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BALANCE

A Bricolage for Legal Augmentation to Navigate Comprehensive Experimentation

Articles

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ABOUT THE JOURNAL

BALANCE, the International Multidisciplinary Law Journal is an effort of Symbiosis Law School, Hyderabad campus (www.slsh.edu.in), a constituent of Symbiosis International University, Pune. As the subject of Law has grown to include normative and critical approaches calling for multidisciplinary involvement to make the field of Law more substantial, the objective of the journal is to cohere the multidisciplinary ideas to the field of Law thus forming a unified whole.

In a nutshell, the purpose of the journal is to create a platform to integrate research ideas of different fields of study into the academic stream of Law to create a synergistic value to field of Law. Given the above, the journal is aptly titled as BALANCE. There shall be two issues in a year. The word BALANCE not only denotes a situation in which different elements are equal or in correct proportions, but also projected as an abbreviation which can be expanded as ***A Bricolage of Legal Augmentation to Navigate a Comprehensive Experimentation.*** *The word 'Bricolage' means construction of creation of things from a diverse range of available things.*

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Chief Editor's Desk

I am elated to see BALANCE, the International Multidisciplinary Law Journal, Volume 2, and First Issue taking shape and seeing the light of the day. I am also excited and thankful to the contributors from India and abroad, and the members of the editorial board who made this happen.

The modern legal systems are just not products of conceptual and theoretical categories but are extensions of a special ideological structure, which consisted of religious morality, feudal domination, and law. This forms the base to think that legal philosophy is interdisciplinary because this domain is between the territory of law and the field of philosophy.

But, the acceptance of inter- and multidisciplinarity proved to be drastically more difficult in Jurisprudence (as in the humanities in general) than in the natural sciences. For instance, natural science is organized on the basis of practicality, whereas ideological momenta have a bigger role in the human disciplines and cultural evolution giving rise to new thoughts and approaches than pragmatic-rational reflections. Thus, Law and legal profession has a lot of responsibility to our society, especially in the wake of complex scientific, social, economic and political changes and developments affecting human relationships. Any legal issue in this fast moving society necessarily embraces the 'peeping and application' of other disciplines. That is why there is all around discussion and deliberation to launch single integrated multidisciplinary studies keeping the man in the center of it.

We are fortunate to have five papers on multiple disciplines for the second volume ranging from primary field study to reviews and reflections on multiple disciplines but finally lacing with Law.

I hope our objective shall fetch good research contributions from different professionals from different disciplines and help the journal go a long way showing light to the world.

Dr. Mirza Ilyas Baig

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Managing Editor's desk

I am very happy to launch the first online edition of BALANCE, the International Multidisciplinary Law Journal from Symbiosis Law School, Hyderabad. We are fortunate to have an interesting blend of research contributions from multiple disciplines from India and abroad. The word BALANCE not only denotes *a situation in which different elements are equal or in correct proportions*, but also projected as an abbreviation which can be expanded as **A Bricolage of Legal Augmentation to Navigate a Comprehensive Experimentation.** The word Bricolage means *construction of creation of things from a diverse range of avialable things.*

The first issue carries 8 papers that are recieved from Universties in Srilanka, Tanzania and India and National Law Schools across India. We have a good blend of papers ranging from protection of geographical indications in developing countries, importance of English Language Skills for Lawyers, Evolution of Euthanasia from different dimensions, Conscience being an ulimate judge with episodes cited from the Epics of India, Free Trade Agreement issues, Data privacy, and controversies associated with capital punishment.

I thank all the contributors and hope we shall receive more contributions to make the journal a success and preach to the world the importance of multidisciplinarity.

Dr. Sukhvinder Singh Dari

Dr. Prageetha G Raju

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BEYOND 'VICTORS JUSTICE'? - A RE-ASSESSMENT OF DR PAL'S JUDGEMENT IN LIGHT OF CONTEMPORARY DEVELOPMENTS

Prosenjit Pal

Assistant Professor, Department of Political Science, The University of Burdwan, West Bengal, India ***E-mail:*** *prosenjitpal@yahoo.com*

ABSTRACT:

The International Criminal Court, theoretically seems to be a step forward in the process of institutionalizing International Criminal Law, as well as an attempt to make up for the criticisms generated for meting out justice through ad hoc tribunals, which have come under scrutiny as being mere attempts at imposing Victor's Justice. But questions still remain as to whether the realm of International Criminal Law has been freed of major power politics.

More than fifty years ago this issue was addressed by an Indian Jurist, Radhabinod Pal, in his landmark judgment dissenting opinion at the Tokyo trials. The Tokyo trials took place in the background of dramatic developments in international law. After Nuremberg, individual criminal responsibility became a recognized tenet of the law. Moreover, international tribunals were regarded as a just mechanism to implement international law. At a time when most of the Allied World was convinced of the Japanese guilt, Radhabinod Pal came up with a verdict of 'not guilty'. Despite suffering from the limitations of the Realist paradigm within which he wrote, Pal's dissent deserves a closer look because of the timeless questions it addresses. This paper attempts to look at Pal's dissent in the context of its relevance in the background of the contemporary realm of international criminal law.

Keywords: Tokyo trial, Nuremberg trial**,** Conduct of Nations

INTRODUCTION:

Criminal law refers to the body of laws, norms and rules governing international crimes and cooperation between national criminal legal systems. International criminal law refers to the crimes committed by national governments or rather by the individuals who control and direct them. The concept of war crimes is at the core of international criminal law. It refers to a range of acts judged to be beyond civilized human behaviour, even in extreme conditions of warfare. Just over sixty years ago, the international community, seeking to heal the wounds of a brutal war, embarked on a bold legal experiment. For the first time in history, legal mechanisms were invoked to bring to justice the perpetrators of war crimes and crimes against humanity in international tribunals specifically formed for the purpose. The trials at Nuremberg and Tokyo were extraordinary and unique in their time. These two trials and their proceedings represented a substantial step forward in the development of the law of war crimes.

Background: The International Criminal Court, theoretically seems to be a step forward in the process of institutionalizing International Criminal Law, as well as an attempt to make up for the criticisms generated for meting out justice through ad hoc tribunals, which have come under

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scrutiny as being mere attempts at imposing Victor's Justice. *But questions still remain as to whether the realm of International Criminal Law has been freed of major power politics.*

More than fifty years ago this issue was addressed by an Indian Jurist, Radhabinod Pal, in his landmark judgment dissenting opinion at the Tokyo trials. The Tokyo trials took place in the background of dramatic developments in international law. After Nuremberg, individual criminal responsibility became a recognized tenet of the law. Moreover, international tribunals were regarded as a just mechanism to implement international law. At a time when most of the Allied World was convinced of the Japanese guilt, Radhabinod Pal came up with a verdict of 'not guilty'. Despite suffering from the limitations of the Realist paradigm within which he wrote, Pal's dissent deserves a closer look because of the timeless questions it addresses. This paper attempts to look at Pal's dissent in the context of its relevance in the background of the contemporary realm of international criminal law.

Judge Pal wrote his dissenting opinion, his understanding of history made it possible for him to find similarities between the Japanese and the Allied policies prior to and during the conduct of the war. Prior to the Second World War, the world as Pal saw it consisted of states, all of which were trying to maximize their gains — economic, political, military and in some cases, ideological — by following certain policies which put them on a collision course. The League of Nations had already proved to be a failure as far as international organization was concerned. There were no rules that could-be universally applicable, regardless of the position of the offender. The international system was at best an inchoate society where only the rules agreed to by all parties had come to occupy the position of law. However, Pal felt that : *nothing can said to be law when its obligation is still for all purposes dependent on the mere will of the party(Pal,1953: 155).*

His conception of law made the existence of an "international community which can be brought under the reign of law"[8] a pre-requisite for any kind of international organization. It is here that one must understand the difference between a 'community' and a 'society'. A 'society' lacks the binding force that makes a 'community' cohesive. Pal believed that the international system did not have standards/norms which transcended all boundaries and which could be applied under all circumstances. The best that could be said of the system was that if states so desired, they could, through agreements, adjust their divergent interests. Human beings had as yet not succeeded in creating an international community where order or security was provided by law. Peace was, therefore, a negative concept — a negation of war, an assurance *of status quo.*

It was quite naive to expect the smaller, less powerful nations to be satisfied with this state of affairs. Moreover, international law recognized that in the absence of an agreement to the contrary, no state was bound to submit its disputes with other states to a binding judicial settlement or to a method of settlement resulting in a solution binding upon both parties. This created a fundamental gap in the international system; a gap which war alone could fill.

One of the main charges levelled against the defendants at the Tokyo trials was that they had plotted to wage an "aggressive" war. This gives rise to two questions:

(/) Was war a crime in international law?

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(ii) What exactly was 'aggression'?

Attempting to answer the former, Pal held that modern international law was developed as a means of regulating external conduct rather than as an expression of the life of a true society.[9] Moreover, existing international practice (especially that pertaining to the Kellogg-Briand Pact of 1928)'° proved that while there might have been contractual obligations, there was no law that made war a crime. War has always remained outside the province of international law and only its conduct has been regulated. As Pal put it:

When the conduct of nations is taken into account, the law will perhaps be found to be that only a lost war is a crime."(Pal, 1953: 188)

As for the issue of defining 'aggression', the main problems arose in determining the index : would 'aggression' be defined in terms of the interests of the dominated nation as distinct from the dominant or would it be merely a reference to the *status quo?* Pal dismissed Robert Jackson's definition of aggression (with its heavy emphasis on first strike) as an ideological cloak intended to disguise vested interests.[12] One of the fundamental principles of law was a *"nullitm crlmen sine lege, nitlla pocna xine legs"* — no punishment of a crime without a pre-existing law. Under : such circumstances, the defendant could not be held guilty of waging an aggressive war.

Since the basis for international relations was "... still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision",(Pal,1953:p145) war could be regarded as a legitimate instrument of self-help against an international wrong. For such a society, the conception of crime was still a bit premature. Pal believed that any conception of crime in international life needed to be looked at from within the framework of the social utility of punishment. Reformatory, deterrent, retributive and preventive theories justify punishment.[14] In international relations, the reformatory and retributive theories probably would not have any relevance. As for the other two theories, in Pal's words:

So long as the international organization continues at the stage where trial and punishment for crime remain available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and preventive effect. (Vardarajan: 1998, p38, IJIL) Viewed from this angle, the very basis of setting up an international tribunal becomes questionable. Moreover, as long as national sovereignty remained the fundamental basis of international relations, acts committed while working a national constitution would remain unjustifiable in the international system and individuals functioning in such capacity would remain outside the sphere of international law. This negation of individual responsibility was a logical progression of Pal's theoretical beliefs.(Vardarajan: 1998, p38, IJIL)

Firmly committed to some to the tenets of Realism — to the extent that he believed in the existence of a self-help system where states acted to maximize power — Pal was not unaware of the cultural relativist position taken by the Allies. As he looked at it, one could not reconcile something like the 'Truman Doctrine' with concepts of self-defence, non-intervention, and aggression." If some victor states could not live securely in contact with governments having radically different ideas, were not defeated nation entitled to share the same feeling? Keeping in mind the lack of any universal standards, how could some nations sit in judgment over others? Pal strong!; believed that:

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If an individual's life or liberty is to be taken then it is imperative to measure his conduct by a standard having universal application.(Vardarajan: 1998, p36, IJIL)

Despite having misgivings about the creation of an 'international community' Pal believed that, given time and "...the vindication of law through a genuine legal process(Vardarajan: 1998, p36, IJIL). ", order and decency could be re-established ir international relations. Till such time, however, any attempt to regulate international crime in the manner the Allies had done, would only be "formalized vengeance".

Pad did not hold any brief for the Japanese; at no point of time did he condone Japanese actions. In fact, there is an implicit condemnation of the Japanese policy in the Pacific when he states that the belief in one nation having "interests" in the territory of others is indicative of a deluded mind. However, given these theoretical underpinnings, Radhabinod Pal could logically deliver just one verdict — "not guilty on all counts". .(Vardarajan: 1998, p38, IJIL)

1.1.

Before addressing the issue of Pal's relevance to the current debate on international criminal jurisdiction, we need to look at the changes that have taken place in the international system in the past fifty years. These changes have, to a large extent, been influenced by the experiences prior and during the Second World War. One can identify three distinct trends since the time Radhabinod Pal wrote his dissent: a growing concern with issues of human fights as seen in the codification of humanitarian laws; the emergence of the United Nations (UN) as a major step forward in the process of international organization; and the renewed interest in attempts to move from *ad hoc* international tribunals to *a* permanent International Criminal Court.

The Nuremberg and Tokyo trials, all their drawbacks notwithstanding,

served an extremely important purpose — that of exposing some striking gaps in the international legal system. These pertained primarily to :

(/) the responsibility of individuals under international law, and
(//) the state of humanitarian law.
Even before the Second World War, Hans Kelsen had argued that, in the-ultimate analysis, individuals were the subjects of international law. .(Vardarajan: 1998, p38, IJIL). The Permanent Court of International Justice, in one of its judgments, *Danzig Railway Officials* case had upheld the rights of individuals as specified in treaties. (Vardarajan: 1998, p38, IJIL). However, only after Nuremberg and Tokyo did it become clear that international law could reach over and beyond traditional technicalities and punish guilty individuals. As the Nuremberg Tribunal put it:

Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[21].(Vardarajan: 1998, p38, IJIL) Despite the objections raised by Justice Pal on this point, the trend of international law towards attaching direct responsibility to individuals has been reaffirmed by subsequent treaties.

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'Crimes against humanity' was a category recognized for the first time in the Charter and judgment of the Nuremberg Tribunal.· (Vardarajan: 1998, p38, IJIL)

These refer to acts of a very serious nature, such as willful killing, torture or rape, and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character. A series of treaties and conventions over the years have contributed to the codification of humanitarian laws. The first act of legitimization was the United Nations General Assembly (UNGA) resolution of 1946 on the Nuremberg Principles. It was followed by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[23] Nazi atrocities, especially the holocaust which 'shocked the conscience of mankind' brought into sharp focus a problem which had never really been dealt with before — acts committed with the intention of destroying a particular national, ethnic or racial group. The Genocide Convention was the direct result of growing concerns over this issue. Apart from defining genocide, the convention makes it clear that such acts, whether committed in times of peace or in time of war, are crimes under international law for which individuals would be tried and punished.

The Genocide Convention was, in a way, a continuation of the 1907 Hague Laws of War. However, there were still issues regarding the conduct of belligerent states towards various categories of people. These were addressed by the 1949 Geneva Conventions.[24] These conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons, namely, wounded and sick members of armed force in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians, in time of war. They form the core of customary law in international armed conflicts.

The issue of defining 'aggression', raised by Justice Pal in his dissent was tackled by the UNGA soon after the war. The almost insurmountable difficulties in completing this endeavor was illustrated by the failure of the two special committees set up in 1952 and 1954 to de.al with the question of defining aggression.[25] It was only at its seventh session (1974) that a special committee was able to adopt, by consensus, a definition of aggression that was latter accepted by the UNGA. As per the existing definition, aggression means, "... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations...". Though the definition tries to cover as many areas as possible, it definitely falls short of legal perfection.

Despite all their drawbacks, the significance of the aforementioned developments lies in the fact that they are all, beyond doubt, part of customary international law: rules which all states accept as binding. Hence, the objection of *'nulliim crimen sine lege'* (no crime without a law), raised by Radhabinod Pal becomes contestable in the present context.

Radhabinod Pal had claimed that the process of international organization was, at best, in its formative stages and states still belonged to a self-help system. However, it can be argued that the existence of the United Nations fosters the notion of an 'international community' even within the framework of Pal's understanding of the term. The inability of the League of Nations to prevent the outbreak of the Second World War did not really affect the process of international organization. Even during the course of the war, the Allies were discussing the possibility of setting up an organization which would take over from where the League left of. The result was the United Nations which came into being in October 1945. The membership of this body has gradually increased from a little over 50 to over 180 nations today. The importance of the UN

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lies in the fact that it has proved to be an extremely effective forum for states to debate and decide upon standardized norms. Most of the conventions and treaties that have been signed and ratified in the past five decades have owed their existence to measures initiated by the UNGA. Issues of international concern ranging from human rights to drug trafficking have been taken up by one or other of the UN bodies. The Charter gives both the General Assembly and the Security Council the right to discuss issues affecting international peace and security.[26] Norms, such as those against the use of force in international relations, have been strengthened by the decisions of the International Court of Justice (ICJ). .(Vardarajan: 1998, p38, IJIL)

One of the main reasons for Justice Pal's dissent was that he felt any tribunal established by the victor in a war would not be able to provide justice. The UN Charter attempts to resolve this problem by giving the world body the right to take action against states which violate the spirit of the Charter. (Vardarajan: 1998, p40, IJIL) Such actions could include setting up of **an** international tribunal to prosecute perpetrators of crimes against humanity. In the normal course of events, state parties would conclude a treaty to establish a tribunal and approve its statute. This treaty would be drawn up as approved by either the UNGA or any specially convened conference. The final step in the procedure would be to open the treaty for signing and ratification. While this approval would ensure that all issues pertaining to the establishment of an international tribunal would be subjected to close scrutiny, it has the disadvantage of being extremely long drawn out. An alternative approach that would expedite the procedure is to establish an international tribunal by means of a Chapter VII decision.[29] This basically implies that the international tribunal would be the result of an enforcement action taken by the Security Council (SC) under the provision of Chapter VII and all states would be under a binding obligation to take whatever action was required to carry out the SC's decision. An international tribunal thus established would not actually be creating or 'legislating' law; it would merely have the risk of implementing existing humanitarian law.

The UN mechanisms do not guarantee implementation of humanitarian laws. However, by making provisions for dealing with violation and providing a forum for the ongoing process of standardization of norms, this organization has tackled many of the questions posed by Radhabinod Pal. .(Vardarajan: 1998, p38, IJIL)

The draft statute of the ICC presented by the International Law Commission (1LC) in 1994,[30] was the results of a concerted effort which was resumed in 1989 when the UNGA requested the ILC to work on such a draft. Since the end of the First World War, there had been attempts to create a court which would enforce international criminal responsibility. The main objection to such proposals was that there was no International Penal Law recognized by all nations.[31] Over the years, there has been a growing awareness of the fact that it might not be possible to establish a definite international criminal law to which all states adhered, in the near future. Even in national societies, criminal law has taken a long time to develop and had been preceded by civil law. Moreover, there existed rules on subjects ranging from war crimes and genocide to drug-trafficking and terrorism, which were recognized by all states as part of customary international law. An additional problem was posed by the fact that the only other body that could serve the adjudicatory purpose of a criminal court was an international tribunal, *ad hoc in* character and created to deal with specific breaches of international law. All this resulted in greater attention being paid to the proposal for an ICC.

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The ILC draft envisages a court which would exercise jurisdiction only over the "...most serious crimes of concern to the international community as a whole".[32] The categories of crime over which the court could adjudicate include genocide, aggression, war crimes, crimes against humanity, and treaty crimes (Art. 20). The enumeration and categorization of crimes in the draft statute is more comprehensive than that in the statute of the international war crimes tribunal. The draft not only covers areas like the crime of aggression, but also includes the grave breaches of the 1949 Geneva Conventions in the aforementioned 'treaty crimes' Apart from detailing the preconditions to the exercise of jurisdiction (Art. 21), acceptance of the jurisdiction of the court by states (Art. 22), and action by the Security Council (Art. 23), the draft statute also focuses on the procedural aspects of the proposed court. Despite its efforts to cover as many areas as possible, the draft statute leaves a lot to be desired. The problems start from the way the court is envisaged in the Preamble itself, giving rise to several questions over the court's jurisdiction and its relations with national courts. These are the issues that are most likely to be taken up when the UNGA debates the draft in 1997. The problem with the draft statute, notwithstanding this proposal undermines many of Pal's beliefs, especially those pertaining to states ever accepting universal norms. .(Vardarajan: 1998, p38, IJIL)

One should attempt to reassess Dr Pal's judgement in the light of contemporary developments, especially from the period following the end of the Tokyo Trials. As the Allied occupation ended in 1952, those who had been sympathetic to the defendants at the Tokyo trial began to spread die view that the victor nations had wrongfully punished the Japanese leaders for crimes they had never committed. In this advocacy, critics commonly cited the dissenting opinion written by Justice Radhabinod Pal, the Indian member of the Tokyo Tribunal, as an authoritative legal opinion in support of their advocacy. While there were three dissenting judges at Tokyo, Pal was unique in that he disagreed with virtually all of the findings made by the majority judges. His final verdict was the acquittal of each and every defendant on all charges. This highly unusual opinion caught the public's attention, and it was soon catapulted to center stage in Japanese post war debates on the trial. Pal, for his part, visited Japan in 1952, 1953, and 1966, galvanizing the rightist campaign to discredit the Tokyo trial.

The greatest disagreement Pal had with the majority opinion was the application of the law pertaining to crimes against peace. He thought that no war had become punishable under international law before or during World War II and that, therefore, all charges concerning aggressive war fell outside the jurisdiction of the Tokyo Tribunal. Similarly, he held that criminal conspiracy had never been a recognized category[7] of offense in the hotly of international law. For this reason, no charge of conspiracy could come under the consideration of the Tokyo Tribunal, cither. To allow the inclusion of aggressive war and conspiracy as chargeable offenses, in his opinion, violated the principle of non-retroactive application of new law and was tantamount to the victors' arbitrary exercise of power.

Second, even if one were to hypothesize that aggressive war and conspiracy had become punishable crimes under international law, Pal held that the evidence did not establish the Japanese commission of these offenses. As a matter of principle, he considered that no war could be regarded as aggressive or conspiratorial as long as there were reasonable grounds to believe that the war-waging country had *"bona fide* belief" that its national security was being threatened by menacing circumstances. In the case of the war waged by Japan, he found that evidence

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pointed to the existence of such genuine belief on the part of the Japanese leaders. For this reason, he concluded that the Japanese war did not merit being labeled as an international offense. Interestingly, the threats he identified as valid justifications for waging war were principally economic, political, and ideological, not necessarily military. He cited, for example, the rise of communism in China, Chiang Kai-shek's support of popular boycott movements against Japanese commercial activities, Western powers' breach of neutrality by siding with Chiang after the Marco Polo Bridge Incident in July of 1957, and Western economic embargoes of Japan. Pal did not establish that Japan had come under actual military attack or that it had been threatened by imminent invasion. The basic legal principle he set out, then, was that Japan, or any other country for that matter, was free to initiate war when confronted with an inhospitable international environment. In other words, the state had the right to use force proactively against unfriendly neighbors in the name of self- defense, even if the latter posed no threat of immediate military attacks.

As for war crimes, Pal again disagreed with the majority judges by holding that the Fourth Hague Convention of 1907 was not legally binding upon Japan. He pointed out that not all signatory nations ratified it despite the requirement indicated in the general participation clause. He held, moreover, that the Prisoner of War Convention of 1929 did not apply to Japan either, even though the Japanese government did agree to observe it by transmitting assurances to the Allied powers after the outbreak of the Pacific War. Concurring with the defense contention, Pal contended that the Japanese government gave these assurances only out of good will and without incurring legal obligations. "This, of course, does not mean that the fate of the prisoners of war was absolutely at the mercy of the Japanese," Pal wrote. But he did not clarify what were, then, Japan's international responsibilities with respect to the treatment of prisoners of war and the civilian populations under its military control. He was also silent about the effect of customary law, even though it was the central component of the majority opinion as well as the judgments at Nuremberg.

With regard to the factual findings about Japanese military violence, he established that Japanese forces committed "devilish and fiendish" acts in certain theatres of war, but concluded that there was no ground to convict any of the individuals on trial at Tokyo. The ones responsible for war crimes were soldiers and officers at the lower levels, he maintained, many of whom had already been prosecuted, convicted, and punished at Class BC war crimes trials. "It should be remembered that in the majority of cases 'stern justice' has already been meted out by the several victor nations to the persons charged with having actually perpetrated these atrocious acts along with their immediate superiors," he wrote. "These actual perpetrators are not before us." Therefore, he deemed it pointless to press charges of war crimes against the 28 accused. In sum, Pal took the position that the International Prosecution Section made the wrong charges against the wrong individuals, on the basis of inapplicable laws and inadequate evidence. (Totani: 2008p.218)

Other than these four major points of dissent. Pal had another level of criticism to the majority opinion. He disagreed with it not only on technical points of law but also on the philosophical foundation in which modern international law originated. Throughout his dissenting opinion, he repeatedly questioned the assumption that the purpose of modern international law was to protect

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international peace and the well-being of mankind. Such noble principles had been enunciated in the body of international law, he readily admitted. But he doubted that the world hail reached such a stage where one could entrust international courts to dispense justice in the name of world peace. Reality, as he understood it, was that the great powers—or "pure opportunist 'Have and Holders'" in his words—had concerned themselves with developing such law that would protect their expansionist claims and gains at the expense of the weak. Deeming that the fundamental purpose of international law was to sustain the existing egocentric and competitive Darwinian world system, Pal could not bring himself to accede to its validity.

Pal's treatment of laws pertaining to war crimes also runs counter to the current of international humanitarian law. His is opinion on the general participation clause in the Fourth Hague Convention of 1907 is a case in point. The Nuremberg Tribunal (IMT) ruled that it was ''not necessary" to determine whether all signatories had ratified the convention, since by the time World War II had broken out, "these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which were referred to in . . . the Charter." (Totani: 2008p.220) In other words, what was articulated in the 1907 Hague Convention had become part of customary law. The general participation clause, in this regard, was a non-issue and could not constitute a defense. The judgments of the successive trials at Nuremberg as well as the Tokyo judgment upheld the same legal opinion, which then became the foundation of the subsequent development of international humanitarian law.

Pal's treatment of the legal principles concerning individual responsibility is also open to critical assessment. Take, for instance, his opinion on the theory of cabinet responsibility. He wrote that this theory "may be an ideal one for the golden age of an international community" but that "(a)t present no government in the world functions in that way, and I would not expect any extraordinary standard of conduct of the present accused." (Totani: 2008p.220) In other words, he rejected the validity of cabinet responsibility by deeming that it was an unrealistic legal concept and that it might be workable only in a utopian world. As for the theory' of command responsibility, Pal held that "a commander-in-chief is en- tided to rely on the efficient functioning of the machinery supplied for the purpose of enforcing discipline in the army" and that he "(does] not believe that it is the function or duty of a commander-in-chief to proceed to prosecute such offenders." (Totani: 2008p.220) On these grounds he acquitted Matsui and all other military officers who were on trial at Tokyo. Yet these very legal principles Pal rejected were applied widely at contemporaneous war crimes trials, and arc now accepted as basic rules in international humanitarian law. (Totani: 2008p.220)

One may strive to place the relevance of Dr Pal's judgement in the context of the trial of Iraqi dictator Saddam Hussain in 2003.

On the December 2003, the provisional Iraqi government, set up by the Coalition Provisional Authority at the behest of the US 'proconsul' Paul Bremer, formalized the statute of the Iraqi Special Tribunal. This legal assembly, charged with judging Saddam Hussein and numerous exponents of the deposed Ba'ath regime, began its duties on the 19 October 2005. It was a

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national tribunal made up exclusively of Iraqi magistrates, presided over until 15 January 2006 by the Kurd Rizkar Mohammed Amin.(Zolo: 2009: p146)

Its architects had obviously had to rule out the International Criminal Court of The Hague, since the Iraqi authorities had not ratified the Statute of Rome. In the case, the Court of The Hague is specifically forbidden from exercising retroactive jurisdiction, unlike all other international criminal courts. Nor did the chief occupying power, the United States, consider getting the UN Security Council to set up a new ad hoc international criminal tribunal, on the model of those for the former Yugoslavia and Rwanda. The power of the Security Council to create special international tribunals on the grounds of its 'implicit powers' is notoriously controversial. The occupies also discarded the idea of setting up, in cooperation with the United Stated Nations, a mixed court made up of national and international judges, on the model implemented in Sierra Leone and East Timor. Nor again did the idea find favour of assigning the investigations and prosecution to the occupying powers, as had also been proposed. The general opinion was that Saddam Hussein had to receive the death sentence, and for it to be carried out- the only doubt being whether by hanging or shooting. The former head of state had to perish on the gallows if he were a common criminal, and be shot if he had been allowed to stand trial as he himself demanded, as commander-in-chief of the armed forces of his country.

It is widely believed in the West that the condemnation of the former Iraqi dictator and his collaborations by the special Tribunal – as happened with the Nazi leaders in Nuremberg- constitutes an important success for international law and justice. And it is also presented as a decisive step towards the pacification and democratic reconstruction of a country that the Anglo-American armies have liberated from a despotic and sanguinary regime. Obviously this is the point of view of those who side with the Western power who, in 2003, in blatant violation of the UN charter and general international law, attacked and invaded Iraq. (Zolo: 2009: p146)

Taking a less partisan standpoint, one can recognize that the former Iraqi dictator and his chief collaborators deserved to be put on trial by legitimate representatives of the Iraqi people. And it can also be conceded that, in the country's present situation, there were no plausible alternatives to a special Tribunal in order to make a break with the preceding despotic regime and inaugurate a new political direction. This thesis can be sustained in spite of the grave limits that any special Tribunal presents, starting from the compression of the rights of the defence and the substantial violation of the principle of *nulla culpa sine judicio* ('no fault without a law') which requires a rigorous presumption of innocence for the accused. It should be added that, in the trial that took place, this principle already appeared to have been seriously violated, if only in the treatment being shown to the principle defendant, Saddam Hussein. The former president was held captive in a secret locally not by Iraqi authorities, but by US forces that possibly tortured, which he himself did not tire of denouncing with the utmost vehemence. (Zolo: 2009: p146)

Apart from the normative anomalies and distortions that we shall come on to, there are good grounds for casting doubt on the international legality, political legitimacy and independence of the Iraqi Special Tribunal, since it was set up in the context of the military occupation and at the will of an occupying power that controlled the whole scenario. From a political standpoint, the power exercised by the civilian and military personnel of the United States and the other contingents present on Iraqi territory is wholly illegitimate. It is a power that was won by force

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of arms- at the cost of thousands of Iraqi lives-in a war of aggression that violated both the UN Charter and customary international law. And from a strictly legal viewpoint- of *jus in bello* – it certainly cannot be maintained that the 1949 Geneva Conventions attribute to an occupying power the authority to set up special tribunal to judge the leaders of a deposed regime. Indeed one can argue. that, being international criminals, the occupiers have no rights whatsoever with regard to the occupied, but only obligations. .(Zolo: 2009: p149)

There is little to be gained by involving Resolution 1511 of the Security Council which, in the interpretation of some Western commentators, 'remedied' the original illegitimacy of the war of aggression and consequent military occupation. In reality that document could not have cancelled out the infringement of international law for which the United States and its allies had made themselves responsible. Moreover, resolution 1511 imposed on the occupies, as a condition for the legitimacy of the power they exercises in Iraq, a precise timetable for securing approval of a constitution, organizing democratic elections and, obviously, effecting the withdrawal of the occupying forces. (Zolo: 2009: p151)

At the formal level, the political source for the statute of the Tribunal was the Iraqi Governing Council, set up by the coalition provisional Authority and thus, in practice, by the US military governor Paul Bremer, no one imagines that the Governing Council, which had no legislative authority and possessed no autonomous sources of funding, was the real power that willed, backed and financed this special Tribunal. It was in fact an occupying power, the United States. That pressed for the institution of a special Tribunal to bring to trial the depose regime with a rigorous application of the Nuremberg model: try the enemy after his military defeat, in order to annihilate him in moral terms and put him to death.

Moreover, even though it is stated repeatedly in the statute that the members of this Tribunal should be persons of 'high moral character, impartiality and integrity', in fact they offered no guarantee of autonomy with respect to the occupying powers or impartiality towards the accused. This negative presumption is reinforced by the fact that it was the provisional government which designated the judges and prosecutors, at least in part. In any case, according to the statute the Council of Ministers was to choose the judges on the basis of political criteria that could be neither transparent nor impartial. As Hanny Megally and Paul van Zyl have shown, it is hardly surprising that the provisional government, under the supervision of Paul Bremer, lost no time in defining in detail the investigative and procedural strategy to be adopted by the Tribunal, providing an appendix listing those held in prison who were to be tried first. (Zolo: 2009: p150)

Moreover, in yet another replication of the Nuremberg model, Article 14 of the Tribunal's statute provides that the court can pronounce on an aggression undertaken by the Ba'ath regime against an Arab country, such as Kuwati, but denies it competence to judge crimes of aggression committed against non-Arab countries. This singular provision was introduced by the US architects of the statute to ensure that the Tribunal did not investigate the war of aggression that Iraq conducted between 1980 and 1988 against Iraq, a country that observes the Muslim religion but is not Arab. The reason for this is very simple: the United States gave economic, military and diplomatic backing to that aggression, which caused no less than 800,000 causalities. (Zolo: 2009: p151)

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In addition the United States was an accomplice to Saddam Hussein in failing to denounce some extremely serious crimes committed by Iraqi troops. The attacks carried out against Iraq with the use of chemical weapons, and the atrocities in the Anfal campaign against the Kurds, were certainly no less serious than those currently imputed to Saddam Hussein. Thus defence being able to use the *tu quoque* argument, which would have been both legally and politically embarrassing for the Tribunal's sponsors. It was, in fact, a trial that celebrated 'victors' justice in the most brazen fashion. (Zolo: 2009: p149)

The statute of the Tribunal approved by the provisional government went well beyond the legal abnormality intrinsic to any special tribunal. Although it displayed the normative hallmarks of Western legal culture, the statute violated some fundamental principles of the rule of law normally respected among Western nations, and which were adopted in the statute of the International Criminal Court of The Hague.

The Tribunal could exercise its jurisdiction retroactively, judging conduct that had taken place before its institution, and hence in the absence of its jurisdiction (established as covering the period July 1968-May 2003). While this can be considered an anomaly typical of any special tribunal, the Iraqi Tribunal went further: it actually violated the principle *nullum crimen,nulla poena sine lege*. (Zolo: 2009: p152). According to this principle no national tribunal –and such was, or pretended to be, the Iraqi Special Tribunal-can apply to citizens under its jurisdiction punishments which were not contemplated by the legal system in force when the conduct in question (subsequently considered illegitimate) was enacted. Alongside Iraqi criminal legislation (Article 14), the Iraqi Special Tribunal introduced a large number of types of crimes(Article 11, 12 and 13 reading to the crimes of genocide, crimes against humanity and war crime) transposed from the statutes of the three international criminal courts then operating. (Zolo: 2009: p152) Some of these types, as is explicitly recognised in Article 24, had not been contemplated by Iraqi criminal legislation, and were introduced precisely because it was felt that Iraqi positive law was lacking in norms that would make it possible to incriminate and condemn the former dictator and his collaborations.

In view of these lacunae, Article 24 of the statute authorized the Tribunal judges, whenever a crime contemplated by Article 11, 12 or 13 had no counterpart in the Iraqi criminal system, to determine the nature of the punishment on their own authority (taking into account the gravity of the crime, the individual characteristics of the accused and international jurisprudence). It is clear that this not only infringed the principles of non-retroactivity of criminal law (incidentally, by an organ- the provisional government- devoid of any legislative power), it also granted to the Tribunal judges such broad discretionary powers as to invest them with the right to establish norms that were in practice unquestionable and, as such, illegitimate and despotic, surely this was the basis for carrying out summary justice on members of the deposed regimes, amounting to all intents and purposes to a political purge. .(Zolo: 2009: p152)

It is the value of the certainty of criminal law that was compromised. As Albert Venn Dicey has explained, this certainty is not only the cornerstone of the rule of law, but one of the axioms of the western liberal democratic tradition: precisely that tradition in the name of which the occupying force claim to have undertaken the war against Iraq. It is clear that these distortion depended on a large degree on the will of the United States to reject international criminal

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jurisdiction and any collaboration on the part of the United Nations, and at the same time to attribute to a national Iraqi Tribunal, operating under its close control, the competence *ratione materiae* (according to subject) of an international criminal court. (Zolo: 2009: p153)

The true purpose of the Nuremberg trial (and indeed that of Tokyo) was not to 'do justice'. Doing justice means trying to interrupt the political sequence of division, hate and bloodshed so as to deconstruct the conflict and exorcize it with the use of legal means. Justice, in this sense, is opposed to the factiousness of politics and the violence of war, because it is the pursuit of a sphere of impartiality – the recourse to legal principles capable of resolving and neutralizing the conflict. If the metaphor of politics is the sword, that of justice is the scales. This is precisely why the institution of special Tribunals at the end of a war – whether international or civil-can be, even though it will not necessarily be, the first step towards pacification of the collective memory and the inhabitation of generalized vendetta, much like an amnesty.

The Nuremberg trials brought about a radical change in the idea of international justice, cancelling out its distinction between politics and war. It was a setting of accounts and of old scores, and represents the revenge of the victors over the vanquished. It was a parody of justice, with a lethal symbolic significance. To be defeated and killed in war is a normal matter, and may even be honourable. But to be put to death after being arraigned by the enemy represents an irremediable defeat- the ultimate degradation of a person's dignity and identity.

The United States stages a trial of Saddam Hussein that reproduced and radicalized the rationale of stigmatization and retributive revenge that predominated at Nuremberg. The legal anomy and the void of legitimate power caused by a war of aggression were such that the trial of the former Iraqi dictator came down to a propagandistic and theatrical ritualization of justice, with the principle objectives of concealing the misdeeds of the **victors**, of making the adversary appear inhuman, and of legitimizing his hostile treatment, as an 'enemy of humankind', to the point of sheer inhumanity. The ritual shedding of the blood of Saddam Hussein made a contribution not to the pacification and democratization of Iraq, but to the cause of hate and terror. Victor's Justice reigned supreme at Baghdad, although Dr Pal's judgement might have somewhat dettered the 'victors' from setting up of an ad hoc tribunal or referring the case to the ICC.

2. CONCLUSION

Radhabinod Pal's dissent is the first main critique of international tribunals by a participant in the process. At a time when the international •community is refocusing attention on this particular mechanism to implement humanitarian laws, the significance of Pal's dissent lies in the nature of the questions it raises; questions regarding the process of norms formation, of individual criminal responsibility, and of the possibility of creating an international criminal law. While the questions remain relevant, Pal's analysis falls short mainly because of the limitations of its theoretical paradigm. Concepts like anarchy and sovereignty, which Pal regarded as static and given, are now being questioned.[35]

For Pal, sovereignty was an unchanging factor: a factor that needed to be respected in international relations. Hence, his emphasis on individuals not being liable for prosecution for acts committed in their official capacity. However, Bruce Cronin and Samuel Barkin, for

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instance, have argued that sovereignty is a variable. There has been a historical tension between state sovereignty (which stresses the link between sovereign authority and a defined territory) and national sovereignty (emphasizes a link between sovereign authority and defined population). In their opinion, the current period is one where international norms legitimize national rather than state sovereignty; one could, therefore, expect the international system to be moic sympathetic to the claims of ethnic groups even within state borders.[36] Placing Pal's dissent in this framework would give us some interesting answers to the questions he posed.

Pal had held that law would be meaningless if its obligation is dependent on the mere will of states. Given that state borders are no longer regarded as sacrosanct, the fear of international intervention might motivate states to respect human rights more than they did in the past. While the standardization of norms is an ongoing process, one important implication of the 'nation' being given priority over the 'state' is that the international community may no longer be willing to turn a blind eye to "gross abuses by governments of their population".[37] In such a context, the creation and implementation of an international criminal law may not be as improbable as it seems. The proposed draft statute has many obvious loopholes, especially pertaining to areas of jurisdiction, law applicable, admissibility and above all the definition of the category of 'crimes of concern to the international community as a whole'. Despite these drawbacks, the ICC promises the best way to ensure to some extent at least, the implementation of humanitarian laws.

As Pal pointed out more than fifty years ago, we do not have a perfect international community with a high level of integration of values; what we do have is a system in which despite its flaws, certain laws can and need to be implemented to preserve the dignity of the individual.

The changes in the international system that have been dealt with in this paper seem to defy the logic of Pal's analysis. The questions that they give rise to are many and unsettling. Are we members of an 'international community' today? Is international law stronger now than it was earlier? Have we found a solution to the problem of 'victor's justice' which had so disturbed Pal? Do international tribunals have a deterrent effect? Does a dissent written in 1948 have any relevance today? An attempt to answer these questions would imply looking at the developments in the international system from within Justice Pal's theoretical framework.

Is there an 'international community'? An affirmative answer to this question would probably be the biggest challenge to Pal's world view. However, before coming to any conclusion, we have to keep in mind Pal's conception of an international community. Going by Schwarzenberger's definition, Pal believed that the pre-requisite to the creation of any community was the binding force which makes it cohesive. In the case of the international system, this binding force is common norms and standards. The question about international community would, therefore, translate into a query on whether we have universal norms. The answer to this would be a definite 'yes', especially while discussing areas like 'war crimes' and 'crimes against humanity'.

There are states which violate these norms time and again; but all these violations are recognized as breaches of international law. At the normative level, the international system can be considered to be a 'community' even within Pal's own definition. The problem, however, arises at the level of implementation. What Pal would probably point out is that a mere recognition of violations does not suffice. Are all the violating states punished by universally applicable rules? To take an oft-quoted example, the USA violated a sencs of laws, right from the one prohibiting the use of 'force to almost all the existing humanitarian laws, in Vietnam. However, no charges

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were brought up against any of the US government agencies involved in the operation, nor were any US citizens tried for violations of international law in any international tribunal or court.

The international tribunals set up to prosecute perpetrators of crimes against humanity in the former Yugoslavia and Rwanda have been cited as illustrations of the existing universal regulatory mechanism. At one level, any comparison between the tribunals in Yugoslavia and Rwanda and that established in Tokyo over fifty years ago would be meaningless: the circumstances are different, the parties involved are different, and the method of enforcing the regulatory mechanism is different. Politics does play a very important role in determining international crimes, but in the case of Yugoslavia and Rwanda, there was a general consensus about the extent of human rights violations and the need to set up tribunals to prosecute the violators. While these were important determinants, what probably swung the balance in favor of setting up the tribunals was that none of the powerful states would be put in the dock as defendants. The concept of 'victor's justice' may no longer exist in the form it was visualized during the Tokyo trials; however, it is still extremely difficult to envisage a situation where tribunals are set up to try a country like the US for violation of humanitarian laws.

The International Criminal Court is being projected as the solution to this problem. Since the court would be permanent and would have a definite jurisdiction, it would probably provide a more equal justice than the concept *of ad hoc* tribunals. While sound in theory, this would not bear close scrutiny in actual practice. The draft statute proposed by the ILC makes it clear that the court can exercise jurisdiction only after states parties accept its jurisdiction. The concept of state sovereignty is too deeply rooted in the international system for any state to accept, without any pre-condition, the jurisdiction of a body like the proposed criminal court. The 'fundamental gap' in international relations-[1]—no state is bound to submit its disputes with other states to a binding judicial decision—seen by Radhabinod Pal during the Tokyo trials exists even today. Even while holding that "nations have not yet considered the condition of international life ripe enough for the transposition of principles of criminality into rules of law in international life", Pal believed that :if and when international law would be conceived to govern the conduct of individuals it may become less difficult to project an international penal law. (Tanaka Maccormack and Simpson, 2011:p228)

Though international law does not actually 'govern the conduct of individuals', the concept of individual criminal responsibility has become an accepted norm. But has it made the development of an international criminal law any easier? Despite the existence of rules governing the conduct of states and to a certain extent influencing the behavior of individuals, one still has to deal with the question of what makes any act, a 'crime'. An answer to this question is provided by Judge Pal in his dissent. While discussing why piracy alone was chosen for international regulation, he makes it clear that it as not because of theoretical considerations regarding the nature of international crime, "but by various political motives, the interest of one country or a group of countries in the combat against a given crime, material facilities for the organization of such combat...".[34] Unless and until we reach a point where a crime against one state would be seen as affecting the interest of all the states, it would be extremely difficult to construct an international criminal code.

Indeed, some of his theoretical views are contestable. An example is his championing of national societies as 'cohesive' and the ideal toward which the international society ought to move.

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Whether nations can be really regarded as 'communities' within Pal's own conception is itself debatable. Moreover, how can the level of integration of values be measured in domestic societies; problems like hegemony and cultural relativism are not unique features of the international system. They exist even within national boundaries. Even if the level of integration in national communities is greater than that of the international system, this takes place over a long period of time. Presuming that we want the international legal system to resemble the municipal legal system, what would be required is a longer time frame. While dealing with the issue of 'social utility of punishment', Pal conveniently overlooks the deterrent effects of tribunals and the norms they create. We may not be living in a perfect world where all offenders are judged by the same criteria, but the creation and internalization of norms would contribute immensely to the development, and eventually, the codification of law. (Vardarajan: 1998, p39, IJIL)

The Tokyo trials concluded at a time when India had just emerged as an independent nation. Radhabinod Pal was an Asian, a citizen of a country that was trying to redefine the international system, a country which had not really borne the brunt of Japanese actions during the war. These factors probably did influence his opinion and verdict. Pal's 'reading of the international system, moreover, reflected the dominant theoretical paradigm of the day, namely, Realism. Whether he might have interpreted the system differently if exposed to other approaches remains a matter of conjecture.

Radhabinod Pal's dissent is the first main critique of international tribunals by a participant in the process. At a time when the international •community is refocusing attention on this particular mechanism to implement humanitarian laws, the significance of Pal's dissent lies in the nature of the questions it raises; questions regarding the process of norms formation, of individual criminal responsibility, and of the possibility of creating an international criminal law. While the questions remain relevant, Pal's analysis falls short mainly because of the limitations of its theoretical paradigm. Concepts like anarchy and sovereignty, which Pal regarded as static and given, are now being questioned. .(Vardarajan: 1998, p39, IJIL)

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to turn a blind eye to "gross abuses by governments of their population". In such a context, the creation and implementation of an international criminal law may not be as improbable as it seems. The proposed draft statute has many obvious loopholes, especially pertaining to areas of jurisdiction, law applicable, admissibility and above all the definition of the category of 'crimes of concern to the international community as a whole'. Despite these drawbacks, the ICC promises the best way to ensure to some extent at least, the implementation of humanitarian laws.

As Pal pointed out more than fifty years ago, we do not have a perfect international community with a high level of integration of values; what we do have is a system in which despite its flaws, certain laws can and need to be implemented to preserve the dignity of the individual.

One may conclude that Dr Pal;s judgement, despite its criticisms, may be approached by researchers in international criminal law as a voice of the third world against the oligarchy of the major powers who have politicized the entire realm of international criminal law, and despite the inception of the ICC, victors justice seems to plague the system, in a different garb. In this anarchical world order, lack of a global regulatory agency, a world government system, lack of democratization, empowerment, equity, seems to be the major hindrances in the path of development of an egalitarian system of international criminal law.

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INTER-STATE MIGRATION AND POLICY RESPONSES: A STUDY OF VULNERABILITIES OF MIGRANT WORKERS OF SOUTH 24 PGS WRT INTER-STATE MIGRANTS WORKERS' REGULATION ACT, 1979

DR.SUJATA MUKHOPADHYAY

Asst. Professor and Head, HMM College for Women, Dakshineswar, Kolkata

ABSTRACT

Sociologists find it difficult to define the structural characteristics of a migrant, as they leave their source area in search of a destination area due to many reasons, livelihood being one of them. Though there are many reasons for interstate migration, this force contributes huge services to the emergent labour market in India, and is a key component in the growth of the economy. However, once the migrant worker settles in the host state, he becomes vulnerable in the hands of the labour contractors, and loses power to bargain. Apart from social and cultural alienation, he is exploited by the middlemen.

In this regard, this research paper analyses the policies laid down by the state via the Interstate Migrant Workers Act of 1979, and goes on to case studies and stratified Survey of the migrant workers living in the Budge industrial belt of South 24 parganas (pgs). The interventionist policy of the state regarding jute workers, fall in different categories. A study will be done to analyse the lacuna in policymaking and ways to overcome intermittent victimisation of the worker, who is uprooted from his own village and is rootless in the host state too.

Keywords- Interstate migrant workers, emergent labour, Interstate Migrant workers Act, 1979, cultural alienation, interventionist policy of State, lacuna in policymaking.

Introduction

There is a considerable conceptual difficulty in defining a migrant. Sociologists have differences of opinion in structuring the basic characteristics of a migrant because the workers' mobility from the source area to the destination area has different reasons. However, for the benefits of this research paper, a migrant is defined as "a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national"[1] (**United Nations Convention on the Protection of the Rights of all Migrant workers and Members of their Families).** There are many sub-divisions within the community of migrant workers depending upon the time they spend in the host states. In India, a cut off time of 6 months is reckoned to

[1] http://www2.ohchr.org/english/bodies/cmw/faqs.htm

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determine migration patterns in workers. Based on this, there are 'permanent', 'semi-permanent' and 'temporary' workers[2].

There are many reasons why there is such rampant migration of workers in India—ranging from economic, social to cultural ones. However it is an undeniable fact that inter-state workers contribute huge services to the emergent labour market in India, and are a key component in the growth of the economy. Very little research has actually been done on the plight of the Inter-State migrant workers in India, largely because of their invisibility. The census has apparent fallacies in counting the proper number of workers in the unorganized sector, because of a faulty policy scheme of the Central Government which exists in paper only but is not implemented. Supervision of contractors is also a grey area that needs to be more transparent especially because it the contractors who ferry the labourer from his native place to the host state. Hence the numbers of workers who actually shift from their own places are not really known.

Depending upon the diversity in the nature of migration, as well as the pattern of development **(NCRL 1991**), it was inferred that chaotic development in key areas of India is one of the primary causes of interstate migration. Also, there are tribal workers who migrate seasonally to other states, as agriculture itself is a seasonal one and the worker has to keep the family thriving throughout the year. Also, there are 'push' and 'pull factors', which work simultaneously. The pull effect happens when the worker feels that he will benefit economically in terms of wages and living conditions by migrating to another state. On the other hand, the 'pull effects', are mainly migration to repay debts incurred by the worker to marry off his daughter of for building a *pucca* house. The NCRL also noted that pure survival instinct is another factor causing massive migration. The poor and landless people mostly belonging to the lower castes are a significant portion of inter-state migrant profile. This however has changed in recent times.

From the 1960s onwards, commercialisation of agriculture has seen peak periods, deploying many farmers, as well as lean periods of local labour deployment. The rice producing areas of Bardhaman in West Bengal produces huge number of migrants in the off-season who come to other parts in search of livelihood. Thus, migration decisions are taken not only at the individual level, the family setup and household demands also play a major role in inter-state migration (**Rogaly et al, 2001**)[3]. Better control of the labour force is often cited as another reason why workers are forced to migrate individually and later on with their families. Taking the example of Kolkata in West Bengal, there is a huge demand for Bihari/ non Bengali drivers to work as taxi drivers as well as drivers in private concerns. This gives a better bargaining power to the owners who feel that they have more control on workers who shift from their native land, as they are ill equipped socially and culturally. Inadequate knowledge of the legalities of the contract with owner as well as lack of political and social identity in the host states makes the migrant

[2]http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/New_Delhi/pdf/Internal_Migration_Workshop_-_Vol_2_07.pdf

[3]Rogaly, B., Biswas, J., Coppard, D., Rafique, A., Rana, K. and Sengupta, A. (2001). Seasonal migration, social change and migrants rights, lessons from West Bengal. Economic and Political Weekly, pp. 4547–58

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driver from Bihar more vulnerable than his local counterpart. Same is the case of outmigration of girls, who come to Kolkata after the Aila (climatic disaster in the coastal area of Sunderbans (regional migration) depleting the economy of the region), working as domestic helps in posh Kolkata areas (**Sardamoni, 1995**[4]). Sometimes groups of women shift together to the more urban areas, setting off intra-regional migration. An interesting pattern that follows is that these individual who come ultimately form powerful social networks, in a better position to exploit bridgeheads especially in urban locations.

The past decade has seen workers migrating more to the tertiary sector. The research area of this paper which is South 24 pgs has most migrant labourers who now belong to the unorganized informal sector like rickshaw pullers, beedi workers, brick kiln workers, masons, van pullers and those engaged in odd jobs like the mutiya mazdoors. There are also semi bonded labourers, child labourers etc, whose names are not enumerated in the Census, as most of them do not possess identity cards.

The research paper is divided into two broad halves—the first section will deal with the chosen area of research that is the inter-state migrant workers who come to South 24 pgs in search of livelihoods. It seeks to understand their vulnerabilities in the sub national context. Recent studies have shown that there has been a huge influx of labourers from the neighbouring states like Bihar, Orissa, Uttar Pradesh. A sample survey was followed by a detailed analysis of their living conditions that is social economic and cultural vulnerabilities of the workers. The second half will deal with the policy responses of the Government, with particular emphasis on the provisions given in the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979. A detailed questionnaire will be prepared for interviewing the workers, the Contractors, policy makers and local trade union leaders to understand the subject from all possible angles. Whether the policies enumerated by the centre which are supposed to be carried forward by the State are at all implemented or not, and if they are not, what are the lacunae will be investigated. The entire operation of Inter-state workers from the places where they come to the role of contractors, middle men, owners are sought to be understood.

Critical Area of the Research

The critical research area is a culmination of various factors like recent coverage's of workers agitations in different plants and factories, the suicide of Tea Garden Workers in North Bengal (**Paul Le Blanc, "India Yesterday: Development and Revolution Part 1" in International Journal of Socialist Renewal**). This is not only a unique feature in West Bengal but is prevalent in more crude forms in places like Rajasthan, Bihar, UP, Maharashtra and Madhya Pradesh. Moreover, field experiments and surveys reveals a glaring gap in the macro data obtained versus sample surveys. A preliminary scanning of these led to the formulation of the key research area. The research conducted on migrant workers **in Punjab by CEC** pointed out gross violations of Child Labour Prohibition Act 1986, the Minimum Wages Act 1948, and the Contract labour Act 1970, the Interstate Migrant Workmen Act 1979 and the Equal Remuneration Act, 1976. A similar situation was reported **by Rani and Shailendra** (2001) in their study of construction

[4] Sardamoni, K. (1995). "Crisis in the Fishing Industry and Women's Migration: The Case of Kerala", in SchenkSandbergen (ed.)

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sites in Gujarat. Migration of workers in India and especially in West Bengal is largely invisible due to lack of data and documentation (Source: www.eldis.org). Though the labour ministry website of the Government of West Bengal does give details of the number of interstate migrants and the percentage of migration, these are not enough and do not reflect the various labourers of the unorganised sectors giving their services, though their numbers are a considerable lot ("**An Overview of Migration in India, its Impacts and key issues" by R. Srivastava and S.K Sasikumar, National Labour Institute, UP, India**). One of the lacunae found in the government websites is the database of these unorganised sectors. Greater effort is needed to reduce the vulnerabilities of the workers, by facilitating its agencies for deeper penetration into these areas. Also, data alone gives only a statistical analysis of trends in interstate migration, but does not reflect the socio political alienation to which the migrant is subjected to, gender equality, nor does it give any reference to the interventionist policies undertaken by the state administration to stop the malpractices of the labour contractors, the middlemen who bring in the migrant from his home state, or the implementation of the Interstate Migrants Act, 1979 at the micro level.

The research paper therefore tries to probe the following:

1. The provisions of the Interstate Migrants Act 1979 and how far it has been implemented by the State.
2. The socio- economic conditions and vulnerabilities of migrant workers in the host state.
3. Analyze the lacuna in policymaking by the State and suggest possible way outs to stop the victimization of migrant workers.

Research Methodology

Both primary as well as secondary data was collected for doing this research paper. A Stratified sample (sample size and characteristics given later) survey of workers was done in the Budge Budge area of South 24 parganas. Interviews were taken of union leaders, who were also workers in the jute mills, who knew the history of the place as well the conditions of the workers of Cheviot Jute Mill and the subsequent lessening of the number of workers due to stagnation and lack of manufacturing work in there. The entire area of Budge Budge worker's colony was visited to collect data from individual families. Random Sample survey of the worker's family members was done to get the socio-political picture of the place. A total of 80 workers were interviewed during the Stratified sample survey, out of which the male to female ratio was 10:1. The total number of family members of the workers interviewed was 100, mostly women. Similarly, Focussed Group Discussions of around 80 workers assembled at the different Jute Mill gates during dispersal were taken to ascertain the conditions of the workers in the unorganized sector, the infrastructure of the place at present, the extent of migration that has taken place in the last 10 years. Detailed discussions and interviews of the Union leaders in the jute factories were taken to get a clear understanding of the prevailing situation amidst the workers. One very interesting fact that emerged during the interview was the socio political cultural differences in the characteristics of the workers. There was gross migration reported while conducting the research, though many claimed that migration was lesser in the last 5-6 years.

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Secondary data was collected from the different government reports published in the internet, documents and books to get the various legal provisions in the Interstate Migrant Worker's Regulation Act 1979. Different research works undertaken in other contexts were also consulted to get an overview of the problems of migrant workers in different states as well as the historical antecedents of the jute mills. Tables and graphs are formulated on the basis of the questions.

The Setting

The area chosen for the field study was the Budge Budge industrial belt in South 24 Parganas. Since many decades this area has been an ideal industrial hub, with the leading Bata factory being situated here. Not only Bata, the entire belt of Bata- Budge Budge has railway lines (the Sealdah-Budge Budge line) for transportation of goods and Hooghly River for supplying water to the jute mills. During 1971, the jute mills in Budge Budge employed thousands of workers At present many of the erstwhile factories and mills have shut down due to many political and economic reasons, some of the Jute Mills that are still operative. Geographically, this entire belt was once considered having huge potential as far as Industrial growth of the state is concerned. Of late, a transformation in lifestyle and structure has taken place, with ongoing projects like Calcutta Riverside and the elevated corridor from Alipore to Batanagar.

For the purpose of this research, the jute mills chosen were

1. Budge Budge Jute Mills Limited
2. Caledonia Jute Mills
3. Cheviot Jute Mills
4. New Central Jute Mills

The Sample

20 workers were chosen from each of the jute mills listed above. A stratified sample survey was done with a research questionnaire. The sample was stratified on the basis that all the workers chosen were interstate migrants, semi skilled, aged between 30-50 years, with a 10:1 ratio of gender orientation of male to female workers. The reason why women workers were not readily found is due to a recent trend where women were not coming from other states due to the socio political landscape of the West Bengal as well as gender differentiation. The migrant workers interviewed in the survey came from Siwan, Chhapra, Gopalgunj, Darbhanga in Bihar and Muzaffarpur, Azamgarh, Benaras in UP. One interesting factor that emerged during the survey was that the percentage of interstate migrant workers has diminished to an alarming scale since the last decade. Instead of workers coming in, skilled as well as semi skilled workers from West Bengal were actually migrating to places like Dubai, Qatar, and within the state in Kerala, Andhra Pradesh, Chennai, Bengaluru etc.the reasons for this outmigration however is not part of this research paper and hence will not be probed.

The Research Questionnaire

The research questionnaire was divided into several halves, covering several aspects of the life of the interstate migrant worker. The first section deals with the socio-economic background of the worker and included his name, address etc, then about his job profile including wages,

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number of working hours, semi skilled or unskilled, and social life like the material with which his house is built, number of children, profession of spouse, educational status etc. the detailed questionnaire is given below for proper appraisal.

Questions to know socio-economic status and Vulnerabilities of the worker of the worker

1. Name
2. Address
3. No. of members in the family
4. Does spouse work elsewhere?
5. If yes, what is her monthly income?
6. Do children work elsewhere?
7. If yes, what is their monthly income?
8. Weekly income of the worker
9. No. of hours spent in the factory
10. If his name was in the Master Pay Roll of the Company
11. Is he entitled to P.F? Gratuity?
12. Does he get bonus?
13. Is there any provision of overtime in the factories for extra work rendered?
14. What is the rent he has to give?
15. What is the ratio of income: expenditure in his family
16. What is the amount of his monthly savings
17. Does the worker have a bank account?
18. What has been his investment pattern in the last one year.
19.

To understand the social status of the worker the following questions were asked

1. What type of room does the worker have?
2. What gadgets does the worker possess, a fridge, a TV, gas, mobile phone, music system?
3. What was the educational qualification of the worker and his wife
4. Does the worker have a cycle/bike?
5. Do his children go to school? How much have they studied?
6. Does the worker own land/ house apart from the one in which they are living?
7. Do you have a separate toilet in your house?
8. How much jewellery does your wife have?
9. Do you have electricity in the house?
10. Do you have a voter/ aadhaar card?

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Questions to analyse the implementation of the Interstate Migrant Workers Regulation Act 1979

1. What made you migrate to West Bengal
2. Who brought you to Budge Budge to work ?
3. Did you get any displacement allowance for coming to work here?
4. Do you get any home journey allowance?
5. Are you getting any residential accommodation here?
6. Do you get accident benefits in case of accidents? Are you aware of your right to lodge complaints with the police?
7. Do you get timely wages? Is there a master pay roll that you are made to sign?
8. Are you entitled to Provident Fund/ gratuity benefits? What is the amount approximately one gets?
9. Do you have an identity card?
10. Do you have a bank account where wages are transferred?
11. Apart from ESI benefits, are there any other medical facilities that you get from the contractors?
12. (for Contractors) do you have a valid contractor's licence for employing interstate migrant workers?
13. (for contractors) Do you issue a passbook to every worker including payments and allowances

Findings of the Stratified Sample Survey and Key Observations: Economic Vulnerabilities of the Migrant Worker

At the outset it is necessary to understand how the vulnerabilities of the interstate migrant workers who come to settle to the host state in search of job affected the job market. Primary research revealed that most of the workers settled in the Budge Budge area are second generation workers. Some member of the family especially the father initially migrated from his native place due to a number of reasons mentioned in the introduction, survival instinct being the primary one. Though the native places like Bihar and Uttar Pradesh gave a good agricultural yield, yet the system of distribution of agricultural produce and the presence of middlemen (dalaals) and changed market conditions no longer made agriculture a profitable venture for them. Bifurcation of land, change in ownership patterns, lack of produce, climatic conditions, interest hikes in personal loans and exploitation by the middlemen as well as moneylenders made things worse for the farmers. Hence since the last few decades, West Bengal witnessed rampant migration from other states.

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Additionally, the jute industry was a profitable venture, with jute mill workers getting higher wages. Also, the demand for jute fabrics, gunny bags, and the projection of jute as a fashion statement made many workers migrate to West Bengal at the dawn of this decade. However, the changing social, economic and political scenario plus state policies have disenchanted many, for which the graph of migrant workers is showing a downward curve. It was initially postulated that the purpose of the research work is to understand how the state has responded to the vulnerabilities of the interstate jute workers. According to Derose et al (2007), vulnerability is shaped by many factors including political and social marginalization and a lack of socioeconomic and societal resources (source: Student paper submitted at Fayetteville University)"

Data collected on educational level of the worker, his children and spouse of all the jute mills covered revealed that none of the migrant workers had passed beyond class 12. Out of the 80 workers interviewed in the stratified sample, only 8 workers had passed class 12, 34 workers were matriculate, 21 were class 8 pass, 10 had negligible education 7 were illiterate. The women and children interviewed had the following educational criteria.

Table 1.Educational Level of Migrant workers, their spouses and their children

Education	Workers	Spouse	children
class 12 pass	8	0	18
class 10 pass	34	13	33
class 8 pass	21	33	24
negligible	10	20	3
Illiterate	7	14	2

Table 2. weekly wages earned by non-skilled, semi skilled and skilled worker

worker	wages (Rs) per day
non skilled	250
semi skilled	350
Skilled	450
women non skilled	150
women semi skilled	300
women skillled	350

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Table 3.Income expenditure pattern of the worker

A total of 80 migrant workers were interviewed for the stratified sample survey. The sampling was done in such a way that all the workers were semi skilled and was working in the respective jute mills for the last 2 years, permanent workers, having to work 6 days a week, 48 hours in total. In this table, the pattern of income and expenditure of 15 workers is presented, to give a graphic illustration of the research conducted. The evaluation however (**given at a later section**) includes all the findings from the workers along with the Focus Group discussions.

Name	Monthly income	Entitled to P.F/ Gratuity	Income: Expenditure	Loans	Savings In bank account	investment
1. Jay Kr. Das (Lakkhisarai, UP)	8400	Yes	7:10	Nil	N	Land
2. Dharmendra Mandal (Lakkhisarai, UP)	8400	Yes	7:12	40,000	N	Land
3. Shyam Kumar (Ballia, UP)	4800	Yes	3:5	15000	N	N
4. Bijay Kr. Rai (Rampur, UP)	6000	Yes	1:2	17000	N	N
5. Dinesh Ram (Vaishali, Bihar)	8400	Yes	7:8	6000	20000	Land
6. Sudarshan Yadav (Siwan, Bihar)	6000	Yes	2:3	Nil	14200	Land
7. Surendra Yadav (Siwan, Bihar)	6000	Yes	7:12	23000	N	N
8. Manoj Yadav Siwan, Bihar)	4800	Yes	2:3	5000	23000	Land
9. Pappu Singh (Chhapra, Bihar)	8400	Yes	7:9	15000	4000	Land
10. Suraj Paswan (Jharkhand, Bihar)	8400	Yes	7:10	12000	1500	N
11. Subhash Yadav (Siwan, Bihar)	6000	Yes	1:1.5	45000	N	N
12. Prem Shaw Asansol	6000	Yes	1:3	6000	N	Land
13. Namish Patel Munger	8400	Yes	7:8	15000	N	Land
14. Mohan ram (siwan, Bihar)	8400	Yes	1:1	Nil	5800	Land
15. Sailesh ram (Chappra, Bihar)	4800	Yes	7:10	21000	N	Land

Table.3 gives an interesting picture of the economic conditions of the worker. The pattern which emerges from the above data shows that Rs. 8400 per month is earned by a worker of more than

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5 years. His daily income is Rs. 350 multiplied by 24 working days= Rs.8400. Similarly, the worker who has worked for more than 3 years gets Rs. 250 per day multiplied by 24 working days= Rs. 6000. Workers who have joined only for a year get Rs. 200 daily multiplied by 24=Rs. 4800. All the workers are enrolled in the master pay Roll of the Company and are hence entitled to PF, Gratuity etc as well as ESI and medical benefits, according to the Act of 1979.

However, though these exist in pen and paper, the PF/ Gratuity received by the worker per month s much less and sometimes there is no Gratuity or PF at all (**these are given in details in the evaluation of the research section**). The income versus expenditure pattern has been reduced to a ratio on the following basis. Suppose a workers income per month is Rs. 8400 and his expenditure is Rs. 12000. Therefore Rs. 8400:12000 has been reduced to 7:10 ratio. The same pattern has been followed for all the workers.

Findings show that all the workers have more expenditure than income. However, the spouses of these workers also earn to keep the family going hence they do not fall into a bigger trap. But financial crisis is very much prevalent, with many workers opting for night duties as security men, shop helpers, rickshaw pullers, suppliers and hawkers etc to replenish the income expenditure ratio. 12 out of 15 workers have outside loans to pay. The loans are usually taken to buy land at their native places, to marry off a daughter or for medical amenities of themselves or of parents. The spouses of the workers usually work as domestic helpers in the adjoining apartment buildings like Purti Housing Complex, Eden City and the Riverside plush apartments, again giving a grim version of reality, where extreme poverty is coupled with extreme luxury. Some other women also earn by tailoring, making jute bags, handicrafts, sewing, bindi making, biri binding and others. To earn more, some women also go in groups by local trains to distant places like Salt Lake, Ballygunge, Alipore (considered as plush areas) in local trains and come back by night.

Focus group Discussions revealed some glaring factors regarding the loans taken. Often, drive by poverty, the worker goes to the contractor for loan, who readily gives him the money. But the rate of interest is extremely high (compounded interest) and along with the monthly interest, he also extracts maximum amount of labour from the worker without paying him for that. This includes overtimes, extra work, double shifts. The extra earnings are all shown in paper work of the contractor, but reality is different. The worker is exploited by the contractors in a veiled way, which is not reflected in the papers or the payroll of the worker, or in the pass book that is supposed to have details of the working hours of the workers.

Findings on the Social Vulnerabilities of the Migrant Workers

To find out the social conditions of the workers, a separate questionnaire was made (**key questions given above).** These included questions on possessions of bike/ cycls/ jewellery by the women, children's schooling, educational status, and home facilities like separate toilets kitchens, as well as the possession of certain gadgets like TV, fridge, Music System, mobile phones etc. one very interesting fact came up during the survey. Even in the poorest of poor families there was the presence of more than one mobile phone, suggesting the giant leaps that telecom majors have taken in the state as well as their penetration level. The multi-functionality of the phones serve good purpose a music system, alarm, video of local and Hindi films,

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pornography, rendering different types of entertainment to the workers and other residents. In this survey questionnaire, 80 workers were sampled. The percentages of workers having the following have been given in a table. As said earlier, almost all households have a mobile phone, some houses having more than one mobile phone. Instead of gas, the majority of the households cooked in kerosene stoves or used cow dung ovens. Another surprise came in the possession of bikes. Many claimed though that they got the bikes as dowry during their marriage, but findings also revealed that bike was the first major investment of the workers who reached a certain level, especially permanent workers. Again A TV set was owned by 1 in 3 households, pointing out to the entertainment factor of the workers. In fact, mobile phone, bike, cycle and TV were the mostly found consumer items, whereas the women still cooked in stoves or open ovens. This somewhat pointed out the gender bias in most households. Cycles were present in 77% of the households as this was the most common form of transport.

Table. 4 Percentage of Workers possessing different Household Items

Percentage of Workers	TV	Fridge	Music System	Mobile Phone	Gas	Bike	Cycle
98%				Yes			
43%	yes						
2%		yes					
4%			Yes				
5%					yes		
22%						Yes	
77%							yes

Table.4 shows the living conditions and the education of the children of the workers, the amount of jewellery owned by the women of the households

Findings on the vulnerabilities of the Interstate Migrant Workers Regulation Act 1979 in respect of the Jute Mill Workers

The role of the labour contractor needs to be clearly defined. The Act of 1979 clearly specifies the following regarding the operative area of the contractors.

According to Sec. 8 of the Interstate Migrant Workers Regulation Act 1979, all contractors who employ at least 20 workers in the jute factories should have a valid licence, granted by the licensing office appointed by the State Government who has jurisdiction in relation to the area where the recruitment is made (Source: www.ncw.nic.in). However, research findings indicate data which does not adhere to the principles laid down by the state. Out of the 10 labour contractors interviewed, only 3 had valid licenses to employ interstate migrant workers. The rest

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of the 7 contractors did not have a valid licence. When asked, they said that the state authorities never asked for the license hence they never thought of getting one.

According to Sec. 13 of the Act, wage rates and other conditions are spelled out. It says that the wage rates, holiday, hours of work and other conditions of service of an interstate migrant worker shall get no lesser wage than what is prescribed in the Minimum Wages Act 1948. From the 80 workers interviewed in the Sample Survey, the wages provided in the Minimum Wages Act was in compliance with what was given by the contractors, but the anomaly was elsewhere. In all the jute mills surveyed, there is a system of the Master Pay Roll where the names of all the workers who were permanent, under the Minimum Wages Act and were liable to PF and Gratuity were enlisted. But the wages of the workers were fixed according to their skills and experience, and this so where the contractors played foul. A non skilled worker in Cheviot Jute Mill for example who had less than 2 years experience is supposed to get Rs. 200-250 daily, but when the wages were given out, he received only Rs. 150 daily. The contractors followed a hire and fire system, where at the slightest pretext, they kicked the worker out and he became jobless. In the existing circumstances, there is such a huge supply of labour, that the worker had no other option but to take Rs. 150 instead of Rs. 250 that was his due.

Regarding working hours, again the Management of the company gave all the hiring rights to the contractors. Even if the workers wanted, there was hardly any scope to get his problems redressed by the main company management. All queries were automatically transferred to the contractor, who actually played a crucial role in placing the workers. During the research, many workers complained that they had to keep the contractor in good humour although the wages being paid were low, the reason being that if the contractor sensed that the worker is rebellious, he will simply not give him work, and his family will perish. Therefore, although paper wise almost all contractors adhered to all the rules, reality proved otherwise. The exploitation of the workers was there but externally it was invisible.

According to Sec.15, the migrant worker is entitled to Home Journey Allowance including payment of wages during the time his journey is valid to his native state. During the entire field study, not a single interstate migrant worker was found who got a home journey allowance. To verify the results further, another small scale field study was done in North 24parganas Jagaddal Jute Mill, even here the workers said that no home journey allowance was ever paid to them, not even in the case of fatal accidents.

According to Sec.16 of the Act, it is the duty of the labour contractor to ensure suitable working conditions for the workers, and to provide and maintain suitable residential accommodation during the period of their employment, to provide medical treatment to the workers free of charge, and in case of a fatal accident or bodily injury, to report to the specified authorities of both the states and the person next in kin to the worker. This is the most challenging part of the research work, as findings revealed an appalling condition that the worker and his family were subjected to. Field studies were conducted for 7 days consecutively, from 11 am till 5. 30 pm, each and every residence of the workers was covered. The entire workers colonies in Budge Budge area, right from sanitation and health conditions, the size and construction of the rooms, the kitchen area, the drainage system, the latrines, the bathing areas for men and women, the common water taps.

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The findings in this section are the most appalling because none of the provisions of the Act are complied to. The workers had to pay Rs. 500 as rent to the company, which was deducted from their payrolls. However, the constructions of these houses were faulty, with faulty drainage system. Almost all the houses had drains right outside or adjacent to the house, filthy water filling up the lower level rooms. The rooms were dingy, with no windows. Bulbs had to be lit up to see inside. Most of the residents had more than one child in the house, who were regularly prone to cholera and other water borne diseases. The water available in the taps was not filtered, and there were common taps per 50 families. In total there were around 2000 families residing in the workers colonies. The kitchen in most of the cases was a small 3 by 4 foot area extracted from the main room ad covered with a cloth/ saree where the cooking was done. However there were also families where the cooking was done outside the house in the main alley and people ate the food under the bed, which was heightened with bricks.

The babies were mostly undernourished with 4-5 children in each family, and the women unable to breastfeed the child due to various ailments like TB, gynaecological diseases and fatigue. The rooms had no ventilation and lack of sunlight made the walls shabby and fungus prone. There was no separate bathing area or latrines. The common latrine was used by all the women of the colonies and there was another common area for men. The condition of the latrines and bathrooms visited were not fit for animals, leaving apart humans. Fungus, dirt, grime and lack of a proper drainage system made the place seem like hell. There was no light and the latrines were open doored, with tiny separations. Most of the women of the households had urinary tract infections and other gynaecological disorders due to use of a common toilet.

There were ponds adjacent to the workers colonies that were filled with waste material and dirt. Swine's and buffaloes relieved themselves in the nearby vat that was never cleaned by the Municipality in months. Garbage lied in the open, with children playing near the ponds, making the entire area extremely unhygienic. All rules of sanitation and drainage were flouted as this was the most crucial area of the research. The children visited in the different households suffered from fever intermittently, and had gastro-enterological and skin problems. Water was fetched from the dirty ponds, and even utensils were washed there. The environment around the workers colonies was dismal to say the least.

The interstate Migrant Worker's Regulation Act 1979 very specifically postulates that all permanent workers whose names are in the Master Pay Roll will be granted PF and Gratuity dues after their retirement. But field studies proved that there is a huge gap in macro level overview of the worker's situations and the actual grass root level situation. The data fed into the Master Pay Roll and the PF due to the workers have anomalies in documentation. For example, when a worker retires, he is immediately not given his PF dues as there are paper works to be completed. Since the worker does not have any permanent residence in the host state, he shifts back to his native state after retirement, and often sends his sons or relatives to go and collect the retirement benefits on his behalf. The contractor keeps on giving false promises and months drag to years. The absence of a permanent residence ensures that the worker can only stay temporarily and cannot probe into the matter further. Research shows that gratuity was not paid to the workers even after 3 generations of the worker came down to the contractor's office for 12 long years. Not only this, there were many workers who were interviewed, retired workers who were getting

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a pension amount of Rs. 900, way below the actual amount they were supposed to get. This is not only gross violation of the Act itself but also a denigration of basic human rights.

Sec. 18 of the Act says that there will be an Labour Inspector appointed by the Government who has sole powers to cancel the licence of the contractors if he finds any anomalies in the pay books, passbooks issued to workers, ledger books or detailed copy of worker's wages etc, and also supervise the form of records to be **maintained in accordance with Sec. 23.** However, there are rampant allegations and complaints on behalf of the workers regarding the supervision of Labour Inspectors. Focus Group Discussions revealed some very interesting facts, pointing to the politicisation of the working environment in the jute factories. Workers say that instead of sudden visits by the labour inspector, the contractor is notified earlier of his visit. This is corroborated in all the "manufactured" papers that are shown to him.

There is an unwritten liaison between the contractor and the labour Inspector, who is supplied with plush hotel accommodations, good food and drinks so that he gives a clean chit and all clear report to the higher authorities. And most importantly, political muscle flexing is quite rampant, to win over the worker's union on one side and coalesce with the management on the other. The Act also says that the contractor is required to give a pass book and to each of the migrant interstate worker, where all details of his wage, day off, working hours, overtime details will be updated, and checked by the Labour Inspector intermittently. However, in all the jute mills covered for the purpose of this research work that is Cheviot Jute Mill, Central Jute Mill, Caledonia Jute Mill and Budge Budge Jute Mill, none of the workers had a Pass Book.

The Act also spelled out that every permanent interstate migrant worker should have a bank account, where the wages will be deposited directly. This is again the State's way of providing safety to the savings of the workers and ensures that they get the deserved wages. The contractor will not be able to tamper with the bank details, and therefore apt steps can be taken by the Labour Inspector if he finds any anomalies in the wage structure given out to the workers. This is of course a very welcome step by the State Administration. However, even this provision laid down by law has been tampered with by the contractors. Through regular Focussed Group Discussions it came to light that the Contractors follow a very unscrupulous method to hoodwink the Inspectors. The contractors maintain all bank accounts of the workers and transfer the wage amount to their respective bank accounts, but the names of the account holders are not the same as the workers. The contractors have created bank accounts with their relatives' names and deposit the requisite wages every month. The records thus are clean when the inspector comes for visit. But nobody bothers to check if the account holder's name in the bank is the same with the workers who work in the jute mills. This is a regular procedure to hoodwink the administration and exploit the workers, as the contractor often creates different parameters for wages, which can never be met by the workers.

Evaluations and Recommendations on Policy Responses by the Government and Proposed Interventions (pertaining to the Worker's Act of 1979)

The entire research takes into consideration of the worker's plight socially, economically and politically. It also recounts how the provisions of the government have met with loggerheads at the micro level. During the field study, major bottlenecks were found at 2 levels- firstly at the

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level of the administration draft policy, which is susceptible to misinterpretations and confusions, particularly in the complexities of language used in the Act. Secondly, the administrative control at the lower levels that is license authorities, labour inspectors from higher authorities at regular intervals is necessary.

1. More often than not, the labour inspectors fall prey to bribery, as he is closer to the political power centre of the adjoining areas of the jute mills, and also the lack of supervision makes him behave in an autocratic and corrupt way. Therefore, it is essential that there should be a system of checks and balances within the hierarchies of administration, particularly in the labour sector as it has a history of exploitation and malpractices. As stated earlier, transparency in the entire operation of the labour department, right from the appointment of labour inspectors to the granting of license to the contractors by the said authorities needs to be put under the scanner.
2. Then arises the process of granting licenses. This again needs intervention by the government, who needs to work out a workable strategy also taking the opposition power into confidence, as to who are the contractors who are actually eligible for license. The credibility of the contractor is of supreme importance, and a thorough check-up of his criminal background needs to be done. Data reveals that most contractors fail to meet even the basic provisions of getting a license, but still manage to get one by bribery.
3. There should be bilateral dialogue on an ongoing basis between the state administration of the native state of the worker and the host state, especially in cases where the migrant worker meets with a fatal accident during working hours. Several cases of malpractices have been found during the Focussed Group Discussions, where no medical aid have been given by the owner of the company or the contractors (whereas the Act says that apart from ESI benefits, the migrant worker should also be given all possible medical assistance). Many workers allege that even ESI benefits cannot be availed as the doctor underplays the gravity of the injury of the worker. Bereft of medical facilities, either the worker stays at home unable to work, or he leaves the host state and returns to his native land.
4. As for minimum demands of the workers regarding their wages and other basic amenities especially the granting of PF/ Gratuity within 45 days after the retirement of the worker, there is a provision of a tripartite agreement as postulated in clause 11 of the agreement, where the representative of the government, the labour union and the contractor takes place and an agreement is signed upon. However, this tripartite agreement actually gets reduced to a bipartite agreement between the owner and the local leaders (wielding considerable political hold), and gratuity becomes a long drawn battle for the worker. In the tripartite agreement of 1929, a maximum of 54 hours per week or 8 hours of daily labour is permissible. However, working hours are not specified by the contractors while deploying the workers from their homelands. They are given false promises, and once they enter the clutches of the contractor, they are made to work extra hours with no overtime, rather even their legal dues are often not given.
5. In cases where permanent workers are to be hired, even here the owners deploy contractors to hire casual labourers instead. This is gross violation of the workers' rights,

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as casual workers are easily victims of the hire and fire policy, wages are negotiated to the point where the worker literally starves, and works for minimum remuneration. The 42% fringe benefit that a permanent worker is supposed to get is actually saved by the owners and deprived from the workers.

6. Since the last few years, there has been a constant crisis as far as skilled labourer migration in the jute industry is concerned. The government has not been taking keen interest in the cultivation of jute as it earlier used to. The reason is that jute cultivation itself needs no supervision or looking after and yet gives a good produce. However, since government is vying for options in other forms of agriculture, there has been a steady entry of middlemen who procure jute at very less prices from the farmer. This is highly exploitative in nature. The government should ideally present jute as an ideal alternative to plastic, advertise jute as a fashion alternative, but for this, first the government has to have a pro jute plantation approach and be able to diversify jute technology as a viable marketing option. This will generate profits in future.

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CHALLENGES OF HUMAN RIGHTS IN MYANMAR AND INDONESIA: THE ROLE OF ASEAN AS A LAW MAKING ORGANIZATION

Dr. Debasish Nandy

Assistant Professor in Political Science, Kanchrapara College, 24 Porgonas (N), West Bengal, India

E-mail: debasishnandy.kc@gmail.com

ABSTRACT

*United Nations Organization was established to protect human rights in the universe. Through different declarations it tries to ensure human rights for all. Southeast Asia is a significant region with a wide diversity. Association of Southeast Asian Region (**ASEAN)** was formed as a regional organization in 1967 to fulfil versatile requirements of this region. There is no uniformity of nature of government among the member countries. There is also wide range of socio-economic structural difference among the member countries. This region had been one of the most resistant regions to the global human rights regime for the years. Both the theory and application of human rights had been challenged by most member states, which viewed the idea as incompatible with their principles for social unity and stability, effective economic development and sovereignty. However, their positions were shifted recently at least at the regional level. Since 2003, members of ASEAN have planned to establish the institutionalization of liberal ideas for encompassing human rights. ASEAN Inter-governmental Commission on Human Rights (AICHR) was established in 2009. Member countries were agreed for protection of the human rights of migrant workers. Moreover, ASEAN leaders were agreed to establish the commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Although there are wide differences among the member countries, yet, on some issues they have consensus. As human rights norms became more prominent in the international arena, ASEAN elites quickly linked human rights with the issue of sovereignty and power differentials in the international system. Previously Indonesia and Myanmar did not pay their attention for protection of human rights. Myanmar has experienced of violation of human rights over the years. The nature of government has been changed in recent times and some pro-citizens policies are taken. In 2003, Indonesia drafted a plan of action for the inclusion of democratic values and human rights as the agenda for ASEAN security Community pillar. However, like other western advanced democratic countries ASEAN countries have started to move towards democratic values and human rights. It is a good sign. Uniformity is required for implementation of the human rights. If this region can ensure the human rights for all, then ASEAN may be an ideal regional organization.* This paper offers a critical review of Human Rights in Myanmar and Indonesia

Key Words: human rights, ethnicity, region, democratic, economic

INTRODUCTION

The aim of this research paper is to evaluate the current state of human rights in Myanmar and Indonesia. In doing so, the paper is analyzed into two broad sections. Primarily, it will deal with

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the theoretical aspects of Human Rights and then it will emphasize on the practice of human rights in Myanmar and Indonesia. In theory, numerous verities found in the conceptual and the doctrinal explanation of human rights, but few of them have been briefly analyzed to outline some common criteria to evaluate the practice of these criteria in Myanmar. However, in practice these principles are lacking both of democracy and human rights due to political turmoil, military intervention in governance, political instability, lack of trust among political parties, problems of free, fair and credible election, abuse of power, non-engagement of civil society, and lack of conscious citizens. As a result, the practices of democratic values are hampered in politics and governance, and violation of human rights is severely enduring in Myanmar and Indonesia. Apart from these, light of hopes noticed in few policy initiatives related to human rights and governance undertaken by the government. Moreover, some civil society and human rights defender organizations are very proactive through the malicious action of the government for better governance and human rights in Myanmar and Indonesia. Human rights are indispensable for a peaceful society.

Methodologies of the Project

The current project will be done on the basis of the following research methodologies—

1. Content analysis method
2. Interview method
3. Mail-questionnaires
4. Observation method

Hypotheses

The present paper is framed on the basis of the following hypotheses-
1.Human rights are varied with regime to regime.
2.Nature of human rights are depended on the nature political culture of a country
3.Universal organization/ Regional organizations are not sufficient for ensuring of human rights of deprived class people of a country
4.International Humanitarian Law can play as safeguards of human rights for marginalized section of a country.

HUMAN RIGHTS: CONCEPT AND THEORIES

There is no universal definition of HR. Generally, HR is the rights of a person by which simply he or she treated as a human being. In other words, HR represents those rights that allow enjoying leading a life in dignity as a human being without considering any geographical or ethnic origin boundary. According to Donnelly (1989:17), "Human rights refer to a social choice of a particular moral vision which deserves the minimum requirements of a life of dignity." Article 1 of the UDHR (1948) enumerated that- *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Article 1, UDHR 1948).The basic rights of human being according to Rawls (1993; cited in Slye, 1994:1572) is: 1)The right to life and security; 2) the right to

personal property; 3) elements of the rule of law; 4) liberty of conscience; 5) freedom of association; and 6) the right to emigrate.

Human rights are those rights which are essential for minimum livelihood with dignity. Human Rights are natural and inveterate claims to certain fundamental and inalienable rights which are supposedly universal and egalitarian. These rights, though not delineated as such had existed since time immemorial in some form of degree in traditional societies as elements of moral codes and religious beliefs. Documents asserting the rights of individuals were published sporadically in Britain and the United States of America from the 13th to the 19th century articulating in various stages and degrees the need for individual rights (Paul, 2013:15-16). In England the Magna Carta (1215) and the English Bill of Rights (1689), French Declaration of Rights of Man and Citizens (1789), (1791) these are the sources of modern human fights. The World War I and II have witnessed the gross violation of human rights. That is why, protect world-wide human rights, the United Nations was duly vested with the primary aim of maintaining world peace and human rights. The Universal Declaration of Human Rights had been adopted by 56 members of UNO on 10th December 1948. There are several international human rights and humanitarian law, as follows:

i) the four Geneva Conventions of 1949 (1971) and Additional Protocol I and II to the 1949 Geneva conventions (September 8, 1980); the International Convention on the Elimination of All Forms of Racial Discrimination (June 11, 1979);
ii) the Convention on the Elimination of All Forms of Discrimination against Women (November 6,Bangladesh 115 1984); the Convention on the Rights of the Child (August 3, 1990);
iii) the Convention on the Prevention and Punishment of the Crime of Genocide (October 5, 1998);
iv) the International Covenant on Economic and Social Rights (October 5, 1998);

INTRODUCTION OF HUMAN RIGHTS IN ASEAN

The Association of South-East Asian Nations (ASEAN) was formed as a regional intergovernmental organization in 1967 through Bangkok Declaration. Indeed, it is illuminating to compare the establishment of ASEAN with formation of regional intergovernmental bodies in Western Europe after the World War II. Following two world wars within the space of 20 years, which has devastating consequences for the region, there exist sufficient political will for states to agree to the surrender of some elements of their national sovereignty in order to help prevent future hostilities between the member states. While Europe was seeking to provide security for states by increasing interdependence through regional integration, South-East Asia also seeking to achieve a similar objective through establishing the norm non-interference. One of the key mottos of U.N.O is protection of human rights. Through the declaration of Human Rights and making of number of regulations U.N.O is trying for promoting of human rights. But it has not been able to ensure it. However, ASEAN's engagement in human rights needs to be placed in the context of ASEAN's process of reform initiated in response to the post-Cold War international environment.

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The effect of World Conference on Human Rights (held in Vienna, Austria in June 1993) had vehemently influenced to ASEAN countries. At the 26th Ministerial Meeting in Singapore this effect was shown sharply. In this meeting, ASEAN members decided to follow of the guideline of Vienna Declaration .Member states had jointly decided that ASEAN should consider the establishment of a regional mechanism on human rights. In normalcy, most of the states of ASEAN states prefer to democratic culture. But, there are some cases, where military or authoritarian regime violated the minimal level of human rights. In case of Myanmar, Philippines, Malaysia and partly Thailand have experiences of violation human rights. However, major political changes at the national level at regional level. The Philippines saw the fall of the authoritarian Marcos regime in 1986 following the people power revolution, mass public protests in Thailand. In May 1992 brought about democratic reforms and popular protests in Indonesia led to the fall of the Suharto regime in 1998 after 32years of authoritarian rule. Hilary Stauffer has rightly observed**, o**ver the past several decades, consensus around the issue of human rights has been building. The manifestation of human rights in Asia may ultimately look different than it does in Europe, or the United States, or Latin America—and that is acceptable. True human rights defenders will welcome home grown mechanisms that provide a measure of protection against rights violations for men, women and children—the citizens of Asia. Think-tanks, NGOs and multilateral organisations should do the same. Firstly, in this paper I will discuss about the current scenario of human rights in Myanmar and Indonesia-two major states of ASEAN. Later on, I will shed light on the structural aspects of ASEAN human rights body and how does it functioned.

MYANMAR

On July 21, 2008, Myanmar1 ratified the Charter of the Association of South East Asian Nations ("ASEAN"), raising controversy among member nations because of its abysmal human rights record and its continued detention of opposition leader Aung San Suu Kyi. The Charter, which is the first such document in the forty-one year history of ASEAN, enumerates ASEAN purposes and principles and establishes formal rights and expectations of ASEAN members. Certain provisions in the Charter, including the establishment of an ASEAN human rights body, are in direct conflict with the ongoing human rights violations committed by Myanmar's ruling military junta. After a highly controversial process, ASEAN member countries agreed upon the terms for the human rights body stipulated in the charter, to be known as the Asian Intergovernmental Commission on Human Rights (AICHR), in July 2009 (Arendshorts, 2009). The AICHR will formally take effect during the ASEAN summit in October 2009. However, no one is sure what effect, if any, the AICHR will have upon the situation in Myanmar. This comment will explore how the actions of the junta affect ASEAN, outline the potential measures by which ASEAN and the nascent AICHR could address Myanmar's actions, and recommend a course of action. First, this comment will lay out the reasons for the controversy, including Myanmar's human rights record, and show how that record is viewed through various lenses of international law. Next, this comment will give background on ASEAN and the Charter and explore the Charter's implicate. This comment will explore how the actions of the junta affect ASEAN, outline the potential measures by which ASEAN and the nascent AICHR could address Myanmar's actions, and recommend a course of action. First, this is viewed through various lenses of international law. Next, this comment will give background on ASEAN and the Charter and explore the Charter's implications for interaction between ASEAN and Myanmar. Third,

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this comment will outline the various comment will lay out the reasons for the controversy, including Myanmar's human rights record, and show how that record.

For well over two decades now, polarization has been a defining feature of discussions on contemporary Myanmar. Amongst the most salient of disputes have been those addressing ethnic relations in the country. Recognizing variance in the competition of Myanmar's diverse inter-ethnic relations, two key issues come to light. First, personal experience of abuse has played a significant role in shaping individual articulations of grievance. Second, linkages across ethnic lines have played a significant role in tempering ethnic animosities and limiting the articulation of grievance in explicitly ethnic terms (Sundar and Sundar, 2014:240-241).

RIGHT TO PROTEST

Myanmar got its independence on January 4, 1948. It adapted a democratic political culture. The democracy in Myanmar was short-lived. In 1962, General Ne Win led military coup had overthrown the democratically elected government and permanently established military regime. Since 1962 all democratic forces were banned. Seldom had the members civil society tried to agitate against the military government demanding of minimum human rights. The iron rule of military had ceased all political or democratic rights. The tight military surveillance was so alarming for entire society. Gradually, Myanmar had undergone through a severe financial crisis. The common masses had no rights to protest against the government. However, in 1987, economy of Myanmar was collapsed. A strong dissatisfaction was generated among the common people. The subsequent political and economic unrest led to massive protests against the military government. The military government was not ready to accept this. The military was instructed to gunfire. Through violent attacks on agitators' military government finally succeeded to stop this protest movement. More than 1000 peoples were killed by the military in 1988's protest movement. The military government had intended to stop social voice. Aun San Suu Kyi, the leader of National League for Democracy had raised her voice in subsequent years for the democracy. She was arrested by the government and confined in her residence for long time. Being a member state of ASEAN Myanmar never follows the outline of human rights given by ASEAN. ASEAN itself is also failed to ensure human rights for Burmese people. Now, question is that what actual role is played by ASEAN in case of Myanmar.

Ethno-Religious Conflict and Violation of Human Rights

According to latest census, country's population clocking in at 51,486,253 people, a number that includes an estimated 1.2 million heads that were not counted in Arakan, Kachin and Karen states. The non-enumerated total breaks down to 46,600 people in Kachin State, 69,753 in Karen State, and 1,090,000 in Arakan State. In Kachin and Karen states, conflict between the government and ethnic armed groups prevented enumerators from entering rebel-controlled areas, while in Arakan State the vast majority of those uncounted were Rohingya, a Muslim minority group that the government does not recognize. Through a controversial policy government has refused to tally individuals self-identifying as Rohingya, contravening UN census guidelines and earning international criticism. (Snaing, 2015:1).

Systematic repression of ethnic Rohingya Muslims in Burma's western Arakan State continued in 2014, especially, against 140,000 internally displaced Rohingya forced out of their homes

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during the violence in 2012. An estimated one million Rohingya in Maungdaw and Buthidaung townships along the Bangladesh border continue to face restrictions on movement, employment, and religious freedom. All Rohingya in Burma are effectively denied citizenship on the basis of the 1982 Citizenship Law, rendering many of them, including children, stateless. The nationwide census conducted in March-April 2014 did not permit Rohingya to self-identify as such, and according to results released in September, 1.2 million people in Arakan State were not included in the census. The number of Rohingya fleeing Arakan State by boat rose dramatically in 2014, with estimates suggesting that 50-100,000 have fled since the start of 2013, mostly for Malaysia. A January 2014, incident in a Rohingya village called Du Chee Yar Tan in Maungdaw township reportedly resulted in the killing of between 40 and 60 Rohingya villagers by security forces and Arakanese residents. One policeman was also reportedly killed.

The United Nations Office of the High Commissioner for Human Rights conducted a short investigation under restrictive government conditions and confirmed that a violent incident had taken place, and estimated that dozens of killings had occurred. Two government investigations and one by the Myanmar National Human Rights Commission, which were below international standards and did not include impartial investigators, dismissed the incident as exaggerated. Journalists and independent human rights monitors have not been given adequate access to the area to investigate. Partly as fallout over this incident, the government suspended on a technicality the work of the humanitarian organization Médecins Sans Frontières (MSF) in Arakan State. This left tens of thousands of Rohingya without badly needed primary health care until MSF was permitted to resume activities in September.

CENSORSHIP ON MEDIA

Media freedoms, viewed by some donor countries as a key indicator of human rights progress, took a sharp downturn in 2014 as the government increased its intimidation of media. In January, the Ministry of Information exerted pressure on publishers to change editorial content and bring publications in line with official spellings, and began imposing visa restrictions on exiled Burmese and foreign journalists entering the country by reducing their permission to stay from 3-6 months to only 28 days. In July, a court sentenced four journalists and the editor of the weekly journal *Unity* to 10 years in prison, later reduced to 7 years, for breaches of the Official Secrets Act over a story alleging a suspected Burmese military chemical weapons plant had been built on seized land. The case alarmed many journalists who saw it as a return to past draconian punishments of media.

INDONESIA

The human rights record of Jokowi's predecessor, Susilo Bambang Yudhoyono, in office for 10 years, was characterized more by failures and missed opportunities than by successes. Yudhoyono's government made little progress in ending impunity for past serious human rights abuses by security forces; failed to protect the rights of Indonesia's religious minorities from increasing harassment, intimidation, and violence by Islamist militants; allowed the enforcement of local Islamic bylaws that violate rights of women, LGBT people, and religious minorities; and failed to address continuing abuses in Papua.

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FREEDOM OF RELIGION

According to the Jakarta-based Setara Institute, which monitors religious freedom, there were 230 attacks on religious minorities in Indonesia in 2013 and 107 cases in 2014 through November. The alleged perpetrators were almost all Sunni Islamist militants; the targets included Christians, Ahmadiyah, Shia, Sufi Muslims, and native faith believers. Throughout 2014, two Christian congregations in the Jakarta suburbs—GKI Yasmin and HKBP Filadelfia—continued to worship in private houses due to the government's failure to enforce Supreme Court decisions ordering local officials to issue building permits for the congregations. National regulations, including ministerial decrees on constructing houses of worship and a decree against religious practice by the Ahmadiyah community, discriminate against religious minorities and foster intolerance.

On May 29, Islamist militants carrying wooden bats and iron sticks attacked the home of book publisher Julius Felicianus in Yogyakarta while his family conducted an evening Christian prayer meeting. The attack resulted in injuries to seven participants, including fractures and head wounds. Police arrested the leader of the attack but later released him after local authorities pressured Felicianus to drop charges on the basis of "religious harmony." On June 1, Islamist militants attacked a building in Pangukan village in Sleman, Central Java, in which residents had been conducting Pentecostal services. Police arrested the leader of the attack, but also filed criminal charges against pastor Nico Lomboan, the owner of the property, for violating a 2012 government ban against using private residences for religious services. In July, Minister of Religious Affairs Lukman Saifuddin publicly expressed support for allowing followers of the Bahai faith to receive national identification cards, marriage certificates, and other official documents that identify them as Bahai. But Home Affairs Minister Gamawan Fauzi rejected Saifuddin's proposal, arguing that he could only legally issue documents listing one of Indonesia's six officially recognized religions: Islam, Protestantism, Catholics, Hinduism, Buddhism, and Confucianism. Fauzi suggested Bahai members choose one of these instead.

RIGHTS TO LAND

The Ministry of Forestry continued in 2014 to include forest lands claimed by indigenous communities within state forest concessions awarded to timber and plantation companies. In May 2013, the Constitutional Court rebuked the ministry for the practice and declared unconstitutional a provision of the 1999 Forestry Law that had enabled it. In October 2014, President Widodo merged the Agriculture Ministry and the National Land Authority into a single ministry and did the same with the Ministry of Forestry and the Ministry of Environment. Activists hope the consolidation will improve efficiency, reduce corruption, and allow for more effective government oversight of land issues.

FREEDOM OF EXPRESSION

The Indonesian government continues to arrest peaceful protesters who raise separatist flags. On April 25, police in Ambon arrested nine people who led a prayer to commemorate the 1950 declaration of an independent "South Moluccas Republic." The nine were charged with treason

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and in November were still on trial. On August 30, Florence Sihombing, a graduate student at Gadjah Mada University in Yogyakarta, was arrested on criminal defamation charges after she called the city “poor, stupid and uncultured” on a social media network. Police dropped all charges and released Sihombing on September 1 on condition that the university impose academic sanctions against her. The university responded on September 9 by suspending Sihombing for one semester.

MILITARY REFORM AND IMPUNITY

Security forces responsible for serious violations of human rights continue to enjoy impunity. September 2014 marked the 10th anniversary of the murder of the prominent human rights defender Munir Said Thalib. Munir was poisoned on a Garuda Indonesia flight on September 7, 2004. Despite strong evidence that the conspiracy to kill Munir went beyond the three individuals convicted in connection with the crime and involved high levels of the National Intelligence Agency, Yudhoyono failed to deliver on promises to bring all perpetrators to justice. Parliament failed to amend the 1997 Law on Military Tribunals even though the Yudhoyono administration submitted a new draft law in February. The 1997 law is widely seen as providing impunity to members of the military involved in human rights abuses and other crimes. If approved, the amendment would pave the way for soldiers to be tried in civilian courts for human rights violations. No progress was made on accountability for serious security force abuses during the 32-year rule of President Suharto, including the mass killings of 1965-66, atrocities in counterinsurgency operations in Aceh, East Timor, and Papua, killings in Kalimantan, Lampung, Tanjung Priok, and other prominent cases.

WOMEN’S RIGHTS

Discriminatory regulations against women and girls continued to proliferate in 2014. Indonesia's official Commission on Violence against Women reported that, as of August, national and local governments had passed 23 new discriminatory regulations in 2014. Indonesia has a total of 279 discriminatory local regulations targeting women. A total of 90 of those rules require girls and women, mostly students and civil servants, to wear the hijab. The mandatory hijab is also imposed on Christian girls in some areas.

On September 27, the Aceh parliament passed two Islamic bylaws which create new discriminatory offenses that do not exist in the Indonesian criminal code. The bylaws extend Islamic law to non-Muslims, criminalizing alcohol drinking, consensual same-sex sexual acts, homosexuality, as well as all sexual relations outside of marriage. The bylaws permit as punishment up to 100 lashes and up to 100 months in prison. In October, Human Rights Watch released a short report documenting the National Police requirement that female police applicants take an abusive “virginity test.”

REFUGEES AND ASYLUM SEEKERS

Indonesia remains a transit point to Australia for refugees and asylum seekers fleeing persecution and violence in countries including Somalia, Afghanistan, Pakistan, and Myanmar .As of May

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2014, there were approximately 10,509 refugees and asylum seekers in Indonesia, all living in legal limbo because Indonesia lacks an asylum law. This number includes 331 migrant children detained in immigration centres, of which 110 were unaccompanied minors. While Indonesia delegates responsibility for processing refugees and asylum seekers to the office of the United Nations High Commissioner for Refugees (UNHCR), it often refuses to release even UNHCR-recognized refugees from detention centres, where conditions are poor and mistreatment is common. Those who are released face the constant threat of re-arrest and further detention.

DISABILITY RIGHTS

On July 8, the parliament passed a new mental health act to address Indonesia's dire mental healthcare situation. Conditions are particularly horrific for the tens of thousands of Indonesians with psychosocial disabilities who spend their lives shackled (*pasung*) instead of receiving community-based mental health care. When implemented, the new law will address the treatment gap by integrating mental health into general health services, making affordable drug treatments available for people with psychosocial disabilities, and facilitating the training of more mental health professionals

THE GAP BETWEEN LEGISLATION AND IMPLEMENTATION

Even with the best of intentions, any ASEAN rights mechanism is several years away from providing Southeast Asian citizens with any kind of immediate relief from human rights violations. And even once it becomes operational, equitable access to justice and support for rule of law will largely depend on the strength of domestic institutions. The best protection for ordinary people will be better implementation of existing domestic laws, strengthening of legal bodies and improvements in legal education, which, in turn, will facilitate effective implementation of ASEAN mechanisms. Every ASEAN member state has existing domestic laws which—if routinely and robustly implemented—could be strong tools to promote and protect human rights, even if not couched in specific human rights language. For example, each country has some language within its criminal laws or criminal procedure code relating to the process that must be followed to ensure the accused has a fair trial without a prolonged pre-trial detention period. In almost all cases, these laws don't match the idealised language of the UDHR. Yes, more work can and should be done to improve the laws; but if the goal is actually to prevent citizens' rights from being violated, rather than just talk about prevention, then the most pragmatic solution is to use the instruments which already exist. governments and use countries' existing domestic legislation to ensure that all citizens have the right to competent legal representation, the right to be protected from cruel and unusual punishment, and the right to a fair trial. Human rights violations are less likely to occur if the presumption of innocence and respect for the rights of the accused are enshrined at every step of the legal process. The IBJ believes that to ensure this respect, there needs to be a sufficient number of trained and available public defenders and legal aid lawyers. Defenders need to be organised in a structure and work within a system which ensures that criminal defendants have access to them at the earliest legally mandated time. Crucially, there needs to be a judicial environment which respects and embraces the role of public defenders.

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HUMAN RIGHTS AGENDA OF ASEAN: SOME INITIATIVES

The promoting and protection of human rights cooperation in ASEAN is an evolving process. It was started by endorsement of the joint Communiqué of 26th ASEAN Foreign Ministers Meeting in 1993 in which ASEAN pledged, for the first time, its commitment to respect and promote human rights. The United Nations World Conference on Human Rights in Vienna has acknowledged this commitment. Since then, the process of establishment an ASEAN Mechanism to promote and protect human rights has been started. Hanoi Plan of Action, as the first Plan of Action to implement the ASEAN Vision 2020 reemphasized ASEAN's commitment to exchange information among its members for the protection of human rights. The ASEAN Inter Governmental Commission on Human Rights (AICHR) has been established to follow-up implementation of Plan. Pursuant to Article 14 of the ASEAN Charter, the ASEAN Intergovernmental Commission on Human Rights (AICHR) shall operate in accordance with the following Terms of Reference. There are some purposes of the AICHR: **firstly,** to promote and protect human rights and fundamental freedoms of the peoples of ASEAN, **secondly,** to uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity, **thirdly**, to promote human rights within the regional context, **fourthly,** to enhance regional cooperation with a view to complementing national and international efforts on the promotion of human rights**. Finally,** development of human rights in ASEAN states as prescribed by Universal Declaration of Human rights (the Vienna Declaration).

SOME IMPORTANT POINTS OF AICHR

The AICHR shall consist of the member states of ASEAN. Each member state shall appoint a representative to the AICHR who should be responsible or accountable for their activities. At the time of recruitment of representative member states shall give due consideration to gender equality, integrity and competence in the field of human rights. Representatives serve for three years and may be consecutively re-appointed for only one more term. Some states of ASEAN states have made human rights a part of their national agenda. Both the Philippines and Indonesia had set up national human rights Commissions, while the 1997 Thai constitution required the establishment of such a commission by October 1999.

ROLE OF THE SECRETARY –GENERAL AND ASEAN SECRETARIAT

The Secretary-General of ASEAN may bring relevant issues to the attention of the AICHR in accordance with Article 11.2 (a) and (b) of the ASEAN CHARTER .The Secretary General of ASEAN shall concurrently inform the ASEAN Foreign Ministers of these issues. The ASEAN Secretariat shall provide the necessary secretarial support to the AICHR to ensure effective performance.

WORK PLAN AND FUNDING

Decision-making in the AICHR shall be based on consultation and consensus in accordance with article of the ASEAN Charter. The AICHR shall prepare and submit a work plan of programmes and activities with indicative budget for a cycle of five years to be approved by the ASEAN

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Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN. The annual budget shall be funded on equal sharing basis by ASEAN member states. The AICHR may also receive resources from any ASEAN member state for specific extra-budgetary programmes from the work plan. Secretarial support for the AICHR shall be funded by the ASEAN Secretariat's annual operational budget.

CHALLENGES TO PROTECTION OF HUMAN RIGHTS

The challenges of promoting and protecting of human rights in ASEAN do not end with the adoption of ASEAN Human Rights Declaration. Ensuring the effective implementation of the Declaration and mainstreaming the values contained therein remains a crucial challenge, particularly for the AICHR and all relevant mechanisms in ASEAN. The commitment to promote and protect human rights in ASEAN is high. There is disagreement among the ASEAN states over the content and the manner of implementation of human rights norms and the lack of enforcement machinery pose formidable obstacles to the achievement of human rights in this region. The natures of states are different from each other. The adequate environment of democracy is almost absent in few countries. In case of ethnic conflicts and majority's persecution over the minorities are often shown in ASEAN states. Finalization of the negotiation on remaining issues related to human rights protection, such as the protection and promotion of the rights of the migration workers, remains one of the crucial challenges that require continued and collective efforts by member countries to expedite the process. Most importantly, the diversified agenda on human rights in ASEAN is another problematic issue. Before the formation of AICHR there was no organ in the ASEAN and also no mechanism to follow-up the implementation of human rights related regulations. The financial constraint and lack of consensus among the states are two negative points in maintaining of human rights in ASEAN. In some member states the issue of human rights are remaining a neglected issue. Due to governmental negligence, ineffective media and the silent role of civil society are simultaneously responsible for restoration of human rights. The ASEAN states would have to face vehement challenges from different sources.

The glaring disparity between theory and practice is nowhere more apparent than in the field of human rights. South East Asia, not unlike any other part of the world, is not devoid of human rights violations, which do not escape notice abroad. The media, internet, and NGO's have, for example, focused particular attention on the extra-judicial killings, disappearances and tortures by the Indonesian military in East Timor, Acheh and Irian Jaya, where separatist movement exist. Given the wide spread terror campaign undertaken against Chinese minorities, the human rights situation in Indonesia was also closely scrutinized in the aftermath of the May 1998 riots (Thio,1999:3). The repressive policies of the military junta in Myanmar, the State Law and Order Restoration Council, against Mon and Karen minorities ---including forced labour and forcible relocation –has also assured Myanmar a place of media spotlight.

CONCLUSION

At the international level, individual ASEAN member states have displayed a greater openness to acceding to human rights conventions and have participated vigorously in human rights

debates within United Nations. In many case, the human rights related data which are published by the members that are wrong. To get substantial foreign aid from Western Develop countries ADB, World Bank, UNO some member states done this. Always there is a wider gap between theory and practice. The ASEAN as a regional organization has already crossed 49 years. Yet the issue of human rights has not been primary concern in this forum. The process of the enhancement and protection has started slowly with the formation of AICHR. To secure human rights in ASEAN, some initiatives are to be taken such as (1) community building process is to be done. (2) Enhancing the awareness could be done through various ways of communication, such as publications, media, workshop or seminars. (3)Member states will have to reach at consensus on human rights issue. (4) ASEAN secretariat should be neutrals and strict without any bias or partiality in maintaining of human rights. (5) A review process may be introduced for monitoring over the member countries, how they are performing in protection of human rights. However, a strong mechanism is required for to foster greater awareness on human rights protection. To protect and promote human rights and the rule of law, government should be accountable and responsible for upholding the spirit of the rule of law and human rights. Law enforcing agencies should be transparent and accountable to the law and the people, the judiciary must be free from all sorts of intervention of the executive and the legislature. Besides, people's participation, including Civil Society and Human Rights defender organizations and NGOs in governance process should be ensured and encouraged by the government through providing adequate independence.

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CHILD SEXUAL ABUSES, POCSO AND RELATED LAWS: WHAT IS THE NEED OF THE HOUR?

Sachin Sharma

Assistant Professor of Law, National Law University, Assam, Email: sachin.sharma@nluassam.ac.in

"Children are living messages we send to a time we need not see".

- John F Kennedy

INTRODUCTION

Great German philosopher Immanuel Kant once stated that, 'human beings are rational being and are worthy of dignity and respect'. The stated proposition is said to be the foundation of the universal human rights jurisprudence. According to which all human beings including children are equal and autonomous. In this sense it can be argued that, it is the obligation of the state to create an amicable and peaceful environment so that all children can grow and develop themselves. In order to achieve the mentioned purpose, there used to be various governmental efforts at different levels. The founding stones of these efforts can be traced from regional level to international level. The *Edicts of Ashoka*[5] and *Megna Carta*[6] are the great example of such efforts, where people from all across the world have recognized the concept and respect for human rights, its values and application. In modern time the point is further recognized by the various modern national and international documents. These include Constitution[7], Human Rights Act, 1996, Juvenile Justice Act[8], Protection of Children From Sexual Offences Act, 2012 and Universal Declaration of Human Rights, (UDHR)[9], United Nations Convention on Right of the Child, (CRC)[10] respectively[11]. Constitution of India guarantees the right to equality, liberty and dignity of individuals including children. Article 21 of the Constitution elaborately talks about the right to life with dignity. The interpretation of this article leads to a very wide ambit as it has been stated as the soul of the

[5]Ven S. Dhammika, The Edicts of King Ashoka,(Aug.13,2015,11:01AM)http://www.accesstoinsight.org/lib/authors/dhammika/wheel386.html
[6]ShamiChakrabarti, MegnaCarta and Human Rights, (Aug.16.2015,04:00PM), http://www.bl.uk/magna-carta/articles/magna-carta-and-human-rights
[7] Constitution hereinafter referred to Indian Constitution.
[8]Juvenile Justice (Care And Protection Of Children) Act, 2014, (Aug.16,2015,11:00AM), http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/india_juv_just.pdf
[9]United Nations Universal Declaration of Human Rights,1948, (Aug.14,2015,01:20AM), http://watchlist.org/wordpress/wp-content/uploads/Universal-declaration-of-human-rights.pdf
[10]Preamble, United Nations Convention on Right of the Child,1990 (Aug.21,2015, 12:00AM), http://www.canadiancrc.com/UN_CRC/UN_Convention_on_the_Rights_of_the_Child.aspx
[11] The list of mentioned laws is not exhaustive; here the names (laws) are used for exampalific sense.

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part III of Indian constitution[12]. The reason for the same is that there are various connecting rights supported or governed by the said article. Here according to one interpretation[13] right to life includes the right to childhood and its enjoyment. This is further contingent to right to hygiene and health.[14] It is further linked to friendly ambience/environment[15]. It can further be related to right to education, as guaranteed under Art. 21 A of the constitution[16]. The web of all these mentioned rights must act smoothly[17], away from any conflict. It is only then there is possibility of achieve the destination called justice for innocent children. Hence in order to fulfil the stated commitments, Article 15(3) empowers the State to make special provisions for children and their better future. Similarly after signing the CRC, it became our commitment and priority to follow the different prescribed standards in the best interest of the Child. In order to achieve the sameWe have enacted series of legislations related *to 3 Ps Principles*[18] *(Preservation, Protection, Progress of children*) and the Protection Of Children from Sexual Offences Act, 2012 (POCSO) is one of them. It specifically talks about the 'proper development of the child'; 'her right to Privacy'; and 'Confidentiality' and their protection during any judicial process.[19]It guarantees the *Physical, Emotional, Intellectual and Social Development* of the child.

STATUS QUO: WHERE ARE WE STRUGGLING?

But despite of having various legislative and judicial tools, we are still struggling to achieve the above mentioned objectives. The *Nirbhya* incident of December 16th 2012 *(Black day for Humanity)* is one such example of failure. The incident generated national and international coverage and was condemned even by the United Nations Entity for Gender Equality and Empowerment of Women. In order to examine the legal situation, Indian government constituted a special Judicial Committee to review the Criminal Laws[20]. The Committee submitted its report within 29 days, on 23 January 2013, supposedly after considering the 80,000 suggestions and petitions received from all across the country.

[12]The wide interpretation of right to life is provided by Supreme Court in Mneka Gandhi v. Union of India SCR 621 AIR (1978). The said trend is still continue in resent cases by supreme court as held in Society for un-aided private Schools of Rajasthan v Union of India 6 SCC 1 AIR (2012).

[13] Interpretation is the meaning given to any particular legal term, which has its justification in logic and reasoning. In its strict sense (legal sense), interpretation is given/done by the court of law and in its loose sense (academic sense) by any individual author.

[14]Ratlam Municipal Council v. Vardichand, SC 1622 AIR (1980); Parmanand Katra v. Union of India SC 2039 AIR (1989)

[15] Here term 'ambiance' is used in include sociological and physiological sense.

[16]Society for un-aided private Schools of Rajasthan v Union of India 6 SCC 1 AIR (2012)

[17] The idea has been drawn from Dowrkin's statement; law is a 'seamless web'.

[18] This is the idea of author's own thought.

[19] Preamble of POCSO Act, 2012

[20] The committee was constituted under the chairmanship of Late J. Verma, Dec. 22, 2012.

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JURISPRUDENTIAL ARGUMENT

'It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the state to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that state is responsible not only for the acts of its own agents, but also for the acts of non-state players acting within its jurisdiction. The State is in addition, responsible for any inaction that may cause or facilitate the violation of human rights'[21].

Hence the statement reminds us about the responsibilities of the state. But state alone cannot create or formulate a *just* society, which is based on the all modern policies of a democratic society. Merely creating of democratic institutions is nowhere the automatic guarantee of success. The success of a democracy is not a matter of having the most perfect institutional structure that we think of. It depends inescapably on our actual behaviour patterns and the working of the political and social interactions. There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like all other institutions, depends on the activities of human agents in utilizing opportunities for reasonable realization..'[22] Hence institutional virtuosity by itself is not enough without individual virtuosity. There is need to give importance to human agency, but in order to achieve the same there is need to work on the grass-root level. This is possible by nurturing the compassionate character among civil society so that they start believing in values enshrined under Article 51 A of the constitution. There is need to educating the citizens in the spirit of the constitution as mentioned by great political thinker Aristotle[23]. The point is further supported by German philosopher Habermas in his theory of 'Deliberative Democracy'[24], where he argues that in order to have a true deliberation, there is need to develop true reason for it. In other words, people should participate in democracy with a firm application of reasons. This is the only way to develop our capabilities (as described by feminist scholar Martha)[25] in a right direction. This ultimately guarantees the human agency for an individual[26].

'Thus the meaning of law and the empowerment which law gives and clothing of man with such constitutional rights is only to make sure that whether it be State or whether it be man, and after all the state contains man, that with Pausanius, King of Sparta, a man feel confidently that "laws should have an authority over man, not man over law" in order to see that a human right is also accompanied by an enforcement modus effectualies, it is necessary to give it in the first instance the prime importance which it deserves and which

[21]Paragraph from NHRC Order dated April 1, 2002 in case no. 1150/6/2001-02.
[22]Amratya Sen, The Idea of Justice, Harvard University Press2011.
[23]Aristotle, Politics, ed. R.F. Stalley, Oxford Publication, 1998.
[24] Jorge Adriano Lubenow, Public Sphere and Deliberative Democracy in Jurgen Habermas: Theoretical Model and Critical Discourses, Dept. of Philosophy, Federal University of Paraiba, Brazil, (Sept.02,2015, 05:15AM),http://article.sapub.org/pdf/10.5923.j.sociology.20120204.02.pdf
[25]Dr. Jan Garrett, Martha Nussbaum on capabilities and Human Rights, April 2008, (Sept.02,2015,12:00AM) http://people.wku.edu/jan.garrett/ethics/nussbaum.htm
[26] The idea is also incorporated in Justice Verma committee Report, Pages 29-31.

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is merited to it in law, after all law itself recognises the high dimensions and dyophysite existence[27] *of rights, the one absolute impregnable and the other subject to social regulation by valid statute law*'.[28] The paragraph remind author the quote above the entrance to Central Secretariat in New Delhi s inscribed in bold letters: '*Honour the State, the Root of Law and Wealth*'. Though, this requires a small reshuffling of the words as, '*Honour the law, the Root of State and Wealth*'.

But as mentioned above that by simply formulating laws and policies or blaming government for its failure is not the solution to the problem. In order to protect children from abuses, there is need to work at multidimensional level. This is the only way to practically achieve the above mentioned jurisprudential thoughts. In order to develop the mentioned statement reference could be made to the sociological aspect of the issue.

SOCIOLOGICAL FOUNDATION AND CHILD ABUSES

It is evident from different deliberations that child abuse is a social problem and can only be corrected or rectified through societal interference. In the light of the mentioned statement, it can be said that child is the 'social actor', hence an amicable environment will helpful in building her character. This will ultimately resulting into building of a prosperous society[29]. The point is well recognized by various national and international agencies, for example Economic and Social Research Council, which funded a large programme of research called *children 5-16: growing into 21st century*. The entire programme was focused on treating children as social actors. This will be achieved by treating children as active agents, influencing and being influenced by worlds they live in. The programme was focused to analyse the childhood, its social appearance and children's sense of belongingness, their expectations and aspirations.[30]It has been recognised since long that childhood is fundamentally a social construction, though there is no universal norm to test the experience of childhood, as it always varies and further it is difficult to recognize that when childhood begins and end. Sociological notion about '*what it is to be a child*' is always varies. In broad sense sociological discourses focuses on two important aspects which are very distinct from each other. It includes children as inherently evil, requiring discipline and correction; on the other hand according to another view children are innocent requiring nurturance and protection. This can be concluded in terms of risk anxiety as fear *of* children and fear *for* children[31]. The aforementioned statements can be further interpreted in a way that if we are not providing a good environment, to children, they might turn into an inherently evil character, a delinquent in legal terminology. It represents the fear of children, which will be

[27]The term is related to Theology.

[28]Justice Verma Committee Report, (the stated paragraph is cited in case of Sheela Barse) Pages 32-33, January, 2013

[29] The statement is based on the statement/proposition that, 'children are the future of our Nation'.

[30]Dr. Sally Holland, Dr. Emma Renold, The Everyday Lives of children in Case: Using a Sociological Perspective to Inform Social Work Practice, February,2008, (Sept.03,2015, 12:00 PM)http://www.hull.ac.uk/children5to16programme/intro.htm

[31] Sue Scott, Stevi Jackson, Kathryn Backett-Milburn, Swings and Roundabouts: Risk Anxiety and the Everyday Worlds of Children, Sage Journals, 2014, (Sept. 14,2015, 1:15PM)http://soc.sagepub.com/content/32/4/689.short?rss=1&ssource=mfc

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felt by society on an advanced stage of delinquency. Hence there is need to work on the second aspect of providing nurturance and protection. This requires collective efforts from state to civic society. Here each of us is the stakeholders, who are affecting by the issue of child abuses. As it evident that state is formulating various policies and laws to deal with the matter, research institutions are running various capacity building programs for judges, police offices, medical practitioners and academicians[32]. But the real success is only possible when all individuals will join their hands against child abuses in our country otherwise child prosperity and safety will just remain a myth, and we will never be in a position to create a county as dreamed by the forefathers of the Nation.

CHILD IN SEARCH OF AN IDENTITY

While deliberating on various sociological factors, it is important to highlight one another point regarding the 'identity of child'. It is evident that we generally don't give any importance to children in terms of their separate identity. It is always their parents or family members are the key players in dealing with all aspects of their child. Many times this leads to the ignorance of harassment suffered by a child. Here if one considers the Indian family system, especially for the lower-class; lower-middle class families, where parents or family members are usually busy with earning their livelihood, and as a result are ignorant about such complaints made by child. This ultimately leads to serious mental, physiological and physical problems for concerned child, affecting his growth both physical and mental. Hence there is need to give a serious thought to the issue so that child care system can become more efficient and accessible for children in need. The one serious step in this regard could be taking children as a concerning party for deliberations on child rights[33]. The idea is drawn on the famous slogan about disability jurisprudence, '*Nothing About Us, Without Us'*.

POVERTY AND ITS SUB-CLAUSES: RESULTING INTO PAINFUL DESTINY OF A CHILD

In order to deal with child abuses, there is need to work on different ancillary factors. One such factor is poverty. It is pointless to prove that poverty is the first step towards 'helplessness', the *founding stone* of exploitation. In various reports by World Bank, Global Hunger Index, Hunger Notes, it is found that still majority of population in India is suffering from malnutrition and earning very low income, far below from standard income. Here it is evident from the history that no war can be won with an empty stomach. In order to earn the two time meal for himself and for his family, person is eager to do any task of any nature. The gravity of stated proposition can went up to selling of one's own child. It is the humble

[32]As author is belonging to Law fraternity, he attended various capacity building programs conducted for above mentioned officials. One such example is series of capacity building programs for police officers and medical practitioners of Assam, conducted jointly by NLU Assam and UNICEF.

[33]The point is justifiable on the ground that in today's 21st century, *one section* of children is much thoughtful and intelligent, the basic prerequisites for any rational deliberation.

submission of the author that it must be the most harsh and cruel time for any parent[34]. Here it can be stated that these days India is becoming the hub of child trafficking, as large number of children are trafficked within and outside the county. The statistics for boarder states is far worse[35]. Despite various governmental efforts, the child trafficking is still flourishing at its heights. Though once in a while we received news regarding rescue[36] but all that still raise the very pertinent question that where things are getting wrong? There are only sceptical ideas to the question ending in creating further doubts.

The next reason for child abuses is related to the illiteracy factor; it is the first *sub-clause* of poverty. When people are illiterate they became unaware (2nd *sub-clause*) about any information as there arises a communication gap between them and welfare functions. Though there are provisions for translations etc., but it is not that effective. The point is based on the thought of *nativeness* of language gives a kind of *comfortness* and *belongingness* to person concern. Hence then it became very easy to share our views.[37] Here the unawareness leads to the exploitation (3rd *sub-clause*). Once people become unaware, they become the soft target for exploitation. Interestingly this exploitation used to be done by those who are there to help and protect them[38]. This further leads to the violation of basic human rights of poor people (4th *sub-clause*) and finally to the death of democracy (5th *sub-clause*). Hence system fails to protect the sanctity of the opening lines of our constitution, '*We the People*…' The said chain can be elaborated further but the links raised above are fair enough to raise and justify the sociological aspect of the situation.

After highlighting the issue, now it is better to overview the existing legal system.

LEGISLATIVE MECHANISM: AN OVER VIEW

POCSO Law and its Main Provisions

The Protection of Children From Sexual Offences Act (POCSO), 2012 is one of the keen legislation regarding protection of children from offences of sexual assault, sexual harassment and pornography. The Act consists of IX chapters having 46 sections. All

[34]The point is based on the experience of author, when once he conducted interviewed few poor people of *Dharvari* slum area, Mumbai in 2011, and also highlighted in various documentaries, reports, interviews etc.

[35]Sanjoy Roy, *Assam a major source of child trafficking: Satyarathi*, The Assam Tribune,(Sept.19,2015,11:00AM), http://www.assamtribune.com/scripts/detailsnew.asp?id=oct1414/at050

[36]BinduShajanPerappadan, *Assam becoming a hotspot for child trafficking*, The Hindu, (Sept.19,2015, 11:36AM), http://www.thehindu.com/news/cities/Delhi/assam-becoming-a-hotspot-for-child-trafficking/article6094367.ece

[37]Alicia CoppJinkerson,Socialization, Language Choice and Belonging, (Sept. 18,2015,03:00AM)https://jyx.jyu.fi/dspace/bitstream/handle/123456789/38124/9789513947613.pdf

[38]Reference can be made to the Illustrations of cases where police personals are raping rape victims (long journey from Mathura rape case till today) there is also involvement of various other factors, one important among them is corruption, where officials doesn't take any action against the wrongdoer.

chapters are comprehensively dealing with the different provisions carrying under it. Chapter I is introductory, in chapter II, sexual offences against children are defined along with its punishment. Section 3 defines the penetrative sexual assault, where punishment for the same is seven years to life imprisonment along with fine[39]. Part B of the chapter deals with the definition of aggravated penetrative sexual assault and punishment there under; it basically talks about the penetrative assault committed by police officers, or different authorities under their office of trust[40]. Section 6 provides for the punishment for the same that include ten year to life imprisonment along with fine. Further part C of chapter II deals with the definition of sexual assault and its punishment, whereas part D deals with aggravated sexual assault and its punishment[41]. Finally part E of chapter gives a very elaborative definition of sexual harassment and its punishment[42].

Chapter III of the Act is titled, 'Using Child for Pornographic Purposes and Punishment therefor'. Here section 13, 14[43] and 15 of the Act deals with definition and punishment of the above, where section 15 specifically deals with the use of such pornographic substance for commercial purposes and provides the punishment up to three years or with fine or with both. Further subsequent chapter (IV), deal with the offence of abetment of and attempt to commit an offence.[44]Section 18 deals with the punishment for attempt of such offence as defined under the Act[45]. The next part of the Act deals with its procedural aspects, which mainly deals with the reporting of the case, provisos regarding statement recording of child, establishment and powers of special courts etc.

CHANGES MADE IN INDIAN PENAL CODE AFTER CRIMINAL AMENDMENT ACT 2013: PROVISIONS REGARDING CHILD SEXUAL ABUSE

As discussed in introduction part that after *Nirbhya* case, a committee was constituted under the chairmanship of Late. J. Verma. It suggested various amendments to criminal and evidence laws. The following is the chart[46] of the amended provisions of Indian Penal code, as relevant under this topic:

[39]Section 4 of POCSO Act,2012

[40]Section 5 of POCSO Act, 2012, it is having seventeen sub-clauses under it, covering a broad area, including jail, remand homes to hospitals.

[41]Section 7, 9 of the Act, section 8 and 10 respectively provides for the punishment that includes imprisonment up to three to five years along with fine. Whereas under section 10, punishment is from five to seven years including fine.

[42]Section 11 of the Act, and Section 12 provides the punishment which is imprisonment up to three years along with fine.

[43]Section 14(1) provides for the punishment up to five years along with fine and on second or subsequent conviction, imprisonment up to seven years and also be libel to fine.

[44]Section 17 of the Act read with chapter V (of Abetment), Indian Penal Code, 1860

[45] Punishment equivalent to the offence attempted, or for a term which may extend to one-half of the imprisonment of life or one-half of the longest term of imprisonment provided for that offence or with fine or with both.

[46] Criminal Law Amendment Act, 2013

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IPC Section	Name of Offence	Description	Punishment
354 A	**Sexual Harassment**	1) A man committing any of the following acts: a) Physical contact and adverse involving unwelcome and explicit sexual overtures; b) A demand or request for sexual favors; c) showing pornography against the will of a women; d) Making sexual coloured remarks, Shall be guilty of offence of sexual harassment.	shall be punished with **rigorous imprisonment** for a term which may be **extend to 3 years** or with fine or with both Any man who commits an offence defined under d) shall be punished with imprisonment of either description for a term which may extend to **1 year** or with fine or with both.
354 B	**Act with intent to disrobe a Women**	Any man who assaults or uses criminal force to any women or abets such act with the intention to disrobing or compelling her to be naked.	Imprisonment not less than **3 years but may extent to 7 years** and shall also be liable to fine.
354 C	**Voyeurism**	Any man who watches, or captures the image of a women engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image.	Shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but may extend **to 3 years** and shall also be liable for fine On 2nd or subsequent conviction –not less than **3 years,** and may **extend to 7 years**, and shall also be liable to fine.

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354 D	**Staking**	a) b)	Following a women and contacts, or attempts to contact such women foster personal interaction repeatedly despite a clear indication of disinterest by such women. Monitors the use bya woman of the internet, email or any other form of electronic communication.	1st conviction- may extend **to 3 years**, and shall also be liable to fine, on 2nd or subsequent conviction, - may extend to **5 years** and shall also be liable to fine.
370	**Trafficking**		Whoever for the purpose of exploitation, recruits, transports, harbours, transfers, or receives a person or persons by- 1st- using threat 2nd- force, or any form of coercion 3rd- by abduction 4th- by practicing fraud, or deception, 5th- by use of power, 6th- by inducement, including the giving or receiving of payment or benefit, in order to obtained the consent of any person having control over the person recruited, transported, harboured, transferred, or received,Commits trafficking. Explanation: The consent of victim is immaterial in determination of the offence of trafficking.	370 (4): in trafficking of minor, shall be punished with **rigorous imprisonment** for a term which shall **not be less than 10** years, but may extend to imprisonment for life and shall also be liable to fine. 370(5): where the offence involve the trafficking of more than one minor- **rigorous imprisonment** not less than14 years, but which may extend to imprisonment of life and also liable for fine. 370 (6)- if a person is convicted of the offence of trafficking of minor on more than one occasion then person shall be punished with **imprisonment of life,** which shall mean imprisonment for the remainder of that person's natural life, and also liable for fine.

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370A	**Exploitation of trafficked person**	Trafficking of minor, engage such minor in any sexual exploitation in any manner	Rigorous Imprisonment for a term which shall not be less than **5 years but may extend to 7 years**, and also liable for fine.
376A	**causing death or resulting in persistent vegetative state of victim**	Whoever commits an offence punishable under 376 (1)(2), and in course inflict injury which caused death of a women or cause a women to be in a persistent vegetative state	Shall be punished with rigorous **imprisonment of 20** years, may extend to imprisonment for life, which shall mean imprisonment for remainder for that person's natural life, or with death.

Here if one compare the two laws as discussed above, it can be easily concluded that provisions of Indian Penal Code, 1860 are more effective in comparison to POCSO law, as it provide more strict form of punishment. Further here it is the humble submission of the author that legislative provisions regarding sexual abuses against children is incomplete without reference to Immoral Trafficking (Prevention) Act, 1956[47]. This is the one of the big loophole of POCSO Act that it doesn't specifically deals with the child trafficking and hence reference is made to below mentioned Act.

CHILD ABUSE AND IMMORAL TRAFFICKING (PREVENTION) ACT, 1956

Child trafficking is one of the most serious issues in India. As per one report of NHRC each year ten thousand children goes missing across the country and out of them approximately two thousand are never traced back. The sorry state of affairs is luring another sad story of child trafficking for sexual harassment including sex trade. In one documentary named 'born into brothel[48]' on sex workers of *sonagachi*[49], it was found that there is a special demand for teenager sex workers in sex industry. The demand for girls' child is so prevalent that there is trafficking of girl children from boarder counties specially Nepal and Bangladesh. The entire deal is fixed through middle-man/agents, who in lure of work sell them to brothel owners. Where the *madams* of brothels used to beat them and forced them to have forceful, unethical sexual relation with their customers. These sexually frustrated customers brutally rape and torture them as a result of which they suffer various unidentified injuries[50]. The agony of the situation is that the entire process is regulated in the surveillance of police, who

[47]As discussed in the first half of the paper that child trafficking is the main source of child abuses.
[48]The documentary is directed by an Activist and photographer,ZanaBriski and her friend Ross Kauffman. She through her cameras gave a very live and thoughtful insight of Life of Brothel.
[49]Sonagachi is the biggest red light area, in Kolkatta, India. It is approximately a house of eleven to twelve thousand sex workers, including young girls and children of sex workers.
[50] These injuries include both physical and mental injuries.

has their fixed amount per brothel and some time the girl of their choice[51]. Though, in order to deal with the situation, Immoral Trafficking (Prevention) Act, 1956 provides various elaborative provisions. As section 5 of the act deals with Procuring, inducing or taking person for the sake of prostitution and according to it if any person who—

(a) procures or attempts to procure a person whether with or without his/her consent, for the purpose of prostitution; or

(b) induces a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel; or

(c) takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution ; or

(d) causes or induces a person to carry on prostitution[52];

PUNISHMENT: Shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees, and if any offence under this sub-section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years[53];

Provided that if the person in respect of whom an offence committed under this subsection, is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life[54]**.**

Further, section 5A provides for recruitment, transportation, transfers, harbors, of a person for the purpose of prostitution by means of by means of threat, coercion, abuse of power, and after receiving the payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons. Any such person who commits the offence under section 5A shall be punished with *on first conviction with* rigorous imprisonment for a term which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life[55].

The Act further talks about the detaining of a person in premises where prostitution is carried on, whether with or without his consent, shall be liable for imprisonment of seven years to life imprisonment and shall also be liable to fine which may extent to one lakh rupees[56]. The section 6(2) of the act is related with the children, according to it, where any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has committed an offence

[51]In Justice Verma committee Report, interviews of rape victims are recorded, where they have narrated the atrocities by police personals, one such shocking interviews is there in Appendix 9, and 10 page 475,511.
[52] Section 5 of the Immoral Trafficking (Prevention) Act, 1956, Universal Law Publication, 2012.
[53] Id.
[54] Id.
[55] Section 5B
[56] Section 6(1)

under sub-section (1). Further section 6(2-A) of the mentioned Act states that, where a child found in a brothel, is, on medical examination, detected to have been sexually abused, it shall be presumed unless the contrary is proved, that the child has been detained for purposes of prostitution or, as the case may be, has been sexually exploited for commercial purposes[57].

From the above stated information regarding legislative mechanism, it is clear that there are very profound legal instruments. Where different laws are supplementing each other and trying to provide the strong argument for the victims against heinous offences. But in order to functional, there is need to work on multi-dimensional levels, where different stakeholders including parents, guardian, psychologist, legal and medical experts need to work in harmony and collaboration[58].

CONCLUSION

Childhood is one of the most beautiful periods of life. It gives the shape to the modern face of the national power[59]. It is today's *micro power* that becomes *macro power* of tomorrow. Hence there is great need to protect the children in need. As discussed above that formulating laws and policies will only work at philosophical level and in order to see the dawn of success there is need to work down at the ladder. The situation of child sexual abuse is nowhere hidden from all the intellectual thinking tank of our society and there are various efforts been made at different levels. But the truth of the story is that it became more an academic or political thought rather than reality[60]. Without the collective efforts of society even one of the strongest organs of the state are helpless[61]. Further in number of cases related to child sexual abuses police personas refuse to register FIR and instead try to write the complaint under daily dairy[62]. As per the data collected from Ministry of Women and Child Development[63], till 2013, total 12,363 cases were

[57] Section 6(2), (2-A)

[58] The point is very well articulated under Justice Verma Committee Report, where emphasis is made on various working of medical practioner, phycologist etc. that how they should help in protecting the forensic and scientific evidences related to sexual assault cases. For further reading refer to chapter 10, 11 of Justice Verma Committee Report, Pages 260-311.

[59] Here term power is used in a as deliberated by French philosopher Michel Foucault.

[60] The purpose of said proposition is to highlight the existing 'welfare' programs for child protections which are just contributing towards academia and politics. By this statement author is trying to highlight the point of politicization of the matter, which only deals in statements rather than functioning.

[61] Bachpan Bachao Andolan v Union of India (2011) 5 SCC 1, in this case court specifically recognized that child trafficking is the big danger to the country, but despite all guidelines the trafficking of children is still flourishing at a high level. The point is evident from the resent **NHRC report**, according to which every year **44,000** children go **missing** and out of them 11,000 remain untraced.

[62] The point is strongly raised by one of the key note speaker in police capacity building Training program conducted by NLU Assam and firmly articulated in J. Verma Committee Report.

[63] In Year of 2014, till March 2014, there are total fore hundred cases of sexual assault are registered across the country under POCSO, The Economics Times, July 17, 2014. (The number is increasing at its alarming pace.)

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registered across India under POSCO Act with highest number of cases being reported in Madhya Pradesh[64] followed by Maharashtra[65], Uttar Pradesh[66], Rajasthan[67] and Delhi.[68]

There were total 2061 persons were convicted in 1611 cases and the conviction rate was 31.5%. Whereas in 2012, a total 8541 cases were registered across the country and 1447 persons were convicted in 1158 cases recording a conviction rate of 28.2%.[69] These all are one side of the factual records and it is followed by another side, according to which cases relating to sexual abuses against children are raising at the alarming pace. The statement is based on the incident of resent Bengaluru school rape case, where six year old minor girl was raped brutally[70]. Hence there is need shake our consciousness and raise the basic fundamental question that, 'whether it is law formulation of its implementation: what is the need of hour?'. Because we can allow a child to commit mistakes, but can't allow our self to commit mistakes.

[64] 2012 number of cases
[65] 1546 number of cases
[66] 1381 number of cases
[67] 892 number of cases
[68] 757 number of cases
[69] The Economics Times, July 17, 2014
[70] Available at: http://timesofindia.indiatimes.com/city/bengaluru/Bangalores-shame-6-year-old-girl-raped-twice-by-teacher-on-school-campus/articleshow/44988308.cms

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DE-CENTERING CASTE AND STATE – SOME REFLECTIONS

Dr. R Madhavan

Assistant Professor, School of Law, SASTRA University, Thanjavur, Tamilnadu, India

Email: madhavan@sastra.edu

Abstract

Scholarship on the relationship between Caste and State has focussed more on the attempts of State to either eliminate the discrimination based on Caste in the society or on the logics and impact of the protective discrimination policy. Both types of scholarship assume that state is a reified monolithic entity with unlimited sovereign powers and capacity to bring social change on its own terms.

This paper critically reviews these attempts and points out to the limitations of such perspectives. Rather than state being a monolith and caste being a single system with fixed vectors, this paper argues that both state and caste are recreated only at the local level in the exchanges between different caste groups and the decentred representations of the state. The dynamics of this interaction and the fluidity of the relationship preclude any meta-narratives on caste and state. The 'segmentary' character of the state and the phenomenology of the inter caste interaction have to be acknowledged to make sense of the way in which both the state as well as the idea of caste are being recreated and perpetuated in the society.

Key Words: Decentering Caste, Segmentary character of State

Introduction:

The relationship between caste and politics has been of scholarly attention ever since the first attempts of colonial administrators to make sense of India. This has produced literature both on caste and state as individual categories with reference to India as well as on the unique nature of their relationship. Writings on the relationship between caste and forms of power brought about by colonialism have generally assumed that state is a reified monolithic entity with unlimited sovereign powers and capacity to bring social change on its own terms.

This paper critically reviews these attempts and points out to the limitations of such perspectives. Rather than state being a monolith and caste being a single system with fixed vectors, this paper proposes that both state and caste are recreated only at the local level in the exchanges between different caste groups and the de-centered representations of the state. The dynamics of this interaction and the fluidity of the relationship preclude any Meta narratives on the relationship between caste and state. The segmentary character of the state and the phenomenology of the inter caste interaction have to be acknowledged to make sense of the way in which both the state as well as the idea of caste are being recreated and perpetuated in the society.

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Caste: Dumont's singular hierarchy

The colonial period was characterised by the notion of the administrators that caste / religion is the master key to understand Indian society and this produced a large volume of ethnographic and textual literature on Caste. Together with the Village, Caste was deemed to be the organising principle that produced a timeless society waiting for the colonial push towards modernity. The contestation for power happened outside the contours of a village community with a more or less stagnant economy. Giants like Marx and Weber contributed to the fossilization of an idyllic picture of a society in which privilege and discrimination, resources and disabilities were forever frozen in a time warp. In many ways, Dumont's Magnus opus Homo Hierarchicus[71] was a logical culmination of this tradition. Power and Economy were subsumed and encompassed by Caste / Religion. The relationship between power and Religion has to be understood through their structural opposition in which power clearly ceded ground to religion. While Dumont was sensitive to understand and go beyond the understanding of a static society, the structural principle of opposition between purity and pollution that animated the singular caste hierarchy, identified as the hall mark of a unique ideological system, was the corner stone of his work.

Critiques of Dumont, notably Nicholas Dirks and Arjun Appadurai criticized this notion of opposition between the religious and the political, and have argued Caste and by implication religion, we are in fact integral part of politics in India. While acknowledging the difference between Western and Eastern socio-political thought, these critiques have argued that the distinction between political and religious in India is artificial[72] and imposed by the analytical categories used in the analysis. Using data gathered in a South Indian little kingdom, Dirks suggested that the king was not inferior to the Brahman, and the notion of the power encompassed by the religious principle represented by the Brahman was not true. So the idea of singular religious hierarchy was fallacious and was a result of Dumont's desire for a pure symmetrical system.

The notion of a single hierarchy is contested from another perspective. The two predominant factors in the analysis of Caste in India are the relative importance and role of two perceived dimensions of caste: (a) hierarchy and (b) identity imposed by the putative differences between caste groups. Each caste group believes in its own superiority over other caste groups and has its own version of hierarchy. This, Dipankar Gupta says, would be borne out by *Jati puranas* or caste origin myths. So the notion of pure and singular hierarchy is untenable and in its place, the reality is characterised by multiple hierarchies.

Caste and State: Modernisation

The other key dimension of caste is difference or division. Each caste distinguishes itself from the other not only by its position in the hierarchy but also the diacritical marks of each caste – dietary practices, attire, personal gods and the like. This has assumed a central place in the

[71] Dumont, Louis, (1960), Homo Hierarchicus, Oxford University Press, New Delhi.
[72] Later commentators of contemporary politics in India extended the same argument on the difficulties of Secularism becoming a factor in social relations in India.

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analysis of the impact of democratic politics in India and the capacity of the caste system for mutation.

Modern mobilization and identity politics harness these distinctive elements in cultural practices of each caste group. Traditions were invented where they were not readily available and new cultural symbols and practices were created. These were appropriated by political parties for negotiation and creation of vote banks. This instrumentalist understanding of caste is dominant in contemporary Indian Political Sociology. Electoral politics and the logic of democracy would enable formation of large alliances across discrete caste groups sharing similar status in the hierarchy. The precursor to such politics in the context of South India is perceived to be the Dravidian movement in Tamil speaking regions. It also gave rise to one of the most powerful anti-Brahminical movements in history, which sought to define the boundaries for a master cultural and socio-political identity for the people of the region. Colonialism and the attendant modernisation resulted in the reconfiguration of the power matrix and there erupted ideological and socio-political conflict between the elites of Tamil society, namely, Brahmans and higher-caste non-Brahmans.[73] When Western modernity and researches in Tamil by missionaries and other scholars brought in concepts of linguistic and religious ethnicity, conflicts between the social groups intensified. It became important for all social groups to look for new cultural symbols, which could command loyalty of their respective members. Such understanding of the dynamics of caste and its relation to politics should be placed broadly under the theoretical rubric of modernisation.

Caste State and Secularisation

State driven modernisation was also perceived to have a secularising impact upon the caste system in India. Writing in 1993, Karin Kapadia speaks about secularisation of caste: Based on a research on marriage practices among non-Brahmins in Tamil Nadu, she argues that the rural non-Brahmin Tamils were far more interested in presenting an urbanised and modernised outlook, rather than achieving mobility in the caste ladder. They try to gain respect through education and adoption of a cosmopolitan attitude, thereby gain status in the society rather than aspiring for higher status for their caste. Despite this, a certain degree of Sanskritisation could be observed along with their higher economic status. But adoption of these sanskritic practices are regarded more a mark of higher economic status rather than caste status[74]. Caste and so religious ideology is clearly devalued in preference for a secular mode of attaining higher status.

The other important overt manifestation of hierarchy was commensal relations between various castes. The concept of purity and pollution was important for the understanding of commensal relations. Each caste had its own hierarchy and followed commensal relations according to it. The pattern of social relations between various castes was dependent on the nature of their

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[73] See E.F. Irschick,(1969), *Politics and Social Conflict in South India: The Non-Brahman Movement and Tamil Separatism, 1916-1929*, Bombay. Also see Charles Ryerson, (1988), *Regionalism and Religion: The Tamil Renaissance and Popular Hinduism,* Madras.

[74] Kapadia, Karin, (1993), "Marrying Money: Changing Preference and Practice in Tamil Nadu" *Contributions to Indian Sociology,* P.26.

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commensal relations. It is believed that the influence of modernising forces is so plainly evident here that it needs no elaboration. As far back as 1966, M. N. Srinivas writes that, because of the modernising forces, it became well-nigh impossible to maintain commensal relations as per caste restrictions. Also, legislations like Removal of Disabilities Act, went a long way in secularising the commensal relations between various castes. This in turn redefined the relationship between various castes by grounding it on secular considerations.[75]

The common feature of the aforementioned writings on caste is the argument that it constitutes a coherent system and the relationship between politics and caste can be understood only by explicating the principles that constitute the system. Regrettably, most writings on caste tend to conflate Varna and caste – an error that induces another error - that caste category can have definitive relationship with Varna. This leads to attempts to understand the relationship between politics and caste through the occupational and ideational vectors of Varna. By and large, whenever attempts were made to link occupation and caste through Varna, there are more examples that disprove the rule than other wise. So to argue that there exists a singular structural relationship between caste and politics is imposing an illusory order upon reality.

The fluidity of the middle castes that claim Kshatriya status and heterogeneity of the Brahmin castes, (this can literally be true of any caste group in India) their occupations and their varying social status even within a small geographical region make any claim upon a one-to-one relationship between them arbitrary. We should rather understand the notions of hierarchy and identity as negotiating tools between various local kinship groups – both that had power at their disposal and those that are powerless. In pre-colonial India, local patronage networks organised the community life and linked them to bigger networks that co-existed along with them. Any notion of a centralised sovereign was more symbolic than real. That does not make power epiphenomenal. Power was widely dispersed and negotiated rather than fixed and centralised.

Caste and Democracy:

The expansion of communication networks and the destabilisation of local patronage networks during colonialism were important factors in understanding the complex relationship that have come to exist between various social groups and representations of state in contemporary India. Attempts to create a centralised state during and after colonialism required a certain understanding of caste. Foisting order and uniformity upon what was essentially a locally mediated, flexible and diverse system became necessary for the newly emergent modern state. This destabilised the pre - colonial social order throwing open fresh opportunities for various caste groups to renegotiate their positions and privileges and create new networks of patronage.

Conclusion:

The complexity of democracy in India often bewilders observers and the seeming success of the electoral democracy has invited different theories. One argument is about the modernity of Caste and the role of caste associations as interest groups influencing the democratic process in India (See Rudolph and Rudolph). The afore-mentioned communication networks and the logic of power in a

[75], Srinivas, M.N., (1966), *Social Change in Modern India*, New Delhi, Orient Longman, P.123.

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modern democratic state have enabled broad alliances to be formed across caste groups. However, it is clear that there is no one single logic or formula that informed these alliances. Seemingly opposed caste groups were seen to form an alliance – for example the alliance between Brahmin and dalit caste groups that for a brief period, appeared to be quite successful in Uttar Pradesh. The absence of any long term alliance between different caste groups is extremely interesting. It is here that we are proposing that unless we understand the idea of state power in India – even as a modern democracy - as de-centered and the capacity of the local caste groups to negotiate with the local representations of state power is configured, precious little can be achieved by way understanding the relation between caste and state. New patronage networks, locally linking caste and state mediate the actualisation of privileges for different castes. Historically disadvantaged groups, through what is now popularly recognised as the democratic upsurge (See Yogendra Yadav), renegotiate this relationship. Political parties rather than represent the interests of citizens as individuals to state, have established locally inter-connected patronage networks. The capacities of a political party to satisfy the local interests and create opportunities for different caste groups determine their electoral success in India. In many ways, understanding the state – caste relationship as the democratic recreation of pre-colonial model of inter-linked patronage networks would throw more light on the relationship. Such a relationship is today determined more by the logic of electoral politics rather than a religiously informed hierarchy. Caste still remains important in India because of its capacity to leverage the multi layered, de-centered state, which is experienced more as segmentary relationships rather than as a centralised sovereign power. Patronage networks exist in multiple locales in Modern India and resource redistribution both material and non-material remains the logic of political parties. Both caste groups and business groups function as important players in this patronage game. The patronage network favoured caste groups that have historically controlled material and symbolic resources because of their capacity to occupy positions of power in the de-centered state. But it also provided space for the disadvantaged groups to challenge the politics of exclusion as witnessed in the democratic upsurge and climate of values favouring social equality that characterises modern democracy in India. The biggest challenge for caste groups, especially the historically disadvantaged groups is the potential loss of this negotiating space in a globalised economy, where the local patronage network may fast lose its relevance and replaced by de-centered global networks inhabited by corporate groups and national / regional political parties.

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ENVIRONMENTAL REFUGEES: DISPLACED DEFINITION VIS-A-VIS LIVES – A REFLECTION

Richa Jain

Teaching Assistant, Symbiosis Law School, Hyderabad, India

E-mail: richa.jain@slsh.ed.in

ABSTRACT

According to the United Nations[76]*, a 'Refugee' is a person who flees his/her home country due to a "well-founded fear of being persecuted for reasons of race, religion, and nationality, membership of a particular social group or political opinion." However, the status of 'Environmental Refugees' is different. They do not flee from their motherland due to any fear of being persecuted or internal- aggression, but they are forced to migrate from their mother lands due to environmental disasters (man-made or natural) which jeopardize their existence.*

Be it death of thousands due to massive tsunamis, hurricanes, earth-quakes or floods, the past turn of century has witnessed it all, the number of Environmental refugees has also grown multifold thereof, owing to the rise in global warming and degradation of sustainable environment. After losing their homes, livelihood, families, these people with a bleak hope for the future move to other countries in search of sanctuary and better lives. Crisis arises, when the host country refuses to grant them the "refugee" status and leaves them helpless and broken.

This appalling situation has led to a massive debate and confusion regarding the status of Environmental refugees. Since there aren't any strong holds, protection programs for the safeguard of the environmental refugees, and their status remains in a fix. Some people advocate that they must be granted the "refugee" status undoubtedly, whereas, others contest that providing such "refugee" status can lead to politically motivated scenarios, which can be dangerous for the host country.

The paper intends to highlight the plight of Environmental refugees and shed light on international organizations working for the same. Further, the paper attempts to finds a balance between both contrary arguments, with respect to granting/not granting "refugee" status and provides some suggestions for the protection of human rights of the people displaced due to environmental turmoil. This research is largely based upon the doctrinal method and majorly focuses upon the study of law and legal authority backing it. The sources of data collection included web resources, International Policies and Laws; and Scholarly Articles.

[76] http://www.unrefugees.org/what-is-a-refugee/

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Keywords: *Environmental Refugees, Human Rights, Humanitarian Aid*

Introduction

According to the United Nations, a refugee is a person who flees their home country due to a "*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."*[77] The world usually interprets the term "refugee" in strict political sense; the term usually symbolizes the victims in a world fragmented by competing philosophies.

Though the term refugee first meant 'one seeking asylum' but has since evolved to mean 'one fleeing home'. As climate change continues at an alarming rate, the spectrum of environmental disasters is widening for the worse and is leading to a growing population of displaced men, women and children whose homes have been rendered unlivable.

According to United Nations High Commission for Refugees (UNHCR), the consequences of climate change are colossal. "*Scarce natural resources such as drinking water are likely to become even more limited. Crops and livestock are unlikely to survive in certain locations if conditions become too hot and dry, or too cold and wet leading to serious Food security issue, thus throwing bigger challenges*."[78]

Thus, for survival, people have to either adapt to the situation, or move to another place as per UNHCR. Those victims of Climate change who opt for the latter option and move to a foreign land in search of a better life are called as the '*Environmental Refugees'*.

The United Nations Environment Programme (UNEP) in 1985, defines environmental refugees as "*those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/ or seriously affected the quality of their life.*" According to the Organization for Economic Co-Operation and Development (OECD), "*an Environmental Refugee is a person displaced owing to environmental causes, notably land loss and degradation, and natural disaster*.[79]"

Categories of Environmental Refugees

It is vital to mention, that the environmental upheavals can be both natural and man-made. Some examples of natural causes include drought, floods, volcanoes, hurricanes, and earthquakes. Some examples of man-made causes include over-logging, dam construction, biological warfare, and environmental pollution.

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[77] The United Nations High Commission for Refugees http://www.unrefugees.org/what-is-a-refugee/ Last Visited: 27/11/ 2016

[78] The United Nations High Commission for Refugees, '*Climate Change Disaster and Displacement'*, January 1, 2015. Available at: http://www.unhcr.org/pages/49e4a5096.html Last Visited: 27/01/2016.

[79] https://stats.oecd.org/glossary/detail.asp?ID=839

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While some disasters have a catastrophic aftermath and may destroys the area completely and make it uninhabitable; on the other hand, some disasters like the wildfire, floods or drought may leave the area uninhabitable for a short while or make it prone to similar disasters in the future.

In such climatic upheavals like long-term drought people might migrate temporarily, and come back to their home country after the climatic disaster subsists but are not offered with the same opportunity for regeneration and hence, they are deprived of an opportunity for re-growth. In the situations also, where re-growth is not likely, people are forced to permanently displace.

Similarly, if the disaster occurs in one part of the country, the 'Internally Displaced' people have an option of moving to other parts of the same country; in situations like these, the government remains responsible for the individuals. But when environmental havoc is wreaked on an entire country, the individuals leaving the country become Environmental Refugees and are left to the mercy of the host country.

2. TRYST WITH REALITY

A Hidden Crisis No More

Sub-Saharan Africa, the Indian subcontinent, China, Mexico, and Central America stand as refuge for large number of environmental refugees (www.climate.org). Due to the constant change in the environment, lack of a proper body to collect data and in the absence of a generally accepted definition and methodology, the accurate count of environmental refugees is difficult. There is an argument that the category of refugees-legally defined as people fleeing persecution without access to protection by their own country should not be muddied by other factors such as environmental degradation.[80]

As per the Climate Institute, which identified 25 million refugees in 1995, approximately 5 million were refugees fleeing drought in Africa's Sahel (semi-arid grasslands and savanna stretching between Senegal and Ethiopia); 4 million were environmental refugees in the Horn of Africa; at least seven million in other parts of famine hit sub-Saharan Africa suffering; 6 million environmental refugees in China due to land-shortage (out of 120 million internally displaced people in the country); and 2 million Mexicans escaping environmental degradation. Approximately 50 million people in China and India had been uprooted by public works projects, and one million of whom had still not been resettled. Large populations of environmental refugees existed in El Salvador and Kenya too"[81]

It is interesting to note that such numbers were reported in 1995 and since then, the number of Environmental refugees has swelled up at an alarming rate. Since 2009, an estimated one person every second has been displaced by a disaster, with an average of 22.5 million people displaced by climate- or weather-related events since 2008.[82] It has been estimated that there are now

[80] World Watch Institute, "*Environment, A growing driver in the displacement of People*". Available at: http://www.worldwatch.org/node/5888. Last Visited: 27/10/2016.
[81] http://climate.org/topics/environmental-security/index.html Last Visited: 27/10/2016.
[82] *Ibid* 2.

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perhaps 30 million environmental refugees.[83] Due to the exceeding climate change, the number of climate refugees is expected to swell and reach 200 million by mid-century.

Despite their overwhelming numbers, unlike political or traditional refugees, environmental refugees are not recognized by the Geneva Convention or the United Nations High Commission on Refugees (UNHCR), and therefore have a differential legal standing in the international community[84].

The International Red Cross has predicted that presently there are more environmental refugees than refugees displaced because of war, yet Environmental Refugees are not included or protected under the International Refugee Law. The UNHCR only protects those people who fit in the following classifications:

1. "*That they are outside their country of origin or outside the country of their formal habitual residence;*
2. *That they are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and*
3. *That the persecution feared is based on at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion."*[85]

Since environmental refugees do not fit in these categories, they are not guaranteed asylum and adequate protection at par with the traditional refugees by the other countries.

Issues faced:

Since Environmental refugees are not protected under International Refugee Law and are not considered actual refugees, they have to undergo massive hardships and face scarcity of resources. Moreover, they may spark conflict with other communities, as an increasing number of people compete for a decreasing amount of resources and may never be fully accepted by the new communities.

Continued exponential growth of the human population, together with a marked increase in resource depletion caused by regional economic growth, aggravates the problem of environmental refugees. Irreversible change in carrying capacity means that a return to their homeland will be impossible for many environmental refugees.

Poverty serves as an added 'push' factor and pile-on the problems faced by the displaced people and refugees. Other factors include population pressures, unemployment, malnutrition, landlessness, rapid urbanization, epidemic diseases, government inadequacies, together with ethnic frictions and conflicts. As per Norman Myers, "*It is sometimes difficult to differentiate between refugees that are driven by environmental factors and those that are impelled by*

[83] World Watch Institute, "*Environment, A growing driver in the displacement of People*". Available at: http://www.worldwatch.org/node/5888. Last Visited: 27/10/2016.
[84] www.unhcr.org
[85] Rule of Armed Conflict Project, "International Refugee Law". Available at: http://www.geneva-academy.ch/RULAC/international_refugee_law.php Last Visited: 27/10/2016.

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economic problems. In certain instances, people with moderate though tolerable economic circumstances at home feel drawn by the opportunity for a better livelihood elsewhere. They are not so much pushed by environmental deprivation as pulled by economic promise."[86] In situations like these, Environmental Refugees find difficulty in finding a stern legal standing and protection by the International community. Moreover, it becomes difficult for the host country to differentiate and to validate the needs of the displaced.

3. HUMAN RIGHTS OF ENVIRONMENTAL REFUGEES

Critical human rights issue that are the biggest concerns for the environmental refugees are as Nondiscrimination (age, gender, color, ethnicity etc.), legal protection, equality, right to security; access to-health services, clean water, food and nutrition, shelter and housing etc. However, to understand the plight of the Environmental Refugees it is necessary to have a glance at the rights already available to them.

The Right to Livelihood:

a) The Universal Declaration of Human Rights, 1948 in its Art 3 postulates that - Everyone has the right to life, liberty and security of person.

b) International Covenant on Economic Social and Cultural Rights (ICESCR) in its Article 6(1) states: "*The States parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which freely chooses or accepts and will be take appropriate steps to safeguard this right*", thereby, stressing on the fact that despite their migration, they do have a right to work and feed themselves.

The Right to Adequate Housing:

Art 11(1) of the ICESCR states: "*The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family.*"

Thereby postulating that "everyone" inclusive of environmental refugees, despite their status have a right to have a proper housing and living.

Right to Equal Access to Education for All in Particular:

Education is one of the foremost Human Rights. It is necessary that education is provided to children and young adults who are living in disaster affected areas as well as the environmentally displaced people in the host country. Moreover, it is necessary that safe schools and disaster-resilient education infrastructure is provided to disaster prone areas; and the students are made aware of their surroundings and possible risks involved.

[86] Norman Myers, "*Environmental Refugees: A Growing Phenomenon of the 21st Century*", University of Oxford, Page 610.

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Right to Development:

Communities living in disaster-prone areas have the right to protect their development efforts. It is their right to restart their lives in a sustainable method and to protect their future.

Humanitarian Aid:

The provision of aid is important not only for humanitarian reasons but also because of its link to the protection of human rights. According to UNHCR, which serves as a clearinghouse for humanitarian aid to traditional refugees, "*Protection and material help are interrelated. UNHCR can best provide effective legal protection if a person's basic needs -- shelter, food, water, sanitation and medical care -- are also met.*"[87] In turn, suitable human rights protections ensure that humanitarian aid is distributed in an unprejudiced manner and is accessible to all.

Protection and Assistance at Times of Emergencies:

Every human has the right for protection and assistance at times of emergencies. Both international humanitarian laws and national legislations aim to protect people during emergency situation.

Both the International Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic and Social Rights acknowledge the "*inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" and that "in no case may a people be deprived of its own means of subsistence*."[88] Therefore, a plausible solution to the problems of the Environment Refugees would be to extend the 1951 definition contained in the Refugee Convention in line with those developments in international human rights law.

CONCLUSION AND RECOMMENDATIONS

It cannot be repudiated that the number of Environmental refugees has grown multifold in the past decades, owing to the rise in global warming and degradation of sustainable environment. After losing their homes, livelihood, families, these people with a bleak hope for the future move to other countries in search of sanctuary and better lives. And this is where they have to undergo yet another trauma and witness major blow on their human rights. Problem arises, when the host country refuses to grant them the "refugee" status and leaves them helpless and broken.

Therefore, the foremost necessity is to give a proper definition to the term "Environmental Refugees" and to lay down laws and international policies and strong hold protection programs for their help. Such classification will be beneficial for the host country also to distinguish

[87] UNHCR (United Nations High Commissioner for Refugees), Convention and Protocol Relating to the Status of
Refugees.

[88] International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 47; International Covenant on Economic,
Social and Cultural Rights, Dec. 16, 1966, Art. 1

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between people who have fled their countries due to political aggression and between people who have been forced to migrate who the nature's havoc.

The author has ascertained that while laying down a comprehensive definition, it is necessary to include victims following under the following categories:

- Forced relocation across borders;
- Sudden or gradual disruption in the environment;
- Natural/ Man-made calamity;
- Temporary or permanent migration.

It is necessary that even in the absence of a comprehensive definition the host country assures that the basic human rights of the refugees are not infringed and that they are at least given an opportunity to survive. They must be provided with clean drinking water and nutritious food till they are able to get back on their feet or are given assistance by their own country or any international community.

Moreover, it must be kept in mind that due to the interminable and unpredictable turmoil in the Environment, in a not so far-fetched future, the number of environmental refugees may surpass the number of war affected persons.

Classifying and mapping of potential risk zones, conserving natural resources, utilizing renewable energy and regulating migration are some of the important steps to be taken in formulating an adaptive mechanism. Formulating rehabilitation programs, policies for rehabilitation and appropriate compensation are essential for the benefit of the vulnerable people and it is necessary that the State and Central Government bodies and International agencies together work for the formulation of the same. Short-term disaster management plans must be linked with long term plans and separate funds may be generated to accomplish the aim. The author believes that national and international support is needed to be given to both area-the disaster hit and the host country, and only then would we succeed in protecting the environment and thus mitigate the effects of disasters.

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All your queries and submissions may be sent to: coherence@slsh.eu.in

Symbiosis Law School, Hyderabad Campus
Survey No. 292, Off Bangalore Highway
Nandigama Mandal, Mamidipalli Village
Rangareddy District
Hyderabad
Website: www.slsh.edu.in
Phone: +91-7093921243