. W. De Klerk.

(C) Peace Talks

"The time for Negotiation has arrived," said F.W. De Klerk in his traditional opening speech to Parliament on 2 February 1990[22]. De Klerk had taken over the government the previous August. He had already committed to repeal of the Reservation of Separate Amenities Act, which Mandela referred to as petty apartheid. On 13 December 1989, initial negotiations between De Klerk and Mandela began[23]. After Mandela refused to give up the armed struggle without more from the government in terms of concessions, the de Klerk government unconditionally released Mandela on 11 February 1990. The ANC's position and activities had not changed from when the government referred to it as a terrorist organization with which it would not negotiate. At a press conference the following day, Mandela defended the ongoing armed struggle:

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[18] Thompson, *Supra n.* 5
[19] Massie, *Supra n.* 9.
[20] Mandela, *Supra n.* 12.
[21] Massie, *Supra n.* 9
[22] Mandela, *Supra n.* 12, 556
[23] *Ibidem*

> I told reporters that there was no contradiction between my continuing support for the armed struggle and my advocating negotiations. It was the reality and the threat of the armed struggle that had brought the government to the verge of negotiations. I added that when the state stopped inflicting violence on the ANC, the ANC would reciprocate with peace.[24]

Eventually De Klerk's government was compelled to put its reform policy and negotiations with the ANC to a vote by white South Africans, still the only people fully enfranchised in South Africa. Whites supported negotiations with the ANC by 69%. The results would likely have been much different if the ANC had adopted a Black Nationalist policy. Fredrickson points out that:

> "The multi-racialism or nonracialism of the ANC not only limited and contained its use of violence during thirty years of underground resistance, it also made it easier, when the time was ripe, to give up violence and return to other methods of struggle[25]. The negotiations lead to a new constitution, a democracy with universal suffrage, and elections which shifted the political power from the white, Nationalist Party to the African dominated ANC in 1994.[26]

2. CIVIL RIGHTS VIOLATION IN NORTHERN IRELAND

In looking at the impact on human rights caused by the 20th Century conflict in Northern Ireland, it is important to first examine the historical events which lead to this conflict. As early as 1170, the British started to settle in Ireland. In the 1600's, this expanded into the Plantation of Ulster, where the British confiscated land, and gave it to their citizens to settle. In 1690, the Protestant King William III (of Orange) was victorious over the Catholic James II, and Ireland became the possession of the British. The Scottish and British settlers, especially in the north of Ireland, maintained their identity and ties with Britain, which also was expressed in their religion as Protestant. The native Irish were predominantly Catholic[27].

The Irish felt oppressed by the increasing ties to Britain. In 1801, the Irish Parliament was abolished, and Ireland became part of the United Kingdom. The

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[24] *Ibid*, 568

[25] Frederickson, *Supra n.* 16, 252

[26] While the Truth and Reconciliation process was an important part of the post-apartheid peace process in South Africa, the focus of this paper is on the struggle to end apartheid. This includes the negotiations leading up to the release of Nelson Mandela and the free elections, not what took place after the negotiations were finalized and power was shifted to the majority.

[27] Hancock, L. (1998), "Northern Ireland: Troubles larecring," *CAIN website Cain.ulst.ac.uk.*

Irish rebelled, and the Irish Republican Army, a paramilitary group, led the Irish people to a break with Britain after World War I. However, the Protestant majority in the north was afraid to become part of the new Republic of Ireland. Identified as British, they feared repression by the Irish. In addition, the north was a more prosperous region, and they feared losing the lands they had taken throughout the previous centuries. In 1921, the British and Irish governments reached an agreement which would create the Republic of Ireland as the 26 southern counties, and the remaining 6, in the north, would become a separate country called Northern Ireland[28]. It was in this division, creating a separate country which was 2/3 British–identified Protestant, and 1/3 Irish-identified Catholic, and thus dominated by the British majority in every aspect of life, that the issues which developed into the "Troubles."

It is important to note here that this political solution for Ireland, that being the partition of the island, created a natural rift, which expanded into the violence of the latter end of the 20th Century. To begin with, the Catholic minority in the north still wanted to be part of Ireland. To this extent they became known as Nationalists, wanting a united Ireland. The Protestant majority felt insecure in this new arrangement. They wanted reassurances from Britain that they would still be protected as citizens, and that their lands and way of life would not be altered by the partition. They saw themselves as Unionists, or loyal to Britain[29].

However, it was in this first time of partition that the development of paramilitary violence and identity occurred, over this part of Ireland being retained as part of Great Britain. Those who wanted to become part of the new Republic of Ireland, and believed that they needed to fight for their place, became known as Republicans. The best known of these groups was the Irish Republican Army. Later, growing out of some of the police forces put in place to fight this movement were the paramilitary groups which were Protestant and loyal to Britain. These groups became known as Loyalists. When Northern Ireland was created, there was to be home-rule. A parliament was built, called Stormont, and a representative government was created. However, from the beginning, the political landscape in Northern Ireland was set up to limit the power of the Catholic minority. While never legally segregating the Irish community, the power structure was set up in such a way as to keep the status quo, that being the Protestant majority in control. In addition, laws were created from the beginning which would fight the emerging Republican paramilitary presence.

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[28] *Ibidem*

[29] Southern, N. (2007), "Britishness, "Ulsterness" and unionist identity in Northern Ireland", *Nationalism and Ethnic Politics* 13, 71-102

Limitation on Voting Rights

Partition was to lead to proportional voting. While the majority was the British-identified Protestants, if this had occurred it would have given a voice for the Catholic minority. However, this was quickly changed by several legislative actions. The proportional representation put in place by the British would have Catholics controlling around 40% of the local Councils. However, Stormont passed legislation which gerrymandered voting districts in 1922. While there is some disagreement as to how much this influenced election outcomes[30], one can compare election results between 1920, where the Catholic Nationalists controlled 25 of 80 local councils, to 1924, where they only controlled 2 after the election.[31]

Added to this legislative redistricting, was the creation of two categories of voters. The *first* was the ratepayers, and this was occupiers of a household, as either a tenant or an owner. However, there were limitations on ratepayers that affected Catholics more than Protestants. Only the owner/tenant and his spouse were allowed to vote. All other adult residents were denied the vote. This affected Catholic households because of the limitations of available housing often required more than one family to occupy a residence, and also the larger families often included adult relatives. The *second* category of voters was owners of commercial property. People in this category could accrue votes for each £10 of value of the property, for up to six votes. Protestants owned 90% of the commercial property in Northern Ireland. As a result, the proportional voting first believed to exist was erased. Thus starting in the 1920's, the Catholic minority was kept from securing even proportional representation, and was left out of the political process. The result of this loss of legitimate power, which is obtained through voting in a democracy, is apparent in several areas of the governmental structure.[32]

(A) Judiciary and Legislature

With control of the political structure, Protestants controlled the court systems. In 1968, 68 of the judges were Protestant, while only 6 were Catholic. Between 1921 and 1972, fifteen out of 28 appointees to the high court of Northern Ireland were current or former members of the Unionist political party[33].

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[30] Whyte, J. (1983), "How discrimination was there under the unionist regime, 1921-1968" : in, *Contemporary Irish Studies* (Manchester University Press)

[31] Rawthorn, B. & Wayne, N. (1988). *Northern Ireland : The Political Economy of Conflict* (London : Policy Press)

[32] Pilkington, C. (2002), *Devolution in Britain today* (Manchester University Press)

[33] Darly J. (1976). *Conflict in Northern Ireland : the development of a polarized community* (Dublin : Gill and Mac Millan)

Jurors were also favored on the side of the Protestant majority, as they made up most of the voting rolls (from which jurors were selected). While the juries appeared fairly even-handed in handing out verdicts to both Protestants and Catholics, the Catholics were prosecuted more vigorously, and reflected the charges issued by the police. Protestant charges might be dropped or reduced, while that was rare with Catholic defendants[34].

It is hard to separate the police from the judicial system. The Royal Ulster Constabulary (RUC) was a force of over 3000, which were trained in heavy weapons and military tactics. While one third of the force was to be Catholic, it never went beyond 12% until recent years. In addition, the government of Northern Ireland created the Ulster Special Constabulary to deal with Catholic paramilitary factions not wanting to partition from Ireland. This group numbered as many as 25,000, and was associated with some of the worst intimidation and violence against the Catholic community. Out of these groups, the beginnings of the Loyalist paramilitaries emerged[35].

In the late 1960's, the prison population for Northern Ireland was below 700. However, with the advent of the Troubles, the prison population grew to over 3,000 by the late 1970's In addition, the administration of the prison system was held by the majority population, and policy was set often by the British. The prison became the site of many political protests, the most notable, the Hunger Strikes in the H-Block of Maze Prison in 1981, which lead to the death of Bobby Sands, and 9 other Republican prisoners.[36]

It was within the legislative sector that some of the greatest deprivations occurred. In 1922, the Special Powers Act was passed to fight against the Republican paramilitaries, fighting to succeed from Britain. This law gave great power to the Police to intern individuals without a trial for unspecified periods of time. This included the broad powers of search and seizure without a warrant and broad power of censorship. The law specifically stated that "if any person does any act of such nature as to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations"[37]. While most of the secessionist movements were over by 1927, this law was kept in

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[34] *Ibidem*

[35] Mulcahy, A. (2006). *Policing Northern Ireland : Conflict, legitimacy and reform.* (Cullompton Devon : Willan Publishing)

[36] O'Hearn, D. (2006), *Nothing but an unfinished song: Bobby sands, the Irish hunger striker who ignited a generation* (New York : Nations Books)

[37] Darly, *Supra n.* 33, 56

place, and regularly used to imprison suspected Republicans until it was repealed in 1973. In addition, when home rule was lifted (The Northern Ireland Act, 1972), similar and more stringent laws were passed by British Parliament in 1973 (Northern Ireland Emergency Provisions Act,1973) and 1974 (Prevention of Terrorism Act, 1974). The laws with respect to voting were also part of the Unionist agenda.

(B) Human Rights Campaign

As a result of the human rights movements around the globe during the sixties, and particularly the Civil Rights Movement in the US, the Catholics of Northern Ireland started to rebel against the confinements that the legal and political system was causing. While there were several demonstrations in other cities, Derry (or Londonderry) was the site of the major demonstrations demanding equal rights in areas of housing, employment and voting.[38]

Derry was the place of most action as its population was a majority of Catholics, although the power was still maintained by the Protestants as a result of the gerrymandering and rate payer voting laws. In 1967, the Northern Ireland Civil Rights Association (NICRA) was formed dedicated to electoral reform, and the Derry Housing Action Committee (DHAC) began to deal with issues related to the limited housing available to the Catholic majority. It was when these two groups combined forces that the first Civil Rights Marches began. They were met with great resistance from both the RUC, and also from the Loyalist groups. The first march scheduled by these groups was for 5 October 1968. The RUC tried to stop it before it began, and it ended up using violence which had a great affect on the Catholic community. It was shortly after this that the Provisional Irish Republican Army (IRA) started to organize, and the first Catholic initiated violence started to occur. However, this was a small minority of the Nationalists who were trying to make change occur through non-violent means.[39]

Relationships between the Catholic community and the police continued to deteriorate. It was during this time that the Special Powers Act was used regularly to detain those who were suspected of any involvement with these organizations. In 1969, the British sent in their troops as an attempt to quell the troubles that were raging. While there was hope that the British Troops would be more of a neutral party, and that this would help the situation for the Catholics, it was soon replaced by further alienation between the groups. Events such as the Falls Curfew

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[38] Melaugh, M. (2008), "The civil rights campaign", *CAIN website cain.ulst.ac.uk*
[39] *Ibidem*

of July 1970, where 3,000 troops imposed martial law on a Catholic area of West Belfast, and ended up in a gun battle where six civilians died contributed to this lack of belief that the troops would bring a balance to the situation.

As these events continued, the human rights campaign struggled to maintain the hope that they could control the rising violent response between the Catholic, Protestant, and British troops. In 1971, the Special Powers Act was utilized by the RUC and the British military, and in a series of raids throughout Northern Ireland, 342 people were arrested. This lead to more violence, where the paramilitary organizations on both the Republican and the Loyalist sides were killed. Finally on 30 January 1972 in Derry, the NICRA started a march against the rise of internments. It was here, on the Bogside of Derry that the British troops opened fire on the demonstrators, killing 13 and injuring another 14. Known as Bloody Sunday, it signaled the end of the peaceful means to achieving human rights, and opened the door for the violent years which would go on through the 1990's. Similar to the Sharpeville Massacre in South Africa, Bloody Sunday marked the failure of civil discourse, and immersed the country into years where paramilitary violence would end up killing over 3,000 people.[40]

(C) Prevention of Terrorism

During the next 35 years, the paramilitary groups, the RUCand the British troops all did battle. At the same time, the number of prisoners greatly increased, some in prison for violence, some as a result of the political situation. The Special Powers Act was widely used to lock up those suspected in any "terrorist" act. An example of such an order read: *John Kelly who is suspected of being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland, should be interned* (Free Derry Museum). Neither a specific act, nor a conspiracy for action, needed to be alleged. These internments were for an unspecified period, and became a major weapon used against the Catholic communities.

In the 1970's the British government increased its ability to deal with the rising violence in Northern Ireland. In 1972, through the Northern Ireland Act, it ended home rule in Northern Ireland, and brought all legislative functions to the British Parliament. In 1973, British lawmakers passed Northern Ireland (Emergency Provisions) Act, which made it illegal to belong to or support financially a "proscribed organization." These organizations included: The IRA, Sinn Fein, and the Ulster Volunteer Force. Finally in 1974, Parliament passed the 1974

[40] *Ibid*

Prevention of Terrorism Act. This stated that the terrorism was criminal and not political. However in this act, only the IRA was specifically identified as a terrorist group. It made it a crime to wear any dress or display any paper which aligned one with a particular "proscribed organization" This was the legal beginnings of making it a crime to associate with paramilitary groups. Thus the British government took the liberty of association, and created a criminal violation based on status.

The growth in the prison population from 700 in the late 1960's to 3,000 in 1979 reflects the additions of political prisoners created by the Prevention of Terrorism Act. In addition to their imprisonment, at times on weak charges, the political theatre was acted out within the walls. The most famous is the case of Bobby Sands. Bobby Sands was a young man with ties to the IRA. Prior to 1979, most political prisoners were allowed to wear their own clothes, therefore distinguishing them from other inmates. However as the policy of the British changed about the paramilitary groups, they stopped allowing this. As a result, the paramilitary groups within H Block of Maze Prison quit wearing clothes. Eventually this was turned into a hunger strike. In 1981, Bobby Sands died as a result of the hunger strike. He was 27. He brought the situation in Northern Ireland to the world. Prime Minister Maggie Thatcher refused to negotiate with him, stating that she would not negotiate with terrorists. In total, 10 Republican inmates died as a result of their participation in the hunger strike (O'Hearn, 2006).

In addition to Bobby Sands dying and becoming a martyr for the cause of Catholics in Northern Ireland, while in prison he was put up as a candidate as a Member of Parliament (MP) from Northern Ireland. Sinn Fein, a Catholic political party and the identified "political wing of the IRA" campaigned for his election, and he won. However again the Prime Minister refused to seat a "terrorist," and Bobby died in his cell at H Block, never being sworn in as an MP. After the death of Sands, the intensity of the violence increased. During this time, Sinn Fein was looking for options outside of violence.

(D) Peace Talks

In 1986, in secret meetings, John Hume, the Catholic MP from Derry, and Gerry Adams, the President of Sinn Fein started to talk. Both had come to realize that the paramilitary violence was never going to give way to a victory. It was at this point that the beginning of the peace process, and the end of "the Troubles" commenced. Although these talks did not give way to any solutions, the fact that a politician sat face-to-face with someone acknowledged to represent the IRA,

was historical. By 1993, the British government, through a representative, Colin Ferguson, was engaging in talks with members of Sinn Fein.[41]

Margaret Thatcher never changed her stand about not talking with terrorists, however the Taoiseach (the Prime Minister) of the Republic of Ireland, engaged her in talks about the situation in Northern Ireland. Out of this came the 1985 Anglo-Irish Agreement which acknowledged the legitimacy of a potential united Ireland for the first time.[42] However, it was Thatcher's successor, John Majors, who lead the way to find a political solution to the violence occurring as a result of the turmoil in Northern Ireland.

In 1996, a mediation was started between all of the parties in Northern Ireland. The US played a lead role under President Clinton, and he engaged former Senator George Mitchell to lead the negotiation. The mediation included the Protestant Democratic Unionist Party (DUP) lead by Ian Paisley and the Social Democratic and Labor Party (SDLP) lead by John Hume. The issue became whether or not to seat Sinn Fein. Could Sinn Fein become part of the mediation when violence was still occurring? And the bigger question, could the IRA be represented without decommissioning their weapons? Sinn Fein, needed to stay within the political arena, and also be able to negotiate with the paramilitary group.[43]

In the end, there were a number of cease-fires during the two years that the mediation occurred. However, a decommissioning plan became part of the agreement. As a result of Sinn Fein remaining in the negotiations, Ian Paisley left the talks, and Protestant David Trimble, of the Ulster Unionist Party (UUP) took his place. In April 1998, the Good Friday Agreement was reached, and was confirmed by the voters in May 1998. Both David Trimble and John Hume were awarded the Nobel Peace Prize for their efforts. Many of the issues, which had plagued the parties during these times of trouble, were dealt with in the Agreement. There were on-going talks related to decommissioning of all of the paramilitaries, both Loyalist and Republican. In addition, the entire judicial system was examined and attempted to balance out the roles of the Protestant and Catholics. Finally, there was the release of many political prisoners.[44] Peace in Ireland has continued, though it is fragile.

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[41] Adams, G. (2003). *A farther shore : Ireland's long road to peace*. (New York : Random House)

[42] *Ibidem*

[43] Mitchell, G. (1999). *Making Peace.* (New York : Alfred A. Knolf)

[44] *Ibidem*

3. ELECTION PROTECTION PROJECT IN THE UNITED STATES

Suffrage history of the Nazi Germany, South Africa and Northern Ireland may be an important component of any course on election law for university students. An election class combined with a service learning component, where students may work in the polls on election day, has been explored as an effective way to teach critical thinking skills, foster civic engagement, and meet the needs of a seriously overburdened democratic institution. After the experience of the 2000 U.S. Presidential election, it was thought that colleges may use service-learning projects in the 2004 Presidential election to make sure every vote was counted and to teach new generation of voters the importance of voting.

(A) Election Law Curriculum

The importance of democracy may best be understood by those who have not enjoyed its privileges. The Election Law class was started in the Missouri Western State University in the US offering underscored the importance of voting through course material on the main struggles for suffrage in the US and other countries. Students discuss how universal suffrage was not the norm in the US or other countries. Britain initially disenfranchised many groups, which students will identify with, including the poor, women, Catholics, Jews, aliens, and servants. American Colonies and later the US would be only slightly more inclusive of white males, but not of women or minorities.[45] The class follows the suffrage movement for women and African Americans to emphasize the importance of suffrage to our students. The PBS film "Not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony" is a good tool for understanding the women's suffrage movement in the US Similarly, the PBS video series *Eyes on the Prize* segment "Mississippi: Is this America?" interviews African-Americans who played a role in the civil rights movement to gain a meaningful opportunity to vote. Court cases also help students gain an important understanding of the right to vote. For example, in *Minor v. Happersett*,[46] the Court found the 14th Amendment can not be interpreted to prohibit the denial of suffrage based on gender. Students also learned how constitutional amendments, court cases, and legislation ended disenfranchisement of African Americans. The 24th Amendment eliminated poll taxes for federal elections. The Supreme Court's *Harper v. Virginia*[47] found that poll taxes violated the equal protection clause in state elections. The Voting

[45] Lowenstein, Daniel Hays & Hasen, Richard L. (2004). *Election law, cases and materials.* 3rd edition. (Durham, N.C. : Carolina Academic Press)

[46] 88 US 162 (1875)

[47] 383 US 663 (1966)

Rights Act of 1965, which outlawed literacy tests in the Deep South, and in 1970 in the rest of the country, represents the use of legislation to affect sweeping reforms.[48]

While the expansion and contraction of suffrage for groups in the US is an important component of an election class, there are other significant areas to cover. The service learning component to an election class is especially important. Not only is there a great need for students to serve as poll workers in the US, but this work enrich the students learning outcomes. Service learning improves academic learning and fosters political and civic engagement[49]. Studies show that integrated service learning, where students work on social issues they are studying, is the most effective method of service learning and may improve student analyses of issues, their perspectives on problem solving, and critical thinking skills.[50]

Students need to learn the mechanics of elections in order to prepare for election day. Students are sometimes required to brief *Bush v. Gore* to emphasize the importance of proper election administration. They may then asked to do some simple legal research on the Missouri Secretary of State's web site. Through this site, which likely has counterparts in other states, students can find out about the mechanics of voting, what forms of identification the state requires of a voter, and what a provisional ballot is used for. By doing some of this background research, students will come into the actual poll worker training able to get a better grasp of their duties on election day. Training students to work as poll workers is where laying the ground work with the local election authority will pay dividends. Before proposing such a class, the authors met with the local election authority to determine how best to work together. Given the shortage of poll workers noted above, election authorities may be very receptive to gaining access to new volunteers. In Missouri, County Clerks administer elections in most regions. One of the County Clerk's goals for students in our jurisdiction was to have them help the poll workers with the new technology. Direct Recording Electronic Devices are a type of electronic ballot box that scans the paper ballot when it is inserted. It checks the ballot for errors (e.g. inadequate marks or more marks for one race than allowed),

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[48] Lowenstein & Hasen, *Supra n.* 45

[49] Eyler, Janet & Giles, Dwight E. Jn. (1999). *Where is the learning in service-learning?* (Sam Francisco, CA : Jossey-Bas); Hepbren, Mary A. (1997). "Service learning in civil education : A concept with long, sturdy roots. *Theory into practice*, 36 (3), 5040-5041. Retrieved March 2005 from EBSCO host Academic Search Elite; Hildreth, R.W. (2003). The "Lived Experience" of political engagement. (Minneapolis, MN: Department of Political Science, University of Minnesote). ERIC Document Riproduction Service no. ED 479697.

[50] Eyler & Giles, *Ibidem.*

sounds an alarm and holds the ballot if any errors are detected, and counts all ballots that are finally submitted. Laptops are also used in some polls to locate the correct precinct for a voter who moved or showed up in the wrong place. This cuts down the number of calls that are made to the Clerk's office on election day to a manageable number for the Clerk. The Clerk's phones can then be used for more important problem solving duties. To this end, the County Clerk provided each college student with a laptop computer and voter database on election day. If a voter walked into the wrong precinct to vote, the voters name would not be on that precinct's list. When this happened, our students were able to look the voter up on the database to advise the voter on which precinct was the proper location to cast a ballot. This issue arose in some polls more than others, because some polls had changed locations because precincts had been consolidated or boundaries redrawn in some areas, and in some precincts voters move more. These were the busiest polls for this activity. The Clerk and his staff provided students with training on how to use the database and interact with voters to solve these problems.

Different polls have different needs, which may be affected by each precinct's population and the other workers at each poll. For example, polls in neighborhoods with more rental property had voters moving in and out of different precincts. These precincts had a greater need for a student to find where voters needed to go to cast a countable ballot. Polls in more stable neighborhoods tended to just need help with the electronic ballot box. Students were also trained on how to help voters cast ballots on a voting machine set up for disabled voters, and with the general voting process at the polls.

Students have also conducted community education and voter registration drives in the election class. Community education efforts are transferable to almost any jurisdiction that holds elections. Education efforts taken on by students are required to be unbiased. So, if the students cover a candidate race, they must focus on the issues. They must learn about and present on the candidates' positions. If the students cover a referendum issue, they must present on both sides of the issue using information from a credible source. Any community education campaign will involve research on the part of students to become better informed on the candidate race or issue so that the students can inform others. The effect of this is multi-fold, including better informed students in the class and on campus. Student community education often focuses on other students. After all, this is the audience the students are most familiar with. This familiarity provides the students with a comfort level in reaching their target audience. It also is an audience the students will be able to reach the most effectively because they can relate to their fellow

students better. They can design educational campaigns based on both the issues they perceive fellow students are most interested in and the best way to deliver the message given the budget available, which is zero.

Educational campaigns can take the form of low or high tech options. We have had students develop posters that are placed in a high traffic areas on campus. We have had other students create a You-Tube video urging students to get out and vote. In addition to community education on candidates and issues, students have also conducted voter registration campaigns. In the US, most states require voters to register ahead of time in order to be eligible to vote. In our state, Missouri, voters must be registered several weeks in advance. There are always eligible voters who are not duly registered for one reason or another. Since the age a person can vote is 18 in the US, many traditional, college first year students are not yet registered to vote. In fact, usually there is at least one student in the class who is not registered to vote. Therefore, voter registration efforts have tended to focus on this community. However, students have also gone out into the community to register as voters. Different student groups have taken different angles on who to register and how to get them registered. Students have targeted churches, retail areas, domestic violence shelters and even food kitchens to register voters. Their efforts have not always been very fruitful; but they are usually very educational. Many of these service learning activities are adaptable to other jurisdictions.

(B) Outcomes

The classes and their service-learning projects have been well received by students. In 2006, there were a total of 22 students who participated in the poll worker project. About one-half of the students were from a junior level honors course on election law and the other one-half were from a senior level social work class on policy. In 2008, there were 23 students participating. Again one-half of the students were drawn from the honors course but the rest were from the Criminal Justice and Legal Studies Department. Students in the Honors Colloquium were given a service-learning survey and a class evaluation survey. Most students who participated were upperclassmen, though some freshmen did participate in 2008 without any problems. There were both traditional and non-traditional students who participated both years.

On the service-learning survey in 2006, all students strongly agreed (answering 5 on a 5 point scale) that the service-learning project related to a need in the community and that the service-learning site (the poll where people voted) valued each student's contribution. Students also reported that they engaged in discussions with classmates about the service-learning project. These questions were not

asked in 2008. In 2006 and 2008, all but one student strongly agreed or agreed that they solved problems during their service-learning experience. Most students also reported that the experience increased their exposure to different viewpoints. In 2008, nine honors students rated their poll working experience with an A, one an A- and one a B in a reflection assignment worth a small percent of the assignment grade. A later paper, worth one-third of the total grade, required the students to synthesize their poll work experience with what they learned in class. This student's comment on an evaluation reflects the overall student support of the service learning component of the class "The applied learning was fundamental to the educational success of the class. If I had not been involved in 1 or both of the projects I would not have taken nearly as much from the class, and think a strong focus on applied learning is essential to its success." Subsequent years have incorporated these more informal, qualitative evaluations of the class. The addition of voter registration and education projects has been very popular among the students.

CONCLUSION

Studying the expansion of suffrage and mechanics of elections is great for teaching the importance of democracy and civic engagement. Said one student in a class evaluation "Overall the class was good and I learned much about voting and the legal system that I did not know."

Northern Ireland and South Africa have suffered oppression at the hands of governments that initially refused to enter into peace negotiations with a major opposition group on the grounds it was a terrorist organization. In the end, the British and South African governments would capitulate on this stance. In both cases, the governments attempted to control indigenous populations, which represented a significant portion of the total countries' population, through oppressive laws and violence. In the case of South Africa, the indigenous population that was disenfranchised made up 75 to 80% of the population. In Northern Ireland, the northern region was carved out of the rest of the country so that the indigenous population was a minority, but only if it was not considered a part of the rest of Ireland, which was given its independence in 1921.

In both countries, the oppositions' struggle for civil rights looked to the US African-American experience as a model for obtaining civil rights. Peaceful protests turned into violent massacres. In Northern Ireland, Bloody Sunday started out as a peaceful demonstration for civil rights but ended in protestors being killed and injured by government troops. In South Africa the similar Sharpeville massacre occurred. Both were pivotal moments in the freedom struggle. These peaceful turned violent events led to more violence and more repressive legislation, including

laws specifically designed to combat terrorism with indefinite detentions imposed without basic due process rights.

Both movements produced charismatic leaders who would lead organizations, previously characterized as terrorists, to a peaceful negotiation. In Northern Ireland, the leader was Sinn Fein's Gerry Adams. In South Africa the leader was the ANC's Nelson Mandela. In both cases, the governments had for years refused to negotiate with these leaders and their organizations because they were terrorist leaders of "terrorist" groups. While the organizations' activities may have fit within at least some definitions of terrorism, they did represent a significant, disenfranchised and oppressed group of people. Had the governments turned to creating a freer society with more human rights sooner, power may have shifted sooner and with less bloodshed.

It was only through negotiations that the violence eventually ended. In South Africa and Northern Ireland, the governments and the terrorists eventually accepted the fact that violence was only bringing more violence. In both cases, international pressure supported the cause of the group identified as terrorists by their governments. In South Africa, international boycotts and isolation from the rest of the world forced it to look at its human rights violations imposed by apartheid. And in Northern Ireland, it was through the efforts of the Republic of Ireland and the US that pushed the peace talks to go forward. It was only through negotiating with terrorists that the peace was won. The laws passed to create a safer society against terrorism, had proven to do the opposite. Can other countries learn from these examples and prevent further bloodshed in the name of human rights?

An election curriculum is enhanced by incorporating an integrated service-learning opportunity to give students hands on work to go with these suffrage lessons. Said one student: "I found the class very interesting. I liked the idea of being able to work on election day to better understand the election process." Several undergraduate disciplines can work together or separately to offer a course like this, including legal studies, political science, history and social work. This service-learning opportunity will also provide most communities with needed resources in the important work of administering elections in our democracy.

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(2015) 10 Universitas 48-69

USE OF FORCE IN INTERNATIONAL RELATIONS: ISLAMIC LAW PERSPECTIVE

Mohammad Naqib Ishan Jan, Abdul Ghafur Hamid & Abdul Haseeb Ansari

Abstract

Islamic law strongly opposes warmongering and promotes peaceful coexistence among nations. It lays dawn a general rule prohibiting the use of force just to uphold peace and security of humankind. Force, which in this paper refers to armed force, if used would destroy peace and if not regulated it would have devastating effect in terms of human loss of life and destruction of property. Sometimes, however, the use of armed force is inevitable, especially if it is used in self-defence or to deter aggression or to eliminate oppression and injustice. The rule and the exceptions relating to the use of force are one aspect of the law of war that regulate the initiation of war (jus ad bellum), as known in the modern international legal system. The other aspect of the law of war is the law regulating the conduct of the warring parties once the war occurs (jus in bello). Islamic law has sufficient provisions governing the initiation of war and at the same time has developed humanitarian rules to regulate the conduct of the warring parties in case war inevitable occurs.

Keywords: Self-defence, Humanitarian intervention, Peace.

Contents

Introduction

1. Peace not violence is the Message

MOHAMMAD NAQIB ISHAN JAN

~ Faculty of Laws, International Islamic University, Malaysia: naqib@iium.edu.my

Mohammad Naqib Ishan Jan has received LLB, MCL and Ph.D. from International Islamic University Malaysia. He is Professor of Law and Deputy Dean (Postgraduate Affairs) in the Faculty of Laws, International Islamic University, at Kuala Lumpur, in Malaysia. His research focuses on international law, international humanitarian law, law of international institutions, tort and contracts.

ABDUL GHAFUR HAMID

~ Faculty of Laws, International Islamic

University, Malaysia:
ghafur@iium.edu.my

Abdul Ghafur Hamid received his LL.M. from University of Yangon, Myanmar and Ph.D. from International Islamic University Malaysia. He is Professor of Law in the Faculty of Laws, International Islamic University Malaysia, at Kuala Lumpur, in Malaysia. His research focuses on international law and maritime law.

ABDUL HASEEB ANSARI

~ *Faculty of Laws, International Islamic University, Malaysia:*
ahaseeb@iium.edu.my

Abdul Haseeb Ansari received his LL.M. and Ph.D. from Banaras Hindu University, India. He is Professor of Law in the Faculty of Laws, International Islamic University Malaysia, at Kuala Lumpur, in Malaysia. His research focuses on revenue law, comparative jurisprudence and environmental law.

2. Prohibition on use of Force for Spreading Islam

3. Use of Force under Islamic Law

- Exception
  (i) Self-Defence
  (ii) Humanitarian Reason

4. Islamic Humanitarian Law

Conclusion

INTRODUCTION

This paper explains the use of force from the Islamic law perspective and attempts to dispel the contention by some quarters in the western world that Islam through its 'jihad' doctrine advocates violence threatening their peace and security[1]. This is certainly a misconception of Islamic law in general and its jihad doctrine in particular. It is baseless and wrong to equate jihad with forcible conquest or acts of terrorism[2]. Islamic law, unlike the wrong perception of it in the West[3], firmly stands for peace and security of humanity[4].It sanctifies human life[5], ensures the

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1 McCarthy and Andrew C (2009). "The Islamic doctrine of jihad advocates violence", *in :* Haugen, David M., Musser, Susan and Lovelace, Kacy (ed.) (2009). Islam (Detroit: Greenhaven Press). Opposing viewpoints. rpt. from (2008), "The jihad in plain sight." *Hudson Institute*. *Opposing viewpoints in context*. Web. 5 Mar. 2016.

2 *Ibidem.*

3 Some people in the West seeks to portray Islam as an inherently violent and expansionist religion equating it with fanaticism, intolerance, violence and wars of aggression. They contend that the Shari'ah plainly exhorts believers to propagate and protect the Islamic faith through the means of aggressive war

4 Shaheen S., Ali, and Rehman, Javaid (2005). 'The concept of jihad in islamic international law', *Journal of conflict and security law*, 10, 321-343; Abdullah A., An-Na'im, (1990). *Toward an islamic reform: Civil liberties, human rights, and international law.* (Syracuse: Syracuse University Press).

5 *Qura'nic* verses: 6:151; 5:32; 17:31 & 17:33.

dignity of human kind[6], guarantees faith[7] and provides for the protection of public and private properties. These and other Islamic values, such as justice,[8] equality of all human race,[9] tolerance, peaceful coexistence and harmony can be adversely affected by the use of armed force particularly when it is used unjustifiably or aggressively. To protect these values Islamic law, promotes peace and prohibits, as a general rule, the use of armed force.

The Islamic law prohibition of the use of force is subject to certain exceptions where force inevitably can be used in response to aggression or in reaction to the serious violation of the aforementioned values. One of the exceptional circumstances which Islamic law permits, similar to contemporary international law, is the use of armed force in self-defence or against aggression. Aggression breaches peace, violates the territorial sanctity of the aggressed nation, infringes human life and dignity, causes destruction of property, both public and private and defies all other values which Islam advocates. The restoration and preservation of these values necessitates and justifies the use of armed force against aggression. The other exceptional situation which justifies the use of armed force is the situation where people, irrespective of their race, nationality or religion, are mass murdered and forced out of their homes and towns.

The paper discusses both the rule and the exceptions on the use of force in international relations and goes on to explain the humanitarian aspects of the use of force, as Islamic law has developed such rules so that in the event of armed conflict the behaviour of the conflicting parties are regulated. In discussing all these and keeping the concept of peace in view, the paper refers to the primary sources of the law, namely, the *Qur'an* and the *Sunnah* of the Prophet Mohammad. Other sources of the law and the views of the Muslim scholars are also referred to. It also refers to the relevant treaty provisions to which Muslim states are parties. Islamic law requires Muslims to abide by their treaty obligations,

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6 "We bestowed dignity on the progeny of Adam" (*Qur'an* 17:70).

7 *Qura'nic* verses: 6:108, 109; 10:99; 18:29; 109:1-6. & 2: 256.

8 "O you who believe ...let not hatred of a people incite you not to act equitably. Be just; that is nearer to observance of duty" (*Qur'an* 5:8) See also the following *Qura'nic* verses: 4:58; 4:135; 5:8; 5:42; 7:29 & 16:90

9 "O mankind, We have created you from a male and a female, and made you into tribes and families that you may know each other. Surely the noblest of you with Allah is the (one who is the) most righteous of you. Surely Allah is Knowing, Aware" (*Qur'an* 49:13). In his Farewell Sermon, the Prophet Mohammed declared: "Righteous actions are the only mark of distinction and not wealth, birth, or status in life." In his Farewell Sermon, the Prophet Mohammad declared: "Righteous actions are the only mark of distinction and not wealth, birth, or status in life."

as the *Qur'anic* verse provides: "You shall fulfil your covenants, for a covenant is a great responsibility"[10]. This is the *pacta sunt servenda* of Islam which we may refer to it whenever it is necessary to explain the binding effect of the treaties to which Muslim states are parties.

1. PEACE NOT VIOLENCE IS THE MESSAGE

Islam is an Arabic term that derives from the root word *Salam* meaning peace and security (*amn*). Whenever Muslims meet and greet one another, they pray for each other's peace and security. In addition, Muslims daily raise their hands to Almighty Allah and pray in the following words, "O Allah! You are peace, peace comes from you and to you returns peace. Keep us alive, O our Cherisher, in peace and take us into the house of peace." Who could be more loving of peace other than those who daily offer prayers of peace for others and also pray for their own peace? Peace "is a state of physical, mental, spiritual, and social harmony."[11] Peace is a condition for a harmonious human society and the society of states, irrespective of the nature of that society, whether Islamic or Non-Islamic. All humans, irrespective of their race, religion or nationality are created by Allah, they are equal[12] and their lives are sacred[13]. In Islam no one, even an individual himself[14], has the right to deprive a person from his right to life unless the deprivation is sanctioned by law. No one has the right to deprive an individual from his God given rights including the right to freedom of religion. Islam calls for the quest for peace, stresses the importance of tolerance and kindness to other people[15], and promotes nonviolent methods to resist oppression, as evident from the *Sirah* (practice) of the Prophet Mohammed. The Prophet Mohammed never resorted to violence or force unless it was absolutely necessary to do so.

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[10] *Al-Qur'an,* 17:34.

[11] *Ibidem*, 5:64

[12] *Shari'ah* upholds the right to equality and in doing so it prohibits discrimination between persons on the basis of colour, race, nationality, nobility of birth, wealth, political status, gender, etc. In Islam, superiority of a man is determined only on the basis of piety, righteousness, and moral excellence. As the *Qur'an* proclaims: "O mankind, We have created you from a male and a female, and made you into tribes and families that you may know each other. Surely the noblest of you with Allah is the (one who is the) most righteous of you. Surely Allah is Knowing, Aware" (*Al-Qur'an,* 49:13). In his Farewell Sermon, the Prophet Mohammed declared: "Righteous actions are the only mark of distinction and not wealth, birth, or status in life." *Al- Qur'an,* 7:11.

[13] *Ibidem,* 5:32

[14] *Idid,* 4: 29. "And do not kill yourself. Verily, Allah is merciful towards you."

[15] *Id.,* 16:90.

The Prophet Mohammed and his followers were oppressed by the Pagans in Mecca. In spite of the fact that Muslims were harassed, abused, tortured, and some even were murdered, they did not initiate violence against the Pagans but instead called the Pagans to peace. When the oppression from the Pagans became unbearable, the Muslims first migrated to Abyssinia and then to Madinah. While in Madinah, the Prophet Mohammed worked tirelessly towards peace by drawing legal documents showing tolerance and respect to other religions. Such legal documents were the basis and Constitution of Madinah, prepared under the leadership of the Prophet Mohammad in 622 AD, was in force until 632 AD. This Constitution brought together different people, with different cultural, ethnical and geographical backgrounds, to form a social unity enabling them to live side by side in peace. It ensured religious and political freedoms, promoted cooperation[16], and provided a model of peaceful coexistence of different religious peoples, endorsed arbitration (*Tahkim*), as a means of settling disputes and made the Prophet Mohammad as the arbitrator of any conflicts that would arise.

The Prophet Mohammad attempted the pacific settlement of a dispute as such a settlement preserves peace and also attract pleasure of Allah (s.a.w.). In this regard the Qur'an provides: "In most of their secret talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (secrecy is permissible): to him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)" (*An-Nisaa:* 114). Peace is better than armed confrontation and if peace is achievable through pacific means, such as mediation and reconciliation, then the peaceful means must be resorted. The Qur'an provides: "Whosoever intercedes (mediates) for a good cause will have the reward thereof, and whosoever intercedes for an evil cause will have a share in its burden. And Allah is Ever All-Able to do (and also an All-Witness to) everything." (*An-Nisaa:* 85). The Prophet Mohammad is reported to have said: 'Should I inform you of something that is higher in virtue than fasting, praying and charity?' They said, 'Yes O Messenger of God.' Then the Prophet Mohammad said 'To make reconciliation between peoples that are in conflict: Enmity and malice tear up heavenly rewards by the roots.'[17]

Islamic law thus promotes the pacific settlements of disputes so does the Charter of the United Nations. The Charter, which is a multilateral treaty to which all the Muslim nations are parties, expresses in its preamble a determination 'to save

[16] 'Help ye one another in righteousness and piety. But help ye not one another in sin and rancour.' (*Al-Maidah:* 2).
[17] Al-Albani, Nasirudin and al-Saghir, Sahih Al- Ja'mi' *Hadith* No: 436.

succeeding generations from the scourge of war', 'to practise tolerance and live together in peace with one another as good neighbours', 'to unite our strength to maintain international peace and security', and to ensure 'that armed force shall not be used, save in the common interest.' Peaceful coexistence is desired by the UN and so is desired by Islam. Islam urges the Muslims to live in peace with non-Muslims who do not oppress the Muslims or who do not drive them out of their homes and towns because of their beliefs. It urges them not to fight the non-Muslims just because they profess religions other than Islam for there is no compulsion in religion.

2. PROHIBITION ON USE OF FORCE FOR SPREADING ISLAM

Islamic law recognises the diversity of faith[18] as the Qur'an provides: "To every People have We appointed rites and ceremonies which they must follow: let them not then dispute with thee on the matter, but do thou invite (them) to thy Lord: for thou art assuredly on the Right Way" (*Al-Hajj,* 22:67). Muslims may invite non-Muslims to the way of Allah (i.e. Islam) but they must do so not through the use of force but with wisdom and beautiful preaching. "Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His Path, and who receive guidance" (*An-Nahl,* 16: 125). Muslims may caution or admonish the non-Muslims to embrace Islam, which can effectively be carried out by beautiful preaching, but they should not force or compel them to do so. The Qur'an provides: "Admonish, for you are one to admonish, you are not one to compel them to believe" (*Al-Ghashiya,* 88: 22-23):

The invitation extended by Muslims may or may not be accepted by the non-Muslims. In any case, the Muslims fulfil their obligation i.e., to, convey the 'Message' which Allah *(s.a.w.)* want them to convey and that is it. As the Qur'an provides: "But if they turn away, We have not sent thee as a guard over them. Thy duty is but to convey (the Message)" (*Ash-Shura,* 42: 48). Where the Muslims' call is not heeded by the non-Muslims then the Muslims must not resort to force to make them to accept Islamic religion. The Qur'an provides: "You are not one to over awe them by force. So admonish with the Qur'an all such as may fear My Warning" (*Qaf,* 50: 45). There is no reason to force the non-believers to believe for if Allah wanted them to believe all of them would have believed. The Qur'an

[18] The holy Qur'an also recognizes diversity in matters of faith by saying:"To every nation have we appointed rites and ceremonies which they follow , so let them not then dispute with thee on the matter but do thou invite (them) to thy Lord: for thou art assuredly on the Right Way"(22: 67).

provides: “If it had been thy Lord’s will, they would all have believed,- all who are on earth! wilt thou then compel mankind, against their will, to believe” (*Yunus,* 10:99).

All the above cited verses clearly suggest peaceful coexistence among people of different faith[19]. Islamic law does not allow its followers to use force as an instrument for the spread of Islam. The Qur’an further provides: “There is no compulsion in matters of faith. Surely the right now became distinct from wrong” (*Al-Baqara,* 2: 256). History is witness that Muslim conquerors never used force for the sake of changing the religion of people they conquered as they correctly thought that sword, though may win territories, cannot win heart and force can bend heads but not minds. In his book entitled “Civilization of the Arabs,” Gustav Lebon observes, “The reader will find, in my treatment of the Arabs’ conquests and the reason of their victories, that force was never a factor in the spread of the Qur’anic teachings, and that the Arabs left those they had subdued free to exercise their religious beliefs. If it happened that some Christians embraced Islam and adopted Arabic as their language, it was mainly due to the various kinds of justice on the part of the Arab victors, with the like of which the non-Muslims were not acquainted. It was also due to the tolerance and leniency of Islam, which was unknown to the other religions.”[20]

Islam spread throughout the world not through the use of sword, though some cynics think otherwise, but through righteous conduct. In his book “History of the Crusades,” Michel Michaud writes, “Islam, besides calling for Jihad, reveals tolerance toward the followers of other religions. It released the patriarchs, priests and their servants from the obligations of taxes. It prohibited, in special, the killing of priests for their performance of worship, and Omar Ibn Al-Khattab did not inflict harm on the Christians when he entered Jerusalem as a conqueror. The Crusades, however, did slay Muslims and burn the Jews when they entered the city.” In his book, “Islam: Impressions and Studies,” Count de Castri writes, “After the Arabs yielded to, and believed in the Qur’an, and people received enlightenment through the True Religion, the Muslims appeared with a new show to the peoples of the earth, with conciliation and treatment on basis of free thinking and belief. The Qur’anic verses then succeeded one another, calling on kind treatment, after those verses in which warnings had been addressed to the heretic

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[19] The Prophet Mohammad in one of his testaments to ‘Ali Ibn Abi Talib (a.s.) said: The most commendable are three deeds:-First is being just to the people even against yourself. Secondly, cooperation and material help to (Muslim) brothers. Thirdly, remembrance of Allah in all circumstances.

[20] Lebon, G (1884), *The civilization of the Arabs,* (Paris), 605. Translated by ‘Adil, Za’aytar.

tribes... Such were the instructions of the Apostle after the Arabs had embraced Islam, and the Caliphs who succeeded Prophet Mohammed followed his example. This writer agrees with Robertson when he said that the people of Mohammed were the only ones who combined kindness to others and the pleasure of seeing their Faith spread. It was this affection that pushed the Arabs on the way of conquest. The Qur'an spread its wings behind its victorious troops that invaded Syria and moved on like a thunderbolt to North Africa, from the Red Sea to the Atlantic, without leaving a trace of tyranny on the way, except what is inescapable in every war, and never did they massacre a nation who rejected Islam... "The spread of Islam and the submission to its authority seem to have another reason in the continents of Asia and North Africa. It was the despotism of Constantinople which exercised extreme tyranny, and the injustice of rulers was too much for people to bear... "[21]

Islam was never imposed by sword or by force, but it got into the hearts of people out of longing and free will, due to the talents of stimulation and captivation of people's hearts, lodged in the Qur'an. As Gustav Lebon writes: "The early Arab conquests might have blurred their common sense and made them commit the sorts of oppression which conquerors usually commit, and thus ill-treat the subdued and compel them to embrace the Faith they wanted to spread all over the globe. Had they done so, all nations, which were still not under their control, might have turned against them, and they might have suffered what had befallen the Crusaders in their conquest of Syria lately. However, the early Caliphs, who enjoyed a rare ingenuity which was unavailable to the propagandists of new faiths, realized that laws and religion cannot be imposed by force. Hence they were remarkably kind in the way they treated the peoples of Syria, Egypt, Spain and every other country they subdued, leaving them to practise their laws and regulations and beliefs and imposing only a small Jizya in return for their protection and keeping peace among them. In truth, nations have never known merciful and tolerant conquerors like the Arabs."[22]

Muslims and non-Muslims living in an Islamic country are required to pay tax. For non-Muslims the tax collected is called '*Jizya*' or poll tax and for the Muslims tax collected is called '*Zakat*' (Alms tax). The two resembles each other and in fact now most of the Muslim states do not make distinction between the two and both Muslims and non-Muslims are required to pay levy to the state treasury which is used for the common good of the society. *Jizya* is levied so that all the

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[21] Castri, Count de. *Islam: Impressions and studies.*
[22] *Ibidem*, 128.

capable non-Muslim citizens of the State can contribute, each from his own money, to the general welfare of the state, and that in return for this, they can enjoy their rights as nationals of the state, including compensation from the Muslim exchequer when they are in need. It is not collected from the weak and poor.[23] In exchange of the poll tax the non-Muslims have to be supported, protected, granted a freedom of faith, and treated on the same footing of justice and equality with Muslims. They are called "*Zimmis*" (the Arabic origin, "*Zimma,*" meaning security, protection and custody) because the said rights are guaranteed by God and His Apostle, and such was the custom the Muslim leaders followed in dealing with the *Zimmis*.[24] The poll tax is a small sum of money indeed when compared to the services the Muslim state offers to protect the *Zimmis* and support the army in charge to keep them safe from others' assaults[25].

The poll tax levied on the *Zimmis* and by definition *Zimmis* refer to non-Muslims who live in the Muslim countries. The institution of *Zimmis* does not entitle the Muslim states to collect poll tax from non- Muslims living abroad. Although a Muslim state may, if necessary, use force to collect poll tax from the *Zimmis*

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[23] In his message to the people of Hira, Khaled Ibn Al-Walid says, "When a person is too old to work or suffers a handicap, or when he falls into poverty, he is free from the dues of the pull tax; his sustenance is provided by the Moslem Exchequer." In his book *Al-Kharaj,* Abu Yusuf says, "No Jizya is due on females or young infants."

[24] In his book "Futooh Al-Buldan" (Conquests of Countries), Al-Balathiri comments on this saying, "Khaled Ibn Al-Walid, on entering Damascus as a conqueror, offered a guarantee of security to its people and their properties and churches, and promised that the wall of the city would not be pulled down, and none of their houses be demolished. It was a guarantee of God, he said, and of the Caliph and all believers to keep them safe and secure on condition they paid the dues of the Jizya."

[25] In his book "Al-Kharaj," Abu Yusuf gives the following reports: "After getting on peaceful terms with the people of Syria and collecting the dues of the Jizya and the Kharaj, news reached Abu 'Ubeida that the Byzantines had amassed their troops to attack him. The effect of this was great on Abu 'Ubeida and the Moslesm. He sent messages to the rulers of cities with whose citizens he had made peace, asking them to return to their subjects the paid dues of the Jizya and Kharaj, with an instruction to tell these: 'We hereby return to you the money you have paid us, because of the news of the enemy troops amassed to attack us, but, if God grants us victory against the enemy, we will keep up to the promise and covenant between us.' When this was delivered to the Zimmis and their money returned to them, they told the Moslems: May God bring you back to us and grant you victory over them!" In his book, "The Spirit of Laws," on dealing with the taxes levied by the government, Montesqieu says, "Such levied taxes were one reason for the strange facility which the Moslems faced during conquests. People, then, preferred — instead of being subjected to an endless series of fines which entered the rich imagination of greedy rulers — to submit to the payment of a minimal tax which can be fulfilled and paid with ease."

living within its territory as citizens, such a force cannot be used for this purpose or for other purses against non-Muslims living abroad in a non-Muslim country as this would amount to aggression, which Islamic law as well as contemporary international prohibits.

3. USE OF FORCE UNDER ISLAMIC LAW

Islamic law prohibits aggression so does the UN Charter[26]. The general prohibition on the use of force contained in the UN Charter binds all states including the Muslim states. The UN Charter is a universally accepted treaty and it binds its members by virtue of the customary principle of *pacta sunt servanda* and Art. 26 of the Vienna Convention on the Law of Treaties.[27] Islamic law also makes specific provisions considering treaties as binding.[28]. Islamic law requires Muslims to abide by their treaty obligations[29], because it is a duty[30] and a responsibility[31]. The holy Qur'an, even considers faithless those who failed to abide by their treaty obligation[32]. Thus under Islamic law, Muslim state parties to any international treaty, like the UN Charter, are bound to abide by the obligation created under that treaty so long the obligation in question does not contravene the teachings of Islam. The prohibition on the use of force contained in Art. 2(4) of the UN Charter is *Shari'ah* (Islamic law) compliance and Muslim states are, therefore, required to abide by the treaty obligation as the sacredness of treaties, faithfulness to covenants and refraining from deceit[33] are stressed in the *Qur`anic* text.

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[26] UN Charter, Article 2 (4).

[27] 1155 UNTS 331 (hereinafter: "VCLT"). Art. 26 of the VCLT provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This provision is based on the doctrine of *Pacta Sunt Servanda* or the customary rule that treaties are binding on the parties and must be performed in good faith.

[28] Bassio, M. Cherif (1980). 'Protection of diplomats under islamic law', *American journal of international law* 74, 609.

[29] *Al-Qur'an* provides: "O you who believe, fulfill any obligations (you may make)" (*Al-Maeda, 5:*1)

[30] *Ibidem.* "Excepting those of the idolaters with whom ye (Muslims) have a treaty, and who have since abated nothing of your right nor have supported anyone against you. (As for these), fulfill their treaty to them till their term. Lo! Allah loveth those who keep their duty (unto Him)" (*Al Tauba*h, 9:4).

[31] *Ibid.* "And perform your Covenant [treaty]; verily the Covenant shall be enquired of [you shall be responsible for it]" (*Al-Isra,*17:34).

[32] *Id:* "Every time they make a Covenant, some party among them throws it aside. Why, most of them are faithless" (*Al-Baqara*: 2:100).

[33] "To the Greeks, the rule of good faith formed part of universal law. To the Romans, it was part of *jus gentium,* which is common to every tribe and people: *pacta sunt servenda.* To the Muslims, it (is) part of the *Shari'ah* or divine law, *at-taharruz 'anal-ghadr* (refraining from deceit), which is set forth in unmistakable terms in both the *Qur'an* and Traditions

Islamic law, like the contemporary international law, generally prohibits the use of armed force in international relation. The Qur'an permits defensive use of armed force but prohibits aggression for Allah does not love the aggressor.[34] The aggressor initiates the use of armed force and such an initiation attracts the displeasure of Allah which a Muslim state never ever would like to attract. The Qur'an instructs the Muslims to be kind and just *vis-à-vis* those who do not commit aggression and do not drive the Muslims out of their homes and towns. Specifically, it provides: "Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just" (*Al-Mumtahina,* 60: 8).

The Muslim world has diplomatic relationship with the non-Muslim world so the non-Muslim world, with the exception of Israel, can be described as '*Darul Sulh*' or the abode of peace. Israel may be described as a '*Darul Harb*' and the Muslim world may be at war with it because it has occupied a Muslim land and for over sixty years oppressed its people. However, the Muslim world can live at peace with the rest of the non-Muslim world so long they live with the Muslims in peace. The Qur'an provides: "Except those who join a group between whom and you there is a treaty (of peace), or those who approach you with hearts restraining them from fighting you as well as fighting their own people. If Allah had pleased, He could have given them power over you, and they would have fought you: Therefore if they withdraw from you but fight you not, and (instead) send you (Guarantees of) peace, then Allah Hath opened no way for you (to war against them)" (*An-Nisaa,* 4:90).

Aggression is undoubtedly an unjust and unkind act for it destroys peace and the international criminal law considers it a crime against peace which is the supreme crime. Peace not war is the basis of relations among nations so that they may exchange benefit and cooperate with each others in order to promote humanity to utmost perfection. This is a well-founded rule of international law and so is the Islamic law. The peaceful relations should not be broken except in extreme urgencies that necessitate war, provided that all peaceful steps have failed in terminating the cause of dispute. This is what Islam has always promoted. The relations of Muslim nations with others are primarily based on peace and

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of the Prophet Muhammad (PBUH))": Gaber, Mohamed Hosny Mohamed (1983). *Early islamic state with special reference to the evolution of the principle of the islamic international law*, 632-750 A.D., 97 The American University Ph.D., 1962. Political Science, International Law and Relations, University Microfilms, Inc. Ann Arbor, Michigan.

[34] *Al-Qur'an, Al-Baqara,* 2:190

confidence. Islam refuses the killing of people merely because they embrace a different faith, nor does it allow Muslims to fight against those who disagree with them on religious questions. It urges its followers to treat such people kindly.[35]

Aggression is a mischievous conduct that creates disorder and for this reason it is opposed to Allah's will. The Qur'an provides: "Every time they kindle the fire of war, Allah doth extinguish it; but they (ever) strive to do mischief on earth. And Allah loveth not those who do mischief" (*Al-Maeda,* 5: 64). Since aggressive war is destructive of peace, it has to be avoided in all circumstances even in circumstances where Muslims are provoked to initiate the use of the armed force they must decline to do unless they come under actual armed attack. This is what the *Shari'ah* ordains, as is now ordained by the UN Charter. When the enemy uses provocation the Muslims instead seek peace. As the Qur'an provides: "But turn away from them and say Peace!" (*Az-Zukhruf,* 43:89).

Peace not war is promoted by Islam. Sometimes disputes may arise between Muslim states and non-Muslim states, but they should not be resolved through the use of armed force instead they should be resolved through peaceful means. This is what Islamic law recommends as is now recommended by the UN Charter[36]. Islamic law promotes peace, as is reflected in the word 'Islam' itself[37]; and for this reason it generally prohibits the use of armed force for the use of force destroys peace. In addition, the Qur'an provides: "But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah. For He is One that heareth and knoweth (all things)" (*Al-Anfal,* 8:61). The peaceful means of settling disputes, which include diplomatic and legal means, have to be exhausted to resolve the dispute.[38] The diplomatic means of pacific settlement of disputes include *inter alia* negotiation (*muzakarah*) and mediation (*Wassatah*) while the legal means include arbitration and judicial decision. If the diplomatic means prove to be ineffective then legal means should be resorted to resolve the dispute. These

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[35] *Ibidem*, *Al-Mumtahina,* 60: 8.

[36] UN Charter, Arts. 2 (3) and 33.

[37] "The Arabic word *Islam* is derived from the root *Salam*, which means peace and security. Whenever Muslims meet and greet one another, they pray for each other's peace and security. In addition, Muslims daily raise their hands to Almighty Allah and pray in the following words, "O Allah! You are peace, peace comes from you and to you returns peace. Keep us alive, O our Cherisher, in peace and take us into the house of peace." Who could be more loving of peace other than those who daily offer prayers of peace for others and also pray for their own peace?" Pirzada, Shaykh Muhammad Imdad Hussain (2006). 'London suicide bombings: The islamic perspective'. *available at* www.mihpirzada.com, 2.

[38] Khaddur, Majid (1955). *War and peace in the law of Islam,* 55.

are nonviolent means which the Prophet Mohammad often used to settle disputes involving Muslims and non-Muslims.[39] .

The reason *de'tare* for advocating pacific settlement of dispute is to ensure protection of human life, property and environment. Armed force should not be used as it violates, *inter alia*, human life which the *Shari'ah* considers sacred. The Holy Qur'an provides: "… take not life which Allah has made sacred, except by way of justice and law: thus He commands you that you may learn wisdom" (*Al-Anaam,* 6:151). In another place the holy Qur'an provides: "… If anyone killed a person not in retaliation for murder or for his spreading evil in the land, it would be as if he killed the whole of mankind. And if anyone saved a life, it would be as if he saved the whole of mankind" (*Al-Maeda,* 5:32). Islamic law not only protects human life but also property and the environment in which we live. But armed conflicts destroy both property and the environment and for these reasons armed force shall never be used unless it is absolutely necessary. The use of force becomes necessary when for example the non-Muslims breach the peace of the Muslim world[40] and attack or oppress the Muslims. These are the exceptional circumstances which justify the use of force under Islamic law. But, as will be discussed letter, even force used under such circumstances the humanitarian rules of Islamic law which include the protection of life of civilians and their property must be observed.

- **Exceptions**

In exceptional circumstances, Islamic law allows the use of armed force in self-defence and in situation where Muslims are ejected from their homes, towns and cities. The later exception can be termed as the collective use of force for humanitarian reason. In these circumstances, Muslim States may justifiably use armed force by invoking the concept of *Jihad*. Since the concept of *Jihad* is central in using armed force under the said circumstances it is important to know, what this concept means.

Jihad is part of the *jus ad bellum* in Islam. The concept is usually mistranslated in the West as "holy war". '*Jihad*' is an Arabic term which means "strife" or

[39] Hashmi, Sohail H. "Interpreting the Islamic ethics of war and peace – Conceptions of war and peace in the Sunna," available at www.ecla.org/articles/contemporary_issues/article. hashmi_sohail_h_1.html.

[40] *The Qur'an* further provides: "Others you will find that wish to gain your confidence as well as that of their people: Every time they are sent back to temptation, they succumb thereto: if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands, seize them and slay them wherever ye get them: In their case We have provided you with a clear argument against them" (*An-Nisa,* 4:91):

"struggle"[41]. *Jihad* in the cause of Allah can be conducted through peaceful means as well as through coercive means[42] which includes the use of force. But force can only be used as a last resort in exceptional circumstances and only after the exhaustion of all peaceful means. Broadly speaking, jihad can be of two types, namely *al-Jihad al-Kabir* (greater *Jihad*) and *al-Jihad al-Asghar* (lesser *Jihad*). The greater *Jihad* is "a self-imposed individual kind of jihad or struggle against the bad desires of the self"[43] and is described by the Prophet Mohammed as the 'best *Jihad*' (*al-Jihad al-Afdal).* The 'lesser *Jihad*' "is used for expanding ability and power in fighting in the path of God by means of life, property, tongue and other than these"[44]. Generally, this type of *Jihad* can be conducted through peaceful means as well as through coercive means. Coercive means, which include the use of armed force, can be used when peaceful endeavours fail to bring brutality, viciousness and oppression to an end.

The lesser *Jihad,* which allows the use of armed force for the defence of a Muslim nation and the protection of humanity, is the concern of the present discussion. Generally, this type of *Jihad* is not considered as a personal duty (*fard 'ayn*), but only a general duty (*fard kifaya*) which, if accomplished by a sufficient number, the rest will no more be condemned for the neglect of that duty[45]. In this sense, the administration of *Jihad* is entirely at the hand of the government of the Muslim state. If the Government called for *Jihad* then the Muslims should follow. The Qur'an provides in verse 4:59 "O ye who believe! Obey Allah and obey the Messenger and those charged with authority among you." Al-mawardy has stated that a war cannot be waged without permission of the Caliph (Central government)[46]. As-Sarakhsiy goes even further to maintain that if a foreign armed force without permission of its government takes belligerent action against a Muslim state, that does not amount to a declaration or existence of a war between the two states[47]. In such cases, redress may be obtained by diplomatic means and even by direct actions as the occasion may require[48].

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[41] Gaber, *Supra n.* 33, 129.

[42] Ibn Rushd, in his Muqaddimaat, divides Jihad into four kinds: "Jihad by the heart; Jihad by the tongue; Jihad by the hand and Jihad by the sword." Jihad by sword means the use of armed force.

[43] Gaber, *supra* n. 33, 129.

[44] Hamidullah, Muhammad (1953). *The muslim conduct of state* (Lahore: Ashraf Publication),163.

[45] *Ibidem*.

[46] *Ibid.*

[47] *Id*.

[48] *Id*.

The primary purpose of *Jihad* is public security and the protection of the sovereignty of the Muslim state[49]. A government, which has the support of the people or is Islamic, has the authority to take enforcement decisions in this regard. If, however, "the government loses support or is considered un-Islamic, then those who have the trust and support of the public can take decisions on public safety after being put in a position of authority according to Islamic law."[50] Such an authority can declare *Jihad* in the following circumstances: (1) there is an attack on a Muslim land, (2) there is "a well-founded fear that the ruler will not protect the lives and properties of Muslims" and non-Muslim citizens, and (3) there is consensus among "Muslim leaders" that *Jihad* should be lawfully declared in defense of the population, Muslims or non-Muslims[51]. In these circumstances, *Jihad* becomes "*fard 'ayn* or a duty of every believer...."[52] Thus, when an enemy state has already attacked a Muslim state then *Jihad* or armed struggle becomes unconditionally incumbent on every able man.

(i) *Self-Defence*

Self-defence is an exception to the general rule that the use of force is prohibited. This exception is recognised under contemporary international law and is also recognised under the *Shari'ah*. The Prophet Mohammad did not initiate war as he used to preach Islam peacefully but the war was imposed upon him as when the enemy of Muslims, the polytheists in Mecca used aggressive methods to inflict harm on the Muslims. They persecuted the Muslims and decided to kill the Prophet Mohammed and when their intention was known to the Prophet, he immigrated to Medina and was warmly welcomed by its people who pledged allegiance to him in the cause of Islam. At that time he did not fight even in self-defence, because he had no permission from God to do so. The enemy of Islam and the Muslims not only attempted to kill the Prophet Mohammad, but also provoked non-Muslim tribes against him in order to put an end to his Message. When the case reached this stage, Allah gave permission to the Prophet Mohammad to fight to defend Islam and the Muslims. The permission was given to drive away aggression and tyranny. The Qur'an provides: "To those against whom war is made, permission is given (to fight), because they are wronged;- and verily, Allah is most powerful for their aid" (*Al-Hajj,* 22:39). This verse recognises the right of self defense – a

[49] Khatab, Sayed (2006). *The power of sovereignty: The political and ideological philosophy of Sayyid Qutb*, (London: Routledge).

[50] Shah, Niaz A. (2008). *Self-defense in Islamic and international law: Assessing AL-Qaeda and the invasion of Iraq (*New York: Palgrave Macmillan), 22.

[51] *Ibidem.*

[52] Gaber, *Supra n.* 33, 133.

right which is also recognised by the UN Charter as an inherent right of states. Surely, war (*harb*) or the use of armed force is not a desirous conduct under the *Shari'ah* but when it is imposed on the Muslims or the non-Muslims aggressed or oppressed, do they have any other choice but to respond in self-defence? The Prophet Mohammad is reported to have said: "Do not wish for an encounter with the enemy; Pray to Allah to grant you security; but when you (have to) encounter them, exercise patience, and you should know that Paradise is under the shadow of the swords."[53] The Prophet Mohammad is also reported to have said: "Whoever fights in defence of his person and is killed, he is a martyr, whoever is killed in defence of his property is a martyr, whoever is killed in defence of his family and is killed is a martyr, and whoever is killed for the cause of God is a martyr."[54] Fighting in the course of God may mean fighting in the defence of oppressed Muslim nations.

The Prophet Mohammad did fight the Meccans, the Jews and their allies, the Christian tribes in Syria, but he did so in the defence of the oppressed Muslims. Yet this did not make the Prophet Mohammad to denounce the People of the Book. The Muslims were forced to defend themselves but they were not fighting a holy war against the religion of their enemies as Islam recognises religious freedom. When the Prophet Mohammad sent Zaid against the Christians at the head of a Muslim army, he told them to fight in the cause of God bravely but humanely. They must not molest priests, monks, nuns nor the weak and helpless people who were unable to fight. There must be no massacre of civilians nor should they cut down a single tree nor pull down any civilian installation.

The force used in self-defence is used out of necessity and it is a generally accepted maxim in s *Shari'ah* that 'a necessity is to be kept within the limits of that necessity'. The force used even in such a circumstance must be proportionate and must not led to transgression (such as expansion or dominance). The Qur'an provides: "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors" (*Al-Baqara,* 2: 190).

The force used in self-defence must be within the limit permitted under Islamic law and once the oppression and its causes removed law and order must be established and the Muslim rulers must uphold justice and forbid evils. The Holy Qur'an provides: "They are those who, if we appointed them as rulers on earth, they would establish the Contact Prayers *(Solat)* and the obligatory charity

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[53] Al-Mawardi, *Al-Ahkam as-Sultaniyyah*, 57. Translated by Asadullah Yate.
[54] Hamidullah, *Supra* n. 44, 165-166.

(Zakat), and would advocate righteousness and forbid evil. Allah is the ultimate ruler" [22:41]

The use of force in self-defence must end once the enemy is inclined towards peace. The Holy Qur'an provides: "But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah. For He is One that heareth and knoweth (all things)" (*Al-Anfal,* 8:61). The use of armed force becomes unnecessary the moment the aggressor inclines towards peace. If peace is desired by the aggressor then there is no reason for the armed conflict to go on endlessly. Armed conflict has to end and the dispute has to be settled peacefully. Restoration and the maintenance of peace is as desirous act to Muslims as is to others. Islam, in fact, makes of peace a special greeting which Moslems exchange whenever they meet by saying, "Peace be unto you" (*Assalamu 'Alaykum*). The Muslim also utters this statement at the end of every prayer.

(ii) *Humanitarian Reason*

Islamic law allows the use of force on humanitarian ground to emancipate people from a tyrannical ruler who oppresses them on the grounds of race or religion. It requires Muslims to stand on the face of injustice and oppression, wherever they may be, and strive towards the eradication of their causes, and not to take hold of the earth, or enslave people or dominate their welfare, but to establish justice. Fighting against oppression in support of the oppressed is a fight in the course of Allah. The Qur'an commands Muslims: "You shall fight in the cause of Allah, and know that Allah is Hearer, Knower"[55], or "You shall strive for the cause of Allah as you should strive for His cause...."[56]

The Prophet Mohammad is reported to have said: "Whoever is killed for the cause of God is a martyr." Fighting in the course of God may mean fighting in the defence of oppressed people. When a non-Muslim State or a Muslim state began to oppress its subjects to the extent of cleansing them from their homes and towns, as for example, Serbia did against the Muslims in Bosnia and Kosovo, then using force to emancipate people from this type of oppression become inevitable. The Qur'an provides: "(They are) those who have been expelled from their homes in defiance of right,- (for no cause) except that they say, "our Lord is Allah.. Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure, Allah will

55 *Al-Qur'an,* 2:244.
56 *Ibidem*, 22:78.

certainly aid those who aid his (cause);- for verily Allah is full of Strength, Exalted in Might, (able to enforce His Will)" (*Al-Hajj,* 22:40). This Qur'anic verse advocates the use of force on humanitarian ground to emancipate oppressed from oppression and injustices. The Qur'an further provides: "Let those fight in the cause of Allah Who sell the life of this world for the hereafter. To him who fight in the cause of Allah,- whether he is slain or gets victory - Soon shall We give him a reward of great (value). And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?- Men, women, and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help!" (*An-Nisa,* 4: 74-5).

The force used in such a circumstance must not, however, lead to arrogance in the land to raise a race above another but rather it must lead to justice, rule of law, freedom from operation. It should also lead to the creation of an environment where people can freely practice their religion so as to attain spiritual exaltation. It must also help to establish social justice, to support the needy to live a decent life, to promote tolerance and kindness among people of different faith. These are the righteous deeds which must be promoted and evil irrespective of its forms whether aggression or oppression has to be crushed. For whatever reason force is used it must not be used to oppress or enslave people. Islamic law allowed use of force for the cause of Allah and weak people, like those in Mecca who were persecuted and oppressed by the Meccan atheists. It is the duty of every believer to support people like these and relieve them from oppression. The Qur'an provides: "Those who believe are fighting for the cause of GOD, while those who disbelieve are fighting for the cause of tyranny. Therefore, you shall fight the devil's allies; the devil's power is nil."[57] The devils and their allies fight for the cause of tyranny and behave arrogantly in the land, enslaving others and depriving them of their rights to have a share in the riches of the earth. But the Muslims should fight in the cause of Allah to spread Divine law (which calls for justice and freedom of religion) in the world without there being any selfish intent or arrogance in the land. If the aim of the use of force is to seek justice against oppression and not to seek exaltation on earth it may result to victory. The Qur'an provides: "We reserve the abode of the Hereafter for those who do not seek exaltation on earth, nor corruption. The ultimate victory belongs to the righteous."[58]

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[57] *Ibid*, *4:76.*
[58] *Id.*, 28: 83.

4. ISLAMIC HUMANITARIAN LAW

Islamic law has permitted use of force (war) as necessity and also makes it regulated with its humanitarian rules and values. *Jus ad bellum* in Islam, as in modern international legal system, is connected to *jus in bello*. The former regulates the initiation of war, the later regulates the conduct of warring parties in time of war, which is known also as humanitarian law. Islamic humanitarian law regulate the conduct of the Muslim armies in time of hostilities. Accordingly, not only war to be just but also to be humane and in accordance with Islamic teaching[59]. The Prophet Mohammad and his companions acting in according with Islamic law had drawn very specific rules for the war to be humane.

One of the most important rules of Islamic humanitarian law is the rule of distinction, which obligates Muslim army to distinguish combatants from non-combatants and direct the hostilities only towards combatants[60] without harming civilians and civilian objects. Muslim army is required by the Qur'an to fight only the combatants. The Qur'an provides- "fight those who fight you but transgress not the limits. Truly Allah likes not transgressors."[61] In fact, the Prophet Mohammad used to fight only those who fought him and avoided attacking non-combatants. The phrase "those who fight you" implies fighting the enemies who are engaged in fighting Islam and its followers and not otherwise. The verse also enjoins Muslims to fight for the sake of Allah and should not be transgressors. The term "transgression" may include mutilating the dead, theft from the captured goods, killing women, children and old people who do not participate in warfare, killing priests and residents of houses of worship, burning down trees and killing animals without real benefit. During a war, the Prophet Mohammad saw the corpse of a woman lying on the ground and he said: she was not fighting. How then was she killed? From this statement of the Prophet Mohammad, jurists have drawn the principle that those who are non-combatants should not be killed during or after the war.[62] In another *hadith,* the Prophet Mohammad stated that fight in the name of Allah and by Allah, and as to the creed of the messenger of Allah. Do not kill an old man, nor a young child, or a woman. Do not grudge, and gather your spoils and do good deeds and be benevolent. Abu Bakr As-Siddique, the first Caliph of Islam, issued a decree to his army stating: 'I prescribe ten commandments to

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[59] Khadduri, M., (2006). War and peace in the law of Islam, (New Jersey, The Lawbook Exchange Ltd.), 57.

[60] *Al-Qur'an* 2: 190

[61] *Ibidem.*

[62] Aduly, M., (ed) (2008). Bulug Al-Maram Min Adillat Al-Ahkam, Attainment of the Objective in Conformity With Evidence of the Legal Judgment. (Lebanon) Hadith No. 1313. Translated by Hibah, G.A., Dar Al-Kotob Al-Ilmiyah.

you; do not kill a woman, a child or an old man, do not cut down trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palm, nor inundate them, do not embezzle, nor be guilty of cowardness."[63] This decree is deduced from the Qur'anic provisions and Prophetic traditions and thus it constitutes an obligation that Muslim army has to follow. Although violation cannot be averted, intentional violation of this decree cannot and should not be tolerated by a Muslim state.

Islamic law draws a vivid distinction between combatants and non-combatants. Non-combatants including civilians, women, children, the old, the infirm and the monks enjoy immunity from being attacked and thus immunity from being killed, so long they do not directly participate in the hostilities.[64] This means when civilians take part in hostilities, they will automatically lose immunity and they will become legitimate target[65]. But if the non-combatants do not directly participate in the hostilities, they enjoy immunity from molestation. When Imam Malik was asked whether or not Muslims could kill enemy women and children who stand on the ramparts and throw stones at the Muslims and cause confusion in their ranks, he answered: the Prophet Mohammad has forbidden the slaying of women and children. Malik went ahead to warned against killing women and children who even take active part in the hostilities[66]. Thus, right from the time of the Prophet Mohammad, Islamic humanitarian law distinguished between combatants and civilians and strongly condemned the indiscriminate use of weapons against combatants and civilians alike.[67]

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[63] Imam Malik, A., *Al-Muwatta Malik,* Book 21, Hadith 21: 3:

[64] Majority of Islamic scholars are of the view that the elderly and monks, who were normally protected, could be attacked if they are involved in supporting the enemy's war. This stand is supported by the incident that happened in 630 AD after the conquest of Makka, during the battle of Hunayn, Muslim fighters killed a man who was over one hundred years old, in the presence of the Prophet. The old man was killed because he was alleged to have provided helpful intelligent advice during the battle to the enemy. Badawi, N., (2009). 'Islamic jurisprudence and the regulation of armed conflict,' available at http://ihl.ihlresearch.org/_data/global/images/Islamic_Jurisprudence_Regulation_AC.pdf, 10

[65] Sultan, H. (1988). The 'Islamic concept' in UNESCO, International dimensions of humanitarian law. (Paris), 38.

[66] The Prophet Mohammad was reported to have prohibited those who killed the son of Abu Al-Haqaiq from killing women and children. One off the people said, when the woman of the son of Abu Al-Haqaiq harmed us with screaming I raised sword at her, but when I remembered the prohibition of Allah's messenger, I gave up. But for this reason, we would have been relieved of her. Imam Malik, A., Al-Muwatta (the Approved). Translated by Hibah, G.A., (2007). *Dar Al-Kotob ALIlmiyah,* I. 229.

[67] Bennoune, K. (1994). "As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence", *15 Michigan Journal of International Law 630.*

Islamic humanitarian law also grants civilian objects immunity from direct attacks. All objects are presumably civilians unless proven otherwise. Civilian objects must, however, be distinguished from military objects as the latter is not immune from direct attack. In distinguishing the two, the nature, use and intended purpose of the objects have to be taken into account. Direct attack against civilian objects is prohibited because they enjoy equal immunity with civilian population. It is reported that the Prophet Mohammad gave instructions to the Muslim troops deployed against the advancing Byzantine army and he said: "in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitant; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children".[68] Likewise, Shafi'i stressed that attack could not be directed against inhabited houses but only against fortresses, unless the homes were located very close to fortresses[69]. In the absence of military necessity, no military attack can be justified against civilian installations.

Islamic humanitarian law permits direct attack against combatants, who carry arms against Muslims and have the physical and mental ability to engage in war and actually waged war directly or indirectly against Muslims[70]. Combatants include military personnel and even civilians who directly participate in the hostilities. Any person who engage in the fight against Muslims is a direct participant in the hostilities and thus subject to attack. In other words, direct participation in the hostilities makes a person the legitimate target of a military attack, irrespective of whether that person is a soldier or civilian. By directly participating in the hostilities, civilians lose their immunity from being attacked. Precaution should, however, be taken to distinguish military personnel from civilians who are not directly participating in the hostilities. Under the Islamic humanitarian law, the later including women, children and the elderly enjoy immunity from being attacked.[71]

Combatants under Islamic humanitarian law are required to behave by certain code of military conduct regarding the treatment of prisoners of war, the wounded and sick and punishment of detainees by torture or fire. The Prophet Mohammad

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[68] *Ibidem*, 629.

[69] *Ibid*.

[70] Mahboub, M.M., War and the protection of the rights of individuals: An examination of Islamic and international humanitarian laws, (Triumph Publishing Co. Ltd, Kano (ND)), 19.

[71] Wiktorowicz, Q. and Kaltner, J. (2003). 'Killing in the name of Islam: Al-Qaeda's justification for september 11' X:2, *Middle East Policy Council Journal,* also available at http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt& folder=10&paper=540

was reported to have said punishment by fire does not behoove anyone except the Master of the fire. Combatants should also accord protection to wounded soldiers who are not fit to fight because the Prophet Mohammad said do not attack a wounded person and that no one should be tied to be killed as Prophet Mohammad was reported to have prohibited the killing of anyone who is tied or is in captivity.[72] Prisoners have to be fed, clothed and treated. This is the dictate of Islamic humanitarian law – a law that limits the harshness of war by protecting civilians, prisoners, the wounded and sick but allows attack against military personnel and military objects and even so it prohibits the use of poisonous weapons or weapons of non-discrimination against any target, military or otherwise.[73]

CONCLUSION

In short, it is absolutely wrong to equate *Jihad* with forcible conquest or acts of terrorism. *Jihad,* as an Islamic law concept, does not advocate violence for the sake of violence or the threat thereof. No doubt, one aspect of *Jihad* is to wage war but war can only be waged in self-defence or when it is absolutely necessary to protect the religion and restore peace and security of mankind. Aggressive war is prohibited because it breaches peace, violates territorial sanctity of the aggressed nation, infringes human life and dignity, causes destruction of property, (both public and private) and defies all other values which Islam law advocates for their protection. Although Islamic law allows defensive war, it has developed humanitarian rules to alleviate the harsh effective of the war on both the combatants and non-combatants. If these rules are broken by Muslim parties to a war, which sadly is the case now a days, those parties have to be blamed not Islam. There is no fault in Islam. Yes, lately there have been cases where some Muslim warriors failed to abide by the Islamic military code of conduct, but this wrong doing cannot be attributed to Islam or its 1.5 billion Muslims that profess this religion.

[72] Maududi, A. (1980). *Human rights in Islam,* (United Kingdom : Islamic Foundation), 36.
[73] Zuhili, W. (2005). *Islam and international law,* 87, 283.

(2015) 10 Universitas 70-89

MIGRANT WORKERS IN FISHING INDUSTRY: HUMAN RIGHTS ABUSE IN THAILAND

Orapan Pangkaew

Abstract

The migration into Thailand has steadily increased since the mid-1980s and early 1990s. During these periods, the country moved from low-end labor intensive operations to more capital technology intensive manufacturing industries. As a consequence, a large number of Thai workers sought work in the skilled labor market to support the country's rapid economic growth. Migrant workers from neighboring countries enter Thailand illegally. Irregular migrant workers become the most vulnerable to rights violations owing to their invisibility in destination countries. Workers on fishing boats are deprived of food and sleep and have to use dangerous heavy equipment. They are often forced to be out at sea for months or years at a time. In addition, physical abuse and threats are common and workers who try to resist or who become sick are killed or thrown overboard to die. This illustrates that migrant workers crossing borders illegally commonly become vulnerable to human trafficking. Most of them find work in slavery-like conditions, i.e., long hours of work, low-wages, and restricted freedom of movement. Furthermore, most of them are in debt to their agents or employers. Hiring migrant workers in Thailand also means lower costs for employers. The commercial fishing industry has an important role in Thailand's for economic and social development. Thailand became the world largest exporter of fisheries product. The fishery

ORAPAN PANGKAEW

~ Faculty of Law, Banaras Hindu University, India: orapan_apple@hotmail.com

Orapan Pangkaew has received her LL.B. degree from Naresuan University, Thailand and LL.M. degree from Sripatum University, Thailand. She is a Ph.D. candidate in law, in the Faculty of Law, Banaras Hindu University, at Varanasi in India. Her research focuses on the law of human rights.

industry has witnessed in widespread exploitation and abuse of workers including force labour and human trafficking.

Keyword: Migrant workers, Fishing industry, Human rights

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INTRODUCTION

International migration had never been as pervasive or as socio-economically and politically significant as it is today. In the context of globalization and the need for cheap labour, migrants are placed in a more precarious situation. Economic disparity is often the motivating factor for migration. Poverty and lack of opportunity, and political and social instability in the communities and countries of origin often force potential migrants to turn to irregular migration channels, including criminal networks.[1]Over the past few decades, Thailand has become the most developed country in Southeast Asia, having relatively higher employment opportunities and higher wages than other neighboring countries. Most migrant workers in Thailand come from three neighboring countries, Myanmar, Lao People's Democratic (hereinafter referred to as Laos) and Cambodia. They are placed mostly in low skilled jobs which most Thai prefer not to perform. The

[1] Jayagupta, Ratchada (2013), "Anti-labour exploitation and anti-human trafficking tool: Capacity-building for thai migrant workers", 146, in: Chantavanich, Supang, Middleton, Carl *et.al.* (eds.), *On the move: Critical migration themes in ASEAN.* (Bangkok: International organization for migration and Asian research center for migration, Chulalongkorn University).

movement of workers and their families has been increasing rapidly evolved into an important social and economic development issue in Thailand. The inequality among countries as a main economic driver of international migration flows in Thailand and other developing countries. It is believed that limited economic opportunities in their home countries and high rates of poverty are push factors compelling people in the neighboring countries to cross into Thailand to explore opportunities in their life. The fact is that income gaps which are widening between Thailand and its neighbouring countries, and the workforce in Thailand and development in the roads and infrastructure linking the Mekong sub- region are the important reasons of cross-border movement of labour into Thailand. Since low-skilled workers in labour-intensive production are in greater demand, foreign labourers are attracted to cross the borders and to find a work in Thailand.[2]

Most of the migrants fall victim to trafficking because of their lack of awareness of their legal rights and the lack of channels for redress. Other factors leading to vulnerability include the lack of valid travel documents and limited access to legal assistance as well as to other social services such as health care. According to this reason, new human trafficking routes are regularly established, and the market for fraudulent travel documents, secret transportation and crossing border has developed worldwide. People globally are trapped in forced labour. Children are engaged in the worst forms of child labour including human trafficking, slavery, debt bondage and hazardous work. Because of high unemployment and demand for cheap labour, human trafficking has grown significantly in recent decades. The threat to human rights has been further by government inadequate or unexercised policy frameworks, allowing traffickers to face few risks of prosecution. Many of workers are trafficked into labour-intensive industries. They often become dependent upon their agents and employers who force them into an exploitative situation. Debt bondage plays a crucial role in the dependence of trafficked persons, since victims are demanded to pay back their debts by using their labour. Finally, they are vulnerable to being forced labour.[3] Many of them have fallen victim to human trafficking.

In 2008, the Anti-Trafficking in Person Act[4] was passed to serve as an important

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[2] Pholphirul, Piriya (2011), "Migration and economy", 53, in: Huguet, Jerrold W. and Chamratrithirong, Apichat (ed.), *Thailand migration report 2011: Migration for development in thailand: Overview and tools for policymakers.* (Bangkok: International Organization for Migration).

[3] *Ibidem.*

[4] Ministry of Foreign Affairs of the Kingdom of Thailand, *The Prevention and suppression of human trafficking*, Retrieved from http://www.mfa.go.th/main/th/issues/98948C.html, (Text in Thai language).

tool to combat human trafficking. The Thai government has adopted several measures to tackle the problem including the implementation of an action plan and the setting up of a coordinating mechanism at national level and cooperation with neighbouring countries but problem remain with corruption among officials and inability to prosecute traffickers. Human trafficking for the purpose of labour exploitation involves illegal migrant workers from Myanmar, Cambodia and Laos. Many of these migrant workers are taken advantage of by recruiters both in the country of origin and destination country and are at risk of having their rights violated both by employers and authorities. They are usually mistreated when arrested, and are often denied their basic labour right to fair wage, freedom to travel, right to decent living and safe working condition and access to health care. The Thai government has adopted a more open door policy to manage rather than reject migrant workers through a registration process and allow them to work temporarily in the country. It has also introduced in cooperation with neighbouring countries in nationality verification process with a view to bringing migrant workers into the proper employment system which will entitle them to protection under the law. However, not all migrant workers have come to register and have their nationality verification. This group of workers together with family members of migrant workers (registered and unregistered) has no legal protection. The Thai government has to ensure that their basic human rights are respected.[5]

1. MIGRANTS IN THAILAND

The migrants in Thailand are divided into the following four groups.

(1) Migrant workers and dependants from Myanmar, Cambodia and Laos are the low-skilled workers and consist of legal and illegal migrant workers without work permits.

(2) Ethnic minorities are the non-Thais already documented and to whom card have been issued with an entitlement as "Persons without Thai Nationality" since 2004.

(3) Stateless persons are those persons who are living in Thailand but are not officially registered with the Ministry of Interior. Most of these people are ethnic minorities who were born or have been living in Thailand for a long time but have been verified and surveyed manage by the Department of Provincial Administration.

    This group also includes *de facto* stateless persons or other individuals despite their right to nationality not been accepted by the state where they live in.

[5] *Ibidem.*

They may be provided Thai nationality subject to the evidence that they were living in Thailand continuously for more than ten years.[6]

(4) Displaced persons live in nine temporary shelters located in four provinces along the Thailand-Myanmar border. Most refugees are ethnic minorities from Myanmar including an ethnic Shan residing in Chiangmai province. Sometimes accepted as refugees, they have escaped from political violence or suppression against ethnic minorities in Myanmar and were registered by the Ministry of Interior. In nine temporary shelters, refugees and asylum seekers receives basic food, shelter, medical care and schooling.[7]

The migrant workers can be classified into two major categories, legal migrant workers and illegal migrant workers.

(A) Legal Migrant Workers

Most of the registered migrant workers from Cambodia, Laos and Myanmar are engaged in agriculture, seafood processing or the fishing industry, construction and domestic service. The large number of migrants from neighbouring countries work in the border provinces or provinces on the coast, whereas many of the migrant workers do job in Bangkok or provinces in the Central Region, because the central area of Thailand attracts huge numbers of migrant workers from neighbouring countries.[8]

According to Thai law, a legal migrant worker is an alien if he has temporarily and legally entered Thailand under the immigration law[9] before 2008 and have received a work permit under the Alien Working Act.[10] Legal migrant workers can be classified into six categories on the basis of the conditions specified by law.

(1) Temporary or general permit migrant is an alien who has been granted a work permit to work in the occupation stipulated by the ministerial regulation under Section 7 of the Alien Working Act, 2008.[11]

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6 Kanchanadit, Bussayarat (2011) "*Access to health care: Primary care*". Retrieved from http://thaingo.org, (Text in Thai language).

7 UNHCR, *"Refugees in thailand"*. Retrieved from https://www.unhcr.or.th/th/refugee/thailand, (Text in Thai language).

8 Huguet, Jerrold W. and Punpuing, Sureeporn (2005), *International migration in thailand*, (International Organization for Migration),30.

9 The Immigration Act 1979.

10 The Alien Working Act 2008.

11 Alien Working Act, 2008, Sec 7: "Any work may be performed, in whichever locality and when by aliens shall be in accordance with the requirements stipulated under the Ministerial Regulation by taking into account the national security, career opportunity

(2) Permanent resident or lifetime permit migrant is an alien who has received work permit issued under Sec 58[12] of the Revolutionary Party Announcement, No. 322, of 13 December 1972. This Section provides that "a work permit granted to an alien who had resided in the Kingdom under the Immigration Law and had worked before December 13, 1972, is valid for the lifetime of that person except he or she changed his or her occupation."

(3) There are other illegal migrant workers from Cambodia, Laos and Myanmar who have got legal status through a process of Nationality Verification and receive a temporary passport or a Certificate of Identification allowing them to stay and work for two years. The Nationality Verification was started in 2007 after bilateral agreements between Thailand and Cambodia, Laos and Myanmar to verify their nationality of origin. Migrant workers under Nationality Verification are limited to manual labor or domestic work.

(4) Migrant workers under Sec 11[13] of the Alien Working Act 2008 or Memorandum of Understanding. Are migrants from Cambodia, Laos and Myanmar who were imported under the MOU between Thailand and Cambodia, Laos and Myanmar. The MOU was signed with Laos in 2003 and with Cambodia and Myanmar in 2004 but its implementation has remained underperformed. Up to 2009, the migrant workers under this category were from Laos and Cambodia only. Migrant workers from Myanmar are covered under MOU started in 2010.

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of the Thai people and demand for alien labors necessary for national developments which, in this connection, such requirements may be stipulated variedly among the aliens themselves in accordance with Section 13 and Section 14 herein."

The provisions under paragraph one above shall not apply to alien working in accordance with Section 12 herein

[12] *Ibidem,* Sec 58: "An alien whoever having already received a work permit or having given a leniency to work under Alien Working Act, 1978 which was amended by Alien Working Act, (No.2), 2001, on the date which this Act has been published in the Government Gazette, shall be deemed to receive the work permit or receive a permission to work in accordance with this Act provided, however, that this shall be in accordance with the conditions prescribed in such work permit or leniency.

A work permit issued under the Revolutionary Party Announcement, No. 322, dated 13 December 1972, shall continue to enforceable as long as the work permit has not expired and that the work permit recipient is still doing such work which has been permitted."

[13] *Ibid,* Sec 11: "Whoever desiring to employ aliens residing outside the Kingdom to do his work in the kingdom or may submit the applications for the permits and pay the fees on behalf of such aliens.

The applications for the permits on behalf of the aliens under paragraph one above shall be in accordance with the procedures prescribe under the Ministerial Regulation."

(5) Migrant workers under Sec 12[14] of the Alien Working Act 2008 or Board of Investment Promotion are migrant workers who come to work in Thailand under the Investment Promotion Act or related laws.

(6) Migrant workers under Sec 14[15] of the Alien Working Act 2008 or border workers have residence and nationality of the country borders with Thailand and temporarily enter Thailand with travel passport or border pass as documents and are permitted to work temporarily or seasonally in the border area.

(B) Illegal Migrant Workers

Many migrant workers enter Thailand for a job and for a better living. Apart from the thousands of migrant workers trafficked to Thailand to work in brothels,

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[14] *Id,* Sec 12: "In permitting aliens to work in the Kingdom in accordance with the Law Governing Investment Promotion or the other laws, the person giving permissions in accordance with such laws shall convey letters of notification on such permissions to the Registrar together with relevant details immediately.

Upon receiving the notifications in accordance with paragraph one above, the Registrar shall issue the permits to such aliens within seven days from the date of receiving the notifications.

During the waiting period for the permits under paragraph two above, such aliens shall be able to work for that time being with the exception that they are not required to comply with section 24 until the date on which the registrar has notified them to pick up the permits."

[15] *Id,* Sec 14:"An alien having the residence in and being the citizen of the country having common border with Thailand, if entering into the Kingdom by using document in lieu of his passport in accordance with the Law Governing Immigrant, may be permitted to do some certain category or nature of work in the Kingdom on a temporary basis during the prescribed periods or seasons provided, however, that this rules shall be applicable to working in the locality having the common border or the continuous area of such locality.

An alien desiring to work in accordance with paragraph one above, shall submit an application for a temporary work permit together with producing document used in lieu of the passport to the registrar and pay the fee as prescribed under the Ministerial Regulation.

On the issuance of a work permit, the registrar shall indicate the locality or place permitted to work, length of time permitted to work category or nature of work and the employer for whom such alien will be working which all these shall be in accordance with the format and procedures prescribed under the Ministerial Regulation."

The provisions under this section will apply to whichever locality, alien of whatever nationality, whatever category or nature of work to be performed, whichever the period or season the work to be performed, how the condition will be, shall be in accordance with the requirements prescribed by the Council of Ministers by publishing in the Government Gazette.

sweat shops, or private homes, many others wanted to enter Thailand legally, but institutional settings make legal admission to Thailand difficult for them. Hence, these workers become irregular migrants on their entry and continue to remain there illegally. According to the Human Rights Sub-Committee on Ethnic Minorities (2007)[16], most Myanmar migrants possesed identity card, granting them some form of citizenship, but this did not allow them to return to Myanmar legally. Since a passport costs thousands of dollars, the majority of Myanmar nationals do not possess passports. When they want to return home, they cannot be processed through immigration for the lack of passport. On the other hand, avoiding immigration is illegal under Art 13(1) of the Immigration (Emergency Provisions) Act of 1947. In agriculture and fishing industry sector, registration is further complicated because of the seasonal nature of migration. With low and uncertain income due to seasonal demand from employers, it is difficult for these migrants to register officially. In Thailand, the restrictive policy towards changing employers and geographic mobility, involve complex and expensive processes to gain permission. However, the Alien Working Act 2008 is expected to provide liberal attitude for geographical mobility and change of employer. But it is also true at the same time that the migrant workers, whose immigration status has been legalized through obtaining the legal travel documents, may become illegal if they temporarily leave Thailand without reporting to Immigration and/or paying the 1,000 Baht as re-entry fee. Those, who fail to do so, have their work permits revoked and they are expected to restart the recruitment process afresh from the original country all over again. Most of refugees are migrant workers, at the risk of serious human rights abuses violations were they to be returned to Myanmar. Although registration of migrant workers has been carried out through a series of Cabinet Resolutions, the number of registered migrants is well below that of actual irregular migrants residing and doing job in Thailand. In fact, a lot of migrant workers attempt to seek legal status to avoid the risk of constant arrest, deportation and exploitation. However, legal channel for labor migration in Thailand is inaccessible to most of the migrants. Due to several constraints like language barrier, complex procedure of labor registration and limited knowledge about the immigration policy and regularization process, migrants are often exploited by agents or brokers.[17]

2. PULL AND PUSH FACTORS FOR MIGRATION

Cross border migration into Thailand has steadily increased since the mid-1980s and early 1990s. During these periods, the country has moved from labour intensive

[16] Rukumnuaykit, Pungpond (2009), *A synthesis report on labour migration policies, management and immigration pressure in thailand*. (International Labour Organization),5.

[17] Kanchanadit, *Supra note*. 6, 5.

operations to more capital or technology intensive manufacturing sectors. The huge economic disparities within the Great Mekong Sub-region cause labour migration to Thailand. The increase in migrant workers from neighboring countries can also be explained by push and pull factors. Different internal push and pull factors influence migrant workers from neighboring countries to migrate to Thailand in search of work. It is clear that the wage difference between the countries of origin and destination determine the flow of migration. The high level of extreme poverty is the push factor for migrant workers to move to Thailand. They seek ways to secure their sources of income and diversify economic risks by having a household member become a migrant worker. One of Thailand's pull factors is its dual economy, i.e. there is both a capital-intensive sector, which employs highly educated and specialized skilled workers for high wages and other benefits and a labour-intensive sector, which tends to hire low skilled and temporary workers without offering benefits or job security. The presence of a dual economy in Thailand causes migrant workers to enter Thailand because there are jobs for them as long as wage differentials persist. Even though 60% of Thai workers, having a relatively low level of education and engaged in agriculture, construction, and other informal economies, there is an increasing demand for migrant workers to work dirty, dangerous, and difficult jobs. In fact, they are pulled in by those factors.[18]

The push factors are lack of economic opportunity and internal political strife. While low income and poverty are major push factors for labour migrants from Thailand's neighboring countries, political instability and administrative inefficiency are the other important reasons. These factors push many people to Thailand not merely for an economic opportunity but also as a security from the exploitative and violent abuse which cause vast majority of them intolerable to survive. Some Myanmar migrants had been living in areas of internal armed conflict, where there still exists fighting between ethnic minority-based armed opposition groups and the central Myanmar government. "Although such conflicts have greatly decreased …., there remain pockets of resistance in Southeastern Shan State, and in small areas of Kayin, Kayah and Mon States and in Tanintharyi Division. Migrants from these regions have often been victims of or witnesses to the Myanmar Army's counterinsurgency activities, including forced labour and forced relocation."[19]

3. CHANGING FACE OF THE FISHING SECTOR

Fishing has always provided livelihood for those living along Thailand's fertile coastline. Since the second half of the 20th century, the rapid industrialization of

[18] Rukumnuaykit, *Supra n*. 16, 4.
[19] *Ibidem.*

the fishing sector and the Thai economy more broadly has drastically changed the character of fishing work. A cabinet decision by the Royal Thai Government in 1993[20] granted permission for migrants to work in the Thai fishing industry in 22 coastal provinces. This policy shift coincided with a major decline in internal migrants from the Northeastern region of Thailand willing to work on fishing boats. This change in policy created a greater range of employment options for low-skilled workers, particularly in construction and export-oriented manufacturing, sparking a significant shift of the Thai labour force to the fisheries sector. Employers within the fishing sector realized that migrant workers could be utilized to fill the emerging labour shortages. Migration to Thailand in large numbers was several times greater than those available in their home countries. Even though they were paid less than Thai workers, they worked harder, and did not demand any additional health or social security benefits. As the Department of Fisheries is aware of the ongoing labour shortage faced by the industry, the Marine Fisheries Management Master Plan stated that: "Chronic shortage of fishing hands had epidemic Thai commercial fisheries for quite some time. Although wages under the catch-sharing system used to serve as a good incentive, the actual pay had… been less competitive...."[21]

In May 2012, an National Fisheries Association of Thailand survey estimated 142,845 fishermen as its membership. It is acknowledged that most of the migrant fishermen on Thai fishing boats were undocumented workers who had entered Thailand in violation of the Immigration Act, 1979, and who had not registered in significant numbers under the Department of Employment periodic migrant worker registration office. One of the reasons for their failure in registration is largely due to the fact that they were at sea during registration periods. Furthermore, many boat owners are unwilling to pay the costs of registration and to obtain work permit because of high turnover of crew members. It is also the fact that fishermen often change employers if they can earn more or can find better working conditions, or if they want to work with their friends and colleagues. The frequent movement between vessels is also the reason that the employers to withhold their pay and limit the freedom. Hence, the employers are unwilling to pay the costs to regularize

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[20] Environmental Justice Foundation, (2010), "All at sea: The abuse of human rights aboard illegal fishing vessels",11, Retrieved from http://ejfoundation.org/oceans/all-at-sea-report.

[21] International Labour Organization, (2013), *Employment practices and working conditions in thailand's fishing sector*, (Bangkok), 27. ILO Tripartite action to protect the rights of migration workers within and from the greater mekong sub-region (GMS Triangle Project) and Asian research center for migration asian studies, Chulalongkorn University, Thailand.

the irregular migrant fishermen. A work permit ties a worker to one employer, and therefore regular migrant fishermen become irregular when they change employers, unless they have the permission of the employer and the authorities. Migrant fishermen who manage to register and obtain the correct work permits frequently do so through a labour broker. While some brokers legitimately try to assist migrants with the process, there is always greater possibility of overcharging, and there is no remedy to seek justice in the case of exploitation. Even if the migrants are able to register themselves under the Department of Employment, agents or boat captains often seize and hold their passports and work permits, preventing them from leaving situations in which their rights are abused. If forced to go into debt with a broker over registration fees, workers may find themselves in situations of debt bondage, and may have to work without remuneration until the debt is paid. These include simply accepting the first job they are offered by brokers or recruitment agents because of a lack of labour market information, the sanctuary from arrest for irregular migration provided by work on fishing boats, the opportunity to save greater amounts of money due to long periods of time spent at sea, and the numerous forms of coercion and deception used by brokers and employers to get migrants to work on fishing vessels. Despite the large number of illegal migrant workers, Thailand's fishing industry is still experiencing a labour shortage. The use of foreign migrant workers to fill the labour demands of the fishing sector is unlikely to change. Most Thai fishermen who work within the industry do not wish to see their children pursue fishing as an occupation.[22]

These challenges to the sustainability and business models of the fishing sector have developed alongside dramatic changes to the composition of the sector's workforce. Shortages of Thai workers willing to work on fishing vessels, emerging simultaneously with expanding structural differences in population demographics and economic development between Thailand and its neighbouring countries, have transformed fishing crews to predominantly consist of migrant workers from Cambodia and Myanmar. Regulating the employment of these migrants aboard Thailand's fishing fleet has proven complex for authorities. These factors have all contributed to the vulnerability of fishers, and there have been several reports of abuse and exploitation on board Thai fishing vessels.[23]

4. STATUS OF MIGRANT FISHERMEN

Thailand is the largest seafood exporter in the world. The seafood-processing and commercial fishing industries are vital components of the emerging economy

[22] *Ibidem*, 28.
[23] *Ibid.*

of Thailand and largest in Southeast Asia. SamutSakhon province, in central Thailand, is one of the most important fishing and seafood processing centers and has continuously attracted migrants. The fishermen are expected to work 18–20 hours per day, and 7 days per week. The cramped living quarters have shortages of drinking water. Those, who do not live up to the expectations of their employers, receive physical violence, denial of necessary medical care, and even maiming or death in some cases. Further, the migrant fishermen are notable to leave the job due to accrued debts, fear of abuse from the captain, and the fact that they are at sea far from the shore.[24] Since they often depend on the assistance of broker or agent to cross the border from Myanmar, traveling with an agent eases the journey, as agents typically have connections with authorities and are well-versed in the ways of smuggling undocumented persons across the border undetected. For their service, agents demand transportation fees. As many of the migrants are not is a position to pay that fee, agents tell them that their fee can be met worked off in a few months time through a job in Thailand. While arrangements vary, brokers often arrange job placements for the workers they transport.

Migrant fishermen are extremely vulnerable to human trafficking for labor exploitation for a number of reasons:

(1) The fact that migrant workers are more susceptible to harassment and exploitation from those who are in power like employers, boat captains, recruitment agents, government authorities and the police. The vast majority of them on Thai fishing boats are undocumented migrant workers without registeration with the Ministry of Labour and are in violation of Thailand's immigration law. As a result, many of them live in constant fear of deportation and silently suffer through exploitative working conditions and discrimination in order to maintain a low profile. Migrants, who manage to register with the Ministry of Labour and obtain work permits to be legally employed, usually do so with the help of a broker or agent, but they are too often deceived and coerced by brokers and agencies and forced to work on board vessels under the threat of force or by means of debt bondage to their employers or to their brokers.

(2) Fishermen are forced to work for long hours. It is especially true for long-haul fishing boats because they do not return to Thai shores for many weeks or months at a time and it is not possible for them to escape or to receive assistance if their working conditions become unacceptable and get very low pay, and the work is intense, hazardous and difficult.

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[24] International Labour Organization, *Supra n.* 21,1.

(3) Even when adequate labor protection exists for migrant fishermen, they are still often found vulnerable to exploitation and trafficking due to the inconsistent nature of the government in addressing the needs of migrant workers. The government and the police adopt an off-and-on approach to alien worker problems on *ad hoc* basis and some official seven facilitate or undertake human trafficking themselves. Hence, instead of seeking out protection or filing complaints to proper authorities, they often choose to keep quiet out of fear. It is through these vulnerabilities they become easy targets for traffickers and those who exploit their labor and their situations.[25] Victims describe illness, physical injury, starvation, lack of pay, psychological and sexual abuse, deaths, and their vulnerability on board vessels in remote locations of the sea for months and years at a time. Less than half of all the migrants are undocumented and therefore they are illegal. A significant proportion of migrant workers have been trafficked into Thailand mostly from Myanmar, Cambodia and Laos. According to the International Transport Workers Federation and the United Nations Inter-Agency Project of human Trafficking, some migrant boys and men are most unfortunate as they end up working on the Thai fishing vessels that ply the South China Sea, an area which is notorious for high incidences of illegal unreported and unregulated fishing. Sold by brokers to Thai fishing boat captains, these migrants suffer the treatment as virtual slaves. They are subject to constant beatings and are compelled to work in inhumane conditions for several days without sleep or meals. Wages and travel documents are withheld for years. In case the migrants want to send money to their relatives, the payments go through brokers affiliated with the Captain. In many of the instances the money is stolen, and never reach to the family of the migrants. The Thai Captain do not want to approach shore for fear of being arrested for illegal fishing. The Thai fishing vessels are put at sea for years at a time, restocked by supply vessels or at remote islands. As a result, it is extremely difficult for crew to escape from their bondage without the risk of drowning or being marooned. If they do jump out of the ship, they have always risk to life. Deserters are often chased by their captains are brutally punished. Those who take shelter in the forests are subsequently sold to plantation owners, who force them to work in the fields under the same slave like conditions they endured at sea. Thai fishing and seafood

[25] Glenn, Schulz Kelly (2012), "An Assessment of the effectiveness of protection mechanisms for migrant workers: A case study of fisherman form myanmar in thailand", 2-3, Retrieved from http://www.icird.org/publications?task=file&action...f... International Conference on International Relations and Development.

processing industries has a hidden cost human trafficking and labour exploitation.[26]

5. HUMAN RIGHTS ISSUES IN THAI FISHERY INDUSTRY

In Thailand, the fishery industry has been implicated in widespread exploitation and abuse of workers, including forced labour and human trafficking.[27] The Thai fishing industry is built on slavery, even being negligent about enforcing legal standards of wages and working conditions for migrant workers. It is reported that workers had no employment contracts or they did were illegal contracts. Sea fisheries work does not place limits on working hours or requires set periods of rest. They work 17-24 hours per day with no pay or without overtime pay, they do not have set working hours and nor adequate rest, men workers among boat owners work like animals. The survey found children under the age of 18 working on Thai fishing vessels.[28] In 2013 a study published by the ILO found that 17% of 600 fishermen in Thailand said that they worked against their will and were unable to leave for threat of financial penalties, the threat of violence or being reporting to authorities. Around six of ten migrants who had been forced to work on Thai fishing boats said that they had seen the murder of another worker, a worker on Thai boat who tried to rebel, escape, or was no longer fit for work, and had risk to be thrown overboard according to a 2009 survey by the U.N. Inter-Agency Project on Human Trafficking.[29]

(A) Human Trafficking

Human trafficking and labour abuse in Thailand's fisheries sector show up cruel human rights abuses, human trafficking and murder in Thailand's fishing industry. The Hidden Cost documented human trafficking and associated human rights and labour abuses, including confiscation of identification documents, with holding of pay, forced detention and bonded labour in the Thailand's fishing industry. Poor and disorder fisheries management has resulted in the majority of Thailand's fisheries becoming over-exploited. The result is that boat operators perpetuate poor working conditions and keep low wages. Forced, bonded and slave labour remain common place across the country; particularly in the Thailand's fishing boats. The widespread use of violence and the heavy reliance on trafficked workers to fill labour shortages and reduce costs is partly a consequence of the government's

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[26] International Labour Organization, *Supra note* 21, 26.

[27] *Ibidem*. xi.

[28] *Ibid*.

[29] Brown, Sophie *Tackling thailand's human trafficking problem*, Retrieved from http://edition.cnn.com/2014/06/20/world/asia/thailand-trafficking-report/

reluctance to ensure sustainable management of fisheries as well as the industry's unwillingness to modernise and invest in labour saving technology. The abuse of vulnerable migrant workers underpins the economic model of Thailand's fishing industry. The case of human trafficking and labor exploitation, according to migrant workers in SamutSakhon's shrimp processing plants, have been documented by both the Non-Governmental Organizations and the news media. The shrimp industry is heavily reliant on migrant workers, many of whom are trafficked and face arduous journeys before having to endure abusive conditions in Thailand's exploitative shrimp factories. The shrimp industry, including human trafficking, exploitation, bonded and child labour, remain widespread. The Thai police and border officials frequently subject migrants documented or undocumented to harassment, extortion and arrest. Insiders are also known to have informed owners of abusive factories before an impending raid by the Thai authorities. Corruption, harassment and abuse strongly contribute to the marginalisation of migrant workers within Thai society. The Thai shrimp industry has a hidden cost: human trafficking and labour exploitation.[30]

(B) Human Rights Abuse in Health Care Sector

Providing health facilities to migrants is a complex and challenging issue for Thai health policymakers. It is complex because the health needs of migrants are related with their past health histories. It is challenging also due to the other factors: the movement of migrants brings difficulties on particular hospitals because many migrants do not speak Thai language or fully understand the Thai culture. Often they do not have money to purchase health insurance and facilities and even most migrants are irresponsible and do not want utilize local health facilities.[31] In Thailand, migrants particularly from Myanmar, suffer from diseases that are rare in Thailand, and therefore cause public health risk. It is believed that migrants place a burden on government hospitals near the border by using services for which they are not able to pay. Before applying for a work permit, they are required to undergo medical tests for tuberculosis, leprosy, elephantiasis, syphilis, drug addiction, alcoholism and pregnancy. However, the registered migrants in Thailand are eligible for health insurance as if they were enrolled in the Government's 30 Baht Health Scheme. They are first expected to pay 600 Baht for a medical exam and 2,200 Baht for one year health insurance. Their insurance contributions of 1,300 Baht per person transferred to the Provincial Public Health Office, and local hospitals could be reimbursed from that fund for their treatment. Migrant funds for health

[30] Environment Justice Foundation (2013), *The hidden cost: Human rights abuses in thailand's shrimp industry*, (London), 4-5.

[31] Baker, Simon (2011), "Migration and health", 85 in: Hugue *Supra n*. 2.

insurance were also used to support health promotion and prevention of disease. Since the insurance does not cover dental care, the Thai Red Cross Society tries to meet some of the need for dental care every month by sponsoring a mobile dental clinic to the migrant workers to visit sites with concentrations of migrants. The unregistered migrants do not qualify for health insurance and they are required to pay the full cost of any health treatment. Moreover, some provincial hospitals maintain policies of reporting migrants to the immigration authorities, thus reducing the likelihood of migrants using the hospital. The lack of treatment results into longer and more serious illnesses. Lack of access to health can also give rise to significant negative externalities for public health lack of awareness of and lack of access to prevention services for HIV/AIDS. The health condition of irregular migrants is often significantly below the Thai standard, because many migrants receive limited or no perinatal care, essential vaccinations and frequently live in environments with poor basic hygiene and sanitation.[32] Migrant children also suffer from the lack of healthcare, whereas all Thai children receive free vaccinations against tuberculosis, diphtheria, pertussis, tetanus, oral polio virus, and measles. Even the migrant adults rarely receive health treatment. The main obstacle to receiving medical care is that they are not permitted to be away from their jobs. Most employers make no provision for sick leave. If a worker is absent for the day, he is not paid. Workers in city can be able to seek healthcare after work hours, although that can also be difficult when working for 12 hours or more a day. Domestic workers and agricultural workers generally live at their workplace and are often not allowed to be away elsewhere. Language differences are often a to communication barrier between Thai health workers and migrant clients, because hospital forms are available only in Thai language.[33]

The Royal Thai Government formally requested International Organization for Migration to assist in addressing the health needs of migrants from Myanmar, irrespective of the fact whether they have legal status or not. It was encouraging to receive a strong appeal by the Ministry of Foreign Affair and the Ministry of Public Health to adopt and develop migrant inclusive policies and strategies for migrant workers. This resulted into a number of consultative meetings with central and local level Ministry of Public Health staff as well as various NGOs working with migrants in Thailand. Thus, an agreement could be possible that the migrant health program must concentrate on migrants, in particular unregistered migrants, living or working outside the temporary shelters along the border. International organizations and NGOs are implementing many programmes to improve health

[32] Huguet, and Punpuing, *Supra n*. 8.
[33] *Ibidem*, 41.

conditions and health services in the border areas, while the International Organization for Migration and the Ministry of Public Health have been collaborating with Provincial/District Health Offices and relevant public health facilities so that innovation and sustainable means could be developed for providing basic health services to migrants. The World Health Organization office in Thailand carries out the Border Health Programme, under which technical publications and information are produced, technical meetings are organized and coordination is strengthened. The Programme operates in 10 Thai provinces bordering Myanmar from ChiangRai in the north to Ranong in the south. Since migrant families are mobile, they often do not keep their medical records. The Programme has developed and distributed widely child health booklet in Burmese, Thai and English language, that mother scan retain and that can be used to record basic information about pregnant history, and the growth and immunization of the child. The Programme organizes annual border health meeting in border province in order to improve coordination among the government, UN agencies, NGOs, donors and others. The purpose is to improve data collection on migrants and a system is being established within Ministry of Public Health to collect and compile statistics about migrants from government hospitals and clinics.[34] The health of migrants is an important issue for policymakers from a human rights perspective, and it is important that they should be given access to basic health services. Regular migrants can access the Thai health system, but many of them, do not take advantage of this facility. The outpatient utilization rate for them is lower than the rate for Thais, hence, it appears that many of them seek medical assistance from the Thai health system only when they are seriously ill. More than half of the regular migrants did not collect their health cards which would have entitled them access to the health system. Although irregular migrants and those accompanying regular migrant workers do not have the right to obtain health insurance cards, they are able to access public health-care services, as long as they can pay for them. Many migrants are reluctant to seek health facilities due to a number of reasons, such as Language and cultural barriers, perceived and real discrimination, fear of arrest for not having proper documents and an inability to pay the fees. Health system service provision in public hospitals is complex; it is divided into several stages and departments, such as registration, outpatient, laboratory, radiology, pharmacy and accounting. Moreover, some employers seize migrants' work permits to prevent them from leaving their jobs. Such instances of exploitation cause additional obstacles for migrant workers in accessing health facilities. Many migrants complain about discrimination in treatment with lower standards in comparison to similar treatment given to Thai nationals. In some provinces, hospital officials have notified the

[34] *Ibid*, 41-42.

police when migrant workers sought health care and the migrants were subsequently arrested. In addition, the absence of legal status causes insecurity to migrants, and as such they try to avoid leaving their living and working environments to seek health care and other services. Furthermore, many migrants are also not aware about their rights to health care.[35]

(C) Human Rights Abuse in Education Sector

The UN Convention on the Rights of the Child[36]obliges Thailand to provide for all children, including the children of migrants, with the right to education. There were 93,000 persons under the age of 15 among persons who were registered as migrants with Ministry of Interior in 2011. This figure included 63,000 children from Myanmar under the age of 12. They accounted for 6.9% of the number of persons from Myanmar who were registered with Ministry of Interior, 3.3% migrants from Cambodia or 2.7% from Laos. Persons, who are registered, have a right access to social services in Thailand, including education in local public schools. However, the enrolment rate indicated no children of unregistered migrants were attending school. The low percentage is relating to a number of barriers. Some of local schools refused to admit the children of migrants. Even the expensive fee creates hurdle for migrant families, in sending their children to schools.[37] The 80% of migrant parents do not send their children to Thai schools because they feel that the school curricular was not adequate to prepare their children for return to their country. Thai schools teach in Thai and also focus on Thai national story and culture as they should. However, it does not adequately meet the linguistic, social, and educational needs of migrant children whose families wish to someday return to their country. One of the reasons as to why migrant parents do not send their children to local schools is because of discrimination against migrant children. In order to adopt progressive move for education of migrant children, the Government passed a decision on 5 July 2005 on education for all people living in Thailand, including migrant children, regardless of their identity status, except for displaced persons in the temporary. Since 2005, the Ministry of Education has, directed schools to admit all students. An amendment to laws restricting migrant children from travelling outside their residential areas is another progressive move of the Government of Thailand. The amendment lets migrant children travel outside their areas of residence for study purposes without seeking permission.[38]

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[35] Baker, *Supra n.* 31, 87.

[36] *Convention on the Rights of the Child*, Retrieved from http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[37] Huguet and Punpuing, *Supra n.* 8, 43.

[38] Jampaklay, Aree (2011) "Migration and children", 97 in: Hugue *Supra n*. 2.

A royal mandate grants every person on Thai soil both Thai and non-Thai the right to an education. It recognizes that the Thai mainstream educational system may not adequately serve all sectors of the population, it allows therefore non-formal education institutions to address the specialized needs of those sectors, while maintaining national security and educational standards. These policies have reached only to 13-28% of migrant children between the ages of 5 and 14. However, a majority of migrant children still remain outside of the education system. Raks Thai Foundation, for example, found that less than 10% of the Burmese children in Mahachai commercial district of SamutSakhon province were in the school system. World Vision estimated that more than half of the stateless children living in Mukdahan, a border province in the Northeast were not enrolled in schools. Meanwhile, Office of the Basic Education Commission has recorded that only 75,000 migrant children were enrolled in Thai schools. It is not surprising, that the National Statistics Office reported that migrant children account for one of the largest numbers of some 900,000 children of primary school age not in school or with late enrolment, and that the proportion of migrant children in government schools is very low. In addition to the government schools, more than 50 NGO-run learning centres for migrant children provided educational services to about 6,000 children Mae Sot, Mae Ramat, and Phopphra districts of Tak province. These centres follow Myanmar and English languages as the mode of instruction. Fang district, Chiang Mai, one of the largest orange plantation areas in Thailand, is a popular destination for migrants from the Shan state of Myanmar. A number of schools catering to them have been established in the district. With support from the United Nations Children's Fund Thailand, seven schools inside orange orchards have been established to provide basic primary education to around 300 migrant children. These special schools are very beneficial in providing migrant children with the basic knowledge needed for their future lives either in Thailand or in their parents' country of origin. The schools' curricular instruction on ethnic traditions and cultures. These special schools provide an alternative for migrant children whose education level is very low for their age, which creates hurdle to take admission in Thai schools and speak good Thai language.[39]

CONCLUSION

The rapid growth of Thailand's fishing industry has resulted in a drive for cheap labour and it seems that human rights victims who end up in fishing industry appear to be the most at risk of exploitation and abuse. The status of migrant workers in

[39] *Ibidem*, 97- 98.

Thailand remains weak. Migrant workers in Thailand are highly susceptible to exploitation and human rights abuse by agents and employers. The immigration system is complicated, costly and poorly communicated. This reason increased the sensibility of migrant workers to trafficking, exploitation and abuse. Human rights abuse remains common and insufficient progress has been made by both of the fishing industry and authorities to properly regulate Thailand's pre processing facilities. In fishing industry that has become so heavily dependent upon cheap there is a need for concerted and sustained efforts by all stakeholders to regulate the fishing sector and lend protection to the migrant workers who drive the fishing industry forward with their effort. Exploitative labour practices and human rights abuse have become an integral part of the Thai fishing industry. The continued failure by Government and industry to act could have severe consequences for the fishing sector and the wider to Thai economy. Combating human rights abuse and exploitation among migrant workers in fishing industry presents an enormous challenge. This is assignable not only to migrant workers lack of access to legal migration channels but also to the lack of oversight of employer adherence to national law. Effective implementation will require significant improvement in oversight and enforcement by Thai authorities as well as within the fishing industry. The transparency and traceability are needed throughout the Thai fishing industry. This will require urgent commitments from Government and industry to apply the necessary pressure for immediate and effective action to combat human rights abuse as well as slavery and forced labour.

(2015) 10 Universitas 90-107

LAW OF SOCIAL SECURITY FOR LABOUR: JUDICIAL APPROACH

Raju Majhi

Abstract

The concept of 'Social Security' is based on the ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain risks. Social security is one of the pillars on which the structure of welfare State rests, and it constitutes the hard core of social policy in most countries. It is though social security measures that the State attempts to maintain every citizen at a certain prescribed level below which no one is allowed to fall. It is the security that society furnishes though appropriate organisation, against certain risks to which its members are exposed. Social security system comprises health and unemployment insurance, family allowances, provident funds, pensions and gratuity schemes, and widows' and survivors' allowances. Social Security may refer to the action programs of government intended to promote the welfare of the population though assistance measures guaranteeing access to sufficient resources for food and shelter and to promote health and well-being for the population at large.

Keyword: Welfare State, Directive Principles of State Policy, Employee Insurance

RAJU MAJHI

~ Faculty of Law, Banaras Hindu University, India: rajumajhilaw@gmail.com

Raju Majhi has received B.Com (Hons.) and LLB from Ranchi University and Ph.D. in Law from Banaras Hindu University, India. He is Assistant Professor in the Faculty of Law, Banaras Hindu University, at Varanasi in India. His research focuses on tribal law, human rights and labour law.

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INTRODUCTION

The term 'Social Security' which originated in the United States of America has spread throughout the World. The Labour Government's Social Security Act, 1938 in New Zealand provided the most comprehensive interpretation of Social Security at that time. Although term has been used in many varieties of ways, and so broadly as it sometimes lose any value as a term of precision.[1] "The concept of Social Security is based on the ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain risks."[2] The large gaps existing between the rich and the poor and the unorganized workers and the organized workers have led in several countries to attempts at providing social and economic security to the poor and to the unorganized sectors. Social security is one of the pillars on which the structure of welfare State rests, and it constitutes the hard core of social policy in most countries. It is though social security measures that the State attempts to maintain every citizen at a certain prescribed level below which no one is allowed to fall. It is the security that society furnishes though appropriate organisation, against certain risks to which its members are exposed. Social security system comprises health and unemployment insurance, family allowances, provident funds, pensions and gratuity schemes, and widows' and survivors' allowances. Social Security may refer to the action programs of government intended to promote the welfare of the population though assistance measures guaranteeing access to sufficient resources for food and shelter and to promote health and well-being for the population at large.

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[1] Cohen, Haber W. (1960). *Social security programs problems and policies*. (Illinois : Richard D. Irvin Inc., Homewood), 28-29.

[2] International Labour Organization (1942). *Approach to social security*, 80.

The Universal Declaration of Human Rights, 1948 has recognised protection of social security as human rights. According to the Declaration that "*every one as a member of the society has the right to social security and is entitled to realization through national efforts and international co-operation and in accordance with the organisation and resources of each state of economic, social and cultural rights indispensable to his personality*".[3] The Declaration further provides that *"everyone has the right to a standard of living adequate for the health, and well being of himself and of his family, including food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood or circumstances beyond his control*".[4]

The role of the International Labour Organisation (ILO) in maintaining standards of social security at the international level has been significant. The Social Security (Minimum Standards) Convention adopted in 1952 embodied universally accepted basic principles and common standards of Social Security. The ILO, through these principles, have highlighted and guarded workers interest throughout the World.

The World Development Report of 1997 states that Social Security is an essential ingredient in the protection, development and full utilization of human resources, and should, therefore be looked upon as an investment both for the development of human resources and human development. [5] A Social Security Scheme is essentially a personal service to cover a person and his dependents, and its success is measured in terms of benefits such as Medical, Sickness, and Compensation in case of disablement as so on. The Report[6] prepared by the ILO for developing countries states that modern social security programs may be regarded as devices to redistribute income within their field and according to their structure, may divest part of the fruits of currents productions for the benefits of insured workers: securing minimum pension for lower paid colleagues; speed and social cost of widowhood and invalidity, and more widely by appropriate tax measures.[7] Social Security Schemes are important from two viewpoints : Firstly, these constitute an important step towards the goal of welfare State. Secondly, they enable workers to become

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3 *UDHR:* Article 22.

4 *Ibidem*, Art. 25.

5 (1997) *World development report,* 182 and 268, available at *www.undp.org*

6 ILO (1984). *Introduction of social security,* 123.

7 *Ibidem.*

more efficient and thus reduce wastage arising from industrial disputes.[8]

Social security protections appear as a foundation creating rights incorporated and protected as other fundamental human rights. These rights are on sound basis, developed in social security law of various countries on general principles, like universality social justice, territoriality, equitable covering reciprocity, etc adopted according to needs of a particular country, as the public policy on social security depends on the social and economical positions in the particular nation. Every nation progresses with its people and not in isolation, which contribute and pave the way for all round development. Lack of Social Security impedes industrial productions and also prevents formation of a stable and efficient work force. Social Security measures should not be considered a burden but a wide investment, which pays rich dividends in long term. According to the Report of the National Commission on Labour 1969, "Social Security has become a fact of life and these measures have introduced on element of stability and protection in the midst of the stresses and strains of modern life. It is a major aspect of public policy today and the extent of its prevalence is a measure of the progress made by a country towards the idea of a welfare State".[9]

It is manifestly clear by going though all the definitions that medical care, sickness benefit, unemployment benefit, old age benefit, maternity benefit, survivor's benefit are certain benefits covered by the term social security. Therefore, it becomes the essential duty of a welfare State to make legislations providing social security to the persons who deserve for it. The social security legislation is a part of social welfare legislation, which emerged and was evolved when *laissez faire* did not work well. In addition to above awareness of workers about their rights, progressive labour policies of the State and ILO Conventions[10] and recommendations are certain factors behind these social security legislations. In view of the above factors, the Legislature has enacted some social security

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[8] Giri, V.V. (1965). *Labour problems in Indian industry*, (Bombay : Himalaya Publishing House), 248.

[9] (1969). *Report of the national commission on labour*.

[10] Social Security (Minimum Standards) Convention, 1952 defines nine branches in social security (medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, survivor's benefit) and sets minimum standards for these benefits concerning scope of coverage, kinds of benefits, their duration and their qualifying conditions. Other ILO Conventions on social security are: Equality of Treatment (Social Security) Convention, 1962, Maintenance of Social Security Rights Convention, 1982, Medical Care and Sickness Benefit Convention, 1969, Employment Injury Benefits Convention, 1964 and Maternity Protection Convention, 2000.

legislations like Employees' Compensation Act, 1923; The Employees' State Insurance Act, 1948 (ESI Act); The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, (EPF Act) Maternity Benefit Act, 1961 and Payment of Gratuity Act, 1972. These enactments provide for distinct type of social security benefits in order to meet or combat against a social risk to which employed persons or their dependants are exposed. Judiciary has also played a significant and praiseworthy role which interpreting the provision of these social security legislations. In this article an attempt has been made to ascertain to what extent judiciary has protected the interest of down trodden by way of giving innovating interpretations of these legislations. Therefore, the judicial approach towards the interpretation of these legislations has been highlighted in this paper.

1. PROMOTION AND RECOGNITION OF SOCIAL SECURITY PROTECTIONS IN INDIA

Social Security protections schemes have been in existence since the times of immemorial. In Ancient India, there were groups, guilds, joint family and some institutions, which had considered social security as service towards the mankind. The Great King Ashoka and Chandragupta were leading rules who had considered people as their children and had responsibility to serve them better. This was the era of charity, and humanitarian feelings toward social security. Medieval India was the darkest period in development of social security protections. Majority of rulers were engaged in wars and could not take care of social security protections and welfare of people. This was the era of charity, where social security depended upon will and wish of rulers. Rulers, such as Sher Sah Suri and the Great Akbar considered social security protections as an instrument needed for the development and welfare of people. During Modern India, the concept of social security has been transformed from charity or donation and humanitarian efforts to duty of government to protect interests of the unprivileged and down trodden strata of society. In modern times Social Security has been influencing both social and economical policy of the nations.[11]

The Indian Constitution guarantees social security protections under Art. 38, 39, 41, 42, 43 and 47.[12] In order to comply with the objectives enshrined in the Constitution, some social security legislations have been implemented. The earliest

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[11] Giri, *Supra* n. 8, 247.

[12] The Part IV of Indian Constitution provides for various policies to its citizens, with respect to social security. "Art. 39-A, right to an adequate means of livelihood; Art. 41, right to work, education and public assistance in certain cases; Art. 42, just and human condition of worker and maternity relief; Art. 43, the State shall endeavor to secure to all

of such legislations is the Employee's Compensation Act, 1923, which ensures payment of compensation in case of a personal injury to a workman arising out of and in the course of employment. The ESI Act, 1948 provides for medical, sickness, dependents, disablement, maternity and funeral benefits. The EPF Act, 1952 and the Payment of Gratuity Act, 1972 provides for retirement benefits. The Maternity Benefit Act, 1961 provides, to those workers who are not covered under the ESI Act, 1948 for maternity leave and medical facilities before and after the delivery of the child and benefits for family planning.

2. CONSTITUTIONAL VALIDITY OF SOCIAL SECURITY

Constitution has been considered as the supreme law of the land. Social security legislations serve as the instruments to achieve the value goals mentioned in Part III and Part IV of the Constitution. There are many instances wherein Constitutional validity of these legislations have been challenged in the Courts from time to time. In *Basant Kumar Sarkar* v. *Eagle Rolling Mills Ltd.,*[13] Section 1(3) of ESI Act, 1948 was challenged before the Supreme Court. This section confers powers upon the Central Government to appoint different dates for operations of different provisions of the Act and also for different States and different parts of any one of the States. Therefore, Sec. 1(3) was contended to be a piece of excessive delegations of powers and therefore, unconstitutional. The Supreme Court held that Sec. 1(3) is a case of conditional legislation not a case of delegated legislation. The Act intends to provided benefits to the industrial employees in case of sickness, maternity, and employment injuries and other matters relating thereto. Therefore, it was not possible for the legislature to decide in what areas and in which factories the Act in question should apply on the date of coming into force of the Act[14]. In view of the above, Sec. 1(3) of the Act was held to be constitutional.

In another case named *Mohemmadali* v. *Union of India*[15], a notification issued under Sec. 1(3)(b) of the EPF Act was challenged on the ground that the powers conferred upon the Central Government under the section are unguided, uncanalized and therefore, it amounts to excessive delegation of legislative powers and ultimately unconstitutional. The Supreme Court held that ".. It cannot be

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workers, agricultures, industrial or otherwise, work, a living wage, condition of work ensuring a decent standard of life; Art. 47, Duty to raise the standard of living and improvement of health.

[13] 1964-II-LLJ-105

[14] *Ibidem*; See also *Regional Provident Fund Commissioner* v. *Laxmi Ratan Engineering Works*, 1962-II-LLJ-604

[15] 1964-I-LLJ-536(SC)

asserted that the powers entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the Official Gazettee specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the preamble indicates… This court has repeatedly laid down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused."

In a subsequent case, the constitutional validity of Sec. 14B of EPF Act, 1952 was challenged as violation of Art. 14 of the Constitution.[16] It was contended before the Supreme Court that Sec. 14B of the EPF Act, 1952 confers unguided and uncontrolled discretion upon the Regional Provident Fund Commissioner to impose such damage "as he may think fit". The Supreme Court rejected the contention by saying that it can't be said that there are no guidelines provided for fixing the quantum of damages under the Act.[17] However, there are certain cases where certain provisions of the EPF Act, 1952 were held to be unconstitutional.[18] Sec. 4(1)(b) of the Payment of Gratuity Act was challenged as violative of Art. 19(1)(g) of the Constitution.[19] The Supreme Court held that the provisions for payment of gratuity contained in Sec. 4(1)(b) of the Act, are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Art. 19(6) of the Constitution, the said provisions are both sustainable and valid.[20] Likewise in *Hindu Jea Band, M/s. Jaipur* v. *Regional Director, ESI Corporation, Jaipur*[21], Sec. 1(5) of the ESI Act was challenged as unconstitutional because it authorizes the State Government to extend all or any of the provisions of the Act to other establishments in the State and thus

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[16] *Organo Chemical Industries and Another* v. *Union of India*, 1979-II-LLJ-416(SC)

[17] *Ibidem*. There are certain other cases also where the constitutional validity of social security legislation was challenged, but the courts held that these legislations were consistent with the Constitution. These cases are *Kunhipaly* v. *R.P.F. Commissioner*, 1966-I-LLJ-642; *R.P.F. Commissioner* v. *Free India Industries*, 1964-I-LLJ-662; *Bharat Board Mills* v. *R.P.F. Commissioner*, AIR 1957 Cal.702.

[18] In *Wire Netting Stores Delhi and Another* v. *Regional P.F. Commissioner and Another*, (1981) 59 FJR 24, Sec. 7A of EPF Act, 1952 was held to be violative of Art. 14 of the Constitution by the Delhi High Court. See also, *Sonapur Tea Co. Ltd.,* v. *Deputy Commission*, AIR 1962 SC 137.

[19] *Bakshish Singh* v. *Union of India,* AIR 1994 SC 251.

[20] *Ibidem.*

[21] AIR 1987 SC 1166.

suffers from the vice of excessive delegation of essential legislative powers. But the Supreme Court found no merit in any of the contentions raised in the writ petition.

After going through the cases discussed above, it is clear that the judiciary has judged the validity of social security legislations in the light of the goals mentioned in the Constitution. It is manifestly clear that in most of the cases the judiciary has upheld the constitutional validity of social security legislations. While doing so it has followed a pragmatic approach by taking into account a benevolent attitude and has done nothing which undermines the supremacy of the constitution.

3. LIBERAL CONSTRUCTION OF SOCIAL SECURITY LEGISLATION

Judiciary has performed an important role by way of giving liberal and benevolent construction to the social security legislations. It has always construed these legislations in favour of the weaker sections of the society. Moreover, the courts have always widened the scope and ambit of these legislations from time to time. Although it is not possible to discuss all the cases in this paper, yet an attempt has been made to discuss a few of them.

(A) Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The object of the EPF Act, 1952 is to make provision for the future of industrial worker after he retires or for his dependents in case of his early death. It provides for the institution of provident fund for the employees in factories and other establishments. This is a social security legislation. Commenting upon the nature and object of the Act, the Supreme Court in *Otis Elevator Employees Union Regd.* v. *Union of India*[22] has held that the Act is a social welfare legislation to provide for the institution of Provident Fund, Pension Fund and Deposit- Linked Insurance Fund for employees in factories and other establishments. In another case Supreme Court has held that the provident fund is payable to an employee under the provisions of a statute and this statutory obligation cannot possibly, be deferred in the event of an untimely death of a worker or an employee.[23] Commenting upon the purpose of the Act, the Supreme Court in *Provident Fund Inspector v. T. S. Hariharan,*[24] has held that the basic purpose of the Act was to provide for Provident Funds and to make provisions for future of the workman

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[22] AIR 2004 SC 3264.

[23] *Balbir Kaur* v. *Steel Authority of India*, AIR 2000 SC 1596.

[24] AIR 1971 SC 1519.

after his retirement or his dependants in the case of his early death. In *Nanzeena Traders Ltd*., v. *R.P.F. Commissioner*[25] the Andhra Pradesh High Court has held that the scope of Sec. 1(3)(a) of the EPF Act, 1952 is not limited to factories exclusively engaged in the industries enumerated in Schedule I of the Act, and fact that a factory carrying on one industry which is excluded in Schedule I, while the other industry within its purview, does not absolve the employer from obligations imposed by the Act, if the total strength of the employees in both the industries exceed the required number. Likewise, Patna High Court has held that establishment engaged in the manufacturing of guns will be covered by the EPF Act, 1952.[26] If employer failed to produce cogent material to show he employed less than 20 employees, coverage under the EPF Act, 1952 cannot be contested.[27] Therefore, it is evidently clear that the trend of the judiciary has always been to preserve the discretion of the Government regarding the coverage of the Provident Fund Schemes. While doing it has also ensured the welfare of the employees. The courts have always made a sincere attempt to bring to the force the intention of the legislature behind the Act. It has never allowed for the frustration of certain benefits merely because of non-observance of certain formalities.[28] The judiciary has also paid its attention towards infancy benefits under the EPF Act, 1952. The meaning of infancy benefits is to provide umbrella protection to the infant industries, as these industries face financial crisis in the initial stage of their development. Therefore, Sec. 16(2) of the EPF Act, 1952 exempts infant industries from Provident Fund contribution for some time. But transfer of ownership of such industries may cause problem some times. The new owner often claims 'infancy benefit' under the Act. Here, the judiciary has played a pertinent role to prevent the misuse of this benefit as well as to protect the welfare of the employees.[29]

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[25] 1966-I-LLJ-334.

[26] *Lawton & Co. Gun Factory Bihar* v. *Presiding Officer, Employees Provident Appellate Tribunal, New Delhi*, 2012-I-LLJ-233.

[27] *Siamangala Enterprises, Bangalore* v. *RP.F. Commissioner II, Bangalore*, 2012-IV-LLJ-778 (Kant.). See also, *K. S. Engineers & Contractors* v. *Asstt. P. F. Commissioner,* 2012-IV-LLJ-667 (Guj.)

[28] *Aiegappa Mudaliar* v. *Veerappan Chettiar*, AIR 195Mad. 116; *Shapoorji Nurserwanji and Company* v. *Trustee*s EPF, 1968-I-LLlJ-739; *Associated Industries (P) Ltd.,* v. *Regional Provident Fund Commissioner Kerala*, 1963-II-LLJ-652; *Kunhiplay* v. *RPF Commissioner*, 1966-I-LLJ-642.

[29] *Supra* n. 25; *Devi Press, Madras,* v. *RPF Commissioner*, 1965-I-LLJ-294 (Mad); *United Hotelliers Calicut* v. *Government of India*, 1972-II-LLJ-596 (Ker.); *Balaji Enterprises* v. *Deputy Regional Provident Fund Commissioner, Madras,* 1980-II-LLJ-380 (Mad).

The judicial approach has always been to ensure that the change of ownership must not be a mere illusion so that the owner may not avoid his responsibility towards the employees under the EPF Act, 1952. Regarding the EPF Act, the Punjab & Haryana High Court has held that *"It must be remembered that the Act has been enacted for the benefit of workers to give them medical benefits, which have been mentioned in Section of the Act... because the Act is a labour legislation made for the benefit of the workman."*[30]

(B) Employees' State Insurance Act, 1948

The ESI Act, 1948 is a social security legislation enacted with a purpose to ameliorate certain risks and contingencies sustained by the workers while serving in a factory or other establishment. It was enacted with the object of introducing a scheme of health insurance for industrial workers. It provides for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work of factories other than seasonal factories. In *ESI Corporation, Hyderabad* v. *J.C. and Co. Products Ltd.*,[31] the Andhra Pradesh High Court has held that the ESI Act, 1952 is enacted to promote the general welfare of the workers. Hence the enactment demands a liberal interpretation in order to achieve the legislative purpose and object. The scheme envisaged under the Act is one of compulsory State Insurance providing for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with the work in factories other than seasonal factories. Kerala High Court, in the case of *ESI Corporation* v. *New India Maritime Agencies*[32], has held that the provisions of the ESI Act, 1948 may be extended by the appropriate Government to any establishment or class of establishments, industrial, commercial, agricultural or otherwise. *In Kumbakonam Milk Supply Co-operative Society* v. *Regional Director, ESI Corporation., Madras,*[33] Madras High Court held that: "*The ESI Act is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in case of sickness maternity and employment injury and also to make provisions for certain other matters incidental thereto. In an enactment of this nature, the endeavour of the court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made."*

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[30] *V.K. Yadav* v. *EPF Appellate Tribunal & Others*, 2012-I-LLJ-879.

[31] 1980 Lab IC 1078.

[32] 1980-II-LLJ-232. *Union of India* v. *Ogale Glass Works*, (1971) 40 FJR 258.

[33] 2003 III LLJ 416.

The Supreme Court has also widened the coverage of the word 'employees' by holding that all the workers including clerks and administrative staff engaged in connection with the work of the factory and the employees working outside the factory, but whose duties are connected with the work of factory are all employees under the ESI Act, 1952.[34] The Madras High Court[35] has justified the wider and comprehensive coverage of the ESI Act, 1952 by observing that: *"The ESI Act is the outcome of a policy to provide a remedy for the widespread evils arising from the consequences of national poverty. It is a piece of social security legislation, conceived as a means of extinction of the evils of society by LORD BEVERIDGE (in his report which inspired this type of legislation in all countries), namely, want, disease, dirt, ignorance and indigenous."*

It is also relevant to mention here that the courts have held that though one benefit does not exclude the other, but overlapping of benefit is not allowed.[36] The process of widening the scope and ambit of the ESI Act, 1952 by the judiciary is also manifestly clear in the case of *K. Venkateswara Rao* v. *State of Andhra Pradesh*.[37] In this case, the Andhra Pradesh High Court has held that the employees employed by the independent contractors running canteen and cycle stands in the precincts of the cinema theatre have been brought under the scope of the ESI Act, 1952. The persons working in the administrative office are employees within the meaning of the definition of employees under the ESI Act, 1952. To work on the floor of the factory is not necessary.[38] If an employee happens to be a shareholder of a co-operative society, it does not disable him for being nevertheless an employee under the ESI Act, 1952.[39] The administrative staff engaged in the purchase of raw materials for the distribution or sale of product of the factory, whether work is done in the factory or elsewhere would be employees within the meaning of the Act.[40]

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[34] *Nagpur Electric Light and Power Co.,* v. *ESI Corporation*, AIR 1967 SC 1364. There are many other decisions of the Courts where the coverage of ESI Act was made wider. These are: *Birla Cotton Spinning and Weaving Mills Ltd.,* v. *ESI Corporation,* AIR 1970 Del. 167; *Hindustan Lever Ltd.,* v. *ESI Corporation*, 1973-I-LLJ-259; *ESI Corporation* v. *Prabhu Lal Brothers*, 1973-I-LLJ-304; *ESI Corporation Hyderabad* v. *Shrikrishna Bottlers*, 1977-II-LLJ-227.

[35] *ESI Corporation* v. *Seiramulu Naidu*, AIR 1960 Mad 248.

[36] *Trading Engineering, New Delhi* v. *Smt. Nirmala Devi*, (1980) 57 FIR 143.

[37] 1980-I-LLJ-70(AP)

[38] *D. V. Jakati and Others* v. *ESI Corporation*, (1981) 59 FJR 143.

[39] *Pondicherry State Weavers Co-operative Society* v. *Regional Director, ESI Corporation*, 1983-I-LLJ-17.

[40] *Indian Jute Mill Co.* v. *Regional Director of ESI Corporation, West Bengal*, 1977-II-LLJ-467

In another case, the petitioner claimed unemployment allowance under the scheme called Rajiv Gandhi Shramik Kalyan Yojana framed by the Employees State Insurance Corporation. It was contested on the ground that the unemployment occurred prior to the scheme and the workers were not 'insured persons'. The Kerala High Court held that as the workmen concerned fulfilled the conditions stipulated in Rajiv Gandhi Shraik Kalyan Yojana Scheme for unemployment allowance, their claim was upheld as proper and it could not be denied.[41]

In view of the decisions discussed above, it is manifestly clear that the judiciary has always attached the maximum widest possible and liberal interpretation to both the Acts discussed above.

(C) Payment of Gratuity Act, 1972

The Payment of Gratuity Act, 1972 is enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure for social security. The courts from time to time have emphasised upon the widest coverage of the Act. The Supreme Court in *Indian Ex-Services League and Others* v. *Union of India*,[42] has held that the claim for gratuity can be made only on the date of retirement, on the basis of salary drawn on the date of retirement and being already paid on that footing, the transaction was completed and closed. Gratuity Act is a beneficial legislation for employees.[43] Discussing the nature of gratuity, the Supreme Court in *Indian Hume Pipe Co. Ltd.,* v. *Workmen*,[44] has said that the principle underlying gratuity is that by virtue of the length of their services, the workmen are entitled to claim certain amount as retiral benefit. It is some of 'efficiency devices' and is considered necessary for an orderly and humane elimination from the industry of superannuated or disabled employees, who but for such retiring benefits could continue in employment even though they function inefficiently. It is paid not gratuitously or as a matter of boon, but for long and meritorious services rendered by the employees to their employer. The Gujarat High Court [45]has said that the Act is to be interpreted in such a manner that maximum amount of benefit is given to both the types of workers. In order to avoid injustice to either permanent or seasonal employee, the seasonal employees are to be paid gratuity on the particular footing provided in the second proviso to Sec. 4(2) and those who are on the permanent establishment have to be paid

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[41] *Thiruvepathi Mills Labour Union* v. *ESI Corporation*, 2012-IV-LLJ-767 (Ker).
[42] 1992 I LLJ 765
[43] *M.C. of Greater Mumbai* v. *Vittal Anna Kamble*, 2013 LLR 531 (Bom.).
[44] 1959 II LLJ 830 (SC).
[45] *Akbar Hussain* v. *Payment of Gratuity Authority, Ahmedabad*, 1979 Lab IC 366.

gratuity as provided in the main clause of Sec. 4(2). The Court further held that the Act applies to all employees irrespective of the fact whether they are appointed on the industrial side or on the clerical side because the definition of the word 'employee' covers all skilled, unskilled, semi-skilled, manual, supervisory, technical or clerical workers so song as other requirements of the definition of the world 'employee' are fulfilled.[46] Supreme Court has also discussed the concept of gratuity and opined that the Act is enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments, as a source of social security.[47] The Court further observed that:[48] *"... Now it is universally recognised that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work due to invalidity and old age etc. For the wage earning population, security of income, is of consequential importance. The significance of this legislation lies in the acceptance of the principle of gratuity as compulsory statutory retiral benefits. The workers who have rendered long and meritorious service are not deprived of their right to gratuity by reason of absence from duty due to circumstance beyond their control."*

While giving a liberal construction to the Act, the Gujarat High Court has held that the absence from duty without leave will not be treated as break in service for purposes of gratuity, unless order treating such absence as break in service had been passed in accordance with rules.[49] Gratuity for workers is no longer a gift but a right.[50] The qualifying period for the entitlement of gratuity is ten years continuous service. Payment of gratuity leads to distributive justice. The delayed payment of gratuity causes great hardship to the workers and his right becomes illusory.[51]

Regarding the meaning of expression 'seasonal establishment' used in the Act, it has been held by the Kerala High Court that the expression has to be understood in its popular sense. Any factory which only works during certain seasons of the year and not throughout the year, is seasonal establishment.[52] The court, in this case, construed the expression in its widest possible manner. As a result of that,

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[46] *Ibidem.*

[47] *Lalappa Lingappa and Others* v. *Laxmi Vishnu Textile Mills Ltd.*, AIR 1981 SC 852.

[48] *Ibidem.*

[49] *PBM Polytex Ltd.,* v. *Union of India & Another*, 2012-IV-LLJ-740.

[50] *Straw Board Manufacturing Company Ltd.,* v. *Its Workmen*, 1977-I-LLJ-463.

[51] *Ibidem.*

[52] *Consolidated Coffee Ltd.,* v. *Uthaman*, 1980-I-LLJ-83 (Ker); *Kothayee Cotton Mills* v. *Gopoala Pillai*, 1980-I-LLJ-356.

workers who remained absence from their duty because of the circumstances beyond their control were also entitled to get gratuity. However, the right to get gratuity can be forfeited if the employee misbehaved with the employer. The purpose of gratuity is to provide a retiring benefit to workman who has rendered long and unblemished service to the employer.[53] The forfeiture of gratuity is justified for the misconduct involving damage to the employers' property, violence or riotous or disorderly behaviour in or near the place of employment and conducive to grave indiscipline.[54] Regarding the question of claiming two benefits, the Supreme Court has held that statutory provisions for payment of retrenchment compensation under Sec. 25F of the Industrial Disputes Act, 1947 is no bar to claim gratuity.[55] The amount of pension cannot be reduced simply because the petitioner was in receipt of Provident Fund and Gratuity.[56] However, overlapping of benefits which are of similar nature, objective and effect are not allowed.[57] Payment of Gratuity Act, 1972 has overriding effect conferred in Sec. 14 and dismissal of employee without proof of loss to employer could not be a ground for forfeiture of gratuity Sec. 4(6) although so provided by service regulations of an establishment.[58]

After going through all the decisions discussed above, it is clear that the trend of the judiciary has always been in favour of the persons for whom these social security legislations have been enacted. It has always given the widest possible interpretation to some expressions like employee, continuous service, seasonal establishment etc. While doing so, it has protected the interests and rights of a large number of people who are poor, ignorant or in a socially and economically disadvantageous position. Justice P.N. Bhagwati has said that[59] "*Time has come when the courts must become the courts for the poor and struggling masses of the country... The poor too have civil and political rights and the rule of law is meant for them also.*" The judiciary has made a sincere attempt for achieving a coherent socio-economic order based on social justice and basic human values. However, at the same time it has also tried to protect the genuine and justified interests of the employers.

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[53] *Delhi Cloths and General Mills Co. Ltd.,* v. *Their Workmen*, 1960-II-LLJ-(SC).
[54] *Ibidem.*
[55] *Supra* n. 44.
[56] *Som Prakash Rekhi* v. *Union of India*, AIR 1981 SC 212.
[57] *Trading Engineering, New Delhi* v. *Smt. Nirmala Devi*, (1980) 57 FJR 143.
[58] *Haryana Financial Corporation, Chandigarh* v. *D. R. Sharma,* 2012-IV-LLJ-42(P&H).
[59] *People's Union for Democratic Rights* v. *Union of India*, 1982-II-LLJ-455.

(D) Employee's Compensation Act, 1923

The Act has been considered as the first piece of social security legislation. It has been amended from time to time and has created legal right for certain employees who can claim compensation for the injury suffered by them by way of an accident. The Act is a piece of social security and welfare legislation. Its purpose is to provide compensation to the workman who suffers some injuries because of the accident arising out of and in the course of employment. The ultimate object of the Act is to maximize the welfare of industrial workers. Therefore, the intention of the legislature was to make the employer as insurer of the workman responsible against the loss caused by the injuries or death which happened while the workman was engaged in his work. Considering the ultimate object of the Act it is necessary to give a benevolent construction to the provisions of the Act. This Act, not being a quasi penal statute, must be interpreted with sympathetic leniency and must not be construed very strictly.[60] Royal Commission on Labour has also commented upon the then Workmen's Compensation Act in the following manner[61]; *"The Workmen's Compensation Act was framed with a view to provide for compensation to a workman incapacitated by injury from accident. But compensation is not the only benefit flowing from the Act; it has important effect in furthering work on prevention of accident, in giving workmen greater freedom from anxiety and in rendering industry more attractive."*

The expression 'arising out of and in the course of employment' has always been the subject matter of judicial analysis. Though it is not possible here to mention all the case law, yet an attempt has been made to discuss a few of them. In the case of *Mackinnon Mackanzie and Co. Ltd.* v. *Ibrahim Mohammad Issak,*[62] the Supreme Court analysed the expression and held that the words 'arising out of employment' are understood to mean that during the course of employment injury has resulted from some risk, incidental to the duties of service, which unless engaged in the duty owing to the master, it is reasonable to believe that the workman would not otherwise have suffered. Therefore, there must be a casual relationship between the accident and the employment.[63] The words 'in the course of employment' means in the course of work which the workman is employed to do and is incidental to it.[64] It is essential and relevant to mention here that in this case the Supreme Court did not make any contribution at its level regarding the beneficial

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[60] *Golden Soap Factory (P) Ltd.,* v. *Nakul Chandra Mondal*, AIR 1964 Cal 217.
[61] *Report of royal commission on labour,* 298.
[62] AIR 1970 SC 1906.
[63] *Ibidem.*
[64] *Ibid.*

construction of this legislation. However, there are certain other cases where the judiciary adopted the benevolent attitude and the Act was construed liberally. Two workmen who had left the harbour premises to drink coffee and after having coffee returned to the harbour premises to resume their work. They took a short cut and as a result of that they were killed by a railway engine. The Madras High Court held that the accident was one which arose out of and in the course of their employment.[65] In another case, a boy was employed by the factory in a teashop to take tea from the teashop to various persons working in the factory. One day when the boy was returning to the teashop after serving the tea, he was killed by a bullet which was fired by the police in self-defence when the mob of workmen attacked the police. It was held that the death of the boy arose in the course of employment.[66] If employment is a contributory cause or has accelerated the death or if death was due not only to the disease but disease coupled with the employment, then it could be said that the death arose out of employment.[67] The Delhi High Court has held that the workman although employed through contractor for carrying out repair work in premises of employer, non-connected with his principle activity, is within Sec. 2(n) of the Act and entitled to get compensation from employer under the Act.[68] It is evident that the attitude of the judiciary has always been sympathetic to the workers. It has always made an attempt to confer maximum benefit of this legislation upon the maximum number of workers.

An employee suffered pain in his chest when he was accompanying his manager to a shop. As a result of that he died on the way to hospital. The Gujarat High Court held that the sudden collapse of the worker is clearly the result of the work he was doing. Therefore, the widow of the deceased workman was entitled to get compensation.[69] If the employee is suffering from a disease and employment causes acceleration of the disease either by strain or fatigue incidental to employment, the employer would nonetheless be liable for compensation.[70]

There are some other cases where the judiciary has applied the theory of 'notional extension of place of employment.' As a result of that maximum benefit of compensation has been given to a large number of workers or their dependents. This theory has been comprehensively discussed by the Supreme Court in the

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[65] *K. Ramabraham* v. *Traffic Manager, Vizagapatnam*, AIR 1942 Mad 353.
[66] *National Iron and Steel Company* v. *Manorama*, AIR 1962 Cal 143.
[67] *Mackinnon Machenizie and Co. Private Ltd.,* v. *Rita Fernandez*, 1969-II-LLJ-812.
[68] *Govind Goenka* v. *Dayavati*, 2012-IV-LLJ-157 (Del).
[69] *B. N. Sodha and Others* v. *Hindustan Tiles*, 1977-II-LLJ-95.
[70] *Amu Bibi* v. *Nagri Mills Co. Ltd.*, 1977-II-LLJ-510.
[71] 1963-II-LLJ-615. Also see, *Union of India* v. *Noorjahan*, 1979 Lab IC 652.

case of *B.E.S.T. Undertaking, Bombay* v. *Mrs. Agnes*.[71] The Supreme Court said that it is well settled that the employment of a workman does not necessarily end when the 'tool down' signal is given or when the workman leave the actual workshop where he is working, and that there is a notional extension of the employment of a workman both in time and space, the scope of such extension depending on the facts and circumstances of the given case. An employment may begin or may end, not only when the workman begins to work or leaves his tools, but also when he uses the means of transport to or from the place of employment.[72] An employee who was standing outside the factory gate to join his duties was knocked down by a cyclist and died was awarded compensation by the Gujarat High Court.[73] Parents of deceased employee fall in the category of 'partially dependents' on the earning of deceased workman at the time of his death under Sec. 2(1) (d)(iii) of the Act.[74] However, it is also evident that the judiciary has not permitted the misuse of the theory of the 'notional extension of place of employment.'[75] Thus, the trend of the judiciary has been to give comprehensive meaning and scope to the expression 'arising out of and in the course of employment.' While doing so it has given liberal interpretations to the terms like employee, establishment, wages and notional extension of the place of employment. Construction of this Act has been stretched to such an extent so that relief to aggrieved workman may be available. Regarding Maternity Benefit Act, the Karnataka High Court has held that the benefits of leave etc. under the Act can be claimed by woman employee engaged on contract basis, although the terms thereof did not provide for their grant.[76]

CONCLUSION

The judiciary has always performed an active and significant role for securing the effective enforcement of the laws providing social security to the employees. These legislations will have a real meaning if stress is laid on what is described as 'remedial jurisprudence' through judicial powers. This is clearly evident from the analysis of various cases decided by the courts from time to time. It has taken adequate care that the poor and ignorant workman might not be deprived of the benefit of

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[72] *Ibidem.*

[73] *Dudhiben Dharamshi and Others* v. *New Jahangir Vakil Mills Ltd., Bhavnagar*, 1977-II-LLJ-194.

[74] *Raziyaben* v. *Surrendra*, 2012-IV-LLJ-164(Bom)

[75] *Jenav Deaulbore Colliery* v. *National Coal Development Corporation Ltd.*, 1977-I-LLJ-128.

[76] *C. Vidya Murthy, Bangalore* v. *Bangalore Metro Rail Corpn. Ltd.,*2012-III-LLJ-113(Kant).

social security legislations. While doing so, it has also emphasised that the socio-economic goals mentioned in the Constitution must be achieved through the instrumentality of social security laws. The trend of the judiciary has always been to widen the scope and ambit of these legislations. As a result of that it has very liberally construed and clarified certain terms and expressions laid down in social security legislations. The judicial approach has always been towards the effective implementation of these laws and in this process it has always observed the principles of natural justice. It has applied the theory of 'notional extension of the place of employment' in a number of cases. But it has never permitted the misuse of this theory. The attitude of the judiciary has always been towards the humanitarian purpose of the social security laws. Therefore, it has always given a beneficial and most liberal construction to these laws. In the end, it can be concluded that while interpreting the social security legislations, judiciary has evolved a 'new labour jurisprudence', which provides social security to the workers.

(2015) 10 Universitas 108-137

UNEP AS GLOBAL ENVIRONMENTAL AUTHORITY: DEBATE ABOUT UPGRADING TO UNEO

Puneet Pathak

Abstract

International environmental organizations play a pivotal role in monitoring, agenda setting and capacity development of a global environmental regime. United Nations Environmental Programme (UNEP) since its inception in 1972 has established itself as an anchor institution for all activities relating to environmental protection. It performs the multifarious task in partnership with diverse groups, including specialized agencies of the United Nations, governments, Non-Governmental Organization (NGO), businesses, industry, the media and civil society. The mission of the programme is to inspire and support nations and communities to improve their quality of life, without compromising that of future generations. The article engages with the theoretical debate on the role of UNEP facilitating as a central platform for all global activities of environmental protection. It provides an overview of its structure, functions and the contribution of UNEP in the protection of the natural environment. Further, it also focuses on current debate regarding the establishment of the United Nations Environmental Organization (UNEO) with an insight into the current status of UNEP.

Keyword: Environmental assessment, Global governance, Coordination of environmental policies.

PUNEET PATHAK

~ Centre for Law, School of Legal Studies & Governance, Central University of Punjab, India: puneetpathak9@gmail.com

Puneet Pathak received his LL.M. Degree in Human Rights and Duties Education from Banaras Hindu University and Ph.D. in Human Rights from University of Allahabad, India. He is Assistant Professor of Law, in the Centre for Law, School of Legal Studies and Governance, Central University of Punjab, at Bathinda in India. His research focuses on human rights and international environmental law.

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INTRODUCTION

The movement to protect the natural environment initiated at domestic level in the second half of the 20th Century attracted the international community to environmental issues and the emergence of institutional arrangement for the global environmental governance. Early environmental movements started against the unwise industrialization resulting in burning rivers, dying lakes, dead forest and toxic chemicals across the US and Europe. Acid rain in Europe demonstrated the need for environmental protection. Japan had experienced first-hand that mercury, cadmium and PCBs poisoning could cause death, fetus deformations and neurological disorder.[1] The literatures published during the 6th and 7th decade of the 20th Century galvanized the movement to protect environment and its related issues.[2] Such literatures play great role in sensitizing international community to

[1] Ivanova, Maria (2009). *Designing the united nations environment programme: A story of compromise and confrontation*, Retrieved from http://environmentalgovernance.org/cms/wp-content/uploads/2009/06/Ivanova _De signing-UNEP_2007.pdf

[2] Literature which stimulated the movement relating to environmental protection includes the book of Rachel Carson, published in (1962) *Silent spring* (Boston, Houghton Miflin). The look brought together research in toxicology, ecology and epidemiology and

develop framework for global environmental governance and to put it as significant issues of international agenda.[3]

Since 1945, UN is working as a platform for solving the problems having global implications. In the history of UN, the promotion of environmental issue has developed gradually. The UN Charter neither comprises any overt reference to environmental protection nor to sustainable development.[4] Birmie, Boyle and Redgwell point out that the lack of explicit reference to protect the environment means that the subsequent evolution of UN power to adopt policies to take measures directed at environmental protection has to be derived from a broad interpretation of the Charter and the implied power of the principal organs and also that of specialized agencies of the UN.[5]

1. FORMATION OF UNEP

The Stockholm Conference (1972) is a landmark in the history of global environmental governance. Prior to Stockholm Conference, the significant task related to human environment was undertaken by organs and specialized agencies within the UN system, in particular the UN General Assembly (UNGA). It also

suggest that agricultural pesticides were building to catastrophic levels. This was linked to damage to animal species and to human health. It shattered the assumption that environment had infinite capacity to absorb pollutants. Another work published in 1968 on the connection between human population, resource exploitation and environment was *Population bomb* (New York, Ballantine Books) written by Paul Ehrlich. He argued that the surging world human population was on a collision course with its life support system. The Club of Rome's Report: *The limits to growth* (1972) had a world-wide impact, even though some of the assumptions and projections were later contested. *Founex Report* (1971), prepared by a panel of experts, also contributed the world community to initiate efforts for environmental protection. It calls for the integration of environment and development strategies. The Report notes that while concern about the environment sprang from the production and consumption patterns of the industrialized world, many of the environmental problems in the world are a result of underdevelopment and poverty. The book *Only one earth (*New York, W.W. Norton & Company, 1972) written by Rene Dubos and Barbara Ward sounds an urgent alarm about the impact of human activity on the biosphere but also expresses optimism that a shared concern for the future of the planet could lead humankind to create a common future.

[3] Johnson, Stanley (2012). *The birth of UNEP-the united nations conference on the human environment: A narrative, united nations environment programme, Nairobi*, Retrieved from http://www.unep.org/pdf/ 40thbook.pdf; See also *Sustainable development timeline*, http://www.iisd.org/rio+5/timeline/sdtimeline.htm

[4] Osmanczyk, Edmund Jan (1990). *The encyclopedia of the united nations and international agreement*, (Second Edition) New York: Taylar & Francies, 390.

[5] Birnie, P. et al. (2009). *International law and the environment*, Oxford, Oxford University Press, 41.

included other principal organs and specialized agencies of the UN such as Economic and Social Council (ECOSOC), International Labour Organization (ILO), Food and Agriculture Organization (FAO), UN Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), World Meteorological Organization (WMO), Inter-governmental Maritime Consultative Organization (IMCO) and International Atomic Energy Agency (IAEA).[6] These organizations are not exclusively concerned with the problem of environment rather relate to some specific aspect of environmental protection. However, the creation of a specialized environmental programme underscored the need for a focal point to provide single platform to coordinate all environmental protection activities within the UN system.[7]

During the 1970's, it was felt by the UN members to focus on the issue of protection of flora and fauna against the shocking consequence of environmental degradation. Having considered the ECOSOC Resolution 1346 (XLV)[8] regarding the question of convening an international conference on the problems of the human environment, the UNGA by its Resolutions 2398 (XXIII) and 2581 (XXIV) in 1968-69, decided to convene a global conference in Stockholm in 1972.[9] One of the vital objectives of the conference was a declaration on the human environment, as a document of basic principles, whose basic idea originated with a proposal by the UNESCO that the Conference draft a "Universal Declaration on the Protection and Preservation of the Human Environment".[10] On 16 June

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6 UN Secretary-General, *Problem of the human environment: Report of the secretary general,* E/4667, 26 May 1969, summarizes activities and programs of UN bodies relating to the human environment. Retrieved from http://untreaty.un.org/ cod/avl/ha/dunche/ dunche.html

7 Desai, Bharat H. (2006). "UNEP: A global environmental authority", *Environmental Policy and Law*, 36/3-4. Retrieved from http://www.rsis-ntsasia.org/resources/ publications/research-papers/en viron ment/Desai%20UNE P%20Article.EPL.pdf

8 UN ECOSOC Resolution 1346 (XLV), 30 July 1968.

9 UNGA in its resolution believed that it was "desirable to provide a framework for comprehensive consideration within the UN of the problems of the human environment in order to focus the attention of governments and public opinion on the importance and urgency of this question and also to identify those aspects of it that can only or best be solved through international cooperation and agreement." (A/RES/2398(XXIII), 3 December 1968); Further UNGA assumed that the purpose to convene the conference was "to serve as a practical means to encourage, and to provide guidelines for, action by Governments and international organizations designed to protect and improve the human environment and to remedy and prevent its impairment, by means of international co-operation, bearing in mind the particular importance of enabling developing countries to forestall the occurrence of such problems." (A/RES/2581(XXIV), 15 December 1969)

10 Handl, Gunther (1972). *Conference on the human environment in Stockholm,* June 5-16, 1972, Retrieved from http://untreaty.un.org/ cod/ avl/ha/dunche/dunche.html.

1972, the Declaration of the conference was passed by the UNGA, by its Resolution on 15 December 1972.[11] The Declaration on Human Environment (**1972**)[12] is a milestone in the field of environmental protection in which governments recognized the ecological interdependence of the world and acknowledged an urgent need for a permanent institutional arrangement within the UN system for the protection and improvement of the environment.[13] As an outcome of the Stockholm Conference, the UNEP was established, and assigned to function as a leading anchor institution for advancing standards, policies and guidelines and developing institutional capacity to address existing and emerging environmental complications.

2. UNEP STRUCTURE

UNEP as an anchor institution is responsible to promote the development of policies and measures relating to the environment, coordinate environmental activities in the UN system, review the emerging environmental problems and also provide scientific assessment. The UNGA Res. 2997 (XXVII) established the Environment Fund, the UNEP Secretariat and Environmental Coordination Board to execute these functions.

The Office of the Secretariat of UNEP is the central point of all activities concerning environmental protection to ensure a high degree of effective management. The

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[11] During the debates in the UNGA's Second Committee, several countries voiced reservations about a number of provisions but did not fundamentally challenge the declaration itself. UNGA Resolution adopted the Declaration, by 112 votes to none, with 10 abstentions. (A/RES/2994(XXVII) 15 December 1972); It also adopted Resolution 2995 (XXVII) in which it affirmed implicitly a State's obligation to provide prior information to other States for the purpose of avoiding significant harm beyond national jurisdiction and control. In resolution 2996 (XXVII), finally, the UNGA clarified that none of its resolutions adopted at this session could affect Principles 21 and 22 of the Declaration bearing on the international responsibility of States in regard to the environment.

[12] The Conference was held under the leadership of Maurice Strong. The Conference was concerned with the regional pollution and acid rain problems of northern Europe. This eco-agenda is opposed by the Group of 77 and the Eastern bloc. Nevertheless, it provides the first international recognition of environmental issues. The concept of sustainable development is cohesively argued to present a satisfactory resolution to the environmental vs. development dilemma.

[13] UNGA Res. 2997 (XXVII), 15 December 1972, establishes UNEP as the central UN node for global environmental cooperation and treaty making.UNEP's functions are to promote the development of environmental policy and measures, coordinate environmental activities in the UN system, keep emerging environmental problems under review and provide scientific assessment. The resolution establishes the Environment Fund, the UNEP Secretariat and Environment Coordination Board to execute these functions.

head of the secretariat is the Executive Director elected by the UNGA. He is responsible to ensure cooperative relations between UNEP Secretariat and Governments, as well as NGOs, inter-governmental organizations (IGOs) and relevant UN bodies, by promoting UNEP's global partnership with these external partners. The Secretariat of the governing bodies is accountable for assisting the Governing Council/Global Ministerial Environment Forum (GC/GMEF) and its subsidiary organs, including the Committee of the Permanent Representatives to UNEP. The most distinct type of international environmental institutions are those established by the individual Multilateral Environmental Agreement (MEA). Virtually every MEA now established a Conference of Parties (CoP), which meets on a regular basis and is open to treaty parties and serves as the supreme decision making body for the agreement. UNEP provides the Secretariat for such MEA.[14]

The Governing Council (GC) of UNEP is responsible for providing general policy guidance for the direction and coordination of environmental programmes within the UN system. It also promotes contribution of the relevant international scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information and, as appropriate, to the technical aspects of the formulation and implementation of environmental programmes within the UN system. UNEP functions through 58 members of its GC which sets general policy and reports to the UNGA through the ECOSOC. The members of the Council are elected by the UNGA, for equitable regional representation basis. The GC/GMEF once a year either as a regular session or special session.[15] One

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[14] Bodansky, Daniel (2011). *The art and craft of internatioanl environmental law*, Cambridge, Massachusetts London: Harvard University Press, 119.

[15] Main functions and responsibilities of the Governing Council of UNEP are provided by the GA Res. 2997 (XXVII) as follows:

(a) To promote international cooperation in the field of the environment and to recommend, as appropriate, policies to this end;

(b) To provide general policy guidance for the direction and coordination of environmental programmes within the UN system;

(c) To receive and review the periodic reports of the Executive Director of UNEP on the implementation of environmental programmes within the UN system;

(d) To keep under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments;

(e) To promote the contribution of the relevant international scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information and, as appropriate, to the technical aspects of the formulation and implementation of environmental programmes within the UN system;

(f) To maintain under continuing review the impact of national and international

of the most important units of Governing Council, the Scientific and Technical Advisory Penal, provides scientific advice to the Global Environmental Facility (GEF).[16]

The Environment Fund is the principal source of financing for the implementation of the programme of UNEP. It was established by the UN GA in 1972 to provide financing environmental programmes. The contributions are voluntary and all Member States of the UN are expected to make adequate and timely payments. 12 countries are the regular annual contributors since its inception, thus ensuring continuous support and implementation of the UNEP programmes, though 181 countries have made at least one voluntary contribution to the Environment Fund over the period from 1973-2011.[17] Despite the small budget, the UNEP has a large agenda.[18]

By the UNGA in its Res. 2997 (XXVII), the Environment Coordinating Board (ECB) was established initially within the framework of the Administrative Committee on Coordination (ACC).[19] ECB was made up of the Executive Heads of the UN agencies and chaired by UNEP's Executive Director. Its principal mandate was to ensure cooperation and coordination among all bodies concerned in the implementation of environmental programmes and to report annually to the UNEP's GC. The ECB was supplemented by the mechanism of environmental focal points within each agency. In 1978, when the ACC assumed the functions and responsibilities of the ECB (UNGA Res. 32/197 VII), each agency appointed a Designated Official on Environmental Matters (DOEM) to work with and advise the UNEP's Executive Director.[20]

Pursuant to the UNGA Res. 53/242 of 28 July 1999, the Global Ministerial Environment Forum (EMEF) is convened every year to review significant and

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environmental policies and measures on developing countries, as well as the problem of additional costs that may be incurred by developing countries in the implementation of environmental programmes and projects, and to ensure that such programmes and projects shall be compatible with the development plans and priorities of those countries;

(g)To review and approve the programme of utilization of resources of the Environment Fund.

[16] Karns, Margarit P. and Mingst, Karen A. (2010) *International organizations: The politics and processes of global goverence*, Bouldar, London: Lynne Rienner Publishers, 515.

[17] UNEP, *Environmental fund*, Retrieved from http://www.unep.org/rms/en/ Financing_ of_ UNEP/Environment_ Fund/

[18] Karn and Mingst, *Supra n.* 16, 515.

[19] The name of ACC is now "UN System Chief Executives Board for Coordination".

[20] UNEP *UNEP's Coordination Mandate* Retrieved from http://www.unep.org/newyork /UNEPsCoordinationMandate/tabid/56200/Default.aspx

emerging policy issues in the field of the environment, with the GC constituting the forum either in its regular sessions or special sessions. The creation of an annual summit of environmental ministers has marked progress. It has helped to generate more attention to global environmental issues and to create a stronger ownership of the UNEP agenda among environmental ministers.[21]

The Committee of Permanent Representatives[22], established as a subsidiary organ of the GC of UNEP comprises of approximately 100 Permanent Representatives. The Committee has the following mandates:

(i) review, monitor and assess the implementation of decisions of the Council on administrative, budgetary and programme matters;
(ii) review the draft programme of work and budget during their preparation by the Secretariat;
(iii) review reports requested of the Secretariat by the GC on the effectiveness, efficiency and transparency of the functions and work of the Secretariat and to make recommendations thereon to the GC; and,
(iv) prepare draft decisions for consideration by the GC based on inputs from the Secretariat and on the results of the functions specified above.[23]

3. PRIORITY AREAS OF UNEP

UNEP, as a leading global environmental authority, is working for more than four decades in the field of environmental protection. Some of its noticeable works can be categorized under 6 strategic areas as part of movement to protect the environment: climate change, disaster and conflict, ecosystem management, environmental governance, harmful substance and hazardous waste.

(A) Climate Change

The problem of climate change is one of the major challenges of our time. The impact of climate change is global in scope and unprecedented in scale. The changing weather pattern has forced the international community to take strong measures to avoid the problem of food production and the rising of sea levels that

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[21] Meyer-Ohlendorf, Nils and Knigge, Markus. "A united nations environment organization", in : Lydia (ed.), *Global environmental governance-perspectives on the current debate*. New York : Swart, Estelle Perry Centre for UN Reform Education.

[22] The Committee of Permanent Representatives was formally established as a subsidiary organ of the Governing Council of UNEP in accordance with decision 19/32 (Governance of the UNEP) on 4 April 1997.

[23] UNEP. *Committee of permanent representatives*, Retrieved from http://www.unep. org/ governingb odies/commiteepermanentreps.asp?DocumentID=43&ArticleID=32

increased the risk of catastrophic flooding. The UNEP, in its Sub-Programme of Climate Change, works with states to strengthen their ability to adapt to climate change and move towards low-carbon societies. It also advances understanding of climate science and disseminate public awareness about climate change. The Sub-Programme is closely aligned with the Green Economy Initiative, which promotes cleaner investments and technologies as opportunities to reduce emissions, protect our planet's biodiversity and ecosystems, and alleviate poverty through green job creation. UNEP provides assistance to states to reduce their vulnerability and use ecosystem services to build natural resilience against the impact of climate change. It also assists nations to formulate sound policy and programmes that lead to GHG emission reductions, with a focus on scaling up clean and renewable energy sources, energy efficiency and energy conservation.[24]

(B) Disasters and Conflicts

UNEP Factsheet on Disasters and Conflicts (2010) estimates that over 35 major conflicts and some 2, 500 disasters have affected billions of people around the world. Since the dawn of the new millennium. Such environmental crisis have destroyed infrastructure, displaced populations, and threatened ecosystems and survival of people. The UNEP played an active role in reducing the risk of disasters and conflicts and addressing post-conflict environmental challenges in more than 30 countries, both through its ongoing country based operations and environmental assessments, and following requests for technical assistance during disaster recovery efforts.[25] From Kosovo to Afghanistan, and from Sudan to Haiti, UNEP has responded to crisis situations in over 40 countries since 1999, delivering high-quality environmental expertise to national governments and specialized agencies and programme of the UN.[26] Poor ecosystem management leads to conflict over dwindling water, food or fuel resources and other problems like landslides or flash floods. Therefore, sustainable management of natural resources can help in reducing disaster and conflict risk and providing a strong platform for recovery, development and lasting peace. This Sub-Programme of UNEP focuses on assisting nations to protect the population from environmental causes and consequences of disasters and conflicts.[27] The sub-programme has four key goals: disaster risk reduction through sustainable natural resource management,

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[24] UNEP (2010). *UNEP six priority areas factsheets-Climate change*. Retrieved from http://www. unep.rg/pdf/ UNEP_ Profile /Climate_change.pdf

[25] UNEP annual report (2011). Retrieved from www.unep.org/annualreport

[26] UNEP (2010). *UNEP six priority areas factsheets –Disasters and conflicts* Retrieved from http:// www.unep. org /pdf/brochures/DisastersAndConflicts.pdf

[27] *Ibidem.*

assessment of environmental risks to human health, livelihoods and security following conflicts, disasters and industrial accidents and environmental recovery programmes through field-based project.[28]

(C) Ecosystem Management

An ecosystem may be defined as a natural system consisting of all plants, animals and microorganisms, which function with all the physical factors of the environment. The health of ecosystems is inevitable for the existence of human being. The benefits derived from nature every day, from timber and food to water and climate regulation, are all ecosystem services. According to UN Millennium Ecosystem Assessment Synthesis Report[29], 60% of the ecosystem services, examined during the Millennium Ecosystem Assessment, are degraded or used unsustainably, including fresh water, capture fisheries, air and water purification. There were 7.06 billion people in the world in 2012 (US Census Bureau 2013); it is expected to be more than 10 billion by 2100 (UN 2011). By comparison, the world population was only 3.85 billion in 1972, the year of the UN Conference on the Human Environment and the establishment of the UNEP.[30] Over the last 50 years, humans have transformed ecosystems more rapidly and extensively to meet growing demands for food, fresh water, timber, fiber and fuel which has resulted in irreversible loss in the diversity of life on the globe.

Due to the changes being made in ecosystems it has largely resulted in disease emergence, abrupt alterations in water quality, the creation of "dead zones" in coastal waters, the downfall of fisheries, and shifts in regional climate. Other harmful effects of the degradation of ecosystem services are growing inequities and disparities across groups of people, and are sometimes the principal factor causing poverty and social conflict. The Ecosystem Management Sub-Programme of UNEP helps countries to use the ecosystem approach to enhance human well-being. The Sub-Programme provides leadership role in promoting ecosystem

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[28] In 2007, UNEP's Post-Conflict & Disaster Management Branch established the Sudan Programme, dedicated to building peace and stability in the country and tackling issues like water, timber and energy resource management. In 2008, UNEP formally established a comprehensive environmental recovery programme in the Democratic Republic of Congo with the aim of assessing the current state of the environment and natural resource management in the country. UNEP has undertaken post-conflict assessment in Liberia, Iraq, Rwanda, Lebanon and others.

[29] *Millennium ecosystem assessment synthesis report* (2005). Retrieved from http:// matagalatla nte.org/nobre /down/MageneralSynt hesisFinalDraft.pdf

[30] UNEP Yearbook (2013). *Emerging issues in our global environment*. Retrieved from http://www.unep.org/yearbook/2013

management and disseminate information about its advantage for development. It also develops tools and methodologies to restore and manage ecosystems and biodiversity.

(D) Environmental Governance

The governance of rich and diverse natural resources of our planet is not an easy task. Environment does not recognise the political borders, thus managing environmental threats of air pollution. Biodiversity loss requires new global, regional, national and local responses involving a wide range of stakeholders. Environmental governance includes the rules, practices, policies and institutions that regulate the relationship of human with the environment. Good environmental governance requires the involvement and cooperation of governments, NGO, the private sector and civil society. UNEP has been fulfilling this mandate to provide scientific assistance and a common platform for negotiation on environmental issues since 1972. Working with States and all major groups and stakeholders, UNEP helps to bridge the science and policy gaps by keeping the state of the global environment under review, identifying threats at an early stage, developing sound environmental policies, and helping States successfully implement these policies. The environmental governance Sub-Programme of UNEP focuses on strengthening global, regional, national and local environmental governance to influence the international environmental agenda by reviewing global environmental trends and emerging issues. It also determines to develop, implement and enforce new international environmental laws and standards.[31]

(E) Harmful Substances and Hazardous Wastes

In almost all economic and industrial sectors, chemicals play an important role. The production and use of these chemicals have an enormous impact on employment, trade and economic growth worldwide. No one can negate the benefits of various chemical but its unwise use has the potential to adversely impact human health such as cancers, birth defects, neurological disorders, and hormone-disrupting and also the environment. Chemical contamination is widespread both on land and in water. It contaminates water bodies and is responsible for ozone depletion. Chemical substances and waste having potential to cause adverse impact on environment and human health are persistent, bio accumulative and toxic substances, acutely toxic, explosives, corrosives, POPs, ODS, healthcare wastes, e-wastes and chemicals that are carcinogens or mutagens

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[31] UNEP. *Environmental goverence, UNEP six priority areas factsheets,* Retrieved from http://www. unep.org/pdf/ brochurees/Envi ronmentalGovernance.pdf

or that adversely affect the reproductive, endocrine, immune, or nervous systems.[32] Harmful Substances and Hazardous Waste Sub-Programme of UNEP carry out scientific assessment of the environmental fate and expose pathway of harmful substances. It also assists governments to develop appropriate policy and legal instruments to control harmful substances. The Sub-Programme provides tools, methodologies and technical assistance to facilitate States to formulate national programmes for management of harmful substances and hazardous waste.[33]

(F) Resource Efficiency

The current consumption and production pattern is not sustainable and it adversely affects the economic growth and social development. It is so because we are extracting more resources to produce goods and services than our planet can replenish, while a large number of people are struggling to meet basic needs. UNEP defines resource efficiency for reducing total environmental impact of the production and consumption of goods and services, from raw material extraction to final use and disposal. Resource efficiency is helpful in building a green economy in which economic growth is decoupled from environmental harm. Green economy uses opportunities for cleaner investments and green jobs to address poverty and enhance human well-being. Resource efficiency is supportive to meet the needs of human beings while considering the carrying capacity of the earth. UNEP ensures that natural resources are produced, processed and consumed in environmentally sustainable way which paving the way towards the green economy. The Resource Efficiency Sub-Programme of UNEP strengthens the knowledge based on resource efficiency working closely with partners from government, local authorities and the research community to develop policies and programme to build a more resource efficient society. The UNEP also develops consumer and procurers information tools, market incentives and public-private initiatives to promote sustainable lifestyles.[34] During Rio+20, countries recognized that a green economy is an important way to achieve a future which will see sustainable development and poverty eradication. A green economy aims at improved human well being and social equity, while significantly reducing environmental risks and ecological scarcities. It is low-carbon, resource-efficient and socially inclusive. Growth in

[32] UNEP. *Harmful substances and hazardous waste: UNEP six priority areas factsheets,* Retrieved from http://www.unep.org/hazardoussubstances/Introduction/tabid/258/Default.aspx

[33] *Harmful substances, UNEP six priority areas factsheets,* Retrieved from http://www.unep.org/pdf/UNEP _Profile /Harmful_substances.pdf

[34] *Resource efficiency, UNEP six priority areas factsheets*. Retrieved from http://www.unep.org/pdf/UNEP_ Profile / Resou rce_efficiency.pdf

income and employment should be driven by public and private investments that reduce carbon dioxide (CO_2) and other non-CO_2 emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services.[35]

4. CONTRIBUTION OF UNEP

UNEP has played the role of anchor institution in global environmental governance notwithstanding its limited mandate and small financial capacity. Major contributions made by UNEP are agenda setting and management of intergovernmental processes to gain agreement on standards, policies, and guidelines or serving as the central forum for deliberation and debate on global environmental issues. It conducts studies on global environmental assessment, and publishes the Global Environmental Outlook (GEO). UNEP has had considerable success in creation of treaties and multilateral environmental agreements.[36] It has played pivotal role in putting several important environmental issues on international agenda: desertification, ozone depletion, hazardous wastes, and toxic chemicals and also catalyzed agreements. Beside it, UNEP has conceded a broad range of initiatives to promote and facilitate regional and national levels to address environmental problems. Being based in the African Continent, UNEP provides clear advantage in understanding environmental issues faced by developing nations.[37] To ensure its global effectiveness, UNEP supports six regional offices. It has its Division of Technology, Industry and Economics in Geneva and Paris. It also hosts several conventions concerning environmental protection.[38]

(A) Agenda Setting

Law fills the gap between policy and action. Since the establishment of UNEP, one of the key areas of its activities is to develop the international environmental law. One of UNEP's most significant role has been to sponsor negotiations on major environmental treaties and implementation of such treaties by its

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35 UNEP Yearbook, *Supra n.* 30.

36 Such conventions include the Basel Convention on the Transboundary Movement of Hazardous Wastes, the Convention on Biological Diversity, the Montreal Protocol on the Protection of the Ozone Layer, etc.

37 The Headquarter of UNEP is situated in Nairobi, the capital of Kenya.

38 UNEP hosts several environmental convention secretariats: the Ozone Secretariat and the Montreal Protocol's Multilateral Fund, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity, the Convention on Migratory Species, and a growing family of chemicals-related agreements, including the Basel Convention on the Transboundary Movement of Hazardous Wastes and Stockholm Convention on Persistent Organic Pollutants (POPs).

Secretariat.[39] Another contribution of UNEP towards the development of international environmental law and policy is its regional sea programme.[40] The role of UNEP in shaping environmental law has been constantly emphasized in the GC of the UNEP and the UNGA.[41] Agenda 21states that the development of international environmental law is one of its priority areas which includes the development of soft and hard law of environmental protection and its implementation.

After ten years the inception of UNEP, the programme for the development and periodic review of environmental law (Montevideo Programme-I)[42] was adopted in 1982. The Montevideo Programme plotted further progress in international environmental law and policy and further identified treaties on issues such as ozone protection as representing markers of such progress. Implementation of the programme was to be performed by the UNEP in conjunction with other UN bodies, regional organization and NGOs.[43] Under the Montevideo Programme a

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[39] Among these treaties are the Convention on Protecting the Ozone Layre (1985), followed by Montreal Protocol on Substances that Diplete the Ozone Layer (1987). The Protocol has been amended several times and is considered the most significant accomplishment to date in the field of international environmental law. Other significant treaties sponsored by UNEP include Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Basel Convention on the Control of Transboundary Movement of Hazadous Wastes and their Disposal (1989), Convention on Biological Diversity 1992 (CBD), UN Framework Convention on Climate Change, 1992 (UNFCCC), Convention to Combat Desertification, 1994 (CCD), Stockholm Convention on Persistent Organic Pollutants 2001, Cartegena Protocol on Biosafety, 2002.

[40] Soroos, Marvin S. (2010). "Global institutions and the environment: An evolutionary perspective", in : Axelrod, Regina S. (ed.) *The global environmental institutions, law and policy*. Washington: CQ Press, 34.

[41] GA in its Resolution (A/RES/S-19/2 of 19 September 1997) states that: "The role of the United Nations Environment Programme in the further development of international environmental law should be strengthened, including the development of coherent interlinkages among relevant environmental conventions in cooperation with their respective conferences of the parties or governing bodies. In performing its functions related to the conventions signed at the United Nations Conference on Environment and Development or as a result of it, and other relevant conventions, the United Nations Environment Programme should strive to promote the effective implementation of those conventions in a mannerconsistent with the provisions of the conventions and the decisions of the conferences of the parties."

[42] A group of senior government officials' expert in environmental law representing Governments from around the world met in Montevideo Montevideo, Uruguay on 6 November 1981.

[43] Montevideo Programme for the Development and Periodic Review of Environmental law, Adhoc Meeting of Senior Government Officials Expert in Environmental Law, Montevideo, 6 November 1981, Decision 10/21 of Governing Council of UNEP of 31 May 1981.

long-term strategic guidance for UNEP in the field of environmental law was developed, and adopted by the Governing Council of UNEP in 1982 and became a UNEP long-term programme for the development of environmental law. The UNEP was to undertake programme activities in regard to the conclusion of international agreements and the development of international principles, guidelines and standards. Montevideo Programme-II, adopted by the GC of UNEP in 1993, provided basis for UNEP's action aimed at progressive development of environmental law. The content was largely based upon the requirements outlined in Agenda 21 adopted in Rio Conference 1992. The GC adopted Montevideo Programme-III in 2001 for the first decade of the 21st Century with a view to strengthening its activities in the field of environmental law. [44]

Under the Programme, a number of global environmental conventions have been developed under the auspices of UNEP. The Vienna Convention for the Protection of the Ozone Layer (1985) and the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) are major international instruments and most widely ratified treaties specifically relating to the protection of the earth's ozone layer. Under the Vienna Convention, the parties determined to protect human health and environment against adverse effects resulting from modifications of the ozone layer due to human activities. Such protection requires international co-operation and action, and should be based on relevant scientific and technical considerations.[45] The Secretariat for the Vienna Convention and for the Montreal Protocol is known as Ozone Secretariat which functions in accordance with Art. 7 of the Vienna Convention and Art. 12 of the Montreal Protocol responsible to monitor, implementation policies and programme to the protection of the ozone layer.[46]

[44] The Montevideo Programme III has a particular focus on enhancing the effectiveness of environmental law, addressing numerous areas including implementation, compliance and enforcement, capacity-building, prevention and mitigation of environmental damage, settlement of international environmental disputes, strengthening and development of international environmental law, harmonization and coordination, public participation and access to information, information technology and innovative approaches to environmental law. This programme also addresses sectorial issues for conservation and management of environment such as freshwater resources, coastal and marine ecosystems, soils, forests, biological diversity, pollution prevention and control, production and consumption patterns, environmental emergencies and natural disasters, Trade and environment, Armed Conflicts and the environment.

[45] *UNEP ozone secretariate*, Retrieved from http://ozone.unep.org/pdfs/viennacov ention20 02.pdf

[46] *The vienna convention for the protection of the ozone layer,* Retrieved fromhttp:// ozone.unep.org/new_site /en/index.php; *The montreal protocol on substances that deplete the ozone layer,* Retrieved from http://ozone.unep.org/new_site/en/montreal_pro tocol.php

The management of hazardous waste was included as one of three priority areas. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) was adopted in response to a public outcry following the discovery of deposits of toxic wastes in developing countries imported from abroad in the 1980s.[47] The Basel Protocol regulates civil liability for damage resulting from the transboundary movement of hazardous wastes and other wastes including incidents occurring as a result of illegal traffic.[48]

At the regional level, UNEP facilitated the development of regional seas conventions and protocols since the mid-1970s, including the conventions and protocols for the Mediterranean, the Gulf, the Red Sea, West and East African coastal zones, the Caribbean, the South Pacific, the South-east Pacific and the Black Sea. Such instruments are supplemented by related action plans have also been developed for the regions where legally binding instruments are yet to be developed, including East and South Asian seas and the Northwest Pacific. The development of regional seas agreements and related action plans continues. In addition, UNEP assisted Governments in the development of regional environmental conventions, such as the 1987 Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System and the 1994 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora. Furthermore, UNEP has facilitated the development of other global and regional conventions by providing decision-makers of countries with the environmental assessment and information on significant environmental issues and coordinated international actions that led to the development of such instruments. [49]

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[47] The principal objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as "hazardous wastes" based on their origin and/ or composition and their characteristics. The provisions of the Convention centre around the following principal aims: *First,* the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal; *Second,* the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and *Third*, a regulatory system applying to cases where transboundary movements are permissible.

[48] The Basal Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal was adopted by COP 5 in 1999, Retrieved from http://www.basel.int/Portals/4/Basel%20Convention/docs /text/BaselConventionText-e.pdf \

[49] Examples of such UNEP's involvement includes the 1992 UNFCC (through the Intergovernmental Panel on Climate Change, organized jointly by UNEP and the World

(B) Capacity Development

The UNEP mandate calls for the programme to play a primarily normative role in capacity development for Global Environmental Governance. In this regard, the Nairobi Declaration recognised the role of UNEP as the leading authority in environment and defines its role in development of international environmental law. It aims at sustainable development, including the development of coherent interlinkages among existing international environmental instruments and implementation of such instruments with agreed norms and rules, provides policy advice, acts as an effective science-policy interface, and strengthen its role in coordination of environmental activities. The Declaration is adopted by the UNEP Governing Council and endorsed by the UNGA to revive UNEP and re-establish its authority.[50] The recommendations of the UN Task Force on Environment and Human Settlements adopted by the UNGA, lead to creation of two new coordinating bodies: Environmental Management Group (EMG) and GMEF.[51] The Malmö Ministerial Declaration adopted by the GMEF raises key areas of concern for the 2002 World Summit on Sustainable Development (WSSD). It also agrees that WSSD should review the requirements for greatly strengthened institutional structure for International Environmental Governance (IEG).[52]

The Cartagena Process initiated to assess options for reforming global environmental governance. The 21st Session of the UNEP GC/GMEF convened the Open-Ended Intergovernmental Group of Ministers or their Representatives on IEG to assess the options for strengthening UNEP, improving the effectiveness of MEAs and improving international policymaking coherence. The outcome of the Cartagena Process builds on UNEP as the environment pillar of sustainable development and focuses on strengthening UNEP's role, authority and financial situation; addressing universal membership of the GC; strengthening UNEP's science base; improving coordination and coherence between multilateral environmental treaties; supporting capacity building, technology transfer and country-level coordination;

Meteorological Organization) and the 1994 CCD in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (through UNEP's activities to combat desertification). UNEP also provided substantive support to the parties concerned to develop the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal and the 2002 Cartagena Protocol on Biosafety.

[50] *Nairobi declaration on the role and mandate of UNEP,* UNEP/GC.19/1.

[51] *Report of the secretary general on environment and human settlements,* GA Res. 53/242, 28 July 1999.

[52] Adopted by the GMEF - Sixth Special Session of the Governing Council of the UNEP Fifth plenary meeting, 31 May 2000.

and enhancing coordination across the UN system, as well as the role of UNEP's EMG. The Report from the process is transmitted to the CSD and to the WSSD and incorporated into the Johannesburg Plan of Implementation. Since 2002 the GC/GMEF have taken several decisions to implement the priorities of the Cartagena package.[53] The "Bali Strategic Plan", adopted by the GC/GMEF,[54] outlines proposals for improving the capacity of developing countries and economies in transition to implement their international obligations at the country level.[55]

It is the mandated role of UNEP, as the voice for the environment within the UN system, to promote the incorporation of environmental protection into development planning at all levels. UNEP also has the responsibility of helping national, regional and global bodies to develop the capacity to do so. UNEP develops environmental capacity in developing countries and countries with economies in transition in three principal ways: *Firstly,* facilitating and supporting environmental institution building by governments at regional, sub-regional, national and local levels; *Secondly,* developing and testing environmental management instruments in collaboration with governmental and non-governmental partners, UN entities and major groups. *Thirdly,* promoting public participation in environmental management and enhancing access to information on environmental matters.[56] UNEP has strengthened its commitment for capacity building by providing strategic framework to various activities and programmes of environmental protection. In 2005, the GC of the UNEP adopted the Bali Strategic Plan for Technology Support and Capacity Building requesting to "enhance the delivery by UNEP of technology support and capacity building to developing countries and countries with economies in transition, including through main streaming technology support and capacity building throughout UNEP activities."[57]

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[53] *Report of the GC on the work of its seventh special sessions/GMEF,* UNEP/GCSS.VII/6, 5 March 2002

[54] UNEP, GC decision 23/1 of 25 February 2005.

[55] "International environmental governance: Moving forward with developing a set of options". Paper presented at the First meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance Belgrade, 27 – 28 June 2009. Retrieved from http://www.unep.org/environm entalgove rnance/Portals/ 8/documen ts/ IEGEDBack groundPaper-1.pdf

[56] UNEP Division of Communications and Public Information (2002). *Capacity Building for sustainable development: An overview of UNEP environmental capacity development initiatives*. Retrieved from http://www.unep. org/Pdf/Capacity_ building.pdf

[57] UNEP. *Ways to increase the effectiveness of capacity building for sustainable development,* Retrieved from http://www.unep.ch/etb/areas/pdf/Microsoft% 20Word%20-%20UNEP-ETB% 20CB-Paper%20Starvan ger-final % 20draft.pdf.

The GA resolution[58] established the GMEF as an annual, ministerial-level forum assigned to providing political leadership within UNEP. Additionally, UNEP's Cartagena process of strengthening IEG has helped various improvements, such as the indicative scale for funding UNEP and the Bali Strategic Plan for Technology Support and Capacity Building. The Cartagena process also underlined the importance of the EMG, which the UN Secretary-General established in 1999 to bring the environment into the mainstream of UN system activities and to improve policy coordination across the environmental activities of the UN system as well as the Bretton Woods institutions and the World Trade Organization (WTO).[59] UNEP is also one of three implementing agencies of the GEF, along with the UNDP and the World Bank, that acts at the funding mechanism for the various MEA. Such MEAs are CBD and UNFCCC, CCD, Stockholm Convention on Persistent Organic Pollutants.[60]

(C) Monitoring, Assessment and Reporting

UNEP has played a significant role in monitoring, assessment, and reporting various issues relating to environmental protection. It also coordinates efforts by UN specialized agencies to assess the state of the planet's environment and to provide timely warning of developments that requires urgent action. In this regard, UNEP has coordinated the preparation of five comprehensive reports in its Global Environmental Outlook (GEO) series. GEO is a consultative, participatory process that builds capacity for conducting integrated environmental assessments for reporting on the state, trends and outlooks of the environment. It is also a series of products that informs environmental decision-making and facilitates interaction between science and policy. It examines trends in the state of the atmosphere, land, water and biodiversity of the planet.

The rigorous assessment process aims to make GEO products scientifically credible and policy relevant - providing information to support environmental management and policy development. It also supports multi-stakeholder networking and intra and inter-regional cooperation to identify and assess key priority environmental issues at the regional levels. A world-wide network of collaborating centre partners, a nomination process that allows governments and other stakeholders to nominate experts to the process, advisory groups to provide guidance on scientific and policy issues, and a comprehensive peer review

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[58] UNGA Res. 53/242 of 28 July 1999.

[59] Meyer-Ohlendorf and Knigge, *Supra n.* 21, 124

[60] Wolst, Justice (2013). *The funding of international environmental law.* in : Alam, Shawkat *et al.* (ed.), *Handbook of international environmenal law.* New York: Routledge, 159

processes are some of the integral elements of GEO. Using the Integrated Environmental Assessment (IEA) methodology, UNEP has produced four GEO reports[61], which have analyzed environmental state and trends at the global and regional scales, described plausible outlooks for various time frames and formulated policy options. Each GEO report is based on the assessment findings of its predecessor and draws from lessons learnt.[62] The fourth report (GEO-4) prepared by 390 experts and reviewed by 1000 specialist was released in 2007.[63] UNEP's fifth GEO-5 (2012) shows that progress on meeting environmental goals and

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[61] UNEP has produced Five GEO reports (GEO-1 in 1997; GEO-2 in 1999; GEO-3 in 2002; GEO-4 in 2007; and GEO-5 in 2012):

- The first GEO (GEO-1) provided a snapshot of the state of the world environment and incorporated regional views.
- In GEO-2000 (GEO-2), Collaborating Centres formed the core of the GEO process, expanding regional input to the process and thus combining top-down integrated assessment with bottom-up environmental reporting.
- GEO-3 provided a 30-year overview of environmental change from 1972 to 2002, including descriptions of how social, economic and other factors have contributed to these changes. It found that despite much attention to environmental issues since 1972, the environment was still at the periphery of socio-economic development and that poverty and excess consumption continued to stress the environment.
- GEO-4 took on the challenge of integrating environment and development, with particular attention paid to the linkages between environmental state and human well-being. These linkages were assessed in the context of targets identified by the World Commission on Sustainable Development (Brundtland Commission), the Millennium Development Goals (MDGs), and other international environmental declarations and agreements. GEO-4 showed that while some progress had been made, real progress towards sustainable development has been slow. It calls for action in dealing with persistent environmental problems that undermine human well-being and development by moving the environment from the periphery to the core of decision making.
- GEO-5 is currently the most authoritative assessment of the state of the global environment, as well as its' trends and outlook. GEO-5 points out that where international treaties and agreements have tackled goals with specific, measurable targets – such as the bans on ozone-depleting substances and lead in petrol –they have demonstrated considerable success. For this reason, GEO-5 calls for more specific targets, with quantifiable results, across a broader range of environmental challenges. The report also calls for a greater focus on policies that target the drivers of environmental change – such as population growth and urbanization, unsustainable consumption patterns, fossil fuel-based energy consumption and transport, and globalization.

[62] UNEP. *About GEO, keeping the global environment under review,* Retrieved from http://www.u nep.org/geo/about.asp.

[63] UNEP. *Global environment outlook: GEO-4 report.* Retrieved from www.unep.org /geo /geo4/media/.

objectives to improve the state of the environment has been uneven.[64] Efforts to slow the rate or extent of adverse environmental change, including improvements in resource efficiency and implementation of mitigation measures, have had modest success but have not succeeded in reversing these changes.UNEP's Global Resource Information Database (GRID) integrates and dispensers environmental date for geographical units ranging from local to global levels in forms that are useful to planners and policy makers.[65]

5. UPGRADING OF UNEP TO UNEO

The status of UNEP within the UN system is the result of extensive discussion and decisions. During the preparatory process for Stockholm, there was consensus that an international arrangement is necessary to put the agreement into effect and to facilitate international cooperation in environmental protection. There were several proposals about the institutional status of UNEP such as, an autonomous specialized agency, a unit within the UN Secretariat or a programme within the ECOSOC. One of the proposals to the new environmental agency was the creation of a new specialized agency on the model of WHO and ILO. But it was dismissed due to several reasons. Specialized agencies are separate, autonomous, IGOs with governing bodies independent of the UN Secretariat and the GA. Generally, the governing body of such agencies often has universal membership and the budget of such agencies comes from the mandatory contributions levied on all its members. The structure of specialized agency was considered counter productive for the new environmental body because a large number of existing organizations were already working in the field and the creation of a new one would create unproductive competition among them. Another objection was that the environmental issue is an integrated issue and it should not be confined to a particular agency responsible for one sector.

[64] UNEP (2012). *Annual programme performance report*.

[65] The GRID is a worldwide network of 15 environmental data centres managed by UNEP's Division of Early Warning and Assessment (DEWA) from its headquarters in Nairobi, Kenya. The GRID network was launched in 1985 with centres in Geneva and Nairobi. GRID centres have now been established in five of the six geographical regions around which UNEP has organised its global activity. It aims to provide and facilitate access to high-quality environmental data and information for decision-making and policy-setting, and to support UNEP's environmental assessment and reporting, networking and early warning activities. Typically, GRID centres specialise in the preparation and provision of value-added environmental information products using tools such as remote sensing, Geographic Information Systems, and by developing client-specific databases and Internet websites.GRID Centres Networkitself expanded from the two original centres in Geneva and Nairobi to some 15 offices at different levels (national, regional and even thematic) around the world.

The report of the UN Secretary General suggested two alternatives for the creation of a new agency. *Firstly,* the new IGO within the UN as a subsidiary of GA pursuant to Art. 22 of UN Charter. *Secondly* alternative was an agency as subsidiary of the ECOSOC pursuit to Art. 68 of the UN Charter. But the UNEP was ultimately established as a subsidiary body to both the UNGA and ECOSOC. It reports to UNGA through ECOSOC. This entitled the status of UNEP as a programme rather than a specialized agency. Under the UN hierarchy programme has the least independence and authority since they are subsidiary to the UNGA. Generally programmes are small and their membership is not universal. As an integral part of the UN, such programme is overseen through UNGA and therefore all UN members have a say in its governance. The Programme budget relies on voluntary financial contributions. Since 1972, UNEP has two sources of funding: *First* an allocation from the UN regular budget to cover the cost of servicing the GC and small secretariat; *Second* is the environment fund by voluntary contributions. Such unreliable and highly discretionary financial arrangement allows for individual donors to influence UNEP priorities to plan beyond the current budget cycle.[66] *Finally*, UNEP's location outside of the centers of political activity far from New York and Geneva affected its capacity to coordinate the numerous agencies with environmental activities as well as, most importantly, its ability to attract top-tier policy staff. Over the year, it is perceived that the decision to constitute it as a programme rather than specialized agency has negatively impacted its ability to fulfill its functions. It fails to establish the autonomy necessary to make it an anchor institution for the global environment. UNEP has not succeeded in becoming the central forum for debate and deliberation in the environmental field like WHO for health and ILO for labour.

The 2006 Report of the UN Secretary-General on 'High-Level Panel on System-wide Coherence' has endorsed the proposal for a 'specialised agency' for global environment. There has been a proposal of the European Union (EU) pending before the GA since 2005 for upgrading the UNEP as UNEO." Such UNEO proposal was similar to the one presented by Bharat Desai, in 1999 where he spoke about how the UNEP established by the GA in 1972 ought to be strengthened as United Nations Environment Protection Organization.[67]

Proposals for the creation of a UNEO have come as some questions to the efficacy of UNEP in dealing with the global environmental issues. Some scholars argued that UNEP has failed to prove as an anchor institution for global

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[66] Ivanova, *Supra* n. 1

[67] "UN delegate approaches JNU professor on new model," *The Hindu*, 23 August, 2007.

environmental governance. The status of UNEP as a programme, lack of funding, location far from UN Headquarter are some of the factors which led to widespread calls for UNEP reform. Maria Ivanova argued that "anchor institutions are the primary, though not the only, international organizations in certain global issue areas and typically perform three core functions: *Firstly,* overseeing monitoring, assessment, and reporting on the state of the issue in their purview; *Secondly,* setting an agenda for action and advancing standards, policies, and guidelines; and *Thirdly,* developing institutional capacity to address existing and emerging problems." However, while the UNEP was chartered to perform these three primary tasks as an anchor institution, it has failed in many ways.[68]

The creation of UNEO needs to be addressed in the wider context of reforming the structure of the UN in general and the system of international environmental governance in particular. Although there are many reform initiatives relevant for the creation of a new institution to meet the environmental challenges.[69] The 2005, UN World Summit recognized the need for more efficient environmental activities in the UN system. The Summit also acknowledged "the need for enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and co-operation, better treaty compliance, while respecting the legal autonomy of the treaties, and better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building." Against this backdrop, it was agreed

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[68] Ivanova, Maria (2005). *UNEP as anchor institution for the global environment: Lessons for the UNEO debate,* Yale Center for Environmental Law & Policy, Working Paper No. 05/01, Retrieved from http://www.yale.edu/gegproject/uneo-wp.pdf

[69] The debate about a powerful agency for global environmental policy was demanded in1989. The Declaration of The Hague, initiated by the governments of The Netherlands, France and Norway, called for an authoritative international body on the environment that would contain a provision for the effective majority rule. Though the proposal did not meterialize but the declaration helped to generate more proposals for an effective environmental organization. At the 1997 Special Session of the UNGA on environment and development, Brazil, Germany, Singapore, and South Africa submitted a joint proposal for a "global umbrella organization for environmental issues, with the UNEP a major pillar." The debate has been given new momentum by the diplomatic effort by France to craft a new environmental organization under the UN. In 2003, the French government circulated a proposal to transform UNEP into a United Nations Environmental Organization which followed up on former French initiatives to replace UNEP by a "world environment organization." The proposal has been emphasized again and again at various international forums. Such as the proposal for the upgradation of UNEP also emphasised in 2007 Paris Call for Action during the Citizens of the Earth Conference for Global Ecological Governance, and further supported by an intergovernmental "Group of Friends of the UN Environment Organization.

"to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies."[70] In November 2006, the Secretary-General's High-level Panel on UN System-wide Coherence in the Areas of Development, suggested upgraded UNEP and real authority as the environmental policy pillar of the UN system".

A consultative process within the UN system explored the possibility of a more coherent institutional framework for the environmental activities in the UN system. After the 58th meeting of the UNGA, a proposal was made by the member states of the EU to transform the UNEP into UNEO. In 2007, at UNEP's GC meeting, the EU repeated its call for "significant strengthening of UNEP, along the lines sketched out in Cartagena which will help UNEP to become more effective in catalyzing action to address major environmental threats."

The outcome document of the Rio+20 Conference 'The Future We Want' did not materialize the demand for the more powerful body to lead and coordinate environmental policies and programme in the same manner as the WTO or WHO are working in their respective areas.[71] The outcome document planned the strengthening of UNEP to allow universal membership, more funding, and an enhanced coordination function within the UN system. It also suggested the creation of a new body –a high level political forum- to address sustainable development more holistically.[72] This forum will definitively through negotiations under the

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[70] Meyer-Ohlendorf and Knigge, *Supra* n. 21, 140-141.

[71] Kostakos, Georgios (2014). *"International environmental governance and UNEP's future"* Briefing. Retrieved from http://www.futureun.org/media/archive1/briefings/FUNDS Brie fing16-Kostakos.pdf

[72] Para 88 of the outcome document of Rio+20, 2012 identifies several avenues for strengthening and upgrading UNEP, notably:

- the establishment of universal membership in the Governing Council;
- having secure, stable, adequate and increased financial resources from the regular budget of the UN and voluntary contributions to fulfil its mandate;
- ensuring the active participation of all relevant stakeholders.
- enhancing the voice of UNEP and its ability to fulfil its coordination mandate within the UN system;
- promoting a strong science-policy interface;
- disseminating and sharing evidence-based environmental information and raising public awareness on critical and emerging environmental issues;
- providing capacity-building to countries and supporting and facilitating access to technology;

authority of the UNGA, will eventually replace the UN Commission for Sustainable Development. [73]

CONCLUSION

Since 1972, UNEP remains the only anchor institution under UN to work in the field of environmental protection and responsible for global environmental governance. Although in general terms, UNEP has been a weak institution, underfunded and of relatively low visibility.[74] It is a small programme with few hundred professional staff with limited budget and it also lacks significant decision making authority. Given that the UNGA oversees the UNEP, all members have indirect voice in the governance of the body. It remains problematic in its contribution to the coordination and development of international environmental law and governance.[75] However, achieving cooperation and coherence remains challenging as there are 44 agencies within UN system engaged in environmental activities.[76] This fact is viewed positive in the sense that it indicates mainstreaming of environmental issues.[77] Yet coherence remains problematic in many instances as recognized in Nasa Dua Declaration.[78] In such condition, effective environmental

- progressively consolidating headquarters functions in Nairobi and strengthening regionalpresence to assist countries in the implementation of national environmental policies.

[73] *Rio+20 outcomes document: The future we want summary,* Retrieved from http://www.idf.org/sites/default/files/201206%20-%20Rio%2B20%20Outcomes%20Document%20-%20The%20Future%20We %20W ant%20Sum mary_0.pdf

[74] Bell, Stuart and McGillivray, Donald (2008) *Environmental law*, New York: Oxford University Press, 149.

[75] Alam, *Supra* n. 60, 108.

[76] The FAO whose broad portfolio includes the relationship between food production and environment has facilitated some initiatives particularly marine environment. The WHO has investigated the impact of air and water pollution on human health. ILO has sought to protect worker for environmental degradation such as pesticides and dust. UNESCO has supported research on environmentally related topics. In the economic realm outside the UN, the powerful institutions- the World Bank, International Monetary Fund and the WTO have included environmental consideration in the policies and programmes.

[77] Govind, Paul (2013). "International environmental institutions", 104 in : Alam, *et al.* (ed.), *Supra* n. 60.

[78] Nasa Dua Declaration, 2010, UNEP/GCSS.XI/L.6 PARA.8; The Nasa Dua Declaration, released in 2010, explicitly recognized that the increasing level of complexity and fragmentation was undermining the effectiveness of international environmental governance. It states "We note that the current international environmental governance architecture has many institutions and instruments and has become complex and fragmented. We commit to further efforts to make it more effective".

governance is critical in responding to urgent environmental issues and the current system exhibits fragmentation.[79]

In comparison to other UN agencies and programmes, UNEP is politically and financially weak body and hardly matched with current global environmental issues.[80] The upgradation of UNEP into UNEO, with stable, adequate and predictable resources and with the appropriate international standing, would enable the organization to fulfill its mandate and to live up to the expectations of developed and developing countries. Strengthening and reforming the institutional framework of environmental governance constitute a key theme of Rio+20 and the overall development. To improve effectiveness and targeted action of environmental activities, the system of international environmental governance should be strengthened and more coherent featuring an upgraded UNEP with real authority as the UN environment policy pillar.[81] Proponents of UNEO argue for its vital role in increasing the political importance of environmental issues in the UN, and could therefore play vital role in solving many environmental challenges the earth currently faces.

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(2015) 10 Universitas 138-151

COMPETITION LAW AND REGULATORY ISSUES

Surender Mehra

Abstract

The primary goal of competition and regulation policies is usually defined as the promotion of consumer welfare. In standard economics, the cost of imperfect competition have often been measured in terms of loss of consumers surplus. However in practice, this goal has to be balance against other public objectives relating to the environment or defence or balanced regional development. A different sort of concern is quiet important in India. India is at an early stage in developing an arms length regime for competition and regulation. New authorities have been set up at a rapid pace and many of them are struggling to find their feet. The Competition Commission is not yet operational in more meaningful sense. There are questions about jurisdiction, and for the regime to work effectively, there is need a continuing debate and dialogue on the economics of competition and regulation policy. Efficiency is associated with competition. In order to maintain competitive conditions, three things are needed. First, there should be appropriate competition laws to prevent market abuse. This should be preventive in character. Second, this must be supplemented by competition policy to ensure that all government policies tend to promote competition .This has a positive dimension because there are many policy induced anti-competitive outcomes , which have been captured. Third, sectoral regulation becomes important in areas where there are natural monopolies. Under such circumstances, it is

SURENDER MEHRA

~ School of Legal Studies and Governance, Central University of Punjab, India:
surenderm1979@gmail.com

Surender Mehra received his LL.M. Degree in Business Law and Ph.D. in Competition Law from Banaras Hindu University, India. He is Assistant Professor of Law, in the School of Legal Studies and Governance, Central University of Punjab, at Bhatinda in India. His research focuses on competition law.

necessary to establish appropriate relationship between sectoral regulators and the competition authorities.

Keywords: Competition, Regulation, Jurisdiction

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INTRODUCTION

India took up economic reforms in the early and did not have specific law dealing with antitrust issues until 2002. It was in this context that a separate law dealing with competition and antitrust issues was considered necessary and the Competition Act, 2002 was passed. Enacted to fulfil India's obligations under the WTO agreements, the Act replaced the then existing Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) which was considered inadequate for the purpose of meeting the objectives of competition policy. Following an Amendment in 2007, the Competition Commission became a market regulator, and the Competition Appellate Tribunal was established. The 2009 amendment provided for a mechanism to dispose of the cases pending before the MRTP Commission.

Competition law has to ensure free, fair and healthy competition in the market. This law believes in the premise that the unrestrained interaction of the competitive forces in the market will yield the best allocation of economic resources, lower prices, improve quality and maximum material progress for the consumers. Thus, the principal objective of the competition law is to make the market economy work better by stopping vested interests from obstructing markets. Therefore, the purpose is to maintain and protect the competitive process. The advantages of competition for economic growth and consumer welfare are well recognized and therefore, strict enforcement of competition law is a big challenge for any competition authorities. It prohibits and penalizes anti-competitive practices by enterprises functioning in the market i.e. addresses market failures whereas

competition policy seeks to correct the anti-competitive outcomes of various government policies and laws, and help in development of competitive markets[1]. Competition law aims to protect competition in the market as a means of enhancing consumer welfare and ensuring the efficient allocation of resources. In terms of its preamble and Statement of Objects and Reasons, the principle objects of the Act, are to eliminate practices having adverse effects on the competition to promote and sustain competition in the market, to protect the interests of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country.

The new Competition Act 2002 has essentially four compartments:

- Anti-Competitive Agreements
- Abuse of Dominance
- Combination Regulation
- Competition Advocacy[2]

1. ANTI-COMPETITIVE AGREEMENTS AND CARTELS

The Competition Act, 2002 has been enacted to promote competition in India. The ultimate aim of competition law is to protect consumer welfare as competition in a market ensures that market players are looking to find the most efficient means of production resulting in good quality services and goods at lower prices. However, unlike the previous Indian competition law, the MRTP Act, the Competition Act 2002 does not apply to all 'unfair trade practices'. So, while many consumer disputes would have come under the MRTP Act, the new Competition Act will not always apply to such cases. Section 3(1) of the Act prohibits and declares void any agreement between enterprises in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, which causes, or is likely to cause an appreciable adverse effect on competition in India. Firms enter into agreements, which may have the potential of restricting competition. Agreements could be formal written documents or oral understandings, whether or not enforceable by legal proceedings. A scan of the competition laws in the world will show that they make a distinction between

[1] Mehta, S Pradeep. "Why should consumers be interested in competition law & policy. Jaipur : CUTS. Retrived from http://www.cuts-ccier.org/pdf/why_should_consumers_be_ interested_in_ a_competition_law _and_policy.pdf, Accessed on 8 December 2015

[2] Chakravarthy, S.(2006). "Competition act, 2002: The approach", in : Mehta,S Pardeep. (ed.), *A functional competition policy for India*, 55. New Delhi, Academic foundation with CUTS International.

"horizontal" (agreement regarding prices, quantities, bids and market sharing) and "vertical" agreements (tie-in arrangement, exclusive supply, distribution agreement and refusal to deal) between the firms. The former agreements are those among competitors and the latter agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreement is the cartel. Vertical agreements are pernicious if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as *prima facie* horizontal agreements are more likely to reduce competition between firms in a purchaser- seller relationship[3].

In *FICCI-Multiplex Association Of India V. United Producers\Distributers Forum*[4], there was a collective decision of the opposite parties (producers and distributers of films) not to release films to the multiplexes with a view to pressurize the multiplexes into accepting the new terms of revenue sharing ratio. The purpose was extracting better revenue sharing ratios from multiplexes. Thus the Competition Commission of India (CCI) held that the agreement entered into by the opposite parties is covered within the mischief of clauses (a) and (b) of Sec. 3(3) of the Act and accordingly Rs.1 lack was imposed on 27 parties each.

In *Uniglobe Mod Travels Pvt. Ltd. V. Travel Agent Federation of India and Ors.*,[5] the informant Uniglobe Mod Travels Pvt. Ltd. has filed the instant information against the opposite party No.1 under Sec. 19(1)(a) of the Competition Act, 2002. The case pertains to a boycott call given by trade associations of the travel agents in India against a few international airlines on account of the shift from 'commission basis' fee structure to 'transaction fee' structure, and the demand to restore the former business model. The CCI found that the consumers have been deprived of the tickets of Singapore Airlines to the extent of non-availability of tickets through the travel agents of TAFI, TAAI and IAAI and their choice has also been restricted to the extent of drop in the sale of Singapore Airlines tickets. Furthermore the boycott cannot be said to have led to promotion of technical, scientific and economic development by means of production or distribution of goods or provisions of services.

2. MISUSE OF DOMINANCE BY BIG BUSSINESSMAN

The Competition Act defines dominance as a "position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (1) operate

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[3] *Ibidem*, 56.

[4] Case no. 01/ 2009 Order, of 25-5-2011(CCI)

[5] Case No. 03/2009 Order, of 4-10-2011 (CCI)

independently of competitive forces prevailing in the relevant market, or (2) affect its competitors or consumers or the relevant market, in its favor"[6].This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then , this ambiguity has a justification having share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance , while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining "dominance" may either allow real offenders to escape or result unnecessary litigation. Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" may, perhaps be an aberration. With the aforesaid definition, the Regulatory Authority under the Act, namely, the CCI will have the freedom to fix errant undertakings and encourage competitive market practices, even if there is a large player around. Abuse of dominance is the key for the Act, in so far as dominant enterprises are concerned. It is important to note that the Act has been designed in such a manner that its provisions on this count only take effect if dominance is clearly established[7].

To attract the provisions of this Act, it needs to be established whether the restraints create a barrier to new entry or force existing competitors out of the market. The key issue is the extent to which these arrangements foreclose the market to manufacturers or retailers and the extent to which these raise rivals costs and dampen existing competition. The costs of such arrangements need to be weighed against the benefits. Abuse of dominance having an appreciable adverse effect on competition occurs if an enterprise,

a) directly or indirectly, impose unfair or discriminatory-
   (i) condition in purchase or sale of goods or service; or
   (ii) price in purchase or sale of goods or service
b) limits or restricts-
   (i) production of goods or provision of services or market therefore; or
   (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
c) indulges in practice or practices resulting in denial of market access; or

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6 Rab, Suzanne.(2012). *Indian competition law an international perspective,* 26. Gurgaon: Wolters Kluwer (India) Pvt Ltd.

7 Chakravarthy, *Supra n.* 2, 59.

d) uses its dominant position in one relevant market to enter into, or protect other relevant market[8].

In the case of *Belair Owner Association V. DLF and Others[9],* the complainant were a group of apartment allottees who had entered into a standard form contract with the DLF, and alleged that the DLF had imposed unfair and one sided conditions in their standard form contract, which amounted to an abuse of dominance. It is alleged that complainants had paid a substantial amount of money before signing the standard form contract and thus they had no option but to adhere to the the terms of the contract. The CCI held that imposition of such terms amounted to an abuse of dominance under Sec. 4 (1)(a) of the Competition Act and imposed a penalty of Rs. 630 crores on the DLF.

In *Saint Gobain Glass v. Gujarat Gas Company,[10]* the main grievances of the informant were as under:

(i) *Long Term Contract:* The period of gas supply contract initially agreed between SGL and opposite party was seven years. It was subsequently changed to 12 years from the date of initial contract by the amended agreement of 27.1.2011.

(ii) *No exit clause:* There was no exit clause allowing the buyer to move out of the contract or to terminate the agreement. While the original GSA gave the buyer a right to terminate the agreement by giving one year notice, the amended agreement introduced a clause which took away this right of exit from the buyer.

(iii) *Minimum Guarantee Off-take liability:* The informant alleged that GS contained a clause of Minimum Guaranteed Off-take of the gas on the part of the buyer, even when the buyer may not require that much quantity of the gas. The informant gave certain facts for the period June 2007 to February 2009, which were not relevant for the purpose of this case and were not being considered. The Competition Act came into force in May 2009 whereafter this agreement was amended twice by the consent of parties. Therefore, the facts prior to May 2009 were not required to be considered in case of alleged abuse of dominance.

(iv) *Right of first refusal:* The amended agreement of 27.1.2011 introduced a new clause 22 which provided that if there was an increase in demand on the part of the informant, the informant was to give opportunity to the opposite

8 *Ibidem.*
9 Case no. 19/ 2010, Order, of 12-08-2011 (CCI)
10 Case No. 20/2013, Order, of 31-5-2013 (CCI)

party to supply the increased demand of the gas and the buyer could approach other suppliers only if the opposite part) refused to meet the additional demand of the buyer. The buyer was supposed to give a written proposal to the opposite party to meet the additional demand and the opposite party was to decide in this regard in a period of 180 days and if the opposite party agreed to supply the additional demand, the buyer was bound to buy the additional quantity of gas only from the opposite party.

It was contended by the informant that aforesaid provisions of the GSA (as amended) were abusive of the dominant position of the opposite party. The CCI observed that the opposite party was enjoying a position of monopoly in the transmission and distribution on segment of Compressed Natural Gas in the geographical area of south Gujarat. As per the facts given by the informant, the opposite party's market share in supply of Compressed Natural Gas excluding the supply of gas under administrative price mechanism by way of allocation by the Central Government was 80%. Thus, there was no doubt that the opposite party was a dominant player in the relevant market of supply and distribution of piped natural gas to industrial and commercial establishments. The supply of natural gas through pipeline owned by opposite party was only confined to South Gujarat as the pipelines did not go beyond three districts of South Gujarat, namely, Valsad, Surat, Bharuch. Thus, the CCI was of the opinion that *prima facie* the clauses of GSA, as pointed out by the informant, appeared to be abusive of dominant position by the opposite party and the matter required detailed investigation.

3. COMBINATION REGULATION AND MERGERS

Sec. 5 of the Act defined the term 'combination' which includes mergers, amalgamations, acquisitions and acquisition controls. The compartment dealing with combinations was one of the most debated ones among the four compartments in the Act. The Act makes it voluntary for the parties to notify their proposed agreement or combinations to the Mergers Bench (a part of the CCI). The Act has made the notifications of combinations, voluntary and not mandatory and has laid down threshold limits for combinations to fall within its surveillance. The reason that impelled the Government to opt for voluntary notifications and for threshold limits merit mention. Sec. 6(1) prohibits any combination that causes or likely to cause, an appreciable adverse effect on competition within the relevant market in India. It declares that such a combination would be void. Sec. 6(2) sets out the procedure for the regulation of combinations.

The Act has made the pre-notification of combinations voluntary for the parties concerned. However, if the parties to the combination choose not to notify the

CCI, as it is not mandatory to notify, they run the risk of a post combination action by the CCI if it is discovered subsequently that the combination has an appreciable adverse effect on competition. The Act has listed several factors to be taken into account for the purpose of determining whether the combination would have the effect of or be likely to have appreciable adverse effect on competition. The Regulatory Authority, namely, the Mergers Bench of the CCI is mandated to adjudicate on mergers by weighing potential efficiency losses against potential gains[11].

4. COMPETITION ADVOCACY AND CULTURE OF COMPETITION

Sec. 49(3) of the Competition Act states that the Commission shall take suitable measures, as may be prescribed for the promotion of competition advocacy, creating awareness and imparting training about competition issues, and activities that could strengthen the competition culture in the market. The rules governing the advocacy role are to be made by the Central Government; these rules, when made, may be expected to provide further guidance on the scope and manner of undertaking advocacy by the Commission. Thus, competition advocacy creates a culture of competition .There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances.

Competition advocacy has been an important area of activity of several competition authorities both in terms of creating general awareness about the law amongst the enterprises and thereby promoting self compliance and also in terms of influencing government and regulatory policies in a pro-competition direction. The CCI, in terms of advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of the laws related to competition at the instance of the Central Government. The central government can make reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. In order to promote competition advocacy and create awareness about the competition issues and also to accord training to all concerned, the Act enjoins the establishment of a fund christened as the competition fund[12].

5. COMPETITION POLICY AND COMPETITION LAW

Competition Policy is a broader term which includes all government policies and laws whereas competition law is a specific statute with a predefined mandate to

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[11] Chakravarthy, *Supra n.* 2, 62.
[12] *Ibidem,* 63.

adjudicate on violation(s) of the law. It would be seen that a competition law is a regulatory instrument to check the prevalence of anti-competitive practices whereas a competition policy is a proactive and positive effort to build a competition culture in an economy. To strengthen the forces of competition in the market, both competition law and competition policy are required .The two complement supplement each other. The competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market i.e. addresses market failures[13]. A number of laws, regulations and policies affect the state of competition. These regulations apply at all levels of government including local, regional, state, national and international, and cover all sectors. There can be no analysis of competition policy in the modern economy without considering the effects of regulations on competition. Many economist state that the effects on competition of anti competitive regulations are greater than the effects of anti competitive practices. It is this consideration which has given rise to the concept of a comprehensive competition policy. A comprehensive competition policy includes all government policies (trade policy, industrial policy, public sector and privatization, tax policy, labour policy[14]) that affect the state of competition in any sector of the economy. and it includes:

(a) fair pricing[15];
(b) fair market process;
(c) removal of distortions and barriers;
(d) balancing competition and intellectual property rights;
(e) competition audit[16];
(f) prohibition of anti competitive conduct;
(g) liberal international trade policies;
(h) free movement of all factors of production;
(i) removing government regulation that limits competition;
(j) reform of inappropriate monopoly structures;
(k) appropriate access to essential facilities; and
(l) separation of industry regulation from industry from industry operation, dominant firms should not set technical standards for new entrants[17].

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[13] National competition policy 2005. Retrieved from <http://www.mca.gov.in/Ministry/pdf/Draft_ National_Competition_Policy .pdf,>Accessed on 9 December 2015

[14] Anant, T.C.A. & Singh, Jaivir (2006). "Central government policies: Interface with competition policy objectives", in : Mehta, *Supra n.* 2.

[15] National competition policy 2011. Retrived form<http://www.mca.gov.in/Ministry/pdf/Draft_ National_Competition_Policy.pdf,>Accessed on 9 December 2015

[16] National competition policy, *Supra n.* 11.

[17] Fels, Allan (2007). "Competition and regulation", in : Dhall, Vinod (ed.), *Competition law today,* 195-197, 206. New Delhi, Oxford University Press.

It has been recommended that competition law should be a general law of general application, i.e. the law should apply to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services. In this regard, both private and public owned and operated enterprises should be subject to the same treatment. However exemptions and exceptions are at times warranted and granted to industries and certain types of economic activities and business transactions. The granting of exemptions and exceptions does not necessarily imply the weakening of competition law enforcement. Indeed, it may well be that such instances are necessary for furthering the objectives of competition policy[18].

The competition laws of various countries either exempt specific sectors or types of economic activity, and have provisions for the granting of such exemptions in given situations. The most common exemptions relate to labour, agriculture, and transportation.It is worth observing that there generally tend to be fewer exemptions in countries which have adopted competition laws recently as compared with more industrialized nations. However, this could be reflective of the fact that in many of the less developed countries, effective implementation of competition law has yet to take place. And various businesses are likely to be still unaware of the potential impact competition law can have on their economic activities, and lobbying for exclusions from the application of competition law has yet to take place.

Exemptions fall into four types of categories for:

(a) balancing unequal bargaining power;
(b) addressing information, and transaction cost;
(c) reducing rish and uncertainty;
(d) special sector or interest group demands[19].

The United States and Canada were among the first nations which enacted specific competition legislation dealing with anti-competitive business practices. With the passage of time, the scope of the competition laws has been broadened significantly and with it special exemptions have been carved out in response to changing economic scenario or lobbying by special interest groups. And until the competition law was amended, regulations governing the activities of commercial banks, airlines, professional bodies and infrastructure services did not expressly address competition issues. And in sectors such as airlines and commercial banks, separate

[18] Khemani, Shyam R. (2007). "Competition law policy exemptions, exceptions, and differential application*", 149-150, in :* Dhall, *Ibidem.*
[19] *Ibidem*, 165.

and different provisions have been adopted in enabling legislation. The reasons for some of the exemptions that appear unique to the US are as follows[20].

Exemptions have been generally introduced in various countries in order to assist farmers, fishermen and forestry workers get fair and stable prices for their products and labour. The seasonal nature of these activities, the cycles in production or harvesting, and the social objectives of ensuring viable farming, fishing and forestry communities are also among the reasons for the exemptions. In addition, with the advent of large processing firms in these sectors, the relative weak bargaining position of individuals engaged in these activities could be exploited. The formation and exemption of cooperatives and marketing boards have been seen as possible measures to correct this[21].

The exemptions granted for underwriting insurance and securities, and other selected activities of financial institutions such as consortium lending, are granted so as to reduce risk and uncertainty. However, these exemptions do not extend to pricing of insurance or security brokerage services, or to setting of interest rates and service charges by banks. Although in many jurisdictions, financial institutions are completely exempted from the purview of competition legislation on the arguments of systemic stability or specialized nature of the industry, there are no sound economic reasons for doing so. Given the central role played by the financial intermediation, savings, and investment in the economic development process, it is important to ensure a competitive financial services industry. The study of exemptions granted to specific types of economic activities and sectors under the competition laws of various countries recommend that competition laws apply to both public and private sector enterprises, and exempt areas that are covered by other government legislation and regulations. The Indian Competition Act 2002 has not exempted any specific sector expressly. Exemptions from the application of competition law can be justified on the ground of uncertainty, risk, balancing bargaining power and innovation. Therefore it is suggested that; (a) exemption should be granted on a limited time basis, (b) exemption should be reviewed on the basis of economic efficiency and consumer welfare, (c) There should be public hearing before granting exemption[22].

6. COMPETITION LAW AND REGULATION

During the 1990, there has been a greater recognition of the value and significance

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[20] *Ibid.,* 166.
[21] *Id.,* 166-167.
[22] *Id.,* 168, 170.

in the use of markets and market-friendly processes in the economy. The benefits of competitive markets are standard material for course in economic theory. Equally it is well recognized that for a variety of reasons, competitive markets may not exist or yield desirable results. The factors typically identified are externalities; economies of scale and scope, imperfect and asymmetric information and imperfect competition. Because of these reasons for market failure, it is argued that crucial economic sectors cannot be left to unregulated markets and a case is made for some form of intervention in the market process. The nature and character of the desired intervention would clearly depend on the source of the failure. But for purposes of analysis, we can classify two broad types of interventions can be classified. The *first* seeks to restore efficiency in a particular market through the creation of a sector regulator. So, there are regulators in professional services(chartered accountants, lawyers and doctors) power, telecom, and the different elements of the financial sector, and so on. This is a centralized process in which decisions are made about tariffs, quality standards, entry conditions, service obligations, and investments. Wherever full-scale competition is not feasible, regulation is essentially considered as a surrogate to achieve competitive outcomes. The *second* intervention seeks to create an entitlement for competition through a competition law, which seeks to promote competition and competitive free and fair practices in markets. It is a decentralized process that aims at attaining the situation where providers, driven by profit motives, offer services to consumers and compete with each other. The form of intervention is clearly the most useful in correcting problems created by imperfect competition.

Regulation tells the firms as to what they have to do. The sectoral regulator has a narrow focus, whereas the competition agency has an economy-wide remit. Regulation is clearly in the executive domain with the regulator examining issues of technology, costs and processes in the regulated industry. Promotion and maintenance of competition is closer to an adjudicatory process, where the authority either on its own, or on receipt of complaints, acts on anticompetitive practices. It needs to be underlined that as against the extant MRTP Act, the Competition Act 2002 creates a proactive obligation on the CCI to promote competition in the market place[23].

Sectoral regulators have been criticized on a number of grounds:

- Sector regulators often approach issues from their technical standpoint, rather than considering the effects on social welfare.

[23] Anant, T.C.A. & Sunder, S. (2006). "Interface between regulation and competition law", in : Mehta, *Supra n.* 2, 95-99.

- Single regulators may not adequately take account of the requirement of efficiency and welfare. The presence of multiple regulators on closely related fields leads to concerns arising out of regulatory overlaps.
- Sector regulators have different objectives. The Reserve Bank of India regulates most banks and developments of financial institutions, the Securities and Exchange Board of India regulates investor protection. The Department of Company Affairs regulates deposit taking activities of corporate entities. The other trouble with overlapping jurisdiction that is different regulators have varied powers to enforce and punish[24].

CONCLUSION

The creation of a statutory competition authority raises additional concerns about the relationship between statutory regulators and the competition authority. The TRAI is directed to determine standards and terms and conditions of inter-connectivety, technical compatibility and effective inter-connection, revenue sharing, and quality of service. On the other hand, the electricity act creates ambiguities, as the preamble talks about the objective of promoting competition in the electricity market. The CCI is empowered to regulate production supply or consumption to promote competition. The Competition Act recognizes that sectrol regulators have a role to play in competition matters and says that statutory regulators may refer competition matters to the competition authority. The ambiguity that whether competition authority will influence the regulator or not in absence of request from regulators is not clear. Competition authority advice is not binding on sectoral regulators. The crucial areas where competition rules interact with industry specific rules are interconnection, monopoly-pricing, anti-competitive agreements and merger control. Therefore, in the absence of legal provisions relating to coordination, it can be achieved in a number of ways: (a) Authorities can enter into formal cooperation protocols for sharing information and seeking advice; and (b) there can be single appellate authority so that jurisdictional conflicts are not escalated to the appellate level[25].Competition law and policy is applied in particular areas to bring about competitive and efficient markets. However, in some situations, it is not possible to have a competitive solution either because there is some kind of natural monopoly situation, or because legislation itself restricts competition. The role of regulation is to bring about efficient outcomes by, for example, setting prices at levels that would apply if there were competition. There may be instances where regulation is needed to achieve desirable social outcomes such as enhanced safety, environment and consumers protection. However, in

[24] *Ibidem,* 96.
[25] *Ibid.,* 97.

practice there is often a different outcome. Regulation obstructs the promotion of competition and economic efficiency. Regulation may limit entry into an industry in the name of various protection issues. It may apply prices in such a way as to discourage competition. Therefore, the relationship of competition and regulation is a complex one[26].

[26] Fels, *Supra n* 17.

(2015) 10 Universitas 152-160

ADULTERY LAW IN INDIA: A CRITIQUE

Apurva Verma

Abstract

In most of the foreign jurisdictions, adultery, apart from being a ground for divorce, has been perceived as a criminal wrong against marriage. Similarly in those jurisdictions, both the spouses are generally held criminally responsible for their extramarital sexual intimacy. However, the penal law of adultery in India is premised on the one-and-a-half century old caste-based stratified social setting in the context of the traditional conservative property-oriented familial ideology and sexual mores. It is also premised on a few outdated and moot assumptions of sexuality, sexual agency and unequal mutual marital rights and obligations of the spouses. It, in ultimate analysis, unmistakably intends to protect wife and not husband. The existing gender discriminatory penal law of adultery, against this backdrop, deserves a serious consideration and revision to the effect that a person, male or female, who, being married, has sexual intercourse with a female or a male (as the case may be) not with his or her spouses without the consent or connivance of such spouses be made criminally responsible.

Keywords: Gender discriminatory, constitutionality, illicit relation

Content

Introduction

1. **Conceptualization of Adultery**
2. **Constitutionality of Section 497 of Indian Penal Code**

APURVA VERMA

~ Hidayatullah National Law University, Raipur, India: apurvaverma09@gmail.com

Apurva Verma received her LLB (Hons.) and LLM (Gold Medel) from Banaras Hindu University, India. She is Assistant Professor (*Ad hoc*), in Hidayatullah National Law University at Raipur, India Her research focuses on Criminal Law and Jurisprudence .

(A) *Yusuf Aziz v. State of Bombay*

(B) *Sowmithri Vishnu v. Revathi*

Conclusion

INTRODUCTION

The term "adultery" has its origin in the Latin term *adulterium*. The literal meaning of the term 'adultery' is voluntary sexual intercourse between a married person and someone other than that person's current spouse or partner. Almost every religion and the Indian society condemns it and consider the same as unpardonable. However, the same is not reflected in the penal laws of our country. Nevertheless, the Indian legal system recognizes it as a ground for seeking divorce from the guilty spouse, irrespective of the gender of spouse.

Meaning thereby, it draws a distinction between consent given by a married woman without her husband's consent and a consent given by an unmarried woman. It does not penalize the sexual intercourse of a married man with an unmarried woman or even a married woman when her husband consents to it. In case the said offence is committed, the husband cannot prosecute his unfaithful wife but can only prosecute her adulterer. Since the offence of adultery can be committed by a man with a married woman only, the wife — whose husband having sexual intercourse with other women — cannot, however, prosecute either her husband or his adulteress. Most interestingly, the law itself expressly states that the unfaithful wife cannot be punished as an abettor to the crime. The offence of adultery, therefore, is an offence committed by the husband of the wife and in no case it can be against the wife. This is the reason why this seems to be gender-discriminatory and contrary to the spirit of the equality of status guaranteed under the Constitution of India. This article evaluates the present law on adultery in the light of the contemporary notions of "marriage" and mutual obligations of wife and husband arising thereunder. The need for reform would also be examined.

1. CONCEPTUALIZATION OF ADULTERY

Lord Macaulay did not consider infidelity in his First Draft of the IPC. After reviewing facts and opinions collected from all the three Presidencies about the criminalization of adultery, he concluded: "*It seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes - those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those*

whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury."[1] After the Second Report of The Law Commissioners on the Draft Penal Code[2], Sec. 497 of the IPC[3], adultery was included as we find it today.

Sec. 497 of the IPC clearly conveys that the adulteress wife is absolutely free from criminal responsibility. She will not to be punished even for abetting the offence. Sec. 497, by necessary implication, assumes that the wife is neither perpetrator nor an accomplice thereof. Adultery, as viewed under the IPC, is an offence against the husband of the adulteress wife and, thereby, an offence relating to marriage. The offence of adultery, therefore, is an offence committed by the husband of the wife and not against the wife. It is in consonance with this approach that Sec. 198 of the Criminal Procedure Code mandates a court not to take cognizance of adultery unless the aggrieved husband makes a complaint.

In 2006, the National Commission for Women recommended that adultery be decriminalized. At a time when many jurisdictions around the globe have decriminalized adultery, we in India are still considering whether or not to decriminalize it. The existing gender discriminatory penal law of adultery deserves a serious consideration and revision, if not declared completely unconstitutional.[4]

Immediately after the commencement of the Constitution of India, Sec. 497 of the IPC was assailed on the ground that it goes against the spirit of equality embodied in the Constitution.

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[1] *Macaulay's Draft Penal Code* (1837), Note Q, at 90-93, cited from, Law Commission of India, *Forty-second Report: Indian Penal Code* (Government of India, 1971), para 20.13.

[2] Second Report on the Draft Indian Penal Code (1847), at 134-135, cited from, Law Commission of India, *Forty-Second Report, Ibidem*, at 365. "*While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note 'Q' ,regarding the condition of the women in this country, in deference to it, we would render the male offender alone liable to punishment.*"

[3] ***Section-497 :*** *"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor."*

[4] https://www.thebetterindia.com/124058/adultery-laws-india/ visited

2. CONSTITUTIONALITY OF SECTION 497 OF INDIAN PENAL CODE

The constitutionality of Sec. 497 of the IPC was challenged before the Supreme Court in the cases of *Yusuf Aziz v. State of Bombay*[5] and *Sowmithri Vishnu v. Revathi*[6] under Article 14 of the Constitution on the grounds that it makes an arbitrary a sex based discrimination.

(A) *Yusuf Aziz v. State of Bombay*

In 1951, Yusuf Abdul Aziz, charged with adultery, contended before the Bombay High Court that Sec. 497 of the IPC is unconstitutional as it, in contravention of Art. 14 and 15 of the Constitution[7], operates unequally between a man and a woman by making only the former responsible for adultery. It, thereby, he argued, discriminates in favor of women and against men only on the ground of sex.

Recalling the historical background of Sec. 497 and the then prevailing social conditions and the sexual mores oppressive to women, and the unequal status of women, the Court upheld the constitutional validity of the provision Mr. Justice Chagla, C.J., observed: "What led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Section 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country."[8]

The Court also opined that "the alleged discrimination in favour of women was saved by the provisions of Article 15(3) of the Constitution which permits the State to make "any special provision for women and children".

Yusuf Abdul, on appeal to the Supreme Court[9] argued that Sec. 497, by assuming that the offence of adultery could only be committed by a man and mandating a court that the adulteress wife be not punished even as an abettor, offended the spirit of equality enshrined in Art. 14 and 15 of the Constitution. Such an immunity

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5 AIR 1954 SC 321

6 AIR 1985 SC 1618

7 Art. 14 mandates the State not to deny any person equality before the law and the equal protection of the laws within the territory of India. It mandates that every law that the State passes shall operate equally upon all persons. While Art. 15, inter alia, prohibits the State from making discrimination on grounds only of sex

8 *Supra n.* 6

9 *Ibidem.*

assured to the adulteress wife even for her willing participation in the adulterous sexual activity, it was argued, did amount to a sort of licence to her to commit and abet the offence of adultery.

Vivian Bose, J., speaking for the Constitutional Bench was not impressed by the appellant's interpretation of Sec. 497 of the IPC as well as of Articles 14 and 15. Mr. Justice Chagla, C.J., relying heavily upon Article 15(3), held that Section 497 is a special provision made for women and therefore is saved by clause (3) of Art. 159. To the argument that Art. 15(3) should be confined only to provisions which are beneficial to women and should not be used to give them a license to commit and abet a crime with impunity, the Apex Court responded: "We are not unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited."

(B) *Sowmithri Vishnu v. Revathi*

During the pendency of divorce petition against the Petitioner / wife on the grounds of desertion and adultery, the husband also filed a complaint against one Dharma Ebenezer under Sec. 497 of the IPC charging him with having committed adultery with the petitioner. Thereafter the petitioner filed the writ petition for quashing the complaint on the ground that

(1) Sec. 497 of the IPC is violative of Art.14 of the Constitution because, by making an irrational classification between men and women, it unjustifiably denies to women the right which is given to men. This argument rests on the following three grounds -
    (i) Sec. 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;
    (ii) Sec. 497 of the IPC does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and,
    (iii) Sec. 497 of the IPC does not take in cases where the husband has sexual relations with an unmarried women, with the result that husbands have, as it were, a free license under the law to have extramarital relationship with unmarried women; and
(2) the right to life includes the right to reputation and therefore if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled appear and to be heard in that trial and since s. 497 of the IPC does not contain a provision that she must be impleaded as a

necessary party to the prosecution or that she would be entitled to be heard, the section is bad as violating Art. 21 of the Constitution.

The Court held that *firstly,* (i) the law, as it is, does not offend Art. 14 or 15 of the Constitution. The offence of adultery by its very definition, can be committed by a man and not by a woman. The argument of the petitioner really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Where such an argument is permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. Such arguments go to the policy of the law, not to its constitutionality, unless while implementing the policy, any provision of the Constitution is infringed. Therefore, it cannot be accepted that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. However, it is for the legislature to consider whether Sec. 497 of the IPC should be amended appropriately so as to take note of the transformation which the society has undergone. (ii) Sec. 497 of the IPC does not envisage the prosecution of the wife by the husband for adultery. The offence of adultery, as defined in that section, can only be committed by a man, not by a woman. Indeed, the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Sec. 497 if the IPC is considered by the legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. (iii) Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extramarital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with the evil where it is felt and seen most: A man seducing the wife of another.

Secondly, it is correct to say that Sec. 497 of the IPC does not contain a provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. There is no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded

on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected directly and immediately, by the decision of the court. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Sec. 497 of the IPC cannot render that section unconstitutional as violating Art. 21. *Francies Coralie v. Union Territory* [10] and *Board of Trustees, Fort of Bombay v. Nadkarni*[11], referred to *Yusuf Abdul Aziz v. the State of Bombay*[12] followed. More than three decades after the Supreme Court's pronouncement in *Yusuf Abdul Aziz case*[13], constitutionality of Sec. 497 of the IPC came to be repaginated in *Sowmithri Vishnu v. Union of India*[14]. In this case, it was held that *firstly*, it is the policy of the law to not to punish women for adultery and policies could not be questioned; *secondly*, that it was not contemplated for a husband and a wife to strike each other with weapon of criminal law; and that adultery therefore was an offence against the matrimonial home and not either against the wife or the husband.

Upholding the constitutionality of Sec. 497 of the IPC and Sec. 198(2) of the CrPC, which according to the Court "go hand in hand and constitute a legislative packet" to deal with "an outsider" to the matrimonial unit who invades the peace and privacy of the matrimonial unit, Thakkar, J. of the Apex Court observed: "*The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. ... There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out*

[10] AIR 1981 SC 736
[11] AIR 1983 SC 109
[12] supra note 6
[13] *Supra* note 5.
[14] *Supra* note 6

even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other."[15]

The constitutional validity of Sec. 497 of the IPC is upheld ostensibly on the impression that it is favorable to the woman as it keeps her out of the purview of criminal law. Such an approach is predominantly premised on a set of moot assumptions pertaining to female sexuality and the inability of the higher judiciary to appreciate current social transformation. The Court, time and again, asserted that it is for the legislature to take cognizance of the social transformation and not for it. It is obvious that no adultery can be committed unless a woman is a consenting partner. The judicial perception that only a man can be "an outsider", who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, less convincing. "An outsider woman", can, like an outsider man, be equally capable of invading the matrimonial peace and privacy as well as of poisoning the relationship of both the matrimonial homes. She is, therefore, not entitled to prosecute either her promiscuous husband or the "outsider woman" who has poisoned (or helped her promiscuous husband to do so).

Surprisingly, the Law Commission Committee has shown any sensitivity to the equally pertinent traditional proprietary rights of the husband over his wife. In 1997, the Fourteenth Law Commission, in its 156th Report on the IPC, proposed reform. It also stressed that changes suggested in its revised Sec. 497 of the IPC be made in Sec. 198(2) of the CrPC[16].

The Apex Court, interestingly till now did not have considered any judicial significance to the proposal for reform recommended by the Fifth Law Commission. It could have justifiably relied upon these proposals to inject gender neutrality in the adultery law. But it preferred to assert, time and again, that it is for the legislature to take cognizance of the social transformation and the changed values as they involve questions of policy of law.

CONCLUSION

The question is whether legal system should apply the rule differently to men and women? Or should the legal system only concern itself with allowing parties to move out of a relationship (through divorce), which is no longer based on mutual

[15] *V. Revathi v. Union of India,* (1988) 2 SCC 72

[16] Law Commission of India, *One Hundred Fifty-Sixth Report: Indian Penal Code* (Government of India, 1997), para 9.47.

trust? Besides the gender discriminatory nature of the law on adultery in India, it is also problematic for other reason. The legal system supports giving a short term and psychological outlet to the parties in a marriage to blame a third person for the breakdown of a marriage. Is it right, one may ask, to hold an outsider legally responsible for the breakdown of marriage between the husband and the wife? If the wife does chose to sleep with a man outside the wedlock, is it okay for the husband to bring a case against the outsider, without looking at what's possibly gone wrong with their marriage? If two people think that their marriage has broken down and that there is no hope in it, then they can always approach the courts for mutual divorce or divorce on the ground of adultery.

The spouse of the errant other part be allowed not only to seek divorce from the other life partner but also to initiate legal proceedings with a view to fixing criminal liability of the "outsider" for wrecking the marriage. The proposals for reform of the Fifth and the Fourteenth Law Commissions of India deserve serious and immediate attention of the legislature. Such changes are required to translate the contemporary social transformation assuring equality to women and the constitutional spirit of gender equality into a reality.

(2015) 10 Universitas 161-172

INSURABLE INTEREST IN LIVE-IN RELATIONSHIP

Om Prasad Tripathy

Abstract

Over the years, there has been a lot of controversy with regard to insurable interest and live-in-relationship It is a debatable whether a couple residing together in a single dwelling place without being marrying be insured with each other. The concept of live-in relationship which is of recent origin provides rights to the unmarried couple living together. On the other, insurable interest is an interest with which insurance can be undertaken which ultimately means no moral, imitational and sentimental interest but only and only proprietary and legal interest with which insurance can be done. Now the question arises as to whether the living partners under live-in-relationship can take insurance for each other? What is the legal status of the female and legal status of the offspring of the live-in relationship. There is no clear cut legislation but a few cases deal with such legal complicacy. This paper to solve the problems of live-in relationship and insurable interest.

Keywords: insurance, live in relation, proprietary interest.

OM PRASAD TRIPATHY

~ Faculty of Law, Banaras Hindu University, India: optrips1020@gmail.com

Om Prasad Tripathy is pursuing LLM (General), I Semester, in the Faculty of Law, Banaras Hindu University, at Varanasi in India.

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INTRODUCTION

Every contract is enforceable irrespective of its subject matter provided it is not illegal, immoral or contrary to public policy. In the beginning, insurable interest was not a requirement for the validity of a contract of Insurance Roche J. observed that there was nothing in the common law of England which prohibited insurance even if there was no interest exists. It is a principle of public policy that person who enters into contractual engagements should be required to fulfill them and contract of insurance in no exception to it. The concept of insurable interest is a subsequent development of insurance practice and in this branch of law it has a double meaning. A contract of insurance being primarily a contract of indemnity, insurable interest (contractual or statutory) is a necessary element. It is the presence of insurable interest that distinguishes a contract of insurance from a wagering contract and hence it is a *sine-que-non* for the validity of the contract of insurance. All the statute provides that an insurance contract will become a wagering contract and hence void if it is affected without insurable interest. Thus, every contract of insurance, to whichever class it belongs, shall show an insurable interest and without it is illegal or void. Therefore, insurable interest is the acid test of insurance policy and becomes *sine-qua-non* for validity of insurance contract.

1. INSURABLE INTEREST

The basic rationale behind insurable interest is that the creator cannot be a destroyer. This means ordinarily a person does not harm himself or his own property. For example, one generally insures our own life, life of wife, life of children or own property but not the life or property of others. One does not take life insurance of a third person or motorcycle of neighbor, because a person is not affected financially after destruction of the property. Therefore insurable interest is that interest with which insurance can be taken.

According to Make Gillivre, insurable interest is assured pecuniary interest in the subject matter of interest. According to Patterson, it is a relation between the insured and the event insured against, such that the occurrence of the event will cause substantial loss or injury of some kind to the insured. According to Rodda, insurable interest may be defined as an interest of such a nature that the occurrence of the event insured against would cause financial loss to the insured, and

(a) there must be physical object;
(b) such physical object must be subject matter of Insurance;
(c) there must be a potential liability;
(d) the insured must have legal relation with the subject matter;
(e) it must be capable of being measured in term of money; and
(f) it must be lawful.

In *Lucena v. Craufurd*, Lawrance [1] insurable interest was defined as, "the having some relation to, or concern in the subject of the insurance which relation or concern by the subject of the insurance which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring and where a man is so circumstanced with respect to matters exposed to certain risk or dangers, he may be said to be interested in the safety of the thing with respect to it as to have benefit from its existence prejudice from its destruction.

In *Lucena v. Craufard,* it was pointed out that the interest must be enforceable at law, was that it has following nature of insurable interest:

(a) interest should not be a mere sentimental right or interest, for example, love and affection alone cannot constitute insurable interest;
(b) should be a right in property or a right arising out of a contract in relation to the property;
(c) interest must be pecuniary, i.e., capable of estimation in terms of money. In other words, the peril must be such that its happening may being upon the insured an actual or deemed pecuniary loss. Mere disadvantage or inconvenience or mental distress cannot be regarded as an insurable interest; and
(d) the interest must be lawful, i.e. it should not be illegal, unlawful immoral or opposed to public policy.

In life insurance the presence of insurable Interest is necessary at the commencement of the policy although it is not necessary afterwards not even at

[1] (1806) 20B & P 296, 301(NR).

the time of occurrence of the risk. It should be there in life policies at the time of taking the policy. It need not exist at the time when the loss takes place or even when the claim is made under the policy. The rule in the marine insurance was extended to life insurance also that the interest must be shown to exist at the time of loss. But the decision was overruled in *Dalby V. Indian and London life Assurance co,*[2] where it was held that the insurable interest must be shown to life insurance also that the interest it exist at the time of taking the policy and at that date only. In fire insurance, it is required both at the commencement of the policy and at the time when the risk occurs. In a sense, therefore, insurable interest is doubly insisted upon in fine insurance law. The insurable interest is necessary at both the times because it is treated as a personal contract and also a contract of indemnity. Life insurance contract, is not strictly speaking contract of indemnity.

There are the following kinds of acceptable insurable interest:

(i) on his own life
(ii) life of others and blood relationship
(a) life of wife or husband
(b) life of children
(c) life of parent
(d) life of adopted child
(iii) contractual relationship
(a) creditor on the life of debtor
(b) partner on the life of co-partner
(c) employee in the life of employee
(d) principal and agent
(e) master and servant
(f) trustee and co-trustee
(g) mortgager and mortgagee
(h) lesser and lessee
(i) a lion holder, and
(j) purchaser and seller.

Now it becomes important to examine as to whether the insurable interest exist in live-in relationship or not.

2. LIVE- IN RELATIONSHIP:

A living arrangement is one in which an man and women live together under the same roof in along term relationship that resembles a marriage known as live-in

[2] (1854)15 CB 365.

relationship. To avoid the obligation of a traditional marriage and on the other hand to enjoy the benefit of cohabitation together, the concept of live in relation has come into existence for a life free from responsibility and commitment which is an essential element of marriage life. The concept is not new to the Indian society, the only difference is that earlier people were hesitant in declaring their status may be due to the fear of the society but now the people are openly entering into this kind of relationship. It is a type of arrangement in which a man and women live together without getting married. This form of relationship has become an alternative to marriage in metropolitan cities in which individual freedom is the top priority amongst the youth and nobody wants to get entangled into the typical responsibility of a married life.

Though the common man is still hesitant in accepting this kind of relationship, this form of living together is not recognized by Hindu Marriage Act, 1955 or any other statutory law. The definition of live-in relationship is not clear and there is no specific law to define its concept. There is no specific law on the subject of live-in relationship in India, nor there is any legislation to define the rights and obligation of the parties to a live-in relationship, and the status of children born to such couples. The court has come forward to give clarity to the concept of live-in relationship due to the absence of any law on the subject. In *Badri Prasad V. Dy. Director of consolidation*[3], the Supreme Court gave legal validity to the 50 year live-in relationship of a couple and thus recognized the live-in relationship as a valid marriage.

Allahabad High Court had recognized the concept of live-in relationship *Payal Katara V. Superintendent, Nari Niketan and Others*[4], where it held that live-in relationship was not illegal. The Court ruled that “a lady of about 21 years of age being a major, has right to go anywhere and that any one man and women even without getting married can live together if they wish”. In 2010, the Supreme Court in *Khusboo case* pointed that a man and women living together without marriage cannot be constructed as an offence.” When two adult live together, it is not an offence. Even Lord Krishna and Radha lived together according to Hindu mythology. Live-in relations suffered a setback with the bar imposed by the Supreme Court in its recent decision in a family dispute in *Bhaashamath v. R. Vijeya Renganath*[5]. The Supreme Court held that a child born out of live-in relationship was not entitled to claim inheritance in Hindu ancestral coparcener property.

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[3] AIR 1978 SC 1557.

[4] AIR 2001 All 254

[5] 2010 STPL (WEB) 406 sc

In *Dinohamy V. Blahamy*[6], the Privy Council laid down a broad rule postulating that where a man and wife live together, the law will presume, unless the contrary be clearly proved.

(A) Live-in Relationship in Foreign Countries

Other countries have different stand on live-in relationship. In Indonesia, an Islamic Penal Code proposed in 2005 would have made cohabitation illegal according to Sharia law in countries where it has been practiced. On the other side in many developed countries like US 23% etc. live-in relationship is a very common practice, as accepted and not illegal.

Despite Family law (Scotland) Act 2006, it was identified by Scotland and in the process by default live-in relationship of over 1,50,000 cohabiting couples in the country was legalized.

The American legal history was witness to several consensual sex legislation, which had paved the way for living together contracts and their consigns, the prenuptial agreement. Later, it institutionalized cohabitation by giving cohabiter, with the same right and obligation as married couples, a situation similar to Sweden and Denmark. Those living together are not recognized as legal parents.

In United Kingdom, live-in relationship is largely covered by the Civil Partnership Act 2004.Though a man and women living together in a stable sexual relationship are often referred to as "common law spouse". The expression is not whole correct in law in England and Wales. The U. K. feel that live in partners owe each other more than that to be worthy of the term.

A law was introduced in 1999 making provision for civil solidarity pact. Live-in relationship allowing couples (even of same sex) to enter into a union was recognized with entitlement to the same rights as married couples in income tax, inheritance, housing and social welfare. Couples desiring such relationship may sign up before a court clerk and can revoke the contract unilaterally and bilaterally with a simple declaration, made in written, with three month notice to the partner.

Article 147 of the Family Code of the Philippines provides that when a man and women who are capacitated to marry each other without benefit of marriage or under a void marriage, husband and wife will be treated as wager and salaries would be owned by them in equal share, and the property acquired by them through their work or industry shall be governed by the rule of co-ownership.

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[6] 1928 1 MLJ 388 (PC)

(B) Live-in Relationship in India

No law at present deals with the concept of live-in relationship in India and its legality. In the absence of specific legislation, the government, has been taking various measures, in the past few years especially after the intervention from the judiciary to protect the interest of female live in partners.

(i) *Indian Constitution*

The Supreme Court validates live-in-relations, grants individuals freedom to live as they think best. Simply raising the hammer may not be the best route to taming the bold and the brave. Awareness has to be created in these young minds. In a much awaited observation on live-in relationships, the Supreme Court opined that a man and a woman living together without marriage cannot be construed as an offence. When two people want to live together, it is not an offence.

The Supreme Court observed that there was no law which prohibited live-in relationship or premarital sex. Living together is a right to life. Apparently referring to Art. 21, of the constitution, the court that the right to life and liberty is guaranteed as fundamental right. The Court made the observation while reserving its judgment on a Special Leave Petition, seeking to quash 22 criminal cases filed against her after she allegedly endorsed premaritial sex in interviews to various magazines in 2005. The Supreme Court's controversial observation in approving live-in relationships and premarital sex has generated a fierce debate across the country. The historic observation has frowned many orthodox groups fearing that it will destroy the sanctity of marriage. A fragment of society including noted social activists and prominent dignitaries have stepped ahead and shared their precious views on the raging debate.

(ii) *Statutory Law*

In one such move, the Government had extended economic right to women in live-in relation under the Protection of Women from Domestic Violence Act (2005). Similar, the Maharashtra state government in 2008 granted a proposal suggesting women involved in cohabitation for a reasonable period should be given the status of a wife. It is praiseworthy that under the Protection of Women from domestic Violence Act, (2005), all benefits are bestowed on women living in such kind of arrangement being covered within term "domestic relationship" under Section 2(f) of the Act. If we propose to enactment of law to regulate live-in relationship is proposed, though it would grant right to parties to it but at the same time it would also impose obligations on them.

In *Varsha Kapoor V. Union of India*[7], the Delhi High Court has held that female living in a relationship in the nature of marriage has right of file complaint not only against husband or male partner but also against his relatives. In the case of *Koppisetti Subbarao Subrmaniam V. State of Andhra Pradesh*[8], the defendant used to harass his live in partner for dowry. In this case, the Supreme Court held that the nomenclature 'dowry' does not have any magical charm written over it. It is just a label given to demand of money in relation to a marital relationship. The court rejected the contention of the defendant that since he was not married to the complaint, Sec. 498A did not apply to him. Thus, the Supreme Court took one more step ahead and protected the women in a live in relationship from harassment for dowry. In one such move, the government had extended economic rights to women from the Domestic Violence Act 2005. Similarly, the Maharashtra state government in 2008 granted a proposal suggestion women involved in cohabitation for a reasonable period should be give the status of wife.

Under Sec. 114 of the Indian Evidence Act, the court shall presumed existence of certain facts. It has been held that where a live in relation continues for long time, it can no longer be termed as "walk in and walk out relationship." Prolonged relationship of this kind gives rise to presumption of marriage.[9] In *S. P. S Balasubramanyam V. Suruttayan Andalli Padayachi & Ors.*[10], the Supreme Court allowed preemption of marriage under Sec. 114 of the Evidence Act out of live-in relations and presumed that their children were legitimate. Hence, they were rightfully entitled to receive a share in ancestral property. Need of a legal provision is felt to secure the future of a child born from a relationship which has not taken shape of marriage the Hindu Marriage Act 1955 gives the status of legitimacy child, whether as a result of void an voidable marriage. Therefore, there is no need of legal provision to grant legitimacy to the child but to grant property and maintenance right.

In *Patel and others case*[11], the apex court observed that live in relation between two adult without formal marriage cannot be constructed as an offence. In *Radhika V. State of M. P.,*[12] the Supreme Court observed that if man and women were involved in live in relationship for a long period, they will treat as a married couple and their child would be called legitimate. Sec. 125 of the Cr.P.C. also supports

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7 AIR 2010

8 2009 Insc 853

9 *Madan Mohan Singh V. Rajni Kant,2* AIR 2010 SC 2933

10 AIR 1992 SC 726

11 2006 8 SCC 726

12 AIR 2008

live-in relationship as it is regarding maintenance to wives in which women desisted from live-in relationship.

In *Abhijit Bhikaseth Auti V. State of Maharashtra and others*[13], the Supreme Court also observed that it is not necessary for women to strictly establish the marriage to claim maintenance under Sec. 125 of the Cr.P.C. A women in a live-in relationship may also claim maintenance under the Cr. P.C. In June 2008, it was recommended by the National Commission for Women to the Ministry of Women and Child Development to include live-in female partners under the Cr.P.C., 1973.

3. MALIMATH COMMITTEE REPORT:

The Malimath Committee also recommended that the word "wife" under the Cr.P.C. be amended to include any "women live with a man like his wife". The Malimath Committee and the law Commission of India which suggested that if a women has been in live-in relationship for considerably long time, she ought to enjoy the legal status as given to wife. However, recently it was observed that it is divorced wife who is treated as a wife in the context of Sec. 125 of the Cr.P.C. even if a person has not married. In the case of live in partners, they cannot be divorced and hence cannot claim maintaince under Sec. 125 of the Cr.P.C.

In the same year, the Ministry of Women and Child Development was urged by the National Commission of Women to include female live in partner in the definition of "wife" as described in Sec. 125 of the Cr.P.C. The objective of these recommendations was to harmonize various other sections of law with the Protection of Women from Domestic Violence Act (2005). The Malimath Committee recommended that this will be turned into law by all states.

On 15 December 2008, during the question hour in the Lok Sabha Mr. H. R. Bhardwaj, Union Law Minister while answering to the question relating to live-in relationship said that if live in relationship is acceptable by society then the Government can make laws, because laws are made keeping in the mind the societal trends.

4. JUDICIAL RESPONSE

In *S. Khushboo V. Kanniammal & Another*[14], the Supreme Court held that living together is a right to life. Live in relationships may be immoral in the eye of the conservative Indian society but it is not illegal in the eye of law.

[13] AIR 2009 (NOC) 808
[14] AIR 2010 SC 3196

Again giving recognition to live-in relationships, the Supreme Court held in *D.Velusawm V. D. Patchaiammal*[15] that a relationship in the nature of marriage under the 2005 Act must also fulfill some of the basic criteria that:

(a) couple must hold themselves out to the society as being akin to spouses;
(b) they must be of legal age to marry; and
(c) they must have voluntarily cohabitated for a significant period of time.

In *Indra Sharma Vs. V.K.V. Sharma* [16], the Supreme Court laid down the following indication to determine whether or not a *de facto* relationship exist:

(a) length of the relationship;
(b) Two persons have resided together;
(c) nature and extent of common residence ;
(d) there is or has been a sexual relationship between the two;
(e) degree of financial dependence or interdependence;
(f) degree of mutual commitment by them to a shared life;
(g) they support children; and
(h) reputation and public aspect of the relationship between them.

The Law Commission of India has proposed restatement of the law on life insurance.

The Supreme Court has ruled for women in live-in relation to be considered wife and to inherit partners property after his death. In a recent judgment, the Supreme Court has ruled that an unmarried couple living together would be presumed legally married. A bench of Justices M V Eqbal and Amitava Roy ruled that a coupled living together for a number of years would rightfully lead them to presume that the couple was for all intents and purposes married. The Bench also added that the women in the relationship would be eligible to inherit it the property after the death of her partner.

The Supreme Court has also ruled in 2015 that domestic relationship where a couple lives together, outside of marriage, will be considered as marriage under the law. Such relationships also known as live-in relationship have over time become increasingly popular. They allow individuals the freedom of getting to know one another with the burden of a legally binding relationship.[17]In *Svetlana Kazankina and Others V. Union of India*[18], it was held by the Supreme Court

[15] 2010 (10) SCC 469
[16] 2013 (14) Scale 448
[17] *The Times of India,* 13 April 2015.
[18] 225 (2015) DLT 613.

that a live-in relationship, though not in the same genre / class as a marriage, is today a *factum* of life and this cannot be ignored. The Rules/Guidelines, providing for extension of visa of foreigners married to an Indian national appear to have been made with the intent of enabling an Indian married to a foreigner to enjoy the fruits of companionship, love and affection of the said relationship. If that be the intent and purport of the Rules / Guidelines, then today, when the same companionship, love and affection is sought by an Indian national from a foreign national of opposite sex, instead of giving the relationship the stamp of marriage, it is difficult to understand as to why, the two should be treated differently for the purpose of granting extension of vise.

5. INSURABLE INTEREST IN LIVE-IN RELATIONSHIP

As in the case with virtually any other type of insurance on any person it must be established that there is an insurable interest between the parties. That means that one or both parties will be negatively affected by the loss of financial contribution from the other. An insurable interest between unmarried couple living together is more. While insurable interest is presumed to exist between married couples, it sometime has to be proven to the insurance company when it comes to unmarried couples living together. This can be proven simply by having legal document that established joint liability or ownership of various debts, obligation or assets. Events and activities that created an insurable interest at least in theory, in any cohabitation situation where both parties are bringing income into the household, it will create an insurable interest. More specifically insurable interest can be created for any of the following:

- apartment in which both parties is on the lease;
- jointly owned home or other kind of real estate ownership;
- mortgage in which both parties are named in the mortgage as co-mortgager;
- utility bills naming both parties;
- debts naming both parties in the lone documents;
- jointly own investments;
- business venture that is jointly owned; and
- existence of one or more children of couple.

Since each situation creates the need for income from both members of the couple, an insurable interest becomes important.

There are two situations where an unmarried couple might be declined for life insurance on one another when the couple is unable to prove insurable interest. There may be gentlemen agreements between unmarried couples. This can happen

when each party maintains separate debts, obligations and assets. If an apartment is in one person's name only, and he or she was previously paying for it without any written evidence, the insurance company may presume that no insurable interest exists. An insurance company would not ask this question but if they do, an application could be denied for lack of written proof. Simply being in a relationship with a person does not necessarily create an insurable interest. Living in the same house or apartment makes it much easier to establish the fact, but if both are living in separate residences there may be no insurable interest. The only way to create that interest apart from actually living in the same residence where both parties are jointly obligated, is to create joint obligations for financial contributions by both parties. Having one or more children is one thing, but being jointly obligated on certain debts, or owning property together, are others.

As long as it is proved then an insurable interest exists between the parties. It will not be difficult for unmarried couples to get life insurance.

CONCLUSION

To be legally enforceable, all insurable contract must be supported by insurable interest. It will reduce moral hazard. Insurable interest is to measure the amount of the insured loss property and all the object of insurance law, regarding live-in relationship, as the couple in such relationship is not actually married but behave as married and perform all marital condition which leaves them to take the benefit of insurable interest. In various decision, the Supreme Court has tried to accord legality to the concept and protect the interest of parties in the live in relationship.

(2015) 10 Universitas 173-184

PROTECTION OF RTI APPLICANTS UNDER RIGHT TO INFORMATION ACT

Saransh Chaturvedi

Abstract

Approach of taking out the right out of wrong has so much been popularised that it has taken a centric approach in the society. Today, the concept of filing Right to Information (RTI) is increasing because we are becoming more aware of our own rights and duties. Demanding information, especially at the grassroot, is often met by intimidation and reprisals. Many citizens face grave physical assaults on regular basis. The police response is often not adequate. When the Parliament enacted the RTI Act, it could not have envisaged that the process of achieving transparency and accountability in the Government machinery would result in attacks of retribution and even death. A dangerous nexus has formed amongst the corrupt to silence the RTI crusaders. The RTI Act 2005 has done a great job by showing us way when there was no way out. But these laws are not understandable to the big mass which faces corrupt practices its everyday life and there comes a debate on awareness in the society which we still lag behind.

Keywords: societal norms, social welfare, corruption.

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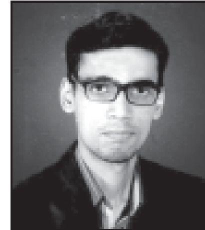

Saransh Chaturvedi

~ Faculty of Law, Banaras Hindu University, India: sahabsaransh@gmail.com

Saransh Chaturvedi is pursuing BA LLB (Hons.), III Semester, in the Faculty of Law, Banaras Hindu University, at Varanasi in India.

1. **Right to Information**
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INTRODUCTION

The protection of RTI applicants and whistle blower in present scenario is important so far as transparency is concerned. Seeking information related to public account or public savings can also come under the ambit of the fundamental right. RTI is an essential step in ensuring transparency and accountability in government systems and processes. When a government is transparent, there is less chance for corruption and more room for accountability. That's why Freedom of Information Acts (FOIAs) is becoming standard good practice in the international society. The RTI generally understood as the right to access information held by public authorities is not just a necessity of the citizens; it is a precondition to good governance. To be specific, RTI makes democracy more vibrant and meaningful and allows citizens to participate in the governance process of the county. In particular, it empowers ordinary citizens, especially those in rural areas. So ultimately if we want to keep democracy vibrant, RTI has to be the biggest tool. When people have RTI, they tend to make more meaningful decisions, raise informed opinions, influence policies affecting their society and even help shape a more assured future for the next generation. RTI has been recognised in Sweden for over 200 years. In the last ten years, it has gained widespread recognition in all regions of the world. While related legislations were adopted only by 13 countries in 1990, this number has grown to 85 and more, and similar pieces of legislations are under active consideration in many other countries. In India, RTI Act introduced since 2005 has proved as strong weapon in the hands of people, for ensuring transparency in government departments and containing corruption.

The concept of filing RTI is increasing only because of the reason that people are becoming aware of their own rights and duties. Demanding information, especially at the grassroots, is often met by intimidation and reprisals. Many citizens face grave physical assaults on a regular basis. Several threats and attacks, including murder, do not even make news. The police response is often not adequate. When the Parliament enacted the RTI Act, it had not envisaged that the process of achieving transparency and accountability in the Government machinery would result in attacks of retribution and even death. It should be solved to its fullest so that those citizen, who are doing something to which they are entitled, are protected. Necessary steps need to be taken to protect such citizens.

1. RIGHT TO INFORMATION

In the *State of Uttar Pradesh v. Raj Narain*[1], the Supreme Court recognized the RTI as important right. While examining the scope and objectives of RTI under Article 19(1) (a) of the Constitution, the Court opined that in a government of responsibility like ours, where all the agents of public are responsible for their conduct, secrecy is also maintained by public functionaries. Citizen are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech through not absolute, is a factor, which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security. To cover veil secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for purpose of parties and politics or personal self-interest or bureaucratic routine. The reasonability of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Further a Seven Judges Bench of the Supreme Court in *SP Gupta v. Union of India*[2] reiterated RTI as fundamental right under Art. 19 1(a) of the Constitution. The Court declared the right is part and parcel of fundamental right enshrined under Art. 19(1) (a) of the Constitution and observed that the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Art. 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government is the rule and secrecy an exception justified only where strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. RTI or right to know is an integral part of the freedom of speech and expression, a fundamental right under Art. 19(1) (a) of the Constitution. But the Supreme Court in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*[3] also recognized RTI as a fundamental right under Art. 21 of the Constitution. The Apex Court, while dealing with freedom of press and administration of justice, held that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens aspire in the broader

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1 AIR 1975 SC 865

2 AIR 1982 SC 149. *Union of India* v.*Assn. for Democratic Rights*, ((2002) 5 SCC 294); *Secy., Ministry of Information & Broadcasting, Govt. of India* v.*Cricket Assn.of Bengal*,((1995) 2 SCC 161);and *People's Union for Civil Liberties (PUCL)* v.*Union of India,* ((2003) 4 SCC 399.

3 (1988) 4 SCC 592.

horizon of the right to live in this age in our land under Art. 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform

2. BACKGROUND

Disclosure of information held by public authorities in India was governed by the Official Secrets Act (1923) enacted during the British rule. The Supreme Court had, in several judgments prior to enactment of the RTI Act, interpreted the Constitution to read RTI as fundamental right embodied in 'right to freedom of speech and expression' and 'right to life'. The *raison d'être* for a gradual and strong evolution of RTI in India is primarily because of a group of villagers in central Rajasthan, mostly poor wage workers, asserted their RTI by responding against ghost entries in muster rolls, which was the sign of rampant corruption in the system, and demanding official information recorded in government rolls related to drought relief work. The movement spread to various parts of Rajasthan, leading to a nation-wide movement for the RTI and related state legislations. Thus, it was states that took the first step by enacting RTI laws such as Tamil Nadu (1997) Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Madhya Pradesh (2003), Assam (2002) and Jammu and Kashmir (2004). The demand for national law started under the leadership of National Campaign on People's Right to Information (NCPRI). The Freedom of Information Bill 2000 was passed in the Parliament in 2002 but was not notified, hence never came into effect. The National Campaign for RTI received a major boost when the UPA Government's Common Minimum Programme promised that the RTI Act will be made more progressive, participatory and meaningful. The National Advisory Council, which was set up to oversee implementation of the Common Minimum Programme since its inception, took a close interest in RTI. These factors, including pressure from the civil society groups led to the enactment of the RTI Act in India in 2005. The Act defines "information"[4] as "any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force." The RTI, defined in Sec. 2(j), provides various rights to access information through various modes like inspection of documents, copies of documents (hard and soft copies), sample of material and raising of questions.

[4] Section 2(*i*) "record" includes— *(a)*any document, manuscript and file; *(b)*any microfilm, microfiche and facsimile copy of a document; *(c)*any reproduction of image or images embodied in such microfilm (whether enlarged or not); and *(d)* any other material produced by a computer or any other device;

It gives *right to access* to any citizen, including overseas citizens of India and persons of the Indian origin can ask information under this law. This right includes inspection of work, documents and records, taking notes, extracts or certified copies of documents or records, and taking certified samples of material held by the public authority or under its control. The *procedural analysis* to a citizen, who desires to obtain any information under the Act, has to submit application to the Public Information Officer (PIO) of the concerned public authority. The application should be precise and specific with name and complete postal address of the applicant. There is no prescribed format of application for seeking information. The application needs to be submitted along with an application fee as prescribed in the Fee Rules. If a public authority fails to comply with the specified time limit, the information to the concerned applicant would have to be provided free of charge. There is *duty to publish* in the Act, and it requires public authority to publish categories of information. This includes the particulars of its organisation, functions and duties; powers and duties of its officers and employees; procedure followed in the decision making process; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; etc. As *exceptions,* the Act enumerates the information(s) are exempted from disclosure or those exempted under the Official Secrets Act can be disclosed if public interest in disclosure overweighs the harm to the protected interest. Also the exempted information(s) would cease to be exempted if 20 years have lapsed after occurrence of the incident to which the information relates.

As a new legislation on accountability and transparency, the RTI Act has introduced an opportunity for common citizen to question public authorities and get access to official documents which were hitherto classified under the Official Secrets Act. This posture by the government has given a new life to the democratic system in India where people have power to scrutinise what their elected representatives and administrators are up to. While the Act has ensured a positive change in government functioning, it has not been a cakewalk for the applicants who have regularly been victimised for exposing wrongdoings in public offices[5]. The RTI Act does not specifically provide for protection of users and though several state governments, Information Commissions and the courts have taken note of the seriousness of the situation and no concrete measures have been formulated to prevent the victimisation. Around 20 cases of murder, 45 cases of assault and 73 cases of harassment of RTI users have been reported from all across India since 2007, i.e. two years after the RTI Act was enacted. Such incidents not only defeat the purpose of enquiry as mandated under the RTI Act but also instil fear

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[5] Raju (2011). *RTI and its importance,* Paper presented in the Indian History Congress, Delhi, 18

in minds of people who may be potential information seekers. More importantly, the present security set up has been found wanting when it comes to protection of the RTI applicants.

3. RIGHT TO INFORMATION ACT

Corruption exists all over the region and thrives at all layers of government. Officers who refuse to enter the bandwagon are victimized. In India, the Tehelka expose involving defense deals had not only victimized the reporters involved in the undercover operation but also harassed virtually anybody associated with the portal. In this case, the owner of the Global Capital, who owned a share in the portal, was imprisoned without any concrete charges framed against him. All this was due to the fact that the expose had caught some of the high ups in the ruling coalition taking bribes on camera. More recently, the Labour Government in England had found a scapegoat in David Kelly who was considered a 'mole' in the Ministry of Defense in order to draw public attention away from the Iraq war. He was named as the source of a disputed BBC report claiming the Downing Street had "sexed up" evidence of Iraqi weapons of mass destruction so as to drive the country into war with Iraq.

The urgency of a RTI Act cannot be overemphasized even as Satyendra Dubey's and Manjunath death sparked off widespread public protest. Both in unlettered societies with meagre resources as also in the developed world, there is an urgent need both for access to information by the public along with an act that would provide protection to all those who blew the whistle. It is time that the authorities take cognizance of the fact that money associated with development works, that usually comes from the tax payers pocket, lands up in corrupt hands. In the process, development takes the back seat. India cannot afford to lose its money nor its resources. The real heroes of today's world are honest people. They are few and far between. The world and the developing countries cannot afford to lose there honest officers who stand up against all odds and risk their lives. It is time to clean the system by providing protection to all those ordinary people who dare to bare open facts and has a stake at country's future. If the government really means business, it has to go about demonstrating that there are systems in place for good people to rely on.

India's RTI Act is generally claimed as one of the world's best law with an excellent implementation track record. It is one of the most empowering and most progressive legislations passed in the post Independent India. From the day the Act came into force, enlightened citizenry had stated using the law by making information request in order get the police to act or get their entitlements of food grain under public distribution system or expose the corrupt officials. Most radical provisions of the Act are that the information seekers need not to give any reason

for it or prove his *locus standi*. Yet the task of implementing the law is not without major challenges. Lack of adequate public awareness, especially in rural areas, lack of proper system to store and disseminate information, lack of capacity of the PIOs to deal with the requests, bureaucratic mindset and attitude etc. are still considered as major obstacles in implementation of the law.

The RTI Act, 2005 received Presidential assent in June 2005, and came into force from 13 October 2005.The Act covers all central, state and local government bodies and, in addition to the executives, it also applies to the judiciary and the legislature. It covers all bodies owned, controlled or substantially financed, either directly or indirectly by the government, and non-governmental organizations and other private bodies substantially funded, directly or indirectly, by the government. It would seem to include private schools, hospitals and other commercial institutions that have got subsidies in the form of land at concessional rates or tax concessions among others. The Act also applies to private sector as it provides the citizens access to all information that the government can itself access through any other law. The Act, under Sec. 8 and 24, contains certain exemptions from disclosure of information. The matters which are beyond the scope of the Act includes the disclosure of information which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with the foreign State or lead to incitement of an offence; or information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court. It also excludes the disclosure of information, which would cause a breach of privileges of the Parliament or the State Legislature. The provisions of the Indian Official Secret Acts, 1923 are also exempted from the scope of the Act. The Act provides for the setting up of independent Information Commissions, one at the Centre and one each in the states, comprising of one Chief Information Commissioner and up to ten Information Commissioners. Complaints against violations of provisions can be made to the Information Commissioner. PIOs are also appointed to accept requisitions and provide information within 30 days after receiving such complaint. Extensions are also allowed in some cases such as when third party is involved[6]. Information pertaining to the life and liberty of a person must, nevertheless, be provided in 48 hours. The Act stipulates penalties for PIOs found to be in violation of the provisions. The Information Commission can impose penalty of Rs. 250 per day, and also penalize for refusals to accept requests, for mala fide destruction of information, knowingly giving false information etc., with and maximum limit of Rs. 25,000. Immunity to PIOs for actions done in good faith is also applicable under the provisions of the Act.

[6] CIC/OK/A/ 2006/00163-19.10.2006

4. OBSTACLES TO PROMOTION OF RTI ACT

A whistle blower may be expressed as someone who exposes wrongdoing, fraud, corruption or mismanagement. In many cases, this could be a person who works for the government who would report misconduct within the government or it could be an employee of a private company who reports corrupt practices within the company. The law that a government enacts to protect such persons, who expose corruption, is called a whistle blower protection law. Some countries have already put in place laws to protect whistle blowers or are in the process of doing so. However, the level of protection and the way in which the law operates differs from country to country. US was one of the earliest country to have the Whistle blower Protection Act of 1989, while the UK has the Public Interest Disclosure Act of 1998, and Norway has a similar law in place since January 2007[7].

The RTI Act does not provide for any protection to the applicants for use of the RTI. Though the Central Information Commissioner (CIC) is empowered to award compensation for any harassment, threat or intimidation caused to the applicants for seeking information, in practice this provision is not being utilized in full swing instances of suppression of information and harassment of the employees and applicants are on the increase. It is evident from the incidents that has occurred in past that the public authority has been trying to suppress the information and coerce the applicant in case the applicant is employed in that organization. The issue of protection for whistle blowers caught the attention of the entire nation when the National Highways Authority of India engineer Mr. Satyendra Dubey was killed after he wrote a letter to the office of then Prime Minister Shri A B Vajpayee[8] alleging corruption in the construction of highways. It is also evident from the series of instances where more than 10 RTI activists were murdered for their active involvement against corrupt activities of bureaucrats, political leaders and contractors' mafia in India. RTI activist Amit Jethwa was killed near the Gujarat High Court in Ahmedabad. Other RTI activities included such as Datta Patil of Kolhapur (Maharashtra), Vitthal Gite of Beed district (Maharashtra); Sola Ranga Rao of Krishna District (Andhra Pradesh), Arun Sawant of Badlapur (Maharashtra), Shashidhar Mishra of Begusarai (Bihar); Vishram Laxman Dodiya of Ahmedabad (Gujarat), and Satish Shetty of Pune (Maharashtra). Mr. Manjunath Shanmugham, an IIM graduate and a sales manager of the IOC, was also murdered on 19 November 2005 for exposing the racket of adulteration of petrol and the

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[7] http://articles.timesofindia.indiatimes.com/2010-03-29/india/28135662_1_publicinterest-disclosures-cvc-protection India doesn't have a law to protect whistle blower, visited on 5 May 2011.

[8] *Ibidem.*

mafia behind it[9]. This list is not exhaustive and depicts a grave concern need to be taken care immediately.

The objectives of the Act cannot be achieved unless RTI applicants are protected from any harassment that might arise from the operation of the RTI Act. *Firstly* it is recommended that the Appellate Authority, the State Information commission and the CIC should be empowered to award exemplary damages in such cases. *Secondly* the Act should also provide for some protection to those employees who seek information from their organizations. Some provisions on protection of employees' especially casual, *ad-hoc,* part time and other temporary employees, on the issue should be inserted in the Act, to prevent the public authorities from terminating the services of, except on some serious misconduct after adhering to the doctrine of natural justice. The Sate Information Commission and the CIC should be empowered to take *suo motto* cognizance of any instance of victimization and pass appropriate order along with exemplary compensation to the victims on the matter[10].

Public authorities covered under the Act do not seriously implement the provisions of Sec. 4[11] of the Act, because there is no penalty provided for the violation. The CIC is aware of this serious issue as it is signified by its circular which reads as: The Central information Commission in a case has highlighted that the systematic failure in maintenance of records is resulting in supply of incomplete and misleading

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9 *Ibid*.

10 "RTI Act weapon to fight corruption in administration", *Deccan Herald,* 4 December 2007.

11 Sec. 4 (1) : Every public authority shall -

a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;

b) publish within one hundred and twenty days from the enactment of this Act,—

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

information and that such failure is due to the fact that the public authorities do not adhere to the mandate of Sec. 4(l)(a) of the RTI Act, which requires every public authority to maintain all its records duly catalogued and indexed in a manner and form which would facilitate the right to information. The Commission also pointed out that such a default could qualify for payment of compensation to the complainant. Sec. 19(8)(b) of the Act gives power to the Commission to require the concerned public authority to compensate the complainant for any loss or other detriment suffered. The CIC directed that the proper maintenance of records is vital for the success of the RTI Act[12]. It is mandatory for all the public authorities to adhere to the principle of maximum disclosure, and furnish the information, as and when sought by the citizens, for which they do not have to charge any extra money, other than what has been prescribed by the government under the RTI fees and costs rules. RTI applicant has to prove that he suffered loss due to such non display and then only he may be awarded some compensation. A citizen can complain because the Department has not updated their information, thus causing damage and risk. It is clear that the Act puts an obligation upon public authority to provide information as mentioned in Sec. 4, on its web sites. But the Act does not provide any penalty for volition of Sec. 4 of the Act. So it is the need of the hour to provide for some penal provision for the violation of Sec. 4 of the Act, which would ensure effective compliance on the issue and would also minimize the numbers of applicants from approaching PIO as the information would be displayed/made available to them in convenient way. It is also recommended, as a preventive measure, that besides penalty for violation of Sec. 4, non-display of information under Sec. 4 should be treated as deficiency in service under the Consumer Protection Act, 1986 and the Consumer Forums constituted under the Consumer Protection Act 1986, should be empowered to take cognizance of such failure in case of loss suffered by applicant due to non display of information under Sec. 4 of the RTI Act.

Right to Inspection[13], an important facet of RTI, includes inspection of any documents or material, and has been recognized under Sec. 2(j) of the RTI Act. But there is no rule or relation on the subject to regulate this right of inspection. An analysis of Sec. 2(j), Sec. 6 and 7 of the Act depicts that none of the provisions provide time frame for inspection of documents. Sec. 7 (1) Subject to the proviso to Sub-Sec. (2) of Sec. 5 or the proviso to Sub-Sec. (3) of Sec. 6, the Central PIO or State PIO on receipt of a request under Sec. 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either

[12] No.12/192/2009-1R Government of India Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) New Delhi Dated the 20 January 2010.

[13] Sec. 2(j) of the RTI Act. *(a)* the details of further fees representing the cost of providing the information as determined by him, together with the calculations made.

provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sec. 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within 48 hours of the receipt of the request. If the Central PIO or State PIO fails to give decision on the request for information within the period specified under Sub-Sec. (1), the Central PIO or State PIO shall be deemed to have refused the request. Where a decision is taken to provide the information on payment of any further fee representing the cost of providing the information, the Central PIO or State PIO shall send an intimation to the person making the request, giving time limit in which the PIO must furnish the desired information to the applicant. The sections stipulate the procedure for submission of RTI Application before PIO/APIO for furnishing information under the ambit of the RTI Act whereas it does not contain any provision as to procedure for submission of application for inspection. Lack of adequate process for inspection provides opportunity to public authority to manipulate the documents/ materials sought to be inspected by the applicants. The inspection of documents/materials should be allowed within 48 hours of submission of application or receipt of RTI application for inspection by the PIOs. It is also recommended that some provision for inspection such as application form, time limit for inspection and procedure for submission of inspection application, and process of inspection of documents/materials should be incorporated in the RTI Act or RTI Rule.

CONCLUSION

All countries across the world have recognized the need to keep their citizens informed about the way Government takes decisions. In India, there is the RTI Act for nearly 8 years. The spirit of the Act can be best summarized by stating that without informed citizens there is no clean governance. It recognizes that citizens are the masters, and servants cannot deny information to their masters. In fact, servants acts as trustees and hold the information belonging to their masters. But for almost 6 decades, the servants behaved like masters and the masters simply accepted this treatment. Rampant corruption prevailing in the country forced the lawmakers to understand that there is no way the country can become better without the servants favouring good governance. Under these circumstances, the preamble of the RTI Act highlights way to contain corruption, improve transparency and make servants accountable by empowering citizens to get information.

It lays down the foundation for a better tomorrow. In fact, every citizen who is the master has now the same power to obtain information which only the legislators had so far. This single aspect alone should create a new group of people who will demand good governance. This tool should help the poorest. To help the poorest requires attacking corruption at its root. The RTI Act is sufficiently strong in its

present form to even attack the roots of corruption. There will forever be corruption at the lower levels as long as its seeds are sown at the highest level. The RTI Act can be used to expose these seeds of corruption which in turn can curb corruption at the lower levels. Similarly RTI activists are helping in the form of whistle blowing to the government to have clean and good governance.

For many who indulge in corruption, giving up corrupt practices may be as difficult as giving up smoking for some. While a chronic smoker rejects counselling to give up smoking, a corrupt person does not make efforts to give up his corrupt practices. Luckily, RTI is a tool which can expose and embarrass a corrupt person. The embarrassment should be so acute that he should feel shy to be seen in public. Unfortunately, today it is not happening. To start with we should recognize the honest and embarrass the corrupt. It is in this way that RTI has become a stick to beat the corrupt with.

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1.	**Title of Publication**	:	**Universitas**
2.	**Place of Publication**	:	**Bhopal**
3.	**Periodicity of Publication**	:	**Annual**
4.	**Name, Nationality and Address of Chief Editor**	:	**D.P. Verma** **Indian** **P-11, New Medical enclave** **Banaras Hindu University** **Varanasi-221005**
5.	**Name, Nationality and Address Publisher**	:	**Amit Tiwari** **Indian** **Faculty of Science, BHU** **Varanasi-221005**
6.	**Ownership**	:	**academique** **P-11, New Medical enclave** **Banaras Hindu University** **Varanasi-221005**

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All correspondence should be addressed to the Editor under reference of *Universitas*:

Invitation price : 400/-

Published by Amit Tiwari, for academique, P-11, New Medical Enclave, Banaras Hindu University, Varanasi-221005, printed at Media Graphics & Computer, Bhopal.

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