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PREFACE

This book is a compilation of the selected research papers received due to Model Governance Foundation-GNLU Centre for Law and Society's joint Call for Papers for Samvaad 2017, a 3-day National Youth Conference organized by the Model Governance Foundation at Ramanujan College (University of Delhi), Kalkaji, New Delhi from 30th June - 2nd July, 2017.

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Lastly, we would like to invite comments, suggestions and guidance from various experts and readers about this book for improvements in future. The comments/suggestions can be mailed to us at info@alexis.org.in.

- **Editor(s)**

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AFSPA: WHERE DO WE DRAW A LINE ON COMPROMISING LIBERTY AT THE ALTAR OF NATIONAL SECURITY?

Author(s): Stuti Dhundia[1] and Ashwani Tak[2]

ABSTRACT

The Armed Forces (Special Powers) Act, 1958, in a nutshell, empowers the armed forces to detain and arrest anyone in "disturbed areas" as a preventive measure and also allows a soldier to shoot civilians even if such an arrest or detention or killing cannot be justified. By extension, the Act provides substantial legal immunity to those misusing this authority and this has been the most contentious point since its inception. It is because of these arbitrary powers in the hands of the defense forces that the AFSPA has been denounced by human rights' groups, activists, public-spirited citizens and the people from areas where it has been implemented. Many committees, NGOs, international Human Rights organizations have questioned the validity of the Act, which clearly breaches the International law and infringes the rights which are considered to be sacrosanct by the Indian Constitution itself. There have been instances where this despotic army and paramilitary behavior resulted in people joining the extremist groups. In 2016, i.e. around 60 years after the Act was passed, the Hon'ble Supreme Court of India considered the gravity of the matter to rule that Armed Forces should be investigated for excesses committed in the name of national security, and delivered a judgment that is prima facie favorable. To put it differently, the ruling attempts to vaguely cure the evils after a systematic and well-defined void in accountability is allowed to fester and grow. The paper attempts to analyse the legal soundness of the Act and Judgments, and recommend what kind of steps are required for a situation that has been entrenched in the minds of people over generations.

It is to be noted that the Authors understand that the rationale behind AFSPA is not necessarily immoral as certain powers in the hands of army are required to effectively counter militancy and terrorism in hostile and disturbed areas, and to protect soldiers who act reasonably. And in this respect, the Authors have tried to avoid the apathy that the

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mainstream media today usually displays towards the security personnel in dealing with the question of AFSPA. Granted that there has been compelling evidence indicating extra-judicial activities, but this has also resulted in a tendency to look at all situations with blinkers on irrespective of whatever actions the defense personnel may take, without even inquiring into the reasons for an act, the chain of command that lead to it, the political motivations, the ground realities, etc. That is why, research has also been made in these areas to objectively analyze the reasons that lead to a particular consequence and provide a complete picture about where the culpability lies. The fact however remains that killing of infants and teens, mass rapes, custodial deaths, unwarranted abductions, etc., are such blatant instances of injustice that they do not merit impunity even in the widest possible interpretations of national security.

Hence, an attempt has been made to provide a balanced analysis. Reading into the interpretation of the Act rendered by the Courts, it seems that AFSPA is a necessary evil, but the powers should not be abused. The authors, however, differ with the Act on certain aspects, and recommend modifications for a regulatory mechanism which is acceptable to all stakeholders. The paper seeks to answer the aforementioned question of where a line can be drawn in the exercise of special powers under AFSPSA by providing suggestions and amendments in light of this socio-political scenario.

I. INTRODUCTION

The AFSPA, 1958, is a Central Act invoked to deal with rebellion, militancy, anti-national elements or insurgency in 'disturbed areas', and has stood out as a maligned legislation, considered especially 'draconian' in the Indian politico-constitutional setup of a democracy.[3] It draws legitimacy from Art 355 in which the Union has a duty to protect every state from aggression and rebellion. It provides:

[3] SAHRDC Resource Center, *Armed Forces Special Powers Act: A study in National Security Tyranny* (South Asia Human Right Documentation Centre) <www.hrdc.net/sahrdc/resources/armed_forces.htm> accessed 15 December, 2016

"Article 355: Duty of the Union to protect States against external aggression and internal disturbance: It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution"

Given how resorting to armed forces to quell unrest is a common practice all over the world, the Act makes way for an enabling environment for the forces to fulfill their duties without a fear of prosecution, giving them sweeping powers to shoot or arrest without warrant, search houses or destroy property which can be "likely" used by rebels in such areas (Section 4). They can be prosecuted only with the Centre's sanctions which gives way for Official bias (Section 6). The Centre and Governors of states are empowered to declare any area as 'disturbed' (Section 3). Section 5 states that a person who is detained under the Act must be handed to the police with "least possible delay", the delay being undefined.[4] A 'disturbed' region has to maintain status quo for at least 3 months.[5] Understandably, this Act has been assailed for usurpation of civilian government and several instances of human rights' violation which it allowed to, but not necessarily intended to, perpetuate.[6]

1.1 BRIEF HISTORY

The British were the first to promulgate the Armed Forces Special Powers Ordinance, 1942 during the Quit India Movement to suppress it. The 1958 Act has its origins in the 1948 Act, which was passed to replace previous Ordinances which had been issued to tackle security issues in Assam, Bengal, United Provinces and East Bengal. The context of the Armed Forces Special Powers (Assam and Manipur) Act, 1958 in the Naga inhabited areas of Assam and Manipur, was to crush the Naga rebellion and restore normalcy in 'unified Assam' following the proclamation of independence by the

[4] Armed Forces Special Powers Act 1958
[5] Disturbed Areas (Special Courts) Act, 1976
[6] Swati Kundra, 'Is AFSPA Truly A Draconian Law?' (*Lokniti: Programme for Comparative Democracy*) <www.lokniti.org/afspa.php>accessed 15 December, 2016

Naga National Council (NNC), as the Assam Rifles and armed police of the state had failed to contain the conflict. This eventually became the popular acronym, AFSPA. However, a difference between the 1942 Ordinance and the 1958 Act was that the latter considered officers of even lower ranks 'competent' to use force with immunity.[7] This was extended to Mizo district in Assam and entire Manipur owing to the secessionist struggles by the Mizo National Front (MNF) and United National Liberation Front (UNLF). By 1970s, the Central Government unilaterally declared Tripura as "disturbed", which was not in consonance with the powers conferred by the Act as only the State Governments were authorized to make such a declaration. To address this, it was amended in 1972 to extend this power to the Central Government. So, by 1990s, Tripura, conflict-ridden areas of Arunachal Pradesh and the entire State of Assam came within the ambit of the Act. The preamble was accordingly amended to include the names of all these states. What was envisaged to exist only for a year kept on being reviewed only to be continued till date.[8] It was withdrawn from Mizoram following a 1986 peace accord, but justice is far from dispensed.[9] In November 2016, the Union Government brought 3 more districts of Arunachal Pradesh within its purview owing to recruitment drives, extortion and area domination by various Naga factions.[10] In 2015 only, 18 years after AFSPA imposition and grave human rights violations by insurgents and armed forces alike, did the Tripura Government draw the curtains on this controversial legislation.[11] Nagaland, too, is peaceful today as

[7]Asian Centre for Human Rights 2005, *The AFSPA: Lawless Law Enforcement According To The Law?: A Representation To The Committee To Review The Armed Forces Special Powers Act, 1958 (*Asian Centre for Human Rights 2005) 93

[8] Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013)11-18

[9] Samudra Gupta Kashyap, 'Explained: Tripura junks the controversial AFSPA, where do the other states in Northeast stand?' *Indian Express* (Guwahati, 29 May 2015) <www.http://indianexpress.com/article/explained/explained-tripura-junks-the-afspawhere-do-the-other-states-in-northeast-stand> accessed 15 December 2016

[10] 'Union Government extends AFSPA in three districts of Arunachal Pradesh' (*General Knowledge Today,* 9 November 2016) <www.currentaffairs.gktoday.in/union-government-extends-afspa-districts-arunachal-pradesh-11201637009.html> accessed 15 December 2016

[11] Prajakta Hebbar, 'There Are 7 Compelling Reasons Why Tripura Decided To Withdraw The Draconian AFSPA' *Huffington Post* (India, 28 May 2015)<www.huffingtonpost.in/2015/05/28/there-are-7-compelling-reasons-why-tripura-decided-to-withdraw-t> accessed 15 December 2016

for the last five years, no soldier has fallen in combat, but the Government turns a deaf ear to State Government's pleas to repeal the Act.[12]

Apart from the North-Eastern states, this Act was imposed in Punjab in 1980s following militancy and struggle for supremacy amongst the Sikh factions, and the Central Government passed the Armed Forces (Punjab and Chandigarh) Special Powers Act with additional provisions like breaking open any lock "if the key is withheld" or stopping and searching any vehicle. It was repealed in 1997 after decisively dealing with militancy.[13]

Another state that has been reeling under hostility since independence because of domestic and foreign factors, and where the AFSPA juggernaut has proven to be excruciating time and again, is Jammu and Kashmir where the incessant power-struggle over and in Kashmir has resulted in alienation of people. In the beginning, the insurgency was internal owing to disaffection with the State over Partition, ascension and disregard of the plebiscite promised to determine the will of the people. Soon, India fought two wars with Pakistan over the fate of Kashmir, giving international dimensions to the insurgency which was supported by Pakistan intelligence agencies.[14] Post 1989, the situation deteriorated to a state of organized militancy and ethnic cleansing by well-connected and resourceful militant groups, compelling the State to impose President's rule and Armed Forces (Jammu and Kashmir) Special Powers Act in 1990. It has not been repealed till date, and the consequences have been abominable enough for the entire world to take notice.[15]

[12]Sanjoy Hazarika, 'An Abomination Called AFSPA' *The Hindu* (Delhi, 12 February 2013) <http://www.thehindu.com/opinion/lead/an-abomination-called-afspa/article4404804.ece> accessed 15 December 2016

[13] Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013) 19

[14] Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 2003) 151–152

[15]Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013) 20-21

Currently, AFSPA is in force in Assam, Nagaland, Manipur, Arunachal Pradesh, Meghalaya and J & K.[16]

If we compare this legislation with its contemporary legislations around the world, we will find that there's hardly any law which designates any specific area as disturbed or dangerous place for indefinite periods. Other common law legislations, like the Terrorism Act in UK, provides for a very democratic and accountable way of conducting searches, there are very clear provisions regarding 'use of force', the damage caused to any property during operations is duly noted, and there is a review committee to scrutinize detentions. Australian Legislation 'The proceeds of Crime Act, 2002, provides for the search to be conducted by the same-sex authorized personnel only. The magistrate issues a search warrant if he satisfied that there are reasonable grounds for such search.[17]

In Civil law countries like the US, there various terrorism laws but none of them applies to any specific area. Homeland Security Act, 2002 is a major legislation for protection against terrorism which provides for regular checks of the detention made. A similar provision is that the higher authority's sanction is required to assess allegations against army and police personnel.

AFSPA, therefore, seems less equitable when a general overview of such laws in other countries is taken into consideration.

1.2 CONSEQUENCES OF AFSPA- IS IT ALL "COLLATERAL DAMAGE"?

In a nutshell, military and militancy have become two sides of the same coin in areas with AFSPA. The Indian armed forces have used AFSPA to justify barbaric acts against civilians, which in some

[16]Ramakrishnan M., 'AFSPA Explained: How Does It Work Exactly?' (*Livemint,* 28 May 2015) <www.livemint.com/Politics/ZppBTWeVoJCVAKRIjyhCVI/AFSPA-explained-How-does-it-work-exactly.html> accessed 15 December 2016

[17]'AFSPA: In Comparative Perspective' *The Morung Express*(15thJanuary 2016)<http://morungexpress.com/afspa-comparative-perspective/>accessed 13 may 2016

cases were draconian, which one would have ideally attributed to single-minded terrorists and militants: open firing and killing of civilians, summary executions of detainees, rape, extra-judicial encounters, abductions, physical torture involving even electrocutions; ironically driving the youth to seek recourse in militant ideology.[18] This is in addition to the byproducts of liberation movements and militant violence. To mention a few, according to 2010 statistics of the Cabinet Committee on Security, civilian deaths attributed to armed forces in Kashmir were more than that by terrorists for the first time since 1980s.[19] "Malom Massacre" of 2000 is the infamous shooting of civilians at a bus stop by Assam Rifles, which also lead to death of a National Child Bravery Award Winner, post which people were dragged out of their homes and thrashed.[20] In 1991, during a search operation in Kupwara, the 4th Rajputana Rifles of the Indian Army gang raped over 50 women of all ages, including pregnant ones.[21]This case is still pending in the Supreme Court and the Army has petitioned the Court in 2016 to close the case.[22] In 1993, BSF officials open-fired at a crowd in Bijbehara, without provocation, killing over 40 civilians, and 13 officers of that unit were charged with murder.[23] Similarly in Kashmir, CRPF gunned down around 40 unarmed protestors in 2008 and detained hundreds, including

[18]Sheikh Mushtaq, 'Ten Killed in Kashmir Car Bomb Blast' ABC NEWS (10 August 2010) <www.abcnews.go.com/International/story?id=82930>accessed 15 December 2016; Clayton A. Hartjen & S. Priyadarsini, *The Global Victimization of Children: Problems and Solutions* (2nd edn, Springer 2012); 'India revises Kashmir death toll to 47,000' *Reuters* (Srinagar, 21 November 2008) <www.in.reuters.com/article/idINIndia-36624520081121>accessed 15 December 2016; Caitlin Huey-Burns, 'Amnesty International Cites Human Rights Abuse in Kashmir' *US News* (28 March 2011) <www.usnews.com/news/articles/2011/03/28/amnesty-international-cites-human-rights-abuse-in-kashmir%3E> accessed 15 December 2016

[19]Josy Joseph, 'For the first time, securitymen kill more civilians than terrorists in J&K' *The Times of India* (New Delhi, 7 September 2010) <www.timesofindia.indiatimes.com/india/For-the-first-time-securitymen-kill-more-civilians-than-terrorists-in-JK/articleshow/6508298.cms> accessed 15 December 2016

[20]'Manipur Remembers 'Malom Massacre' *Meghalaya Times* (Imphal, 2 November, 2016) <http://www.meghalayatimes.info/index.php/front-page/22585-manipur-remembers-malom-massacre> accessed 15 December 2016

[21] Gara La Marche, *Abdication of Responsibility: The Commonwealth and Human Rights* (Human Rights Watch 1991) 13–20

[22]'Army moves SC in Kunan Poshpora 'mass rape' case' *The Hindu* (Srinagar, 28 June 2016) <www.thehindu.com/news/cities/Delhi/Army-moves-SC-in-Kunan-Poshpora-%E2%80%98mass-rape%E2%80%99-case/article14405336.ece> accessed 15 December 2016

[23] Siddharth Varadarajan & Manoj Joshi, 'BSF Record: Guilty Are Seldom Punished' *The Times of India* (21 April 2002) <www.timesofindia.indiatimes.com/india/BSF-record-Guilty-are-seldompunished/articleshow/7503214.cms> accessed 15 December 2016

teenagers.[24] The writ petition on the basis of which the Supreme Court gave the 2016 verdict stated that between May 1979 to 2012, 1528 people civilians had become victims of extra-judicial executions.[25] And these are just the mass-scale incidents; the armed forces have also been responsible for carnage like the gang rape in Shopian district, cold-blooded murders in Pathribal, Machil Encounter, and the extra-judicial execution and rape of Manorama Devi after torturing her in front of her family in Manipur[26] which sparked off a civil disobedience movement where Meira Pabi women activists stripped in front of the headquarters of Assam Rifles, demanding a review of the Act.[27] This list still doesn't include all the skirmishes which have become routine life for denizens. This situation is compounded by mobilization of people against the State, resulting in a vicious circle to continue the Act. Can all this be swept under the blanket of collateral damage?

II. .ANALYSIS- THE UNENDING DEBATE ON IMMUNITY AND IMPUNITY

Given these consequences, which are still open wounds for the people who survived through them, and considering how the Act is still active; it is important to discuss the role of judiciary, how it should be legally looked at, and the results thereof.

a. LEGAL ANALYSIS

- **Fundamental Rights:** Justice requires justification of use of force on grounds of self-defense and proportionality.[28] At the outset, it is evident that AFSPA manifestly failed to even contain,

[24] Fayaz Wani, 'After Uprising, 300 Protestors Arrested In Indian Kashmir' *News Blaze* (6 Septmeber 2008) <www.http://newsblaze.com/world/south-asia/after-uprising-300-protestors-arrested-in-indian-kashmir_6255/> accessed 15 December 2016

[25] *Extra-Judicial Execution Victim Families Association (EEVFAM) and Anr. v. Union of India* (UOI) (2013) 2 SCC 493 [5]

[26] Ravi Nitesh, 'Ten Cases Under AFSPA You Should Know About' (*Counter Currents*, 17 Novmber 2014) <http://www.countercurrents.org/nitesh171114.htm> accessed 15 December 2016

[27] The Asian Centre for Human Rights, *An analysis of Armed Forces Special Powers Act, 1958* (PUCL, March 2009) <http://www.pucl.org/Topics/Law/2005/afspa.htm> accessed 15 December 2016

[28] SAHRDC Resource Center, *Armed Forces Special Powers Act: A study in National Security T\yranny* (South Asia Human Right Documentation Centre) <www.hrdc.net/sahrdc/resources/armed_forces.htm> accessed 15 December, 2016

forget resolve, insurgency; and even if we overlook the repercussions and consider just the bare Act, it indubitably violates the essential tenets of Indian and International Law. Articles 14 (equality before law and equal protection of laws) and 21 (right to life and personal liberty) form the edifice of a working democracy, and it cannot be overemphasized that the "procedure established by law" mentioned in the latter has to be just, fair and reasonable.[29] Given the extensive powers under the Act and loose definitions, there is an obvious scope of misinterpretation. For instance, armed forces have the power to shoot at an assembly of five or more persons, but "assembly" has not been defined, therefore conferring on the army the power to fire indiscriminately at any gathering, and the state of siege can be seen in an incident in Kohima (1995) where the BSF mistook a tyre-burst for a bomb and fired for an hour at a town, resulting in civilian deaths.[30] This is in stark difference with the IPC, where member of an unlawful assembly can be punished with imprisonment up to 6 months and/or a fine only.[31] Hence, for victims of AFSPA, even the basic fruits of Art 21 are far from realized; leave alone the realization of its judicially expanded scope.

The provisions of AFSPA also violate the fundamental provisions of arrest and detention of Article 22 and the procedures in Criminal Procedure Code (CrPC). Under s.4, a person can be arrested on mere suspicion without communicating the grounds of arrest, without warrant, and there is no advisory board to review punitive or preventive detentions, which is a discernible violation of Art 22. Also, 22(2) confers a right upon a person detained to be presented before the nearest magistrate within 24 hours, and the purpose of this provision is

[29] *Maneka Gandhi v Union of India* 1978 SCR (2) 621
[30] SAHRDC Resource Center, *Armed Forces Special Powers Act: A study in National Security Tyranny* (South Asia Human Right Documentation Centre) <www.hrdc.net/sahrdc/resources/armed_forces.htm> accessed 15 December, 2016
[31] Indian Penal Code 1860, s 143

to minimize scope for torture in custody, but in AFSPA this time period is an ambiguous "least possible delay".[32] Subsequently, this term was interpreted to mean 24 hours by the apex Court[33], but the practice is to disregard this because people have been put in captivity for several months, even years, and excessive delay is a norm, while their families go from lamp to post in their search.[34] Excessive delays have been found in several Habeaus Corpus petitions[35], but these precedents haven't proved to be enough to enforce them in light of the tyrannical immunity and impunity clauses.

- **Criminal Procedure Code:** Procedure to be followed by police for seizures, arrests, etc. is laid down in CrPC, in which the army and para-military are not trained.[36] With regard to maintenance of public order, CrPC provides certain safeguards and is more just than AFSPA even for a situation where armed forces are required to disperse an assembly, for instance, only civil force can be used, directives of the Magistrate are to be followed and only commissioned officers can command,[37] but under AFSPA, power has been also conferred on non-commissioned officers, and its scope is wide enough to disperse even peaceful assemblies by death. Moreover, Armed Forces are already immune from arrest for acts done in the exercise of their official duty in the whole Indian Territory under CrPC.[38] AFSPA escalates that to the level of providing blanket immunity, where one needs a sanction by the Govt. to prosecute an instrument of the Govt, thus suspending the Constitutional Right to sue in a

[32]Armed Forces Special Powers Act 1958, s 5
[33]*Naga People's Movement of Human Rights v. Union of India* [1998] 2 SCC 109
[34]Ashok Agrawaal, *Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004* (South Asia Forum for Human Rights, Kathmandu 2008)
[35]*Nungshitombi Devi v. Rishang Keishang, CM* Manipur (1982)2 Gauhati LR 137; *Civil Liberties Organisation (CLAHRO) v. PL Kukrety* (1988) 2 GLR 137; *Bacha Bora v. State of Assam* (1991) 2 GLR 119
[36]Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013) 25
[37] Code Of Criminal Procedure 1973, s 129-148
[38] Code Of Criminal Procedure 1973, s 45

system where Courts had the power to reject vexatious or abusive claims.[39] It goes without saying that this sanction is rarely granted. In J & K, this sanction was sought in 50 cases from 1989 to 2011 out of which 26 were declined and others are still up in the air.[40] The Delhi High Court has even rationalized that this prevents "frivolous claims".[41] If a victim is fortunate to have the case registered, conviction and investigation is a long shot because of various other immunity clauses.[42] So a Habeas Corpus Petition is the only recourse available to a victim of AFSPA in our apparently rights-oriented politics and judiciary.

- **Emergency provisions:** It is interesting to note that in Indian law, the Fundamental Rights may be suspended during an Emergency under Art 359, but Articles 20 (Protection in Respect of Conviction for Offences) and 21(right to life and liberty) can still not be abrogated; Emergency itself can be declared only for a specified period. AFSPA can be continued indefinitely and the pattern of abuse has shown that it is more despotic than the Emergency provisions too.
- **Existing Specific Legislations to accommodate reasonable AFSPA Provisions:** To deal with insurgents and non-State actors, India had previously adopted other specific legislations like Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Prevention of Terrorism Act, 2002, which were either lapsed or repealed because of their misuse, and necessary changes were made in the Unlawful Activities (Prevention) Act, 1967, but AFSPA still prevails. UAPA, as amended in 2004, already has requisite provisions to get to grips with insurgency and unlawful assemblies.[43] This was also the suggestion of the 2004 Justice BP

[39] Armed Forces Special Powers Act 1958, s 6
[40] 'Shroud of Impunity' (*India Together*, 10 December 2011)<http://www.indiatogether.org/2011/dec/hrt-afspa.htm> accessed 15 December 2016
[41] *Indrajit Barua v State of Assam* [1983] AIR 1983 Delhi 513
[42] Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013) 72
[43] Unlawful Activities (Prevention) Act 1967, s 10-23

Jeevan Reddy Committee, which was appointed in wake of Irom Sharmila's indefinite fast following the Manorama Devi incident. It recommended: revoking AFSPA and incorporating its appropriate provisions in the UAPA, clearly demarcating powers of officers, and establishing grievance cells for districts where it is in force[44], but Central Government junked it. The Report claimed that the AFSPA has become a "*symbol of oppression, an object of hate and an instrument of discrimination and highhandedness.*" Therefore, the advice was that a legal mechanism is required where the Army should stay, but the Act must go.[45] This was also endorsed in the Second Administrative Reforms Commission Report on Public Order.[46]

- **Justice Dispensation through Court-Martials:** According to the Army Act, 1950, competent authorities under sections 125 and 126 have the discretion to decide whether the proceedings will be instituted in a criminal court or before a court Martial in cases where both of these courts have concurrent jurisdiction, and AFSPA cases, involving Defense forces, fall in this category. A criminal court cannot take cognizance of an offence without sanction by the Centre. It goes without saying that the choice is always a court Martial. So a problem, in this context, is that these rulings are never published, and they also do not have to consider Art 21, hence the usual practice has been to close these cases or if trial takes place, it mostly results in exoneration. One glaring instance is the *Pathribal vs CBI* case, where 5 civilians were killed in a fake encounter in 2000 on a pretext that they were foreign militants, and the CBI submitted that the officials had staged it, murdering them in cold-blood. The officers challenged the charge sheet, and the Supreme Court directed the army to either have court-martial proceedings or grant sanction for prosecution in regular criminal courts. Army chose

[44] Government Of India Ministry Of Home Affairs, *Report Of The Committee To Review The Armed Forces (Special Powers) Act, 1958* (Government of India) 75-81 <http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf> accessed 15 December 2016
[45] Ibid 75
[46] Second Administrative Reforms Commission, *Fifth Report: Public Order* (Government of India 2007) 242

the former and after a prolonged legal battle, the Army Court, egregiously enough, acquitted them in 2014.[47] In 2016, the J & K High Court dismissed the petition by victims' families to transfer the report of the proceedings to the CBI Court, so hope for justice lies buried.[48] In the rare *Machil fake encounter case of 2013,* which had also resulted in widespread unrest in Kashmir Valley in 2010, 6 army personnel were sentenced to life imprisonment, and the Army cited it as proof of their willingness to dispense justice and enhance their human rights record.[49] Even though the ruling is commendable, sentencing is so seldom that this conceited declaration conveyed the exact opposite message and rubbed salt on the wounds of hundreds of families trying to secure justice for their long-gone relatives.[50]

The Paramilitary forces are not within the purview of the Army Act but have sweeping immunity under AFSPA and Disturbed Area Acts of the respective states, i.e., a similar kind of immunity, that only the army personnel are entitled to by virtue of their posts, has been conferred upon the paramilitary by virtue of these legislations.

- **International Law Standards:** AFSPA also seems like a clear derision of standards of International Law and International Humanitarian Law, where arbitrariness includes not only transgressing laws, but also injustice, inappropriateness and lack of predictability.[51] In its form and application, it violates the provisions of equality, dignity, liberty, non-discrimination of the

[47] 'Reopen the Pathribal case' *The Hindu* (27 January 2014) <http://www.thehindu.com/opinion/editorial/reopen-the-pathribal-case/article5620678.ece> accessed December 15, 2016
[48] D A Rashid, 'Pathribal Fake Encounter: High Court dismisses plea for trial in CBI court' *Greater Kashmir (April 2016*) <http://www.greaterkashmir.com/news/kashmir/pathribal-fake-encounter-high-court-dismisses-plea-for-trial-in-cbi-court/215967.html> accessed 15 December 2016
[49] 'Reopen the Pathribal case' *The Hindu* (27 January 2014) <http://www.thehindu.com/opinion/editorial/reopen-the-pathribal-case/article5620678.ece> accessed 15 December 2016
[50] Bashaarat Masood, 'In Pathribal, verdict 'like rubbing salt on wounds'' *The Indian Express (*August 2015) <http://indianexpress.com/article/india/india-others/in-pathribal-verdict-like-rubbing-salt-on-wounds/> accessed 15 December 2016
[51] United Nations Human Rights Council, *General Comment No 8, Right to Liberty and Security of Persons (Article 9), ICCPR* (UNHRC 30 June 1982) <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument> accessed 15 December 2016

Universal Declaration of Human Rights.[52] It also contravenes the ICCPR to which India is a signatory, and which imposes an obligation on States to secure the rights mentioned therein for its citizens,[53] especially the right to life and prohibition of torture which are non-derogable.[54] ICCPR allows derogation of some provisions only in a situation of public exigency which strictly requires this, and this cannot violate other International law obligations,[55] and AFSPA is outside the purview of this provision. International law is also clear in its rebuff of the immunity clause in AFSPA, from which stems the greatest outrage against it. The UNHRC has stated that the pre-requisite of State sanction to institute proceedings should be abolished. It is argued that the armed forces have high standards and their internal proceedings are enough to dispense justice, but the empirical data points to clear contravention of International customary law found in UN Code of Conduct for Law Enforcement Officials, where they are supposed to protect human dignity and respect human rights.[56]

- **Role of the Apex Court and Important Judgments:** A "democratic" country has its strength in supremacy of the judiciary, but with respect to AFSPA, judicial ignorance of administrative actions and the above-mentioned shortcomings has been exemplified time and again. Even in those rare instances where this issue is taken into cognizance for judicial or administrative review and the findings/rulings/guidelines issued are victim-centric, they are mostly left in limbo and seldom implemented, thus allowing the officers of the armed forces to stay above the law. The issue of constitutionality of the Act came before the Supreme Court in 1998, 40 years after it was enacted, in *Naga People's Movement of Human Rights vs UOI*[57], and

[52] Universal Declaration of Human Rights 1948, Art 1-9
[53] International Covenant on Civil and Political Rights 1966, Art 2
[54] International Covenant on Civil and Political Rights 1966, Art 6-7
[55] International Covenant on Civil and Political Rights 1966, Art 4
[56] UN Code of Conduct for Law Enforcement Officials 1979, Art 1-2
[57] *Naga People's Movement of Human Rights v. Union of India* [1998] 2 SCC 109

judicial review reached a new low. It was held as constitutional with the instructions that a declaration of "disturbed area" should be reviewed periodically after every 6 months, officers should use minimal force, an allegation of abuse should be thoroughly investigated, and the 'Dos and Don'ts' issued by the army on AFSPA must be followed, like troops should not harass innocent people, women can be frisked only in presence of female police, every delay in handing detainees to the police must be justified and least possible delay can extend up to 24 hours only, civil force should be used as far as possible, etc. Consequently, excesses by armed forces were seen as mere aberrations.

Technically, intentional violation of this judgment is commission of a crime, but given the serious deficiencies in enforcement mechanism, rampant abuse continued irrespective of these guidelines, and the Court constituted the high-powered Justice Santosh Hegde Committee in 2013 to probe 6 encounter deaths in Manipur, allegedly under AFSPA and to "*make recommendations for keeping the police and security forces within the legal bounds without compromising the fight against insurgency.*"[58] The Committee reported that 5 out of 6 encounters were fabricated, disproportionate force was used, and immunity was misused even by the local police. It recommended scrupulous adherence of guidelines issued in the previous case, and suggested that if the Central Govt doesn't grant a sanction under s. 6 within 3 months, it should be presumed as granted. It considered AFSPA an impediment in the way of peace. However, the Government is still sitting on these recommendations.

[58] Dr. Ajai Kumar Singh, *Report of the Supreme Court Appointed Commission* <https://docs.google.com/viewerng/viewer?url=http://www.hrln.org/hrln/images/stories/pdf/hedge-report-manipur.pdf> accessed 15 December 2016

The transgressions continued and 1528 alleged extra-judicial executions in Manipur came before the consideration of the Court in *EEVFAM vs UOI*.[59] In 2016, the Supreme Court held that an indefinite AFSPA defeats the purpose of what is supposed to be an emergency provision, the purported immunity is not invincible and has to yield to broad principles of human rights; the armed forces cannot evade investigation for alleged excesses. Even if they take action at their own level, it will still not preclude other inquiries. It reiterated the rationale in the *Naga People's Movement Case*, but this judgment has a special significance for the state which has been reeling under AFSPA for nearly 60 years, and also gives momentum to the increasing framework of opinion that the Act should be amended or repealed. However, the Court left open the questions how the inquiries will be conducted and will issue appropriate directions post a detailed report on the 1528 incidents. This judgment is the only favorable one so far which can go a long way in narrowing the scope of conflicts in the area as the Supreme Court categorically held that the immunity afforded to security personnel is not above human rights of people. The notion that any person bearing arms in a disturbed area is *ipso facto* an enemy was rejected. Now armed forces cannot evade investigation for alleged excesses. The rationale of the ruling is also in consonance with India's obligations as a signatory to the ICCPR which obligates a State to adhere to international humanitarian obligations even when it is dealing with a public emergency situation. Moreover, customary International law as found in the UN Code of Conduct for Law Enforcement Officials clearly provides that they will respect human dignity and will use fore only where strictly necessary and to the extent required by the situation[60], and this judgment espouses the same.

[59] *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. v. Union of* India (UOI) (2013) 2 SCC 493

[60] UN Code of Conduct for Law Enforcement Officials, Art 3

It seems like a breath of fresh air, and one might even appreciate the rights-based activism behind it; but the controversial Act is still alive, and the aforementioned dialectical analysis shows that aspiration of justice might still remain a distant dream.

III. PERSPECTIVES- PEOPLE vs THE SECURITY FORCES

People's consternation in the strife-torn areas is evident, and in areas which are now peaceful, like Nagaland, AFSPA still creates insecurity. Their discontent can be clearly seen in the protests that erupt time and again, and in the cause of the families who still have slight glimmers of hope of vindication. The Act has proved to be counterproductive because of its militarized and offensive approach, rather than a humanitarian and defensive one. In India, the paramilitary forces are under the Home Ministry, state police is the responsibility of the state government, and the defense forces are under the Ministry of Defense. And at a particular point, one of these groups is actually liable for an atrocity, but a general distrust against "men in uniform" as representatives of the State is created in people. It should be remembered that emotions can often color facts and become belief systems. Army is often seen as a bully with a pernicious addiction to abuse, and the reason why this exaggerated view prevails is that viewpoint of the military is seldom reported[61] in a society where perceptions easily sway.

That is why security personnel at various levels are vital stakeholders in this debate, and one cannot overlook their perspective, the ground realities, chain of commands, etc. It is important to understand the security forces have to undergo extensive physical and mental training, and the standards or values that they have to adhere to can be summarily seen in the 10 commandments issued by the COAS and also endorsed in the *EEVFAM case*[62], i.e., use minimum force, avoid collateral damage, act honestly,

[61] Ajai Shukla, 'Reassure the Army on AFSPA' Business Standard (13 December 2011) <http://ajaishukla.blogspot.in/2011/12/reassure-armyon-afspa.html> accessed 15 December 2016

[62] *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. v. Union of* India (UOI) (2013) 2 SCC 493 [151]

synergize actions with civil administration, take pride in protection of the country, etc. The indispensability and the exemplar role of the Defense Forces cannot be overemphasized.

A number of arguments have been given by the army for the retaining AFSPA, the most prominent one being that in such tensed circumstances as found in 'disturbed areas', a sense of immunity is required to raise morale and to be able to act swiftly without fear of persecution for legitimate actions done in good faith. Maj Gen Umong Sethi points that seeing reduced violence as indicative of lasting peace with no chance of tripping is erroneous, especially in J & K where Pakistan has repeatedly tried to exploit any perceived weakness of India so a "proxy war" situation always exists. The "impressions" about AFSPA are based on past experiences and have failed to take into account the "fact" of a changed reality where army has done a good job in informing the general public about its conduct and operations.[63] He also points that insurgents compel the populace to project forces as perpetrators of violence, and when insurgency subsides, politicians and civil authorities do the same to establish that some modicum of control is because of them. Media leaps on to this bandwagon as a tangential force whereas the army and CAPFs must be duly credited for declining infiltration and reducing violence, and can't be disempowered when peace is just on the horizon.[64] In fact, Maj Gen Nilender Kumar has given suggestions to humanize the AFSPA with checks and balances, so that an encouraged people can work hand-in-hand with the forces.[65]

However, with respect to the foot-soldiers, a detailed account of an executioner policeman, Herojit, was recorded by the Guardian in 2016, who had the rare epiphany to let the world know of his crimes and confess. In his harrowing tale, Herojit admitted to over a 100 extra-judicial encounters in Manipur

[63]Vivek Chadha, *Armed Forces Special Powers Act: The Debate* (Lancer's Books & Institute for Defence Studies and Analyses 2013) 39-40
[64]Ibid 52
[65]Ibid 59-62

as he was convinced of his immunity, becoming one of India's most seasoned counter specialists. He recalled that he used to feel no compunctions about casual executions as he was trained in that. He mentioned that it was pointless to arrest insurgents as the judiciary proved to be an impediment to convict militants because of the insistence on "benefit of doubt" but they had another option: staged encounters. Even when he was interrogated following the Manorama Devi protests, he stuck to the official story. When he was faced with charges, his officers abandoned him and the Court rejected his petition to investigate chain of command.[66]

As cathartic as this account is, it resonates with the state of affairs. But it is necessary to comprehend that a critique of AFSPA is never an attack on the integrity and abilities of the entire organization and our forces are not so mindless that they support it in all its repercussions; it may be just a chink in the armor.

IV. DRAWING THE LINE- RECOMMENDATIONS AND CONCLUSION

Withdrawal of AFSPA or any other major changes will definitely be a legally and politically difficult exercise, as even in the judicial opinions, an AFSPA like legislation is not a constitutional fraud as evinced by the judgments and the clear provisions of Art 355, *provided* that the use of force can be reasonably justified, for which the legislation needs to be amended. The Apex Court has acknowledged that special powers have been given only to effectively deal with militancy, and that these powers nowhere warrant the commission of extra-judicial excesses. Therefore, it can be certainly modified to regain the trust of the people, keeping in mind the views of the armed forces, or it can be incorporated in the Unlawful Activities (Prevention) Act.

[66]Raghu Karnad & Grace Jajo, 'Confessions of a Killer Policeman' *The Guardian* (21 July 2016) <https://www.theguardian.com/world/2016/jul/21/confessions-of-a-killer-policeman-india-manipur?CMP=share_btn_fb> accessed 15 December 2016

- An essential requirement is accountability. So, first step that is required, and is long due, is to develop a monitoring mechanism for thorough adherence of Supreme Court guidelines issued in various judgments and for this, the recommendations of Justice Santosh Hegde Committee seem to be the most relevant.
- Inquiry reports of alleged sexual harassment and civilian killings should be easily accessible to civilians, processed in a manner resembling pleas made under the RTI Act. Whenever such allegations surface, they have to be probed, irrespective of whether the suspect is an insurgent, militant, terrorist or a civilian. This is not only in tune with the 2016 Judgment, but will also enable people to seek legal action in due time. Having information on missing family members can be a step towards disincentivizing teenage militancy, as administrative apathy is one of the reasons for young people taking to arms.
- A Grievance cell can be set up in districts with AFSPA, which should be allowed to investigate whether the 'Dos and Don'ts' were followed in the chain of command of an alleged incident.
- The NHRC can be given more teeth to conduct time-bound formal probes in instances of violation of human rights under AFSPA, for instance, it can be allowed to take suo motu cognizance of such cases as such an initiative is already within its jurisdiction with respect to other cases of Human Rights.
- The Act should be amended to specify the threshold level at which an area can be declared "disturbed".
- The provision of obtaining a sanction before prosecuting should be completely done away with as the judicial system is competent enough to first, determine whether a complaint is vexatious and second, to dispose frivolous complaints swiftly.

- Instructions should be issued to the administrative agencies that organizations and citizens working for rehabilitation and counseling of victims of AFSPA and their families should be allowed to conduct their sensitization activities, counseling and public meetings without fear of detention or unnecessary interventions.
- A parallel sensitization activity can be for ground defence personnel on better awareness of the Do's and Don'ts issued and of humanitarian law which dictates that force is not the last resort even in conflict situations. Appropriate higher authority to report to in case of an unreasonable command must also be made known to them. There should unbending rules for disciplinarian actions against them in cases of abuse which should be made known to them too.

It should be remembered that a proactive and public-spirited political setup is more conducive to justice dispensation as the decision of calling armed forces or sending them to barracks is a political move. This process is complex involving an array of opinions, experiences, perceptions; and maintenance of order should be the only factor taken into consideration to truly win the battle of public diplomacy. It is hoped that these safeguards are taken into cognizance to assuage the prevailing cynicism, as national security cannot be achieved in a scenario of insecure sentiments, and a line needs to be drawn on the basis of these suggestions.

ARTICLE 370: PAST, PRESENT AND FUTURE

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ABSTRACT

On 26th January 1950, the Constitution of India came into force with a unique provision- Article 370. The special status accorded to the state of Jammu and Kashmir in the article meant that its people lived under a different set of laws while being a part of the Indian Union. When Article 370 was adopted into the Constitution, there was a widespread belief that the provisions under Article 370 were transitional in nature manifested by fact that the heading of article uses the word 'temporary' and it falls under Part XXI of Constitution which specifically deals with Temporary and Transitional Provisions. Since then advocates of unity and integrity of India are waiting for its abrogation.

Even while this was being done, there were voices of dissent. Dr. Syama Prasad Mookerjee led the campaign against the idea of Article 370 by proclaiming the famous slogan- "Nahi challenge- Ek desh mein do Vidhan, do Pradhan aur Do Nishan" His martyrdom led to a series of measures being adopted, that gradually limited the scope and impact of Article 370. Pandit Nehru favoured gradual erosion of Article 370, believing that an abrupt removal will be fatal to the cause of a unified India. In the Lok Sabha election campaign, The Prime Minister raised the issue of Article 370. He did not favour its abrogation; neither did he encourage its continuation- all that he wanted was a debate and discussion. (Phrase this paragraph better- provide me with the context of the constitutional assembly debates and how they played out)

Though Article 370 is an internal arrangement within Indian Constitution it has far reaching external implications in case if it is abrogated. There lies a debate whether Article 370 is the only link between India and State of Jammu Kashmir as suggested by few leaders from state and would any change in it effect position of state externally.

This paper would go into legal basis of Accession including the letter of Maharaja Hari Singh which in legal terms is called collateral Document and how this document formed the basis of events which unfolded in later days and eventually

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granting special status to state of Jammu and Kashmir. We will also look into interpretations of this article with help of Constitutional Assembly debates, along with debates in Jammu and Kashmir's Constitutional Assembly. Along with CAD's we will also look into Delhi Agreement of 1952.

The Paper tries to understand article 370 and the consequences of it on Kashmir and India and we will also look at aspect how it causes hindrance to integration of people of Kashmir to mainstream of India. We will also try to Demystify some notions about article 370 such as one on Right of outsiders to buy property in Jammu and Kashmir, which is not result of this article but this provision is holdover from Dogra times besides other states having similar provisions.

This paper would also try to investigate gradual erosion of this article by means of orders issued by President in last 70 years virtually taking away the special considerations given to state making article "tooth less tiger". Therefore, virtually making it of no use, however it has Psychological importance for people of J&K. Therefore, there is need to make people of Kashmir party to fate of this article.

We will also look into another debatable legal question whether this article can be removed or not, and if yes what would be procedure, can it be removed by means of article 368 or consent of state constitutional assembly is needed (which ceased to exist in 1954) as given in clause 3 of article 370 and in absence of such assembly can state legislative assembly give that consent on their behalf.

The Paper will look into consequences of abrogation of said article both at National and International level and whether it should be removed or not on basis of the consequences and whether Balance of interest is in favour of "National Interest of India" and whether is it the correct timing to touch the article when Kashmir is boiling and under curfew since last three months.

I. INTRODUCTION

The state of Jammu and Kashmir holds a peculiar position under the Constitution of India. Though it forms part of 'territory of India' as defined in Article 1[68] of the Constitution. It ceased to be 'Part B

[68] .Name and territory of the Union-(1)India, that is Bharat, shall be a Union of States.

State ' when this category was abolished[69] (Provide the context of the history as to what this Part B states are in 1-2 lines) and was fifteenth state included in First Schedule and is therefore is in the list of 'States' of the Union of India, all of which are now included in one category. However, the special and unique constitutional position which is accorded to state of Jammu and Kashmir by virtue of article of 370 since independence has been maintained and remains untouched so far. This special status accorded to the state of Jammu and Kashmir in the article 370 meant that its people lived under a different set of laws while being a part of the Indian Union. Therefore, all the provisions of the Constitution of India relating to states in first schedule are not applicable to Jammu and Kashmir even though it is very much 'State' as specified in schedule[70] and defined[71] in Constitution . When Article 370 was adopted into the Constitution, there was a widespread belief that the provisions under Article 370 were transitional in nature manifested by fact that heading of article uses word 'temporary'[72] and it falls under Part XXI of Constitution which specifically deals with " Temporary ,Transitional and Special Provisions". Prime Minister Nehru, himself a Kashmiri and architect of India's Kashmir policy even as late as in 1963 categorically stated that Article 370 is part of certain transitional provisions arrangements and is not permanent part of the Constitution[73].There were voices of dissent amongst the leaders at time when article 370 was in process of negotiation - Dr.Syama Prasad

(2) The States and the territories thereof shall be specified in the First Schedule.

(3) The territory of Union shall comprise-

(a)The territories of the States;

(b) the union territories specified in the First schedule ; and

(c)such other territories as may be acquired.

[69] Constitution (7th Amendment) Act, 1956.

[70] First Schedule of Constitution of India.

[71] Article 12 of the Constitution of India.

[72] Article 370- Temporary Provisions with the respect to the State of Jammu and Kashmir.

[73] Jawaharlal Nehru in Lok Sabha, 27 November 1963 (taken from Lok Sabha Debates, 1963).

Mookerjee, one of the colleague of Nehru in his Cabinet and later leader of Jan Sangh led the campaign against the idea of Article 370 by proclaiming the famous slogan- "Nahi challenge- Ek desh mein do Vidhan, do Pradhan aur Do Nishan" His martyrdom led to a series of measures being adopted, that gradually limited the scope and impact of Article 370. However, it is clear from intention of makers of Constitution and also by expressly mentioned provisions of Constitution of India that Article 370 is not a permanent feature and it is in Black and white till those special circumstances last and since past 70 years Kashmir is enjoying this special status.

In order to understand this dilemma that Jammu and Kashmir though enlisted as State as given in First schedule of the Constitution of India, was yet accorded a special status unlike other states one has to look at history of accession of state to Union of India and its constitutional relationship with Union must be looked into.

II. HISTORY OF ACCESSION

Jammu and Kashmir, until August 15th, 1947, was an autonomous, princely State in treaty relations with, and subject to Paramountcy of the Crown of England and was left with option of either acceding to Dominion of India or Pakistan or to remain Independent[74]. State of Jammu and Kashmir led by Maharaja Hari Singh on the 26th of October 1947, when attacked by 'raiders' supported by Pakistan was obliged to seek help of India after executing an Instrument of Accession similar to that executed

[74] The position of the Indian states on transfer of power was made clear in His Majesty's Government's declaration of June 3rd, 1947, supplemented by the statement issued by the British cabinet Mission on May 16th,1946. A large number of States acceded to the Dominion of India, and copies of the Instrument of Accession, as well as of the Standstill Agreement governing the administrative arrangements between the States and the Government of India until the new Constitution should come into force in India.

by the Rulers of other Indian states. until that time the Government of India had no agreement, military or political, with the State[75].

It should be kept in mind that the Instrument of Accession signed by Maharaja Hari Singh was in same form[76] as was executed by the rulers of the numerous other states which had acceded to India following the enactment of Indian Independence Act of 1947.The legal consequences of the execution of the Instrument of Accession by the ruler of Jammu and Kashmir cannot, accordingly, be in anyway different from those arising from the same fact in the case of other Indian States. The Indian Independence Act, 1947 empowered the Governor General of India to adapt the Government of India Act, 1935 as the interim constitution till the enactment of a Constitution by the Constituent Assembly of India. The Act, as adapted, served as a Constitution. Section 6 (1) of the Act enabled an Indian State, a formerly princely state, to accede to India by its ruler executing an Instrument of Accession. It is important to note that no specific form was prescribed by the Act itself. All it required was that the Instrument declare the act of accession and specify its terms. The legal basis[77] of exercising the sovereign power by the rulers as well as the form of the Accession were the same in the case of those states which acceded to Pakistan and those which acceded in India. Once the Instrument of Accession was signed State of Jammu and Kashmir became legally and irrevocably part of Indian Territory and Government of India was entitled to exercise jurisdiction over the state with respect to subjects given in Instrument of Accession. Therefore, when it seems that there was no distinction in legal basis of accession by state of Jammu and Kashmir and other princely states, why special

[75] The State of Jammu and Kashmir announced its intention of negotiating Standstill Agreements with both India and Pakistan. In fact, however, the State signed a Standstill Agreement only with Pakistan and entered into no agreement with the Government of India, prior to its accession on October 26th, 1947.

[76] Vide White Paper on Indian States (MS.6)rule pp.111,165.

[77] Section5-6 of the Government of India Act,1935 read with section 7(1)(b) of Indian Independence Act, 1947.

concessions were made for J&K. In order to understand this dilemma one has look into uniqueness of circumstances of Accession it to understand unique provision of article 370 in Indian Constitution. In the case of Jammu and Kashmir, the Instrument of Accession which the Ruler executed on 26 October 1947 was accompanied, uniquely, by a letter of the same date signed simultaneously with the Instrument. In law, such a document is a collateral document and two form an integral whole. Meaning thereby that letter has the same legal effect as does the Governor General's letter of acceptance dated 27th October,1947. This Acceptance is a legal pre-requisite under 6(1) of the Act. Therefore, Letter by Maharaja, Instrument of Accession attached to this letter and acceptance of this letter by Governor General as a whole form integral part of this Collateral Document and all must be read as a whole and not in isolation. It should be further noted that Letter by Maharaja[78] was written in grave emergency requesting immediate assistance from Union of India in light of attack by Pakistan thereby virtually leaving no space for negotiations and letter was attached with Instrument of Accession requesting its acceptance. The Instrument of Accession was signed with condition and of "assurance that if an agreement is made between Governor-General and the Ruler of the State" in which distribution of functions between union and state with relation to State will be made and such agreement shall be deemed to be part of Instrument of Accession[79].Therefore, the Instrument of Accession kept a room

[78] Maharaja's Letter to the Governor-General of India, Lord Mountbatten, on 26 October 1947 (accompanied with the Instrument of Accession).

"With the conditions obtaining at present in my State and the great emergency of the situation as it exists I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government".

[79] Instrument of Accession of the State of Jammu and Kashmir, as signed by Maharaja Hari Singh on 26th October 1947.

" I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of

open for negotiation on extent of power sharing between union and State. Until then Union was given jurisdiction over only three subjects with regard to state of Jammu and Kashmir i.e. Defence, External Affairs and Communications. Nevertheless ,the accession was accepted by Governor General but since circumstances of Jammu and Kashmir were such that accession was considered "disputed" it was accepted with the condition that question of accession would ascertainment by wishes of the people[80]. Accordingly, the Government of India made it clear through a white paper in early 1948 that accession would be regarded as purely provisional and until such time as the will of the people of the State could be ascertained[81]. Therefore, in its peculiar position due to the fact that having regard to the circumstances in which the State acceded to India, the Government of India had declared that it was people of state of Jammu and Kashmir, acting through their Constitutional Assembly, who were to finally decide the Constitution of State and the Jurisdiction of the Union of India. The applicability of the provisions of the Constitution regarding this State were, accordingly, to be in nature of interim arrangement.

Debating Article 370 (Provide a historical context to the extent of when such claims started coming up with and how they were dealt with and further, what exactly has this whole debate led to in terms of the position that is reflected in the Constitution and a critique on the same)

any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly."

[80] Reply from Governor-General India to Maharaja Hari Singh, dated 27 October 1947.

" where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people. ".

[81] White Paper on Jammu & Kashmir published by the Government of India early in 1948.

The Constitutional Assembly of India, which till that time also included prominent leaders from state of Jammu and Kashmir such as Sheikh Abdullah, Mirza Mohammed Afzal Beg,Maulana Mohammed Saeed Masodi and Moti Ram Bagda intensely debated the issue of Special status being accorded to the state under Article 370 (306A in draft Constitution).

However, the Article was opposed in Constitutional Assembly by many members on grounds of being hindrance to process of national integration and discriminating to status of other states by giving special status to Jammu and Kashmir. However, it was assured by the government that the status was granted to state because it was believed that State was not "yet ripen for this kind of Integration as taken place for case of other states" and the prevailing conditions of state are as special and requires special treatment. Those special circumstances included both domestic as well as International commitments.

Government of India also promised to" ascertain the of will of people" over two issues and by two means i.e. Accession to India and extent of Jurisdiction of Union over state, while the former was to be decided by means of Plebiscite once normalcy is restored and it was agreed that sphere of Union Jurisdiction over the State will be determined through the instrument of a constituent assembly of state of Jammu and Kashmir[82].Since Constitution Assembly of State was not possible due to prevailing circumstances of that time therefore an interim system was needed and article 306A(later 370)is an attempt to establish such interim system and therefore not permanent. The Right of Kashmiri's to draft their own Constitution was well recognized by leaders of India including Jawaharlal Nehru and

[82] Exposition of Article 370 (Article 306-A in the Draft) in the Constituent Assembly of India on 17 October 1949 by N. Gopalaswamy Ayyanagar .

Sardar Patel[83] and it is evident by white Paper of the Government of J&K on the Delhi Agreement[84] and process of formation of Constitutional Assembly of Jammu and Kashmir was initiated.

Meanwhile, on 26th January 1950, the Constitution of India came into force with a unique provision- Article 370 and it reflected the dual attitude of the Government of India with regard to status of Kashmir. Though Jammu and Kashmir was part of territory of Union of India as given in Article 1 but the applications of other provisions of Constitution were placed on tentative basis, subject to eventual approval of the Constitution Assembly of the State and therefore constitution thus provided for applicability of only two articles to the state i.e. Article 1 and Article 370[85]. The application of other Articles was to be determined by the President in consultation with the Government of State. Legislative Authority of Parliament over the State was confined to those items of the Union and Concurrent Lists as correspond to matters specified in Instrument of Accession and with regard to it Presidential Order[86] was passed in 1950 as per Article 370.

III. CONSTITUTION ASSEMBLY OF STATE

[83] A reference may in this connection be made to the letter addressed by Panditji to the Prime Minister of Kashmir on 18th May 1949 in which it had been stated:
"It has been the settled policy of the Government of India which on many occasions has been stated both by Sardar Patel and by me that the constitution of Jammu and Kashmir State is a matter for determination by the people of the State represented in a Constituent Assembly convened for the purpose. The Kashmir Constituent Assembly was perfectly free to accede or not to accede to India on any subject on which the State had not already acceded to India by virtue of the Instrument of Accession executed by it."

[84] 'India and Kashmir—Constitutional Aspect' white Paper of the Government of J&K on the Delhi Agreement.

[85] Article370(1)(c) of Constitution of India- "the provisions of article 1 and of this article shall apply in relation to that State;"

[86] Constitution (Application to Jammu and Kashmir) Order, 1950 by President of India.

As it was decided from very beginning by the Government of India that, notwithstanding the Accession of State of Jammu and Kashmir to India by the then Ruler, the future Constitution of the State as well as its relationship with India were to be finally determined by an elected Constituent Assembly of the State. Therefore, people of state elected a sovereign constitutional assembly in which met for first time on October 31st, 1951. The main functions which the Constituent Assembly was to discharge were:— (i) The question or the accession of the State; (ii) Retention or abolition of the Ruler as the Constitutional Head of the State; (iii) The question of framing a constitution for the State including the question of defining the Union sphere of jurisdiction over the State; and (iv) The question of awarding compensation to the landlords whose lands had been expropriated under the Big Landed Estates Abolition Act.

The scheme of the constitutional relationship, the division of powers, between the state and the centre was reached with an agreement at Delhi in 1952. The Delhi Agreement determined the subject matters other than those already extended by the Presidential Order of 1950, and were extended to the state. This Agreement was given a legal effect in 1954, when the president of India passed the Constitution (Application to Jammu and Kashmir) Order, 1954 by virtue of the powers vested in him under Article 370 of the Constitution. By this constitution order, the jurisdiction of the union was extended from the original subject matters acceded under the instrument of accession to all subjects of the union list, subject to some modifications and exceptions. The order sought to implement the Delhi Agreement. The Constituent Assembly of Jammu and Kashmir in early 1954 ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India. In pursuance of this, the President, in Consultation with the State Government, made the Constitution (Application to Jammu & Kashmir), Order, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. With this Order, the jurisdiction of Union extended to All Union subjects under the Constitution of India

(subject to slight alterations) instead of only the three subjects of Defence, Foreign Affairs and Communications with respect to which the State had to acceded to India in 1947. This Order deals with entire Constitutional position within the Constitutional framework of India under which has to work excepting only the internal Constitution of the State Government which was to be framed by the Constitution Assembly of the State. Internal Constitution means that the provisions governing the Executive, Judiciary and Legislature of the State of J&K were to be found in the Constitution drawn by the people of the State and corresponding provisions of the Constitution of India were not applicable to that State.

The State of Jammu and Kashmir thus acquired the distinction of having a separate Constitution for the administration of the State, in place of the provisions of part VI of the Constitution of India which govern all the other State of the Union[87].The Constitution was promulgated in 1957 with a declaration of Jammu and Kashmir to be "an integral part of Union of India". The territory of the state will comprise all the territories as on 15th August,1947, which were under suzerainty and sovereignty of Ruler of the State i.e. including territory of Pakistan occupied Jammu and Kashmir (24 seats in Legislative Assembly of J&K are kept vacant, to be filled by representatives of people living in these regions). The executive and legislative power of extends to all matters except those with respect to which Parliament has powers to make laws for the State under provisions of the Constitution of India. Constitution of state of Jammu and Kashmir also created the distinction between this State and other states of India with respect to Head of the State. While in the rest of India head of State Executive was called 'Governor' and he was appointed by President of India[88], the Executive head of State of Jammu and Kashmir was called *Sadar-i-Riyasat* and was to be elected by the Legislative Assembly.

[87] The very definition of 'State'(in Art.152) for the purpose of part VI excludes the state of Jammu and Kashmir.

[88] Article 152 , 155.

However, this special concession given to state was removed by an amendment[89] and as of now there lies no distinction between J&K and other states of India.

IV. UNDERSTANDING STRUCTURE OF ARTICLE 370

One must do analysis of Features and structure of Article 370 in order to understand the implications and consequences of Article 370.The text of Article is labeled as "Temporary provisions with respect to State of Jammu and Kashmir", it is an enabling provision that allows for the constitutional difference between the J&K and the rest of the territory of the Union of India. It has Three clauses.

Clause (1) is further divided into four sub-clauses. Sub- clause (a) states unequivocally that the applicability of Article 238 shall not extend to the State of J&K. Article 238, a provision regulating the relationship between the Union and the princely States, was deleted from the Constitution when the reorganization of all States on the basis of language took place. Hence, the presence of this sub-clause in Article 370 is absolutely redundant. Sub-clause (b) provides that the Parliament can make laws for the state of J&K on matters in the Union and the Concurrent Lists only if the President declares it to be concurrent to the matters of defence, communication and external affairs after consultation or by order specifies that laws be made on it after concurrence with the State Government. Sub-clause (c) simply means that Article 370 makes the provisions of Article 1, which deals with the territorial components of the Union of India; applicable to the State of J&K. Sub-clause (d) follows the same principle of consultation and concurrence with the State Government of J&K.

Clause (2) required that any concurrence given by the Interim Government of J&K before the Constituent Assembly of the State was convened must be placed before that Assembly for decision.

Clause (3) states that the President can issue a mere notification to cease the operation of this Article or to restrict it operation, but on the recommendation of the Constituent Assembly of the State, which

[89] Constitution of Jammu and Kashmir (6th Amendment)Act, 1965.

was dissolved long back in March 1957. Again, the provision is redundant to Article 370 in contemporary J&K.

Implications of Article 370 (There is no structure- there needs to be a link such as the judgement doesn't connect to the narrative that is being presented- provide more case examples and narrate it in a logical manner as to what are the implications of A. 370 for the state, for the Parliament, for other states and for the individuals)

Article 370 imposes restriction on Legislative and Executive powers of Union Government. Article uses the term "consultation with the State Government of J&K" and its implication is that it is a requirement under constitution that the Parliament consult the J&K Government before extending any law on defence, communication and external affairs to the state. This is a mockery of the Instrument of Accession whereby the three subjects were absolutely surrendered to the Union of India.

While the three afore mentioned subjects require an only "consultation" with the Government of J&K, for the rest of the subjects in the Union List and the Concurrent List, there is a mandatory requirement of concurrence with the State Government. It is implication of this legislative exception granted to the State of J&K where "concurrence with state government" is mandatory that there are large number of legislations which are not applicable since consultation with the State Government failed or there was no concurrence. Major amongst them being The Indian Penal Code,1860, arguably the most comprehensive legislation on criminal law in India, is applicable throughout the India except the state of Jammu and Kashmir, The Prevention of Corruption Act, 1988 the most effective contemporary statute under which corrupt politicians and government employees are brought to book for their offences is not applicable to J&K. The applicability of the Religious Institutions (Prevention of Misuse) Act, 1988, under which religious institutions are prohibited from permitting the promotion of any political activity or the storing of arms and ammunitions on its premises, does not extend to

J&K. J&K is exempted from the application of the Delhi Special Police Establishment Act, 1946, the source of the establishment and powers of the Central Bureau of Investigation, the premier criminal investigative body of the country

Then, there are numerous legislations that are applicable to the State, but have been enforced in J&K in a modified form. Certain statutes have thus, been applied in a limited manner, defeating their basic objectives. The Commissions of Inquiry Act, 1952, which empowers the Central Government to set up an inquiry commission to look into any irregularity of public importance, is applicable to J&K, but 61 subjects in the State List, including prisons, hospitals and water supply, are exempted from its application. Again, the Protection of Human Rights Act, 1993 is excluded from its application with respect to the subjects enumerated in the State List.

Also, the provisions of Part IV of the Constitution dealing with Directive Principles of State policy do not apply to the State of Jammu and Kashmir and the provisions of Article 19 are subject to special restrictions for a period of 25 years. Special rights as regards as employment, acquisition of property and settlement have been conferred on 'permanent residents' of the State. Also Articles 19(1)(f) and 31(2) are not omitted, so that fundamental right to property is still guaranteed in this State. Hence, this aspect of Article 370 indicates the degree of legal integration of the State with the rest of the country.

Similar fetters have been imposed upon the executive power of the Union to safeguard the autonomy of State of Jammu and Kashmir, a privilege not enjoyed by other States of Union. Article 3, which provides that the Government of India can increase or diminish the area of any state or change its name. Ironically, this article is applicable to J&K on the condition that consent of the State Legislature has to be obtained in that respect, which is contrary to the idea of the Parliament's supremacy over the States. Another anomaly is that the voting right based on adult suffrage is guaranteed to every Indian citizen resident in J&K for election to the Lok Sabha, while the adult suffrage applies to only

"permanent citizens" of J&K for its State Legislative Assembly election as per their constitution. The Constitution of India provides that the Parliament shall make provisions with respect to Assembly elections in the States16; however as per section 141 of the Constitution of J&K, the State Legislature is empowered to make all such provisions. Perhaps the most surprising modification is that of Article 352 whereby the President can proclaim a state of emergency in the nation, by laying down that such an emergency shall apply to the state of J&K only at the request or with the concurrence of the State Government. This plainly indicates the unfair dichotomy existing within India and the confinement of the nation's supreme law-making body by the special status bestowed upon the State of J&K.

However, there are large number of misconceptions in minds of general public about implications of Article. It is amongst the foremost grievances against Article 370 of the Indian Constitution, is the impression that it prevents Indians from buying land in the State. Contrary to this popular belief, the imposition of restriction on non-permanent residents as to the buying of immovable property in the State of J&K does not emanate directly from Article 370. The prohibition against outsiders buying the land in Kashmir was introduced by the Dogra's who bought the territory from the British in 1846 under the Treaty of Amritsar. Also similar restrictions on buying the land apply to many parts of India. These areas include state of Himachal Pradesh, Arunachal Pradesh, Andaman and Nicobar Islands and Nagaland. In fact Prime Minister Nehru advocated this rule and termed it as "good rule" and which should continue to protect interests of people of Kashmir.[90] Another myth perpetrated by the

[90] Jawaharlal Nehru in Lok Sabha, 27 November 1963 (taken from Lok Sabha Debates, 1963)

"The fact that there may be some special matters attached to it does not come in the way of integration at all, and I gave as an instance that in Kashmir citizens of India other than those of Kashmir are not allowed to buy land or own property. That is an old rule coming on, not a new thing, and I think that it is a very good rule which should continue, because Kashmir is such a delectable place that moneyed people will buy up all the land there to the misfortune of the people who live there; that is the real reason and that reason has applied ever since British times and for the last one hundred years or more."

people advocating the abrogation of Article 370 is that it discriminates against women. If a woman who is state subject to Jammu and Kashmir marries a man from outside the state, she can no longer buy land in Jammu and Kashmir. This issue was put to rest by the state's High Court in a judgment in 2000 which clarified that a woman does lose her right to own land in Kashmir on marrying outside the Kashmir.

Consequences of Article 370 (Provide relevant sources to substantiate the claims made under the consequences of A. 370) (Restructure and make more interesting and interactive through examples and through a comparison with whether there are such provisions in other legislations of other countries and what has been their effect and their basic history)

A very important consequence of Article 370 has been the isolation of the people of J&K from the rest of the country. Every state is said to be an integral part of the nation, but J&K with its separate Constitution challenges the very significance of this statement. The entire population of the state has been bereaved of the economic development that the rest of the country has achieved. Private industries cannot transfer land in their own name and hence, the state has seen no industrialization, while rapid urbanization and the mushrooming of factories in other states has provided employment and raised the standard of living. Financial legislations have constantly been prevented from being introduced in the state with the assistance of the farce called Article 370 and has prevented the concepts of gift tax, urban land ceiling, wealth tax etc. from making the powerful accountable to the people of the state, thus broadening the divide between the rich and the poor. Since no land can be owned by people who are not permanent residents of the state, the power elite who are the only ones with the capacity to invest in immovable property have cornered the land resources.

The abuse of Article 370 is perhaps the main reason why it should be abrogated, with the abuse leading to hopeless governance and breakdown of the social machinery. The immunity given to the J&K State from a number of Parliamentary laws operating in the rest of the country has been misused greatly by

the powerful to deny citizens their rights say for example the Jammu and Kashmir Right to Information Act, 2009 whereby the State Government is vested with more power as compared to the Central Act of 2005. The Domestic Violence Act, 2005 does not extend its application to the State of J&K, which has not enacted its own protective law for women in the domestic sphere. J&K has refused to enact laws that would extend the applicability of the 73rd and 74th Amendments to the Constitution that provide for reservation of seats for women in the Panchayats, thus preventing the women in the state from asserting the right that has become fundamental to the concept of Panchayat Raj all over the country. Another apparent abuse is the denial of state citizenship to the thousands of minority Sikhs and Hindus who migrated from Pakistan in 1947 by quoting Section 6 of the Jammu & Kashmir State Constitution that seems to have set in stone the definition of permanent resident. These are not isolated examples. Cumulatively, these create the shape of a phenomenon in J&K – a phenomenon of human rights abuses under the garb of validity bestowed upon it by article 370.

Article 370 has nursed a lack of physical and emotional integration of the State of J&K with the rest of the country. It has given impetus to the separatist movement that demand to be severed from its home by taking the route of militancy. The special status bestowed upon the state in the name of protecting its culture and identity has created psychological barriers. A culture cannot hope to flourish without the stimulus of contact from outside and an occasion to cross-fertilize its way of life with others. By allowing Article 370 to operate, we are taking away J&K's inherent right to the social, economic and cultural development of India. The continuation of Article 370 will gradually erode the remaining attachment of this state with the country and the granting of autonomy will ravish any hope of an integrated India.

Article 370 was included in the Constitution as a hurried step towards the formation of a republic and was specifically meant to be a temporary provision as the Constitution-makers were fully confident

that the close association of the people of Kashmir with free democratic India would convince them of their bright future by becoming an integral part of the Republic.

V. ABROGATION OF ARTICLE 370

Whether or not Article 370 be abrogated is moot question and further the process of its abrogation is another unsettled question of Constitutional law. The arguments of people supporting its abrogation majorly includes it being a temporary provision and therefore cannot last forever. They also state that it has been abused by Govt. of Kashmir and provision is being used as tool by separatist leaders playing in hands of Pakistan to hamper 'national interest of India'. They vehemently argue that it has caused more loss to people of Kashmir than benefits and therefore should be abrogated. However, there is another class of people who feel rather than choosing extreme path of abrupt abrogation the powers of State should be gradually eroded and has been considerably eroded by means of 47 Presidential Orders passed over a period from 1956 to 1994. They argue that this process of gradual erosion has led to extension of powers of Union from merely 3 subjects in Instrument of Accession to almost whole of Union and Concurrent Lists as given in Constitution of India to the State of Jammu and Kashmir. Today as many as 94 of 97 Subjects of Union list are applicable to Jammu and Kashmir and Article 370 is eroded beyond recognition without hurting sentiments of people of Kashmir. PM Nehru was one of the major supporter of this process of gradual erosion[91].

Article 370 is a complex legal/constitutional provision and the interpretations of article can vary and therefore there is no single solution to question of process of its abrogation. There are two views on

[91] Jawaharlal Nehru in Lok Sabha, 27 November 1963 (taken from Lok Sabha Debates, 1963)
"we feel that this process of gradual erosion of article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed. We should allow it to go on. We do not want to take the initiative in this matter and completely put an end to Article 370. The initiative, we feel, should come from the Kashmir State Government and people. We shall gladly agree to that. That process is continuing".

the question that whether Article 370 can be repealed like any other provision of the Constitution or not? Article 368 of Constitution of India deals with Power of Parliament to amend the constitution and its procedure. However, there lies a specific provision in Article 370 which provides a procedure for abrogation of article in question. The answer to procedure of abrogation of Article 368 lies on what is given primacy, a general provision of Article 368 or the specific provision as provided in Article 370. If one gives more weight to Article 368 which is general provision than it can be repealed by Parliament by introduction of Bill in Parliament and passing it by two-third majority but if preference is given to specific provision than procedure laid down in clause (3) of Article 370 should be followed. Power to put an end to Art. 370 clause (3) of Article 370 provides: -

"Not withstanding anything in the forgoing provision of this article, the President may, by public notification, declare that Art. 370 shall cease to operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification "

Therefore, Article 370(3) empowers the president to make an order to abrogate or amend Article 370. However, the recommendation of the state's Constituent Assembly was made mandatory in this regard. Article 370 would not be abrogated or amended since no constitutional amendment can have effect in relation to the state of Jammu and Kashmir unless applied by order of the president under Article 370. This is because amendment to Article 370 requires recommendation of the Constituent Assembly which was dissolved in 1956 after it completed drafting the State's Constitution.

Dissolution of Constitution Assembly gave rise to two possibilities for procedure for abrogation i.e. abrogation merely by notification of the President considering the fact that this clause has become redundant in conditions prevailing today it is not mandatory to get recommendation from State therefore it can be abrogated merely by notification of the President without reference made to

nonexistent Constitutional Assembly or it is suggested that Legislative Assembly of State should be deemed to be given status of Constituent Assembly and which in-turn recommends abrogation of article 370 to satisfy requirements given under 370(3). But such a process is politically impossible as none of the political parties in Kashmir stands for abrogation of this special status, despite the fact that this article has caused more harm to interests of people of Jammu & Kashmir than benefiting them anyways. Political impossibility of the task however does not give license to leaders of Kashmir to use this technicality as excuse to make it permanent feature of Indian Constitution as Legislative intention of Constitution makers clearly shows that it was of temporary nature and cannot be allowed to last forever.

Abrogation of Article 370 has been in core agenda of Bhatia Jante Party (BJP) from time of its Birth in 1980 and fact that the founder of BJP, Dr. Shame Prasad Mukherjee was martyred for the cause of Kashmir puts immense political pressure on Narendra Modi government to take steps to abrogate it. However, looking at the current state of Jammu and Kashmir where BJP shares power with PDP, initiative to completely put an end to Article 370 should come from State Govt. and people of Kashmir. However, looking at recent security threats and law and order Situation of the state, one needs to win hearts of people of Kashmir by means of "Insaniyat, Kashmirayat and Jamhuriyat"(Humanism, essence of Kashmir and Democracy) as suggested by Atal Bihari Vajpayee.It should be kept in mind that Article 370 was introduced as bridge between India and Kashmir and with time article 370 has acquired important place in psyche of people of Kashmir therefore no such actions should be taken which further deepens the gap between Delhi and Srinagar. Government of the day should focus on explaining the people of Kashmir the hindernce caused by Article 370 in process of Integration and development of Kashmir rather than removing it abruptly. Abrogation of Article 370 is phased step by step process and not just a single step event therefore, it should not be abrogated abruptly and all the decisions with regard to State should be taken with keeping people of

Kashmir in mind and making them party to decision and doing so will be in " National Interest" of India. (What are the effects of abrogation? Do a cost benefit analysis of why there is a need for abrogation? Also, provide a structure- don't introduce the political history without context into the same for instance- give a link as to what is, the political arguments and why they are accepted or thwarted, arguments for and against, your personal views, effects of both and the current position of law and what is it that your paper adds to the corpus of literature on this particular topic)

COOPERATIVE FEDERALISM: THE WEB THAT MUST SURROUND A. 356

Author(s): Kritika Goyal[92]

ABSTRACT

The fictional Union of Discordia embraced the spirit of Federalism in its Constitution since its inception. It however recently witnessed havoc on its federal fabric when the democratically elected government of the State of Docilia was unjustly toppled by the Union government. The laws of the Union have been imposed on the State under the Emergency powers enshrined in the Constitution of Discordia, undoing the will of the people of the State. This has brought the Union and the State government at variance taunting the holy concept of Federalism envisaged in the Constitution. Therefore, a network of relationships based on political compromise and administrative pragmatism between the Union and States is the need of the hour.

This article has critically analyzed the power of the President of India to issue a proclamation under Article 356 imposing President's rule in the light of the concept of Cooperative Federalism. Firstly, it describes federal character of Government of India. Secondly, it elucidates the concept of Cooperative Federalism and also a shift in the approach of the Indian Courts to promote cooperation between the Centre and the State. Lastly, it makes an attempt to arrive at solutions that take into account a cooperative approach while invoking Article 356.

I. INTRODUCTION

"It is the Union of India that is the basis of our nationality. It is in that Union that our hopes for the future are centered. The States are but the limbs of the Union, and while we recognize that the limbs must be healthy and strong and any

[92] BA. LLB (Hons.) student at Gujarat National Law University

element of weakness in them should be eradicated, it is the strength and the stability of the Union and its capacity to develop and evolve that should be the governing consideration of all changes in the country."[93]

The Constitution seeks and defines India to be 'Union of States' with a federal structure.[94]In a federal set up, the central government and the governments of the units act within a well -defined sphere, co-ordinate and at the same time act independently. The Constitution demarcates the sphere of action of each government by devising an elaborate scheme of distribution of legislative, administrative and financial powers between the Union and the States. Each government is entitled to act within its assigned field and cannot encroach on the field assigned to the other.[95]Federation is a changing notion and not a static paradigm.*Federalism is a living faith to manage diversities and it needs to be supported by institutional mechanisms to facilitate co-operation and co-ordination among the Units and between the Units and the Union.*

With the emergence of Social Welfare State, the traditional theory of federalism completely lost its ground.Indian Federation is closely connected to the concept of "Cooperative federalism"[96]The concept of Cooperative Federalism is characterized by increasing interdependence of federal and regional governments, a development that does not destroy the federal principle so as to promote welfare of the people in the country.[97]The idea of Cooperative Federalism essentially comprises of participative policymaking, decentralization of power and responsibility, sharing of resources, channel for negotiation and consultation between the Central and State governments towards the achievement of national goals.

[93]INTER STATE COUNCIL, 1 REPORT OF THE SARKARIA COMMISSION (1988).
[94]PUNCHHI COMMISSION, 1 REPORT OF THE COMMISSION ON CENTRE-STATE RELATIONS (2010).
[95]*Supra*, note 2.
[96]*Supra*, note 1.
[97]*Supra* note 2.

In the discussion below, the author highlights the nature of India's political structure and why the idea of cooperative federalism becomes relevant in today's scenario.

The importance of federal structure lies in the fact that India is a vast and culturally and linguistically diverse country and it would be difficult to administer the whole country without progressive decentralization of power to state and local governments. This was realized by the British government when in 1858 the administration of the country was taken over directly by the British crown. Charter Act of 1833 set up a centralized administration which was reversed by the Indian Councils Act of 1861. Later, the Government of India Act 1919 set up diarchy. However, it failed to meet the aspirations of the people for full responsible government. The provinces derived their authority by devolution from the Central Government. The Indian States enjoyed certain degree of internal sovereignty but were controlled by the Governor-General so far as their external relations were concerned. The provinces and the Indian States were proposed to be united into a federation under the crown in the Government of India Act, 1935. The federal structure envisaged by the Government of India Act, 1935, however never came into being; for it was optional with the Indian states to join the proposed Federation, and they never gave their consent.[98] The British Cabinet Mission Plan on May 16, 1946 envisaged a Central Government with very limited powers and relatively stronger Provinces having considerable degree of autonomy with all the residuary powers. However, the Constituent Assembly resolved in favor of a strong central authority not just to *"take care of its own responsibilities but to guide and co-ordinate the activities of the units while allowing the latter, in normal times, to act independently in a designed and by no means insignificant area of government".*[99]With regard to the nature of a federal state, Mr. N. Gopalaswami Ayyangar said that the orthodox definition of federalism as adopted

[98]Rouhan Gazi, *Federalism In Indian Constitution,* ACADEMIA, Https://Www.Academia.Edu/7330818/Chapter_2_Federalism_In_Indian_Constitution (Last Visited Sep 25, 2016).
[99]*Supra* note 2.

by other Constitutions could not be rigidly applied in Indian context as India had to integrate and bring areas under its control which were under the British Crown under one Federation. Our Constitution expects all constitutional authorities to act in harmony and there must be comity between them to further the constitutional vision of democracy in the larger interests of the nation.[100]

II. FROM CONFRONTATIONAL FEDERALISM TO CO-OPERATIVE FEDERALISM

The period from 1947-67 was attributed to the single party domination at the Central level and it was easy to implement national policies through the party mechanism. However, after 1967, often called as the period of confrontational federalism, the Country saw the advent of the multi-party system and coalition governments. This period has witnessed dilution of the cooperation between the Centre and State. These political complexions have brought the Centre and States at loggerheads and have made it difficult for them to work collectively on most of the important issues. This calls for an arrangement in which the Union Government respects the constitutional provisions in letter and spirit without any discrimination and endeavor to strengthen the arrangements for a co-operative approach to national problems while the states extend their cooperation in serving these institutions.

Such cooperative arrangement, referred to as co-operative federalism, developed in the early 20th century, entails the union and the states to strive together towards strengthening the unity of the country, safeguarding security, preserving democratic institutions and promoting economic development and the well-being and happiness of people.[101]The idea was first introduced in the United States during the New Deal era of the 1930s and, as a result, the constitutional concept of dual federalism nicknamed 'layered cake federalism' almost disappeared. A number of programmes were

[100]NabamRebai&Ors.v. Deputy Speaker &Ors., Civil Appeal No. 6203-6204 of 2016.
[101]Irfan Nabi, *Cooperative Federalism: A Comparative Study*, ACADEMIA, https://www.academia.edu/9267593/cooperative_federalism_a_comparative_study (Last visited Sept 4, 2016).

introduced as part of the New Deal, and these programs were administered by the states to help assuage the effects of the Great Depression.[102]

Similarly, in Canada, the federal system of government divided legislative powers amongst different levels of government which behaved like water tight compartments and represented particular interests. The Great Depression of 1929 led to the realization that both the levels of government cannot afford to stand up against each other for allocation of resources. Neither can they afford to wait for the courts to render decisions settling inter-governmental disputes. It was realized that effective policies require joint action between numerous legislative bodies. Hence the concept of Cooperative Federalism was employed.[103]

Both the countries saw a shift from 'watertight compartment' notion of federalism which viewed each branch of government as operating on its own to a notion of federalism in which in which national, state and local governments interact cooperatively and collectively to solve common problems, rather than making policies separately.

The coming up of multi-party system and coalition government in India, calls for cooperation between the two levels of government. The idea behind Cooperative Federalism is that the Centre and the State Governments should be guided by the broader national concerns of using the available resources for the benefit of the people.[104] The concept also underlines the idea that the Centre and State should work harmoniously with a cooperative spirit as partners and not work as water-tight compartments representing their own particular interests. To avoid working of the Centre and State as rivals or in

[102]Clifford Lee State, *Theodore Roosevelt: Dual and Cooperative Federalism*, 23 Presidential studies quarterly 129-143 (1993).
[103]David A.M. Seccareccia, *The Applicability of Co-Operative Federalism: Lessons Learned from the Assisted Human Reproduction Act*, 2013.
[104]*Cooperative Federalism and Decentralisation*, PLANNING COMMISSION OF INDIA, http://planningcommission.nic.in/plans/planrel/fiveyr/9th/vol1/v1c6-1.htm (last visited Sep 18, 2016).

seclusion, it is essential that the national objectives must be clearly identified and defined. With regard to such national objectives, there should be no reason for dissension by the States which must necessarily act in their own fields with the object of achieving those national goals. The Centre should not adopt a Big Brother policy vis-à-vis States but must take the role of facilitator with two way communication.[105]

Under our constitutional system, no single entity can claim superiority. Sovereignty doesn't lie in any one institution or in any one wing of the government. Co-operative federalism makes it possible to take advantage of a large national market, diverse and rich natural resources and the potential of human capabilities in all parts of the country and from all sections of the society for building a prosperous nation. The concept does not depict the States as servants or agents of the Central Government but as allies working for the same defined objectives. Cooperative Federalism essentially involves meaningful participation of states while allocation of funds to states by Centre for the implementation of various policies, identification of area specific grants and provision of flexibility and autonomy for the states for the use of funds for development.

Participative Policymaking involves continuing consultation and contestation between Union and State governments while formulation of policies or taking decisions that impact both Union and State governments.[106] In a multiparty setup where Centre and States are ruled by different parties, continuous consultation between the two levels of government helps to address many of the apprehensions of the stakeholders by integrating various concerns in decision making. Therefore, a policy after discussions and deliberations which impacts the other is the most likely node for generating federal harmony.

[105]VIDHI CENTRE FOR LEGAL POLICY, CO-OPERATIVE FEDERALISM: FROM RHETORIC TO REALITY (2015).
[106]FINANCE COMMISSION OF INDIA, 1 REPORT OF THE FOURTEENTH FINANCE COMMISSION (2014).

Cooperative Federalism involves sharing of powers and responsibilities between the three levels of government with grant of certain degree autonomy at each level to take decisions independently.

"*The Centre will join hands with the States in working towards the goal since it is possible only with cooperative federalism, wherein the Centre and States work together*".[107] The essence of the new Government's concept is that the successful working of 'co-operative federalism requires the Centre to be in a position to provide leadership to the regional governments, to coordinate their activities and perhaps on occasions to pressurize them to act in a particular direction if the national interest so demands.'[108] But the recent episodes of imposition of President's Rule under Article 356 of the Indian Constitution in Arunachal Pradesh and Uttarakhand have casted doubts on the intention of the Government behind the concept becoming a reality.

Article 356 of the Constitution allows for Center's interference in State's affairs when there is a breakdown of constitutional machinery. Article 356 of the Constitution of India gives the President the power to impose President's rule in states where he, on receipt of a report from the governor of the state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried out in accordance with the provision of the constitution. In such an emergency the Union government can extend its power into domains normally reserved for the states.[109]

The States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. The invasion of power in

[107]B. Chandrashekhar, *Cooperative Federalism Key To Progress, Says Narendra Modi*, THE HINDU(2016), http://www.thehindu.com/todays-paper/cooperative-federalism-key-to-progress-says-narendra-modi/article8957449.ece (last visited Sep 18, 2016).
[108]M.P. JAIN, INDIAN CONSTITUTIONAL LAW (7thed. 2014).
[109]CONSTITUTION OF INDIA, Art. 356.

such circumstances is not a normal feature of the Constitution. It is an exception and has to be resorted to only occasionally to meet the exigencies of the special situations.

The Constitution-framers recognized that the provisions of Articles 355 and 356 were necessary to meet an exceptional situation where break-down of the Constitutional machinery occurs in a State. At the same time, they hoped for the growth of healthy conventions which would help ensure that these extraordinary powers were used most sparingly, in extreme cases, for the legitimate purposes for which they were intended. Dr. B. R. Ambedkar expressed his sentiment that these articles would never be called into question and would remain a dead letter and all precautions would be taken before suspending the administration of the provinces if at all these articles are called into question.

Unfortunately, however, it so happened that over the years, the Centre has not always kept in mind the concept of co-operative federalism or the spirit and object with which the article was enacted while dealing with the States and has indeed grossly abused the power under article 356 on many occasions. Between 1950 and 1994, the said power was exercised on more than ninety occasions.

III. JUDICIAL APPROACH TO ARTICLE 356

The initial approach of the Courts has always favored the Central Government by taking the position that the Courts do not have the competence to go into the validity of a Proclamation under Article 356. Hence, the Court had outrightly denied the power of judicial review available under Article 356.

In *K Kaboo v. Union of India*[110] no political party could achieve clear majority in the state of Kerala. The then governor after a brief discussion with leaders of various political parties reported to the President that no political party could form a stable government and consequently president's rule was imposed. This action was challenged in the Kerala High Court which held that the validity of Proclamation

[110]AIR 1965 Ker 229.

under Article 356 cannot be challenged in Courts. It is a matter of personal satisfaction of the President, who is the constitutional head.

In *Rao Birendra Singh v. Union of India*[111] president's rule was imposed in Haryana owing to continued defections and counter defections of the MLAs. It was challenged in the Punjab and Haryana High Court in a writ petition on the grounds that the ruling party enjoyed majority in the house and the proclamation is hence mala fide. The Court however refused to go into the validity of the proclamation holding that if there is a substance in such ground, then that would be the basis for a debate in both the Houses of Parliament on the question of approval or otherwise of the Proclamation."

In *Sreeramulu v. Union of India*[112], the Andhra Pradesh High Court while considering the scope of Article 356 ruled that the absence of satisfactory criteria for the judicial determination in the Constitution makes the Article beyond the reach of the Court. The Court held that:-

"The President is not only the 'highest dignitary of the realm but the embodiment of the unity of the country. The power is subject to review by an elected Parliament which includes representatives from all States. And, after everything is said and done, it is the people of the country that should resist despotic tendencies on the part of the President or the Majority party in the Parliament and it is scarcely a matter for the Courts."

In *Bijaynanda v. President of India*[113], the governor recommended the imposition of President's rule in Orissa after the ruling party got reduced to minority owing to defections. The proclamation of the president was challenged as the governor did not invite the opposite party i.e., Pragati Party to form

[111] AIR 168 Punj 441.
[112] AIR 1974 A.P 106.
[113] AIR 1974 Ori 52.

the government when it staked a claim to form the government. The High Court ruled that the President's satisfaction which is subjective is not justiciable.

However, in the late 1970s, there was a shift in the approach of the Court when for the first time, in *State of Rajasthan v. Union of India*[114]the Supreme Court held that proclamation issued under Article 356 is subject to judicial review provided the satisfaction of the President is malafide or is based on wholly extraneous and irrelevant grounds.

The Supreme Court discussed at length provisions of Article 356 in the landmark case of *S R Bommai v. Union of India*[115]. In this case, the Governor of Karnataka had reported to the President that there were dissensions and defections in the existing ruling party as nineteen letters were sent to him by the council of ministers from withdrawing their support. He also mentioned that Chief Minister has lost confidence of the majority of the House and requested for President's Proclamation under Art 356 and it was eventually granted. The nine judge bench held that Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction contemplated is a subjective one however it must be based on relevant material including Governor's report. Such material can be reviewed by the Court. The Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds or irrelevant material. If the court strikes down the Proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. The court laid down the principle for the state governors that a Ministry's strength should be tested on the floor of the house. Further, the President

[114]AIR 1974 SC 1361.
[115]AIR 1994 SC 1918.

shall dissolve the assembly only after the Proclamation is approved by both Houses of Parliament. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

In *Harish Chandra Singh Rawat v. Union of India &Anr.,*[116] it was alleged that Chief Minister Harish Rawat has lost his majority in the legislative assembly that he tried to win back through the means of bribing. A deadline was given to the Harish Rawat government to prove its majority on the floor of the house. However, presidential rule was imposed in Uttarakhand a day before the Rawat government was to face a test of strength in the Assembly. The Presidential rule was challenged by the State Government.

The Court while taking the alleged charges of corruption against the Chief Minister into account, held that firstly, it was unverified material, which was acted upon and was made the basis for cabinet decision. Secondly, even if there is horse trading, floor test must be resorted to as held in the case of *SR Bommai*[117]. The Court lamented the President's Rule as the petitioner was denied the opportunity of proving his majority on the floor of house. Moreover, good governance cannot be the ground for recommending dissolution of a Legislative Assembly as was in the present case.

Throughout the ruling, the Court has highlighted the repercussions of the misuse of provision on the principles of democracy and foundations of federalism and how the misuse could play havoc on the constitutional system. The court held that every effort has to be made to prevent the very undoing the will of the people of a State by dismissing the duly constituted government and dissolving the duly elected Legislative Assembly.

In *NabamRebia&Ors.v. Deputy Speaker &Ors.*[118],the winter session of Arunachal Pradesh state assembly was scheduled to take place in January, 2016 and suddenly the session was advanced the session to

[116] Writ Petition (M/S) No. 795 of 2016.
[117] *Supra*, note 23.
[118] Civil Appeal No. 6203-6204 of 2016.

December 16, 2015 by the Governor while exercising his discretion under Article 163(2) of the Indian Constitution. He also issued an order to take up on priority basis a notice served by the leader of Opposition for impeachment of Speaker NabamRebia. The session was presided over by the deputy speaker in which the Speaker was impeached and a no-confidence motion against the CM was also passed. On January 26, the Union Cabinet approved President's rule in the state under Article 356 citing law and order collapse.

Thereafter a five judge bench of the Supreme Court held the actions of the Governor to be unconstitutional as the discretionary power of the Governor envisaged under Article 163(1) & 163(2) are meant only for situations where the advice of the Council of Ministers is not available and responsible government is not possible. The Constitutional Court held that when the Governor believes that the State Government has lost the confidence of the majority, he could propose a floor test. Under no other circumstances, the Governor can act without the aid and advice of the Council of Ministers. The judgment is a guiding direction to the Governor to act dispassionately and disassociate himself from any political affiliation.[119] The Court further held that "the Governor is not the conscience keeper of the Legislative Assembly" and is expected to exhaust all the alternatives before exercising his discretion. The Governor shall take steps to rectify the collapse of communication between him and the Council of Ministers. The Governor in the instant case had the advice of the Council but chose to ignore it. No opportunity was given to the Chief Minister to prove his majority on the floor of the House. President's rule was imposed in Arunachal Pradesh following multiple reports by the Governor and recommendation of the Union Home Minister.

[119]UtkarshAnand, *Lessons from Uttarakhand and Arunachal: What court orders on Central rule say*, THE INDIAN EXPRESS (2016), http://indianexpress.com/article/explained/arunachal-pradesh-verdict-nabam-tuki-harish-rawat-uttarakhand-president-rule-supreme-court-modi-government-2914435/ (last visited Sep 20, 2016).

The judgments by the Supreme Court mark a departure from the earlier view that the satisfaction of the President is not amenable to Judicial Review. The judgments have elucidated the necessity of a "comity" between the constitutional functionaries "to further the constitutional vision of democracy in the larger interests of the nation."[120]

The solution to preserving the balance between the Centre and the States does not lie in the deletion of Article 356 but in an enhanced cooperation between the two to maintain the federal spirit of the Constitution.

IV. RECOMMENDATIONS

The Rajamannar Committee[121], Sarkaria Commission[122] and Venkatachaillah Committee[123] had emphasized that Article 356 should be used in very rare cases and only when it becomes unavoidable to restore the breakdown of constitutional machinery in the State. In case where the ruling party fails to command majority in the legislative assembly, the Governor should call upon the leader of the opposition to form the ministry. If this is not possible and there is complete breakdown of constitutional machinery in the state, only then the Governor should send a report to the President.

The Rajamannar Committee emphasized that the Governor of the State should not consider himself as an agent of the Centre but play his role as the constitutional head of the State.

Highlighting the role of the Governor, The Governors Committee (1971) recommended-

[120]UtkarshAnand, *Arunachal Pradesh verdict: SC quashes Governor order, restores sacked CM,* THE INDIAN EXPRESS (2016), http://indianexpress.com/article/india/india-news-india/arunachal-pradesh-presidents-rule-quashed-by-sc-nabam-tuki-reinstated-as-cm/ (last visited Sep 30, 2016).
[121]GOVERNMENT OF TAMILNADU, REPORT OF CENTRE-STATE RELATIONS INQUIRY COMMITTEE (1971).
[122]*Supra*, note 1.
[123]MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, REPORT OF NATIONAL COMMISSION TO REVIEW THE WORKING OF CONSTITUTION (2002).

"*As Head of the State, the Governor has a duty to see that the administration of the State does not break down due to political instability. He has equally to take care that responsible Government in the State is not lightly disturbed or superseded ... It is not in the event of political instability alone that a Governor may report to the President under Article 356.*"

It is suggested that, before sending his report, the Governor should communicate it to the State Government and obtain its comments.[124]The Commission recommended that the report of the Governor regarding Article 356 should be a 'speaking document'[125]containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356. The report of the Governor regarding Article 356 should be placed before each House of Parliament.

On the receipt of the Governor's report, the President should follow the Principles of Natural Justice by providingthe concerned Statean opportunity to "*explain its position*".[126]In case, the President is not satisfied with the State's explanation of the situation, a warning to the concerned State should be issued, that things are not happening in the way in which they were intended to happen by the Constitution.[127]If the warning fails, the next thing for him to do will be to order an election allowing the people of the State to settle matters by themselves. If it is not possible for such a government to be installed and if fresh elections can't be held without avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government.

The main aim of the caretaker government would be to keep the administration going and to ensure that the elections take place in a free and fair manner. However, it would resist from taking major

[124]*Supra*, note 1.
[125]*Supra,* note 31.
[126]*Id.*
[127] Supra, note 23.

policy decisions.[128] If the outgoing ministry is allowed to function as caretaker government, the administration of the State can be carried out by a government which is acquainted with the situation in the State. At the same time, this would prevent over-centralization and promote cooperative federalism. The proclamation of President's rule under Article 356 should be the last resort after having exhausted all the above alternatives if the President is satisfied that the government of the state cannot be carried out in accordance with the provisions of the Constitution.

The satisfaction of the President should be based on the objective material which shall not be restricted or confined to the Governor's report only[129] and may be available in the form of the report sent by the Governor or otherwise of both from the report and from other sources [130]

In the case of *Rameshwar Prasad v. Union of India*[131], the Court held that:-

"If the satisfaction is based on Governor's report the Union Council of Ministers should verify the facts stated therein before hurriedly accepting the governor's report as gospel truth."

In keeping with the inclination of the people to know more about the affairs of the state under Article 19(1) (a), the material on the basis of which the decision is taken under Article 356 should be made public. This will result in *opening up of the windows and allowing in the sunlight of information and knowledge in an open democratic society.*[132]

Where Presidential Rule is imposed the Governor may be entrusted by the Centre with the task of actively carrying on the administration for which he then becomes directly responsible under the

[128]J.C. JOHARI, THE CONSTITUTION OF INDIA A POLITICO-LEGAL STUDY (2004).
[129]D.D.BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (8th ed. 2011).
[130]*Id.*
[131]AIR 2006 SC 980.
[132]*Supra,* note 24.

overall direction of the Union Government.[133] However, the Constituent Assembly while dealing with this issue had made it clear that in the break-down of Constitutional arrangements, the responsibility of intervention would be exclusively that of the President, in effect, of the Union Government, and the Governor would have no authority in such a situation to assume, in his discretion, the powers of the State Government even for a short period.[134] The provisions so finalized, it was considered, would be broadly in accord with the basic principle of Parliamentary democracy, the Union Government being accountable for all its actions to Parliament.

V. CONCLUSION

The recent episodes have shown that the difference between the governments at the Centre and the State level have led to the imposition of the President's Rule even when the conditions for the same did not arise. The provision which was envisaged to be used as the last resort has been invoked frequently. The provision in the Constitution cannot be and should not be used by the Union to advance the political interests of any political party. The adverse use not only questions the relationship between the Union and the States but is also a mockery of the cooperative federal pattern imbibed in the Constitution. The 'watertight compartment' notion of federalism which views each branch of government as operating on its own and rarely over-lapping with another level of government is not suitable for India's federation now. Such regular uses of the provision puts the democracy at stake. In the federal / quasi-federal set-up which we have, it is not open to the Central Government to get rid of State Governments by uprooting the democratically elected Governments. In the words of Sir Winston Churchill, the little man who stands with a little white paper to cast his precious vote battling snow, the scorching heat and the rain, such measures undermine the confidence of a little man.

[133] DEPARTMENT OF ADMINISTRATIVE REFORMS & PUBLIC GRIEVANCES, REPORT OF THE ADMINISTRATIVE REFORMS COMMISSION (1968).
[134] *Supra*, note 2.

The Court has not remained a mere spectator and has tried to enforce the views of co-operative federalism. Article 356 of the Constitution, is, in Sumner's simile, "*a giant*", and hence, should be watched carefully, since the tremendous powers assumed by the Central Government via this power can be dangerous. It is only the spirit of co-operative federalism that can preserve the balance between the Centre and the States. Co-operative federalism will be fundamental in removing the threat of centrifugal forces, in increasing popular involvement all along the line, in broadening the base of our democratic polity, in promoting administrative efficiency and in improving the health and stability of inter-governmental relations. The successful working of such federalism requires the Government at the Centre to respect the constitutional provisions in letter and spirit without any discrimination and to endeavour to strengthen the arrangements for a co-operative approach to national problems. At the same time, all the States will have to extend co-operation in serving these institutions and making their deliberations increasingly fruitful and beneficial both to the Union and to themselves. The recommendations provided by the various committees require a consideration by the Central Government as well as the State Government. The Governor who is the Linchpin of the constitutional apparatus of the State cannot be moved by political considerations. The common objectives of preserving democratic institutions, promoting economic development and the well-being and happiness of our people, strengthening the unity of the country, and safeguarding security require the Union and the States to strive together. Co-operative federalism is easily endorsed but is extremely difficult to practice without adequate means of consultation at all levels of government. A need for a dialogue and meaningful discussion in a spirit of compromise and cooperative partnership between the Union and the concerned State is of paramount importance in case of the breakdown of the Constitutional machinery in a State.

BIBLIOGRAPHY

BOOKS

1. B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, (2015).
2. D.D.Basu, COMMENTARY ON THE CONSTITUTION OF INDIA (8th ed. 2011).
3. J.C. JOHARI, THE CONSTITUTION OF INDIA: A POLITICO-LEGAL STUDY (2004).
4. M.P. JAIN, INDIAN CONSTITUTIONAL LAW (7thed. 2014).

ARTICLES

1. B. Chandrashekhar, *Cooperative Federalism Key To Progress, Says Narendra Modi*, The Hindu (2016), http://www.thehindu.com/todays-paper/cooperative-federalism-key-to-progress-says-narendra-modi/article8957449.ece.
2. David A.M. Seccareccia, *The Applicability of Co-Operative Federalism: Lessons Learned from the Assisted Human Reproduction Act*, 2013.
3. UtkarshAnand, *Arunachal Pradesh verdict: SC quashes Governor order, restores sacked CM,* The Indian Express (2016), http://indianexpress.com/article/india/india-news-india/arunachal-pradesh-presidents-rule-quashed-by-sc-nabam-tuki-reinstated-as-cm/ (last visited Sep 30, 2016).
4. UtkarshAnand, *Lessons from Uttarakhand and Arunachal: What court orders on Central rule say*, The Indian Express (2016), http://indianexpress.com/article/explained/arunachal-pradesh-verdict-nabam-tuki-harish-rawat-uttarakhand-president-rule-supreme-court-modi-government-2914435/.

REPORTS

1. DEPARTMENT OF ADMINISTRATIVE REFORMS & PUBLIC GRIEVANCES, REPORT OF THE ADMINISTRATIVE REFORMS COMMISSION (1968).
2. FINANCE COMMISSION OF INDIA, 1 REPORT OF THE FOURTEENTH FINANCE COMMISSION (2014).
3. GOVERNMENT OF TAMILNADU, REPORT OF CENTRE-STATE RELATIONS INQUIRY COMMITTEE (1971).
4. INTER STATE COUNCIL, 1 REPORT OF THE SARKARIA COMMISSION (1988).
5. MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, REPORT OF NATIONAL COMMISSION TO REVIEW THE WORKING OF CONSTITUTION (2002).
6. PUNCHHI COMMISSION, 1 REPORT OF THE COMMISSION ON CENTRE-STATE RELATIONS (2010).
7. VIDHI CENTRE FOR LEGAL POLICY, CO-OPERATIVE FEDERALISM: FROM RHETORIC TO REALITY (2015).

STATUTES

1. THE CONSTITUTION OF INDIA, 1950.

CORPORATE SOCIAL RESPONSIBILITY: WHERE DOES INDIA STAND TODAY?

Author(s): Neha Chaubey[135] and Divya Rana[136]

ABSTRACT

India's Companies Act 2013 (Companies Act) had presented a few new introductions which would change the face of Indian corporate business. One such new arrangement is Corporate Social Responsibility (CSR) on which the paper will center. Business Dictionary characterizes CSR as "A company's sense of responsibility towards the community and environment (both ecological and social) in which it operates[137]. It also says that companies express this citizenship (1) through their waste and pollution reduction processes, (2) by contributing educational and social programs and (3) by earning adequate returns on the employed resources." The point of this exploration paper is to unite every one of the effects, comes about, realities (details/suggestions) old convictions relating to it and the most recent conditions to at long last present another view and after that remark on its utility, achievement or disappointment so far what has it brought. Numerous such analogies have been drawn however giving it another measurement is our thought process. The creators trust that with its incorporation it would not just require the organizations to spend/contribute cash to it additionally take after the revelation and other statutory necessity. We will begin with different meanings of CSR which till today have not been limited to one and investigate the advancement of CSR in India going back decades represented by four periods of its improvement expressing that it has been an old convention in India even before its incorporation in lawful world. Its effect in all angles, for example, on the workers and associations will likewise be discussed. We will likewise investigate a couple contextual analyses by the organizations themselves and a couple bodies of evidence against the organizations alongside an argument against the possibility of CSR itself. Together with every single such case we will represent a couple of world class cases of CSR. We will likewise cover a substantial number of occasions in the present

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[137] *Corporate Social Responsibility*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/corporate-social-responsibility.html.

year going from suggestions for clearer CSR standards to TATA getting gold rating for CSR for the third year running and significantly more to assist dissect late circumstance as for reply to the question which has till today not found a tasteful answer which is whether CSR is dealt with as a smokescreen even today or the organizations really consider it important and work towards it with the intention of being some assistance towards the improvement of the country. Do they really have confidence in the equation of "giving it back to the general public" which numerous a period is propounded as a definition or rationale appended to CSR, will likewise be a viewpoint around which our paper should spin. Certainly not deserted will be the presentation of Section 135 and Schedule VII of the Companies Act and also the arrangements of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CRS Rules) which became effective from 1 April 2014, by the Ministry of Corporate Affairs. Closing will be suggestive conceivable cures or changes that could help make CSR a much more effective belief system additionally expressing the new circumstance and analogies between various time ranges with illustrations. Henceforth this paper will give a new review on CSR's position in India today.

I. INTRODUCTION

"Corporate Social Responsibility is the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large."[138]

CSR helps companies live up to their responsibilities as global citizens and local neighbors in a fast-changing world, it acts an agent of social progress. Furthermore, acting in a socially mindful way is more than only a moral obligation for an organization, yet is something that really has a primary concern pay-off. Business organisations have obligations to their society such as to increase in societal expectations of business, a reduction in the power and scope of government, globalisation, heightened

[138] *World Business Council for Sustainable Development*, WBCSD - WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT (last visited Dec 15, 2016), http://old.wbcsd.org/home.aspx.

media reach, the greater spread of democracy, and a series of corporate scandals that have undermined confidence in the integrity of corporations, financial institutions and markets.[139]

The process though promoted recently, has been followed since ancient times. Philosophers like Kautilya from India and pre-Christian era philosophers in the West preached and promoted ethical principles while doing business. The concept of helping the poor and disadvantaged was cited in much of the ancient literature.[140] The idea was also supported by several religions where it has been intertwined with religious laws. Hindus follow the principle of Dhramada or getting salvation and forms an integral part of almost all hindu rituals. Zakat, followed by Muslims, is a form of alms-giving treated in Islam as a religious obligation or tax. Today, in most Muslim-majority countries, zakat contributions are voluntary, while in a handful (Libya, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen), zakat is mandated and collected by the state.[141]

The private sector involvement in social responsibility is an important character in the developing world. Many governments in developing countries like India, facing poverty problem are trying to involve the private sector, to a certain extent, to carry on some social and environmental activities in their own way. The authorities have been promoting the adoption of CSR without imposing a mandate. The role of the government is creating an enabling environment for CSR and providing incentives to help companies, and ensuring minimum legal standards and the firms' policy frameworks become more responsible and accountable.[142]

[139] Tilakasiri K, Welmilla I, Armstrong A, Heenatigala K., *A Comparative Study of Corporate Social Responsibility in the Developed and Developing Countries* (May 14, 2017), http://www.kln.ac.lk/uokr/ICBI2011/A&F%20120.pdf.
[140] *CSR in the World and India* (May 14, 2017), http://shodhganga.inflibnet.ac.in/bitstream/10603/15950/12/12_chapter%203.pdf.
[141] MARTY, MARTIN E. & APPLEBY, R. SCOTT, FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE 320 (University of Chicago Press 1996).
[142] *Id.* at 3.

II. CSR IN INDIA

Corporate Social Responsibility is not a new concept in India, the Ministry of Corporate Affairs, Government of India notified the Section 135 of the Companies Act, 2013 along with Companies (Corporate Social Responsibility Policy) Rules, 2014 "hereinafter CSR Rules" and other notifications related thereto which makes it mandatory (with effect from 1st April, 2014) for certain companies who fulfill the criteria as mentioned under Sub Section 1 of Section 135 to comply with the provisions relevant to Corporate Social Responsibility.

India's New Companies Act 2013 has introduced new provisions relating to Corporate Social Responsibility. The idea of CSR lays on the belief system of compromise. Organizations take assets as crude materials, HR and so forth from the general public. By playing out the undertaking of CSR exercises, the organizations are giving something back to the society. Section 135 and Schedule VII of the Companies Act as well as the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CRS Rules) came into force from 1st April 2014, as notified by the Ministry of Corporate Affairs.

The companies on whom the provisions of the CSR shall be applicable are contained in Sub Section 1 of Section 135 of the Companies Act, 2013. As per the said section, the companies having Net worth of INR 500 crore or more; or Turnover of INR 1000 crore or more; or Net Profit of INR 5 crore or more during any financial year shall be required to constitute a Corporate Social Responsibility Committee of the Board "hereinafter CSR Committee" with effect from 1st April, 2014.[143]

- **CSR Committee and Policy**: Every qualifying organization requires spending of no less than 2% of its normal net benefit for the promptly going before 3 money related years on CSR

[143] Section 135(1), Companies Act, 2013 (India).

exercises. Promote, the qualifying organization will be required to constitute an advisory group (CSR Committee) of the Board of Directors (Board) comprising of at least 3 executives. The CSR Committee might figure and prescribe to the Board, a strategy which should demonstrate the exercises to be embraced (CSR Policy); prescribe the measure of use to be caused on the exercises alluded and screen the CSR Policy of the organization. The Board might consider the proposals made by the CSR Committee and favor the CSR Policy of the organization.

- **Activities under CSR**: The activities that can be done by the company to achieve its CSR obligations include eradicating extreme hunger and poverty, promotion of education, promoting gender equality and empowering women, reducing child mortality and improving maternal health, combating human immunodeficiency virus, acquired, immune deficiency syndrome, malaria and other diseases, ensuring environmental sustainability, employment enhancing vocational skills, social business projects.[144]

  Under the Companies Act, inclination ought to be given to neighborhoods where the organization works. Organization may likewise take up with at least 2 organizations for satisfying the CSR exercises gave that they can report exclusively. The CSR Committee should likewise set up the CSR Policy in which it incorporates the ventures and projects which is to be embraced, set up a rundown of undertakings and projects which an organization arrangements to attempt amid the execution year furthermore concentrate on coordinating plans of action with social and natural needs and process so as to make share esteem.

III. CII & Corporate Social Responsibility

[144] *Finance Department*, FINANCE DEPARTMENT (last visited Dec 15, 2016), http://finance.bih.nic.in./.

The Confederation of Indian Industry (CII) is an association of Indian businesses which works to create an environment conducive to the growth of industry in the country.

As a business organization that connects with seriously with society everywhere, CII's work spreads to help individuals in get-together their social change desires. Corporate Social Responsibility is currently developing into a urgent territory of enthusiasm for companies that want to offer back to society and contribute their advantages. Companies with driving social engagement convey more prominent incentive to their partners.[145]

CII connects with Government, NGOs, and common society to help industry prosper compelling projects for social advancement. It gives various positions through which agents can attempt on different issues, for example, sexual orientation fairness, microfinance, advancement of in reverse locale, HIV/AIDS and general well-being. Through centered intercessions, CII persist to standard monetarily and socially tested substances and bring them into a period of development, improvement and strengthening. Every one of these medications are propelled under CII's expansive canvas of "Improvement Initiatives".

CII works closely with Government on policy issues, interfacing with thought leaders, and enhancing efficiency, competitiveness and business opportunities for industry through a range of specialized services and strategic global linkages.

IV. EVOLUTION OF CSR IN INDIA

The development of corporate social responsibility in India alludes to changes after some time of the social standards of companies of corporate social obligation (CSR), with CSR referring to

[145] CII, Unicef ink pact for corporate social activities, The Hindu Business Line, December 10, 2012.

organizations how to realize a general positive effect on the groups, societies, social orders and situations in which they work.

The fundamentals of CSR rest on the fact that not only public policy but even corporates should be responsible enough to address social issues. Thus companies should deal with the challenges and issues looked after to a certain extent by the states.[146]

India has the world's richest tradition of corporate social responsibility. Though the term CSR is comparatively new, the concept itself dates back to over a hundred years. CSR in India has evolved through different phases, like community engagement, socially responsible production and socially responsible employee relations. Its history and evolution can be divided into four major phases.[147]

Phase I

In the first phase charity and philanthropy were the main drivers of CSR. Culture, religion, family values and tradition and industrialization had an influential effect on CSR. In the pre-industrialization period, which lasted till 1850, wealthy merchants shared a part of their wealth with the wider society by way of setting up temples for a religious cause. Moreover, these merchants helped the society in getting over phases of famine and epidemics by providing food from their godowns and money and thus securing an integral position in the society. With the arrival of colonial rule in India from the 1850s onwards, the approach towards CSR changed. The industrial families of the 19th century such as Tata, Godrej, Bajaj, Birla, and Singhania were strongly inclined towards economic as well as social considerations. However it has been observed that their efforts towards social as well as industrial

[146] Chahoud, Dr. Tatjana; Johannes Emmerling; Dorothea Kolb; Iris Kubina; Gordon Repinski; Catarina Schläger (2007) - *Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compact's Role* (Dec 15, 2016), http://www.ijird.com/index.php/ijird/article/viewFile/86004/65922.
[147] *Evolution of CSR* (Dec. 13, 2016), http://csrandsustainability.com/1-5-evolution-of-csr/.

development were not only driven by selfless and religious motives but also influenced by caste groups and political objectives.[148]

Phase II

The second phase was during the Independence movement. Mahatma Gandhi urged rich industrialists to share their wealth and benefit the poor and marginalized in society. His concept of trusteeship helped socio-economic growth. According to Gandhi, companies and industries were the 'temples of modern India'.[149] He affected industrialists to set up trusts for schools, and research and preparing foundations. These trusts were likewise required in social change, as country advancement, training and strengthening of women.

Phase III

This phase was characterized by the emergence of PSUs (Public Sector Undertakings) to ensure better distribution of wealth in society. The policy on industrial licensing and taxes, and restrictions on the private sector resulted in corporate malpractices which finally triggered suitable legislation on corporate governance, labor and environmental issues. Since the success rate of PSUs was not significant there was a natural shift in expectations from public to private sector, with the latter getting actively involved in socio-economic development.

Phase IV

In this last phase CSR became characterized as a sustainable business strategy. Globalization has transformed India into an important destination in terms of production and manufacturing bases of

[148] *Id*. at 10.

[149] *Understanding and Encouraging Corporate Responsibility in South Asia* (May 13, 2016), http://bookstore.teri.res.in/docs/books/CSR-India-Europe%20Booklet-SampleChp.pdf.

TNCs are concerned. As Western markets are becoming more and more concerned about labor and environmental standards in the developing countries, Indian companies which export and produce goods for the developed world need to pay a close attention to compliance with the international standards.[150]

V. CASE STUDY ON THE IDEA OF CSR ITSELF

Can companies do well by doing good? – argues *Aneel Karnani* in his article "The Case Against Corporate Social Responsibility"[151]. He believes the idea of corporate social responsibility is not only flawed but it's leading to a dangerous route, because due to such smokescreens we are misguided in not finding real solutions to our societal/environmental problems and relying on corporate world to take part in it is leading in the wrong direction. Let's see this side of the debate as well.

Again let's have a look at the question "Can companies do well by doing good?"[152] How far this is true requires an analysis because this is our whole idea. When such is the motive then real world implementation and possibilities of such ideas (fancies) being true need a check.

Well this question got a backseat when everybody was busy praising and welcoming Corporate Social Responsibility in the business world. Though criticisms were not spared but the actual concern was overshadowed. Some professionals argue that because corporate sector is an entity it becomes its duty to contribute to the society; another view is that this will create a symbiotic relationship of the Corporate sector with the society-"the giving back to the society" picture it portrays: also a synergy[153]

[150] *Id.* at 10.
[151] Aneel Karnani, *The Case Against Corporate Social Responsibility*, THE WALL STREET JOURNAL (May 14, 2017), https://www.wsj.com/articles/SB10001424052748703338004575230112664504890.
[152]Rosabeth Moss Kanter, *How to do Well and to do Good*, MIT SLOAN MANAGEMENT REVIEW (May 14, 2017), http://sloanreview.mit.edu/article/how-to-do-well-and-do-good/.
[153] *Id.* at 16.

as you may call it was one of the views but the idea that companies have a responsibility to act in the public interest and will make profit from doing so (sometimes-yes) seems fundamentally flawed[154].

Companies now started claiming that they are not in business for profits but also for serving on a larger social purpose and worldly recognized institutions like the United nations encourage them to pursue such strategies. They claim to produce healthier foods or more fuel efficient vehicles or conserve energy and other resources in their operations and so forth and so on to make the world a better place[155]. But this clearly is an illusion and that too a dangerous one.

Simply put, cases wherein private profits and public interests go hand in hand, corporate social responsibility will be irrelevant as the increase in their profits will lead to increase in social welfare also whereas in cases where private profits and public interests stand in opposition an appeal to corporate social responsibility shall be ineffective, because executives are unlikely to act voluntarily in public interest and against share holders interests[156].

Ineffective or irrelevant is not the concern here, the danger we are talking about is that a focus on social responsibility will delay or divert or discourage more effective measures to enhance social welfare in those cases where profits and public goods are at odds. As society looks to companies to addresses these problems, the real solutions may be ignored. Often the companies camouflage the harm done by them to the society by selling lucrative ideas of balancing the harm with the good which in turn are no good in addressing the social welfare.

[154] Idris Mootee, *Corporate Responsibility is an Illusion?*, IDEA COUTURE (May 14, 2017), https://www.idr.is/corporate-repsonsibility-is-an-illusion-what-is-he-thinking/.
[155] Joel Makower, *Walmart Sustainiblity at 10: An Assessment*, GREENBIZ (May 14, 2017), https://www.greenbiz.com/article/walmart-sustainability-10-assessment.
[156] MARION NESTLE, SODA POLITICS: TAKING ON BIG SODA (AND WINNING) (Oxford University Press, 2016) (2015).

To get a better understanding of the same let us have a look at situations where private profits and social welfare go hand in hand. Say the market for healthier food. Fast-food outlets have started to include salads and other options designed to appeal to health-conscious consumers. Other companies have indulged in providing low-fat, whole-grain and other types of foods that have grown in popularity for being healthy (costly too). Social welfare is improved. Everybody wins.

Likewise, auto makers have profited from responding to consumer demand for more fuel-efficient vehicles (the one's which can be charged using electricity/solar energy), a plus for the environment. And many companies have boosted profits while enhancing social welfare by reducing their energy consumption and thus their costs.

In any case, social welfare isn't the main thrust behind these patterns. More advantageous nourishments and more fuel-productive vehicles didn't turn out to be so normal until they got to be distinctly gainful for their creators. Vitality protection didn't turn out to be so essential to many organizations until vitality turned out to be all the more exorbitant. These organizations are profiting society while acting to their greatest advantage; social activists asking them to change their ways had little effect. It is the persistent amplification of benefits, not a guarantee to social responsibility that has turned out to be a shelter to the general population in these cases. Unfortunately, not all companies take advantage of such opportunities, and in those cases both social welfare and profit suffers.

Now let us look at the situations where companies sometimes can do well by doing good, more often they can't. Reason given in most cases doing what's best for society means sacrificing profits. This is true for most of the society's permeant and persistent problems because if it were not all such problems would have been solved by companies questing to maximize their profits. A suggestive example is the pollution caused by manufacturing, reducing that pollution is costly to the

manufacturers, and that eats into profits[157]. Poverty is another example, companies could pay their workers more and charge less for their products, but their profits would suffer. So the solution should be that the executives shall heed to the call of corporate social responsibility and keep aside their shareholders interests? But this too wouldn't be long term as such managers/ executives are hired to maximize profits. The movement for corporate social responsibility when in direct opposition to the movement for better corporate governance, demands that managers fulfill their fiduciary duty to act in the shareholders' interest or be relieved of their responsibilities. That's one reason so many companies talk a great deal about social responsibility but do nothing—a tactic known as green washing[158]. Even if owner-operated business choose to accept diminished profit in order to enhance social welfare, that decision isn't being imposed on shareholders as shareholder's money cannot be used to pursue one's philanthropic goals.

This is not to say, of course, that companies should be left free to pursue the greatest possible profits without regard for the social consequences. But, appeals to corporate social responsibility are not an effective way to strike a balance between profits and the public good is the conclusive view for this side of the debate.

VI. CASE STUDY OF TATA GROUP: CORPORATE SOCIAL RESPONSIBILITY

Introduction

Tata group operates more than 80 companies, ranging from steel, automobiles to consumer goods. Tata is accredited to initiate various labor welfare laws. For example- the establishment of Welfare Department was introduced in 1917 and enforced by law in 1948; Maternity Benefit was introduced

[157] Paul Holmes, *The Case against Corporate Social Responsibility Once Again*, THE HOLMES REPORT (May 14, 2017), https://www.holmesreport.com/latest/article/the-case-against-corporate-responsibility-once-again.
[158] LYNN R. KAHLE, EDA GUREL-ATAY, COMMUNICATING SUSTAINABILITY FOR THE GREEN ECONOMY, (Ed 2014).

in 1928 and enforced by law in 1946. A pioneer in several areas, the Tata group has got the credit of pioneering India's steel industry, civil aviation and starting the country's first power plant. It had the world's largest integrated tea operation. It is world's sixth largest manufacturer of watches (Titan).[159]

Approximately two third of the equity of the parent firm, Tata Sons Ltd., is held by philanthropic trusts endowed by Sir Dorabji Tata and Sir Ratan Tata, sons of Jamsetji Tata, the founder of todays Tata empire in the 1860s. Through these trusts, Tata Sons Ltd. utilizes on average between 8 to 14 percent of its net profit every year for various social causes. Even when economic conditions were adverse, as in the late 1990s, the financial commitment of the group towards social activities kept on increasing, from Rs 670 million in 1997-98 to Rs 1.36 billion in 1999-2000. In the fiscal year 2004 Tata Steel alone spent Rs 45 crore on social services.[160]

CSR Activities of Tata Companies & Societies

"*Corporate Social Responsibility should be in the DNA of every organization. Our processes should be aligned so as to benefit the society. If society prospers, so shall the organization...*"[161]

Tata group has been committed to being a good corporate citizen, by actively assisting in the improvement of the quality of life of the people in the communities in which it operates with the objective of making them self reliant.

[159] Amit K Srivastava, Gayatri Negi, Vipul Mishra, Shraddha Pandey, *Corporate Social Responsibility: A Case Study of TATA Group*, IOSR JOURNAL OF BUSINESS AND MANAGEMENT (Dec. 14, 2016), http://iosrjournals.org/iosr-jbm/papers/vol3-issue5/D0351727.pdf.
[160] *Forerunners in corporate social responsibility*, THE TATA (Dec. 12, 2016), www.tata.com.
[161] Mahesh Pednekar, Dr. Nishikant Jha, *CSR and Business Strategy: A Case Study on the TATA Group*, MARATHA MANDIR'S BABASEAHEB GAWDE INSTITUTE OF MANAGEMENT STUDIES (Dec. 13, 2016), http://www.mmbgims.com/docs/full_paper/5_mahesh_pp.pdf.

Some of the work carried out by the Tata companies-

Self-Help Groups

Around 500 self-help groups are operated under various poverty uplifting programs; out of which over 200 are engaged in activities of income generation. Women empowerment programs through Self-Help Groups have been extended to over 700 villages.

Supports Social Welfare Organizations

Tata Steel supports various social welfare organizations. They include;

- Tata Steel Rural Development Society
- Tribal Cultural Society
- Tata Steel Foundation for Family Initiatives
- National Association for the Blind
- Shishu Niketan School of Hope
- Centre for Hearing Impaired Children
- Indian Red Cross Society, East Singhbhum

Healthcare projects

The healthcare projects of Tata Steel include facilitation of child education, immunization and childcare, plantation activities, creation of awareness of AIDS and other healthcare projects.

Pollution Control

Tata Motors is the first Indian Company to introduce vehicles with Euro norms. Tata Motors' joint venture with Cummins Engine Company, USA, in 1992, was a major effort to introduce emission

control technology in India. To make environment friendly engines it has taken the help of world-renowned engine consultants like Ricardo and AVL. It has manufactured CNG version of buses and also launched a CNG version of its passenger car, the Indica. Over the years, Tata Motors has also made investments in the establishment of an advanced emission-testing laboratory.[162]

Natural Capital

On the World Environment Day, Tata Motors has launched a tree plantation drive across India and countries in the SAARC region, Middle East Russia and Africa. As many as 25,000 trees were planted on the day. Apart from this more than 100,000 saplings were planted throughout the monsoon.[163]

Tata companies work towards empowering people by helping them develop the skills they need to succeed in a global economy, which is now consolidated into a group CSR programme called Tata STRIVE. The group equips communities with information, technology and the capacity to achieve improved health, education and livelihood outcomes. It also works towards enabling other living things on the planet get their fair share of the resources.[164]

TCS believes in giving back to all communities in which it operate, and in using IT as an instrument for social development and progress. TCS has a deep commitment to education, the environment, and setting up and maintain infrastructure for urban beautification, pollution reduction and healthcare waste management.

The case for privatization in India today therefore lays overwhelmingly on hypothetical or ideological contemplations, as to be sure has been valid for comparable tests somewhere else. There is a sense,

[162] Id. at 23.
[163] *Tata Motors: Corporate Social Responsibility Annual Report 2009-10* (Dec.14, 2016), www.tatamotors.com/sustainability/CSR-10/content.php.
[164] *Corporate Social Responsibility*, TATA (Dec 13, 2016) , http://www.tata.in/sustainability/articlesinside/corporate-social-responsibility.

originating from the colossal development towards privatization worldwide in the course of recent decades, that an exchange of possession to private hands will improve for execution of state-claimed ventures (SOEs) and will support general monetary execution. For private firm no particular reference to setting out of store in connection to benefit for CSR exercises. A few private corporate, which are focused on CSR and a few, having approach on CSR. India had a standout amongst the most-created private segments in assembling in the Third World.[165]

VII. CSR UPDATES AND EVENTS IN INDIA (YEAR 2016)

We will further discuss a few selective events the current year saw. Jindal Steel & Power Ltd (JSPL) was conferred with prestigious best CSR Practices Award for 'Outstanding CSR Practices in Steel & Power Sector' at the 'Odisha CSR Summit 2016' held in April. That's how the CSR practices are being awarded when carried out diligently. In the month of May, the government- Ministry of Corporate Affairs demanded to be furnished with accurate details regarding the CSR activities undertaken by the eligible companies in the period 2014-2015 which was the first year of its implementation, as discrepancies were found on analysis of their statutory filings. This illustrates how government steps-up for implementation when self –regulation as an alternative does not flourish.

India's largest CSR management company NextGen, in partnership with International Finance Corporation (IFC) and ET CSR, hosted a workshop on 'Off-grid renewable energy solutions: A CSR opportunity' on 22nd June 2016 in New Delhi to discuss that when in India, 400 million people live without adequate electricity access still the solar lighting market remains nascent with penetration well below five percent. Here, we are taking steps to widen the scope of welfare. The government is looking at ways of making corporate social responsibility (CSR) commitments more relevant. For instance, a

[165] CSR in the World and India (May 14, 2017), http://shodhganga.inflibnet.ac.in/bitstream/10603/15950/12/12_chapter%203.pdf.

company like Hindustan Unilever could assign some of its brightest marketing minds to a women's self-help group or Larsen & Toubro could send engineers to help with a village water conservation project. Skilled technicians, water experts, marketing managers and engineers will support government schemes as part of companies' CSR commitment to address the shortage of skills in many flagship public programmes [166] . The departments don't lack funding but trained professionals. A Nasscom executive said that there is a lack of good mentoring in rural areas not talent. This is an example of government handling the regulation by try to merge rural welfare and company's CSR requirement.

Another such example was when startup Mrida group focused on rural development and when achieved success helped corporate invests their CSR funds in them. The first step was providing access to electricity by financing micro-electric grids. Mrida is also involved in facilitating e-hubs for education and entertainment, e-rickshaws for travel, agri-interventions to improve crop yield, initiating livelihood generation and self help projects—tailoring, candle-making—as well as providing market access to farmers. It works with small farmers and encourages them to cultivate high-value plants, crops and herbs, which it then buys from them. This provides the farmers with a regular income. Mrida creates health and wellness-related product products from the farmers' produce, employs its expertise in supply chain and logistics, branding, marketing, etc. and takes it to the market. They say "It's a true win-win situation for all concerned. We are not a not-for-profit business, a grant-giver or a charity."[167]

Maharashtra government plans to involve top industrialists, philanthropists and executives such as Ratan Tata, chairman emeritus of Tata Sons, Reliance Industries Mukesh Ambani, Mahindra &

[166]Ruchika Chitravanshi, *Government may engage India Inc expertise under CSR*, THE ECONOMIC TIMES, September 5, 2106.
[167] Vinay Dwivedi, *Startup Mrida Group focused on rural development, helps corporates in CSR efforts*, THE ECONOMIC TIMES, August 29, 2016.

Mahindra's Anand Mahindra and HDFC's Deepak Parekh for a mammoth corporate social responsibility (CSR) project that aims to transform 10,000 villages over three years. Having industrialists on the governing board would boost the confidence of those willing to be part of the initiative and assure them that their funds are being put to right use. A lot of these companies are doing CSR and they do yield positive results. But this is a scattered approach. Government is planning a more synchronised move with corporate participation with deadlines and goals in place. This is one of the best moves for correct CSR implementation so far. If it is believed that companies should too be a helping hand for the government in building the nation, that is how it should be done via CSR as an initiative.

There has been substantial increase in actual Corporate Social Responsibility (CSR) spending comparatively to previous year even as education, skill development and health-care areas have received the highest CSR funds, as per a recent report. [168] The report 'India CSR Outlook Report (ICOR)' was launched in the inaugural session of India CSR Summit and CSR partnerships Exhibition 2016 on 27-28 September.

An assessment of CSR expenditure of 7,334 companies for 2014-15 indicates that 4,195 companies did not incur any expenditure on CSR, also show cause notices have been issued by Registrar of Companies to 496 companies for non-compliance with the CSR norms. [169]

Tata Consultancy Services has been awarded the Gold rating certificate by EcoVadis, an independent CSR advisory firm. This is the third year in a row that TCS has received the top accolade from the

[168] PTI, *Substantial Rise in CSR spending compared to previous year*, THE ECONOMIC TIMES, September 25, 2016.
[169] PTI, *CSR: 4,195 companies spend nothing; show cause notices to 496 firms*, THE ECONOMIC TIMES, November 22, 2016.

Paris headquartered firm. [170] This illustrates how seriously such tasks are planned and implemented for maximizing benefits to the people.

Various companies also received show cause notices related to CSR spend. The government also asked state-run companies to deposit unspent CSR in Prime Minister's pet Swachh Bharat Programme.

In a well appreciated move the Ministry of Youth Affairs and Sports took up with the Ministry of Corporate Affairs the issue of widening the scope of CSR activities in sports promotion by revising the existing entry in either promotion or development of sports and promotion of rural sports, nationally recognised sports, Paralympics sports and Olympic sports. New angles are considered.

These were a few updates on the initiatives taken up by corporate sectors and government in the current year. As you can see when the government together with its shareholders and private giant owners comes up with such initiatives to multiply development and welfare of the people the chances of a strong and rapidly developing nation increases. Though not denying people, companies and government officials trying to get away with all their profits, the government is also not easy on them. A proper regulation check mechanism is trying to be formed as can be seen above. We can say that India in its system uses it all – self regulation, government regulation and financial calculation too.

VIII. RESULTS AND IMPACTS OF CSR

India incorporated CSR into its system on record in the year 2013, which came to be implemented from the year 2014. In such a short span commenting on the results and impacts it has on various aspects will be difficult. By far commenting on its implementation will also be too early as till now the government and corporate have been trying to formulate their strategies where to invest, which area

[170] Priyanka Sangani, *TCS gets gold rating for CSR for the third year running*, THE ECONOMIC TIMES, September 21, 2016.

to get involved in and a lot more. We have various ideas on the front such as Maharashtra government's initiative and government getting help from big companies (professionals) as seen above. Also we are open to all possible sectors we can include i.e. sports industry and renewable energy. The government too is not at all lagging behind in keeping a check on its implementation by issuing show cause notices, making companies file regular spending on CSR, examination of such submissions and being active about new proposals and ideas. Nobody is taking a backseat and observing, the nation is progressive about it. We have instances of Mahindra Company donating 3D printers to schools to help students explore their creative side and make prototypes. An exhibition hosted by NGOBOX in September saw 160 company CSR heads and 400 on-profits and social enterprises in attendance. Such numbers definitely speak volumes when we see the actions. The exhibition reports say "There are 10 companies that spent over Rs 50 crore each on health-care and WASH projects while 9 companies spent more than Rs 50 crore each on education and skills development projects,". It also added that "The data from 2015-16 suggests an increase in adherence to the documentation guidelines and a substantial increase from 79 per cent in 2014-15 to 92 per cent of actual CSR spend to the prescribed CSR,"[171] Education and health are the biggest sectors benefitting from CSR initiatives. And it is not only the urban section which is benefitted but also the rural as example setup by Mrida group. The results "speak for itself" as illustrated. As of now we are striving our best to make it a success. CSR involvement also has its own perks and impacts on the companies. Consumer retention can be said to be one of them. Consumers may choose to not do business with companies that have a reputation for being socially irresponsible. Conversely, businesses that show a commitment to the community and the environment can attract customers who share these values. The good the company does is part of the perceived value of its products and services and can result

[171] *Id.* at 32.

in higher customer satisfaction. These satisfied customers are likely to continue to do business with the company. Thus, a stable, loyal customer base is a valuable asset.[172] CSR contribution will definitely have an effect on the company's image, if formed positive it will lead to various benefits of employee recruitment, access funding and will be able to communicate its intentions to the community at large. These are the results and impacts which can be seen today.

IX. RECOMMENDATIONS FOR BETTER CSR ACTIVITIES.

We will start with recommendations on how to strike a balance between profits and public good if possible. Below three alternatives are given

(i) Firstly the power of regulation shall be transferred to the government because with all their faults (corruption, inefficient implementation), governments are a far more effective protector of the public good than any campaign for corporate social responsibility. The society (civilians) also plays a role in constraining corporate behavior that reduces social welfare, acting as a watchdog and advocate with the help of various nonprofit organizations.

(ii) Self-regulation is another alternative, but it suffers from the same drawback as the concept of corporate social responsibility does. Companies are unlikely to voluntarily act in the public interest at the expense of shareholder interests. Self-regulation can also be useful as it is more flexible than government regulation, allowing it to respond more effectively to changing circumstances. The challenge is to design self-regulation in a manner that emphasizes transparency and accountability, consistent with what the public expects from government regulation. It is up to the government to ensure that any self-regulation meets that standard. And the government must be prepared to step in and impose its own regulations if the industry fails to police itself effectively.

[172] http://smallbusiness.chron.com/impact-corporate-social-responsibility-organizational-stability-62563.html.

(iii) If nothing works in the end only financial calculation is the solution because social responsibility is a financial calculation for the executives just like any other aspect of business. The only sure way to influence corporate decision making is to impose an unacceptable cost, regulatory mandates, taxes, punitive fines, public embarrassment on socially unacceptable behavior.

The other recommendations are:

(i) The employees can be awarded with incentives if involved in CSR activities and will provide job satisfaction to them. It is a win-win as organization and its employees make a company.

(ii) Formalise Environmental and Social Justice: Integrating CSR into the corporate culture of a business takes a formal process. Addressing climate change and social justice can and should become part of this process.

(iii) Structure Cross Collaboration: When departments get out of silos and stretch horizontally to become more communicative, everyone benefits.[173]

(iv) **Sustainable purchasing:** Make purchasing decisions that are responsible and sustainable, for goods as well as services. Ex. Buy business supplies with green certification, and make your purchases from local suppliers.

(v) **Transparency:** Make sure your organization is upfront and honest, provide information in a way that stakeholders involved can obtain a proper insight into the issues they deem relevant.

(vi) **Community development:** Ensure a positive relationship with the community, get your organization involved. Partner with different charities, and help causes in need.

[173] Gina London , *Top Five Recommendations To Improve CSR* (May 14, 2017), http://oceanpublishing.ie/council-review/wp-content/uploads/sites/3/2016/10/corporate-social-responsibility-2.pdf.

(vii) **Employee relations:** Follow the rules of law, no discrimination towards employees, and ensure that minimum wage is met. Communicate with employees, be commitment to listen to your employees and allow time for feedback. Make them feel like they are a part of a team, use unexpected rewards and stimulate innovation.

(viii) Support the local community

(ix) Encourage Innovation**:** Actively work to create an environment that encourages your employees to come forward with ideas about how to improve your corporate social responsibility.[174]

(x) Let your employees have voices and participate in crowd funding.

(xi) Through well-executed crowdfunding campaigns, companies can start communicating with and form partnerships with a number of other companies or community organizations. This will extend the reach.

(xii) **Use your voice in a way customers will want to hear:** Too many companies only talk about themselves. Leverage your social reach by backing and supporting the crowdfunding campaigns of groups your support. Many times your social voice is worth more than your donation.[175]

The need for such changes can be reflected in the points itself and how incorporation of the same will bring the desired environment to work in. Therefore, our job is not to only praise when such ideas are included but to see all its sides and circles. Something which might not be practical to the greatest extent shouldn't be blindly followed because it is for the worldly good. Because by doing this we will get nowhere, waste our time and be under a misinterpretation (green washing as they do). Empirical

[174] *5 Ways to Improve Your Company's Corporate Social Responsibility*, PERFORMANCE PH (May 14, 2017), http://www.performph.com/ways-improve-corporate-social-responsibility/.
[175] Richard Swart, *Top 7 Ways To Greatly Improve CSR Through Crowdfunding*, SOCIAL MEDIA IMPACT (May 14, 2017), http://socialmediaimpact.com/corporate_social_responsibility_crowdfunding/#.

research may help us monitor the implementation which will result in examining if the largely perceived notion is true or the hidden side subsists today.

GST AND E-COMMERCE: THE ROAD AHEAD

Author(s): Yashi Saraswat[176]

I. INTRODUCTION

In a revolutionary turn of events, the Goods and Services Tax Bill was passed by both the Houses in a big move towards integration of the economy and the creation of a common national market. The GST tax, set to be levied at the final destination of consumption, is slated to replace the complicated maze of several indirect taxes. To increase state revenue with the introduction of specific measures aiming at reducing evasion, it strives for inclusion of a greater number of goods within the taxability net. It addresses issues that have been litigated upon by past governments, such as cascading of taxes, taxability of inter-state sales and reform a fragmented market reeling under the effects of imposition of taxes at differential rates by various State governments. Heralded as a 'great step towards transformation, and a great step towards transparency' by Prime Minister Modi, the GST regime is expected to establish a corruption-free tax administration in the country.

Currently, there are 160 countries in the world that have implemented VAT/GST, out of which eight are not members of the United Nations.[177] Out of the 193 member states of the UN, only 41 Member States have not implemented VAT/GST.[178] Expectations run galore considering that India enjoys a 'late mover'[179] advantage – that it has sufficient backdrop to examine and rectify the administrative roadblocks and compliance challenges faced by other tax jurisdictions around the world, and evolve a

[176] BA. LLB (Hons.) student at Gujarat National Law University

[177] "Countries implementing GST or VAT", last modified January 24, 2014, http: //gst.customs.gov.my/en/gst/Pages/gst_ci.aspx.

[178] *Ibid.*

[179] L. Badri Narayanan and Meghna Mohapatra, "Big GST Problem For Small E-Commerce Vendors", *Bloomberg Quint*, December 21, 2016, accessed December 22, 2016, http: //www.bloombergquint.com/opinion/2016/12/21/gst-on-e-commerce-expect-more-changes

practically viable and industry-friendly model. However, it is a utopian misconception to nurture if one believes that the Indian polity is adopting a full-fledged version of GST – instead what is set to be brought into implementation is a dual tax version of GST that allows for imposition of IGST and SGST, one that makes allowance for the federal nature of the Indian polity as envisaged by the Constitution.

It is not a superficial transition that merely represents a change in taxation nomenclatures and rates of taxation, but is a core reform that will affect industry finances, production, economics and the regulatory burden that they will be required to adapt to before the final rollout. As much as it expected to contribute to GDP growth in the long run, it is set to roll increased productivity and reduced logistic costs. The Model GST Law, as released by the Empowered Committee of State Finance Ministers in June 2016, was the government's response to the challenging task of establishing a regime of transparency and unambiguity in terms of application of tax provisions. This was followed by a revised Draft which was released on November 25, 2016. The fact that separate provisions were introduced in respect of e-commerce transactions indicates that this sector had received special attention in drafting of the model law.[180] Considering that India has one of the fastest growing e-commerce sectors around the world which is witnessing the addition of new players every year, the e-commerce industry has the ability to be disruptive in an otherwise traditional retail market and deserves all the support it can get.[181] This inevitably leads to the question as to whether the tax reforms specific to the e-

[180] Economic Laws Practice: Solicitors and Advisors, "Model GST Law: An Analysis", accessed December 12, 2016, http://www.manupatrafast.in/NewsletterArchives/listing/GST%20ELP/2016/ELP%20Analysis%20of%20Model%20GST%20Law.pdf

[181] Pratik Jain, "GST and e-commerce: How tax collection burden can hit India", *The Financial Express*, July 25, 2016, accessed December 19, 2016, http: //www.financialexpress.com/opinion/gst-and-e-commerce-how-tax-collection-burden-can-hit-india/327558/

commerce sector will contribute to its growth or whether GST will push it back by a few notches by its regulatory hassles and unfair compliance burdens.

II. CHANGING DEFINITIONS AND REGULATORY COMPLIANCES

In the initial draft, the two section-long Chapter XIB titled as 'Electronic Commerce' concisely enlisted the provisions that entailed a full-blown impact on the multi-million e-commerce sector in our country. Section 43B on 'Definitions' enlisted a series of definitions specific to the sector, while attempting to classify the diverse business models into the terminologies of 'aggregator' and 'electronic commerce operator'. Additionally, it redundantly defined a 'brand name/trade name', 'branded Services' and 'electronic commerce'.

The proposed aggregator model involved three entities: an aggregator, service provider and end user. The aggregator was neither the service provider nor a service receiver, but only an intermediary entity, whose mobile application was used by the end user to get connected to the service provider. The definition of aggregator was the same as the definition in service tax.[182] The supply of any branded service by an aggregator was deemed to be within the 'Meaning and Scope of Supply' in Section 3. This made the aggregator liable to register and pay GST as a 'supplier of service' irrespective of the threshold limit of Rs. 9 lakhs in Model GST Law,[183] making it a huge compliance burden for such aggregators.

The definition attributed to 'electronic commerce operator' in the initial draft was restrictive, confined to those who own, operate or manage an electronic platform facilitating supply of goods and/or services or any information or services incidental to or in connection with, and explicitly excluding

[182] Anika Bansal and N. K. Gupta, "GST Impact on E-commerce Sector", [2016] 74 taxmann.com 3.

[183] *Ibid.*

suppliers of goods and/or services on their own behalf. In light of the fact that the additional compliance burden of tax collection at source is imposed on electronic commerce operators and this collection of tax at source will adversely affect the working capital requirements of the small and medium businessmen operating through them, the provision was criticized for being discriminatory as it was set to indirectly hamper the growth of the 'marketplace model'. Interestingly, Schedule III on 'Persons Liable to be Registered' mandated the registration of all persons supplying goods and/or services on behalf of other registered taxable persons whether as an agent or otherwise, and of every electronic commerce operator irrespective of the aggregate turnover threshold of Rs. 9 lakhs applicable to an offline supplier. Thus, there is an additional regulatory burden in the form of compulsory registration applicable even to those online sellers with an aggregate turnover lower than Rs. 9 lakhs, though they might not have been required to do the same if they were supplying goods offline. This move was set to discourage these smaller businesses from going online to evade the additional registration requirement.

These definitions contain inherent flaws such as: a blindfold classification of the facilities provided by all e-commerce players whose business model resembled of the proposed aggregators as 'supply of service', and the exclusion of operators 'selling goods and/or services under their own brand name/trade name' from the liability of tax collection at source which was prima facie a discriminatory provision detrimental to the marketplace model, was followed by a revised version of these definitions in November 2016. Enlisted along with all other definitions in section 2, this draft defines 'electronic commerce' and 'electronic commerce operator'. A wider definition of 'electronic commerce operator' now consists of any person who owns, operates or manages digital or electronic facility or platform

for supply of goods and/or services including digital products over digital; or electronic framework.[184] It is now inclusive of those suppliers who sell their own goods/services online, thus doing away with the discriminatory compliance burden of tax collection at source which initially excluded them. The registration requirement mandated in the earlier draft has been carried to the revised version, with Paragraph 6 to Schedule 5 of the revised draft making a blanket provision for every electronic commerce operator to obtain registration irrespective of whether they fall below or above the higher prescribed aggregate turnover threshold of twenty lakh rupees in case of suppliers.[185] In this context, it is worthy to note that the GST regime does not provide for centralised registration; rather registration will have to be applied for individually. Given that GST shall have to be filed with the State in which the consumption of goods and/or services takes place, the electronic commerce operators and the suppliers offering their goods and/or services will have to apply for registration in every state separately. Practically, the implementation of such a provision would be unworkable and cumbersome. However, there are hopes that the state-wise registration for e-commerce operators may be mulled in favour of centralised registration for certain sectors, including that of e-commerce via the enabling provision under the draft law to provide centralised registration to certain sectors. The categories await negotiation in the GST Council, and will be added to the GST Rules. Hopefully, the approval of such a proposal will ease some of the newfound discomfort of the new provisions.

The revised draft has done away with the unnecessary definitions of aggregator, brand name/trade name and branded services. However, this does not mean that the possibility of electronic commerce operators providing services which are not chargeable under GST has been altogether nullified.

[184] "Model GST Law: GST Council Secretariat (November 2016)", http: // www.cbec.gov.in/resources//htdocs-cbec/gst/draft-model-gst-law-25-11-2016.pdf.

[185] *Ibid.*

Specific provisions have been introduced to complement the broader definitions adopted.[186] The deletion of the concept of 'aggregator' and their classification in the service segment is well balanced by the provision allowing for notification of 'specific categories of services' on which the electronic commerce operators will pay tax as supplier of service in Section 8(4) of the revised draft.[187]

To incorporate greater accountability in terms of fixation of liability of electronic commerce operators which offer specific categories of services notified by the Central or State government but do not have a physical presence in the taxable territory, the provision makes any person representing such operator responsible for paying tax, and mandates the appointment of such a representative if it does not already have one there. This is in line with the recent amendment in Service tax Rules related to Online Information Access and Data Retrieval Services. Given the erstwhile regime of clashing provisions under different laws and the same entity being subjected to multiple compliance requirements under various laws, this attempt to bring the compliance requirements for providers of 'notified services' in sync with those mandated in Service Tax rules is indeed commendable.

Thus, it can be surmised that in the event of an e-commerce operator supplying goods and/or services and such services have not been notified under Section 8(4) by the Central or State government, he is totally exempted from the payment of GST. It is only when an e-commerce operator is the provider of any of such 'notified' services that he becomes liable to pay GST on the supply of such service as if the service is supplied by the e-commerce operator itself.

III. FILING OF REFUND AND REDUCED WORKING CAPTIAL FOR SMALL SUPPLIERS

[186] *Op. cit.* 3.

[187] *Op. cit.* 8.

Another gaping flaw in the drafting of the provisions concerning e-commerce sector in the Model GST Law is the obverse and inefficient applicability of the tax exemption made available to small businesses while they are transacting on e-commerce platforms. GST exempts businesses with annual turnover of less than 10 lakh, the limit having been increased to 20 lakh for all but certain states in the revised draft; however it mandates e-commerce platforms to collect tax on source for every transaction by a seller, irrespective of the turnover of the seller. This essentially means that a small seller on the platform will invariably end up paying tax and would later apply for a refund.[188]

Judging from the fact that the rules will most likely provide for filing of exemption by small and medium businesses at the same time when such tax collection is filed by the e-commerce operator i.e. during a timeframe of ten days after every calendar month and there is no other way such businesses would be able to claim the exemption while it is withheld in the form of TCS by the e-commerce operator, the provision is discriminatory in its stifling of the daily working capital requirement of these online sellers, whereas the offline sellers remain unaffected. This clearly discourages smaller businessmen from going digital as they will be able to trade offline without undergoing the lengthy hassles of filing of refunds at a later stage. The provision is roundabout and disadvantageous as it imposes a statutory burden on e-commerce operators to collect taxes for every supply made by the seller made through their platform, instead of confining such tax collection at source only from businesses beyond the prescribed annual turnover limit. When the GST provisions are surmised with respect to such small businesses alone, it reduces to the e-commerce operator deducting tax at source from the credit received by such seller from the consumer, then file the same with the Central/State

[188] Shrutika Verma, "GST law poses multiple challenges for e-commerce firms", *Mint*, June 17, 2016, accessed November 20, 2016, http:// www.livemint.com/Companies/i45nwN0FnKEfABtFEc7I1I/GST-law-poses-multple-challenges-for-ecommerce-firms.html

government in the first ten days of the next month and then such deducted tax amount falling within the exemption limit shall be claimed by and credited to the seller at a later stage. Collecting tax from them by way of TCS would adversely impact their cash flows and would put many of them in a situation where they would unnecessarily have to go through the trouble of additionally claiming refunds from the government, since the tax is collectible from them without any limits on the threshold, and without any consideration for the input tax credits that they may have in their accounts.[189] But why should such small businesses suffer from the deprivation of tax amounts for durations which may even stretch year-long[190] when they are liable to be exempted from the imposition of tax in the first place?

An additional paradigm to the blockage of working capital of small businessmen and the resultant discouragement of the online medium lies in the fact that the online medium is not an option that can be discarded by every seller. The question of reverting to the offline mode in the eventuality of such periodic withholding of cash credits in the GST regime does not arise for those small and medium sellers who are 'otherwise constrained by geographical limitation'[191]. While e-commerce is often lauded for its endless benefits to consumers – doorstep delivery, availability of diverse products at a finger's click, its benefits for sellers, most importantly easy 'access to consumers'[192], are sadly neglected and not given due consideration in the policy making process. The consumer's perspective being the cynosure of the policy structure, it fails to look after the welfare of such small and medium businesses mushrooming on different electronic platforms, by neglecting their working capital requirement while

[189] *Op. cit.* 5.

[190] Rajeev Dimri, "Tax Collection at Source takes the sheen out of GST Law for ecommerce companies", *Forbes India*, Jul 25, 2016, accessed November 20, 2016, http:// www.forbesindia.com/blog/economy-policy/tax-collection-at-source-takes-the-sheen-out-of-gst-law-for-ecommerce-companies/

[191] *Op. cit.* 5.

[192] *Op. cit.* 5.

also hindering the growth of the e-commerce firms. Nasscom believes the move to be detrimental to the 'beneficial impact of e-commerce on lakhs of small businesses'[193] by eating into their working capital.

Needless to say, many small businesses that work on very tight working capital could face a financial crunch as a consequence of such tax collection at source. It is a known fact that sales of fast moving products on ecommerce platforms typically have a very low margin.[194] Working capital is a financial metric which represents the operating liquidity available to a business.[195] A business requires a minimum cash balance to meet basic day-to-day expenses and to provide a reserve for unexpected costs.[196] Working capital is often associated with the liquidity and profitability of a business. A reduced working capital can severely impact the company's operation and cause inefficiencies to crop up coupled with inability to pay off due obligations, whereas jeopardize its profitability by affecting the business' ability to promptly provide goods/services to the consumers.[197] Deprived of small margins which are necessary to provide affordable rates to consumers, these small businesses may eventually hike prices to sustain their business, which may defeat the lower price model of e-commerce.

This working capital deficiency combined with the rigid registration requirement can sound the death knell of the e-commerce model both directly and indirectly, particularly the marketplace model, which has from the beginning focussed on providing lucrative competitive rates to consumers. A reduction

[193] Press Trust of India, "GST: Tax At Source Clause Worries E-Commerce Firms", *NDTV Profit*, August 5, 2016, accessed November 20 2016, http:// profit.ndtv.com/news/start-ups/article-gst-tax-at-source-clause-worries-e-commerce-firms-1440617.

[194] *Op. cit.* 14.

[195] Huynh Ngoc Trinh, "The Influence of Working Capital Management on Profitability of Listed Companies in the Netherlands", (PhD diss., University of Twente, 2012).

[196] Karl F. Seidman, *Economic Development Finance* (New York: SAGE, 2005), 92.

[197] *Op. cit.* 19.

in the number of sellers who would opt for operating their business via such e-commerce platforms will directly affect the revenue generation and the viability of these operators. It is apparent that the policy-makers have not grasped that the popularity of the e-commerce model, while stemming from its lower price range due to a direct interface between the e-commerce platform and manufacturer, is also heavily dependent on the attractive product range and variety offered by the thousands of small scale businesses competing in the same segment. Stripping the e-commerce model of its smaller players or forcing them into a situation wherein they may hike prices for sustenance will not just affect the quality of service offered by these operators but also render the core of the model hollow. The elimination or reduction of smaller businessmen from the face of the e-commerce model will leave the bigger businesses out in the open to dictate the price trends, and one cannot be too quick to conclude that this will mark the beginning of the end of the 'marketplace model' success story.

IV. TAX COLLECTION AT SOURCE

Section 43C of the Model GST Law (June 2016) imposed the responsibility of 'tax collection at source' on the 'electronic commerce operator'. Peculiarly enough, it is only the e-commerce sector that has been exposed to the nightmarish burden of tax collection at source by the Model GST Law. In this draft, the aggregator was relieved of such a burden. The electronic commerce operator was made responsible for collection 'representing consideration towards the supply of goods and/or services made through it' i.e. the goods and services tax at the applicable rate to be notified on the recommendation of the GST Council by the Central or State government both in cases of online payment or cash on delivery or any other possible mode. It mandated the crediting of such amount collected by the operator to the appropriate Government within a timeframe of ten days after every

month.[198] This was to be accompanied by an electronic statement detailing upon the amounts so collected and the supplies made, supplier-wise in the prescribed form and manner, also to be submitted within ten days after every calendar month.[199] This deduction at source by the operator was a 'deemed' payment of tax, which will be claimed by the concerned supplier and reflected in the latter's electronic cash ledger.[200] Any emerging discrepancy was to be subsequently communicated to the operator and the supplier within the prescribed time.[201] The tax liability in the succeeding month of a discrepancy which was not rectified by the supplier in the month in which it is communicated, was to be payable along with interest calculable at the rate of one per cent.[202]

Moreover, the operator may be required to furnish details related to supplies of goods and/or services effected during any period and the stock of goods held by the suppliers in the godowns or warehouses managed by the operators, which had been declared as additional places of business by such suppliers, within five working days of such notice being served, failing which a penalty of up to twenty five thousand could be imposed in addition to any action under section 66.[203]

The revised draft continues the tax collection at source in section 56 with respect to 'electronic commerce operators' as defined in this draft as inclusive of the erstwhile aggregators and electronic commerce operators.

198 "Model GST Law: Empowered Committee of State Finance Ministers (June, 2016)", http: //finmin.nic.in/reports/modelgstlaw_draft.pdf

199 *Ibid.*

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

203 *Ibid.*

E-commerce models aim at bridging the gap between buyers and sellers by merely serving as a platform to showcase or provide value-added services as well. But the truth remains that the transaction is undertaken between the seller and the buyer. The e-commerce entity deducts a small amount for its services and the rest is for the disposal of the seller. The onus of tax collection at source is set to be discriminatory, as the obligation of tax collection at source is cast in respect of supplies made by suppliers online, while similar entities supplying goods and services from a brick and mortar structure are not saddled with such encumbrances.[204] Interestingly, the June 2016 Draft Model GST Law singularly exempted suppliers selling their own goods and/or services from TCS. It was touted to take away the level-playing field even within the larger e-commerce sector.[205] It is only the proposed wider definition attributed to an 'electronic commerce operator' in the November 2016 Draft and the inclusion of such suppliers in this definition that creases out the initial unevenness in the application of this tax reform.

Thus, all e-commerce operators have to compulsorily maintain details of such tax deducted for transactions each month, supplier-wise. Given that GST is a destination-based taxation system which seeks to divide revenue amongst states on consumption basis, the operator will have to keep track of each supply of goods/services state-wise as well, as it will have to flesh out details of transactions by different sellers in which the goods/services were delivered in a state to the respective Central/State government, as the case may be. This is bound to be an onerous task as popular platforms such as Amazon and Flipkart witness thousands of such transactions on a daily basis. Needless to say, this compliance requirement is accompanied by its own manpower and infrastructure costs conveniently delegated by the Central/state tax administration to these platforms.

[204] *Op. cit.* 14.

[205] *Op. cit.* 14.

The very introduction of TCS in the midst of such a scenario seems to be flawed, as it stems from the understanding that the robust information garnered from the e-commerce operators would not suffice to track possible evasion of tax.[206] Considering that digital transparency is already incorporated in the IT infrastructure and in-built in the methodology of such electronic transactions i.e. the generation of an automated invoice furnishing all the details of the transaction, the provision vesting the responsibility of collecting tax at source in the e-commerce operators seems forceful and superfluous. Access to invoice details and information filed by the operators is sufficient armour for the tax administration to curb instances of tax evasion. Since the responsibility of enforcement and detection of tax evasion is a power vested with the authorities, it is unfair to entirely shift the responsibility of tax collection on these operators.

Drawn from the Malaysian GST framework rolled out in 2015, the provision seems to have been born out of a consumer-oriented policy framework, and the government's keenness that the benefits of lowered tax rates are passed down to consumers. There has been some apprehension among policymakers about companies absorbing the tax benefits and not passing them on to consumers.[207] Companies and industries have been known to pocket tax advantages.[208] "It was seen when VAT was introduced…It is observed when tax cuts are introduced officially, companies usually raise prices before the budget and then reduce it marginally if a tax is cut, without passing on the actual benefit to consumers".[209] Another contributing factor could be the apprehension in the tax administration,

[206] *Op. cit.* 14.

[207] Press Trust of India, "E-commerce firms like Flipkart and Snapdeal to deduct TCS under GST", *Economic Times*, November 27, 2016, accessed November 30, 2016, http:// economictimes.indiatimes.com/industry/services/retail/e-commerce-firms-like flipkart-and-snapdeal-to-deduct-tcs-under-gst/articleshow/55650366.cms.

[208] *Ibid.*

[209] *Ibid.*

particularly the states, that there is rampant evasion of tax by sellers listing on e-commerce platforms.[210]

Traditionally, the problem of tax evasion has been a fundamental reason for expanding the scope of tax collection at source.[211] It is an instrument designed for quick and smooth collection of tax due to the authorities from the taxpayer. While this system aims at maximisation of revenue collection while minimising the cost of collection, it often ignores the minimisation of indirect costs borne by taxpayers and by the economy, the reduction of which is also an inherent duty of the tax jurisdiction of a country.[212] The indirect costs include: welfare costs, compliance costs and good relations costs.[213] The welfare cost per rupee collected may be defined as the excess cost to society of collecting this rupee of tax revenue.[214] Compliance costs refer to the cost to the taxpayers-in terms of lost time, added stress, payments to tax accountants and lawyers and visits to the tax office.[215] Public relations costs are connected with the organisation of the tax administration: the number and pattern of use of employees, their salary levels and working conditions.[216] Given that the e-commerce operator shall have to bear the welfare costs, compliance costs and public relations costs to adhere to the burden of tax collection at source, it is perhaps time that a cost-benefit analysis of all such measures be undertaken before implementation; weighing the benefits of such measures against the increased costs,

[210] *Op. cit.* 5.

[211] Kanwarjit Singh, Parthasarathi Shome and Pawan K. Aggarwal, "The System of Tax Deduction at Source (TDS): Coverage, functioning and suggestions for Reform", report published by the National Institute of Public Finance and Policy under UN sponsorship, December 1996, accessed on November 20, 2016.

[212] *Ibid.*

[213] *Op. cit. 35.*

[214] *Op. cit. 35.*

[215] *Op. cit. 35.*

[216] *Op. cit. 35.*

and not just for the tax authorities, but also for the person who has to undertake the compliance.[217] Today, the focus is only on the cost to the government, and not on the increased compliance burden on the public, or its impact on the ease of doing business.[218] The erstwhile information-dissemination relying on the indelibility of electronic transactions by these e-commerce operators has involved state governments getting hold of the defaulting sellers. The question of how the collection of tax by these operators instead of the tax administration would serve as an improvement when the electronic commerce industry affords one of the highest levels of transparency remains unanswered. Considering that the experience in Malaysia on a similar provision has also not been encouraging,[219] one can only wonder about what prompted the government to attempt to implement a provision that seems problematic on paper alone in its nascent stage. Surely, tax measures should raise tax collections, but should not be so burdensome as to make business uncompetitive in the global market.[220]

Seen as a drastic compliance burden imposed on e-commerce platforms, it initially invited flak from major industry players, with Snapdeal co-founder and CEO Kunal Bahl stating that the letter and spirit of the GST reforms need to be reflected in the implementation so that the current maze of compliance requirements is not unwittingly replaced with another set of fresh hurdles.[221] eBay India MD Latif Nathani has criticized the government's move to mandate online online marketplaces to "front" compliances, disclosures and reporting obligations.[222] A partner with PwC believes that the practical ground-level implementation could end up in a volley of complex paperwork and unwarranted

[217] Gautam Nayak, "Tax Collection at source – a solution and a problem", *Mint*, April 07, 2016, accessed November 20, 2016, www.livemint.com/Money/3yGMTAj9e2KALB7xULJvxI/Tax-collection-at-sourcea-solution-and-a-problem.html.

[218] *Ibid.*

[219] *Op. cit. 31.*

[220] *Op. cit. 41.*

[221] *Op. cit.* 17.

[222] *Op. cit.* 17.

litigation.[223] In fact, the provision has been termed 'discriminatory' by Nasscom according to which this reform can potentially render such e-commerce companies unviable.[224] Considering the fact that the continuing Indian e-commerce success story has big names as well as small, the possibility of additional compliance costs increasing the entry cost for smaller names and start-ups in this otherwise innovative sector seems real.

This differential taxing of marketplaces seems a run-down version of the Karnataka government's attempt to treat marketplaces as agents of sellers and make them responsible for payment of VAT on their behalf, and then even charge 1% tax deduction at source.[225] Both these proposals were not carried through after industry representation.[226] This does not seem the welcoming dawn of 'Digital India' that the e-commerce industry was looking forward to. And perhaps, it was to escape the blame of similarity with this provision that the government ended up imposing the responsibility of tax collection at source on every e-commerce operator who is not an agent, in the revised Draft. The initial Model GST Law was silent on the plight of tax deduction at source on sale returns. Online sale returns average around 30%, but in India this can be as high as 50%. Considering that the uniform imposition of tax deduction at source would have required the e-commerce firms to bear the tax amount from their own capital till they would be able to claim refund in case of returns and cancellations and would have led to double taxation when the said returned goods are resold after repairs refurbishment, repacking or as scrap,[227] the revised draft clears the air by laying the onus of

[223] *Op. cit. 31*.

[224] *Op. cit.* 17.

[225] *Op. cit.* 5.

[226] *Op. cit.* 5.

[227] Deepshikha Sikarwar, "Govt Delves into E-tailer's GST Gripe", *Times of India*, August 8, 2016, accessed November 20, 2016, http:// timesofindia.indiatimes.com/companies/Government-delves-into-E-tailers-GST-gripe/articleshow/53807976.cms

tax deduction only for the 'net value of taxable supplies', effectively excluding any sale returns occurring during the month. This puts end to the mounting confusion of the increasing complications tangled in the tax collection at source compliance imposed on the electronic commerce operators.

CONCLUSION

The Model GST Law and its revised version clear the picture about the changing face of the e-commerce sector in the GST taxation regime. The fact that the revised version discarded redundant versions and introduced vastly improved definitions in connection to the e-commerce operator is an indicator of the government's willingness to introduce a compliant and simplified taxation system with clearly demarcated boundaries for the law-maker and the law-abider. The applicability of tax collection at source to this sector remains questionable; it needs a policy revision considering that GST is not only aimed at easing consumer woes and reducing the burden of tax administration, but also to maintain a certain standard of ease of doing business.

Nevertheless, some grey areas subsist. A questionable proposition is that of application of certain provisions to overseas suppliers transacting with Indian consumers through e-commerce operators, as is the matter of imposition of entry tax by certain states on goods sold online which is pending before court. Another worrisome proposition is that of imposition of GST on freebies and discounts given out by these e-commerce operators. One can only hope that GST turns out to be a 'win for the democratic ethos of India' as termed by Modi, by promoting a system of healthy tax compliance that does not hinder the inclusive growth of the players of the e-commerce sector.

INDIA'S SURROGACY LAWS IN INTERNATIONAL CONTEXT

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ABSTRACT

Surrogacy is the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby to give to the intended parents. Intended parents may seek a surrogacy arrangement when either pregnancy is medically impossible, pregnancy presents an unacceptable danger to the mother's health, or is a couple's preferred method of having children. On August 24, the Union Cabinet approved the Surrogacy (Regulation) Bill, 2016. The bill proposes a ban on commercial surrogacy, restricting "ethical" and "altruistic surrogacy" to legally wedded infertile Indian couples, who have been married for at least five years. Overseas Indians, foreigners, unmarried couples, single parents, live-in partners, gay and lesbian couples are barred from commissioning the services of surrogate mothers.[230]

This bill is regressive compared to the previous surrogacy laws in India itself and also compared to laws in many other countries in the world. In 2002, India became one of the few countries in the world to legalize commercial surrogacy and emerged as a hub for surrogacy related medical tourism. There were various cases, however, that alerted people and lawmakers in the country towards the need for regularization of surrogacy in India. Concretization of the rights of the baby, the surrogate mother and the commissioning parents was the need of the hour. The Manji Yamada case, the cases of exploitation of the surrogate mothers, the cases of babies being abandoned led to the 228th Law Commission Report on "Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parties to a surrogacy."

The 2016 Bill fails to recognize and safeguard the equal reproductive rights of all women and men, irrespective of their sexual orientation, marital status, economic standing etc. It rightfully seeks to prevent and control exploitation of the

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[230] Anil Malhotra, *One more for the ban-wagon,*THE INDIAN EXPRESS(Aug. 27, 2016) http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/.

surrogate mothers, however, it does so to the exclusion of many sections of the society and seeks to control how and when individuals should start their family. There are also some absurd conditions such as the requirement that the surrogate mother be a close relative, which could lead to some social, familial and psychological issues. This paper aims to analyze the ramifications of this bill, were it to be passed and compare it with the surrogacy laws in various other countries and their level of acceptance, medical issues, protection of rights of all stakeholders and our suggestions as to what the perfect model for India would be.

I. INTRODUCTION

The New South Wales Law Reform Commission defined surrogacy as "…an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth."[231] The word "surrogate" has been derived from the Latin word *surrogatus*, meaning 'substitute' or 'appointed to act in place of'. Surrogacy is generally considered to be an alternative to adoption, for those people who wish to have their own genetic offspring. Intended parents may seek a surrogacy arrangement when pregnancy is either medically impossible or presents some kind of danger to the mother's health or is simply a couple's preferred method of having children. A surrogacy agreement is an agreement between the surrogate mother, also known as "gestational carrier" and the intended/commissioning parents. In such contracts, the surrogate mother agrees to carry the intended parents' baby for the full term of pregnancy and also agrees to give up all her parental rights and claim after the child is born. The parents agree to pay a certain sum of money and fund her medical expenses, life insurance costs, loss of earnings due to the pregnancy, expenses arising out of any unexpected complications etc. In India, in case the surrogate mother is a married woman, her husband's consent is required. Surrogacy may be commercial or altruistic. In commercial surrogacy agreements, the surrogate is paid a certain amount of fees in

[231] New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood*(Report 60, 1998).

addition to the reimbursements such as medical fees, loss of earnings due to the pregnancy etc. Some countries have legalized both forms of surrogacy, some permit it only for altruistic purposes and others have completely banned surrogacy in any form. Couples from jurisdictions where surrogacy is banned travel to countries where it is permitted, and this is popularly known as "fertility tourism." They choose their destination based on various factors such as low cost, advancements in healthcare, recognition of legal rights over the children born through surrogacy and ways of obtaining such legal rights, whether by adoption or direct parental rights.

Commercial surrogacy was legalized in India in 2002. India emerged as a "surrogacy hub" due to low cost of medical treatments, easy availability of surrogate mothers and legality of commercial surrogacy. There are established surrogacy clinics in India which offer the complete package- fertilization procedure, surrogate mother's fees and delivery of baby at minimal costs compared to other countries. One cycle or one attempt in India can cost around $20,000-30,000.[232] After adding travelling and accommodation expenses and considering the possibility of having to take 2-3 cycles, the prices are still considerably lesser than opting for surrogacy in countries like the US, where the procedure costs around $100,000-150,000.[233] As India emerged as a favorable destination for couples seeking children through surrogacy, a number of social, moral, legal and ethical issues were raised. It was widely believed that these surrogacy clinics were exploiting women belonging to socio-economically weaker sections by luring them with promises of money without properly informing them of the physical and psychological implications of carrying babies and relinquishing all rights over them respectively. Moreover, many people considered such jobs to be immoral and used terms such as "wombs for hire" and "rented wombs" and "baby-selling factories" to describe surrogacy clinics. Feminists supported

[232] VICTORIA INTERNATIONAL IVF CENTER, <http://ivfinindia.in/cost-of-surrogacy-in-india> (last visited Dec. 09, 2016).
[233] CIRCLE SURROGACY, <http://www.circlesurrogacy.com/costs> (last visited Dec. 09, 2016).

the surrogate mothers' right to bodily autonomy and hence, the practice of surrogacy, including commercial surrogacy, but demanded strict regulations in place to protect these women from exploitation by the surrogacy clinics and also suggested that counseling sessions be conducted for the to-be surrogate mothers so that they fully understand the risks associated with pregnancy and what it will be like to give up the child so that they can give their informed consent.[234] One of the biggest legal issues was the contradiction between the legalization of commercial surrogacy and the provisions of the Transplantation of Human Organs Act, 1994, which banned the sale of human organs. Activists, lawyers and politicians were divided over whether or not surrogacy amounted to "organ-loaning" and many demanded a ban on the commercial form of surrogacy. Some people were of the view that through commercial surrogacy, single parents, unmarried couples, gay and lesbian couples would be able to have children, which they opined were against Indian culture and ethos and shouldn't be allowed. Moreover, a lot of issues connected with surrogacy were completely uncertain and unregulated, which led to confusion when a few surrogacy agreements did not go as planned. Two of the most notable cases in this regard are the Jan Balaz case and the Baby Manji Yamada case.

In the case of Baby Manji Yamada,[235] a Japanese couple entered into a surrogacy agreement with a surrogate mother in Gujarat. However, before the child was born, the couple had divorced and the mother disowned the child. The father wanted to claim the child, however, Indian law does not permit a single father to adopt a female child. He sent his mother to India to bring the child to Japan and a petition was filed in the Supreme Court. The absence of any concrete laws on surrogacy led to much confusion. However, the Supreme Court, recognizing the genetic claim of the father, gave custodial

[234] Sheela Saravanan, *Global Justice, Capabilities Approach and Commercial Surrogacy in India,* 18 MED HEALTH CARE AND PHILOS 297 (2015).
[235] Baby Manji Yamada v. Union of India, AIR 2009 SC 84.

rights to him. The government was directed to issue Baby Manji Yamda a passport so she could leave for Japan with her grandmother.

In the case of Jan Balaz v. Union of India,[236] a German couple, who were the commissioning parents of twins- Leonard and Nikolas, born through surrogacy in India were unable to obtain any citizenship for their children. The German authorities refused to grant them German nationality as the twins were born in India and Germany did not recognize surrogacy. Indian authorities refused to issue Indian passports as the baby was born through surrogacy to German parents and not entitled to Indian citizenship. Finally, the German authorities agreed to provide the requisite documents once the parents adopted the children through the Central Adoption Resources Agency. The Indian authorities issued exit visas so that the children could take a flight to Germany.

In both cases, it is noticeable that the Indian judiciary has an outlook that seeks to uphold the sanctity of these surrogacy agreements and intervenes to ensure the best possible solution for the children concerned. In the Jan Balaz case, the Supreme Court expressed its concern regarding the lack of regulations and pointed out that the twins were stuck as "stateless citizens" till the age of 2, before they were allowed to go to Germany with their parents. In the Baby Manji Yamda case, it was clear that there were no set regulations in place to help the parties concerned when such unexpected incidents occurred. This often led to uncertainty in the future of the babies born through such surrogacy agreements.

[236] Jan Balaz v. Union of India, Letters Patent Appeal no. 2151 of 2009.

In August 2009, the Law Commission of India submitted its 228th report on "Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations Of Parties To A Surrogacy."[237] The observations made were as follows:

- The contract concerning the surrogacy agreement between the parties must necessarily contain the consent of the surrogate mother to carry the baby and her willingness to give up all parental rights over the child born and hand him/her over to the intended parents. It must also include the agreement of her husband and other family members to such arrangement.
- The contract must cover life insurance for the surrogate mother during the term of the pregnancy.
- The agreement must provide for the financial support for the child in the event of a divorce and subsequent refusal to take the child, or death of the commissioning parents or individual.
- At least one of the commissioning parents must have a biological link to the child so as to inspire natural love and affection for the child in the parents. In the case of a single parent, he/she must be the donor, and if he/she isn't, the child must be adopted. This has been suggested to reduce the cases of child abuse when children are adopted.
- However, ideally the legislation itself should include provisions recognizing the child to be the legitimate child of the commissioning parents without there being any need to adopt the child or declare oneself as guardian.
- The birth certificate of the child must mention the commissioning parents' names only.
- Sex-selection must not be allowed in surrogacy agreements.

[237] Law Commission of India, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations Of Parties To A Surrogacy*(Report no. 228, 2009).

- The identities of the donors as well as the surrogate mother must be kept confidential to protect their right to privacy.
- In cases of abortions, the provisions of the Medical Termination of Pregnancy Act, 1971 must be followed.

In 2005, the Indian Council of Medical Research released certain guidelines for Assisted Reproductive Technologies (ART) Clinics.[238] However, these were not legally binding. In 2008, the first ART Bill was drafted, empowering a National Advisory Board to formulate policies and regulations. The ART Clinics were to become the hub of all surrogacy agreements. In 2010, the second draft was released. This draft was not very progressive as it excluded homosexual couples from its definition of "couple". It failed to address issues of the surrogate mother's health and rights. Moreover, it provided that 75% of the payment to the surrogate mother should be made in the last installment, i.e., after the birth of the child. This was widely criticized. This draft also provided that commissioning parents who don't reside in India must have a local representative whose duty it will be to take delivery of the child if the commissioning parents fail to do so. The positive aspects of this draft were the provisions making available a state-appointed lawyer to the surrogate mother at the time of signing the contract considering her vulnerable position and the compulsion of providing life insurance cover for the surrogate mother by the commissioning parents. The 2012 draft of this bill banned foreigners, whose countries of origin didn't allow surrogacy, from hiring Indian surrogates. The next draft of the bill came in 2013. This bill was also met with some criticism. The bill failed to set any standard whatsoever when it comes to the ART technologies and the low success rate and risks associated with it. Measures

[238] Ministry of Health and Family Welfare and Indian Council of Medical Research, *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*(2005).

to protect the surrogate mothers' health and well-being found little mention. The bill also completely ignored the pivotal role played by third party agents such as surrogacy agents, tourism operators and surrogacy home operators in arranging surrogates.[239]The next draft of the Assisted Reproductive Technologies (Regulations) Bill was tabled in the winter session of the Parliament in 2014. Some of the important features of this draft are as follows:

- Surrogacy was allowed only for infertile Indian couples. "Couple" was defined as a married man and woman, thereby excluding homosexuals and people in live-in relationships. The Indian couples opting to go for surrogacy also had certain restrictions imposed on them. They had to be married for a considerable amount of time and had to produce a certificate stating that the woman was incapable of conceiving her own child.
- Foreign nationals were banned from hiring surrogates in India.[240] This bill, however, allowed surrogacy to Persons of Indian Origin (PIOs), Non-Resident Indians (NRIs), Overseas Citizens of India (OCIs) and foreigners married to Indian citizens. Foreigners married to Indian citizen had to produce a 'Medical Visa' for surrogacy.
- This Bill aimed to make it compulsory for the commissioning parents to accept the custody of the children, even in cases of abnormalities and physical deformities.
- This Bill made it mandatory for the commissioning parents to submit a certificate stating that the child shall not be subjected to sexual abuse or any other form of paedophilia and that the child shall not be used for pornographic purposes.
- Only married women or single women who have been divorced or widowed were allowed to become surrogate mothers. An age limit of not less than 23 years and not more than 35 years

[239]AarthiDhar, *Gaps in Surrogacy Bill*, THE HINDU (Oct. 27, 2013).
[240] Aditi Tandon, *Draft Bill Bars Foreigners from Hiring Surrogates in India*, THE TRIBUNE (Oct. 23, 2015).

was imposed. It was mandatory that the surrogate mother have one living child of her own- three years old or above. She could only act as a surrogate mother for one successful live birth in her entire life.

- A child born to a foreigner married to an Indian citizen would not be entitled to Indian citizenship, but as an Overseas Citizen of India (OCI), despite being born in India.[241]
- This Bill, however, also left some questions unresolved such as the regulation of these ART Clinics, the right to payment of the surrogate mothers, under what circumstances pregnancies can be terminated etc. Moreover, this Bill restricted the scope of surrogacy, treating it as sort of remedy for infertility, further restricting it only to couples who have been married for a long time.

II. THE SURROGACY (REGULATION) BILL, 2016

The Surrogacy (Regulation) Bill, 2016 was introduced in the Lok Sabha on 21st November, 2016 by Mr. J.P.Nadda, the Minister for Health and Family Welfare.[242] The purpose of this legislation is to ensure effective regulation of surrogacy and the prohibition of commercial surrogacy. The important provisions and features of this Bill are as follows:

i. **Eligibility:** Only Indian couples who have been married for five years can opt for surrogacy. At least one of them should provide proof of infertility. This eligibility criterion is regressive compared to the previous ART Bills and excludes unmarried couples, homosexuals, single parents and foreigners from having children by way of surrogacy. The couple must have been married for at least five years before they can opt for surrogacy. Another condition is that the commissioning parents must not have a surviving child unless the child is mentally or

[241] § 7A, CITIZENSHIP ACT, 1955.
[242] *Bill to Ban Commercial Surrogacy Introduced in Lok Sabha,* THE ECONOMIC TIMES (Nov. 21, 2016).

physically handicapped or suffering from a life-threatening disorder. Many people are against these conditions on the grounds that the government is trying to dictate when a couple should have children after marriage. The scope of surrogacy has been narrowed and this way of parenthood can be availed of only in cases of infertility, unlike before.

ii. **Only altruistic surgery permitted:** This Bill puts a complete ban on commercial surrogacy. Only altruistic surrogacy is permitted. The surrogate mother is only allowed medical reimbursements and life insurance covers and other pregnancy related expenses, but no payments otherwise can be made to her. Surrogacy clinics, however, can be paid for their services.

iii. **Surrogate mother must be a close relative:** Only a close relative (not necessarily by blood) of the commissioning parents can be a surrogate mother. She must be a married woman and must have a child of her own. She must be between 25-35 years of age and can be a surrogate mother only once in a lifetime.[243]

iv. **Age limits for parents:** The commissioning mother must be between 23-50 years of age and the commissioning father must be between 26-55 years of age.

v. **Surrogacy Regulation Boards:** To ensure effective implementation of the provisions of this Bill, a National Surrogacy Board will be set up at the national level. State Surrogacy Boards and appropriate authorities shall be set up in States and Union Territories.[244]

vi. **Registration of ART clinics:** Surrogacy clinics (ART Clinics) cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply

[243]Chitra B. George, *Why the Government must rethink the Surrogacy Bill*, THE WIRE (Sep. 08, 2016).
[244] Press Information Bureau, *Cabinet approves introduction of the Surrogacy (Regulation) Bill, 2016,* (Aug. 24, 2016).

for registration within a period of 60 days from the date of appointment of appropriate authority.

vii. **Ban on egg donations:** Egg donations have been banned, perhaps to curb illegal trafficking and surrogacy rackets.

viii. **Offences and penalties:** The Bill provides for a minimum penalty of 10 years and fines up to 10 lakh rupees for offences such as exploitation of surrogate mothers, advertisement of commercial surrogacy, abandonment of babies born through surrogacy, selling or importing of human embryo or gametes for surrogacy.

For several reasons, this Bill drew heavy criticism from the public. Considering the drawbacks in the previous drafts, many thought the Government would add certain provisions to ensure the rights of all the stakeholders would be protected and duties and obligations specified. The opposite, however, occurred. The Government was expected to bring in regulations to regulate surrogacy and clearly define acceptable parameters of surrogacy agreements. Instead of doing so, the Government chose to ban commercial surrogacy and even altruistic surrogacy for a large section of society. Earlier versions of the Bill viewed surrogacy as one of the many ways of achieving parenthood, the 2016 Bill has reduced the practice of surrogacy to being a mere remedy for inability to conceive a child for married couples. The Bill has completely shunned single parents, unmarried couples, people in live-in relationships, gays and lesbians and foreigners. The government seeks to take away their right to have their own genetic offspring as the only available option of having children now is adoption. Even for married couples, the pre-requisite of having been married for five years seems absurd. Moreover, only those couples who don't already have a child obtained biologically or through adoption or surrogacy, unless they are physically or mentally handicapped or suffering from fatal diseases can opt for surrogacy. The Government seeks to regulate when a couple can become parents and how many

children they can have, which is not acceptable.[245] Infertility, especially in a woman, is already stigmatized in Indian society. The government's many conditions do not make it easier for infertile couples who wish to have a genetically linked child.

Commercial surrogacy has been completely banned. Most of the women who volunteered as surrogate mothers did it for the money, because they wished to contribute to the income of their household. This way of earning livelihood will be abruptly taken away from them. Altruistic surrogacy is permissible, as long as the surrogate mother is a close relative, not necessarily related by blood, and must be of the same generation as the commissioning parents. The surrogate mother must also be married and must have a child of her own. This makes things even more difficult, as it will be hard to find close relatives willing to become surrogate mothers. If the psychological impacts and effect of this rule on familial ties were to be considered, it is obvious that this condition hasn't properly been deliberated upon. It is hard for a surrogate mother to give up the child she has nurtured inside her own womb for nine months and surrender all her parental rights over it. If the child she gives up is her own niece, nephew or any other close relative, it will be much harder for the surrogate mother to watch the child grow up, before her own eyes and not be able to call the child her own. There is a potential risk of family relations getting spoilt over such matters. Many commissioning parents, if given the chance, would never opt for a relative as a surrogate mother due to the reasons mentioned above, but will have to do so now out of compulsion.

The compulsory registration of all ART clinics is a welcome initiative. This will prevent potential exploitation of the surrogate mother, regularize costs involved in surrogacy and ensure effective use

[245] *Supra,* 14.

of the latest technology. National and State Surrogacy Boards have been set up to ensure proper regulation of surrogacy practices and to prevent illegal trading of human gametes and embryos.

III. INTERNATIONAL CONTEXT AND CONCLUSION

Surrogacy is an issue that has become important internationally since the 1970s. It was largely unregulated during those times, however, the increasing number of people opting for surrogacy and the recent technological advancements made it necessary for countries to pass laws for its regulation. The laws vary depending on the social and political situations in the countries. Many countries have chosen to ban commercial surrogacy, while allowing altruistic surrogacy. Many countries have banned the very practice of surrogacy, while some countries have legalized both commercial as well as altruistic surrogacy. Commercial surrogacy was legalized in 2002 and India became one of the most popular destinations for "fertility tourism", but the passing of the Surrogacy (Regulation) Bill, 2016 could spell doom for the entire industry. Germany, Italy and France have completely banned surrogacy whereas countries such as Spain, China, UK, Canada and Australia only allow altruistic forms of surrogacy.

The most progressive surrogacy laws are those of California, USA. The 'California Assembly Bill 1217' came into force on 1st January, 2013. The Bill has completely regulated everything that concerns the practice of surrogacy from surrogacy agreements to establishment of parental rights of the commissioning parents over the child born through surrogacy. With regard to the surrogacy agreements, the law states that the surrogate mother and the commissioning parents must be represented by separate legal counsel. The agreement must compulsorily be executed and notarized before any medical treatment or procedure used in assisted reproduction or embryo transfer can be started.[246]It is possible for all intended parents, regardless of their marital status and/or sexual

[246] Rich Vaughn, *California Surrogacy Law Takes Effect Jan 1,* INTERNATIONAL FERTILITY LAW GROUP (Dec. 14, 2016, 3:18 PM), https://www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/.

orientation to establish legal parental rights prior to the actual birth of the child without the need to go through proceedings for adoption.[247]

Ukraine is one of the few surrogacy-friendly European countries. Commercial surrogacy is legal and the laws protect the parental rights of the commissioning parents. No adoption procedure needs to be followed through and the surrogate mother has no parental rights on the child. The child is legally considered to be the child of the commissioning parents since the very moment of inception.[248]There are some similarities with India's Surrogacy (Regulation) Bill, 2016. The intending parents must be a heterosexual married couple, with medical indications for surrogacy and the surrogate mother must have a natural child of her own. However, there is no condition that the couple must have been married for a specific number of years. The surrogate mother's marital status is irrelevant and she may not have any relationship with the parents.[249]Russia is also considered to be a surrogacy-friendly nation. However, Russian surrogacy laws also require the intending parents to be a married couple and state that the surrogate mother must have a child of her own.

Australia only permits altruistic surrogacy and commercial surrogacy is a criminal offence. Canada permits altruistic surrogacy agreements, except in the state of Quebec, where both altruistic and commercial surrogacy is illegal.

The requirement that the surrogate mother already have a child of her own is a common feature in the laws of many countries. This is so that the surrogate mother will have a fair idea of what to expect from a pregnancy and even the surrogacy clinics and intending parents can take reassurance from the

[247] MODERN FAMILY SURROGACY CENTER, <http://www.modernfamilysurrogacy.com/page/state_laws_in_california_for_surrogacy> (Last visited Dec. 14, 2016).
[248]UKRANIAN SURROGATES, <http://www.ukrainiansurrogates.com/legal/surrogacy-law-in-ukraine> (Last visited Dec. 15, 2016).
[249]SURROGACY IN UKRAINE, <http://www.sensiblesurrogacy.com/surrogacy-in-ukraine/> (Last visited Dec. 15, 2016).

fact that the woman carrying their child has had a successful pregnancy before. Moreover, once the baby is born, the surrogate mother will have to give up the child. It will be easier for her to take comfort in her own children and make the loss easier for her to bear.

The Surrogacy (Regulation) Bill, 2016 has a few provisions that need to be reconsidered. In today's times, it's absurd that only infertile heterosexual couples who have been married for at least 5 years are being given a chance to have a baby through surrogacy. This Bill, if passed would take away the freedom to choose a way of achieving parenthood from single parents, unmarried couples, live in partners, gays and lesbians and even those heterosexual couples who are capable of having their child the conventional way but would prefer to opt for surrogacy. The condition that the surrogate mother be a close relative is unreasonable and makes it harder for couples opting for surrogacy and limits their option. People who wish to become parents but can't opt for surrogacy due to all these restrictions will have no option but to adopt children. Adoption, despite being a wonderful way of achieving parenthood, cannot be forced on everyone. Some people have an innate desire that their children be biologically connected to them and this innate desire to have one's own genetic offspring is something that should not be suppressed.

The condition that the surrogate mother should be a close relative and the banning of commercial surrogacy is probably to prevent any potential exploitation of the surrogate mothers. However, banning a practice completely is not an answer. Instead, just like the compulsory registration of ART clinics provided for, there must be a database of all surrogate mothers and records of their medical history, previous pregnancies etc. If the women who wished to be surrogate mothers were given proper guidance, counseling and legal advice, they would make informed decisions and not blindly agree to become surrogate mothers just for the money. Provisions should also be made to provide them with them independent legal counsel so as to ensure they are not forced into any medical

procedures that could be harmful for them or they're not comfortable going through with and proper care and attention is accorded to their health and well-being. Many women wish to become surrogate mothers because they wish to help childless couples and also, so they can contribute to their household income. Willing surrogate mothers are generally from the weaker socio-economic group and this way of earning livelihood should not be taken away from them just because there is a risk of exploitation, which, with strict laws and proper regulation can be avoided.

SOUTH CHINA SEA (CHINA-USA. -INDIA IMPLICATIONS)

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ABSTRACT

"International politics, like all politics, is a struggle for power"

— Hans J. Morgenthau, Politics among Nations

With the modern era having globalized, the nations have come together. In their own lands, nations try to develop and make their citizens happy and secure. But if we see across the globe, one can realize that the urge of power is the real instinct. Every nation wants to achieve more and more power and in doing so, it intelligently chooses its actions. The globe is a big platform where the nations act as individual participants of a big power game. When any nation tries to further its international interest and act accordingly, it becomes evident that every player of the game is likely to be affected by activities and behavior of any such participant. Taking it a step further, the game is of trust and confidence building. The entire matrix of international politics is a smart arrangement and the actions of the participants result into threats and opportunities for the other contenders. One may fail to analyze similarly but these considerations are very crucial in the study of international politics and international relations. Hence, it becomes essential to analyze each and every global event in the light of the endeavours of the nations to securitize themselves and further their power interest. To the point, the arbitration tribunal has passed its award in the favour of Philippines regarding the South China Sea issue and China, in its interest, has refused to acknowledge the authority of the award and continues the invasion in the Sea. This is an event and as per the theory explained above; this event brings along certain implications for the co-participants. This research aims at critically analysing such an action of China, its paramount importance for India and the stand taken by US.

Keywords: International relations, South China Sea, India, Power, World order.

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I. INTRODUCTION

South China Sea is the most important issue for the South Asian Nations. Every surrounded nation is claiming certain territories of the sea. As a part of realism theory of International relations, which is the existential rationale of every nation, every nation strives to forward its political, national and international interest. South China Sea is contended by various nations by historical or legal evidence. If a piece of the high waters goes to one nation, it definitely means that the other nation has lost it. Whatever may be the consequences but the counter actions that may be taken by a nation in order to contain the other nations are most important.

Every nation has its personal enemy. To exemplify, India's personal enemy is terrorism, while for China it is environment, as debts is for USA and Hunger for South Africa. With increased interaction among themselves, nations strive to find a solution to their issues using cooperation and bilateral agreements. Cooperation agreement is entered into between those nations that usually draw mutual interests from the cooperation. Placing the statement in the given context of the Sea dispute, the stands of the nations will depend upon their gains.

South China Sea dispute has impact, not only on the nations disputing it, but for India and USA as well. The main reasons for this are the relations of China with these two countries. China is India's neighbour and a threat to us against Pakistan. While for USA, China is huge competitor in technology and mass production. China is a potential superpower and a pressing force for India against Pakistan. Both the countries are interested in the outcomes for the interests they hold, be it economic, diplomatic or political.

II. THE SOUTH CHINA SEA DISPUTE

WHY IS THE SOUTH CHINA SEA SO IMPORTANT?

The South China Sea is located to the exact south of China and is bordered by many countries which are Cambodia, Brunei, China, Malaysia, Indonesia, Singapore, Philippines, Taiwan, Vietnam and Thailand. The South China Sea is a critical commercially very important for a significant portion of the world's merchant shipping, and is also an important economic and strategic sub-region of the Indo-Pacific[251]. As far as geopolitics is concerned, all the surrounding countries are raising claims over certain or the other portions of the South China Sea. Winning over areas of the South China Sea is very crucial for demonstrating power of the nations.

The natural resources lying within it are equally important as its significance as a commercial route. South China Sea has oil reserves of seven billion barrels, and 900 trillion cubic feet of natural gas. China estimates that the Sea will yield 130 billion barrels of oil, which is more than any area in the world not including Saudi Arabia[252].

It holds significance also because it is a defence point as well, transportation route and is full of natural resources. The tacit importance of the sea is that it is a sign of being sovereign, controlling the South Asian zone and becoming strategically powerful.

CLAIMS OF VARIOUS COUNTRIES

China claims Paracel and Spratly islands stating that the islands belong to it since the islands were an integral part of the Chinese nation. In 1947, it even released a map to substantiate its claim over the

[251] "*South China Sea*." South China Sea | Lowy Institute. Accessed November 17, 2016. https://www.lowyinstitute.org/issues/south-china-sea.
[252] Robert D. Kaplan, "*Asia's Cauldron*" Feb 20, 2015, 11:07 PM, Kaplan D. "Why the South China Sea is so crucial." Business Insider Australia. February 20, 2015. Accessed November 17, 2016. http://www.businessinsider.com.au/why-the-south-china-sea-is-so-crucial-2015-2

islands. Taiwan also, declares similar kind of claims, contending that the islands have belonged to the nation since history. China's claim is popularly referred to as the 'nine dash line' wherein it is yet not clear whether China claims only the land within the islands within or the sea waters as well. Philippines substantiates its claim through geographically proximity of the Spratly islands to its nation and hence, the area belongs to Philippines. Malaysia and Brunei lay claim to the island by stating that the territory lies within their exclusive economic zone as defined by the United Nations Convention on the Law of the Sea.

USA believes that the waters are international and sovereignty should be determined according to United Nations Convention on the Law of the Sea. Moreover, it supports freedom of navigation in the areas and has an interest in the route for the purpose of trade and naval forces against the South Asian countries. China is the biggest claimant of the disputed areas. China's claims are historic in nature which it substantiates its claim by showing historical facts in the form of presence of its population centuries ago in the Areas. But the tribunal upholds the UNCLOS. In 2002, a code of conduct was signed among contending nations restraining them from taking unilateral actions in the area[253]. But this was violated by China.

THE CASE – 2016

Philippines moved against China with regard to the disputed South China Sea. For this, the Permanent court of Arbitration appointed a tribunal to look into the matter and adjudge. The verdict over the disputed area was delivered on 12 July 2016.

[253] "*Declaration on the conduct of parties in the south china sea*." ASEAN | one vision one identity one community. Accessed December 25, 2016. http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2
The code of conduct, as signed and displayed on the ASEAN website.

A tribunal comprising of five judges was constituted at Hague, Netherlands to adjudge upon the issue. The case was named "The Republic of The Philippines v. The People's Republic of China[254]". The tribunal came out with a bulky judgement of 500 pages. However, it seemed that its endeavour had gone in complete vain, since China claimed the verdict to be ill founded and denied the award and has chosen not to submit its sovereignty to the award of the tribunal, so constituted.

It is also interesting to note that China did not even appoint any representatives or agents to support its claim to the disputed sea. It did not participate in the proceedings. From this, it can be deduced that since China had refused to accept the jurisdiction of the tribunal in the matter since the beginning. It seems that China does not want to resolve the issue lawfully and amicably. The course of action taken by China reveals that it wants to establish its autocracy in the high waters and disputed lands as well.

THE VERDICT

The tribunal was constituted under the 1982 United Nations Convention on Law of the Sea. The 168 ratifying parties include China and Philippines. Hence, they are bound by its verdict. Also, the convention is known as the constitution of the Sea. The disputed lands were not claimed in the case. The questions of land sovereignty over the land had also not been discussed and answered. The matter was decided in favour of Philippines.

On a general note, the tribunal rejected China's claim over the nine dash line waters which china said that they were historical and they belong to its maritime waters. The tribunal ruled that the waters within the nine dash line do not fall within its maritime waters. They are free waters and there is

[254] *The Republic of the Philippines - and - the People's Republic of China, PCA case n 2013-19 501* (an arbitral tribunal constituted under annex vii to the 1982 United Nations Convention on the Law of the Sea July 12, 2016).

freedom of navigation for every nation in the waters.

Understanding the basic terminologies[255] that led to the judgement,

1. As per United Nations Convention on the Law of the Sea, 'Islands' are a naturally formed area of land, surrounded by water and are above water during a high tide.
2. Any Island that lies within 12 nautical miles from a country's coast belongs to the country. In this, a country can even restrict foreign entities to enter its territorial waters.
3. The island is further entitled to a 200 nautical miles in the exclusive economic zone. It thus, gives that country, a right to exploit the resources within it such as fishes, minerals, oil resources etc.

China has been claiming the Spratly archipelago that is off the Philippine coast. It has even built and continuously exploited the area by establishing military security and excavators there. But the tribunal ruled that the areas cannot be called as natural islands. They are artificially constructed since there is a proof that they submerge during high tide whereas natural islands do not submerge during high tides. Hence, no one can claim exclusive economic zone in the area. In such case, the zone can be derived from the coast only. Confirming that the nearest coast is that of Philippines, the waters belong to it. The tribunal ruled out China to be an illegal occupier and also slammed it by calling China's action to be highly offensive to the environment.

The tribunal has made great endeavours to come to the conclusion as to what waters belong to whom. Such endeavours would not have proved fruitful had they helped in solving the issue amicably by demanding compliance with the award passed. However, as far as China is concerned, it has already

[255] Santos, Matikas . "*UNCLOS explained: Why China's claims in South China Sea are invalid* ." Www.globalnation.com. February 28, 2014. https://globalnation.inquirer.net/99689/unclos-explained-why-chinas-claims-in-south-china-sea-are-invalid

given the insight that it does not believe in such awards

Significant conclusions emerge from the 500-page verdict[256] of the Permanent Court of Arbitration. Court's opinion on China's claim with respect to the nine dash line is clear that the same does not belong to China. The islands in the area are artificial islands and therefore China cannot claim any legitimacy or sovereign rights over the nine dash line. Philippines enjoys exclusive economic zone in the reef and the shoal. Hence, only Philippines can exploit the natural resources present in the sea. China has a duty, not to disturb Philippines when it is exploiting the resources. The Chinese fisherman should be barred from doing so. China is completely violating its obligations under the United Nations Convention on the Law of the Sea. This amounts to disrespect to the global norms. But, as far as the United Nations Convention on the Law of the Sea is concerned, the document has supreme authority over all matters falling in the purview of Maritime Disputes. To be specific, the convention was too restricted while granting remedy to Philippines. It did not grant remedy for the islands but only for the waters.

The verdict has hence, completely undermined China's claims. It has highly weakened its position. Moreover, it has restored the confidence of the entities in the absolute sovereignty of the tribunal and United Nations Convention on The Law of the Sea. It has many implications. But most important are the implications that the verdict may act as a precedent in various other territorial and maritime issues as far the entire world is concerned.

[256] Sukumar, Arun Mohan. "*South China Sea Case: A Guide to the Verdict*." The Wire. July 12, 2016. Accessed November 25, 2016. http://thewire.in/51045/the-hague-verdict-is-a-big-victory-for-the-philippines-but-not-for-the-south-china-sea-dispute/.

III. CHINA – AN ANALYSIS OF ITS TENDENCY

From the general observations, China is a rising super power. It is highly equipped with technologies and innovations. With regard to its warfare as well, it is a powerful nation. At the same time, we are aware of many encounters between India and China regarding territorial claims and Pakistan-China bonds. In these circumstances, it is crucial to understand what and how China holds interest in the South China Sea.

With regard to the tribunal's ruling over the South China Sea dispute, China has, as expected, highly condemned the decision. It has questioned the jurisdiction of the tribunal over the matters and has called it, "ill founded"[257]. In the interview given by Mr. Wang Yi, China's foreign minister, he said "with regard to such an arbitral case that involves far-fetched procedural and legal application and has so many flaws in ascertaining evidence and facts that the Chinese people do not accept it at all and anyone across the world who upholds justice shall not agree with it. By not accepting or participating in the proceedings, China is in fact safeguarding the International rule of law and regional rules. Now this farce has come to an end and its time to return to the right path. China has noticed that the new Philippine government has made series of statements recently including expressing its willingness to resume negotiations and talks with China over South China Sea.[258]"

There are many reasons to explain China's behaviour. Firstly, as we know, South China Sea is full of natural resources. Since, it is very rich in resources, it is but obvious that no country would like to let go off the claim over such a rich area. China is not a country that is open to rejection of its claims so

257 "*China's Xinhua says court has issued 'ill-founded award' on South China Sea*." TODAYonline. Accessed May 14, 2017. http://www.todayonline.com/world/chinas-xinhua-says-court-has-issued-ill-founded-award-south-china-sea.

258 Phillips, Tom, Oliver Holmes, and Owen Bowcott. "*Beijing rejects tribunal's ruling in South China Sea case*." The Guardian. August 12, 2016. Accessed November 13, 2016. https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china.

far as South China Sea is concerned. Even if it wants to give up the claim, it would not be strategically favourable for China since it could denote surrender as a super power for the Chinese nation. Controlling the numerous tiny islands is a matter of controlling the wealth assumed to lie beneath the sea in the form of unexploited minerals and oil and gas, not to mention the immense fisheries that exist in these waters. It is in part a matter of increasing the country's sense of security, by dominating the maritime approaches to its long coast, and securing sea lanes to the open Pacific[259]. Given these circumstances, it can be somewhat explained why China would never let go off its claim.

If one takes a look at the pattern in which China has been exploring the South China Sea, s/he can easily conclude that the sea is used as a defensive tool rather than an expansive tool. It means that China is not in need of the sea for exploration purposes for minerals, oils, and fishes etc. primarily. It aims to use it for its nuclear strategy. It is developing the islands as strategized warfare points by installing new technology of nuclear submarines in the islands. China is further expanding it for logistics and technical surveillance purposes if need be, during situations of stress or tension.

With quite distinct purpose in mind – namely the increased security competition between Beijing and Washington – China is rapidly equipping itself with the world's largest submarine fleet, including a new force of nuclear ballistic missile vessels. It has also launched programmes to build a fleet of modern aircraft carriers, and the full range of associated battleships.[260] Looked at from China's perspective, then we can see that China has a history of big invasions. The British, French, American have tried to trespass the maritime boundaries of China. With such experiences, China would always be willing to protect its maritime waters. China works with an ideology of developing a forward

[259] French, Howard W. "*What's behind Beijing's drive to control the South China Sea?* | Howard W French." The long read. July 28, 2015. Accessed November 17, 2016. https://www.theguardian.com/world/2015/jul/28/whats-behind-beijings-drive-control-south-china-sea-hainan.
[260] *Supra,* note 8

position to create a deterrent effect on America if it is planning to invade (Containment theory, elaborated upon later). But one must also understand that the situation today is very different from past.

China is an important importer and exporter of goods. It is commercially very viable. China's economy relies on the open sea passage of ships carrying goods to and from the mainland. More than $5 trillion in trade, roughly 1/3 of world trade, passes through the South China Sea every year. If another country controlled these waters at a time of war, they could cut off the supplies needed for China to sustain a war effort and take care of its people. In such a situation, it is very less likely that China would want to surrender its control to any other nation. As an important participant in global discourse of threats, war and security, China would always play safe and never let any foreign entity to invade the waters or gain control over the waters. Among varieties of possible dominances by nations in the waters from the least to the most oppressive means, many qualifying adjectives are possible. Minimal, superficial, selective, extractive, patronizing, censoring, demanding, suppressive, and despotic are but a few that come to mind, and fluctuations over time are possible across this spectrum from smiles to frowns in either direction.[261]

A theoretical analysis of China's constant efforts to claim portions of the South China Sea, one may come across certain aspects, such as:

1. Containment theory
2. Sovereignty
3. Realism

[261] Emmerson, Donald K. "*Why does China want to control the South China Sea?*" FSI - Why does China want to control the South China Sea? May 24, 2016. Accessed November 14, 2016. http://fsi.stanford.edu/news/why-does-china-want-control-south-china-sea.

4. Jingoism

The above mentioned theories are used strictly to analyse China's actions. May be the theories do not strictly apply to the issue, but they can provide an insight of the matter. The theories named here, are purely for an academic analysis and cannot guarantee in itself the sole basis to explain every behaviour and action.

1. Containment Theory

Containment is a military strategy to stop the expansion of an enemy.[262] It implies that whenever any nation forwards its invasion tactics, a counter reaction is bound to arise. Analytically, it is a self-surviving strategy. It aims at creating deterrence in the minds of the enemy. It means to be always defensive so that the scope of the enemy to expand is reduced. A look at USA's position in the South China Sea would reveal that it is trying to contain China through military forces and by extending security to the counter nations. On the other hand, China is trying to contain USA in reaction. China has been using the artificial islands in a defensive manner. Hence, it is a tough situation between both the countries where both countries are trying to contain each other. And thus, both are employing defensive means against each other. This is why South China Sea is a strategic point. Both the countries are being defensive towards each other in the zoned waters. This strategy is a form of tacit non-cooperation among nations.

2. Sovereignty

China is claiming sovereignty over the islands and waters in the sea. It is unwilling to surrender its supremacy in any case to any entity. But it forgets that one cannot be sovereign by not abiding by international norms. China doesn't want to surrender to USA and negate its power. Also it doesn't

[262] "*Containment.*" Wikipedia. Accessed November 2016. https://en.wikipedia.org/wiki/Containment.

want to surrender its defeat in a manner where India may press on Pakistan. Further, it doesn't want to surrender its dictatorship to the counter claiming countries. In such circumstances, we can understand why it is not accepting the award of United Nations Convention on the Law of the Sea tribunal. Sovereignty is supreme for it.

3. Jingoism

Oxford dictionary defines Jingoism as "extreme patriotism, especially in the form of aggressive or warlike foreign policy."[263]If we judge China on the basis of its activities, it can be said that China wants to give the best and most to its people. We know that China is a communist nation and media has a very restricted role to play and doesn't enjoy freedom of speech and expression as in other countries. China thus does not want to be subjected to the resentment of its people. Chinese people demand a tough stance on territorial issues and no Chinese leader should seem weak to the Chinese people. China wants to maintain in the eyes of its people that it is successful in all its foreign policies and is ready to bend any norms, if need be, for the purpose of its development. China wants to uphold the will of people in all situations. Hence, China is unable to step back from its stand on the South China Sea verdict.

4. Realism theory

Realism theory means "emphasize the irresistible strength of existing forces and the inevitable character of existing tendencies, and to insist that the highest wisdom lies in accepting, and adapting oneself to these forces and these tendencies."[264] China is pursuing its self-interest, and they are striving to obtain as many resources as possible. It is building its militaries in order to survive and thus

[263] "*Jingoism.*" Oxforddictionaries. http://www.oxforddictionaries.com/definition/english/jingoism.
[264] Carr, E. H. *The Twenty Years' Crisis, 1919-1939: An Introduction of the Study of International Relations*. 2nd ed. London: Macmillan, 1962.

protecting its 'national interest'. From this perspective, China's foreign policy in the South China Sea is geared towards defending and reclaiming the islands. China's behaviour can be well explained by this theory as well.

IV. USA – INTERESTS AND REACTIONS

USA is the ultimate super power. And we all know that USA and China have always been highly competitive. But the fact remains that USA remains the mightiest of the states till today. If we trace the relations of USA and China, then we can easily say that they have never been that good. It is highly understood that USA would definitely have a take on China because of its completely disregarding the award given by the tribunal. It will be useful to note that USA, just like India, is the promoter of freedom of navigation in the waters of the South China Sea.

When the verdict over the sea was finally out, USA highly appreciated the decision claiming that the authority of the tribunal shall always be upheld. USA carries out its trade in the disputed waters. Moreover, even USA has faced confrontation from Chinese authorities while crossing the waters. Given the circumstances, USA shall never maintain silence over the matter. Also, China and USA share antithetic ideology. As per a press statement released by USA, it said "As a Pacific nation and resident power, the USA has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without

threats, and without the use of force."[265]

It must be noted that China does not like USA's intervention in the dispute. USA and China have always had conflicting views and China has repeatedly questioned USA as to the interest it is taking in the South China Sea dispute. China says that after 1970, when oil was explored in the waters of the sea, all small territories invaded the waters. USA never took a stand against any territory but it seems to have objections when China is doing the same. Philippines renounced its claim to the South China Sea in 1898, treaty of Paris. But after 1970, it has occupied eight islands and reefs in China's territory. China believes that USA should allow the disputes to be settled peacefully and amicably and should not intervene.

It is also important to point out that USA[266] has condemned the "artificial islands" created by China. But China claims that it is completely legal under International law and has been constructed in China's sovereign territory. But USA also has a reasonable justification that the excavations by other territories are around 100 acres whereas with respect to China it is around 3000 acres, which cannot be justified under any circumstance.

China's stand is clear that the way in which USA is exploiting its islands (in a defensive manner) is a concern for its own security and every nation has the right to safeguard itself against any threats that it may see coming. Moreover, USA is no party to United Nations Convention on the Law of the Sea. In such a case, how can it force China to enforce the decision taken by the tribunal under its norms?

[265] "*South China Sea*." U.S. Department of State. August 03, 2012. Accessed November 14, 2016. https://www.state.gov/r/pa/prs/ps/2012/08/196022.htm. Press Statement by Patrick Ventrell, Acting Deputy Spokesperson, Office of Press Relations Washington, DC

[266] Smith, Jeff M. . "*What Does China Really Think About the South China Sea (And America's Role)?*" Nationalinterest.org. September 26, 2015. http://nationalinterest.org/feature/what-does-china-really-think-about-the-south-china-sea-13943?page=3. Jeff M. Smith is the Director of Asian Security Programs at the American Foreign Policy Council and author of Cold Peace: China-India Rivalry in the 21st Century.

Further, USA has been confronted many times by China while passing through the waters. But China says that only the military vessels have been confronted and not the commercial vessels. Analysis of this manner however, has been highly rejected by majority of countries because they believe in freedom of navigation in respect of all kinds of vessels. China wants USA to alert it even when it is passing beyond 12 nautical miles in the sea as that falls within the purview of China's military alert zone. But USA does not want to comply since free waters do not require any permission. The more China presses and expands, the stricter policies and actions will be adopted by USA for balancing China. USA and India's action against South China Sea in the form of joint statements has almost exemplified the theory of balance of power. America is also strengthening the counter nations for showing its power and asking China indirectly to stay limited and not to adopt expansionist tactics. The USA military has done many things to strengthen the contending parties in the South China Sea muddle. It installed four A-10 Warthogs carrying powerful aircraft guns in the Philippines and has sent a clear indication to China that it is well equipped to involve and interrupt in case of any military deviance in the waters. The USA military has increased the activities of aircraft and naval vessels to assure the regional partners that USA has committed itself to their security by going forward to nullify the Chinese military in force escalation. USA has imparted coast guard training to the Philippines in 2015, the USA training exercise for navy in Balikatan, and the training of the Japanese defence force for expeditionary warfare. In Vietnam, there has been active work done with regard to the coast guard. It said that it would continue to train them in maritime law to improve their capabilities in the South China Sea.

With regard to the ideological implications, it is said that 'continuing the USA' current tactic of mirroring Chinese show of force in the South China Sea by deploying Coast Guard assets to the region would be a mistake. Conducting law enforcement activities in certain parts of the South China Sea on

behalf of regional allies and partners would involve recognition of those countries' territorial claims, something the USA would never do. Compounding this risk, any action taken by the USA Coast Guard towards Chinese civilians would be a propaganda victory for the Chinese government, cementing their claims of American aggression"[267].

V. OPPORTUNITY AND THREAT ANALYSIS FOR INDIA

India and China relations are the hot topic of the hour. And in all these complexities, if a verdict comes against China, lot can be expected. China is that giant which neither speaks straight nor acts straight. It is too difficult to fathom the actions of China. China is a constant striving participant to claim the super power. India has a lot of opportunities and threats as far as the verdict is concerned. But to say in a line, China refusing to accept the award has more consequences and opportunities for India than it had, if China had accepted the award. This is primarily because India has many claims to lay against China in consistency with the International and Diplomatic law.

Firstly, when the ruling on South China Sea came in favour of Philippines, the decision was very much appreciated and welcomed by India. Being a democratic country, India said that every country much comply to the international norms and especially the jurisdiction of the tribunal in maritime issues. Previously India had to intimate the Chinese if they were passing through the South China Sea waters. In 2011, INS Airavat was going down from Vietnam to India where it was confronted by two Chinese soldiers stating that they needed to inform the Chinese whenever they are passing through these waters. Since 55 percent of India's trade passes through the SCS, the Indian Navy has been prioritizing energy security and sea-lane protection lately. Since 2007, Beijing has been protesting a Vietnamese-

[267] Picozzi, Aaron, and Lincoln Davidson. "*China's Secret Strategy to Dominate the South China Sea.*" The National Interest. June 10, 2016. Accessed November 3, 2016. http://nationalinterest.org/blog/the-buzz/chinas-secret-strategy-dominate-the-south-china-sea-16539?page=3.

Indian energy exploration project in the disputed waters of the South China Sea, and there have even been reports of Chinese warships confronting Indian naval vessels in the region. But this will not be the case now. The waters are independent and any one can go through it without intimating the Chinese.[268] The ruling not only has important implications for countries with unresolved territorial disputes with China but also impinges on India's relations with Japan, the USA, ASEAN countries, and the international order.[269]

VI. ENTRY INTO NSG

NSG- THE NUCLEAR SUPPLIERS GROUP is a group of nuclear supplier countries that seek to prevent nuclear proliferation by controlling the export of materials, equipment and technology that can be used to manufacture nuclear weapons[270]. As of 2016, NSG has 48 members. India has been willing to enter NSG but China is resistant by stating that India needs to sign the Non- Proliferation Treaty to be a member of the NSG. "NPT membership is not a requirement for membership in the NSG, although 'adherence' is a factor, and many participants would favour India making binding legal commitments — including to NPT Articles I and VI and to the Comprehensive Nuclear Test Ban Treaty — that would bring India closer to the global non-proliferation mainstream"[271] said Mark Hibbs, Senior Associate in the Nuclear Policy Program at the Carnegie Endowment for International Peace. It means it is not essential to sign NPT. When India was awaiting its entry into NSG, India restrained itself from commenting on South China Sea in any joint statements that it made with US.

[268] Singh, Sushant. "*South China Sea Ruling: How Will It Impact India.*" YouTube, IndianExpress. July 12, 2016. Accessed December 26, 2016. https://youtu.be/Iggf1gvSadc

[269] ANI. "South China Sea verdict: China's bullying tactics fail." The Indian Express. July 14, 2016. Accessed December 8, 2016. http://indianexpress.com/article/world/world-news/south-china-sea-philippines-verdict-chinas-bullying-tactics-fail-2912846/

[270] "*Nuclear Suppliers Group*." Wikipedia. https://en.wikipedia.org/wiki/Nuclear_Suppliers_Group.

[271] PTI. "*NPT not a requirement for NSG but adherence is a factor, says US think-tank expert*." The Indian Express. July 13, 2016. Accessed December 26, 2016. http://indianexpress.com/article/india/india-news-india/npt-not-a-requirement-for-nsg-but-adherence-is-a-factor-says-us-think-tank-expert-2911053/.

Despite such careful stances by India, China is still reluctant to allow India into NSG till India signs the NPT. Through circumvented route and by gaining confidence of nations, it can easily argue that China doesn't believe in global norms so it cannot have a say on whether India can be a member of NSG or not. India cannot afford signing NPT since the world order is changing with new nuclear armaments. Also, we have global threat of North Korea who is completely dictating nation and cannot guarantee rational take on armaments. This development should bolster India's case for NSG membership and undermine China's efforts to rally countries like South Africa, Brazil, Ireland, and New Zealand against India in the next plenary meeting[272].

VII. INDIA-BANGLADESH VERDICT

India has a commendable decision in its bag with respect to its international respect and trust. In 2014, a verdict came from a tribunal set up under United Nations Convention on the Law of the Sea. India and Bangladesh voluntarily approached the tribunal for solving the maritime disputes relating to the Bay of Bengal. The tribunal passed an award in the year 2014 with respect to the issue of 200 nm economic zone, delimiting territorial sea and continental shelf wherein the tribunal decided in favour of Bangladesh. The tribunal awarded Bangladesh with 19467 sq. km out of the disputed 25602 sq. km. India, however, happily accepted the award and clarified its compliance to global norms. Bangladesh Foreign Minister Mahmud Ali said: "This is a victory of friendship between Bangladesh and India. The maritime dispute between the two countries has come to an end following the verdict. The verdict would take the relationship between the two countries one step forward".[273] So, the nations have cited

[272] Nagy, Stephen. "*In South China Sea, War Games Set Sail In Troubled Waters.*" In South China Sea, War Games Set Sail In Troubled Waters | Here & Now. September 15, 2015. http://www.wbur.org/hereandnow/2016/09/15/china-russia-military-exercises?utm_medium=RSS&%3Butm_campaign=storiesfromnpr.

[273] Habib, Haroon. "*Bangladesh wins maritime dispute with India*." The Hindu. July 9, 2014. http://www.thehindu.com/news/national/bangladesh-wins-maritime-dispute-with-india/article6191797.ece.

India as an example to China to comply with the global norms. But China refuses comparison between the two issues. By doing so, China has disrepute itself in the eyes of the world and losing global confidence.

VIII. INDIA-CHINA TERRITORIAL AND SEA DISPUTES

As far as India-China territorial disputes are concerned, India has a discord with China in the north in Himalayas. China has always been trying to expand its land frontiers in the Himalayas. It has been highly condemned though China does not have a legal right to do so. India has also noted a striking similarity between the tactics adopted by Beijing to extend its land frontiers in the Himalayas and those that it uses to advance its maritime boundary in the South China Sea. Just as the People's Liberation Army (PLA) periodically sends border patrols in the garb of villagers, yak graziers and road-construction engineering teams to the Indo-Tibetan border to change the facts on the ground, coast guard, fishermen, and maritime militias have been dispatched to expand China's maritime frontier in the South China Sea.[274] .

Since 2008, China has been doing multiple expeditions in the Indian Ocean and has sent nearly two dozen naval expeditions to the Indian Ocean, ostensibly to counter piracy, but implicitly to project power in the region. Given their unresolved disputes, China's role as the largest arms supplier to India's neighbours, and patrols by Chinese nuclear submarines in the Indian Ocean, India is understandably manoeuvring for advantage in those spheres of influence that overlap with China[275].

In both cases of India-China strike with regard to territorial and Sea disputes, China has no bonafide claim. The strikes are not disputes. They are wild attempts by China to claim as much land and sea as

[274] Malik, Mohan. "*India's Response to the South China Sea Verdict*." The American Interest. July 22, 2016. http://www.the-american-interest.com/2016/07/22/indias-response-to-the-south-china-sea-verdict/.
[275] *Ibid*

it can. China's position is very clear that it is dictating and not showing any respect to global norms. It is ready to take all global norms which are in its favour e.g. signing NPT for entry into NSG, but when it comes to unfavourable awards by tribunal, it calls it ill founded. Therefore, reiterating, China is only making its global position weaker.

Also, China is only asserting historical facts to substantiate its claim. However, law overrides history. And only such history can be guaranteed recognition which is in consonance with the established global norms. Mongolia once conquered the entire lands of Asia. If any tribunal is considering such facts, then it can have no such validity since it is unreasonable after acknowledging the settled principles on International boundaries.

IX. RELATIONS WITH SOUTH ASIAN NATIONS

India has been indulged into sea exploration in the disputed waters of South China Sea with Vietnam, which has been condemned and questioned by China many a times. In a move to expand India's friendship with Vietnam, India, after negotiations has sold Brahmos cruise missile to Vietnam. It has also sold frigates and patrol craft to Philippines. Also, with regard to the south Asian nations of Indonesia, Malaysia, Thailand, and Singapore, India is strengthening its commercial and trade ties.

China has believed that it may negotiate one to one with all the nations involved in the South China Sea dispute. It is open to such discussions and negotiations. But what it fears is the polarization of ASEAN. It fears that if all the concerned South Asian nations unite against it for the dispute, then it is a lost battle. But nonetheless to say that if Philippines have won it singlehandedly, so can every nation. If it becomes China versus the rest, India is an opportunist and India is strengthening its ties with the opposite team. The theory of balance of power is quite evident here. When China is on a rise, all other nations are allying against it to bring down the power. The term balance of power refers to

the distribution of power capabilities of rival states or alliance. The balance of power theory maintains that when one state or alliance increases its power or applies it more aggressively; threatened states will increase their own power in response, often by forming a counter-balancing coalition. Also, Balance of Power is a central concept in neorealist theory[276].

X. CHINA PAKISTAN ECONOMIC CORRIDOR

When Prime Minister Mr. Narendra Modi mentioned in his Independence Day speech about the gross human rights violations taking place in Baluchistan area, the entire nation gained some confidence as to widening the scope of surrounding Pakistan with its wrongful claims over Kashmir. A new enthusiasm arose in the mind of every citizen that pressing the issue of Baluchistan will give a new bend to the India-Pakistan fight over the issue.

No Indian is unaware of China – Pakistan bond. China interferes in the matters of India every now and then saying that it can't let its neighbours quarrel. But it forgets to realize that a person interfering in good faith never does partiality. China has been selling warfare items to Pakistan and everyone is well aware of the same.

China Pakistan Economic Corridor, often referred to by the acronym CPEC, is a collection of projects currently under construction at a cost of $46 billion, intended to rapidly expand and upgrade Pakistani infrastructure as well as deepen and broaden economic links between Pakistan and the People's Republic of China[277] The CPEC passes through Gilgit - Baltistan area which is still disputed. If China constructs CPEC in the area, it would become very difficult for India to reclaim those lands. By

[276] Pandey, Shubhya. "*Balance of Power in International Relations*." Balance of Power in International Relations. http://www.legalserviceindia.com/article/l326-Balance-of-Power-in-International-Relations.html.
[277] "*China–Pakistan Economic Corridor*." Wikipedia. https://en.wikipedia.org/wiki/China%E2%80%93Pakistan_Economic_Corridor#Indian_objections_to_CPEC.

constructing CPEC, China is simply changing and manipulating territorial facts which would go in China's favour. It is very important for India to check and get CPEC stopped in the disputed territory. India is well aware of China's expansionist tactics. China will not only gain economically but would also be able to deploy its warfare ammunition against India in those areas. Since China has refused to comply with the tribunal verdict, it is highly possible that China would dictate even in territorial awards if India wins although it is a farfetched prediction. India has increased its international confidence by complying with the tribunal's award in Bangladesh case. Wherein, China has lost international confidence by calling its award ill founded and refusing to comply. In such a case, India's hold against Pakistan and China has strengthened. India is not only likely to gain not only POK, but also Gilgit – Baltistan and the disputed territories. Eventually, only rule of law can be upheld. Tribunals do not look at international confidence and trustworthy nations. China's behaviour with respect to South China Sea speaks about its aggressive policies which is likely to help us untie the China – Pakistan bond. India's strongest point is that it has no weak point because it has always upheld International legal norms. If India doesn't stand on the side of Philippines, it would not stand with India if Gilgit – Baltistan are concerned. We can in no manner support China's claim over South China Sea even if we wish to.

Since, Pakistan is backed by highly untrustworthy China; it is possible that the international policies of the participants are likely to polarize against both nations. India will become a big game player and will have USA in its favour. This is why India is trying to strengthen its relations with USA. The polarization will be as said. Since faced with an aggressive China, Asia's major maritime and democratic powers—India, Japan, and Australia will work in a more synchronized manner in a quadrilateral grouping with the USA. They will be backed by the Middle Powers (South Korea, Vietnam, the

Philippines, Malaysia, and Indonesia) which are increasingly worried about Chinese maritime behaviour[278].

This is as far as China is trying to interfere in India's territorial issues. But there is an indirect approach. Baluchistan has a Gwadar port in which China's economic corridor with Pakistan is said to be established. Though the position is not same as Gilgit – Baltistan since they were disputed areas while the latter is not, Pakistan is however making grave human rights violations in Baluchistan. This is important for India as far as India's relations with Pakistan over Kashmir are concerned. It is to be noted that Pakistan is making such violations because Baluchistan is full of natural resources. It constitutes 44% of Pakistan area. It is selling away the resources to China. In return, China promises Pakistan ammunitions, security, political backup and what not. China has restrained India from issuing Joint statements with USA for South China Sea. It has said that it has no problem with India's freedom of navigation. It has problems with USA but India has to support USA. Secondly; it has to take POK from Pakistan. In such case, what is favourable to India is only not favouring China's behaviour as to non compliance to the tribunal's award. India can never support South China Sea claims of China.

Moreover, India has also strengthened its ties with USA by recently signing the Logistics Exchange Memorandum of Agreement. It again makes Balance of power operative. It is very likely that China will now press any point against India with respect to Pakistan.

XI. CONCLUSION

Fear of war is an important tool to maintain peace. The current situation and circumstances of world politics are in tension. Let us say, every nation is pursuing its interest by being allies or improving friendship with stronger nations to fight their enemies. E.g. USA – India ties against China,

[278] *Supra,* note 23

Afghanistan – India ties against Pakistan etc. Every nation is in a constant dreading fear of being attacked. Every nation has the feeling of insecurity.

As far as the analysis of the dispute is made, it is clear that all theories well exemplify themselves in the light of the dispute. There is no two way as to China's harsh diplomatic policies and its autocratic behaviour. China is an illegal claimant of the Sea. China is giving an opportunity to India to strengthen its ties with USA. At the same time, China is pressing Pakistan against India through CPEC. USA is likely to help us against Pakistan. While India is interested more against Pakistan and USA is interested against China. It has formed a power quadrilateral. China and Pakistan are losing international confidence. At the same time, India and USA have strong foreign diplomatic policies. China is internationally undermined.

But, if one looks at China's position regarding South China Sea, they need to clearly examine the demography of the sea. South China Sea is surrounded by various nations. The nations are also strong. They are even aided by USA and India which are constant fears and tension for China. In such, it is but obvious that China will always try to maintain a strategic military position in the sea which is well justified. China is not, absolutely at fault.

It is but obvious that every nation will take action against power gaining and enemy nations. It justifies the actions of China and the theory of balance of power. The equations are internationally justified. But undoubtedly, China's failure to observe International law is highly condemnable. But USA and India should understand that China will react to every power display by them. Well, it is also well asserted that China is exercising autocracy in the South China Sea. While the quadrilateral power may have various other justifications, these are the essential ones.

MAKE IN INDIA- A BOOST TO INDIA'S MANUFACTURING SECTOR

Author(s): Srihari Gopal[279]

I. INTRODUCTION

Gregory Mankiw in his 10 principles of economic theory outlined an important principle –a country's standard of living depends upon its ability to produce goods and services, which means that much of the onus of development of an economy in the modern world lies upon the manufacturing sector. While many of these so called developed countries benefitted from an industrial revolution and received an early 'jump-start', many other countries such as Indiawere not as 'lucky', and due to British subjugation for over three hundred years, India wasfaced with a redundant manufacturing sector. So much so that when Jamshedji Tata, one of the pioneers of the Indian Iron and Steel industry came up with the idea of manufacturing steel in India, a British officer mockingly remarked that the Indian steel would be so weak, that the British would eat it.

Manufacturing Industry in India has gone through various phases of development over the years. Since independence in 1947, the Indian manufacturing sector has traveled from the initial phase of building the industrial foundation in 1950's and early 1960's, to the license–permit Raj in the period of 1965–1980, to a phase of liberalization of 1990's, Indian Manufacturing sector currently contributes ~15-16% to GDP (2015) and gives employment to ~12% (2014) of the country's workforce. Studies have estimated that every job created in the manufacturing sector has a multiplier effect, creating 2–3 jobs in the services sector. In a country like India, where employment generation is one of the key policy issues, makes this sector a critical oneto achieve inclusiveness in growth. However, it is seen that majority of the population is employed in the agricultural sector, and yet others in the unorganized sector. In the wake of such a scenario Prime Minister Narendra Modi has introduced Make in India

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in order to provide a much needed boost to India's growing manufacturing sector, planning on increasing the manufacturing sector's contribution to the GDP to about 25% by the year 2025.

According to data from July 2015, the Indian economy runs on a trade deficit, meaning that the imports are higher than the exports. Being highly dependent on foreign manufactured products, especially those from China (from where we import manufactured equipment and other products worth 32.8 billion dollars). This has made the Indian economy especially volatile to international market changes. This was seen especially during the Chinese 'Black Monday' of August, 2015, when the Shanghai stock market crashed and the Chinese economy went into a slump, and along with it the Indian economy too had suffered. Therefore, it was considered essential to introduce a measure in order to make India self-sufficient in production of goods and services as well as a global manufacturing and investment hub, and thus was born one of the most landmark initiatives of the Narendra Modi government- Make in India.

Launched on the 25th of September, 2014 in New Delhi, the Make in India initiative marks a new era of indigenous industrialization, investment in manufacturing sector, and prioritized sectorial development. With a core focus on 25 priority sectors, the Make in India aims to instill confidence in India's industrial capabilities, and encourage Foreign Direct Investments in India. The initiative is largely seen as a recovery measure, a response to the failing growth rate of India in the year 2013. The initiative runs on the motto of 'Minimum Government, Maximum Governance', and marks a clear change in the mindset of the government from being an issuing authority to a business partner. Inspiring confidence in foreign investors and prospective business partners, providing a framework for imparting technical information to these investors and spreading updates on reforms and developments in key manufacturing sectors have been the biggest focus of the initiative, along with infrastructural development in key industrial areas. Imparting information through the social media

has received special emphasis, and for this purpose, the Department of Industrial Policy and Promotion (DIPP) has developed a website which provides technical information regarding various sectors in a sleek manner.

India currently ranks 130 in the list of ease of doing business out of 180 countries, and the initiative aims to pull up India's rank to the top 50, and for the same, it has laid down a structured developmental plan for the next three years, and focuses on infrastructural development in the manufacturing sector, which was severely lacking in India's industrial policy over the years. Another theme of the initiative is 'cut down the red tape and lay down the red carpet', which aims to directly tackle a corrupt bureaucratic system that has plagued the Indian manufacturing sector over the years. This has been done by minimizing human interface and improving technological efficiency.The Prime Minister Narendra Modi, while addressing a gathering of 500 global CEOs described the Make inIndia initiative as a lion step in order to make the Indian market scenario more conducive for global businesses to thrive, and in the process, provide a huge market to sell their products, and a massive employment opportunity for the Indian populace.

II. INITIATIVES UNDER THE SCHEME

The Make in India initiative primarily involves priority development in 25 major sectors, including priority sectors like Defense, Railways, Media and Space. The newly created website for Make in India website gives a detailed description regarding each sector, recent developments as well as advantages of investing in these sectors.

Additionally, the government has also provided various incentives to the manufacturing sector, such as

a. unwinding in stamp obligation exclusion marked down/lease of area;

b. force duty motivators; concessional rate of enthusiasm on advances;

c. venture sponsorships/charge impetuses; in reverse zones appropriations;

d. Extraordinary impetus bundles for financialactivities.

a. Tackling Red Tapism

The current Indian market scenario has been plagued by red tape and unnecessary bureaucratic delays. It is widely believed that this is one of the main reasons why India had performed poorly on the ease of doing business Index, of which one of the important criteriais the 'time period required to obtain approvals for conducting businesses'. A significant reform which has been brought about through the Make in India initiative is the introduction of the single window clearance system, enabling companies to submit the required regulatory papers in a single place for approval, significantly reducing the time to receive the same. Moreover, certain clearances such as broiler clearances have now been outsourced to third parties, again reducing the time taken for approval.

b. Investment Facilitation Cell

To further facilitate investments, the government has also initiated an investment facilitation cell to act as primary support for all investment queries and for providing handholding and liaising services to investors. The queries can now be addressed to and their responses accessed from the makeinindia.com website.

c. Smart Cities Initiative

The government has increasingly come to recognize that in the long term, investments cannot be attracted unless world class infrastructure is developed. Therefore the government has also started the smart cities mission which aims to modernize 100 already existing cities into investment friendly destinations. This Rs. 98,000 Crore project, in the long term, is set to give India some of its first world

class cities. The course followed in each city is unique and is planned in such a way as to suit the needs of the city as a whole. This initiative is also based on the idea that investors prefer areas where there is easy availability of skilled and healthy workers.

d. Foreign Partnership

Two additional programs, the Japan Plus and Korea Plus, with which the government aims to develop infrastructure in the country, has been introduced. Being leading pioneers in the field, it is expected that India would benefit from such kind of a partnership. Such a partnership has been successful in the past, as seen from the construction of the Delhi Metro, which was done with Japanese assistance. Currently under the partnership, the Chennai- Bengaluru Industrial Corridor and the Delhi Mumbai Industrial Corridor are being planned. This collaboration has been extended to the pharmaceutical sector, and the first ever joint symposium between India and Japan to facilitate regulatory collaboration for medical products was organized by FICCI from May 18-19, 2016 in New Delhi.

e. Additional Measures

Furthermore, the government has also undertaken various additional measures in order to facilitate investment such as the following –

a. Released the New Defense Procurement Policy in April 2016, which is aimed at increasing FDI's in the defense sector up to 49% and encouraging local industries to produce and export defense goods.
b. Ms Nirmala Sitharaman, Minister of State for Commerce and Industry, dispatched the Technology Acquisition and Development Fund (TADF) under the National Manufacturing Policy (NMP) to encourage securing of Clean, Green and Energy Efficient Technologies, by Micro, Small and Medium Enterprises (MSMEs).

c. The Ministry of Heavy ventures and Public Enterprises, in organization with industry affiliations, has declared production of a start-up focus and an innovation store for the capital merchandise division to give specialized, business and budgetary assets and administrations to new businesses in the field of assembling and administrations.

d. Provided support to neighborhood fabricating by presenting the new 'Make in India green channel', which will decrease the time taken for payload leeway at ports from around a week to a couple of hours with no forthright installment of obligations.

The Make in India week conducted in February, 2016 was considered a huge success as it singlehandedly brought in investments worth Rs. 15 lakh Crores, or 220 billion dollars, with some states like Maharashtra bagging Rs. 8 lakh Crore by itself.

III. CRITICISMS & CONCERNS

Despite significant successes, the reactions to the initiative has been seen to be mixed , the main criticism being the lack of sectoral reforms especially in the labor sector which is considered essential for the successful implementation of the program, . Experts, in this regard have repeatedly pointed towards the weak labor laws in India. Labor being a subject of the concurrent list where the center and the state can legislate laws, it is seen that both have used this right liberally, leading to a maze of overlapping rules and regulations. The Indian Labor law system is seen as highly employer- unfriendly on paper, sometimes strangling businesses with regulations, whereas in reality, it is highly employee-unfriendly. Such regressive laws have resulted in the exploitation of the working class, as well presented India as an unattractive investment opportunity to potential investors as the laws appear stringent on paper. Even though the government has constantly tried to achieve a national minimum wage standard (which in some states and sectors are already as low as Rs 38 for Tea Plantation workers), it is seen that such measures are still not mandatory in many states. Moreover, the Industrial

Disputes Act, 1947, makes it compulsory for factory owners to receive due permission before laying off workers if the number of workers are more than a 100. As muchas this presents a gloomy picture regarding the manufacturing sector, in reality, majority of the small businesses in India have less than a hundred employees, implying that the law will not be applicable to them. Such loopholes being present in the system would block the benefits of the initiative from trickling down to the working class. Another concern that has been raised regarding the program is that excessive emphasis on export promotion would come at the cost of devaluing the Rupee, which would have disastrous consequences on payments of the import bill, as the initiative calls for significant import substitution, and hence may affect the import sector and the services attached to it. In spite of all the criticisms, the initiative seems to be going at a steady pace, considering the fact that at a time of a global market volatility, when an average growth rate of 3.5% is expected for the rest of the world, the Indian economy is expected to grow at a steady rate of 7.5%.

Despite the widespread optimism regarding self-sufficiency and an incentive driven export oriented economy, many analysts, including the Former Governor of the RBI,Mr. Raghuram Rajan, has been critical of the Make in India initiative, claiming that the initiative cannot serve its purpose of import substitution unless, as the afore-mentioned structural reforms still exist. There was little attempt to institutionally strengthen the policy framework. A technical expert, working on an inter-ministry committee to remove the bottlenecks of stalled projects, mentioned how the bureaucrats were aghast at the pace at which he wanted to restructure and revitalize stalled projects. In fact in the last quarter of 2015, the value and number of stalled projects went up. On the other hand, despite repeated attempts at selling non-core assets and monetizing assets, many highly indebted companies surprisingly saw an increase in their debt levels with few revivals of stalled and bleeding projects coming through.

Again, it has been seen that, with the highly liberal government increasing its focus on the private sector, development of Public Sector Undertakings is lacking. As of January 2016, all 57 listed Public Sector companies (PSUs) on the Indian stock market have a market capitalization less than that of the top 5 privately owned companies. The market value of these PSUs has fallen over 40% in the last two and a half years. With no bureaucrat tasked with a goal based on increase in market values of PSUs, we have seen value destruction on a massive scale.

Banking sectors reforms and bank balance sheet-strengthening are also essential conditions for the success of Make in India. PSU banks need to be capitalized. Distressed loans should be moved to a "bad bank" manned by Enforcement Directorate officers with empowerment to recover defaulted loans from promoters. This will reward efficient promoters with lower loan rates and instill fear in chronic defaulters who have diverted funds with impunity.

Another point of concern has been the demography. The Indian population is considered to be demographically advantaged as its average age is lesser than most of the countries in the world, and hence, it has a high potential to contribute to the economy. However, it is believed that India is sitting on a 'demographic time bomb' as most of the youth entering the work force every year are not employable. The education system needs to be urgently revamped into a Germany-like apprentice system which provides vocational skills to students to create employability amongst school and college students. On the other hand, India's major business rival China has a more skilled population due to their extremely high literacy rate (91.6%). However, the Skill India campaign gives us a ray of hope regarding this issue.

Another point of concern raised is the non-enthusiasm of technology based companies who still find in China a better option to manufacture its components. Despite its recent slump, the Chinese economy is all set to hasten its own manufacturing through the Made in China 2025 policy, through

which 10 sectors have been prioritized to use certain 'intelligent manufacturing processes' to transform the economy from a low cost manufacturing giant to a high tech manufacturing superpower, by encouraging domestic manufacturers to make technological breakthroughs and focus more on value added production. Moreover the Chinese economy is further advantaged from cheap labor and also the presence of ancillary industries which manufacture small goods required for production such as nuts, bolts and screws in China, and therefore additional costs for import of the same need not be incurred. China also ranks higher than India in the Ease of Doing business index, and is significantly ahead of India when it comes to important aspects such as enforcement of contracts (China- 5, India- 172), registering property(China- 42, India-138) and trading across borders (China-96, India- 143).

However, in spite of all the speculations, hope and criticisms, theMake in India lion seems to be going faster than ever, and nothing seems to be stopping it.

BIBLIOGRAPHY

1. Anant Patel,*Benefitsof Make in India*, DIGITAL INDIA INSIGHT, (Nov. 28, 2016),http://digitalindiainsight.com/benefits-or-advantages-of-make-in-india/., (LAST VISITED, NOV.28, 2016).
2. Vinay Aravind, *How Wwe make "Make in India": Llabour laws Laws in our countryCountry*, NEWSLAUNDRY.COM (Dec. 1, 2016) https://www.newslaundry.com/2014/10/15/how-we-make-in-india-labour-laws-in-our-country , (last visited- Dec.1, 2016).
3. MANKIW N. G. MANKIW, N. G. (2008).PRINCIPLES OF MACROECONOMICS,.(Toronto, Thomson Nelson 2008).
4. *CHINA'S ECONOMIC CRASH*, *Five Ways China's Market Meltdown can Impact India,*BUSINESS STANDARD (Nov.30, 2016) http://www.business-standard.com/article/international/5-ways-china-market-meltdown-can-impact-india-115070800667_1.html. , (last visited Nov.30, 2016).

5. *Make in India Week: More than 50 percent of investments go to Maharashtra*,FIRSTPOST (Dec.5, 2016),http://www.firstpost.com/business/make-in-india-week-more-than-50-percent-of-investments-go-to-maharashtra-2632320.html. ,

6. CONFEDERATION OF INDIAN INDUSTRIES,http://www.cii.in/, (last visited Nov.22, 2016) http://www.cii.in/.

7. MAKE IN INDIA, http://www.makeinindia.com/home, (last visited Nov.22, 2016), http://www.makeinindia.com/home..

8. *Make in India Summit,*THE ECONOMIST, (Nov.23, 2016), http://www.economist.com/events-conferences/asia/india-summit-2016., (last visited, Nov.23, 2016).

9. FOREIGN DIRECT INVESTMENTS, (Nov.28, 2016). http://www.makeinindia.com/policy/foreign-direct-investment, (last visited, Nov.28, 2016).

10. QUOTES: SIR DORABJI TATA, (Nov, 28th , 2016), http://www.tata.com/aboutus/articlesinside/FX6UE!$$$$!cbFhc=/TLYVr3YPkMU=, (last visited, Dec.5, 2016).

MATERNITY POLICIES: THE SOLUTION TO INCREASING FEMALE LABOUR PARTICIPATION IN INDIA

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ABSTRACT:

India's GDP growth (annual percent) has been 7.6% in 2015. Women contribute only 17% to this number as compared to the global average of 37%. The number of women working in India has always been drastically low and continues to decline. As of 2014, women in India only represent 24.2% of the paid work force as opposed to the global standards of 39.6%. In fact, India ranks 11th from the bottom out of 131 countries in female labour force participation. National Sample Survey Data shows that India's female labour force participation in rural areas is 36% while in rural areas is 21%. These numbers shout concern. A very obvious solution to the problem- reduce gender discrimination in the labour market, thereby promoting women's participation in large numbers. If women and men were to contribute equally to the economy, India could boost its GDP by $0.7 trillion by 2025 thereby adding 1.4 percentage points annually to the GDP growth rate.

One of the primary reasons for the inadequate contribution of women is discriminatory work policies. If these policies are modified and made mother-friendly, in all probability, female labour force participation will increase sharply.

The main focus of this paper is to look at the effect of comprehensive maternity policies on expanding female labour participation in India. The paper first looks at maternity standards as set down by the International Labour Organisation and then goes on to analyse the Indian Maternity Benefits Act, 1961 and the vital amendments added to the Act in 2017. Later, the opinion of the judiciary on maternity benefits is noted through judgements of the Supreme Court and High Courts. Lastly, the paper seeks to understand whether a change in maternity policies can truly increase female labour participation and the areas which still need improvement to achieve social justice.

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I. INTRODUCTION

India's GDP growth (annual percent) has been 7.6% in 2015.[281] Unfortunately, women contribute only 17% to the GDP as compared to the global average of 37%. [282]The number of women working India has always been drastically low and continues to decline. As of 2014, women in India only represent 24.2% of the paid work force as opposed to the global standards of 39.6%.[283] In fact, India ranks 11th from the bottom out of 131 countries in female labour force participation.[284] National Sample Survey Data shows that India's female labour force participation in rural and urban areas has been 36% and 21% as compared to men whose participation has been 76% and 81% respectively. This declining labour force participation is incongruent with the increasing education and decreasing fertility rates in India.[285]

Reducing gender discrimination in the labour market, thereby promoting women's participation in large numbers, is likely to affect the economic growth of a nation positively. In fact, if women and men were to contribute equally to the economy, India could boost its GDP by $0.7 trillion by 2025 thus adding 1.4 percentage points annually to the GDP growth rate[286]. One of the main reasons for the inadequate contribution of women is discriminatory work policies. If these policies are modified and made mother-friendly, there is a high chance that the female labour force participation will increase sharply.

[281] World Bank Data, *GDP growth (annual%),* Aug. 20, 2016, http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG.
[282]Mckinsey Global Institute, *The Power of parity: advancing women's equality in India* (2015), (29 July 2016), http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-india.
[283] World Bank Data, *Labour force, female (% of total labour force)* (Aug. 20, 2016), http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS.
[284] International Labour Organization, *India: why is India's labour participation force dropping*, Feb. 13, 2013 (25 July 2016), www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_204762/lang--en/index.htm.
[285]Ravinder Kaur SurjitBhalla, *Labour force participation of women in India: Some Facts, Some Queries*, (2011) Asia Research Centre Working Paper (Aug. 13, 2016) http://eprints.lse.ac.uk/38367/1/ARCWP40-BhallaKaur.pdf.
[286] *Ibid.*

This article seeks to look at the effect of comprehensive maternity policies on increasing female labour participation in India. Part II looks at the evolution of maternity policies as set down by the International Labour Organisation. Part III analyses the Indian Maternity Benefits Act, 1961 (hereinafter referred to as 'the Act') and Part IV discusses the amended Maternity Benefits Act, 2016. Part V notes the courts' opinion while Part VI and VII look at how a change in maternity policies can increase female labour participation and the areas which still need improvement to truly achieve social justice. Part VIII concludes.

II. EVOLUTION OF MATERNITY POLICIES

There are seven key factors which are to be catered to while providing maternity protection. These factors are: scope, leave, benefits, health protection, job protection and non-discrimination, breastfeeding breaks and breastfeeding facilities.[287] The goal is to cover all these seven elements in the national legislation of maternity protection. The International Labour Organization (ILO) recognized the need for maternal protection right from the day the organization was instituted in 1919. So far, the ILO has passed three conventions with respect to maternity protection. India is not a signatory to any of these conventions.

The maternity protection convention (No. 3) was passed on 29th November, 1919 and was effective from 13th June, 1921. The said convention was signed by a total of 34 countries and allowed a woman 6 weeks of maternity leave after giving birth. It also provided for monetary benefits funded either by state funds or by insurance policies. The convention prohibited employers from dismissing an employee for taking maternity leave. It applied to women employed in industry and commerce.

[287] International Labour Organization, *Maternity at work: A review of national legislation* (2nd ed.) (Aug. 28, 2016), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_124442.pdf .

Although the provisions of the convention were not sufficient to protect all the rights of a mother to be, it laid down a foundation for national laws and practices.

Convention No.105, 1952 extended the scope of convention no. 3 to women employed under agricultural undertakings and non-industrial establishments. The revised convention also increased the minimum period of maternal leave to 12 weeks out of which at least 6 weeks were to be given after the period of confinement (period of time right after delivery).[288]

Convention 105 has been replaced with a new convention numbered 183 which was passed on 15th June, 2000. The convention has been ratified by 32 countries till date. It has three major aspects: 14 weeks of maternity leave, maternity benefit at the rate of at least two-thirds of previous earnings and health and safety guidelines for pregnant and nursing mothers at work. Globally 34% of 185 countries fully meet the requirements of Convention No. 183 (hereafter referred to as C183) on all three aspects.[289]

- **Scope:** Scope of C183 is wider than that of previous maternity conventions. However, it still excludes women who do not work on work contracts. The proportion of woman working in the unorganised sector in some countries is almost 80%.[290] This means that maternity protection has no meaning to many women even where legislation exists. To confront this anomaly, the ILO adopted C184 titled 'safety and health in agriculture'. The convention stated: "Measures shall be taken to ensure that the special needs of women agricultural workers are taken into account in relation to pregnancy, breastfeeding and reproductive health".[291]

[288] Maternity Protection Convention art. 4, 1952
[289] International Labour Organization, *Maternity and paternity at work: Law and practices across the world* (2014) , http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf, Sept. 1, 2016.
[290] *Key elements of maternity protection at work*, WASHINGTON AREA BICYCLIST ASSOCIATION (Aug. 28, 2016), http://www.waba.org.my/whatwedo/womenandwork/pdf/02.pdf.
[291] Maternity Protection Convention [C183] art 18, (2000).

Although the convention protected the women working under the agricultural sector, many women such as those working in vegetable markets, tailor shops, selling food, etc. still remain unprotected. The unorganized sector must be kept in mind by the ILO when the next convention is drafted.

- **Leave:** Article 4 or C183 states that the duration of maternity leave must not be less than 14 weeks. The leave can either be paid or unpaid depending on the nation's legislation.
- **Benefits:** The maternity protection convention provides health and monetary benefits. Monetary benefits must be sufficient to take care of the mother and the baby and can be paid by either state funds or the employer based on the national legislation. Either way, providing monetary benefit is compulsory.
- **Health protection**: In light of the increasing maternal mortality, the convention prohibits employers from giving pregnant or breast-feeding mothers such work which carries significant risk.[292] The types of work to be avoided are elucidated in R191 which was passed on the same day as C183.
- **Job protection and non-discrimination:** Since being pregnant is not a disability, the ILO found the need to adopt a non-discrimination policy. This policy as illustrated in Article 8 of C183 stated that a woman has the right to return to the same position or an equivalent position when she returns to work from her leave.
- **Breastfeeding breaks**: The mother must be provided with one or more breaks or a reduction in the number of hours of work to breast feed her child.
- **Breastfeeding facilities**: Although not cited in C183, R191 recommends setting up nursing facilities at or close to the work place.

[292] *Ibid,* art. 3.

The evolution of standards of maternal protection has been quite strong. The scope, duration of leave, monetary and health benefits, non-discrimination of women employees and benefits to breast feeding mothers have amplified.

Although India is not a signatory to any of the ILO conventions, it has signed two important international conventions: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on Elimination of All Forms of Discrimination against women (CEDAW).[293] Both these conventions spell out in detail the right to health to women in all sectors of employment.

III. MATERNITY BENEFITS ACT, 1961

The maternity benefits Act was passed on 12th December, 1961 with the aim of regulating the employment of women in certain establishments for certain periods before or after child birth. It is a comprehensive piece of legislation[294] with numerous provisions to protect a woman from being dismissed from duty for being pregnant. Offenders under the act can be subject to civil or criminal liability.

- **Scope**: The Act applies to every factory, mine and plantation, and any shop or establishment which has ten or more employees.[295] To be applicable for the benefits provided by the act, the employee must have worked in the establishment for at least 80 days in the 12 months preceding the date of delivery.[296]

[293] *Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India,* NATIONAL HUMAN RIGHTS COMMISSION, (Aug. 22, 2016), http://nhrc.nic.in/documents/india_ratification_status.pdf.
[294] *Occupational hazards of a working mother,* TECHWOMEN (Sept. 5, 2016), http://techwomen.in/wp-content/uploads/flipbook/5/book.html#p=44.
[295] §2, MATERNITY BENEFITS ACT, 1961 [*hereinafter* MBA].
[296] [MBA], § 5.

Maternity leave: Section 6 discusses maternity leave. It states that a woman is entitled to a maternity leave of twelve weeks out of which six weeks are allotted to her only after the period of confinement. If there has been a miscarriage, the Act provides the mother the benefit of leave of six weeks immediately following the date of miscarriage.[297] If the mother after the delivery of her baby, inflicts certain illness, she is entitled to a leave of up to one month[298] with wages at the rate of maternity benefit.

- **Maternity benefit**: The maternity benefit provided under the Act includes the payment of maternity benefit for the period of her absence from work. If an employer fails to pay maternity benefit, he shall be punished with imprisonment which shall not be less than three months. The employer can also be liable to pay a fine of not less than Rs. 2000 to the aggrieved party.[299]

  Maternity benefit is determined by the average daily wage of the worker. Average daily wage is determined by calculating the average of the wages payable to her for the days she worked during the three months immediately preceding the date from which she takes maternity leave.[300]It is the duty of the employee seeking the maternity benefit to hand in a written notice to the employer seven weeks before the date of delivery of the baby. The notice must inform the employer of the day from which she will absent herself from work and must have an undertaking that the employer will not work for any other establishment during her maternal leave. These provisions are provided to protect the employer. However, failure to give a notice

[297] [MBA] § 9.
[298] [MBA] § 10.
[299] [MBA] § 21.
[300] [MBA] § 5.

does not disentitle a woman from maternity benefit. The amount has to be paid to the woman on demand from an inspector appointed under the Act.[301]

- **Duties of the inspector**: An inspector has been given requisite amount of power through the Act. The inspector is considered to be a public servant under Section 21 of the IPC.[302] He is to be appointed by the appropriate state government. It is the inspector's duty to ensure that employees are provided with all the advantages guaranteed under the Act. Section 15 lays down the powers and duties of the inspectors. It states that an inspector has the power to:
  i. Inspect establishments and the records/ registers that the stated establishments are meant to keep under the provisions of this Act.
  ii. Order the employer to give him information regarding the names and addresses of women employed and the applications or notices received from them under this Act.
  iii. Make an inquiry regarding the improper dismissal of a woman from her work in accordance with the provisions of the said Act.
  iv. Pass an order for the payment of the maternity benefit amount if it has been withheld.

If a party doesn't agree with the decisions of the inspector, he can appeal against it to the prescribed authority. This appeal must pass within thirty days of the inspectors' decision. The decision of the prescribed authority is said to be final and binding.

- **Health protection**: No employer shall knowingly employ a woman in the period of six weeks immediately following her delivery.[303] This clause is also applicable if the lady has a miscarriage and gives birth to a still born. Furthermore, the pregnant woman shall not be given any work

[301] [MBA], § 17.
[302] [MBA], § 16.
[303] [MBA] § 4.

of arduous nature which can adversely affect her health one month preceding the six weeks before the date of expected delivery.

- **Job protection and non-discrimination**:[304]It shall be unlawful for an employer to dismiss a woman or change the conditions of her service to her disadvantage when she absents herself from work in accordance with the provisions of the Act. If the woman is deprived of maternity benefit or is dismissed on the grounds of being absent from work during her pregnancy, she may appeal to the prescribed authority within sixty days from the date on which the order of deprivation or dismissal is communicate to her. The decision of the authority regarding the payment of benefits or dismissal from duty shall be final. Even if the employee is dismissed, she will still be entitled to the maternity benefit.
- **Breastfeeding breaks**: Every woman is entitled to be provided two breaks each a span of fifteen minutes during the day until the child attains an age of fifteen months for the purpose of breastfeeding.[305] If the employer does not provide post-natal care free of charge, then the employee is entitled to receive a medical bonus of minimum two hundred and fifty rupees.[306] Looking at how inadequate a medical bonus of Rs. 250 is in the present age, the parliament passed an amendment to the bill in 2008 which increased the bonus payable from Rs. 250 to Rs. 1000. The amendment also gave powers to the central government to revise the medical bonus from time to time up to a maximum of twenty thousand rupees. Currently, the minimum bonus is Rs. 3500.
- **Breastfeeding facilities:** The Act did not provide for breastfeeding or nursing facilities.

[304] [MBA] § 12.
[305] [MBA] § 11.
[306] [MBA] § 8.

IV. MATERNITY BENEFITS (AMENDMENT) ACT, 2017

The 44th, 45th and the 46th Indian Labour Conference discussed the need of amendments to the maternity benefit act, 1961. The 46th Indian Labour Conference, reiterating that which was stated in the 44th and the 45th Indian Labour conference recommended that the period of maternity leave under the Act in discussion must be increased from 12 weeks to 24 weeks. The Ministry for women and child development-the nodal ministry for women welfare, also recommended the same. Based on these recommendations the Act was amended and passed by the Rajya Sabha on the 11th August, 2016 and by the Lok Sabha on 9th March, 2017. With the passage of this Act, India will join the league of 42 countries where maternity leave exceeds 18 weeks.

- **Scope:** The scope of the Act remains the same.
- **Maternity leave:** Maternity leave has been increased from 12 weeks to 26 weeks. A woman can take leave of 8 weeks before the expected date of delivery as opposed to 6 weeks which was provided in the Act of 1961.[307] The increased maternity leave will not be applicable to mothers having 2 or more children. A leave of 12 weeks is to be provided to a 'commissioning mother' or a mother of an adopted child younger than 3 weeks. A commissioning mother is defined as a biological mother whose egg is used to create an embryo which is implanted into any other woman. In lay man terms, a commissioning mother is one who uses a surrogate mother to get a baby.[308]
- **Benefit to work from home:** If the employer and employee agree, the employee maybe allowed to work from home after period of maternity benefit is over. The condition and duration of the work is to be decided upon mutually by the employee and the employer.[309]

[307] [MBA] § 5(3)
[308] [MBA] § 3(ba).
[309] [MBA] § 5(5).

- **Breastfeeding breaks:** The number of nursing breaks have been increased from 2 to 4.
- **Breastfeeding facilities:** Any establishment having more than 50 employees is to have a crèche within a minimum distance as prescribed.

There have been no changes in policy of maternity benefits, job discrimination and health benefits.

V. COURTS' OPINION ON MATERNITY POLICIES

On an analysis of a fair number of cases reported, the author notes down the various defences that employers make to circumvent liability under the Maternity Benefits Act.

Firstly, employers classify their women workers using different nomenclature such as daily, ad hoc and casual workers on the assumption that the Maternity Act applies only to temporary and permanent employees. The Supreme Court came down heavily on the employers in this regard.

In the celebrated case of *Mrs. Neera Mathur v. Life Insurance Corporation (LIC)*[310], the Supreme Court ruled in favour of the pregnant employee regardless of her being an ad hoc worker. Mrs Neera Mathur had been appointed on September 25, 1989 by LIC. She was put on a probation period for six months and her employment was contingent on her performance. Mrs. Mathur applied for a maternity leave on December 27th, 1989 but was discharged from duty on February 13th, 1990 and denied maternity benefit. When she moved to court, LIC stated that the reason for her dismissal was that she withheld the fact that she was pregnant at the time of appointment. The Supreme Court in 1991 ordered LIC to cancel her dismissal because it went against the provisions of the said Act. Besides this, the Court has held that the use of different nomenclature does not hold because India is a signatory to the Convention of Elimination of All Forms of Discrimination against Women adopted by the United Nations on 18th December, 1979. According to the Convention, casual female and workers employed

[310]Mrs. Neera Mathur v. Life Insurance Corporation (LIC), A.I.R. 1992 S.C. 392.

on daily basis are entitled to benefits under the Maternity Benefit Act. Hence, employers failed in this regard.

Secondly, the recruiters arbitrarily changed the employment stipulations to make the female employee ineligible for any benefit.

The court in *Dr. Shilpa Sharma v. The Chairman*[311] after drawing an analogy to *Bangalore Water Supply and Swaging Board v. A. Rajappa*[312] adjudged that any condition in the agreement, which tends to deprive a woman of maternity leave, would also be viewed as opposed to public policy as well as law and consequently void in terms of Section 23 of the Indian Contract Act, 1872. Hence, this defence also does not stand.

Thirdly, when none of the other defences worked, the employers came up with a new mode of payment of salary. The employers cited that employees on consolidated mode of salary are not eligible for benefit under the Act. The courts have been vigilant and have ruled in favour of the pregnant women in this regard.[313]

In 2011, in the case of *Dr. Shilpa Sharma v. The Chairman*,[314] the Rajasthan High Court affirmed that which was held in the case of *Neetu Chaudhary v. The State of Rajasthan*[315] and rejected the claim that a person employed on consolidated salary (contract basis) is not entitled for casual leave, day off, maternity leave etc. The court stated that it would be very convenient for a respondent to put women employees on a consolidated salary and try to circumvent the statutory obligations. However, the respondent cannot blind himself to the benefits dealing with fundamental rights such as maternity

[311] Dr. Shilpa Sharma v. The Chairman (2011) C.A.T. D.L. 939.
[312] Bangalore Water Supply and Swaging Board v. A. Rajappa, (1978) 548 A.I.R. 1978 S.C.R. (3) 207 (S.C.).
[313] Durgesh Sharma v. State of Rajasthan & Ors RLW 2008 (2) Raj 1304.
[314] *Supra* note 31.
[315] Neetu Chaudhary v. The State of Rajasthan, [2009] R.H.C. 208 (2) R.L.W. 1404

leave. Although the courts consider payment of benefits as a settled position of law, there has been a recurrence of similar cases which are, in the opinion of the courts, avoidable litigation.[316]

Callousness of employers towards mothers-to-be was yet again brought to light in the newspapers in the *Indrani Chakraverthy case*.[317] Indrani was working for a Delhi design firm called Idiom Consulting Ltd. for a few years. In August 2009 when she was expecting her first child, she was told over the phone that she had been sacked. She filed a criminal case against the company as per Section 21 of the Maternity Benefits Act, 1961 and won Rs. 7.5 lakh as settlement money on orders of the Delhi High Court.

VI. MATERNITY POLICIES AS A REASON FOR LOW FEMALE LABOUR PARTICIPATION RATE IN INDIA

Generally, when the economy improves and there is an increase in educational attainment along with a decrease in the fertility, increase in female labour participation is a no-brainer. Bangladesh, Pakistan showed an increase in the female labour participation accordingly.[318] Surprisingly, the latest National Sample Survey Office data shows otherwise. India's female labour force participation fell nearly five points to 24.2% between 2004-05 and 2011-12.[319] Despite the fact that parents are ready to invest in their daughters' education, the idea of a woman working outside the confines of her home is not well-settled due to the ossified patriarchal attitude.[320] When a woman is neither given positive incentives to work nor is she being encouraged by her family, an increase in female participation cannot be expected.

[316] Dr Hemalatha Saraswat v. State of Rajasthan & Ors. (2008) R.L.W. 2008 (2) 1397.
[317] Sengupta, *Sacked while pregnant, lady sues company*, THE TELEGRAPH INDIA (New Delhi, Aug. 6, 2012) , http://www.telegraphindia.com/1120807/jsp/nation/story_15824271.jsp#.V9Z2pSh97b3, Aug. 18, 2016.
[318] Fatima, Ambreen, and Humera Sultana. 2009. *Tracing Out the U-shape Relationship Between Female Labor Force Participation Rate and Economic Development for Pakistan* (2009), International Journal of Social Economics, http://www.emeraldinsight.com/10.1108/03068290910921253, May 11, 2017.
[319] World Bank Data, *Labour force, female (% of total labour force)* (Aug. 20, 2016), http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS, 20.
[320] Mandakini Devasher Suri, *Where are India's working women?,* Mar. 9, 2016, (Sept 1, 2016), http://asiafoundation.org/2016/03/09/where-are-indias-working-women/>

Research and practices across the globe have shown that organizations and countries with employee-friendly maternity policies and good child care facilities not only ensure good health both for the mother as well as the child but also ensure retention in female force.[321] Countries like Norway, Sweden or Denmark, that have one of the world's highest median per capita income, also have the highest female labour participation rate.[322] A research conducted by Accenture on a set of 1000 women in Delhi showed that a third of the Indian women aged between 25 to 30 leave their job and 30% of those one third never return.[323] The reason for leaving work for 72% of these women is the difficulty faced in taking care of the child. Thus, if policies which make childcare easier such as guaranteed leave of absence if the child is sick; parental leave; and a well-equipped crèche for infants and toddlers were to be implemented then the number of women leaving the work force would reduce substantially.

Countries which have understood the importance of effective child care systems such as Brazil have had a 15% increase in female participation in work force.[324] The Swedish government provides child care centres for children under the age of six. Consequently, the female labour force participation in the Sweden has been 60% in 2014.[325] Although state-run child care centres are not feasible considering the economic implications, it may be possible to come with public subsidies for establishments that have children friendly models. Strengthening laws and policies which support working women is a welcome relief. In this regard, the maternity benefits (Amendment) Act, 2017 is a historic step towards

[321] NAASCOM report, *Maternity benefits and facilitating return to work*, (Aug. 23 2016) https://gallery.mailchimp.com/f5446e0d77a0923b9d5eec172/files/Trilegal_NASSCOM_Report_Maternity_Benefits_Facilitating_Return_to_Work.pdf.
[322] World Bank Data, *Labour force participation rate, female (% of female population ages 15+)* (May 13, 2017), World Bank Data, *Labour force, female (% of total labour force)* (Aug. 20, 2016), http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS, 20.
[323] Divya Arya, 'Why motherhood makes Indian women quit their job' *BBC news* (April 23, 2015).
[324] International Monetary Fund, *Women, Work and the Economy: Macroeconomic gains from gender equity* (Sept. 2013) https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf (May 11, 2017)
[325] *Supra* note 42.

assisting women to attain their rightful place in India's economic growth. However, there are still many issues that are left unattended.

VII. FACTORS THAT NEED TO BE STRENGTHENED

A. Poor Implementation:

Much like many other laws, the maternity benefit Act remains poorly implemented. Courts have had to deal with many cases where the aggrieved woman has been denied maternity benefit despite being entitled to it. As seen in part IV, numerous cases have been reported in the high courts and some have even reached the Supreme Court.

Although the courts' decision favours the aggrieved woman employee, not many cases are reported. The pressure of being a mother along with family pressure from in-laws; costs and complicated procedure make it impossible for most of the women to initiate legal proceedings. Thus, most of the women end up leaving their jobs. With the new comprehensive amended legislation, the number of employers exploiting their employees is only going to increase. More than beneficial provisions in national legislation, policy-makers should be concerned with the accessibility of labour beneficial policies. To make sure that the benefits of the Act are reaped by all, it is important to give more authority to the inspectors appointed under the said act so that injustice can be detected at the root itself and litigation is avoided.

B. Discrimination based on number of children:

The fertility rate of women in India is 2.48 children born/woman.[326] 19 million women in India have given birth to seven or more children. [327] The new amendment increases the maternity leave to 26 weeks only for those having their first or second child. This policy discriminates against the 19 million plus population of women and their children.

C. Benefits for the unorganized sector:

Data shows that while 62.8 percent of women were employed in the agriculture sector, only 20 percent were employed in industry and 17 percent in the services sectors.[328]

In 2004-05, out of the 148 million women workers in the Indian economy, almost 96% were unorganized workers.[329] This includes those working informally in the organized sector. Excluding the workers who do informal work in the organized sector, almost 90% of the female work force is in the unorganized sector. Thus, this Act applies only to ten percent of working population. The government should either increase the scope of the Act by changing the meaning of the term 'establishment' or it must pass a new law catering to the unemployed sector if it wants improved rates of female labour participation.

[326] The World fact-book, *Total fertility rate* , Mar. 1, 2016, (Aug 15, 2016), https://www.cia.gov/library/publications/the-world-factbook/fields/2127.html
[327] Editorial, *19 million women in India have 7+ child births*, THE TIMES OF INDIA, May 11, 2016, (July 28, 2016), http://timesofindia.indiatimes.com/life-style/health-fitness/health-news/19-million-women-in-India-have-7-child-births/articleshow/52217778.cms.
[328] International Labour Organization Department of Statistics, (June 2016) *Statistical update on employment in the informal economy* (Aug. 3, 2016), http://laborsta.ilo.org/applv8/data/INFORMAL_ECONOMY/2012-06-Statistical%20update%20-%20v2.pdf.
[329] National Commission for Enterprises in the Unorganized Sector, '*Report on conditions of work and promotion of livelihood in the unorganized sector'* (September 2007). http://www.prsindia.org/uploads/media/Unorganised%20Sector/bill150_20071123150_Condition_of_workers_sep_2007.pdf.

D. Discrimination between adoptive and natural parents:

Although the maternity Act is progressive, it discriminates between a natural mother and mother of an adopted/surrogate child. Many times, women decide to have a baby at a later stage and go through the process of adoption or surrogacy. Regardless of who the biological mother of the baby is, an infant needs proper care and attention for at least the first four months of its development. The intention behind the Act is to foster a bond between a mother and child. Thus, the clause of 12 weeks of leave for adoptive/ surrogate mothers must be amended.

E. Paternity leave:

A women's employment can be driven by two factors- by necessity or by increasing educational attainment, changing societal norms and available employment opportunities.[330] For developed economies, participation of women is driven by necessity because of decreasing population and dwindling labour force. In India where no such necessities exist because of the abundant population, participation of women is hinged on various socio-economic factors at the macro and the household level.

Presence of children is a factor which affects the participation of women at the household level. Single women are seen to participate more in jobs than married women.[331] Women's work in the developing world is often over-looked and undervalued because of the time spent on non-market activities such

[330]Ruchika Chaudhary SherVerick, *Female labour force participation in India and beyond* [2014] ILO Asia-Pacific Working Paper (Aug 12, 2016) , http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@sro-new_delhi/documents/publication/wcms_324621.pdf.

[331] P. K. Panda, *Poverty and young women's employment: Linkages in Kerala*, (1999) (Sept. 1, 2016) http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@sro new_delhi/documents/publication/wcms_324621.pdf.

as care giving, cooking, and cleaning etc.[332] Globally, women do three times more the un-paid work as compared to men.[333] In India, women end up doing 9.8 times more the unpaid work done by men.[334] Parental leave is the leave that can be taken by either parent based on requirement. It is an evolving concept where a child is believed to be a shared responsibility. When a mother takes long leaves, it is only natural that the prospects of her promotion are curbed heavily.[335] Many European countries such as France, Sweden and the United Kingdom provide maternity leave. While France provides 3 years of unpaid paternal leave, Sweden and the United Kingdom provide 70 weeks and 50 weeks of paternal leave respectively.[336]

By providing paternity and paternal leave, there could be a more equitable sharing of unpaid work which could lead to a higher GDP. At least 14 multinational companies in India provide paternity leave.[337] In fact, even the Indian government employees (employees of central civil service, all India services and Indian railways) are provided with five days of paternity leave. Paternity leave must be added to the maternity Act to ensure that mother and father share equal burdens and duties of the child.

VIII. CONCLUSION

If India aims to become the third largest economy by 2030, equal opportunity in work force is a must. The amendments to the Maternity Act put India at a good position in terms of legislation. Courts are

[332] Lourdes Beneria, *Accounting for women's work*, WOMEN AND DEVELOPMENT: THE SEXUAL DIVISION OF LABOUR IN RURAL SOCIETIES 119.
[333] Organization for Economic and Cultural Development, *Gender, institutions and development database* (2014) (Aug 21, 2016), https://stats.oecd.org/Index.aspx?DataSetCode=GIDDB2014.
[334] *Supra* note 5.
[335] Aditi Bishnoi and Pamela Philipose, *Women's employment: work in progress* FRIEDRICH-EBERT-STIFTUNG INDIA OFFICE(2013) (July 24, 2016), http://library.fes.de/pdf-files/bueros/indien/10446.pdf.
[336] France, *French fathers to get more time off under parental leave reform*, FRANCE 24, Jan 21, 2014 http://www.france24.com/en/20140121-france-lawmakers-approve-reform-parental-leave-fathers-gender-equality-bill (May 12, 2017); Kevin Peachey, *How the UK's new rules on parental leave work*, BBC, Apr. 5, 2015 http://www.bbc.com/news/business-32130481 (May 13, 2017)
[337] *Supra* note 41.

also very sympathetic towards the aggrieved employee. With passage of the Maternity Benefits Act, 2017; India's future in self-sufficient, independent women is bright. However, making a career comeback is still going to be a mammoth task for the Indian woman.

Women's participation in the labour market is regulated not only by structural factors but also by social norms that govern gender roles. Factors impacting women's economic activity cannot be simply explained. Besides, the factors interact amongst themselves thus quantifying effect of every factor becomes very difficult. In a traditional society, a man plays the role of the provider and thus a woman's presence in the labour market shows economic hardship.[338]

Women can still be penalized tacitly for not asking for their rights and 'disrupting' the patriarchal workforce. The Act is a double-edged sword. Although it presents great opportunities it affects a very minor portion of the population. The question that stands ahead of us today is whether the Act can change the concerning statistics regarding female labour participation or will the change not occur until there is progress in other aspects such as education and societal norms.

[338] Rahul Lahoti, *Economic growth and female labour force participation in India* (2013) https://iussp.org/sites/default/files/event_call_for_papers/Lahotiswaminathan.economicgrowthandfemalelabourIUSSP.pdf (May 13, 2017).

PRISONER'S APATHY IN JAILS: HOW THE SYSTEM PUNISHES, NOT TEACHES

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ABSTRACT

"An eye for an eye only ends up making the whole world blind. Hate the Crime and Not the Criminal"

-Mahatma Gandhi

Three hundred years ago a prisoner condemned to the Tower of London carved on the wall of his cell this sentiment to keep up his spirits during his long imprisonment: 'it is not adversity that kills, but the impatience with which we bear adversity'. What is it like to be in prison? How is life in prison? Are the prisons, often projected as the reforming centres for offenders actually fulfilling their purpose or are they just cuddling around a large group of people to keep them away from society in some unwanted manner?

This research brings forward the life of prisoners in the Jails of India, the conditions that they are subjected to while serving their term, and the effective ways in which deterrence could be balanced with rehabilitation and reformation. With problems such as overcrowded prisons communicable diseases, unprotected sex, substance abuse, lack of medical assistance with negligible mental healthcare, the goal of recreating a good citizen out of a criminal seems improbable and this research paper intends to highlights the same.

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It discusses the role of prisons and the radical changes in them over the years and how they should no longer be regarded as mere custodial institutions. Therefore, this research particularly lays emphasis on the shift from custody, to training and re-education of prisoners. Moreover, there is a detailed discussion on the Indian Jail and legal system, and how it fails to cope with changes in time and still depends on conventional theories like the preventive and deterrent theories of punishment.

Additionally, this paper takes into account the latest facts and figures from government departments and websites and the views of prisoners, lawyers, police, and jail records to further substantiate the point. One prisoner dies every five-and-a half hours[346]*. Though convicted, they still remain human and should be respected as humans. This paper intends to reconfirm the same through the solutions proposed. We strongly support the idea of 'an eye for an eye makes the whole world blind.*

I. INTRODUCTION

Article 21 of the constitution of India guarantees right to life. This provision has been interpreted to ensure that citizens lead a life with dignity, peace and freedom. While enforcement of this right would mean a peaceful, crime free nation, the same should also take care of the "right to life" of prisoners.

Convicts who are banished to prisons do not cease to be humans or citizens of the country and should be treated with a humanitarian approach. The objective of criminal jurisprudence in India has been deterrence, prevention, reformation and rehabilitation. However, time and again the judiciary has established that a balance must be struck between all the theories and barring extreme circumstances, courts must direct all their powers for the reformation and rehabilitation of convicts. The punishment system in India which mostly includes sentencing expects a convict to spend years in prison. Though

[346]'Looking into the Haze: A Study on Prison Monitoring in India', and 'Circle of Justice: A National Report on Under Trial Review Committees on Prison Monitoring', Report of Executive Committee of the Commonwealth Human Rights Initiative (CHRI).

the benefits of this sentencing for the prisoner can be that he gets time to repent and reform and society would no longer be prone to mischievous activities of the criminal, what is the position practically?

In jails, prisoners are left joggling for basic amenities like proper food, clean toilets, and clothing and secure surroundings. But here the question arises - Are they actually undergoing change in these inhumane conditions? Should not the prison walls ensure that they are not breeding hard core criminals or installing a sense of revenge for the system that is enslaving them?

This paper highlights the plight of prisoners and problems such as overcrowding, ill health, sanitation etc. It also mentions how the legislature and judiciary have time and again fought to correct the failures inside the prisons and turn them into 'correctional homes'. However, the main thrust of the paper is how the Indian system envisages reformation and rehabilitation but what follows out of the current position is only an institutional failure, neither supporting the deterrent nor the preventive theory (examining the impact of those prisoners who turn into hardcore criminals due to their neighbourhood in prisons) nor promoting the reformative or the rehabilitative theory(no future economic opportunities force them back into criminal activities).

II. LEGAL POSITION

Domestic Laws:

1. Prisons Act, 1894 is the first legislation on regulation of prisons in India, on the basis of which the present jail management and administration operates in India. This Act has hardly undergone any substantial change.

2. The Transfer of Prisoners Act, 1950 was enacted for the transfer of prisoners from one state to another for rehabilitation or vocational training. It is helpful in the transfer of prisoners from over-populated jails to less congested jails within the state.[347]
3. The Prisoners Act, 1990 mainly deals with prison reformation and prison justice. It mentions that all reference to prisons or the imprisonment or confinement shall be construed as referring also to reformatory schools to detention therein[348].

Committee Reports/Policies:

In 1980, the *All India Committee on Jail Reforms* was set up under the guidance of Justice A.N. Mulla. The Mulla Committee submitted the report in 1983 and scrutinized all aspects of prison administration and made varied recommendations for protecting the society and rehabilitating offenders.

In 1987, the *National Expert Committee on Women Prisoners* was constituted under the chairmanship of Justice V.R. Krishna Iyerto undertake a study on the situation of women prisoners and suggest measures for their rehabilitation, training and employment. The Committee has recommended induction of more women police force in light of their special role in tackling women and child offenders.[349] It also suggested that women prisoners be allowed to keep their children with them.

The *National Human Rights Commission* in its first report in 1993-94 highlighted the "appalling conditions of overcrowding, lack of sanitation, poor medical facilities, inadequate diet and the like, in most of the jails in the country. These serious deficiencies are compounded by unconscionable delays

[347]Mudasir A. Bhat, Prison Laws in India: A Socio Legal Study, http://ujala.uk.gov.in/files/Ch12.pdf (last visited December 15, 2016).
[348] Section 28, Prisoners Act, 1990.
[349]http://rajprisons.nic.in/Training/Overview%20of%20prisons%20in%20India.pdf(last visited December 17, 2016).

in the disposal of cases for various reasons and mismanagement in the administration of jails, all of which need to be remedied."[350]

In 2007, the Bureau of Police Research and Development prepared a Draft *National Policy on Prison Reforms and Correctional Administration* which has been useful in prison systems.

Prison Committee for Amendment to Prison Act, 1894 has been set up by NHRC in 2015 in pursuance to recommendations of National Seminar on Prison Reforms 2014, under the chairmanship of Shri Sanjay Kumar to suggest amendments to the Prison Act, 1894, in orderto make it in conformity with human rights norms, SC judgments and International Covenants binding on India.[351]

Model Prison Manual:

In the*Ramamurthy case*[352], the Supreme Court emphasized that uniformity must be brought in all laws regulating prisons in the country and also directed the framing of a new All India Jail Manual. With this aim, the committee set up for this purpose undertook to frame the Model Prison Manual 2003.

The 2003 Model has been revised and a latest Model Prison Manual has been formulated by the BPRD in 2016, which forms the basic guidelines for prison administration. It is an all-encompassing document dealing with a number of issues including legal aid, parole and furlough, medical care, premature release, women prisoners, vocational training, remission, education and welfare of prisoners etc., having 32 chapters in total. It also focuses on prison discipline which contains the duties of prisoners, prison offences and a grievance redressal mechanism. The Manual also calls for jail staff to

[350]NHRC Annual Report 1993-94, available at http://nhrc.nic.in/ar93_94.htm (last visited December 17, 2016).
[351] MHA Annual Report 2015-16, available at http://mha.nic.in/sites/upload_files/mha/files/AR(E)1516.pdf (last visited December 18, 2016).
[352] Ramamurthy v. State of Karnataka, AIR 1997 SC 1739.

be sensitive towards gender issues and sexual violence and also aftercare panels to plan and devise mechanisms for rehabilitation of inmates.

Role of the Judiciary:

The Judiciary plays a very active role in administration of prison justice and in the reformation of prisons. The Courts have given some landmark judgements for protecting the rights of prisoners:

- In *D.B.M. Patnaik v. State of AP*[353], the Supreme Court declared that mere detention does not deprive convicts of all the fundamental rights enshrined in the Indian Constitution.
- In *HiralalMallick v. State of Bihar*[354], the Court stressed on the rehabilitation of prisoners and the reformation of prisons.
- In the landmark decision of*Sunil Batra*[355], the Court held that 'the fact that a person is legally in prison does not prevent the use of Habeas Corpus to protect his other inherent rights.' It stated that there is no total deprivation of a prisoner's right to life and liberty. The "safe keeping" in jail custody is the limited jurisdiction of the jailer.
- In *Prem Shankar Shukla v. Delhi Administration*[356], the Court observed that no person shall be hand-cuffed or fettered routinely for the convenience of the custodian or escort.
- Supreme Court has also held that the right to fair treatment and the right of judicial remedy are pre-requisites of administration of prison justice.[357]
- In *Hussain Ara Khatun v. State of Bihar*[358], the Court stressed on the improvements of the conditions of prisons in India.

[353] AIR 1974 SC 2092.
[354] AIR 1977 SC 2237.
[355]Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.
[356] AIR 1980 SC 1535.
[357] R.D. Upadhyay v. Delhi Administration, AIR 2001 SCC 437.
[358] AIR 1979 SC 1377.

- In a very recent judgement of *Re – Inhuman Conditions in 1382 Prisons*[359], the Supreme Court gave some positive directions for improvement of prison conditions, for instance, the DGP of prisons should ensure that there is proper and effective utilization of funds so that living conditions of prisoners is commensurate with human dignity. Also, the MHA will conduct an annual review of implementation of Model Prison Manual 2016.

International Obligations:

The *Universal Declaration on Human Rights* (UDHR) Article 5 imposes an obligation that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The *International Covenant on Civil and Political Rights* (ICCPR) contains a similar obligation as in the UDHR.[360] Further, Article 10 states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Also, the penitentiary system shall comprise treatment of prisoners with the essential aim of their reformation and social rehabilitation.

The *International Covenant on Economic, Social and Cultural Rights* (ICESR) in Article 12 states that prisoners have a right to the highest attainable standard of physical and mental health. Apart from civil and political rights, the second generation economic and social human rights as laid down in the ICESR also apply to prisoners.[361]

The *Standard Minimum Rules for the Treatment of Prisoners* was formulated by Amnesty International in 1955 which form a basic guideline for prison laws. It embodies the principle of equality, that there

[359] Delivered on February 05, 2016.
[360] Article 7, ICCPR – "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[361] http://rajprisons.nic.in/Training/Overview%20of%20prisons%20in%20India.pdf (last visited December 17, 2016).

shall be no discrimination on grounds of race, sex, colour, religion, political or other opinion, national or social origin, property, birth or other status among prisoners.[362] The rules prohibit corporal punishment, punishment by placing in dark cells, and all cruel, inhuman degrading punishments.[363]

Other UN directives include:

- The Basic Principles for the Treatment of Prisoners (United Nations 1990);
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations 1988);
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

III. SANITATION

Proper sanitation and hygiene conditions is one of the basic human rights of prisoners. As per the Draft National Prison Policy,hygienic conditions in prisons are adversely affected by shortage of latrines, urinals and bathrooms, due to overcrowding, improper construction of urinals and night latrines inside barracks, general non-availability of flush systems in latrines and no sewer lines in prison campuses leading to choking of sewerage systems. Sock pits are choked due to entry of water other than it is meant for, improper and obsolete drainage systems, no rain water harvesting systems and no systems to recharge ground water by rain water. The situation is further aggravated by non-availability of sufficient funds, unhygienic habits among prisoners, lower sensibility towards hygiene etc.[364]

[362] Rule 6(1), Standard Minimum Rules for the Treatment of Prisoners, 1955.
[363] Rule 31, Standard Minimum Rules for the Treatment of Prisoners, 1955.
[364] Draft National Policy on Prison Reforms and Correctional Administration, 2007, Part 3, available at http://www.bprd.nic.in/WriteReadData/userfiles/file/5381992606-Part%20III.pdf (last visited December 18, 2016).

In 2015, the MHA has submitted a report on the Implementation of the Mulla Committee Report (1983). Some of the points highlighted by it are[365]:

1. There appears to be a lack of water based flush type toilet in jails – in some states such as UP and Haryana, 50% shortage of such toilets was recorded.
2. There is a major dependence on open based toilets –Haryana, Tamil Nadu and UP have a large number of toilets in this form.
3. The ratio of latrines to prisoners is 50:1 in Chhattisgarh and Haryana.
4. Many states have not taken steps to examine the status of prison hygiene, sanitation, kitchens and the treatment of sick prisoners. Also, there has been no set mandate for medical officers and psychiatrists. It has been observed that in about nine states and UTs that the post of Medical Officers has not been created to study the healthcare of inmates in jails and correctional homes.
5. Additionally, in about 23 states and UTs, the medical officer's post has been designated only second to the jail superintendent. This is a positive change, that allows this post to assist the jail superintendent in all major activities.

The International Committee on Red Cross (ICRC) has come up with a handbook to ensure that prisoners are given proper and equitable access to basic human amenities along with maintenance of hygiene and sanitation. Some of the measures suggested by it are[366]:

- Availability of water 24 hours a day
- Adequate water purification systems, adhering to WHO standards

[365] Implementation of the Recommendations of All-India Committee on Jail Reform (1980-83) Vol. 1, available at http://mha1.nic.in/PrisonReforms/pdf/Mulla%20Committee%20implementation%20of%20recommendations%20-Vol%20I.pdf(last visited December 18, 2016).

[366] Water, Sanitation, Hygiene and Habitat in Prisons: Supplementary Guidance by ICRC, available at https://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf(last visited December 18, 2016).

- Each toilet block must be equipped with one tap for washing hands
- Availability of one shower to cater to 50 detainees for a bath at least 3 times a week
- A dedicated team should be formed for cleaning and maintenance of toilets, which should be given adequate training and mandate to manage the cleaning system
- Women should be allowed to have secured entry to toilets throughout the day
- Extra facilities should be available to women who are pregnant, lactating, undergoing menstrual cycle or having young children

The BPRD in its Model Prison Manual has also recommended a number of detailed measures to deal with hygiene in prisons.[367]

Recent News and cases:

Recently, a Bombay High Court Division Bench has directed the state government to take corrective measures and improve the sanitation facilities in all state prisons. The state was instructed to provide proper toilet and bathing facilities and a policy to curb overcrowding.[368]

In Chhattisgarh, the CAG has found some shocking figures on overcrowding and poor sanitation facilities. According to CAG report, the state prisons are overcrowded by 132% to 160% and contrary to norms of one toilet seat for five prisoners, there are only 863 toilet seats for 10, 213 prisoners.[369]

The situation is quite bad in Jaipur jails and worse still in Central Jail, Ajmer and sub-jail, Jhunjhunu. In Jhunjhunu, where there was incidentally no shortage of water, the jailor sanctioned half a bucket of

[367] Model Prison Manual 2016, available at http://mha1.nic.in/PrisonReforms/pdf/PrisonManual2016.pdf (last visited December 18, 2016 18:00).
[368] http://www.dnaindia.com/mumbai/report-provide-basic-sanitation-facilities-in-all-jails-in-4-weeks-bombay-high-court-to-state-2185293(last visited December 18, 2016).
[369] http://timesofindia.indiatimes.com/city/raipur/1-toilet-for-12-prisoners-CAG-pulls-up-state-for-poor-sanitation-in-jails/articleshow/48288672.cms (last visited December 18, 2016).

water per week per person for washing and bathing. There was overcrowding, the food was bad and inmates suffered from all sorts of skin diseases. If anyone complained, he was beaten.[370]

In one instance, in 2011, DMK MP Kanimozhi complained about the stench from the attached toilet in her cell in Tihar's Jail No. 6 and the authorities bent over backwards to ensure proper water supply to her cell. She should consider herself lucky that she is not in the Tiruchirapalli women's prison in Tamil Nadu where inmates have to get mud to clean their toilets since there isn't any water. Lodged in the Tamil Nadu prison for five years as an under-trial from 2005 to 2010, Murugeswari says that the water was so scarce that they had to choose between washing themselves and their clothes.[371]

In the case of *P. Bharathi v. Union Territory of Pondicherry &Ors.,*[372]the prisoners wrote a letter to one of the SC judges about their bitter experiences in Central Jail of Puducherry. It talked about the poor and unhygienic conditions and maintenance inside the prison and also restrictions on visits by relatives. There was no toilet facility inside the cell to answer nature's call during night time. Only two plastic buckets with a lid was provided for this purpose and the next morning, the buckets containing excreta were made to be cleaned by the inmates of the cell on rotation basis.

[370]Jails in India: An Investigation by Raman Nanda.
[371]http://indiatoday.intoday.in/story/right-to-justice-bill-jails-turn-into-nightmares-for-undertrials/1/142622.html (last visited December 18, 2016).
[372] 2007 CriLJ 1413.

IV. LIFESTYLE AND LIVING CONDITIONS

Prisoners in India face a plethora of problems related to improper living conditions to which they are forced to adapt. Overcrowding, unhealthy and inadequate food, lack of recreational facilities, almost negligent social and family visits are just a few of the problems plaguing the prisoners due to inefficient implementation of existing laws.

Overcrowding:

Overcrowding has remained a long-standing problem and it adversely affects the health of prisoners and overall conditions of prisons including hygiene and quality of food. Overcrowding is associated with morbidity, recidivism, violence and indiscipline and hampers rehabilitation and reformation of prisoners.[373]

The effect of overcrowding is that it does not permit segregation among convicts punished for serious offences and for minor offences. As a result of this, hardened criminals may spread their influence over other criminals.[374]

Prison Statistics as at the end of 2015 have been given by NCRB as follows[375]:

[373] Draft National Policy on Prison Reform and Correctional Administration Part 3, available at http://www.bprd.nic.in/WriteReadData/userfiles/file/5381992606-Part%20III.pdf (last visited December 18, 2016).
[374] Paranjape, N.V., *Criminology Penology*, p.364 (12th Ed., Central Law Publication, 2005).
[375] http://ncrb.nic.in/StatPublications/PSI/Prison2015/TABLE-1.1.pdf (last visited December 18, 2016).

Number of Jails, Capacity, Population and Occupancy Rate

in the Country at the end of 2015

S. No.	Type	Number of Jails	Capacity	Population of Inmates	Occupancy Rate
1.	Central Jail	134	1,59,158	1,85,182	116.4
2.	District Jail	379	1,37,972	1,80,893	131.1
3.	Sub-Jail	741	46,368	39,989	86.2
4.	Women Jail	18	4,748	2,958	62.9
5.	Borstal School	20	1,830	1,003	54.8
6.	Open Jail	63	5,370	3,789	70.6
7.	Special Jail	43	10,915	5,769	52.9
8.	Others	3	420	13	3.1
9.	**Total**	**1401**	**3,66,781**	**4,19,623**	**114.4**

To reduce overcrowding, provisions in statutes (in terms of parole, bail, furlough, short leave and appeal petitions etc.) should be exercised liberally. Jail committees may also be constituted, having representatives from amongst the inmates, to assist the jail authorities in the completion of the following process.[376]

[376] MHA, Annual Report 2015-16, available at http://mha.nic.in/sites/upload_files/mha/files/AR(E)1516.pdf (last visited December 18, 2016).

The Law Commission in its 78th Report made some recommendations, including liberalizing the conditions of release on bail,for decongesting prisons.[377]

The Mulla Committee had also remarked that "Almost all over India overcrowding in prisons has become a common problem. In some prisons the cells and barracks which were originally meant for accommodating inmates have been converted into store-rooms, go downs, work-shops, etc. The original authorized accommodation of an institution is thus slowly shrinking whereas the daily average population and the total admission indicate a steady increase. As a consequence, overcrowding has assumed the proportions of a major problem for the Correctional Administration."

The Standard Minimum Rules also encompass that for sleeping arrangements each prisoner shall occupy by night a cell or room by himself. If for special reasons such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.[378]

It has to be noted that establishing more courts would be of no avail till the "adjournment culture" continues.

Even though the court has passed a number of interim orders to the States to decongest prisons, the picture still remains bleak. Particularly in February this year, the Supreme Court had spelled out measures that authorities should undertake to reduce prison occupancy. Cramped prison environments militate against the prisoner's right to good health and dignity.

In a recent case, the Court has received some proposals for constructing additional jails, but has found that these are only ad hoc proposals, with no indication of either a time frame or the resources

[377] Law Commission of India 78th Report, 1979 on "*Congestion of under-trial prisoners in jails*".
[378] Rule 9(1), Standard Minimum Rules for Treatment of Prisoners, 1955.

provided for building these facilities.[379] The Court said that the prisons in India were overcrowded by 150% and directed the govt. to submit an action plan by March 31, 2017.

Family Visits:

The Prison Act, 1894 under Section 40 as well as the Model Prison Manual 2016 envisage that the prisoner shall be allowed reasonable facilities for meeting and communicating with his/her relatives and friends.

The Supreme Court in the*Sunil Batra Case*[380]has also held that "visits to prisoners by family and friends are a solace in isolation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity".

The person detained or arrested has a right to meet his family members, friends and legal advisers and woman prisoners are allowed to meet their children frequently. This will keep them mentally fit and they will respond favourably to the treatment method.[381]

Despite such provisions being in place, there still happens to be incidents where prisoners are not allowed to meet their family members. One such instance being of Yadav who was beaten up, along with other detainees, by the state police for peacefully protesting against the quality of food served in the jail. After he was admitted to the hospital, his wife and brother tried to meet him separately but were denied permission by jail authorities.[382]

[379]http://www.thehindu.com/opinion/editorial/Time-to-decongest-our-prisons/article16071311.ece(last visited December 18, 2016).
[380] Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.
[381] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi &Ors., AIR 1981 SC 746.
[382]http://www.amnestyusa.org/news/press-releases/detained-journalist-beaten-for-protest-in-prison-in-india (last visited December 18, 2016).

Theirs is a closed existence; visits from friends and relatives are few and far between for most prisoners. Many of them have not had a visit for years together. Poor as their friends and relatives are, they find it difficult to bear the transportation expenses to visit their kith and kin in jail. Further, they are made to wait for hours at the jail gate and in many jails the gate-keeper asks for a bribe.[383]

Accommodation and Food:

The Standard Minimum Rules provide that dormitories and sleeping accommodation shall meet all requirements of health, keeping in view the climatic conditions and the cubic content of air, minimum floor space, lighting, heating and ventilation.[384]

"The food served to the prisoners is unfit for consumption. According to a report of Seraikela Jail in Bihar in Economic and Political Weekly, July 1978, "Due to overcrowding, a number of prisoners have to spend the nights actually sitting up. The prisoners are invariably very poor people; but the food is so rotten that they find it revolting...Quite often the prisoners are ordered to lap up the dal which overflows on to the floor. For vegetables, the prisoners are fed with wild grass and roots.... A glass of water was found to have no less than one inch of mud at the bottom… For 400 to 800 prisoners, there are just eight latrines. The prisoners therefore defecate at the drains. In winter, six of them have to huddle under one blanket. Tuberculosis prisoners sleep with the as yet un-diseased ones."[385]

In 13 States no difference is there between diets for labouring inmates and pregnant women inmates[386]

[383] Jails in India: An investigation by Raman Nanda.
[384] Rule 10, Standard Minimum Rules for Treatment of Prisoners, 1955.
[385] Jails in India: An investigation by Raman Nanda.
[386] Implementation of the Recommendations of All-India Committee on Jail Reform (1980-83).

Delhi, Goa, Maharashtra and Gujarat spent the least on prison food in 2015 — Rs. 31.31, Rs. 32.83, Rs. 34.22 and Rs. 35.38 respectively per prisoner per day NCRB data shows.[387]

The Model Prison Manual prescribes a calorie intake of between 2,320kcal and 2,730kcal/ day for male prisoners, and 1,900kcal to 2,830kcal/day for women prisoners. States have the right to decide on the menu in their prisons, provided it adheres to the nutritional requirements.

Recreational Facilities:

Recreation facilities such as access to books, newspapers, library, sports and exercise play an important role in a prisoner's life. Similar provisions have been incorporated in the draft National Prison Policy which states that such activities are important in social development of the inmates. It also suggests that the committee should plan special celebrations on national holidays and festivals and other modes of providing recreational facilities.

The Standard Minimum Rules also provide that every prisoner, not employed in outdoor work, shall have at least one hour of exercise in open air. Further, young prisoners should receive physical and recreational training during such exercise. (Rule 21)

Earlier in 2016, the Rajasthan High Court tooksuomotu cognizance of the State's deplorable and inhuman prison conditions and made some critical observations on the sanitation, food, healthcare and other relevant aspects of inmates' lives. It set out some directives and gave orders as to adequate kitchen, ensuring inmates get one sweet item per week, making enough newspapers and novels are available, organising fortnightly movie screenings, construction of adequate toilets[388], thereby highlighting the need for proper recreational facilities in jails.

[387] http://indianexpress.com/article/explained/on-the-plate-what-jail-inmates-really-get-to-eat-biryani-in-jail-4373624/ (last visited December 20, 2016).
[388] http://indianexpress.com/article/india/india-news-india/condition-of-jail-food-quality-in-jail-rajasthan-hc-wants-sweets-once-a-week-movie-screenings-for-prisoners/(last visited December 18, 2016).

It has been observed that only in six states and one UT a Committee on Recreation and Sports exists at the jail-level.[389]

V. MENTAL AND PHYSICAL HEALTH

It is an established position of law that mere conviction for crime does not make a person less of a human. He is still entitled to all the basic human rights as guaranteed by our Constitution. The state has an obligation to preserve lifebe it an innocent person or a criminal liable to punishment under the law.[390]

The ICESR provides that prisoners have a right the highest attainable standards of physical and mental health.[391]

Right to life and personal liberty[392], enshrined in Article 21 of the Constitution also considers "*Right to health care*"[393] as an essential ingredient. The Prisons Act also contains various provisions relating to the health of the prisoners in prisons[394]. The Prisoners Act further provides provisions for transfer of prisoners of unsound mind to lunatic asylums and other places where he will be given proper treatment.[395]

[389] Implementation of the Recommendations of All-India Committee on Jail Reform (1980-83).

[390]ParmanandKatara v. Union of India, 1989 SCR (3) 997; Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488.

[391] ICESR, Articles 7 & 10; UDHR, Articles 1 & 3.

[392]The Constitution of India, 1950, Article 21: "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"

[393]ParmanndKatara v. Union of India, AIR 1989 SC 2039; Consumer Education and Research Center v. Union of India, (1995) 3 SCC 42; Kishore Brothers Ltd v. Employee's State Insurance corporation, (1996) 2 SCC 682.

[394]Section 14, Prisons Act, 1894: "*Whenever the Medical Officer has reason to believe that the mind of a prisoner is, or is likely to be, injuriously affected by the discipline or treatment to which he is subjected, the Medical Officer shall report the case in writing to the Superintendent, together with such observations as he may think proper*.";
Section 24 (2): *"Every criminal prisoner shall also, as soon as possible after admission, be examined under the general or special orders of the Medical Officer, who shall enter or cause to be entered in a book, to be kept by the Jailer, a record of the state of the prisoner's health, and of any wounds or marks on his person, the class of labour he is fit for if sentenced to rigorous imprisonment, and any observations which the Medical Officer thinks fit to add."*

[395]Section 30, Prisoner's Act, 1990.

All the above provisions form the basic obligation on the prison authorities to take care of basic physical and mental health of the prisoners. The said obligations can be divided under two heads: (1) Mental health; and (2) Physical Health

1) Mental Health:

It has been estimated that mental illness in prisons and jails prevail three to five times higher than that prevailing in the community.[396]In a study carried out by NIMHANS[397], 79.6% of the 5200 prisoners systematically interviewed in the Central Prison, Bangalore, showed evidence of mental illness.

Mental illness maybe present at the time of admission to prison or it may develop during the period of imprisonment. Further the cause of mental disorder, developed during the imprisonment, may be prevailing prison conditions like over-crowding, dirty and depressive environment, poor food quality, inadequate medical care etc.

As per 2015 NCRB report, 5203 out of 4,19,623 inmates, accounting for 1.2% of total inmates, suffered from mental illnesses at the end of 2015.[398]

Provisions under Section 30 of the Prisoners Act, 1900 and the Indian Mental Health Act, 1987 are taken into consideration while treating mentally ill prisoners. Prisoners declared insane are assigned to a mental hospital, while mentally ill prisoners who aren't certified as insane are sent to central jails.

[396]HM Inspectorate of Prisons, The mental health of prisoners: A thematic review of the care and support of prisoners with mental health needs, (2007) available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/mental_health-rps.pdf (Last visited on December 14, 2016).

[397]BADAMATH S, MURTHY P, PARTHASARATHY R, NAVEEN KUMAR C, MADHUSUDAN S., MENTAL HEALTH AND SUBSTANCE ABUSE PROBLEMS IN PRISON: LOCAL LESSONS FOR NATIONAL ACTION (NIMHANS and KSLSA, NIMHANS Publication No 98.ISBN 81-86430-00-8.).

[398] State/UT-wise Distribution of Different Types of Inmates Suffering from Mental Illness at the end of 2015 available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Snapshots-2015_18.11.2016.pdf (last visited on December 14, 2016)

Further there are instances which show that the provisions of the Mental Health Act and Prisoners Act are not implemented properly by the authorities, some of which are provided here. For instance, Hitler Baba Khan was diagnosed as a schizophrenic, but instead of being sent to a psychiatric facility, Roy was kept in solitary confinement in Central Jail, Jaipur.[399]

If the accused is suffering from a mental illness at the time of trial, the trial against him cannot proceed until he becomes mentally fit to stand trial. But there is no clear provision in the Mental Health Act 1987 with regard to further proceedings if a patient is chronically ill, treatment resistant and never likely to be fit to stand trial.

One such case was of Mr. MachangLalung, an under-trial prisoner, who languished in the mental institute in Tejpur, Assam as an under-trial prisoner for 54 years. He was detained at the age of 23 but he could secure his release only when he was 77 years oldan that too on the intervention of the Supreme Court.[400]

This shows that though there are laws made by Parliament for the regulation of mental health among prisoners but there are still many loopholes when it comes to its implementation either due to vagueness of provisions or due to lack of necessary manpower and resources for the same.

2) <u>Physical Health:</u>

The physical health problem which prevails in prison can be classified into three broad categories: (a) Torture, (b) Outburst of Diseases and (c) custodial injury or death due to prison riots.

a) Torture

Various international conventions and instruments provide against torture such as UDHR Article 5.

[399] RPS Teji, Additional District & Sessions Judge, THE PRISON, OBJECT AND REFORMS, available at http://www.delhidistrictcourts.nic.in/ejournals/RPS%20TEJI%20%20PRISON%20OBJECT%20REFORMS.pdf(last visited December 14, 2016).

[400] *Ibid.*

SC has suggested that prison authorities should change their attitudes towards prisoners and protect their human rights for the sake of humanity.[401] The prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crime.[402]

People's Union for Democratic Rights (PUDR), New Delhi, published a brief report in October 1990 on deaths in police custody in that city, according to which 48 deaths were reported in from 1980 to 1989, most of which were persons under the age of 30 and the cause of death was severe beating and prolonged torture.[403]

The worst form of prison violence was witnessed in Khatri v. State of Bihar[404] where the police had blinded 80 suspected criminals by puncturing their eyes with needles and dousing them with acid. A total of 1,584 deaths in jails were reported (1,469 natural and 115 un-natural) during the year 2015.[405]

As per the report of the Asian Centre for Human Rights more than 14,000 people died in police custody in India out of which 99.99% of deaths can be ascribed to torture.[406]

This clearly shows that despite various Court rulings, torture has been prevalent in Indian prisons and the same has led to many custodial deaths and injuries.

b) Outbreak of Diseases

"Right to health care" is an essential ingredient of Article 21 and a basic human right. The Gujarat High Court *RasikbhaiRamsing Rana v. State of Gujarat*[407] directed the jail authorities to take proper care

[401] Sanjay Sun v. Delhi Administration, AIR 1988 SC 414.
[402] DBM Patnaik v. State of Andhra Pradesh, AIR 1974 SC 2092.
[403] HUMAN RIGHTS WATCH, PRISON CONDITIONS IN INDIA, 1991 available at https://www.hrw.org/sites/default/files/reports/INDIA914.pdf (last visited on December 14, 2016).
[404] 1981 SCC (1) 627.
[405] Deaths in Jail at the end of 2015, available at http://ncrb.nic.in/StatPublications/PSI/Prison2015/Snapshots-2015_18.11.2016.pdf (last visited December 20, 2016)
[406] http://www.thenational.ae/news/world/south-asia/human-rights-report-says-14-000-indian-prison-deaths-in-a-decade (last visited December 20, 2016).
[407] (DB) 1997 Cr LR (Guj) 442.

of ailing convicts and take prompt actions regarding the same and held that the neglecting officers were to be personally liable.

In 2005, the Gujarat High Courtin a *suo motto* writ issued directions to State Government, that all Central and District jails should be equipped with ICU, pathology labs, expert doctors, sufficient staff including nurses and the latest instruments for medical treatment.[408]

The main cause of outbreaks of diseases among inmates is due to overcrowding in prisons, lack of proper sanitary facilities and lack of decent healthcare.

As per a study conducted in the Central Jail at Hindalga in the Belgaum district of Karnataka, 850 prisoners were evaluated for a period of 1 year and it was revealed that anaemia (54.82%) was the commonest morbidity followed by respiratory tract infections (21.75%) and diarrhoea (13%). Pulmonary TB and HIV contributed 2% and 1.5% respectively, while other morbidity included, diabetes (3.6%), senile cataract (7%), pyoderma (12%) etc.[409]This could be because of overcrowding, poor living conditions, and close contact with one another.

Sex between men is reported to be common in prisons in India, though homosexuality is illegal. In a study conducted in Arthur Road Jail, 71.6% of 75 employees and 677 inmates said that they thought sex between men was common in prisons. 11% of the inmates and staff engaged in homosexual activity in prisons. A study in a district jail near Delhi found that 28.8% of 184 male inmates had a history of sex with men.[410]

This has exposed the inmates to high risks for sexually transmitted diseases like HIV. Furthermore, in India there is no clear policy on testing for HIV in prisons which has led to a lack of uniformity among

[408] Gujarat Samachar, Ahmedabad Ed. dated May 20, 2005.
[409]http://rajprisons.nic.in/Training/Overview%20of%20prisons%20in%20India.pdf(last visited on December 14, 2016).
[410] WHO SEARO 2007.

various prisons in India. Some prisons require testing at entry while some require it during custody stage and some before release.

Also there are *ad hoc* interventions in the form of HIV education, information and communication in Indian prisons like a sexual health programme titled Partnership for Sexual Health Project in January 2000 started by the Government of AP; the Mumbai District AIDS Control Society and the ILO together with the Department of Preventive and Social Medicine, Sion Hospital conducted a workplace intervention programme at the Arthur Road Jail from 2004 to 2006; In West Bengal, Vivekananda International Health Centre has been delivering an AIDS intervention programme in 20 prisons etc.

It was revealed that in Arthur Road Jail, Mumbai there was a problem of overcrowding and sanitation as claimed by an inmate according to whom toilets were not cleaned for days, and living in such close proximity to so many people had led to prisoners getting skin diseases.[411]

c) Custodial Injury or Death due to Prison Riots

Prisons are often dangerous places for those they hold. Group violence is also endemic and riots are common.

In a three-day riot and stand-off in the Chappra District prison in Bihar towards the end of March, 2002, 6 prisoners died in the shootout that occurred when commandos of the Bihar Military Police were called in to quell the riots.[412]

[411] *Ibid.*

[412] RPS Teji, Additional District & Sessions Judge, THE PRISON, OBJECT AND REFORMS, available at http://www.delhidistrictcourts.nic.in/ejournals/RPS%20TEJI%20%20PRISON%20OBJECT%20REFORMS.pdf(last visited on December 14, 2016).

VI. DISCRIMINATION IN PRISON

Discrimination in prisons is common these days thus violating basic human rights. While the poor are not getting the basic human rights, rich and influential prisoners are getting luxury treatmentin prisons. In Indian Society, discrimination is based on caste, gender and status.

One of the important rules embodied in the Standard Minimum Rules, is the principle of equality, according to which there shall be no discrimination on grounds of race, sex, colour, religion, political or other opinion, national or social origin, property, birth or other status among prisoners.[413] The following are some of the types of discrimination generally prevalent in prisons.

i. Discrimination based on caste

Even after independence, there are few sections of society that still continue to discriminate. Dalits are still ill-treated, beaten up by the upper caste and are given work like that of cleaning toilets inside the Prison. There have been various incidents of discrimination and abuse against Dalits in the country's prison system.[414] Moreover, they are not allowed to take part in cooking food or management of kitchens.[415]

Mr. Chandrashekar says that while in prison, he was beaten up for no reason by members of the jail staff who were Thevars. The food served in his Dalit block was scarcely edible and hardly enough to quell his hunger. His access to books and newspapers was also restricted. His visiting time for friends and relatives was also curtailed. He had to work, but was not paid. And he was deprived of medical attention. "*Prison life does not offer anything to reduce the sense of violence,*" he says, "*It only flares it up.*"[416]

[413] Rule 6(1) of Standard Minimum Rules for the Treatment of Prisoners, 1955.
[414] INDIA 2015 HUMAN RIGHTS REPORT.
[415] All India Committee on Prison Reforms (1980-83).
[416] Shahina KK, CASTE IN PRISON STONE.

In most of the jails across the southern districts, inmates are divided on the basis of caste.[417]

i. Discrimination based on Status

Discrimination based on status is seen in every prison where money buys every luxury one wants. Section 59(17) of The Prisons Act gives powers to the state government to make rules for the classification andseparation of prisoners.

In the *Prem Shukla case*[418], the Supreme Court struck down provisions of the Punjab Police Rules which discriminated between the rich and the poor in determining who was to be handcuffed.

In a historic judgement of *Rama Murthy v. State of Karnataka*[419], the Court laid down principles to implement the recommendations of the Mulla Committee on the subject of giving proper medical facilities and maintaining proper hygiene.

Influential people get hospital facilities even outside jail; nobody cares for the poor and those who actually require treatment.

Under-trial prisoners and convicts having high connections or "money power" can enjoy the comforts of home by getting themselves admitted to private AC rooms of government hospitals.[420]

While rich people get police escorts "to go to hospital", there are prisoners who are genuinely sick and in need of treatment but as they do not possess the necessary resources, they are usually not sent to hospitals and jail authorities usually plead that "The police do not send us the guards".[421]

[417] Ibid.
[418]Prem Shankar Shukla v. Delhi Administration, AIR 1980 SC 1535.
[419] (1997) 2SCC 642.
[420] The Tribune, Chandigarh, 5 October 2007.
[421]Raman Nanda, JAILS IN INDIA : AN INVESTIGATION, PUCL Bulletin, Nov 1981.

Major examplesbeing of Sanjay Dutt (always allowed Parole and furlough over other inmates)[422],Lalu Prasad Yadav (enjoyed the privilege of meeting with visitors for longer hours than the set time limit)[423], Amar Singh (had two cell mates with him, who scrubbed the floor of the cell 4-5 times every day)[424], Bibi Jagir Kaur (had a 32-inch television with cable-network in her cell and free access to her Mobile phone)[425], Asharambapu (two of his followers are his personal attendants in jail)[426] and the list is endless.

i. Other types of Discrimination

Discrimination based on gender and nationality in prison is another important issue. Discrimination based on gender is a much more serious issue inside prison than outside prison. There should not be any discrimination between male and female inmates inside the jail. They should be treated equally for all types of facility available for prisoners.[427]

Discrimination based on nationality is not permitted. The way foreign prisoners are treated by the prison administration should not be discriminatory in any way. Foreign prisoners may well experience language difficulties and social and cultural isolation that will require the prison authorities to take special measures to help them. The fact that they are foreign nationals should not be a ground to restrict their access to facilities and programs that are generally provided to prisoners.

[422] http://alexis.co.in/preshti/furlough-and-parole-a-reality-check/ (last visited December 20, 2016)
[423] Ananta Sharma, 6 FAMOUS INDIAN WHO LIVED LIFE KING-SIZE IN PRISON.
[424] *Ibid.*
[425] *Ibid.*
[426] *Ibid.*
[427] Dr. Amrita Patel, WOMEN IN PRISONS – A STUDY IN ODISHA.

VII. WOMEN PRISONERS AND THEIR CHILDREN

The condition of women is extremely shocking when it comes to the male-centric model ofthe prison system especially in common jails. Women comprise 4.3% of total prisoners and they require gender differentiated facilities keeping in mind their body anatomies and since needs significantly vary.

Female prison population: trend[428]

TABLE 1 INDIA

Year	Number of female prisoners	Percentage of total prison population	Female prison population rate (per 100,000 of national population)
2000	9,089	3.3%	0.9
2005	13,986	3.9%	1.2
2010	15,037	4.1%	1.2
2015	17,834	4.3%	1.4

The Model Prison Manual specifically deals with women prisoners and their children and provides for the following:

i. Atleast one women's jail should be established in each state

[428] Institute for Criminal Policy Research's World Prison Brief, available at http://www.prisonstudies.org/country/india (last visited December 20, 2016).

ii. When a women prisoner is found to be pregnant, she should be medically examined and adequate food supplements and opportunities for regular exercise shall be provided

iii. Arrangements should be made for temporary release of the prisoner to deliver her child in a hospital outside prison

iv. A child upto 6 years shall be admitted to live with his mother if no other arrangement can be made

v. Children of women inmates should be given proper education and recreational facilities such as a crèche and nursery school

vi. Children should be regularly medically examined and be given vaccines

vii. Pregnant and nursing women should be given a special diet

viii. Sterilized sanitary pads should be given to women

ix. Vocational training such as tailoring, embroidery, sewing should be provided to women

x. Separate cells should be given to women inmates

The Supreme Court has particularly given guidelines for children of women prisoners[429] which have been incorporated in the Model.

Despite statutory provisions being there, instances of horrific conditions faced by women are innumerable.

A scene of women's plightin a jail at Mumbai is narrated as follows:[430]

The woman at these jails when are to be present themselves before the superintend of jail, she was asked to remove her footwear, cover her head, in some cases the women asked to change to saris from any other clothing, when a reason for is

[429]R.D. Upadhyay v. State of A.P., AIR 2006 SC 1946.
[430]http://www.thehindu.com/todays-paper/tp-national/tp-mumbai/notes-from-a-jail-cell/article8208384.ece (last visited December 20, 2016).

demanded, no answer is given. There is grave discrimination in terms of necessities supplied to male and female inmates. The women are given less food by the reason that women eat less than men. There is always a lack of napkins: from March 2014, six napkins were given every month; this quantity is not sufficient. Earlier, the staff asked inmates to strip to show if they are menstruating.

In Tamil Nadu, a few women who served prison terms alleged torture and inhuman treatment within the prisons. They said they were stripped naked and abused verbally and physically and not provided even basic facilities. Children of prisoners were deprived their quota of milk and eggs. When they were given milk, it was diluted and the one egg a week was divided between two children, they said. Four to eight prisoners were crammed into a cell and they were forced to use a small corner as their toilet, without even a curtain to provide them privacy.[431]Such has been the reality in South.

A report under consideration of the Bombay High Court states: there were 99 convicts lodged in the women prison besides 228 under-trials as opposed to the sanctioned capacity of 125. The 327 women have a mere 19 toilets at their disposal. But those toilets require immediate repairs. For all these women, there are two common bathrooms where 15 women take bath simultaneously, hence, no privacy.[432]

Other Facilities

This varies from state to state. In the case of Maharashtra, while bathing, women prisoners shall be allowed soap for washing their hair at the rate of 28 grams per head.[433] Women prisoners sentenced to six months imprisonment or below should be issued two saris, two blouses, two petticoats, one

[431]http://timesofindia.indiatimes.com/city/chennai/Ex-women-prisoners-say-conditions-bad-inmates-tortured/articleshow/7650943.cms (last visited December 20, 2016).
[432]http://indianexpress.com/article/cities/mumbai/hc-seeks-corrective-measures-to-improve-prison-conditions/ (last visited December 20, 2016).
[433] Ch. XLI, Section II, Rule 5 MAHARASHTRA PRISON MANUAL, 1979.

towel and two sets of customary undergarments. Women prisoners sentenced to more than six months of imprisonment should be issued three saris, three petticoats, three blouses, two towels and three sets of customary undergarments. Adequate warm clothing, according to local conditions and change of seasons, shall also be provided. Women prisoners should be given one pillow with pillow cover and woollen blankets according to climatic conditions. Women prisoners shall be provided two cotton sheets for every six months.[434]

Involvement of women in crime both as crime-doer and crime-victim is low, mainly on account of their subdued participation in education, work and community affairs as well as social and official tolerance for their anti-social and anti-legal behaviour. It follows that their proportion is also low. Nonetheless, corrections have to provide for and their reformatory needs must be catered to. It goes without saying that women prisoners have special physical as also psycho-social needs. For reasons more than one, they have to be segregated. They have to be provided clothing in keeping with cultural norms. Women prisoners require still more understanding and facilities, be it medical attention, extra diet or maternity facilities.[435]

VIII. HOW THE SYSTEM ENVISAGES REFORMATIVE THEORY

Amidst the changes in international perspectives towards a more humanitarian approach, India has been at the forefront to adopt the reformative and rehabilitation measures in its prison system. Prison authorities have adopted meditation and Vipasna as the reformative steps.

[434] Ch. XLI, Section II, Rule 5 MAHARASHTRA PRISON MANUAL, 1979.
[435]Implementation of Mulla Committee Recommendations (1980-83) available at, http://mha1.nic.in/PrisonReforms/pdf/Mulla%20Committee%20implementation%20of%20recommendations%20-Vol%20I.pdf(last visited December 20, 2016).

In *Narotam Singh v. State of Punjab*[436] the SC took the view that, "*Reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice*".

Overall, the Indian prison system supports the deterrent and preventive theories but the motive is reformation and rehabilitation.

In the*Sunil Batra case*[437] the Supreme Court while regarding a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus, dealt at length with the shocking conditions prevailing in Indian prisons and suggested a series of prison reforms. The court observed that "*The rule of law meets with its Waterloo when the State's minions become law-breakers, and so the Court as a sentinel of justice and the voice of the Constitution, runs down the violators with its writ, and serves compliance with human rights even behind iron bars and by prison wardens*."

J. Krishna Iyer, in his judgments altered the concept of prison into therapeutic places for correctional measures while retaining the fundamental rights,and makingrehabilitation and reformationthe main approaches towards prisoners. In the *Mohammed Giasuddincase*[438], he emphasized the Gandhian approach of treating offenders as patients and the therapeutic role of punishment. He also established that a court must direct its inherent powers towards the reformation of the prisoner. Regular visits to prison by district and sessions magistrates, bans on solitary confinement and hard labour and fair treatment of prisoners without torture and other atrocities have been reiterated by the Supreme Court of India time and again[439]. Courts have also spoken up strictly against the prison areas becoming

[436]AIR1978SC1542.
[437] 1980 3 S.C.C. 488.
[438] A.I.R. 1977 S.C.1926.
[439] Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C.1675; V.R. Krishna iyer, "Justice in Prison: Remedial Jurisprudence and Versatile Criminology" in Rani DhavanShankardass (edi), Punishment and the Prison: Indian and International Perspectives (2000), Sage Publications, New Delhi, p.58.

breeding areas for hardcore criminals[440]. The court in many instances stressed on the need to provide proper atmosphere, leadership, environment and circumstances for re-generation and a reformatory approach[441]. The court has also pointed out the need for providing adequate amenities by the state for the prisoners in advancement of their living conditions inside the prison and have focused on problems like overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and management of open-air prisons[442].

The report of the Mulla Committee recommended that the "protection of society as an objective of punishment has been universally accepted and this can be achieved through reformation and the rehabilitation of offenders".

Hence, we see that the thrust of the Indian judiciary has been rehabilitation and not deterrence. It seeks to balance both the objectives to promote common good along with upholding the fundamental rights provided in the Constitution for every citizen of India, be it the common man or a prisoner.

However, despite this reformative and rehabilitative approach, the idealsituation is far from being achieved. Overcrowded prisons, unhealthy conditions, lack of mental health consultation turn the prisoners away from any sort of change and rather drives them towards more criminal mentality. They tend to learn from their surroundings or situations where the living conditions are very poor and excite the convict in a negative manner thereby moving him away from anykind of reformation. Many fall prone to lifelong diseases such as HIV and later are not accepted by their families because of huge economic burdens. Others tend to lose income-generating jobs or those who do not develop some significant skills during their prison time are forced to move back to crime after their release thus

[440] Rakesh Kaushik v. B.L. Vig, Supdt. Central Jail, New Delhi, A.I.R. 1981 S. C. 1767; State of Maharastra v. Asha ArunGawali, A.I.R. 2004 S.C. 2223.
[441] Sanjay Suri v. Delhi Administration, A.I.R. 1988 S.C. 414.
[442] Ramamurthy v. State of Karnataka, (1997) S.C.C. (Cri) 386.

nullifying any chance of reformation. Lack of rehabilitative measures by the government after release also prevent the convict from quitting crimes. Conclusively, what we see in practice is the Indian prisons nurturing future prisoners and not reformed citizens.

IX. CONCLUSION

It is very much evident that prisons are a breeding ground of gross human rights violations. The grim reality of prison's pathetic condition is undergoing transformation. Budding NGOs, welfare organizations and an aware government have improved conditions in some places.

Efforts of IPS officer Kiran Bedi in Tihar jail by introducing Vipasna (meditation), international awareness towards prisoners' rights can be put forward proudly. State governments are releasing data of the number of prisoners rehabilitated, new methods such as open jails, parole and furlough are being adopted more frequently. In all, reformation seems to be at the forefront objective in India.

But a lot still needs to be done. Reports of prison deaths, assaults, account of released prisoners giving record of the horrible condition of jails still exist. Until India realizes that the prisoners could be treated as an economic investment rather than an economic burden, where they can be invested in to bring out skilled and efficient workforce, the objective of the Indian criminal system cannot be accomplished. And to achieve this, the key drive has to be reformation and rehabilitation of those citizens who went on the wrong roads.

PROSPECTS AND CHALLENGES OF WOMEN ENTREPRENEURSHIP IN KASHMIR

Author(s): Anmol Rathore[443]

ABSTRACT

"No nation can ever be worthy of its existence that cannot take its women along with the men. No struggle can ever succeed without women participating side by side with men. There are two powers in the world - one is the sword and the other is the pen. There is a great competition and rivalry between the two. There is a third power stronger than both, that of the women."

-Muhammad Ali Jinnah

Kashmir has been the heart of a geopolitical conflict in the Indian subcontinent for the past 70 years since both India and Pakistan attained freedom. Due to this conflict the people and the economy of the state have suffered a huge setback. Women suffer disproportionately during and after a conflict as the already existing inequalities in society are magnified and all sources of empowerment and freedom for women are shut. In Kashmir, women have often been subjugated and forced to live a sheltered life inside the four walls of their house, away from the shutdowns, protests and the violence that is so common in Kashmir. Jammu and Kashmir has the highest rate of unemployment among women in north India. This is mainly due to the fact that their main struggle is to keep themselves and their families protected from all the harm the conflict entails. However, with the changing society of Kashmir, the role of women has also undergone a significant change. Both the central and the state governments have taken various initiatives to spur women employment in the state, mainly by promoting women entrepreneurship. Braving all odds, Kashmiri women have emerged as entrepreneurs who are not only supporting themselves and many others financially but also promoting the art and culture of Kashmir and starting a fresh new wave of freedom and liberty for the women of Kashmir. The objective of the paper is to study the

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prospects of women entrepreneurship in Kashmir and the challenges faced by the women entrepreneurs. The paper focuses on various schemes launched by the government to promote women entrepreneurship in the state and the challenges faced by the women entrepreneurs of Kashmir.

Keywords: Kashmir, women, entrepreneurship, government, empowerment, challenges.

I. INTRODUCTION

"An intelligent woman is a goldmine! She has the ability to learn, reason and understand things better and faster than her contemporaries. She is competent, alert and can reason out stuffs easily."

—Jaachynma N.E. Agu

An entrepreneur is a person who organizes and manages any enterprise, especially a business, usually with considerable initiative and risk.[444] Entrepreneurship is nothing but a creative and innovative response in any field, be it business, agriculture, education or any other. Entrepreneurship is the avenue of the courageous and is the task of "creative destruction", as Schumpeter rightly described it. Entrepreneurship is not only about making money or starting one's own enterprise, it is also about creating something new, to defy the challenges and pass the barriers in doing so. It reflects in the psyche of a person.

To quote the renowned economist, T.N. Srinivasan, 'India has been an entrepreneurial society…we had the entrepreneurial skill but suppressed it for too long a time… and now it is thriving.'[445] Today, the ubiquitous and idiosyncratic India attitude of "jugaad" is identified as an inherent entrepreneurial trait that has very much been a part of every Indian.

[444] *The Definition of Entrepreneurship*, DICTIONARY.COM, http://www.dictionary.com/browse/entrepreneurship(last visited December 02, 2016).

[445] SankarRadhakrishnan, *Create a Framework That Helps Entrepreneurs*, THE HINDU, BUSINESS LINE (Apr. 23, 2007), http://www.thehindubusinessline.com/todays-paper/tp-new-manager/create-a-framework-that-helps-entrepreneurs/article1687429.ece.

II. OBJECTIVES

- To study the various prospects and opportunities of women entrepreneurship in the Kashmir division.
- To study the challenges faced by the women entrepreneurs of Kashmir.

III. RESEARCH METHODOLOGY

The locale of the research was chosen to be the Kashmir division of the state of Jammu and Kashmir. The study relied mainly on secondary data from the Jammu and Kashmir Entrepreneurial Development Institute (JKEDI) and the Jammu and Kashmir Women Development Corporation(JKWDC). Apart from this, the Economic Survey of J&K, 2014-15 was also consulted for the study. Also, personal interviews with the officials and trainers of JKEDI and JKWDC also provided relevant information. Besides these sources, various websites and journals were also consulted for useful information.

IV. WOMEN ENTREPRENEURSHIPIN INDIA

"If society will not admit of woman's free development, then society must be remodelled."

- Elizabeth Blackwell, The first US doctor

Women are the better half of the society.As the Indian economy grows and more new and innovative initiatives take place in the public and private domain, women have to have a fair share of these development gains.[446]Women's equal access and control over economic and financial resources is

[446]National Policy for Women 2016 (Draft) National Policy for ..., WCD, http://www.bing.com/cr?IG=79507D0DFEED4EFB880D920A935FB104&CID=0B905AC9BFFB69253B395322BECA6823&rd=1&h=ba8cxhAJN2TCOr7RY2MEueXppS9gsPdb3M7p5Ch0Fg&v=1&r=http://wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016.pdf&p=DevEx,5081.1. (last visited December 14, 2016).

critical for the achievement of gender equality and empowerment of women as well as equitable and sustainable economic growth and development.[447]

With regard to ownership, an SSI managed by one or more women entrepreneurs in proprietary concerns, or in which she/ they individually or jointly have a share capital of not less than 51 % as partners/ shareholders/ Directors of Private Limited Company/ Members of Co-operative Society is called a 'Woman enterprise'.[448] Women entrepreneurship is an important source of economic growth of a nation. Women entrepreneurs not only create new jobs for themselves, but also for others. Functions of women entrepreneur include the following:

- Exploration of the prospects of starting a new business enterprise.
- Undertaking of risks and the handling of economic uncertainties involved in business.
- Introduction of innovations or imitation of innovations.
- Coordination, administration and control.
- Supervision and leadership.[449]

Female entrepreneurs in developing countries have attracted greater attention in recent years given the key role of women in development and the still widespread discrimination. Evidence to date suggests that a variety of reasons contribute to explaining observed differences in entrepreneurial behaviour between women and men. Some of these differences include that women entrepreneurs'

[447]All India Report of Sixth Economic Census, MSME, http://www.bing.com/cr?IG=032C027B71404034BE3CD43630961DC8&CID=0269DF7F49D76F2F0E78D69448E66EE4&rd=1&h=mI9hSqFaH73kfnoau0wpGP8c-zLTE9TlVCok23I-Eak&v=1&r=http://msme.gov.in/WriteReadData/DocumentFile/All%20India%20Report%20of%20Sixth%20Economic%20Census.pdf&p=DevEx,5236.1 (last visited December 14, 2016).

[448] India, Development Commissioner (MSME), Ministry of Micro, Small & Medium Enterprises, Government of India.

[449]V. Alagu Pandian et al., *Growth and Performance of Women Entrepreneurship in India*, 2 IJPSS 262 (2012).

businesses tend to be smaller and to provide less employment than those owned by men. Women's businesses also tend to be less profitable than those of men and generate lower sales turnover than men, even in same-industry comparisons.[450]

Women's entrepreneurship can make a particularly strong contribution to the economic well-being of the family and communities, poverty reduction and women's empowerment, thus contributing to the Millennium Development Goals (MDGs). Thus, governments across the world as well as various developmental organizations are actively undertaking promotion of women entrepreneurs through various schemes, incentives and promotional measures.[451]

The National Policy for Empowerment of Women (NPEW) has set certain clear-cut goals and objectives, which include-

- Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential.
- The de-jure and de-facto enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres-political, economic, social, cultural and civil.
- Equal access to participation and decision making by women in social, political and economic life of the nation.

[450] *Entrepreneurship and Economic Development Theory ...*, http://www.bing.com/cr?IG=2843B13EA39C4CC49E32F677073E4699&CID=29A829BFAAB36D382B372055AB826CBA&rd=1&h=WUl4QnNd5jXzRNx9MuQGus13sQNAUKlHHFFZYbJvFk&v=1&r=http://ftp.iza.org/dp7507.pdf&p=DevEx,5057.1 (last visited December 13, 2016).

[451] *Women Entrepreneurship*, SMALLB.SIDBI.IN, http://smallb.sidbi.in/ /fund-your-business /additional-benefits-msmes /women-entrepreneurship (last visited December 13, 2016).

- Equal access of women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office etc.
- Strengthening legal systems aimed at elimination of all forms of discrimination against women.
- Changing societal attitudes and community practice by active participation and involvement of both men and women.
- Mainstreaming a gender perspective in the development process. Building and strengthening partnerships with civil society, particularly women's organization.

Thus, an important way of socio-economic upliftment of women as envisioned in the NPEW is to provide for their self-employment and consequently their financial independence.Women entrepreneurs make a significant contribution to the Indian economy.

As per the sixth Economic census conducted in 2013, 8.05 million out of the total 58.5 million establishments were run by women entrepreneurs in India which is around 13.76 % of the total number of establishments. Total workers engaged in women owned & run establishments were 13.48 million persons, which is 10.24% of the total number of workers engaged in India under different economic activities. [452]Tamil Nadu has the maximum number of women owned establishments - around 10 lakhs, followed by Kerala(9.13 lakh), Andhra Pradesh(8.5 lakh)and West Bengal(8.3 lakh).

V. WOMEN ENTREPRENEURSHIP IN KASHMIR

Sir M. Iqbal(Armaghan-e-Hijaz-24) described the valley of Kashmir as "A land, which was once known among the wise, as Little Iran." The beautiful land of Kashmir which is bestowed with the

[452]*Supra at* 4

bounties of nature is today under the heels of hardship and misfortune as Kashmir has emerged in the past few decades as the heart of a geopolitical conflict in Southeast Asia.

The border state of Jammu and Kashmir is faced with an armed conflict for the past three decades. The economy of Kashmir has suffered immensely from disturbed conditions prevailing in the State. Moreover, the Kashmiri women have been the main sufferers of the conflict and have seemed to have moved more backward than forward in all those years. The impact of the violence and tragedy has been fatal for them for they have not just borne the wrath of the conflict but have also been scarred and scared by terrorism. Over the years, they have tried to extinguish the fires of this continued conflict, simultaneously keeping the fires in their houses burning.

The former President of India APJ Abdul Kalam had said "empowering women is essential for creating a good nation, when women are empowered, society with stability is assured. Empowerment of women is essential as their thoughts and their value systems lead to the development of a good family, good society and ultimately a good nation."

With the changing Kashmiri society, a large number of women have begun working outside their homes regularly, on a remunerative basis. They work in all fields, manual and non-manual, commercial and professional-technical, government offices, public and private sectors, and on a part time and full time basis. They belong to all classes, groups and communities.[453]

As per Census 2011, the work participation rate for J&K was estimated to be 34.5% as against 39.8% for whole India. Of the 43.23 lakhs workers in the state, only 11.28 lakh i.e., 26.09% are females. Also, according to the Census 2011, the state has 58.01% female literates, showing that in comparison to male literacy, female literacy has improved at a faster rate i.e., against 11.66 percentage points in male literacy female literacy has increased by 15.01 percentage points.Thus, while the female population of

[453]B.A.DABLA, WORKING WOMEN IN KASHMIR (Rawat Publications, 1991).

the state has shown a significant growth in the last few years, the employment opportunities have not kept pace with the growing population. There are not enough public sector jobs for all the educated unemployed people in the state. The only way to tap this growing potential of the human resource in the state is to provide them with self-employment opportunities. The low participation of women in the workforce clearly depicts how women have taken a backseat in driving the lagging economy of the state. Most of the women in the region of Kashmir are unemployed, many of them being widows and half widows. The only way to their social upliftment is their economic upliftment. In a place where the women have always been restricted to the confinements of their homes, development of women entrepreneurship is definitely a challenge.

Even though the thrust of the people is on government jobs, still the Centre and state governments have rolled out a number of schemes and introduced various policies to put the economy back on the rails by enabling an average person to get self-employment opportunities. In a state ridden with violence and conflict and having a population of 5, 00,000 unemployed youth, the challenges before the State of J&K are immense.

Women entrepreneurship, thus becomes one of the prime areas of concern for the government. The women of Kashmir, who were prevented from standing up on their own all these years due to violence and conflict, are being encouraged to start entrepreneurial activities in different areas like agriculture, food processing, handicrafts and handlooms, tourism etc.These industries have been the mainstay of the J&K economy and hold significant potential for growth and employment.

In the Kashmir region, women traditionally ply the crafts of embroidery, namda-making, carpet weaving and a little pottery-making. [454]

[454] I. AWASTY, RURAL WOMEN IN INDIA (B.R. Publishing Corporation, 1982).

The shawl industry gave work to a number of women in their homes. The Pashmina was given in its raw state to women who spun it into the reed to different degrees of fineness. [455]

There was a total of 31292 women owned enterprises in Jammu and Kashmir in 2013 as per the sixth economic census which constitutes only 0.39 % of the total share of establishments in the country and is far less than the number of women owned establishments in the other states such as Tamil Nadu, Kerala etc. but their number seems to have increased since then. Out of all the women owned enterprises, 23264 were perennial, 7030 were seasonal and 998 casual.

VI. OPPORTUNITIES

One primary and significant characteristic of the women entrepreneurs is that they often cite family needs and independence as a reason to initiate an enterprise. Where on one hand men generally see entrepreneurship as a business decision, for many women it is a life choice-a way of integrating family and career needs.

Consequently, various schemes and programmeshave been introduced to help women entrepreneurs in the State of Jammu and Kashmir. Together with this, a number of institutes promote entrepreneurship. Some of these are discussed below.

ROLE OF JAMMU AND KASHMIR ENTREPRENEURIAL DEVELOPMENT INSTITUTE

- The Government of Jammu and Kashmir set up the Jammu and Kashmir Entrepreneurial Development Institute(JKEDI) with the aim of sustainable and holistic development of entrepreneurs in the state. Even though there are no women specific entrepreneurial development

[455] MUZAMIL JAN, WOMEN DEVELOPMENT IN KASHMIR: AN INTERVENTION THROUGH COOPERATIVES (Jaykay Books, 2011).

schemes launched by the Institute at present, there are various schemes and projects launched by the Institute that create and nurture an enabling and conducive environment for the budding and existing entrepreneurs of the state.

Some prominent schemes launched by the JKEDI to promote entrepreneurship in the state are:

1) **Seed Capital Fund Scheme (SFCS)-** It is one of its kind scheme which is being implemented by the JKEDI in collaboration with the Jammu and Kashmir Bank Ltd. and is one of the most popular schemes among the female entrepreneurs of the valley. Under this scheme, JKEDI provides seed money of 35% to the start-up entrepreneurs as non-refundable seed capital coupled with bank finance of 65% at concessional rates to enable their successful enterprise creation.

   The thrust areas of the scheme include Agriculture and allied sectors, manufacturing, food processing, tourism, Information Technology and Services.Many women from Kashmir are taking up entrepreneurship as a career option after completing their studies. The following table shows the educational qualification of the female beneficiaries of the SCFS from Kashmir division since its inception in 2011.

Edu. Qualification	No. of women beneficiaries
10+2	303
Graduate	131
Post-graduate	60

Table 1

(Source: JKEDI)

Observations-

The maximum number of women entrepreneurs who have availed of this scheme are plus two graduates, followed by graduates and post graduates.

2) **Youth Start-up Loan Scheme-** A component of the Sher-e-Kashmir Employment and Welfare Programme for the youth of the state, this scheme provides financial assistance to educated start-up entrepreneurs upto Rs. 8 lac @ 6% Simple Interest per annum.
3) **Himayat**- The scheme is a path breaking initiative of the Ministry of Rural Development, implemented in J&K by JKEDI, aiming to provide entrepreneurship opportunities for sustainable livelihood to the youth of J&K and facilitate access to finance and support services to at least 50% of them over a period of 4 Years for setting up their business ventures.

ROLE OF JAMMU AND KASHMIR WOMEN DEVELOPMENT CORPORATION

The aim of socio-economic upliftment of women in the state is furthered by JK Women Development Corporation (JKWDC), which was set up with an aim of women empowerment by promoting women entrepreneurs.

The various objectives of this institution, which specifically promotes women empowerment are-

i) Identification & promotion of women entrepreneurs.
ii) Conducting of awareness camps and identifying women for various activities by which they can be empowered.
iii) Identification of activities, trades for skill upgradation training and thereafter, framing Self Help Groups amongst them for providing micro credit.
iv) Strengthening and institutionalizing the saving habits among rural women and the control over economic resources.

v) Creation of confidence and awareness among members of SHGs regarding women's status, health, education, sanitation, hygiene, legal rights, economic upliftment and other socio-economic and political issues.

vi) To empower women by helping them to establish income generating units by providing soft loans at a very nominal rate of interest.[456]

This aim is fulfilled with the help of certain women specific schemes, implemented by the JKWDC-

1) **NATIONAL MINORITIES DEVELOPMENT & FINANCE CORPORATION (NMDFC)-**Under this scheme, women belonging to minority communities viz. Muslims, Buddhists, Sikhs, Christians and Zoroastrians are financed at a nominal rate of interest 6% p.a. to be liquidated within a period of 5 years. Maximum loan amount for an individual beneficiary is Rs. 1.00 lakh. Under this scheme Rs. 302.575 lakhs were allotted in the year 2016-17 (upto 9/2016) and 127 beneficiaries were covered in the entire state.

2) **NATIONAL BACKWARD CLASSES FINANCE & DEVELOPMENT CORPORATION (NBCFDC)**- Women belonging to backward & other classes are being financed under this scheme at a very low rate of interest 4% p.a up to Rs.. 50,000/- & 6% p.a up to Rs.1.00 lakhs for which the repayment period is 5 years. Under this scheme Rs. 11.40 crore were allotted and 29 beneficiaries were covered throughout the state.

3) **NATIONAL HANDICAPPED FINANCE AND DEVELOPMENT CORPORATION (NHFDC)-**

[456]JAMMU & KASHMIR STATE WOMEN'S DEVELOPMENT CORPORATION,http://www.jkwdc.com/Achievements.htm. (last visited December 13, 2016).

Under this scheme, handicapped women with 40% disability are financed at a very low rate of interest 3% up to Rs. 50,000/- and 4% p.a. up to Rs. 1.00 lakh which is to be liquidated within a period of 7 years.

4) **WOMEN ENTREPRENEURSHIP PROGRAMME (WEP)**- A significant initiative to help the women entrepreneurs of the state, WEP has been functional since 2010.

Year	Funds received (lakhs)	Funds utilized (lakhs)	Units established	Employment generated	
				Direct	Indirect
2009-10	650.00	Not disbursed due to non-availability of Guidelines.			
2010-11	0.00	650.00	433	433	1290
2011-12	375.00	375.00	250	250	750
2012-13	200.00	200.00	111	111	333
2013-14	200.00	200.00	112	112	336
2014-15	nil	nil	nil	nil	Nil
2015-16	200.00	200.00	97	97	291
2016-17 (upto 9/2016)	50.00	50.00	22	22	66
Total	1675.00	1675.00	1025	1025	3066

Table 2

(Source: Official website of jkwdc- jkwdc.com)

OBSERVATIONS

The following observations can be made from Table 2:

i) A total of Rs. 1675 lakhs have been received by the JK Women Development Corporation for the Women Entrepreneurship Programme since 2009-10 and whole of the amount has been disbursed for the establishment and promotion of women enterprises in the state.

ii) The number of units established was the maximum i.e., 433 in 2010-11.

iii) No work was undertaken under the scheme during 2014-15.

iv) A total of 1025 business units have been established under the scheme till the 9th month of 2016 throughout the state.

v) 1025 women entrepreneurs have started their own enterprises and 3066 people have been indirectly employed under the programme.

5) **EMPOWERING SKILLED YOUNG WOMEN SCHEME (ESW)**-The Empowering Skilled Young Women Scheme (ESW) that forms a part of Sher-i-Kashmir Employment and Welfare Programme, was launched by J&K State Women Development Corporation on 8th of March 2010, on International Women's Day. Out of the total release of Rs 6.50 crore, J&Ks Women Development Corporation (JKWDC) has sanctioned Rs 6.46 crore in favour of 403 women entrepreneurs belonging to different districts of the state for establishment of gainful income generating units on nominal interest rate of 6 per cent on select trades of readymade garments, aromatic Medicinal Plants, boutique, fashion designing, cosmetic Shop, DTP, Medical Health Care, Mushroom Cultivation and Floriculture/Agriculture etc.

6) **MAHILA SAMARIDHI YOJANA (MSY)**- Under this scheme, a group of 20 girls are trained in a particular trade say readymade garments, through an NGO which has already created infrastructure for such training. After maximum 6 months of training which is

provided free of cost and during which a stipend is also provided to the girls, this group of girls is brought under the microcredit net by availing loan facility through Women's Development Corporation at 5% interest. [457]

7) **MARGIN MONEY SCHEME OF KHADI & VILLAGE INDUSTRIES COMMISSION (KVIC)**- Even though this scheme is also not women specific, but it categorises women as a weaker section of beneficiaries, and margin money is granted to them at the rate of 30 per cent of the project cost upto Rs.10.00 lakhs as against 25% for other beneficiaries and above this amount for upto Rs.25 lakhs it will be 10% of the remaining cost of the project. Margin Money Scheme is applicable for viable Village industry projects (Khadi and Polyvastra are kept out of its purview).

Apart from the already existing schemes some new initiatives have also been planned and are to be introduced by the state government to help promote the women entrepreneurs of the state.

- The state government, in April, 2016 announced that soon Jammu and Kashmir will have an exclusive "Women Business Centre" which would help boost women entrepreneurship in the state.
- Women entrepreneurship in the state will receive shot in the arm since the J&K Bank announced a slew of women-specific initiatives in October, 2016. This will include certain women specific schemes and financial assistance at lower rate of interest for women entrepreneurs.

[457] *Compendium of Departmental Programmes for Self-Employment,* JAKEMP.NIC.IN, http://jakemp.nic.in/firstpage_files/compendium.pdf (last visitedDecember 14, 2016).

VII. CHALLENGES

Even though quite a few programs and schemes have been initiated and implemented by the Central and State governments to help and promote women entrepreneurs in the state, still women entrepreneurs in Kashmir continue to face certain challenges and barriers to start their own enterprises. Some of these challenges faced by women entrepreneurs of Kashmir are-

i. **Lack of basic and technical knowledge-** Women often lack knowledge about the establishment of business units they wish to start. There is no proper availability of guidance at grass root level for the people in general about the basics of small and micro level business ventures. The women are not aware and familiar with the business world and most of the people are unaware of the schemes launched by the government to help women entrepreneurs start their own enterprise. Therefore, the State of Jammu and Kashmir is counted as a major industrially backward state of India.

ii. **Societal mindset-** The social backdrop against which the women wish to start their own start-up poses a major hindrance. The conservative society, for which finding a government job is the utopian solution, poses a major challenge. The mindset of the people is that a government job is a safe and secure option for their wards and this view is more strengthened for the girls. For girls, a government job as a doctor or a teacher is found most suitable. Even if not a government job, a private job as a school teacher is deemed fit for girls and entrepreneurship is not looked at as something women should venture into.

iii. **Gender stereotyping**- Seen as a male dominated avenue, entrepreneurship was not thought of as a field of employment for women. Many women entrepreneurs who are running successful businesses now, were discouraged to start their own enterprise in the beginning.

iv. **Location-** Even when women are allowed to set up their own enterprises or shops, they aren't allowed to open their shops on the main road or on the ground floor, just to keep them away

from the sight of the people. This conservative mindset often prevents the enterprises of women entrepreneurs to flourish.

v. **Hiring issues**- Even when women open their own enterprise, they face a major problem of hiring since it has been seen that often, men are not willing to work as subordinates under women.

vi. **Family's responsibility-** Unlike men, women are burdened with the responsibility of taking care of their family. In Kashmir, often women are married off young and they are not encouraged to start their own start-up after marriage. Even if they wish to start an enterprise, they are often reluctant to establish their business units away from their homes. They wish to establish their business units in the vicinity of their homes. It is because of this, women become unable to make use of readily available infrastructure in the industrial estates located in Kashmir. Further, women entrepreneurs in Kashmir are hesitant to travel to far off places for work or for the procurement of raw materials because of some peculiar problems like fear of staying out during nights at distant places.

vii. **Difficulty to start a start-up-** Women entrepreneurs in Kashmir, find it extremely difficult to comply with various legal formalities in obtaining licenses for the establishment of their business units as it has been found that the officers at the helm of affairs often raise unnecessary queries and the documentation process poses a major problem. To start any enterprise, the entrepreneurs need to get an Income Certificate from the Tehsildar but the lower staff at these offices do not get any work done without taking bribes. The rates vary anywhere between Rs. 300 in Srinagar to Rs. 150 per certificate in the peripheral areas. Thus, corruption at various levels of government officials pose a major challenge.

viii. **Lack of adequate skill and attitude-** Women still hesitate to attend the various Entrepreneurship Development Programmesorganized by JKEDI or any other institute, held throughout the Kashmir division.

ix. **Poor risk-bearing ability-** Women are often reluctant to take loans and financial help, fearing that their business will not run successfully and they will not be able to pay back their loans. Also, they are criticised about their ability and role in their business, and the decision of their family members especially the elders, dominates them.

x. **Mobility constraint-** Though things are changing slowly in Jammu and Kashmir but it is still perceived that a woman's place is inside the house. A woman willing to become anentrepreneur, especially in rural areas of J&K faces huge mobility constraints which become more pronounced due to insecurity arising out of the conflict in J&K.[458]

xi. **Problems faced while running the enterprise-** The women entrepreneurs face certain disadvantages which are gender specific, while running their own enterprise.

   a. They need to hire labour for even petty jobs like transportation of raw materials and finished products.

   b. The women entrepreneurs of the valley also face time constraints i.e., there is a limited period of time for which they can work and unlike men who can open their shops early and stay till late at night, women cannot stay out of the house after sunset. Thus, women face challenges related to time constraints which affect their marketing and sales.

xii. **Apprehension of failure-** Women who try to start an industry, either in a managerial or entrepreneurial role, are generally exposed to various environmental constraints. Starting and

[458]Dr. Kavita Suri, *Rural EntrepreneurshipDevelopment and Women in Jammu and Kashmir,* 2 IJSR 542 (2013).

operating business involves considerable risk and effort on the part of the entrepreneur, particularly in the light of highest failure rate. Perhaps, this rate is even higher in the case of women entrepreneurs who have to face not only the usual business problems but also their family problems. This not only limits the scope of their contribution to the industrialization process, but also undermines the productive utilization of an available human resource, that is most needed in our country.[459]

xiii. **Problem of Marketing-**Generally women entrepreneurs have small scale business, thus, they have to strive hard to sell their products amidst the stiff competition in the market. Their marketing knowledge is generally less and they often lack marketing skills as compared to men. Also, men attend more exhibitions and trade fairs to market their products, but owing to certain constraints women fail to attend as many trade fairs and exhibitions as their male counterparts.Women entrepreneurs have to face the problems of middlemen more, as they generally depend more on them. Their margin of profit will be more and hence cause for higher selling price which affects consumer's attraction towards women's products.

xiv. **Connectivity-** Kashmir is connected by road with Jammu which passes through Pirpanchal mountainous range. The road remains closed during the rainy season and due to snowfall during winter. Lack of all-weather permanent connectivity has put the valley in a disadvantageous position. This makes the cost of road and air transportation dearer which is the main bottleneck in the spread of industrialization in most of the districts of the state. The drastic drop in the temperature during winter in Kashmir valley almost halts economic

[459] Jeevan Jyoti, Assisstant Professor et al., *Factors Affecting Orientation and Satisfaction of Women Entrepreneurs in Rural India*, Annals of Innovation & Entrepreneurship, (July 12, 2011),http://journals.coaction.net/index/php/aie/article/view/5813.

activities in the region.[460] Due to poor roads, and poor electricity a lot of money has to be spent by women entrepreneurs on buying fuel to power generators. Also, this reduces the profit margin and hence many women entrepreneurs, especially the ones in the rural areas of Kashmir choose not to sell their products outside Kashmir.

xv. **Conflict-** Women in Kashmir have been held back for all these years by a protracted and episodic conflict which has brought extended instability in the region. The local economy, continuously fluctuating due to the unpredictable circumstances, has left many Kashmiris with little to no option of economic engagement. The women have borne the brunt of the conflict in the form of grave and gruesome violations of fundamental human rights.

VIII. SOME CASE STUDIES

Despite all odds, barriers and challenges, many women of the state have been successful in their business ventures. The schemes of the governments and the financial assistance has further boosted female entrepreneurship. The following are few of the numerous cases of successful women entrepreneurs of the valley.

I. Smt. Zohra Begum belonged to a blacksmith family. Her husband was a private employee and earned meagre sums. Smt. Zohra Begum approached the District Office, Khadi and Village Industries Board(KVIB) Srinagar and set up herself, anincome generating unit under the Prime Minister Employment Generation Programme (PMEGP). The KVIB provided her full information and help to set up self-income generating unit. She started her own project under Steel Fabrication Scheme by getting financial aid from J&K Bank, Zakura. Subsequently, KVIB also provided her with a margin money facility to the tune of Rs. 1.22 lakhs. Now she is not only

herself financially independent but also provides employment to 12 unemployed youth. She creates innovative designs and provides them to artisans for manufacturing gates and grills.

II. Nusrat Jahan graduated in Computer Applications in 1999 and started working as a community organizer in Jammu Development Authority but she had some other plans in her mind. A monotonous 10 to 5 job didn't satisfy the lady and in 2000 she started her own small venture of cut-flower business. In the beginning, she had to face not only a non-existent market for her product but also her unsupportive relatives. But what started as a small venture, has an annual turnover of Rs. 2 crore today. Hers is not only a story of success but also of a hope for a better and bright future, inspiring many other women of Kashmir to chase their dreams.

III. Braving all odds, Arifa Jan has taken up the daunting task of not only supporting herself financially but also providing other women with financial support and making her own identity. Arifa took up the task of reviving the once-famed Kashmiri handicraft "*numdha*" which is the traditional embroidered rug of Kashmir found in almost every Kashmiri household and has been a part of the Kashmiri culture and heritage for years now. She could have easily gotten a job after completing her Bachelor's degree in Commerce from Kashmir University but Arifa had no interest in a government job and wanted to start her own business. It was her determination and self-belief that helped her cross those barriers. She couldn't afford to pay her fee for the two-year Craft Management and Entrepreneurial Leadership programme at the Craft Development Institute but seeing her talent and zeal, CDI facilitated a grant for her provided by the then CM Omar Abdullah. She started her own venture, producing new designs of *numdha* in line with the existing trends in the market. It was however, not a joy ride for this young entrepreneur as she had to face numerous challenges. Society looked down on her decision to start her own enterprise and criticized her. Being from a poor family she also sought financial help but could not as her religion didn't permit

this. But later she got some help and started her very own venture "Incredible Kashmiri Crafts" which, today, has some 25 artisans working under her.

IX. CONCLUSION

Women in Kashmir are daring to enter a seemingly daunting task of running entrepreneurial ventures. It can be thus concluded that today women participation in the field of entrepreneurship is increasing at a considerable rate, in the Kashmir division and various efforts are made by the Central and State governments to enhance women's involvement in the enterprise sector and promote self-employment among women. Though women still face several challenges like conservative mindset of the society, time and mobility constraint, connectivity and family responsibilities to name a few, but daring and risk-taking abilities of women, support of family members, introduction of certain reforms and relaxations in government policies, granting various upliftment schemes to women entrepreneurs etc. have transformed the scenario of women entrepreneurship in the region with numerous women taking up entrepreneurship as a career option and being successful at it. Thus, to maintain and further this positive socio-economic change it is essential to emphasize on educating women of the state, spread awareness and consciousness amongst women to outshine in the enterprise field, making them realize their strengths, and their significant contribution to the economy of the state and the nation as a whole.

THE JUVENILE JUSTICE ACT 2015; A REVOLUTIONARY CHANGE OR A MERE GAP-FILLER?

Author(s): Ketaki Rao[461]

ABSTRACT:

Creating ripples in the existing Social structure of India, the Juvenile Justice (Care and Protection of Children) Act, 2015 was passed by both the houses of the parliament in the latter part of 2015. It drew severe flak from legal scholars, advisors and intelligentsia. After the 2012 Nirbhaya Gang rape incident there was immense pressure to bring about change in the existing juvenile delinquency laws. Thus, several changes were introduced in the previous Act, and eventually the new Juvenile Justice Act, 2015 came into force, replacing the old Act. Though the Act envisaged changes in consonance with various international conventions, it is known to have violated a few, like the United Nations Convention on the Rights of the Child. This paper will attempt to analyse the provisions of the recent Juvenile Justice Act 2015, taking into consideration the important provisions of the Act in light of International covenants, juvenile justice systems across the world, the previous act, and other important instruments. The Juvenile Justice System forms an integral part of the legal mechanism of the country and the system cannot be understood in toto without analysing this vital part. This paper will trace discussions relating to the Act, right from when it was introduced in the Parliament to how it became an active piece of legislation. The passing of the Bill was not a very smooth process and the Bill had faced several criticisms. One of the most furious debates the country has ever seen includes the debate on the provision relating to the trying

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of juveniles within the age group of 16-18 years as adults, on their commission of heinous offences. Despite this, the Bill has successfully transformed into an Act today.

I. INTRODUCTION

The Juvenile Justice System evolved from the concept of juvenile delinquency. To understand juvenile delinquency, it is important to understand the factors responsible for it. Some of the factors responsible for the growth of Juvenile delinquency are; drastic changes in socio-economic life, immense stress on materialistic culture, rapid increase in social mobility and weakening of traditional means of social control. The Juvenile Justice system was evolved to treat children separately from adults. The philosophy behind this differential treatment relates to the idea that most children do not understand the consequences of their acts and that they must not learn the technicalities of committing crimes through hardened criminals by keeping them alongside prisoners in jails. A special procedure has been laid out to try juvenile delinquents wherein they are not punished but are treated as helpless children in need of care and protection.

Since the very beginning, it has been seen that the focus was always on a rehabilitative and reformative machinery rather than a mechanism focused on crime and punishment. An early illustration would be that of the Children Act, 1960.[462] The 1960 Act provides "for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union territories."[463] Even while enacting

[462]The Children Act, 1960 (Act No. 60 of 1960).
[463] The Children Act, 1960.

the Juvenile Justice Act of 2000, the Parliament ensured that the ultimate goal of this legislation was rehabilitation of such children.[464]

1.1. The Nirbhaya Rape Case

In the wake of the infamous Nirbhaya Gang Rape Incident in 2012, where a paramedic student was brutally gang raped by six men on a moving bus on the night of 16th December, 2016, eventually leading to her death, members of the civil society in India ranging from political leaders to the common man questioned the competence of the existing Juvenile delinquency law in India. The incident shocked the collective conscience of the people and saw severe demonstrations and protests throughout the country. One of the convicts in the case was sent to a Juvenile Home on the pretext that he was below the age of 18 years during the commission of the crime and according to the existing Law in the country, had to be treated as a juvenile. Subramanian Swami, a BJP politician filed a Public Interest litigation in the Supreme Court of India seeking that this boy be tried as an adult in a court in July, 2013.[465] The court thereafter asked the Juvenile Court to delay its verdict. After the Supreme Court gave its verdict, it allowed the Juvenile Court to give its verdict wherein the boy was sentenced to 3 years in a Reform Home on August 31, 2013. The victim's family criticized the verdict of the court and said that by not punishing the juvenile the court was encouraging other teenagers to commit similar crimes.[466]

1.2.The Aftermath

[464]Rajagopal, Krishnadas, *Parliament veers away from history*, THE HINDU, Dec. 23, 2015. http://www.thehindu.com/todays-paper/tp-national/parliament-veers-away-from-history/article8019516.ece.
[465] Tamanna Pankaj, *Juvenile Justice Act (Care and Protection) Act, 2015*, LEGAL SERVICES INDIA, July 30, 2015, http://www.legalservicesindia.com/article/article/juvenile-justice-act-2015-2147-1.html.
[466] *Ibid.*

Looking at the dissatisfaction over the court verdict, the minister for Women and Child Development, Smt. Maneka Gandhi said that they were preparing a new law which would allow 16-year-olds to be tried as adults. She said that 50% of the juvenile crimes were committed by teenagers who knew that they would get away with it. She added that changing the law, which will allow them to be tried for murder and rape as adults, would scare and deter them.[467] As a result of the confusion regarding the content and scope of the already existing Juvenile Justice Act, the government introduced the new Juvenile Justice Bill. The incident was only one of the many reasons for introducing this Bill. Other reasons cited by the Ministry of Women and Child Development were implementation and procedural delays faced by the Juvenile Justice Act 2000[468] and the increase in the juvenile crimes committed by children between the age group of 16-18 years (i.e.1% in 2003 to 1.2% in 2013) as seen in the National Crime Records Bureau (NCRB) Reports.[469]

Mrs. Maneka Gandhi carefully remarked that this was a 'Comprehensive Act', during the debate in the Parliament.[470] She acknowledged that the main contention was about the 'proposed reduction from 18 to 16 years for the purpose of allowing a juvenile to go to jail, if it is perceived that he committed a heinous crime'.[471] To clarify the purpose of the clause, she gave two examples. In one case, there was a child whose drunken father beats his mother everyday and inflicts pain on him and his siblings by stubbing cigarettes on their body. One day the child hits back at the father which leads to his death. In another case, few boys of 16 years of age drug a seven-year-old girl

[467] *Ibid.*
[468] The Juvenile Justice (Care and Protection of Children) Parliament of India Rajya Sabha, Two hundred sixty fourth report (264th) Juvenile Justice (Care and Protection of Children) Bill, 2014 (Parliament of India Rajya Sabha).
[469] Apoorva Shankar, *The Juvenile Justice Bill, 2015: All you need to know.* THE OFFICIAL BLOGSITE OF PRS LEGISLATIVE RESEARCH, Dec. 18, 2015, http://www.prsindia.org/theprsblog/?p=3610.
[470] Rajya Sabha Debates, Dec. 22, 2015, 60.
[471] Rajya Sabha Debates, Dec. 22, 2015, 60-61.

and kidnap her. She is kept in a field for three days and is repeatedly raped by these young boys. Unlike the existing laws where the accused in both cases would be let off as juveniles, the recommended clause, Maneka Gandhi claimed, would punish the perpetuators of the crime in the second case as the act of violence was intentional and curated.[472] She constantly referred to the various incidents happening across the country which shows how one of the objectives of the act is to satisfy public demand while also adhering to the United Nations Convention on the Rights of the Child on reformative justice.[473]

II. JUVENILE JUSTICE SYSTEMS ACROSS THE WORLD:

2.1 Great Britain: The English youth courts exercise jurisdiction over children who commit offences in the age group of 10 to 16. (Those under 14 are designated as "children," and those over 14 years and less than 17 years of age are classified as "young persons.") Offenders aged 17 and above appear in the normal adult courts, though special sentencing provisions apply to offenders under the age of 21. Almost all offenses committed by children can be tried in youth courts but the courts are not bound to deal with extremely serious offenses such as robbery or rape. If charged with such offences, a young person will almost always be tried as an adult. If he is charged jointly with an adult crime while being tried in juvenile court, he can be sent to an adult court for trial, though he is normally returned to the youth court for sentencing. Youth courts also deal with children belonging to any age up to 17 years. This is called a care proceeding. It is based on the idea that the child is in need of court-ordered care, protection, or control because one of the many conditions has been satisfied.[474]

[472] Rajya Sabha Debates, Dec. 22, 2015, 61.
[473]Rajya Sabha Debates, Dec. 22, 2015, 63-66.
[474]Gary Jensen and Donald Shoemaker, *Juvenile Justice*, ENCYCLOPAEDIA BRITANNICA, Oct. 15, 2007.https://www.britannica.com/topic/juvenile-justice.

The new JJ Act, 2015 is in a way similar to this system in that juveniles will be tried as adults for heinous offences. The Act has also segregated children into two categories; a) Child in conflict with law and b) Child in need of care and protection.

2.2 U.S.A: In the United States, a juvenile may be tried in the criminal court rather than the juvenile court under any of the following circumstances: (1) if state laws mandate such processing for certain offences within a set age range; *statutory exclusion*, (2) prosecutors decide on a criminal proceeding with limitations based on offense and age; *prosecutorial discretion*, and (3) the juvenile court judge decides to waive the case within limits based on offense and age; *judicial waiver*. An increasingly popular approach, known as "restorative justice," has been used especially in cases of delinquency unrelated to gangs.[475]

The JJ Act of 2015 has tried to draw from this system. An age bracket of 16-18 years has been decided for a child to be tried as adult if he/she commits a heinous offence. The *mens rea* of the child is also assessed by the Juvenile Justice Board.

2.3 Europe: France passed its first juvenile court legislation in 1912, which created a court dedicated to handling juvenile cases. A more comprehensive system has been in use since 1945 and is based upon the Tribunal for Children, a court composed of three members, one of whom is a juvenile judge. Lesser offenses committed by youths are handled by a children's judge who functions as a magistrate and who is charged with both investigating and judging minor cases involving juveniles. Similarly, India also has a Juvenile Justice Board to decide cases pertaining to minors.

[475]Gary Jensen and Donald Shoemaker, *Juvenile Justice.*

Examples of juvenile criminal cases being treated separately from adult cases can be found in early Germanic law. It was only in 1923 that Germany established a separate system of juvenile courts. German law also recognizes three juvenile categories: children (those under 14 years of age, who are presumed to be not responsible for their actions because of their youth), juveniles (those between the ages of 14 and 18), and adolescents (those between the ages of 19 and 21). Generally, adolescents are considered more accountable for their actions than juveniles.

Prosecutions of juvenile cases also differ depending on the seriousness of the offense: relatively minor cases (involving less than one year of incarceration) are handled by a juvenile court judge; more serious cases are heard by a tribunal composed of one juvenile judge and two lay judges; and the most serious cases are reserved for another mixed tribunal consisting of three trained judges and two lay judges. In the Indian juvenile justice system as well, offences are classified. There are separate definitions provided for "heinous" and "serious" offences depending on the time period of imprisonment.[476]

2.4 China: China follows most Western standards in setting 18 years as the age of criminal responsibility, but it also assigns lower levels of responsibility beginning at age 14. China does not recognize status offenses, and responsibility for the correction of problematic juvenile behaviour thus lies with parents and schools, in keeping with traditional Chinese customs and practices.[477]

It is thus seen that, even though the Indian Juvenile Justice System has borrowed a few characteristics from other countries across the world, it has still tried to maintain an identity of its own.

[476]Section 2(33) and 2 (54), Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016).
[477]*Supra note*, 13.

III. SALIENT FEATURES OF THE JUVENILE JUSTICE ACT, 2015

The Juvenile Justice (Care and Protection) Act, 2015 came into force on the 15th of January, 2016. The Act was passed by the Lok Sabha on 7th May, 2015 and by the Raj Sabha on 22nd December, 2015. It replaced the existing juvenile delinquency law i.e. The Juvenile Justice (Care and Protection of Children) Act, 2000. Some of its salient features are as follows:

1. As in the Juvenile Justice (Care and Protection) Act, 2000, the Juvenile Justice Act of 2015 has made a distinction between children in need of care and protection and children in conflict with law. One of the most distinctive features of the new piece of legislation is that of "the Judicial Waiver System"; in that it allows for the treatment of juveniles between the age group of 16-18 years as adults when they have committed heinous offences. Also, a child belonging to the same age group who has committed a lesser serious offence can be tried as an adult only when he is apprehended after attaining the age of 21 years. [478]
2. Each district will have a Juvenile Justice Boards (JJB) consisting of a Metropolitan or Judicial Magistrate and two social workers, including a woman and Child Welfare Committee (CWC). The JJB will conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. Section- 19(3) states that the enquiry will be assisted by experienced psychologists, psycho-social workers and other experts. The CWC is also responsible for determining institutional care for children in need of care and protection. This provision needs proper implementation and timely regulation for attaining the aim that it sought to achieve.

[478] Section 14, Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016).

3. The Act also provides for adoption of juveniles which was not provided under the Juvenile Justice (Care & Protection of Children) Act of 2000. It adopts the concept of Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption,1993.
4. This Bill faced a lot of criticism when it was introduced in the Parliament. It was referred to the Standing Committee of the parliament which also rejected such provisions. This did not matter as the opinions and decisions of the Standing Committee are not binding. Shashi Tharoor, an Indian National Congress Member of Parliament (MP) argued that the law was in contradiction with the international standards and that most children who break the law come from poor and illiterate families. He said that they should be educated instead of being punished.[479]
5. The Bill was also criticized by child and women rights activists by calling it a regressive step. [480] Retired judge of the Delhi high court, Justice R.S. Sodhi on August 8, 2015 told Hindustan Times, "We are a civilized nation and if we become barbaric by twisting our own laws, then the enemy will succeed in destroying our social structure. We should not allow that but we must condemn this move of sending children to fight their war."[481]
6. There are provisions which provide for penalties for cruelty against a child, offering a narcotic substance to a child and abducting or selling a child.

[479]Mayank Labh, Juvenile Justice Bill, 2015 – An analysis of the controversial provisions, IPLEADERS BLOG, May 19, 2015. http://blog.ipleaders.in/juvenile-justice-bill-2015-analysis-controversial-provisions/.
[480] *Ibid.*
[481]Tamanna Pankaj, Juvenile Justice Act (Care and Protection) Act, 2015, LEGAL SERVICES INDIA, July 30, 2015. http://www.legalservicesindia.com/article/article/juvenile-justice-act-2015-2147-1.html.

IV. CRITICISMS OF THE ACT:

A. General Criticisms:

i. One of the issues raised was that this approach is based on the lines of retribution rather than on reformation and rehabilitation. This act was introduced particularly to adhere to illiberal voices of the angry citizens of the country after the 2012 Delhi Gang-Rape incident. [482]

ii. One of the major motives to pass this amendment was that there is a perception that many of the crimes, particularly rapes, are committed by juveniles belonging to the age group of 16 to 18 years. However, according to National Crime Records Bureau, only 3.4 percent of the rapes were registered against juveniles of the same age group. Moreover, this statistics is based on the FIRs filed against such juveniles.[483] It must be noted that on several instances, FIR of rape, kidnapping are also filed against teenagers in elopement cases. Therefore, the perception that juveniles commit most of the heinous crimes is not established.

iii. Further, it was thought that children are as blameworthy as adults for their conduct. Some argue that such crimes reflect the mental culpability of offenders and such commission of heinous crimes is a mature act in itself. However, according to a recent brain studies conducted by TISS, according to which risk-taking tendency is really high during adolescence. It is discovered by neuroscientists that prefrontal lobe which is responsible for functions such as planning, reasoning, controlling the impulse, etc. develop only after 25 years.[484]

[482] Two years since the Delhi gang rape, here's what's changed—and what hasn't, QUARTZ INDIA, December 15, 2014. https://qz.com/312738/two-years-since-the-delhi-gang-rape-heres-whats-changed-and-what-hasnt/.
[483] *Supra* note, 13.
[484] *Ibid.*

A. Statutory problems

It is pointed out by experts that this Act is in violation of the norms of United Nations Convention on the Rights of the Child since this Convention requires every child under 18 to be treated as equal.

B. Technical Problems

The determination of maturity of the juveniles is a difficult job. Psychological tests are highly subjective and arbitrary. It is also argued by experts that some mature juveniles can crack the test and pass-off as immature while some susceptible immature juvenile minds can still be considered as mature. [485]

C. Focus on Deterrence

This system has been taken from the U.S. where it has not been a very effective deterrence. The U.S. is even closing down prisons, looking for alternatives like community-based treatment programmes for prisoners. Most of the juveniles who commit crimes belong to very poor families with very little education. It is imperative that the government focus on tackling such issues which compel the juveniles to commit crimes.

D. Retributive vs. Reformative

One of the major criticisms of the Act has been that it is retributive in that, juveniles who commit heinous crimes (imprisonment of seven years or more) shall be tried like adults in the children's court. The Court has to make sure that a child found guilty of committing a heinous offence shall be sent to a place of safety till the age of twenty-one years after which he/she will be shifted to

[485] *Supra note*, 18.

jail. This essentially means a juvenile in conflict with law committing a heinous crime will no longer avail of the benefit of being a child. These juveniles transferred to jails, could become hardcore criminals after interacting with the hardened criminals already serving their prison-terms.

E. Maturity as the guiding factor

Neuropsychologists have conducted various studies which have proved that "Adolescent brains are far less developed than previously believed".[486] According to Ruben C. Gur, a renowned psychologist, the biological age of majority is close to 22 years and the pertinent parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable, develops after attaining the age of maturity.[487] In this respect to punish a juvenile like an adult would result in excess punishment. According to the lawyer cum child rights activist Maharukh Adenwalla, The Juvenile Justice (Care and Protection of Children) Act, 2015 has reversed the well-founded principle of juvenile justice by allowing Juvenile Justice Boards to waive the right of children above the age of 16 years who have committed a heinous offence into the criminal justice system. This means the treatment of a juvenile will depend upon the type of offence committed instead of his situation.[488]

Inconsistency with other laws:

The age of consent according to the Protection of Children from Sexual Offences Act (POCSO) is 18 years and if any crime is committed by a Juvenile under the POCSO Act, then as per Section 23 of the POCSO Act it will be dealt as per the provision of Juvenile Justice Act, 2000 (Now as

[486] Hybrid Medical Animation, *Cruel and Unusual Punishment: The Juvenile Death Penalty*, AMERICAN BAR ASSOCIATION 1(2004).
[487] Ruben C. Gur, American Bar Association, *Declaration of Ruben C. Gur*, PH.D. 15 (2016).
[488] Maharukh Adenwalla, *A dislocation of the Juvenile Justice System*, THE WIRE, May 23, 2015. http://thewire.in/2015/05/23/a-dislocation-of-the-juvenile-justice-system-2282/.

per the new amended Act). As in the Prohibition of Child Marriage Act, 2006, child marriages are voidable but not void.[489] If children who marry each other perform a 'consensual sexual act' and it attracts provisions of the two acts, they may be tried as adult offenders. In a hypothetical situation, when both the guy and girl are involved in a consensual sexual relation, then the male child will be treated as a Child in Conflict with Law and the female will be treated as a Child in need of care and protection.[490] This situation may arise because in Section 3 'penetrative sexual assault' starts with 'he' and excludes women from its periphery. It states that a girl can only be an abettor in the penetrative sexual assault not an active criminal.[491] Such a harsh law against juveniles can be a weapon in the hands of angry parents in child elopement cases.

V. CONSTITUTION AND THE JUVENILE JUSTICE ACT

The new Juvenile Justice Act was criticised for violating articles 14, 15(3) and 20 of the Constitution of India. Article 14 talks about equality before law. But, if this is read with Article 15(3) it indicates how the government can make special provisions for children. Another issue, which is pointed out by many activists is that the 2015 Act violates the spirit of Article 20(1), where a person cannot be subjected to greater punishment than what would have been applicable to him under the law in force at that time. Under the new Act, if a juvenile who has completed the age of twenty-one but has not completed the full period of his sentence may be sent to the jail if it is considered so proper. This Act undermines the very spirit of Article 20(1). According to this provision, one may not be subjected to greater penalty, which may be inflicted at the time of

[489] The Prohibition of Child Marriage Act, 2006 (Act No. 6 of 2007).
[490] Srishti Agnihotri and Minakshi Das, *Rehabilitation not retribution should be the focus of juvenile justice*, THE WIRE, December 30, 2015. http://thewire.in/2015/12/30/rehabilitation-not-retribution-should-be-the-focus-ofjuvenile-justice-18262/.
[491] Government of India Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Child Welfare Committees/support Persons and Health Professionals NCPCR (2013).

committing offence. Here, if a juvenile commits a heinous crime at a young age under compelling circumstances but realizes his mistake after attaining majority, he will still be sent to jail on his previous record for the heinous crime.

The work of Juvenile Justice Board in determining the *mens rea* of the child is quite challenging. In this process, there is huge chance of uncertainty. Researchers have reiterated that individualized assessments of adolescent mental capability are impracticable. Thus, this assessment by the Juvenile Justice Board may result in procedural arbitrariness and violates the provisions of the Constitution.

According to the United Nations Standard Minimum Rules for the Administration of Juvenile, 1985 prime importance should be given to the juvenile justice while considering a juvenile in conflict with law. This essentially means that 'the circumstances of both the offenders and the offence' needs to be given importance,[492] but in the current Act only the type of crime is given importance. In ***Pratap Singh v. State of Jharkhand***,[493]it was observed by the Court that in Rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice, while defining a juvenile criminality or criminal responsibility, the moral and the psychological components must be given prime importance. However, in the present law, this psychological component has been given least importance.

VI. AN ANALYSIS OF THE IMPORTANT PROVISIONS OF THE ACT

[492] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), art. 5, U.N. Doc A/RES/40/33 Nov. 9,1985.
[493] Pratap Singh v. State of Jharkhand, 3 S.C.C. 551 (2005).

Despite the above-mentioned criticisms to this Act, a detailed analysis of its provisions will give a wholesome picture of this Act, highlighting the positives as well as its negatives.

The aims and objectives of this piece of legislation encapsulates what the act purports to do, in catering to the needs of the children found to be in conflict with law and children in need of care and protection.

There is a reference made to the provisions of the Constitution which have conferred powers and imposed duties on the state such as Articles 15 (3), clauses (e) to (f) of Article 39, Article 45 and 47 to ensure that the needs of the children are met and their basic human rights are fully protected.[494] References have also been made to standards prescribed in international instruments such as:

- United Nations Convention on the Rights of the Child
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993).

[494] CONSTITUTION OF INDIA, 1950.

There has been complete restructuring of the Chapters in the new Act. The chapters are divided as under:

- Preliminary
- General Principles of Care and Protection of Children
- Juvenile Justice Board
- Procedure in relation to Children in Conflict with Law
- Child Welfare Committee
- Procedure in relation to Children in Need of Care and Protection
- Rehabilitation and Social Reintegration
- Adoption
- Other Offences against Children
- Miscellaneous

Chapter I consists of important definitions which help understand the provisions in the Act. They are to be read in consonance with each other and have the same meaning throughout the Act. Some of the key features of the definitions in this Chapter as following:

The definition of a "**Child in need of care and protection**" has been expanded (as compared to the previous act) to include:

a. A child who is found working in contravention of the labour laws
b. or is found begging, or living on the street;
c. who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

d. who resides with a person (whether a guardian of the child or not) and

   such person— has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

e. who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child;[495]

Some more definitions incorporated in the new act, which were not included in the previous act are:

1. Adoption Regulations
2. Authorised Foreign Adoption Agency
3. Child Legally free for Adoption
4. Foster care
5. Foster Family
6. Group Foster Care
7. Heinous offences-includes the offences for which the minimum punishmentunder the Indian Penal Code or any other law for the time being in force is imprisonmentfor seven years or more;
8. Inter-Country Adoption
9. Prospective Adoptive Parents

[495]Section 2 (14), The Juvenile Justice (Care & Protection of Children) Act, 2015.

10. Serious Offences-includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years;
11. Specialised Adoption Agency
12. Sponsorship
13. Surrendered Child

Thus, the definitions in the Chapter are very comprehensive and help understand the provisions of the act in a better way.

Chapter II entitled "General Principles of Care and Protection of Children" consists of the fundamental principles which the State Governments, the Board, and other agencies, while implementing the provisions of this Act shall be guided by. The following principles have been clearly explained:

(i) Principle of presumption of innocence

(ii) Principle of dignity and worth

(iii) Principle of participation

(iv) Principle of best interest

(v) Principle of family responsibility

(vi) Principle of safety

(vii) Positive measures

(viii) Principle of non-stigmatising semantics

(ix) Principle of non-waiver of rights

(x) Principle of equality and non-discrimination

(xi) Principle of right to privacy and confidentiality

(xii) Principle of institutionalisation as a measure of last resort

(xiii) Principle of repatriation and restoration

(xiv) Principle of fresh start

(xv) Principle of diversion

(xvi) Principles of natural justice

This clear indication of the principles to the adjudicating authorities equips them to deal effectively with the cases which come their way. The cases that come before the Child Courts are not to be dealt in the same manner as those that come before the Adult courts. This important point has been established by distinctly laying down these principles to be followed and to be kept in mind.

Chapter III of the Act deals with the Juvenile Justice Board. There was no separate chapter dealing with the JJB in the previous act. It was incorporated within the Chapter on 'Children in Conflict with Law'. Unlike the older act, the criteria for ineligibility of a member of the Board has been outlined which includes:

a. past record of violation of human rights or child rights;
b. conviction of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence;
c. Removal or dismissal from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government;
d. Previously indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

The functions and responsibilities of the board have been very clearly set out, which was not the case with the older act. The detailing of the functions will facilitate the entire process and make it less cumbersome.

The Act confers a responsibility on the State Government to ensure that the all the members of the board are trained and sensitized on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment. Section 8 (2) also provides that the powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under Section 19 or in appeal, revision or otherwise. The Court has the discretion to conduct inquiry and take necessary evidence to determine the age of the person alleged to have committed the offence and if the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.[496]

Chapter IV prescribes the Procedure in Relation to Children in Conflict with Law. In the previous act, the title used was "Juvenile" in Conflict with law. This leads one to think if there is a reason behind the change in the term used. "Children" seems to be a simpler and more commonly used term which a layman would easily comprehend. It also asserts that a child should be handled with care. As soon as a child alleged to be in conflict with law is apprehended by the police, such a child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board within a period of twenty-four

[496]Section 9(3), Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016).

hours of apprehending the child. Information about apprehension has to be immediately provided to the:

a. Parent / Guardian of the child; and

b. Probation Officer/ Child Welfare Officer[497]

Section 12 stipulates that the person apprehended under this act, is entitled to be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. Emphasis has been placed on the speedy disposal of cases. Apart from the usual procedure adopted when a child is found to be in conflict with law, different procedures are adopted when a child commits a heinous offence. In the latter, according to Section 15, the Board has to conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18, provided that that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Section 16 states: (*1*) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards. The stress on review of pending cases will ensure speedy justice.

Section 19 (1) states: After the receipt of preliminary assessment from the Board under section 15, the Children´s Court may decide that—

[497] Section 13, Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016).

(*i*) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(*ii*) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18.

Thus, the discretion to treat the child as an adult is upon the Juvenile Justice Board. This is a huge responsibility and any mistake could ruin the future of the child. This power is very subjective as there is no practical way to determine the intention of the child to commit the offence. This provision has been criticised for the reasons abovementioned.

Another provision, which has been the subject of severe scrutiny is Section 19 (3), which states: The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail. As has already been explained in the criticisms of the act, it violates the provisions of the Constitution of India.

As provided in Section 20 (1), when the child in conflict with the law attains the age of twenty-one years and is yet to complete the term of stay, the Children´s Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society and for this purpose the progress records of the child under sub-section (4) of section 19, along with evaluation of relevant experts are to be taken into consideration.

Chapter V elaborately deals with the establishment Child Welfare Committee which shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children, just like in the older act. The functions and responsibilities of the Child Welfare Committee has been detailed under Section 30 the Act. This enumeration of the functions is a relatively new addition. Section 27(10) makes the District Magistrate, the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders.

Chapter VI details the procedure adopted in relation to Children in need of Care and Protection. Section 32 mentions mandatory reporting regarding a child found separated from guardian. Non-reporting is also a punishable offence. The Committee has to be satisfied that the child before it is a child in need of care and protection. Only after this, can it pass the necessary orders.

Section 36 states:(1) On production of a child or receipt of a report under section 31, the Committee shall hold an inquiry in such manner as may be prescribed and the Committee, on its own or on the report from any person or agency as specified in sub-section (2) of Section 31, may pass an order to send the child to the children's home or a fit facility or fit person, and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer.

Chapter VII deals with Rehabilitation and Social Reintegration of the Child. Section 39 of the act states that the process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care unlike the old Act. Children leaving the home after attaining the age of eighteen shall

also be provided with financial support to help them reintegrate with the mainstream of the society. There is a provision mandating registration of Child Care Institutions.

Foster Care and Sponsorship has been dealt with in detail in this chapter. There are provisions which talk about open shelters, foster care and group foster care. It also talks about special homes and observation homes to cater to the needs of the children in need of care and protection and the necessity to maintain certain standards while doing so, which the State Government can provide by coming up with rules of its own. There are also provisions which underline undertaking various programmes of sponsorship of children, such as individual to individual sponsorship, group sponsorship or community sponsorship.

One of the most prominent additions to the old Act is the new Chapter on Adoption (**Chapter VIII**). Adoption has been dealt with in detail under this Chapter. Criteria and eligibility for adoptive parents has been stipulated. The Specialised Adoption Agency is in place to carry out important functions. The opening provision in the beginning states, (Section56)(1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made there under and the adoption regulations framed by the Authority. The pre-existing Central Adoption Resource Agency renamed as Central Adoption Research Authority under the act, has been given the following functions under the act:

(*a*) to promote in-country adoptions and to facilitate inter-State adoptions in co-ordination with State Agency;

(*b*) to regulate inter-country adoptions;

(*c*) to frame regulations on adoption and related matters from time to time as may be necessary;

(*d*) to carry out the functions of the Central Authority under the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption;

(*e*) any other function as may be prescribed.

The Authority will also have a steering committee, the functions of which have been set out.

One of the most important sections is Section 61(1) Before issuing an adoption order, the court shall satisfy itself that —

(*a*) the adoption is for the welfare of the child;

(*b*) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and

(*c*) that neither the prospective adoptive parents have given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption have received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus.

A new Chapter **(IX) entitled Other Offences** against Children is a relatively new addition to the Act. Though the provisions are familiar, the Chapter as a whole has been newly added. Some of the offences are:

i. Prohibition on disclosure of identity of children
ii. Punishment for cruelty to child, employment of child for begging

iii. Penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to a child

iv. Using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance

v. Exploitation of a child employee. Punitive measures for adoption without following prescribed procedures.

vi. Sale and procurement of children for any purpose

vii. Corporal punishment

viii. Use of child by militant groups or other adults

ix. Kidnapping and abduction of child

x. Offences committed on disabled children

xi. Classification of offences and designated court

xii. Abetment

The last Chapter (**Chapter X**) in the act is titled "Miscellaneous". Provisions which did not fit into any other chapter were clubbed and put under this one. Some key aspects dealt with are:

a. Attendance of parent or guardian of child.
b. Dispensing with attendance of child.
c. Placement of a child suffering from disease requiring prolonged medical treatment in an approved place.
d. Transfer of a child who is mentally ill or addicted to alcohol or other drugs.
e. Presumption and determination of age.
f. Transfer of a child to place of residence.
g. Transfer of child between

h. Children's Homes, or special homes or fit facility or fit person in different parts of India.

i. Release of a child from an institution.

j. Leave of absence to a child placed in an institution

k. Procedure in inquiries, appeals and revision proceedings.

l. Power of the Committee or the Board to amend its own orders.

m. Juvenile justice fund.

n. State Child Protection Society and District Child Protection Unit.

o. Child Welfare Police Office and Special Juvenile Police Unit.

p. Reports to be treated as confidential.

q. Protection of action taken in good faith.

r. Appeals and Revision

s. Power to make rules, Repeal and savings.

The provisions in the act are self-explanatory and have been written in simple words so that even a layman can comprehend it. The act is an elaborate one and the law-makers have put in a lot of thought and effort to bring such a fine piece of legislation into force. The act is very comprehensive and consists of an exhaustive list of functions to be carried out. Ultimately, it is upon the members of the Juvenile Justice Board and the Child Welfare Committee to ensure that the provisions of the act are interpreted correctly and complete justice is meted out.

VII. CONCLUSION

Though the pressure to make changes in the existing Juvenile Delinquency laws of the country, led to the introduction of the present Juvenile Justice Act of 2015, the Act cannot be said to be a decision made in haste. This Act is revolutionary change, a step in the right direction. In light of

the misuse of the lenient provisions in favour of juveniles in the previous JJ Act of 2000, it was high time that we made place for stricter laws with better implementation. There are criticisms to the Act which cannot be overseen. One of the largely unanswered questions still lingers. The bracket created for the age group of 16-18 years for juveniles to be tried as adults is arbitrary. As the Act has already come into force, policy makers and citizenry can only wait for the act to show some positive outcomes in the years to come. If the Act does not bring about any change in the existing scenario in the country, it will have to endure the wrath of angry citizens who will again push for change in the laws. The cycle will continue.

INDIA V/S BHARAT- BRIDGING THE GAP

Author(s): Samidha Mathur[498]

ABSTRACT:

Today, the country of India faces a social battle- a battle which begins over every issue, with its soldiers comprising of the entire population, their sides determined by their sheer luck. Some lead a life of wonder in the cities, amidst skyscrapers, working before desktops, living with changing times each day in their westernized dome that they call India. Others toil in fields, rejoice under the stars, walking on mud streets, waiting on harvests in what they call Bharat. The soldiers on both sides take to their arms which include protests, strikes, and debates on each issue- such as the famous handloom v/s power loom debate. Each one wants to see a better tomorrow, wants to feel a sense of security, however, their meanings of security and better vary. This paper seeks to examine the growth of such differences and their unification to build a singular path for a country which both sides best known as their home

I. INTRODUCTION

THE CONTROVERSY ON SURFACE

Article 1 of the Indian Constitution states- 'India, that is Bharat, shall be a union of states'[499]. It is not common for a country to have two names. Two widely used, commonly understood names. Such is the fate of the Indian subcontinent- one of its names has lasted years and is constitutionally proclaimed, has a history rooted in Vedas and Puranas, a grandiose story with Emperor Bharata giving the land a piece of himself to last forever and calling it, Bharat. The other is comparatively contemporary, known to have its origin because of the reason that the English tongue was unsuited to saying Bharat. And so, the name lay tailored, and remained so, in memory of its colonial past, the golden bird was christened India.

This paper does not seek to end this controversy, but simply wishes to examine how it has turned into a political debate, an insight into many differences. One might quote Shakespeare defeated here, when he proclaimed- "What's in a name? That which we call a rose by any other name would smell as sweet." For, there is a lot to this name. For many, names reflect ideology, what one thinks, what one wants

[498] BA. LLB (Hons.) student at Gujarat National Law University
[499] INDIA CONST. art. 1.

for the nation. Leftist parties particularly attach a deep significance to the name, Bharat, using it as a projection of revival of the traditional. To them, India is the villain, sucking out the life of the Bharat.

This issue came to light in a Public Interest Litigation filed by a social activist called Niranajan Bhatwal which stated that the main aim of introducing the name India in Article 1(1) of the Indian Constitution was for reference, in order to repeal Government of India Act, 1935, and Indian Independence Act, 1947.[500] The petition stated that Bharat was the rightful name for India, given its historical relevance. Hence, it only seems correct to use this name for all official purposes. It seemed a reasonable appeal to many, given the fact that the name India has no origin of any significance. However, it seemed to be shrouded in political controversy, marking a change in ideology, outlook and the way the country functioned. To truly understand the perspectives these names stand for, it becomes necessary to examine the historical evolution of both of these.

II. THE BRITISH ERA

In the times before the advent of the Britishers, India was a stranger to full-scale modernized industrialisation. However, this is not to say that India lacked industries. The strong cotton textile industry was a major attraction to foreigners all over, the chintzes of Lucknow, dhotis and dupattas of Ahmedabad, silk, bordered cloth of Murshidabad, the woollens of Northern India, were testimony to its capability to satisfy all its wants and those of others as well.

The British entered India with the agenda of building a monopolistic position for themselves. They also had the intentions of starting a cycle of exploitation, making India serve as their source of raw materials as well as their market for finished goods, this meant creating a profit zone for themselves in India. Nehru, in his popular history, argued that the British deindustrialized India, and that this "is the real the fundamental cause of the appalling poverty of the Indian people, and it is of comparatively recent origin"[501]

A class of merchants emerged in India, those who were quicker to pick up the English tongue and tact, called dubhashes. As transactions increased, the professional classes grew, lawyers were needed to draft agreements, businessmen needed to manage the multiplicity of transactions, teachers needed

500 Utkarsh Anand, *Country need not be called Bharat, Govt tells apex court* , THE INDIAN EXPRESS, November 16, 2015.
501 J. NEHRU, THE DISCOVERY OF INDIA 299 (Day, New York, 1946)

to spread English, journalists needed to promote the spread of information. These professionals had a dual identity- their jobs entailing continuous interaction with the Englishmen, who did not consider them equals, and their descent, Indian.

Ironically, at a time of rapidly growing nationalist fervour, these classes felt quite alienated from their land. At the same time, with the growth of an education system loosely based on the British, universities came to be set up with half-baked graduates of English, but sufficiently Westernized to be alienated from their own culture.[502] These new classes were representations of the dream of the British to create a quasi- Britain in India. Many of these even defended British control over India as now, they were able to acquire a position in society owing to their education and capabilities.

This was not the only area of westernization. In agriculture, there was a shift from customary landholders to contractual landholders, this shift was not understood by the poor illiterate landless 'tenant' farmer. This farmer lost the paternalism of the previous landowners, as the new one was solely interested in extracting revenue as demanded and would throw out those who would not pay him on time. When customary landholders had their land snatched from them, this largely came into the hands of the moneylenders, a class already accustomed to exploiting. Over time, two forces raised the income of landowners. One of these was the increasing scarcity of land as population expanded. This raised land values and rents. The second was the decline in the incidence of land tax.[503] An already oppressive class was slowly turning all-powerful. This increased income did not promote much investment but instead, led to these landowners building palatial houses for themselves, hoping to lead the lives of kings and queens. In Marxist terms, the owners were English, but this was a class of quasi owners, of local dominators, consists of landowners, merchants and zamindars.

Another class enjoying privileges were the princely rulers who were used to a life of grandeur, even in pre- British times. Before the advent of colonial rule, those close to the ruler enjoyed a better standard of living. Caste also played a role in determining who held power. However, British rule changed this notion and created a new inequality, this inequality was not based on religion (Caste inequality, while creating differences was based on the commonality of religion between different groups. British rule changed this and brought to the front differences arising out of different education, a varied

[502] ANGUS MADDISON, CLASS STRUCTURE AND ECONOMIC GROWTH: INDIA & PAKISTAN SINCE THE MOGHULS 42 (Routledge, 2006)
[503] ANGUS MADDISON, CLASS STRUCTURE AND ECONOMIC GROWTH: INDIA & PAKISTAN SINCE THE MOGHULS 48 (Routledge, 2006)

background and the question of who grabbed the opportunity the quickest? This made these differences different from those earlier).

The differences that began herein continued growing. These were felt by a number of nationalists as well, including Gandhi. The spinning wheel was introduced to ensure a better livelihood for the rural poor, to enable them to reduce their increasing poverty. At the same time, the swadeshi movement sought to ban any foreign mill cloth to ensure protection for the *daridra narayanas* [504](The name given to the poor by Gandhi). Thus was born the idea of Khadi, a symbol of liberation for the poor, while the mills were symbols of the enemy, the cheaper cloth which had shut down handlooms and thrown thousands of textile workers out of jobs. The gap between the have and have-nots was to be filled by this simple wheel.

III. POST INDEPENDENCE ECONOMIC PLANNING

After Independence, the Indian government sought to change the outlook propagated by the British. The enemy was believed to be gone, but the fights did not disappear with it. The British did leave behind their mark, in terms of a class which had stayed away from the soil for too long to return to it easily. This class wanted a more industrialised country, as they felt this was the key to the future. They wanted to become more like Britain, a landscape of industrialisation which they had learnt to associate with great profits. On the other hand, another class of people expected a different approach. These people had suffered under zamindaris for long enough and had been forced to meet demands for unreasonable profits. They wanted a government based on paternalism, a protector, a government with a socialist outlook. To deal with these varying demands, the government decided to embark on economic planning measures in the form of Five Year Plans (FYPs).

The First FYP dealt with problems of the agricultural sector, particularly as this required urgent attention following the partition. The Second, based on the Mahalanobis Model is what this paper seeks to focus on, mainly because of the fact that this was the plan which advocated rapid industrialisation for the first time. The Mahalanobis Model was constructed to find the optimum allocation of resources in different sectors. However, one of its major weaknesses was that it did not

[504] Dr. D. Pulla Rao, Empowerment of Rural Poor: The Gandhian Approach. http://www.mkgandhi.org/articles/empowerment-of-the-rural-poor.html (December 4, 2016)

consider the problem of distribution of resources across different sectors. the problem of economic planning should not stop- at stipulating merely the overall targets in respect of employment and income; the question of distribution of these targets over the several sectors, so that the balance between supply and demand is ensured for each, should also be considered and settled at the beginning.[505] That is why in achieving targets, the Second FYP also largely focused on the heavy industries, without regard to the effect of the same on agriculture.

The Second FYP laid out the problem clearly-

"Economic development has in the past often been associated with growing inequalities of income and wealth. The gains of development accrue in the early stages to a small class of businessmen and manufacturers, whereas the immediate impact of the application of new techniques in agriculture and in traditional industry has often meant growing unemployment or under-employment among large numbers of people. In course of time this trend gets corrected partly through the development of countervailing power of trade unions and partly through state action undertaken in response to the growth of democratic ideas. The problem before under-developed countries embarking upon development at this late stage is so to plan the alignment of productive resources and of class relationships as to combine development with reduction in economic and social inequality; the process and pattern of development has, in essence, to be socialised. There are existing inequalities of income and wealth which needs to be corrected and care has to be taken to secure that development does not create further inequalities and widen the existing disparities. The process of reducing inequalities is a two-fold one. It must raise incomes at the lowest levels and it must simultaneously reduce incomes at the top. The former is, basically, the more important aspect, but early and purposeful action in regard to the second aspect is also called for. Development along these lines has not so far been attempted on any significant scale under democratic conditions. There are no historical parallels or plans of action which could be regarded as providing an answer to this special problem facing under-developed countries. The problem will have to be faced pragmatically, and it will call forth a great deal of flexibility and experimentation in the matter of techniques. It is important to ensure that in reducing inequalities no damage occurs to the productive system as would jeopardise the task of development itself, or imperil the very processes of democratic change which it is the objective of policy to strengthen. On the other hand, regard for democratic and orderly change cannot be allowed to become a sanction for existing or new inequities."[506]

A solution to this problem was believed to be that the State would play an important role in the setting up of industries and would ensure that proper institutional and fiscal measures were in place so as to

[505] Ashoke Mitra, *A Note on the Mahalonobis Model,* THE ECONOMIC WEEKLY, March 16, 1957.
[506] THE SECOND FIVE YEAR PLAN

reduce inequities. An expenditure tax also came to be suggested to both promote saving and moderating inflationary and deflationary measures.[507] A gift tax and ceilings on income were also expected to help with differences arising out of property held. A system of technical education was also believed to be an equaliser. These were suggestions made from a socialist outlook.

On the other hand, the Plan also brought with it the Industrial Resolution of 1956, focusing on industrialisation. This resolution sought to solve the problem of different expectations by dividing the industries in different categories. In the first category will be industries the future development of which will be the exclusive responsibility of the State. The second category will consist of industries which will be progressively state-owned and in which the State will, therefore, generally take the initiative in establishing new undertakings, but in which private enterprise will also be expected to supplement the efforts of the State. The third category will include all the remaining industries, and their future development will, in general, be left to the initiative and enterprise of the private sector.[508] Industrial undertakings in the private sector have necessarily to fit into the framework of the social and economic policy of the State and will be subject to control and regulation in terms of the Industries (Development and Regulation) Act and other relevant legislation. The Government of India, however, recognise that it would, in general, be desirable to allow such undertakings to develop with as much freedom as possible, consistent with the targets and objectives of the national plan. When there exist in the same industry both privately and publicly owned units, it would continue to be the policy of the State to give fair and non-discriminatory treatment to both of them.[509] It was largely believed that by creating a space for industrialisation that was driven by the state would help to create a positive image of industrialisation, increasing public support for the same and creating a more equitable society. However, simply making the public sector solely responsible for management of certain industries or services does not ensure that the public perceptions and expectations are met. For example: An IIM Indore study conducted in 2009 measured service quality in banks. Before 1991, only public sector banks were permitted in India. After the Liberalisation-Privatization-Globalisation regime was implemented, private sector banks were set up. This study found significant differences in quality of service of private and public sector banks. The study implied that public sector banks will have to focus on the reduction of the gap in customer expectations and perceptions about their service quality

[507] *ibid*
[508] INDUSTRIAL RESOLUTION OF 1956
[509] INDUSTRIAL POLICY RESOLUTION, 1956

if they are to compete in the global marketplace. To this end, public sector banks should continually assess and re-assess how customers perceive their services to know whether these banks meet or exceed or fall short of the expectations of their customers.[510]

Public Sector Industries often become inefficient as they are subject to a greater range of rules, regulations, and procedures fixed by the authority of a superior body.[511] Also, the Public Sector is less driven to be profitable. Profit is not their main consideration, they are set up for socio-economic benefits. Apart from financial performance one can judge the public sector enterprises in terms of technical efficiency allocative efficiency and dynamic efficiency. Technical efficiency is related to input- output ratio or productivity of inputs. Allocative efficiency is related to the correction of market failure leading to better allocation of resources than what will be decided by the price mechanism. Dynamic efficiency relates to innovations and technological development. Even in relation to these criteria, the results in relation to public enterprises are mixed.[512] In fact, in recent times, there has been greater call for introducing private membership into such enterprises for the purpose of increasing efficiency in the organisations by disinvestment. Government`s resources are limited. These resources should be devoted to areas of social priority such as basic health, family welfare, primary education and social and economic infrastructure. More resources can be devoted to these priority areas by releasing resources locked up in nonstrategic public sector enterprises. The demands on the governments both at the centre and in the states are increasing. There is need to expand the activities of the state in priority areas. It is, therefore, legitimate that a part of the additional resources needed for supporting these activities come out of the sale of shares built up earlier by the government out of its resources.[513] Hence, the focus, since the Liberalisation policy has taken a clear shift and the Public Sector has not been seen as sufficient in bridging gaps and giving rise to equity.

[510] . R.K. Dhar and S.K Kushwah., *'Service Quality Expectations and perceptions of public and private sector banks in India: A Comparative study'*, 1 IIMJ 34, 48 (2005)
[511] Peter J. Robertson and Sonal J. Seneviratne, *'Outcomes of Planned Organizational Change in the Public Sector: A Meta-Analytic Comparison to the Private Sector'*, 55 Public Administration Review 547 ,548 (1995)
[512] Sri Santosh Koner, Professor Jaydeb Sarkhel, *'Disinvestment of Public Sector in India: Concept and Different Issues'*, 3 IOSR Journal of Economics and Finance (IOSR-JEF) 48, 48-52 (May-Jun. 2014).
[513] *ibid*

IV. POLITICAL PERSPECTIVES

One way to look at the India vs. Bharat debate is to approach it from a political perspective. Post-Independence, the political system of India was dominated by the Indian National Congress (note the *India*). In search for truth and 'Swaraj' from Raj, Gandhi preached the gospel of non-violence and class harmony. And Nehru and other Congress leaders declared that the Congress was to be turned into an electoral organization or into a party to win electoral battles and sit on the saddle of power or at least into a Gandhian organ of constructive programme, i.e., transition from movement to a party or from mass politics to elite politics. Thus pragmatism or 'real politik' began to replace the ideals of socialism, truth and non-violence and watered down Marxism into a milk-water Fabianism. After Independence, the change in the character of the Congress from a party fighting for freedom to an enthroned party on power seat charged with the constitutional responsibility for political development, economic regeneration and cultural advancement began to take place by a solemn public act. Nehru did not agree to take Congress as mere electoral organization into account. But leaders of Congress did not take any recourse to such action and were unable to do so because the party attracted many new members no longer moved by any idealistic reason but were primarily concerned with power and patronage (Hartmann, 1977: 56). Therefore, Congress leaders followed a middle-of-the-road policy. For that reason Congress party followed the formula of 'socialistic pattern of society' in the Avadi Session (1955) and later on 'Socialist State based on Parliamentary Democracy' in the Bhubaneshwar Session (1968), which were not possible in our socio-economic set-up.[514] The initial approaches of protectionism soon gave way to a neutral approach. Later, when Congress split, Indira Gandhi claimed to be heading a faction mainly favouring the poor, whilst called the old Congress supporters of the rich. One of the steps undertaken by this new Congress under Indira Gandhi was to abolish the privy purse. The Privy Purse was a group of privileges granted to former rulers of the India who lived like princes and accepted the suzerainty of the British Crown. This move was said to be a step towards equity, a means of bringing into common citizenship this set of people who were isolated from ordinary ways of Indian citizens and still lived like royalty. This move was made by a Constitutional amendment, inserting Article 363A. This Article stated:

[514] Md. Ayub Mallick, '*Ideology of the Indian National Congress: Political Economy of Socialism and Socialistic Pattern of Society*', 12 IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 96-112 (May. - Jun. 2013).

' Notwithstanding anything in this Constitution or in any law for the time being in force— (a) the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler shall, on and from such commencement, cease to be recognised as such Ruler or the successor of such Ruler;

(b) on and from the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished and accordingly the Ruler or, as the case may be, the successor of such Ruler, referred to in clause (a) or any other person shall not be paid any sum as privy purse."[515]

The Congress under Indira Gandhi formed a socialist perspective for itself, with the addition of SOCIALIST in the Preamble in the Constitutional Amendment passed during the Emergency of 1976. The Congress was never strictly a leftist or a rightist party. In 1991, the Liberalisation-Privatisation-Globalisation policy introduced by Rajiv Gandhi was a lean towards the right, unlike the earlier leftist motives of Indira Gandhi.

The other major political party which came into limelight in the 1980s and has become very powerful since then is the Bharatiya Janta Party. Note the fact that this name consists of 'Bharat' which that of Congress contains 'India'. The reason this controversy has attracted so much attention in recent times is due to the consistent use of the name 'Bharat' by the representatives of the BJP which is the current ruling party. To understand the reasons for this usage, one needs to delve into the ideology of the BJP.

The BJP emerged as a proponent of Hindu Nationalism. V.D. Savarkar was the first to articulate a coherent ideology of Hindu Nationalism in a 1924 book titled Essentials of Hindutva. In it he identified the movement's objective as Hindu sangathan, or the unification of Hindus. Hindu Nationalist ideology, as expounded by Savarkar, was first and foremost an ideology about building a modern nation-state in India, and as such focused on questions that a doctrine concerned with religious revivalism would have largely ignored. The principal issues of the day for Savarkar, as for Nehru, were the political representation of and relations among different groups, and how to promote economic development. Savarkar justified his answers on the grounds that they would further the

[515] THE CONSTITUTION (TWENTY-SIXTH AMENDMENT) ACT, 1971

strength and unity of the nation, rather than by appealing to religious values.[516] Traditionalism was the core of BJP's ideology right from the beginning and hence, the name 'Bharat' seemed rather suited to them, a symbol of infusion of national identity and a means of increasing national belongingness. The Hindu Nationalists believe that by creation of a common unity between people through the means of the name 'Bharat', they could reduce internal divisions between people in the country.

The Indian National Congress never changed its name to something more indigenous after the departure of the British and continued with the original name which it had acquired when it gained its form as a political association under the British. It believes that making a complete shift to the name Bharat would be greatly beneficial to the BJP in its electoral politics and hence is opposed to ending this dichotomy of names. Moreover, the rift here is not that of the left vs right as was the original meaning of these names. If the rift here was based on anything but a political strategy, the BJP, which is a rightist party would never have the Bharat in its name, and the same would be left for parties like the Communist Party.

V. SOCIO-ECONOMIC ORGINS

The India vs. Bharat debate began in the 1980s during the farmers movement undertaken by the Shetkari Sangathana in Maharashtra and was largely propagated by Sharad Joshi who was a farmers leader. The farmer's movement was an attempt to call out exploiters, who had been living off profits of the others, in both rural and urban scenarios. It was an attempt at a Marxian Revolution to overthrow the enemy and establish a new social order. The propagators of this movement believed that the differences in the Indian society had become so deep that there was huge gap between sections of society. The issue was clearly laid out by Vijay Parulkar in his book 'Yodh Shetkari'-

"When the English left in 1947, some cunning and self-interested people here began to think that though the English have gone, their place is still here - and we should fill it! There is no need to send raw materials to England. All the loot which the English stole, we should steal! Who is going to throw away this wonderful chance to loot the peasants! And then this cunning group -built up a second country like England on their own land. They built up mills and factories like those of Lancashire and Manchester in big cities like Bombay, Pune, Nasik and Jalgaon, and in this 'New

[516] ARUN R. SWAMY, *Ideology, Organization and Electoral Strategy of Hindu Nationalism: What's Religion Got to Do with It- Religious Radicalism and Security in South Asia* 78-79.

England' which we call 'India' - these 'Indians' continued to drink our blood on this very land in the same way the English used to exploit us. 'India' began to rule over 'Bharat' "[517]

Joshi from the beginning has posed the country side against the city, what he calls 'Bharat' against 'India', and defines all rural families, from agricultural labourers to rich farmers and land lords, as 'peasants' who have a basic unity of interest on the issue of higher prices for agricultural products. And he goes beyond this to take price as the key issue, one which can both unlock the door to the prosperity of the peasants and free the blocked and warped productive forces of the country for a new industrial and agricultural development.[518] Joshi majorly applies the same as used by the Third World countries in international platforms, this argument is that the industrialised world of the West seeks to exploit the poorer countries by encouraging unequal exchange of goods and depriving the ex-colonial countries of the profits they need to make to ensure their development. Similarly, the towns get their raw materials from villages at cheap rates, process them in their mills and make profits by selling them. This is a cycle of exploitation within the country itself.

Sharad Joshi's posing of the countryside against the city has become the ideology of the farmers' movement, and even though all the various bourgeois and left parties that have supported this movement in one way or another don't agree with all this, s4till they have gone along with two basic notions: that unequal terms of trade have indeed resulted in a significant exploitation of the rural sector, and that all those who own any amount of land do indeed have something significant in common as 'peasants' or 'farmers'.[519] This movement sought to create a new unity in rural classes against the urban society.

However, this initial argument was not without flaws. Joshi said in a speech, '"I'm really surprised when those people who throw away their money on the cinemas organise anti-price rise marches because the price of onions has risen! And once the march is over you can look at the cinema theatres again and see 'house full'" In attacking the cities, he forgets that the way of life in villages and cities is not the same and whilst their interests are contradictory, they are both also complementary to each

[517] VIJAY PARULKAR, YODH SHETKARI,.41
[518] Gail Omvedt, *Rasta Roko, Kulaks and the Left*, 16 Economic and Political Weekly, No. 48, 1937, 1939-1941 (Nov. 28, 1981).
[519] Gail Omvedt *supra* note 20.

other. The cities need the villages just as much as the villages need the cities. If cities did not exist, produce would not be bought from villages and if villages did not exist, the mills and factories of the cities would lay without work If anything is the need of the hour, it is unity between the two. And quite often, the government intervenes with a paternalist approach to ensure that both sides are on an equal footing. Consider a sugarcane farmer, for instance, whose crop remains viable only for only 24 hours post -harvest. At this point, the farmer is largely vulnerable as his crop only remains profitable for a very short amount of time and so, he must sell it to any buyer, irrespective of the price offered, who approaches him in that time frame. Here, government intervention in form of easy availability of freezing technology to ensure better retention of sucrose content in the sugarcane could help to put the producers and buyers at an equal footing. However, a more lasting solution would be to understand the importance of the producer for the buyer and the buyer for the producer. This realisation has already crept in slightly with a number of factories offering transportation services to their mills for the farmers so that the farmers do not have to worry about the efficient transfer of sugarcane from the field to the mills Often, lack of government intervention can result in best outcomes as parties on both sides work to choose the best outcome for themselves.

Also, in projecting the urban rural divide, Sharad Joshi forgets that there is no absence of exploitation in urban areas as well. He displays the urban areas as those of comfort, when this is not always true. The differences that exist in rural society exist in urban societies as well. Sharad Joshi and his colleagues speak of the cities as a whole rather than their rules, classes and systematically ignore the urban toiling masses. Their life is pictured as a comfortable one, their organisations are seen as self-interested, and their struggles are mocked.[520] The urban workers can organise themselves to achieve what they want, even earn higher wages than the farmers. However, this is not true. There is a clear inequality of opportunities available in towns and in villages but this gap is easily filled by migration. Also, not all classes in cities live comfortably. Often, migrant workers face great amount of social stigma and are disillusioned by the existence of big gaps between the have and have nots in the cities as well. This ideology ignores the reality that big cities like Mumbai also house slums like Dharavi, where the standard of living is very low, even lesser than that in the villages.

The realisation of this defect slowly led to a change in the debate. 'Bharat' included the footpath and slum-dwellers of the cities, while the 'peasant leaders' of the villages were part of 'India'. Sharad Joshi

[520] Gail Omvedt *supra* note 20.

himself conceded, "I have never said that the Bharat-India divide was a village-city one". Many left leaders had simplified this debate to become a one of village vs. city but the realities were much more complex. It was soon made clear that Sharad Joshi, and probably other theorists of the movement have never denied that there is inequality in the villages; they have only argued that the main exploiters of the peasants are the urban capitalists and the state, and that organised industrial workers-not unorganised workers-share in the profits of that exploitation.[521] The farmer's movement began to be identified as a movement for a second Independence, a movement calling out the Brown British who resided within the country itself. It did not however, ever attain a national character because the rural society in itself was divided into so called gentlemen farmers who were farming for profit and as a means of business and farm labourers for whom the farm was subsistence.

VI. SIGNIFICANCE OF THE DEBATE

It is true that our country is one of differences. These have existed since a long time and have only grown. An important facet of the India vs Bharat debate is the way in which it also depicts the capital intensive vs labour intensive debate. This has been greatly prominent in the textile sector in the rift between the handloom and power loom. The handloom employs a backward looking technology, but also acts as a source of instant employment. Earlier, it was the mills of Lancashire that were impeding the handloom sector which was a source of livelihood for the farmer of Varanasi or Kanpur, who had nothing to do in the off seasons of agriculture. Post-Independence, when power looms came to be set up in India itself, these farmers found themselves competing against their own industrialist brothers. These industrialists offered better quality, more uniformity, higher availability and cheaper prices. Moreover, their bulk production also enabled them to form international contacts. The handloom weavers still used traditional methods, their cost of production was high and they sold less as they produced less. They also had poorer access to international markets. This was a case of the infamous labour vs capital debate. India has no shortage of labour given its expanding population. But the pertinent policy question that faces the government is whether it is a good idea to promote only household industrialisation which does not help with aspirations of becoming an international superpower or improving economic growth or to promote rapid mass scale industrialisation which might initially harm small scale industries but will lead to a higher economic growth in the long which

[521] Gail Omvedt and Chetna Gall, '*Ideology for Provincial Propertied Class'?'*, 22 Economic and Political Weekly No. 45, 1925, 1926 (Nov. 7, 1987).

can be expected to increase employment and make up for the initial unemployment caused. In case of power-looms, one can expect that this stage has not come yet; the initial round of unemployment is still a cause of distress. At the same time, the shift to power looms cannot be complete because of traditional reasons. Certain sarees and fabrics are produced in handlooms only and this is what makes them distinctive, adding to their beauty and value. This, symbolically displays that the dichotomy between labour and capital can never be resolved, and must only be embraced. The labour units can be better utilised if put to task in jobs which cannot be mastered by machines. Here, their efficiency will be higher and greater output can be achieved. Workshops can be set up to properly conduct handloom works for sarees like the Paithani, whose beauty lies in the hands of the maker. If handloom works are properly organized and made into community works rather than individual household industries, they can help preserve the Bharat within the India.

One also needs to understand that agriculture and industry are deeply related. It is impossible to make a case for the survival of one without the other. If our farmers suffer, our industrialisation suffers too. And our industrialisation can help farmers as well. In the words of T.W. Schultz, "Few scientists think of agriculture as the chief, or the model science. Many indeed do not consider it a science at all. Yet it was the first science - the mother of all sciences; it remains the science which makes human life possible; and it may be that, before the century is over, the success or failure of science as a whole will be judged by the success or failure of agriculture." For a country like India, this realisation is extremely important and must sink in. Understanding agriculture can help bridge the gap between villages and cities. Mahatama Gandhi believed truly that the future of India lay in its villages.

It is high time that there is development of innovative practices to ensure agricultural growth and its coexistence with industrial development. Theodore Schultz was right in examining the economics of agriculture. Most of the world's poor people earn their living from agriculture, so if we knew the economics of agriculture, we would know much of the economics of being poor. Given the fact that India has been plagued with poverty for years, improving the occupation that brings home the bread of a large section of these poor people is of great importance.

An excellent example is of how fertilisers help farmers grow crops. The fertilizer sector has been reforming itself through industrialisation to help the poor farmer. Since 2014, important reforms have been implemented in the fertiliser sector. These include the neem-coating of urea, which has likely reduced the diversion of fertiliser meant for Indian farmers; and gas-pooling, which should increase

efficiency of domestic urea production. Both steps should help small farmers by improving their access to low cost fertiliser. They will also provide good building blocks for further fertiliser sector reform.[522] Here is a clear example of how industrial growth can give back to the agricultural sector; how it does not necessarily have to be a choice between the two when there can be space for coexistence. Similarly, there has also been an emergence of genetically modified crops. These can withstand severe conditions and made suitable to the taste and preferences of the consumers. Their hardiness makes them beneficial to farmers. New research in the field of agriculture can promote use of technology to ensure efficiency. India's National Agricultural Research System (NARS) (comprising the Indian Council of Agricultural Research (ICAR), other central research institutes, and national research centres set up by ICAR), together with agriculture research universities played a key role in the Green revolution. In more recent years, however, agriculture research has been plagued by severe under investment and neglect. The system has been sapped by a number of weaknesses. One, in states where agriculture is relatively more important (as measured by their share of agriculture in state GDP), agriculture education is especially weak if measured by the number of students enrolled in agricultural universities. This is especially true in states in the Northern (except Punjab and Haryana) and Eastern regions. The agriculture universities have been plagued by: (i) resource crunch, (ii) difficulty in attracting talented faculty, (iii) limited linkages and collaborations with international counterparts, (iv) weakening of the lab-to-land connect; and, (v) lack of innovation[523]. Most people who study agricultural science do not actually engage in farming while those who do engage in farming lack knowledge of the science itself. Ideas like Kisaan Call Centres are expected to help in dissemination of technological and scientific knowledge to farmers to ensure better output. Second, investment in public agricultural research in India needs to be augmented. Given the large externalities, the centre needs to play a more important role. India's current spending on agriculture research is considerably below that of China and as a share of agriculture GDP even less than that of Bangladesh and Indonesia.[524] Agricultural research can, not only help in enhancing productivity but also in ensuring that a more positive attitude towards urbanisation and industrialisation within agriculture. Developed countries have already implemented agricultural practices which have been made more efficient by means of industrial assistance in the form of manufactured seeds or high scale machines. This has also benefitted smaller farmers who cannot afford such technology in an indirect but positive way. This

[522] ECONOMIC SURVEY, 2016, 130.
[523] ECONOMIC SURVEY, 2016, 78
[524] ECONOMIC SURVEY, 2016, 78

has increased relevance of these local farmers as many better off people wish to buy organically grown vegetables which are bred in traditionalist patterns. Smaller local farmers sell their organic produce at higher prices, whilst the bigger farmers produce more with technology and industrial processes and acquire a higher profit margin, everyone is a winner. Traditionalist approaches get the importance and credit they deserve and those who cannot afford to shift to more modern formats find themselves shrinking in numbers if technology is made affordable and available.

Also, to bridge the gap between villages and cities, it becomes necessary to empower the villages. The rural and urban ways of life are different but they cannot be placed in a hierarchy, both need to be given due respect. Equalising the standard of conduct between and within villages and cities could help reduce large scale migrations as well as the negativity associated with certain ways of life. The truth is that it is human beings who toil in fields and it is human beings who toil in farms, human beings who breathe the city air and those who breathe village air. Before being Bharateyis or Indians, we are people first, and in that sense, our priority should be to end exploitation everywhere-to create jobs, to ensure better health, well-being and safety. To ensure these facilities for all is to create a level field, to make sure that an education in a city or a village is the same, to ensure that the sons of farmers can become industrialists and sons of industrialists can become farmers, to promote better informed practices in both spheres can improve growth in both. A farmer with a full stomach can openly negotiate prices with city-men without pressure of his growling stomach to take the first price he is offered. The industrial worker who has a minimum standard of living guaranteed to him will be less subject to exploitation. Classes can come closer to each other, only with support. Since ages, they have drifted apart as each has been in pursuit of individual goals and aims, gaps have only grown in a country like India, there are a large number of rural and urban workers and a large number of owners. There exist high rise skyscrapers overlooking slums. Such is the irony of our country. A debate over the name of this land is futile- what is beneficial for our future is understanding that whether it be Bharat or India, this land is ours. It is born of the sacrifices of our forefathers, and it belongs to each of us equally. Our policies must be drafted keeping a holistic view of society in mind. They must reflect our differences Consider the stand taken by India at the WTO with regard to agricultural agreements. It was not India or Bharat which stood up for its farmers and stared the developed countries of the world in their face, it was a country that cared about its citizens. There is no easy solution to ending the gaps in our society, any bridge built will have flaws, but the urban society and the rural must understand each other through interaction. Children of the cities must be exposed to their rural

brothers and sisters, whilst those born in villages must glimpse the cities. After all, village or city does not matter; it must all be the same. This is not a debate of modernisation vs. backward looking techniques. In fact, it must not be a debate at all. It should be a search for reconciliation. Countries like China opened up their economies slowly; similarly our doors to modernisation can be opened at a slow pace, upon conviction that this is beneficial to all. The debate over the name of the country is simply frivolous, but the unification of the ideologies it represents, to ensure welfare, is essential. This unification can only be brought about through the sensitivity of policy makers to problems, even those which are not before their eyes, as policy is biggest instrument for change in a democracy.

GOODS AND SERVICES TAX: A ROADMAP TOWARDS IMPROVING THE LOGISTIC INDUSTRY

Author(s): Harshil Patel[525]

ABSTRACT

The logistics industry in India amounts to 13% of the total Gross Domestic Product of the country and is worth more than $130 billion. The industry is predicted to grow steadily due the different initiatives undertaken by the NDA government, like, the Make in India programme, 100% Foreign Direct Investment in warehouses, National Integrated Logistic Policy and the proposed Goods and Services Tax implementation. The proposed dual Goods and Services Tax model plans to unify the state and federal taxes and tariffs for a single tax at the point of sale. It is proposed according to some estimates that the introduction of Goods and Services Tax will increase the Gross Domestic Product of India by 2%.

Transportation of goods amounts to 60% of the Logistic industry and the rest 40% are warehousing, freight forwarding, values added logistics, etc. In the cases of warehouses, due to the present taxation method, the companies are forced to have warehouses in each state which makes the supply chain longer and inefficient. And as long as the logistic time is concerned, 30% to 40% of the time on logistic is wasted by local body taxes, entry taxes, etc.

The main purpose of this research paper is to illustrate the implementation of Goods and Services Tax on the Logistic industry and to capture the impact of Goods and Services Tax on Logistic industry and to answer the question that how the proposed tax regime will help to bring down the cost of logistics in the country and increase the efficiency of the industry.

For the purpose of this research paper secondary data has been used from different newspaper articles, books, and websites.

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I. INTRODUCTION

Goods and Services Tax (GST) is the biggest economic reform in the country after the opening up of the economy in 1991, which was introduced because of the balance of payments crises. It is planned with the implementation with GST, the present multiple indirect taxes levied by both Central (i.e. Excise duty, Service tax) and State (Value-added tax, Octroi and Entry tax, etc.) governments would get colligate, when an end-user will purchase goods or services. This means the same percentage of taxation would be levied on a specific product or service across the entire country irrespective of where it has been manufactured or sold.

The introduction of Goods and Services tax is going to play a significant role in the indirect taxation reforms. The Goods and Services tax Bill proposes a dual GST model (Central GST and State GST) which aims to replace 29 State and Central taxes for a single tax regime at the point of sale. This step has been taken to mitigate the cascading effect caused due to multiple indirect taxes.

At present, every state in the country levies tax on the goods that move across their border at different rates. Because of which, the freight that moves from say, Gujarat to Assam would be taxed multiple times.

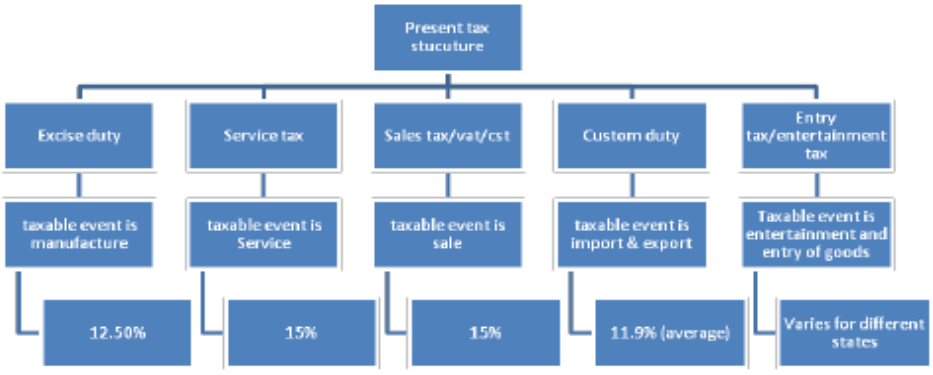

Chart 1: Present tax structure[526]

[526] Care Rating Professional Risk Opinion, *Impact of proposed GST on Indian Logistics Industry*, July 11, 2016.

From the implementation of the Goods and Services tax, the cascading effect, complex tax structure, administration expense would be mitigated and uniform tax rate would be applicable all over the country. In the case of Intra State taxable supply, Central Goods and Services tax (CGST) for, Excise and Service tax and State Goods and Services tax (SGST) for, local Value Added Tax & other taxes would be applicable.

Whereas, in the case of Inter State taxable supply, Central Sales Tax which presently deals with inter-state transactions would then be known as the Integrated Goods and Services tax (IGST). It will be an aggregate of CGST and SGST.

The following table explains the same.

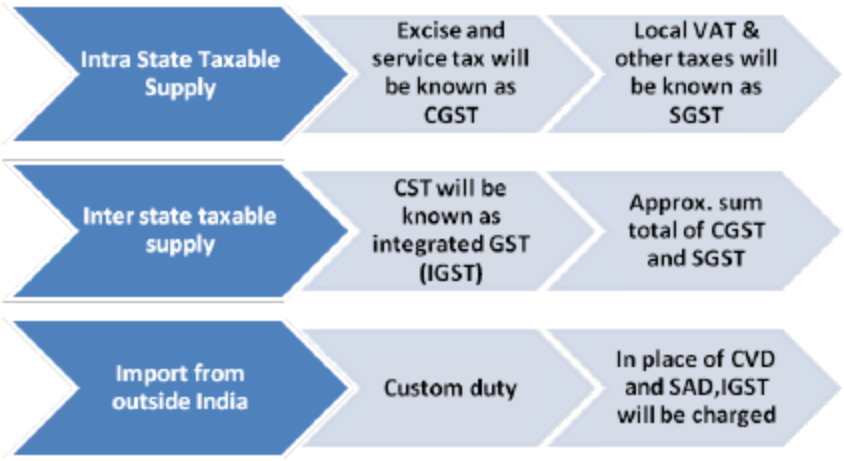

Chart 2: Post-GST Indirect tax structure [527]

Steps towards GST

Keeping in step with the technological revolution, path-breaking recommendations for a modern tax administration and for the introduction of a Goods and Services Tax (GST) were presented by Vijay

[527] Care Rating Professional Risk Opinion, *Impact of proposed GST on Indian Logistics Industry*, July 11, 2016.

Kelkar in his *Reports of the Task Forces on Direct and Indirect Taxes* (2002)[528], and in *Implementation of the Fiscal Responsibility and Budget Management Act, 2003 (2004)*.[529]

The Union Finance Minister announced in his budget speech of 2007-08 that the Goods and Services Tax (GST) would be introduced by 2010. The proposed GST will replace the existing Central Value Added Tax and Service tax levied by the Central Government and the State Value Added Tax levied by the State Governments.

To pave the way for the introduction of GST, the Empowered Committee (EC) appointed a Joint Working Group (JWG) on GST consisting of four Joint Secretaries from the Central Government and Secretaries/ Principal Secretaries of Finance/Taxation of the States as its members , and with Advisers to the Union Finance Minister and Member Secretary (EC) as the Co-conveners. Additional Secretary (Revenue), Ministry of Finance; Adviser (Financial Resources), Planning Commission; Commissioner, Central Board of Excise and Customs (Service Tax); and Director (Sales Tax), Department of Revenue, Ministry of Finance, were requested to join the deliberations of the JWG as special invitees. The JWG constituted three Sub-Working Groups to facilitate in –depth discussions. These were also assigned the following tasks, viz. to identify the Central and State taxes which possess properties to be appropriately subsumed under GST; to identify the possible alternative models for introduction of GST in India; examine the various characteristics of each alternative GST model and its suitability to India's fiscal federal context; to suggest base and rate structure of GST; to identify and seek solutions to the problems faced during inter-State transactions; and the treatment to be given to exempted goods and services and non-VAT items (such as petroleum goods and alcohol) under the new GST regime. The JWG submitted its Report to the EC in November 2007.[530]

[528] Ministry of Finance (2002), *Report of the Task Force on Direct Taxes*, Government of India, New Delhi.
[529] Ministry of Finance (2004), *Report of the Task Force on Implementation of the Fiscal Responsibility And Budget Management Act, 2003*, Government of India, New Delhi.
[530] Empowered Committee (2007), *Report of the Joint Working Group on Goods and Services Tax*, New Delhi.

Based on the recommendations of the JWG, the EC submitted its findings to the Government of India on April 30, 2008. The recommendations of the EC, as communicated to the Government of India, are documented in a booklet titled A Model and Road Map for Goods and Services Tax in India.[531] As per these recommendations of the EC, broadly speaking, the proposed structure of GST will have two components –Central GST (levied by the Centre) and State GST (levied by the States).

For this the timeline prepared by the Joint Working Group was:

- Final draft was to be sent to the government by January 2008;
- Central government had to adopt the draft report by February 2008;
- Needed amendments were to be made in the constitution by February 2009;
- Preparation for the implementation of the new regime was to be made by both the central and the state government by March 2009;
- Legislative steps were to be taken before March 2010;
- Finally the dual-GST was to come into force from April 2010.

But clearly the schedule was not followed. And in order to amend the Constitution, the 115th Constitutional Amendment Bill was introduced in the Lok Sabha in 2011. The Bill was then submitted to the Standing Committee and the report from them was received on August 2013.

However, the 115th Constitutional Amendment Bill, was lapsed because of the dissolution of the UPA government in 2014. With the newly elected NDA government, the bill was again introduce in the lower house of the parliament as the 122th Constitutional Amendment Bill and this time on May 6, 2015 the bill was passed and was then sent to the upper house. Later on the Rajya Sabha with some amendments passed the bill on August 3, 2016 and on August 8, 2016 the Lok Sabha accepted the

[531] Empowered Committee (2008), *A Model and Road Map for Goods and Services Tax in India,* New Delhi.

amendments[532] and the 101st Constitutional Amendment Act came into force, with amendment in Article 248, 249, 250, 268, 270, 271, 286, 366, 368, sixth schedule, seventh schedule and deletion of Article 268A.[533]

II. LOGISTICS INDUSTRY: OVERVIEW

The aim of Logistics industry is to have an effective freight transportation or timely movement of goods from one place to another. The Indian logistics industry comprises three segments the first being, transportation of goods via different modes of transportation i.e. road, rail, air and water, the second being, warehousing and the third being, other value added services like third party logistics. The contribution of transportation and warehousing revenue towards the total industry's revenue is more than 90 percent. As far as, transportation is concerned freight transportation via road dominates the transport mix and amounts to about 60 percent of the total quantity of fright traffic in India. Whereas, rail and coastal shipping is concerned it amounts to 32 percent and 7 percent respectively and share of airways transportation amounts to 1 percent.

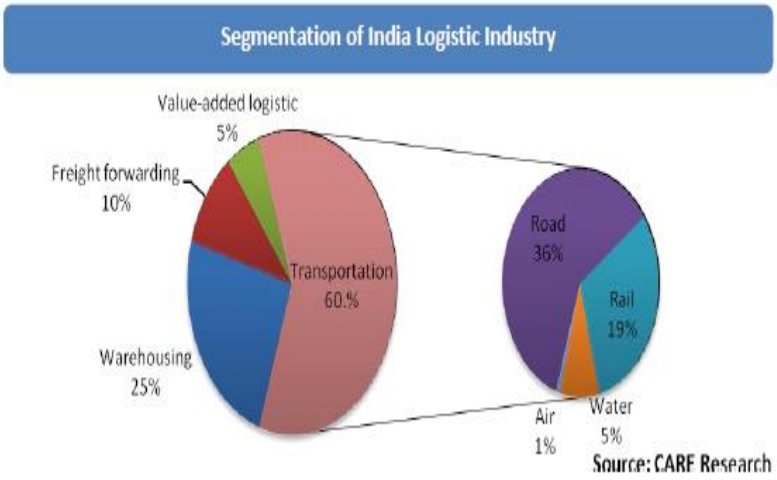

Chart 3: Segmentation of Indian Logistics Industry[534]

[532] IANS, *Timeline: long journey of GST Bill*, Business Standard, August 3, 2016, New Delhi.
[533] http://www.ndtv.com/india-news/president-pranab-mukherjee-approves-goods-and-services-tax-bill-1456189?pfrom=home-lateststories (last accessed at 15th December 2016, 7:57 PM).
[534] Supra Note 2

Over the past 10 years, the economic size of India has nearly increased by 200 percent. The market value of logistics industry is estimated to be around $307 billion by 2020, Mr Ram Kripal Yadav, Minister of State for Drinking Water & Sanitation quoted.[535]

The Indian Logistics industry is expected to grow steadily, for the following reasons:

- Penetration of e-commerce;
- Economy revival;
- Proposed GST implementation and;
- Government initiatives like:
    a) Make in India;
    b) 100% FDI in warehouses;
    c) Food storage facilities etc.

The expenditure on logistics in India is estimated to be around 14.4% of its GDP, higher than US (10 percent), Europe (11 percent) and Japan (10 percent).[536]

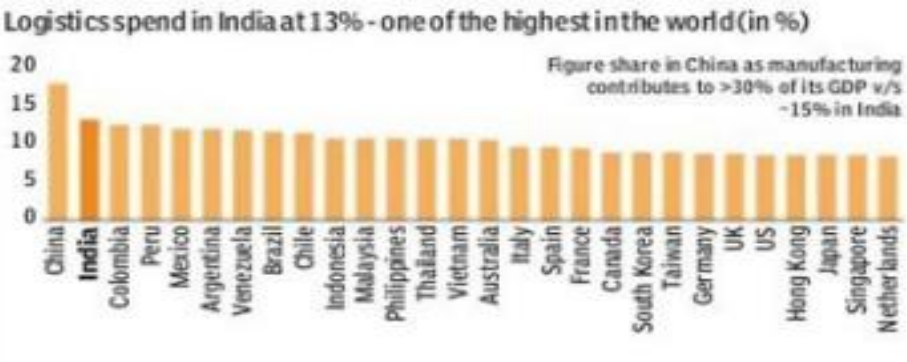

Chart 4: Annual Expenditure on Logistics by different countries[537]

[535] Ram Kripal Yaday, *Indian logistics market to touch US$ 307 billion by 2020*, Businnes Standard, May 5, 2016.
[536] http://www.tcil.com/tcil/pdf/print/Current_Statuse_of_the_logistics_industry.pdf (last accessed at 15th December 2016, 8:04 PM).
[537] FE Bureau, *Logistics set for rapid growth*, The Financial Express, March 18, 2015.

III. IMPACT OF GST ON LOGISTICS INDUSTRY

Logistics industry is anticipated to develop at a Compounded Annual Growth Rate of 15-20 percent from 2016 to 2020, which is further projected to gloat if the proposed Goods and Services Tax is implemented from this year, which can reduce the logistics expenses by almost 20 percent, says a report via Care Rating.[538]

With the implementation of the Goods and Services tax, the percentage of taxation that would be levied on a specific product or service across the entire country would be the same, irrespective of where it has been manufactured or sold. Because of which there will be a direct impact on different industries, especially the logistics industry. Till now, there was no uniform taxation system in the country, because of which the problem of double-taxation frequently occurred. With the one nation one tax GST structure, it can be said without a doubt that the costs related to freight transportation and warehousing are going to decrease drastically. It will also decrease the time consuming long queues at border check-points.[539] The adjustments in the proposed indirect tax system could diminish transportation process durations, upgrade inventory network choices, prompt to consolidation of warehouses,[540] and so on the usage will decrease costs as tax collection will be done at a national level and not by every state

At present the logistics expense in India is almost 14 percent of the total value of the goods as compared to 7-8 percent in the developed countries.[541]

Companies dealing with logistics operate with different features, like, "Only Supply" or "Supply + Warehousing" or "Supply + Warehouse + Manufacturing". With all the different features one thing common between these companies is the feature of "supply of goods". As per the present tax

[538] PTI, GST can lower cost of logistics industry by 20 percent, The Hindu, July 17, 2016, Mumbai.
[539] Ibid.
[540] Pratik Shah & Jigar Doshi, *GST: Impact on the logistics Industry*, CNBC the Firm, September 3, 2015.
[541] Madhav Mohan, *Benefits of GST for logistics Industry in 2016, IT Roadmap, January 28, 2016.*

structure, taxable event would be either manufacture, sale or service. Whereas, with the implementation of GST the taxable event will only be the event of supply.

From an overview of Goods and Services Tax Bill it can be stated that every supply from say, Gujarat to Assam could be taxed under the proposed bill as the event would come under supply of goods. In the same way, if there is a warehouse between Gujarat and Assam, and the goods are stored their temporarily, then that can also be said as a taxable event.

Also, a classification to clearly differentiate between the 'activity of providing courier services' and 'activity of supplying of goods' would be welcomed.

Interstate tax burden

As per the current tax structure, each of India's 29 states levies different rates of indirect taxes on goods that move across their borders. Because of which problems like double taxation, unnecessary administrative expenses, complexities in the market are prevalent.

To curb these problems, the implementation of the Goods and Services Tax is needed. With the GST in force, the multiple tax rates will be abolished and a uniform one nation one tax would be followed as proposed by the GST council. Following the uniform taxation structure, the problems of double taxation, unnecessary administrative expenses will be avoided.

Other problem due to the present tax structure is that trucks lie idle for 30-40 percent of the day, due to trade barriers such as, local body tax, Octroi, entry tax, etc. With the introduction of GST, logistics companies would be able to deliver goods in a more efficient and optimal manner as compared to the present.

With GST it is expected that the uniform one nation one tax would bring down the logistic cost during goods transportation by 1.5-2 percent of sales because of warehouse optimisation and lower inventory cost.[542]

Impact on Warehousing

Warehouses play a vital role in the operations of a business. Places where warehouses should be established, also affect the business's strategic business plan. Establishment of warehouses in different states also affect the logistics cost.

Presently, one way of doing so is having multiple warehouses in different states. Having multiple warehouses in different states would help in intra-state sale of goods. Usually in case of Intra-state sale, Central Sales Tax is applicable. But if the logistics company has a warehouse in the state where it intends to make a sale, then the company would be able to show the sale of goods as mere a stock transfer, which would not be a taxable event under Central Sales Tax, 1956. However, with the Goods and Services tax coming in force, the markets in India would become a common market without having any difference between inter-state or intra state sale, making both the transactions a taxable event under GST.

Thus, having multiple warehouses in different states to evade taxes would become ineffective, after the GST is implemented. Leading to reduction of logistic costs. [543]

Impact on e-commerce

The growth of e-commerce industry in the country is rapid and is expected that its market values will be worth $220 billion by the year 2025. Some of the factors which will affect the success of the industry are speedy delivery of goods and the quality of product, thus making efficient logistics a key component for the success of the e-commerce industry.

[542] Supra Note 7.
[543] Supra Note 9

Steps like, collaboration between e-commerce companies and logistics providers, 24/7 parcel pick-up and drop destination and vehicle tracking would be some of the logistics industries recent developments which would be helpful in the development of the e-commerce industry.[544] However, the proposed GST law binds a lot of compliance burden on the emerging e-commerce industry.[545]

Goods Transport Agency vs. Courier Services

The perennial question among different logistics specialist co-ops is to whether classify themselves and their administrations under the pail of Goods Transport Agency or Courier Services. Even though both the heads come inside the services tax regime, the complex Central Value Added Taxes Credit rules and procedures would be applicable on Goods Transport Agency, which in turn may influence service providers to avoid classifying themselves as Goods Transport Agency. In additions, the necessity of issuing a consignment note and applicability of the reverse charge mechanism for payment of service tax are differentiating factors pertaining to Goods Transport Agency.

The transport industry additionally appreciates a few edges/exclusions, which should be possible away with the GST regime keeping in mind the end goal to address the significant service related issues. It is expected that these classification of issues may not proceed under the GST and a consistent flow using a loan would be allowed in the whole supply chain.

IV. CONCLUSION

With Goods and Services tax coming in force, the multiple tax structure will be abolished and a uniform tax structure will be introduced. Leading to decrease in the problems which were prevalent because of the multiple tax structure. The introduction of GST will not only affect the Logistics industry but the country's economy as a whole.

[544] Adam Robinson, *3 logistics industry trends for 2016,* Cerasis, January 14, 2016.
[545] Kunal Wadhwa, *Impact of GST on E-commerce sector,* ET Retail, September 5, 2016.

The implementation of GST will prompt companies to have less number of large warehouses to decrease their logistics cost. The logistics industry is as such expected to grow at a Compounded Annual Growth Rate of 15-20 percent from 2015 to 2020. The reasons behind such rapid growth is: the penetration of e-commerce; economy revival; proposed GST implementation and; Government initiatives like: Make in India; 100% FDI in warehouses; Food storage facilities etc. Even though with a government having a vision of development, the logistics industry may however take a hit after the decision on demonetisation and affect the industries growth rate.

AFFORDABLE HOUSING

Author(s): Prasad Hegde[546]

ABSTRACT

Even after 69 years of Indian Independence housing for all remains a challenging task for the governments. This shelter problem especially for the poor has multiplied due to the continuous migration of people from the rural areas to the urban areas. There are several housing shortages in India with the demand-supply gap increasing daily. The present NDA Government and previous UPA Governments have taken measure such as Rajiv Awas Yojana, Indira Awas Yojana and the present govt. has started the scheme 'Housing for All' which is expected to be achieved by 2022. It is too early to decide whether these projects are going to solve this huge problem which India is facing. This paper will critically analyse the efficacy of these policies from the policy point of view in being able to provide those sections of the population with housing who are unable to avail of this facility from the formal housing market. More importantly, it will address the reasons why housing has become a lot more expensive which in turn has taken away value from customers. This paper also tries to identify the different stakeholders and their roles and responsibilities and how they have performed over the past few years. It also establishes the relationship between housing and other important aspects of the economy such as GDP, Employment etc. This paper also tries to analyse the outcomes of the fact that 99% of houses are to be built for the lower income group people and if the goal is not achieved within the given time frame then the consequences can be harmful to the economy. It also tries to show the effects of demonetisation of the currency on the real estate market and affordable housing. Based on the learning from how these problems have been solved in different countries the paper tries to provide feasible solutions to this problem.

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I. INTRODUCTION

Housing is an important engine for the growth and development of the country. Safe and secure housing implies a better community and a better civil society. The housing sector is linked to a lot of industries such as furniture industry, real estate, property industry etc. A major contributor to the present economic growth is investment in housing. It is a key part of the economic, civic and social development and governments are taking measures to deal with this problem effectively. After agriculture, housing is the second largest employer in India. The sector provides jobs to almost 33 million people[547]. It is also estimated that the industry will increase employment opportunities both in the labour sector as well as in the real estate sector to almost 83 Million persons by 2022[548]. The housing sector has its own Macroeconomic effects such as CPI, Interest Rates, Wealth effects on spending levels and multiplier effects from the employment sector too[549].

Housing loans have remained at 7 Per Cent of the GDP which is significantly low. It is a clear indication of the deeper penetration which is possible in this sector. The mortgage to the GDP Ratio is likely to increase with the increasing economies of scale. The Stakeholders in this sector have to be patient and quick to respond to the changes which the market can face in the future such as changes in the economic cycle and even changes in policy and even land acquisition might play a role[550].

But Housing still remains an onerous problem in India despite it being a Constitutional right available to the citizens. As Per the 2011 census the country had a population of 1,210.98 million out of which 377.10 million people lived in urban settlements[551]. During 2001-11 the rate of urban population grew

[547] Economic Survey 2010-12: Report on service sector.
[548] Economic survey 2010-2012: Report on Service Sector.
[549] National Housing Bank, *Report on trend and progress of housing in India,* 119, 120(2012), http://nhb.org.in/Publications/Report-Trend-and-Progress-of-Housing-in-India-2012.pdf.
[550] RBI, Annual Reports of mortgage lenders and ICRA report on Housing Finance Companies and the Indian Mortgage Finance Market.
[551] CENSUS INDIA, http://censusindia.gov.in/Census_Data_2001/India_at_glance/rural.aspx (Last visited Dec. 1, 2016).

at a rate of 2.8% from 27.81% to 31.16%[552]. The increasing concentration of people in urban areas has led to large scale problems of land shortage and housing shortfall. As per the 2011 census the housing stock in urban India stood at 78.48 million for 78.86 million households in urban areas[553]. The shortage is prominent among the economically weaker sections and the lower income group people as it is estimated that the shortage of housing will be close to 34.10 million households by 2022[554]. Given the scenario, it becomes necessary to fill in these gaps and for achieving this task the real estate sector can play a pivotal role in urban development but cost pressures are causing a problem for these real estate builders which is causing a further increase in the gap. Though the gap between them is shrinking, the core issue is that the present houses are not in a good condition and are not suitable for people in the urban households to stay. The houses are in a dilapidated condition and many people live in congested dwellings. Urbanisation has led to the people living in slums and unorganised settlements which has degraded the housing conditions of the economically weaker sections of society. In the given scenario millions of houses are to be built within a particular time frame and about 99% of the houses are to be built for the economically weaker sections of the society[555] and it is expected that the problem of housing will increase rapidly by the end of this decade because it is estimated that about 40% of the Indian population will reside in urban areas by 2020 and this is expected to increase to 50% by 2050. Ultimately the people who are affected are the economically weaker sections of the society because of the ever-increasing prices of land, the real estate business in urban India and the ever-increasing gap between the demand and supply of houses.

[552] CENSUS INDIA, http://censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter3.pdf (Last visited on Dec. 1, 2016).
[553] CENSUS INDIA, http://censusindia.gov.in/Tables_Published/H-Series/H-Series_link/S00-005.pdf (Last visited on Dec. 1, 2016).
[554] Economic Times & RNCOS, http://economictimes.indiatimes.com/wealth/personal-finance-news/urban-housing-shortage-to-touch-3-4-crore-units-by-2022-rncos/articleshow/46262427.cms (Last Visited on Dec. 14, 2016).
[555] National Housing Bank, *Report on trend and progress of housing in India*, 119, 120(2012), http://nhb.org.in/Publications/Report-Trend-and-Progress-of-Housing-in-India-2012.pdf.

Consequentially it has forced the poor people to occupy marginal housing lands with poor and outdated housing stock. It has to be noted that housing plays a very important role in National Economic Competitiveness[556]. This paper tries to depict the problems of affordable housing in India and the measures taken in the past and present regarding this problem and tries to put forward certain viable solutions for the problem keeping in view the shortage of time and ever-increasing population of the urban areas. This paper also tries to assess the schemes initiated by the present as well as the previous governments such as the Housing for All by 2022 and Rajiv Awas Yojana Scheme, and tries to bring out the main finding that severe deformity regarding land use and allocation and the limitation in the framework of the nation's policies have reduced the concept of affordability to a certain extent. It also tries to put forward an analogy that the success in the field of housing in other countries have been achieved through government commitment through public housing and efficient measures to reduce the price of land.

II. FIVE YEAR PLANS AND HOUSING

Housing is one such sector which has had a low priority since the post-independence era. Since India was a closed economy the government focused on the capital market sector because it was of the view that the country could develop by increasing the investment in the capital goods and the infrastructure sector rather than the housing sector which was a necessity at that point of time because of the growing concentration of people in urban areas due to the partition[557]. Being a final goods sector (Housing Sector) whose consumption if reduced could enhance the supply of the saving outflow from the household sector many of the state-owned development finance institutions were restricted to lend

[556] Ernst and Young, *The Growing concern of affordable housing concern in MENA* (2012), 3, 4(2012), http://www.ey.com/Publication/vwLUAssets/The_growing_crisis_of_affordable_housing_in_MENA/$File/The_growing_crisis_of_affordable_housing_in_MENA.pdf.

[557] PLANNING COMMISSION, http://planningcommission.nic.in/plans/planrel/fiveyr/1st/1planch4.html (Last Visited on Dec. 2, 2016). The chart shows the budget allocation for different sectors and also the huge difference between the focus on housing sector when compared with the capital market sector.

for the growth of the housing sector. It was only in the 1980's HDFC and LIC started funding housing projects. Even HUDCO did not have a positive approach towards affordable housing.

During the first five year plan a sharp turn was visible in the Union Govt. Policy. The first five-year plan laid the steps for national housing programs and focused on housing for plantation and mine workers *in toto* the lower income group people. The 1st Five-year plan called 'Slums' a national problem and called for its immediate demolition but it soon realised that it neither had the monetary capacity nor the institutional capacity to achieve this task. Consequentially the 2nd Five-year plan took up the task of improving these slums so that they become a place of habitat at least for a temporary period of time. The second five-year plan focused not only on the housing for the lower income group people but also on the housing facilities for the middle-class people which later on proved to be costly[558]. The early plans also laid the foundation for an institutional framework so that the govt. could deliver decent housing to economically backward people. Hence, the govt. advocated the creation of the National Housing Board and even the Town and Country planning organisation came into existence. Various organisations of the same type were established in the state levels too. The main objective of these boards was providing housing facilities for the people with special focus on the economically backward people. But later the government realised that housing for all was a very huge task so the government changed its policy and focussed on providing housing facilities to lower income group people and other sections of society were encouraged to take it up on their own with limited support from the government. Clearance of slums was also a huge task so the govt. realised it was not possible because it was of the view that demolition of slums will lead to the creation of new slums again. The main reasons why these policies of the governments were not successful was because of lack of investment,

[558] PLANNING COMMISSION, http://planningcommission.nic.in/plans/planrel/fiveyr/2nd/2planch26.html (Last Visited on Dec. 2, 2016). For further details about the approach undertaken by the Govt. in the 1st and 2nd five-year plan with respect to affordable housing for the lower and the economically backward people.

improper approach adopted by the bodies established for providing housing, the Indian economy was a closed economy so this also might have caused problems for investment, growing slums in urban areas, non-availability of land and ineffective land management, and excessive focus on the capital market sector and less focus on the Housing sector which was a necessity at that point of time.

All that was just history with the liberalisation policy being implemented by the Narasimhan Rao Government in 1991-92/1992-93 which provided banks and other financial institutions with the freedom to lend loans to medium sized households as well as for real estate groups and other builders to finance their construction. The Indian economy in the year 2003-2008 experienced a high growth rate of 8.5% which happened mostly due to the investment in housing. But still the problem of affordable housing exists and this sector has consumed a lot of public resources but has proved inadequate to fulfil the needs of lower income group people and achieve the goals of the affordable housing schemes.

III. THE CONCEPT OF AFFORDABLE HOUSING AND ITS SHORTAGE

India is witnessing rapid urbanization. According to a NSSO report, the urban population is increasing by about 3% every year due to large scale migration from rural areas to urban areas (Reason being in search of jobs). Especially when the EWS or LIG sections migrate, housing is a big burden and more importantly affordability becomes a big issue because of their low level of income.

The term affordable is prone to subjective interpretation. The interpretation is dependent on the different classes of people i.e. EWS, LIG and the middle class and higher income group people. Defining Affordable housing helps to create targeted policies aimed at making finance more accessible, provide interest rate subsidies and being in par with infrastructure financing.

- According to the KPMG Report on affordable housing, Affordable housing is defined in three main parameters namely Income Level, Size of dwelling unit and affordability. The first two parameters are independent in nature but the third parameter is correlated to Income and property prices.

	INCOME LEVEL (PER ANNUM) (INR)	SIZE OF DWELLING UNIT	AFFORDABILITY
EWS	<1.5 LAKHS	Upto 300 sq. ft.	EMI TO Monthly income: 30% to 40% Housing price to annual income ratio: Less than 5:1
LIG	1.5–3 LAKHS	300-600 sq. ft.	
MIG	3-10 LAKHA	600-1200 sq. ft.	

Source: KPMG Report, 2011

- According to RICS Report on marking urban housing work in India the term means adequate shelter on a sustained basis ensuring security within the means of common urban household. It also states that affordable housing means providing housing facility to those who are not able to avail this facility through the open market due to any reason and even to the EWS and LIG people
- According to the Task Force on Affordable housing setup by the MHUPA in 2008, affordable housing is defined by the size of the residing units and affordability is derived from the Income of the household.

	SIZE	COST	EMI or RENT
EWS	300-600 sq. ft. Carpet area	Not exceeding four times of the household gross annual income.	Not exceeding 30% of the gross monthly income of the buyer.
MIG	Not exceeding carpet area of 1200 sq. ft.	Not exceeding five times of the household gross national income.	Not exceeding 40% of the gross monthly income of the buyer.

Source: Task force on affordable housing, MHUPA, 2008.

- The JNNURM Mission directorate of MHUPA has also defined housing in its guidelines issued in December, 2011.

	SIZE	EMI or RENT
EWS	1) Minimum of 300 sq. ft. super built-up area 2) Minimum of 269 sq. ft. carpet area.	Not Exceeding 30-40% of the gross monthly income of the buyer.
LIG	1) Minimum of 500 sq. ft. super built-up area 2) Maximum of 517 sq. ft. carpet area.	
MIG	1) 600-1200 sq. ft. Super built-up area 2) Maximum of 861 sq. ft. carpet area.	

Source: Guidelines for affordable housing in partnership, MHUPA, 2011

The Technical group on urban housing shortage for the 12th Five-year plan has defined affordable housing on the following 4 terms:

- Excess of households over the acceptable housing stock
- Total No. of extra house needed due to congestion
- Total No. of extra houses needed due to obsolescence
- Total no. of Katcha houses to be upgraded in terms of technology.

This classification is not the effective demand for housing. It just merely says from the "Need Based" perspective and does not say from the effective demand perspective. If the effective demand perspective is considered, then the exact figures stand at 19 Million units as per census 2011.

Affordability of houses is mainly expressed keeping in mind the level of Income, Size of the house, EMI or rent which has to be paid. These are not the only factors, the other Factors which effect affordable housing according to a report by JLL (John Lang LaSalle) is Minimum Volume of Habitation, Cost of house, Provision of basic amenities and Location of the house. In India, Low Cost housing is typically meant for the EWS category and includes minimum housing facilities and Affordable housing is meant for LIG and MIG and includes basic amenities.

IV. URBAN HOUSING SHORTAGE

Increasing population in urban areas has led to people living in slums and squatter settlements. High Land and real estate prices in urban areas has forced the poor to occupy marginal lands. It is apparent that substantial housing shortage looms in urban India and a huge gap exists in the demand and supply of housing in terms of both quality and quantity.

It is very important to calculate the housing shortage in India because only when the mismatch between the demand and supply is calculated it becomes possible to design appropriate strategies and

monitor them at different levels. It is only when the magnitude of the problem is known can effective policies be designed and agencies draw their roadmaps to achieve their action plan.

The housing shortage in India has been calculated by the following 4 factors:

- Residing in Katcha or houses which are outdated or affected by obsolescence.
- Houseless Households
- Residing in Overcrowded or congested houses
- Excess of households over housing stock (Not much of relevance today).

The no. of Urban Households as per Census 2011 was 78.86 Million households and on 1st March, 2012 the same stood at 81.35 Million. This figure of 81.35 Million was used by the Technical Group to estimate the Urban Housing shortage[559].

1) OBSOLESCENCE – Obsolescent units of houses consist of 2 parts:
    - All bad houses excluding those which are less than 40 years of age.
    - All houses which are in existence for more than 80 years.
2) CONGESTION – All those households living in a congested physical and socio-cultural environment appear in this category[560].

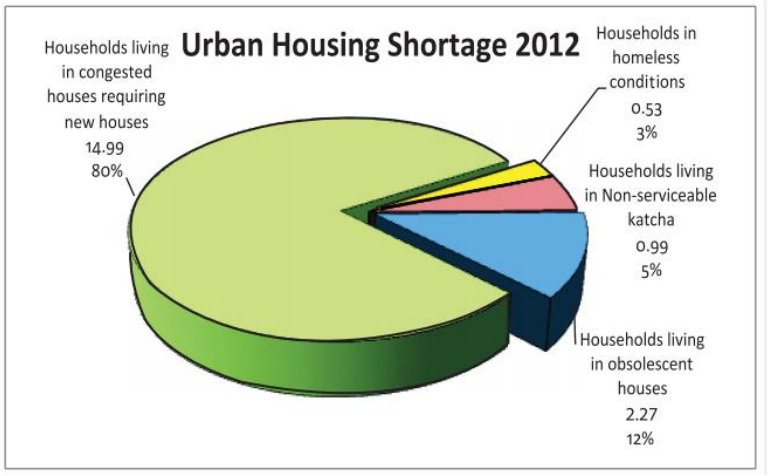
[559] Government of India, Ministry of Housing and Urban poverty alleviation, *Report of the Technical Group on Urban Housing Shortage (TG-12) (2012-17),* 1, 25 (2012), www.mhupa.gov.in/writereaddata/urban-housing-shortage.pdf.
[560] For further details and information regarding congestion one can look into the report published by the 65th round of the NSS; Government of India, Ministry of Housing and Urban poverty alleviation, *Report of the Technical Group on Urban Housing Shortage (TG-12) (2012-17),* 1, 37 (2012), www.mhupa.gov.in/writereaddata/urban-housing-shortage.pdf.

3) HOMELESS – The Technical Group has formulated that about 50% of the homeless people are single migrants and the other half are households with 3 persons. So, it is estimated that about half a million households fall under this category.

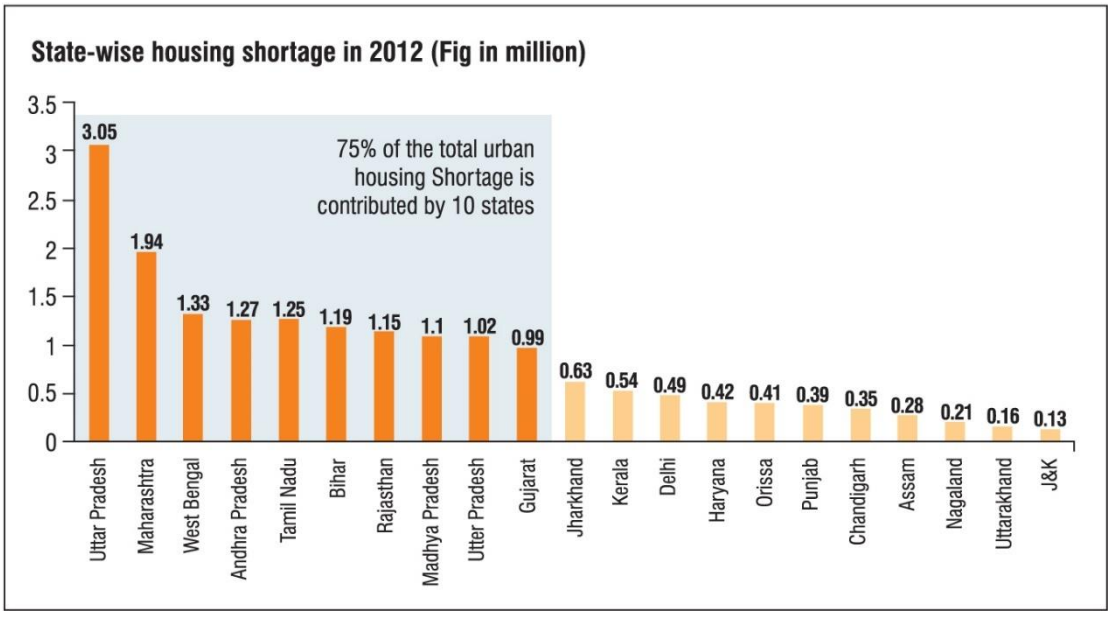
Housing Shortage in Urban India

	Congestion (In Millions)
Households living in Katcha houses	0.99
Households living in obsolescent houses	2.27
Households living in congested houses	14.99
Homeless households	0.53
Total	18.78

Source: Report of the Technical Urban Group (TG-12) on Urban Housing Shortage 2012-17, Ministry of Housing and Urban Poverty Alleviation, September 2012.



According to the report published by the Technical group on Urban Housing Shortage 10 States in India account for more than 76% of the Urban Housing Shortage in India. The table below depicts the distribution of the shortage of 18.78 million households among different states.



Source: Report of the Technical Urban Group (TG-12) on Urban Housing Shortage 2012-17, Ministry of Housing and Urban Poverty Alleviation, September 2012.

With Reference to the Socio-Economic category EWS sections are those people whose income is less than Rs. 5000 /- p.m., LIG sections are those people who have a monthly income of Rs. 5001 /- to Rs. 10000 /- and the rest are considered Middle class people. The following table depicts the housing shortage among these socio-economic groups in society.

Category	No. in Millions	No. in Percentage
EWS	10.55	56.18
LIG	7.41	39.44
MIG	0.82	4.38
Total	18.78	100.0

Source: Report of the Technical Urban Group (TG-12) on Urban Housing Shortage 2012-17, Ministry of Housing and Urban Poverty Alleviation, September 2012.

According to a report submitted by a technical committee to the Ministry of Housing and Urban Poverty Alleviation (MHUPA), India's urban housing shortage is estimated at nearly 18.78 million households in 2012. Besides those living in obsolescent houses, 80 percent of these households are living in congested houses and require new houses. The report also highlights that nearly one million households are living in nonservice able katcha houses, while over half a million households are in homeless conditions[561].

TENURE	FAMILIES LIVING IN OLD HOUSES	FAMILIES LIVING IN KATCHA* HOUSES	FAMILIES LIVING IN CONGESTION	FAMILIES WHO DO NOT HAVE A HOUSE	TOTAL HOUSING SHORTAGE
Self-Owned	1395735	770817	9188746	326430	11681728
Rented	870417	219183	5700019	203570	6993189

Source: Report of the Technical Urban Group (TG-12) on Urban Housing Shortage 2012-17, Ministry of Housing and Urban Poverty Alleviation, September 2012.

*Katcha refers to the houses made of Bamboo, Mud etc…

This report by the MHUPA shows that 62% of the housing shortage is for self-owned houses and 38% is for rented houses.

Not only do urban areas have a shortage of housing but rural India does have a problem of housing shortage. The working group on rural housing for the 12th Five-Year plan has estimated the total rural housing shortage at 43.67 million units and it is a major concern because more than 90% are people are in the BPL category. The sector is deeply affected by Infrastructure deficit, electrical supply and

[561] National Housing Bank, *Reports on trend and progress of housing in India,* 119, 120(2012), http://nhb.org.in/Publications/Report-Trend-and-Progress-of-Housing-in-India-2012.pdf.

sanitation. Housing finance is also a major problem. The lack of vibrancy in the market for village properties and the marked volatility in agricultural incomes combine to dampen the prospects of this sector. The main reason for shortage of housing in rural sector is not due to non-availability of houses but because of congestion and also because of obsolescence.

In India, private developers primarily target luxury, high-end and upper-mid housing segment, since it fetches a premium over low-income housing. This leads to a sustained supply for this segment, increasing market competitiveness for developers. On the other hand, the housing for the poor and EWS is primarily provided by the government for welfare purposes. However, it is insufficient compared to the existing shortage in the segment. Thus, it is the housing requirements of the lower middle-income and lower income groups that are grossly neglected, and there exists a huge dearth in the supply of affordable houses primarily demanded by this income group in India.

V. MARKET AND GOVERNMENT IN AFFORDABLE HOUSING

Formal and informal market: The housing market is of two types i.e. formal and informal market. The formal market in India has to meet certain standards set by the government, but many of which are not followed or implemented because of unviability and inflexibility. The informal market is a market where houses do not confirm to any of even the basic standards required for a civilised society. Those who are unable to avail of housing facility from the formal market resort to the informal market and stay in slums and squatter settlements especially in urban areas.

The informal market must be something which the government must aim to eliminate. The current reach of the formal housing market is also very limited. To estimate its reach the cost of the house,

the income and its distribution is required. In this research paper the reach of the formal market in the city of Pune is represented[562].

Property Prices per Sq. ft. in Central Pune

Area	Price Per Sq. Ft.	Average Price (in Rs)
Apte Road, Model Colony	15000-18000	16500
Prabhat Road, Deccan Area	15000-18000	16500
Bhosale Nagar	10000-12000	11000

Property Prices per Sq. ft. in North Pune

Area	Price Per Sq. Ft.	Average Price
Chinchwad	4000-4500	4250
Nashik Road	3000-3500	3250
Ravet	3000-3500	3250
Talegaon	2700-3500	3100

Property Prices per Sq. ft. in South Pune

Area	Price Per Sq. ft.	Average Price
Ambegaon	4000-4500	4250
Katraj	4000-4500	4250

[562] ICICI Home Finance Limited, *Pune Residential Real Estate Overview December 2012*, 3, 10(2012), http://www.icicihfc.com/property_pdfs/pune-report-2012.pdf.

Khondwa NIBM	5000-6500	5750
Khondwa Khurd	4000-4200	4100
Salisbury Park	13000-15000	14000
Singhad Road	5500-6500	6000
Undri	3300-3800	3550

Property Prices per Sq. ft. in East Pune

Area	Price Per Sq. ft.	Average Price
Koregaon Park	12000-15000	13500
Kalyani Nagar	7500-13000	10250
Wagholi	3300-4200	3750
Kharadi	4500-7000	5750
Hadapsar	4000-6000	5000
Vishrantwadi	5000-6000	5500
Viman Nagar	5500-6500	6000

Property Prices Per Sq. ft. in West Pune

Area	Price Per Sq. ft.	Average Price
Aundh	9000-12000	10500
Bavdhan	5000-5500	5250
Hinjewadi	3500-5300	4400

Pimple Saudagar	4500-5500	5000
Wakad	4000-5000	4500
Pashan	5000-5300	5150
Pimple Nilakh	4500-6000	5250
Baner	5000-6000	5500
Balewadi	4700-5500	5100

Avg. Price per Sq. ft. in Pune is Rs 6574.1666/- which is rounded off to Rs 6600/-.

Income Distribution of Households

Class	Annual Income	Total Households	% of Households
EWS	138000	245317	44.14%
LIG	276000	111321	20.03%
MIG	1380000	145890	26.25%
HIG	2760000	53243	9.58%
TOTAL		555771	100%

Source: Housing Study by Pune Municipal Corporation and World Bank Policy Research Working Paper.

Computation of Monthly Income Requirements for Affording a Small Tenement of 250 Sq. ft. Area

Rate per Sq. ft.	6600/-	₹
Sq. ft. required per unit	250	Sq. ft.
Price Per Unit (A)	16,50,000	Lakhs
Rate of Interest(r)	10%	Per Annum
Maturity(n)	15	Years

Savings(s)	32%	Of GDP

Note – 2% Processing Fee is applicable on the loan.

Equated Monthly Payments (X) – $A*r/1-1/(1+r)^n$ = ₹ 1,80,852

EMI = X/2 =₹ 15,071

Monthly Income Required = EMI/s =₹ 47100 (Rounded Off from ₹47,096)

Considering an average price of ₹6600/- per sq. ft. in Pune, the EMI of a basic dwelling unit of 250 sq. ft. comes to around ₹15,071/- and assuming a savings of 32% the monthly income required to afford a 250 Sq. ft. dwelling unit is ₹47100/-.

Household Monthly Income	47,100
Household Annual Income	5,65,200
% of Households with Income more than 5,65,200 p.a.	Approximately 26%

*Assuming Equal Distribution of Income among all the households in each sector.

This is a clear indication of the low reach of the formal market sector. Not only in the city of Pune but in the entire country the reach of the formal market is low. So, the government must take measures to reduce the price of the formal market sector so that it is accessible to the poor sections of the society by reducing the distortions of the land market or else regulatory reform including allowing high FSI/FSI and removing the vast regulatory rents. The causes for the low reach of the formal sector has been discussed in the subsequent parts of this paper.

GDP & Allied Factors – Housing which is the 3rd most basic need of human beings has always had important socio-economic implications. Especially in a country like India where investment in housing

is a very important aspect as it contributes to the national economy in a substantial way. **Housing and GDP** are invariably linked and help each other in their respective growth. The housing sector contributes to GDP in two ways: through Private Residential investment and consumption spending on housing services. Residential investment includes construction of new single and multi-family residential units, residential remodelling and production of manufactured homes and on the other hand consumption spending on housing services includes gross rent paid by renters and imputed rent of owners and even utility services. Including imputed rent of owners is a part of GDP because if it is not included then there is a possibility of a decrease in GDP. Housing also increases **employment opportunities** and helps to lead a good civil life. Besides its direct contribution to GDP it also increases social capital which comes with a good social network.

Housing has been called the "Engine of domestic Growth" for a long time. Investment in housing effects 269 industries directly and indirectly such as the cement industry, steel industry etc. In terms of contribution to the GDP, for every rupee invested in Housing and construction, 78 paisa is added to GDP. Housing ranks fourth in terms of the multiplier effect on the Economy, ahead of sectors like transport and agriculture. Investments in the Housing sector have steadily increased from Rs. 1150 Cr. in the First Plan period to more than Rs. 1,20,000 Cr. in the Ninth Plan period. Estimates of the Tenth Plan peg the figure at about Rs. 7,00,000 Cr.

Housing is the second largest employment generator after[563] agriculture in India. It provides employment to a vast no. of people such as the engineers, plumbers, furnishers, interior decorators etc. Housing can be a very good solution for the unending problems of employment which the

[563] NAREDCO, *Building, Construction and Real Estate: Union Budget 2016*, 3, 3(2016), https://home.kpmg.com/content/dam/kpmg/pdf/2016/04/Building-Construction-RealEstate.pdf.

government faces. Especially another advantage of Housing to the government is the stamp duty which it collects on real estate assets.

The Construction sector is divided into Residential (Housing), Non-Residential and Other construction sector.

- The Residential construction sector accounts for 1.24% of the Total Output of the economy (Total construction sector is 11.39%).
- The Residential construction sector accounts for 1% of the total GDP of the nation (Total construction sector 7.4%).
- The Residential construction sector accounts for 6.86% of the employment (Total construction sector 11.52%).
- Housing sector is the 4th largest employment generator in the country.
- 99.41% of the jobs in the housing sector are informal jobs.
- Its labour to output ratio i.e. number of persons employed to produce a lakh units of output, is 2.34 and is the highest among all the sectors.
- For every lakh invested in the housing sector 2.69 Lakh jobs are created and with the induced effect, the figures would increase to 4.06 Lakh jobs.
- The sector's capital to output ratio is 0.61 which means that 0.61 units of capital produces 100 units of output.
- For every 1 Rupee of investment in the housing sector the household income increases by 0.41 Rupees and by the induced effect it is up to 0.76 Rupees.
- Every additional rupee invested in the housing sector will add Rs. 1.54 to the GDP and with household expenditure considered, this is going to add Rs. 2.84.

- For every rupee invested in creation of housing, Rs. 0.12 gets collected as indirect taxes.
- A unit increase in final demand for this sector is expected to result in an overall increase in the economy's output by 2.33 units, when direct and indirect linkages are considered. With induced linkages added, the economy's output is expected to increase by 5.11 units.
- Income and tax linkages of society are 0.41 and 0.06 respectively. This means that a unit increase in the final demand of this sector results in increase of the household income by 0.41 units and an increase in the indirect tax by 0.06 units (Direct effect)[564].
- Income and tax linkages of the society are 0.76 and 0.12 respectively. This means that a unit increase in the final demand of this sector results in increase of the household income by 0.76 units and an increase in the indirect tax by 0.12 units (Induced effect)[565].
- A comparison between the mortgage finance and GDP ratio indicates a penetration level of less than 2% in the Indian Housing Market.

According to the Economic Survey 2015-16, the real estate sector constituted 7.4 per cent of India's GDP in 2014-15. Both domestic and global slowdown affected the sector, with growth decelerating from 4.4 per cent in 2014-15 to 3.7 per cent in 2015-16. The Private equity deals in the real estate sector increase by 80% which in turn reached Rs. 19500 Cr. In the financial year 2015-2016 FDI in the housing sector was negligible with just INR 673 Cr. However, the institutional credit growth of the housing sector has improved and reached 19.5% in the financial year 2015-2016 which was 16.8% in previous financial year.

[564] If the final demand of a particular product increases, there will be an increase in the output of that product, as production increases to meet the increase in demand. This is known as direct effect.
[565] Induced Effect: In response to the direct and indirect effects, the level of household income increases due to increased employment and a proportion of this increased income are re-spent on consumption of final goods and services. This is called the induced effect.

Two other important aspects which come under the sub topic of GDP and allied factors are **Tax Policy** and **Interest Rates** which effect the housing sector.

If there must be a 10% increase in the demand in the housing sector then some factors such as Tax rates, Interest Rates or even Income must be favourable to the common man. If these are favourable then it would lead to an increase in the GDP and employment level as well.

Tax Incentives not only attract the real estate groups but also attract buyers when the buyers are getting tax incentives. Tax policy can be known by the Union budget and this paper is going to highlight certain tax policies initiated by the govt. in the latest union budget and their implications.

The Union Budget (2016-17) provided a significant push to the struggling affordable housing sector. Under the Pradhan Manthri Awas Yojana it announced that there would be a 100% tax exemption for private real estate players constructing affordable housing of 30 Sq. Meters in the 4 Metropolitan cities and 60 Sq. meters in the other cities approved during the June 2016 to March 2019 period, to be completed within three years of construction approval. However, Minimum Alternate Tax would be applicable on these undertakings which would not be so huge to discourage them. Apart from this the government has also announced that private firms launching affordable housing under the "Housing for All by 2022' or "PMAY" scheme would be exempt from paying Service Tax of 5.6%. Another bonus for the private players is that there is a 100% exemption on excise duty payment for ready mix-concrete by satisfying the above-mentioned criteria. Especially the exemption from payment of Excise duty would bring down the construction cost to some extent. These policies were announced to make the supply side meet the ever-increasing demand side.

On the demand side an additional rebate of Rs 50,000 per annum has been announced on housing loan interest for first time home buyers in the affordable housing segment. This scheme is only

applicable for houses whose loan amount does not exceed Rs. 35 Lakh and the total cost of the house does not exceed Rs. 50 Lakh. The finance minister also provided a boost to the rental housing market with an increase in house rent allowance (HRA) deductions. Those not owning a house and not receiving any HRA from their employers previously, can now avail of a standard deduction of Rs. 24,000 per annum; while for those already availing HRA, the limit has now been raised to Rs. 60,000 per annum towards rent paid for their homes.

The budget helped the real estate businessman in another way by exempting them from levy of dividend distribution tax on amounts of dividend paid by a special vehicle to a real estate investment trust. It must make REIT[566] an efficient tool to monetize their assets and raise funds from investors. The budgetary proposals will also make it easier for the builders to access the much-needed capital from foreign and domestic investors by showing them the expected return on investment.

Once a property is purchased a property tax has to be paid to the local municipal corporation and the amount to be paid differs from place to place. Once a property has been purchased tax exemption for loan repayment and interest payments can be claimed under Section 24(b), section 80(c) and Section 80(EE) of the Income Tax Act. These are some of the statutory provisions from which tax benefits can be availed for Home loan repayments.

Therefore, in order to make affordable housing more and more affordable and attractive to the EWS and LIG, tax benefits while purchase and also while loan repayment has to be provided to a certain extent. Another factor which makes it look more affordable and attractive is interest rates.

[566] Real Estate Investment Trusts (REIT's) helps to safely purchase completed rent bearing commercial and residential projects, and expect to generate good rental yield. Globally REITs provide fixed income options to investors and help them invest indirectly into such big-ticket rent bearing real estate assets which are still under construction.

The role of Repo rate is very important in interest rate determination. Whenever the RBI decreases the Repo rate the banks have to reduce the interest rates and when the interest rate decreases it becomes favourable to raise a loan to purchase a house. In the other way round, it becomes unfavourable to raise a loan for purchasing a house when the interest rates increase due to a hike in the repo rate by the RBI. So, there is an inverse ratio between Interest rates and favourableness to raise a loan for purchasing a house.

A non-linear trend is followed while establishing the relationship between **income and affordable housing.** A significant portion of the income of the lower income group people is consumed by food, non-food and house rent. As in the case of higher income group people the rise in costs do not go up in the same level. Disposable surplus income which is often used to purchase new homes drops at the lower income group people and is relatively much higher in the higher income group people. So, the higher income group people can afford to purchase new homes owing to their higher disposable surplus income. Disposable surplus income is highly sensitive to increase in expenditure for the EWS & LIG. If there is an increase in the expenditure on food by a lower income group household the level of disposable surplus income reduces because of the already low level of income but for MIG or HIG income household this is not the case because even if there is an increase in the expenditure it won't have much effect on the disposable surplus income. Although the purchasing power of the LIG household is less the demand is high from their side but the real estate developers cater to the needs of the HIG and MIG and not to the LIG, but it must be noted that there exists a huge potential for developing affordable housing for the EWS and LIG households.

Role of National Housing Bank (NHB) & HUDCO - One of the major factor which makes housing more attractive is increasing the access and affordability of housing finance. The GOI has envisaged policy measures to provide low cost housing finance through various policies. The apex

institutions for providing affordable finance is NHB & HUDCO. NHB was established in the year 1987 to promote Housing Finance institutions and strengthen the credit delivery network for housing finance in the country. The bank is concerned with catalysing institutional funds for reducing housing shortage through various development initiatives. The functions of NHB are assumed in collaboration with various housing finance institutions, commercial banks, cooperative banks, regional rural banks, multilateral agencies, microfinance institutions, development authorities and public agencies. The integrated approach and continuous efforts of NHB have been towards undertaking measures for capacity building for the housing finance system and for improving the credit absorption capacity of the sector[567]. It not only is concerned with finance but also encourages augmentation of supply of buildable land, also building materials for housing and to upgrade the housing stock in the country and even encourages public agencies to emerge as facilitators and suppliers of serviced land, for housing. Its activities also include building institutional frameworks and market infrastructure which are critical for the expansion for the promotion of the housing finance system. It is a Development Finance Institution (DFI) and performs a range of activities including financing, regulation and supervision, and promotional initiatives. Broadly speaking its roles includes financing, promotion and regulation of the mortgage market.

Refinance operations of the NHB (2013-2014) is depicted in the following table:

Institution category	Sanctions[568] (In Crores)	Disbursement[569] (In Crores)
Commercial Banks(SCB)	19552.70	7942.72
Housing Finance Companies	11414.70	9632.99

[567] National Housing Bank, Report, trend and Housing in India 2012, 119, 141(2012), http://nhb.org.in/Publications/Report-Trend-and-Progress-of-Housing-in-India-2012.pdf.
[568] Sanctions refers to the total amount of money sanctioned by the NHB to the respective financial institutions.
[569] Disbursement refers to the total amount disbursed by the respective financial institutions to the people eligible to receive it.

Cooperative Banks	215.00	0.00
Regional Rural Banks(RRB)	365.69	280.47
Total	31548.09	17856.18

Note: The cumulative refinance disbursements as on June 30, 2014 were 1,20,485 Cr.

The disbursements made in 2013-14, aggregating 17,856.18 Cr. represented the highest figure of refinance disbursements achieved during any one year, registering a marginal increase of approximately 2% over the previous year's refinance disbursements.

Tenure Wise break-up of disbursement is presented in the following table:

Tenure	Amount in Crores	% of Total
Upto 1 Year	448.33	2.51%
1-3 Years	5444.00	30.49%
3-5 Years	1445.19	8.09%
5-7 Years	4408.94	24.69%
7-10 Years	1754.39	9.83%
More than 10 Years	4355.33	24.39%
Total	17856.18	100%

It is also to be noted that 72.56% of the disbursement made was made on fixed rate of interest and remaining was made on floating rate of interest. 57% of the loans were given to people in the urban areas and the remain 43% were given to the rural people to avail of housing at affordable prices.

NHB provides direct financial assistance for project lending to a range of borrowers in the public and public-private partnership, microfinance institutions, state level housing boards and area development authorities for integrated housing projects and slum redevelopment projects.

The other nodal agency is **HUDCO**. HUDCO was established in 1970 as a fully owned government enterprise to provide long-term finance for construction of houses for residential purposes in urban & rural areas and finance or undertake, the setting up of the new or satellite towns and industrial enterprises for building material. 95% of the residential dwelling units sanctioned by HUDCO are for to EWS/LIG Category clients. HUDCO provides loan assistance to weaker sections at subsidized interests rates and undertakes special projects for such categories of clients.

To Summarize NHB and HUDCO are primary agencies of the government to provide affordable finance for purchasing houses at affordable rates. Both these institutions do not reach out to the general masses directly but sanction money to the Banks, HFI and other agencies in the form of refinance and these agencies provide funds to the needful (EWS & LIG) at affordable rates of interest or provide funds to the needful as per the government scheme under which funds are being claimed. NHB & HUDCO not only provide refinance but also are concerned with regulation and supervision of the financial sector of the housing market[570].

Constraints in the development of affordable housing – Rapid urbanization coupled with increasing slum population and many other reasons have contributed to this problem which is dealt with in detail, below –

[570] National Housing Bank, *Report on trend and progress of housing in India*, (2014), http://www.nhb.org.in/Publications/T&P_English_FINAL.pdf (For further Information about NHB & HUDCO and their performance and functions over the past few years in the development and progress of the Financial sector of the housing market).

- **Rapid Urbanization –** The increasing population of megacities has social, economic and ecological consequences. In such a situation, it becomes difficult to manage it in a feasible manner. As per census 2011 almost 28% of them lived in Urban areas. With the country's population already crossing a billion it is estimated that the population will reach 1.35 billion by 2040 with almost 40% living in urban areas. So, while cities are engines of growth, they face enormous problems of traffic, pollution, poverty and even housing. With rapid urbanization housing for the EWS and LIG is becoming a big problem coupled with a lack of land and their low level of income. Rapid urbanization has also caused un-planned growth settlements and slums which also cause problems of planned housing for the people with low levels of income.
- **Unavailability of Land and Ineffective Land Management –** High population density in urban areas has triggered a huge rise in demand for urban land. Government regulations have created artificial shortages of land which have caused an increase in the prices of land. Excessive control over marketable lands situated in centrally located areas and some regulations which are intending to push urban development towards the darker side has caused unnecessary problems which would not have been caused if land supply was smooth. Regulations when not implemented properly by the government leads to corruption in the real estate market. Another important fact is the non-usage of empty government owned lands which can be used to generate housing for the poor and often non-maintenance of this land leads to slums and squatter settlements in these areas. According to the estimates of the department of public undertakings 2.35 Lakh acres of empty land is lying vacant which can be used for providing housing facilities. The govt. under the cantonments act has notified 1,57,630 acres as cantonments and almost 15,96,000 acres of military land is vacant and of this almost 80% is surplus which can be used to provide housing facility to the needful.

However, some of them are which were inherited colonially for railway and military purposes but are not being used to their optimal level and have been lying vacant for many years. There is a growing need to release these lands (located in prime locations in urban areas) from government control so that it can be used for some productive use as it has the potential or else there is a high risk of it getting converted into non-marketable pockets. This problem is exacerbated by excessive control and difficulty in land recycling. Illegal occupation of land is also contributing to this problem in the form of land mafias and illegal encroachments. Indian real estate market also faces the titling problems which further delay real estate and affordable housing projects. Formal recognition by the state in the form of titles and facilitation by the state in the form of efficient trade in rights by registration exists but in an incomplete form. These issues further dig the problem of titling and land ownership.

Another important aspect is FSI/FAR (Floor to area ratio) it is defined as the ratio of maximum floor area allowed for construction to the land area on which the building is constructed. It effects the height of the building and is hence an important aspect of housing supply. It is kept low in Indian cities for limiting population density and avoiding congestion but unfortunately the plan has not worked for India. The perfect example being Mumbai with an FSI of 1.33 has a density of 20,000 sq. km. and New York with an FSI of 20 has a density of 4,000 sq. km. Lower FSI has led to a hike in property prices the best example being Mumbai. Lower FSI curtails the vertical expansion of cities and cause a horizontal expansion of cities which cause a lot of problem to the citizens in their daily lives. So, land shortage coupled with lower FSI has further increased the problems of housing for the poor.

- **Rising cost of construction –** Construction cost have a significant share in affordable housing. Construction generally follows a gradual trend from premium luxury to mid income to low income. In the urban sector construction costs accounts for 50-60% of the total selling

price. If land is purchased at a cost of 250 per sq. ft., then the selling price will be almost 1500-1600 per sq. ft. In luxury housing projects construction costs is almost 20-22% of the selling price. Construction costs are effecting affordable housing projects and not premium housing. Hence, it becomes important to reduce the price of these projects by balancing the amenities provided, nonetheless ensuring the safety and security. In the recent past the cost has increased by 80&-85% due to increase in the price of construction material and also shortage of labour.

- **Financing problems –** The current financial market is tilted towards the MIG & HIG. Due to this the lower income people find it difficult to secure support from this market. Banks and financial institutions do not cater to this section because of their irregular income and their inability to provide collateral security. Lack of documentation with these sections of the society tend to make it more difficult for the banks to sanction loans. The loan market of INR 3-10 lakhs is estimated at INR 1,100, 000 Cr. Despite this, less than 20 percent of the INR 55, 200 Cr. worth of housing loans disbursed by HFCs in FY2011 were in the loan bracket of INR 3-10 lakhs[571]. With the emergence of NHB the problem of finance for the LIG & EWS is decreasing.
- **Regulatory constraints –** Regulatory constraints include land use and transfer policies. Lengthy processes and approvals from various local and municipal bodies delay the construction projects. It is said that in order to construct a building, a builder must visit around 40 departments. India is ranked 177 out of 183 in construction permits which shows how much India is lagging in this area. As banks, do not favour loan against land, developers must move on to private financing. Stringent land policies cause unnecessary wastage of land.

[571] NAREDCO, Report on trend and progress of housing in India, (2011), www.naredco.in/notification/pdfs/Urban-housing-shortage-in-India.pdf.

As land use norms are not designed for practical needs so they do not serve the purpose. Some of them might be useful but majority of them are not useful. Land transfer policy i.e. conversion of agricultural land to non-agricultural land is a tedious process and often involves legal issues. Lack of Clarity in Building Bylaws and Guidelines and Continuation of Archaic Laws further add to the regulatory constraints. Disputable taxation regime is also a major concern for builders.

VI. THE WAY AHEAD

The policy must aim at two things Firstly, Improving the reach of theformal market and secondly, removing hurdles to construction. To achieve this the following steps are feasible to be taken:

- **Increasing Land Supply –** Using vast amounts of land available with the government especially those lands situated in the central areas of cities for affordable housing projects. Resolving the issues of titles by adopting a Torrens system and allowing squatter rights to some part which are convertible to either actual occupancy rights or rights that are more transferrable to affordable housing locations. Increasing FSI would have the most impact on value creating affordable housing. When it comes to legal barriers constraining availability of land the Urban Land Ceiling & Regulation Act must be repealed which places a limit on both ownership and possession of vacant land because whoever controls land, controls supply of housing. The current practice of auctioning land by housing boards must stop if private developers must provide housing at affordable rates. Land at reasonable rates must be provided for institutions with good record of providing housing. By following a model adopted in San Francisco it would be better if an agency is established to regulate the supply of land. The government also has an active role to play in this segment by ensuring availability

of land by computerization of land records, use of GIS and efficient dispute redressal mechanisms.

- **Increasing the role of Private Parties –** Private developers are tilted towards the HIG & MIG because of the profit and affordable housing projects are less profitable because of the already existing hurdles in this sector. Viable business models can help private developers to actively participate in this sector. The government can direct Urban local bodies and urban development departments to provide incentives by allowing them access to cheaper land, providing higher FSI, reduction in the time taken for approvals, easier home loans, interest subsidies and tax benefits and can help them actively participate in this sector.
- **Innovative and low cost technology –** There is a need to invest in innovative technologies to promote mass housing developments and at subsidized construction costs. Portable modular housing can also be helpful in this regard. They can be built from standard material and are portable. These are not only to easy to build but also easy to maintain. Another way is pre-fabrication, which is almost 20% costlier than other material but are efficient and durable and developers can even gain from low labour costs. It is being implemented in Europe and the Middle East and is successful. Incentives on construction cost will not only make the project viable but also affordable because they effect the selling price of the house to a large extent. Single window approval for the project, subsidized prices of goods, exemption from sales tax and reduction in stamp duty can substantially reduce the cost and make the housing affordable.

- **Affordable Financing –** Fundamental changes must be made in the financial sector so that the EWS & LIG sections of the society can avail of loans to fund their houses. The government could encourage it through SHG or through other efficient and innovative

financing mechanisms. Flexible payment mechanisms must be put in place considering the fact of their varying income. REITs and REMFs can be excellent funding opportunities for real estate development provided the ambiguities in taxation and additional transaction cost such as stamp duty are removed. As housing industry is an infrastructure industry the investment will increase which is a good sign of growth for this sector. Providing micro finance facilities is a very useful tool as it gives these borrowers access to credit, it helps them to gradually improve their homes and housing credit. An interesting example of housing micro-finance comes from South Africa, where the Kuyasa Fund offers loans between R1,000 and R10,000 to be repaid within 30 months, to members of community-based savings groups. Nearly 75% of Kuyasa's clients are women, 60% work in the informal sector or are old-age pensioners, and 85% live on less than $2.60 per day. Subsidized rates of interest for borrowers and more HFC's targeted towards these sections can reduce the problem of affordable housing. It is also recommended that a secondary mortgage market be promoted by RBI and Residential Mortgage Based Securitization (RMBS) be nurtured through NHB, Banks and HFCs.

- **Building Talent Capacity and Skilled Professionals –** Initiatives to fill up manpower demand gaps can be done in collaboration with educational institutions which can impart vocational training for professionals at all levels. Structured training programs can be initiated to enhance the resource quality of labour. It is a critical aspect and should cover both institutional and HR capacity needs.

Improved penetration of rental housing in urban areas, inclusive and institutional planning can also help to solve these problems.

VII. ANALYSIS OF PMAY AND HOUSING FOR ALL

The government has started countless number of programs for housing such as RAY, JNNURM, NUHHP, CRGF, 20 Point Program, Deendayal Antyoday Yojana etc… but not all of them were successful. This paper is going to analyse 2 major schemes i.e. PMAY & RAY from the policy point of view.

- **PMAY- Housing for All –** The slum population of urban India is growing at a phenomenal rate. The decadal growth of the slum population stood at 34%. The slum household is projected to go up to 18 million and 2 million non-slum urban poor has also been included in this criterion. So, this scheme is going to serve 20 million poor people suffering in urban slums. The mission is being implemented within a span of 7 years ranging from 2015-22 and provides central assistance to ULB's and other implementing agencies through States/UT for:

  1) Rehabilitation of existing slum dwellers.
  2) Credit linked subsidy
  3) Affordable housing in partnership
  4) Subsidy for beneficiary led individual house construction.

  This scheme provides flexibility to states to choose the best option from the above four to achieve their primary goal. States have the freedom to formulate and implement the scheme for faster accomplishment. A technology mission has been setup to adopt modern and cost effective technology. It helps states to adopt disaster resistant and environmental friendly technology for achieving the goal.

  "In-Situ" Slum Redevelopment is a grant of 1 Lakh provided for each house built for slum dwellers using land as resource with private parties. The grant can be utilised by states for any slum redevelopment project.

The credit linked subsidy will be provided on home loans taken by the eligible poor for acquisition or construction of houses. Beneficiaries seeking loans will be given an interest subsidy of 6.5% for a tenure of 15 years or during tenure of loan whichever is lower. The NPV is calculated at a discount rate of 9%. The credit linked subsidy will be available for a loan amount of 6 Lakh and additional 6 lakhs if any will be at non-subsidized rates. Interest subsidy will be credited which makes the loan amount and EMI lower. To avail of this facility the carpet area must be 30 sq. mts. and 60 sq. mts. for EWS (Income up to 3 Lakh) & LIG (3-6 Lakh annual income) respectively. HUDCO & NHB are major institutions to implement this scheme.

When housing is delivered in partnership with private or public Central Assistance of Rs. 1.5 Lakh per EWS house is provided by GOI in projects where at least 35% of the houses in the projects are for EWS category and a single project has at least 250 houses.

Under beneficiary led individual housing a EWS household is eligible to get 1.5 Lakh as central assistance under this project.

The scheme has sub-divided housing shortage of the country into 4 parts as per MHUPA Report of HFA 2022:

1) Slum Dwellers
2) Urban poor living in non-slum areas
3) Prospective migrants
4) Homeless and Destitute

It has been further divided into:

1) Slums on Public Land

2) Slums on Private Land

3) Slums on tenable Land

The strategy for slums on public land includes upgradation of public land based on private partnership by using land as a resource, increase of FSI, private party has a right to exploit land and increase FSI for commercial purposes and under cross subsidization private parties to build some land free of cost for slum dwellers.

The strategy for slums on private land includes freeing part of land for commercial use with higher FSI and govt. to provide technical specifications & norms and shifting of slums to lesser areas.

The strategy for slums on tenable land includes regularisation of these colonies, improvement of infrastructure and improvement of basic civil and social amenities.

The policy also aims to resolve supply side issues with the following methods:

- Provision for extra FSI.
- Easier Window clearance for development projects.
- Freeing up govt. land to increase land supply.

The policy tries to hold the govt. occupied land in a way by utilizing the govt. owned land by squatters. The policy tries to free up the land by dividing it into housing land and commercial land. It tries to leverage private land in dispute by providing higher FSI to private party and also providing affordable housing in the same land. The policy provides an easier clearance window which removes many of the hurdles while development of the project. The project also provides for higher FSI.

Under PMAY, 7.26 Lakh houses have been given nod from Central Government and a Central Assistance of Rs.1911.20 Cr. has been released to States. In Credit Linked Subsidy Scheme, Rs.200 Cr. has been released to provide Loan Subsidy to over7,776 beneficiaries in a period of 10 months. This has been the cumulative performance of the scheme till the recent past.

- **Rajiv Awas Yojana –** This program aims to create a slum free India. It has been launched in two phases with the preparatory phase ending in 2013 and the implementation phase going on with an aim to achieve the goal by 2022. The main objective of this program is Legal recognition of slums and introducing them into formal market and redressing the drawbacks of the formal market system. It comprises of a series of guidelines that govern and implement the scheme. This paper focuses on the policies and a few facts about its progress.

  The key features are discussed below:

  1) Slum Intervention strategies: The scheme provides for a provision of dwelling units in all tenable slums. If In-Situ redevelopment is not possible, the slum dwellers must be rehabilitated elsewhere. Homeless people must be included and relocated. The strategy would be of 3 types i.e. Upgradation, redevelopment and resettlement.
  2) Slum Prevention Strategies: This program tries to address the time-consuming approval process which delays the projects, assess constraints related to rental housing and also provide access to finance to both the demand side and the supply side and try to prevent slums by removing constraints and by providing affordable finance.
  3) Affordable housing in partnership: The govt. has approved AHP as a part of RAY to increase housing stock as a part of preventive strategy. Central support is provided at the rate of Rs. 75,000 per Economically Weaker Sections (EWS)/Low Income Group

(LIG) Dwelling Units (DUs) of size of 21 to 40 sqm. It includes affordable housing projects taken up under various kinds of partnerships including private partnership. A project size of minimum 250 dwelling units is eligible for funding under the scheme. The DUs in the project can be a mix of EWS/LIG-A/LIG-B/Higher Categories/ Commercial of which at least 60 percent of the FSI/ FAR is used for dwelling units of carpet area of not more than 60 sqm.[572].

A total of 21 projects of 3 States (Karnataka, Gujarat & Rajasthan) with a total project cost of Rs. 1398.41 crore involving Central Share Rs. 140.05 crore have been approved and Rs. 50.68 crore has been released for construction of 24141 dwelling units. During the period, April 2015-December 2015, 1,872 DUs were completed and 741 were occupied[573] with respect to housing in partnership.

4) Cross Subsidization: 15% of FSI & 35% of Dwelling units must be reserved for EWS & LIG in future housing projects started under this scheme with basic civil and social amenities also being provided to the urban poor.

5) Improving access to credit: Interest subsidy scheme for the urban poor at 5% for long term loans (15-20 Years), it also has a ceiling of Rs. 5 Lakh for EWS and Rs. 8 Lakh for LIG. It also provides for a single window approval of projects and online registration too.

6) State Policy Reforms: It provides for the assignment of lease rights to those people who have stayed for more than 5 Years. These rights are inheritable and mortgageable. It will be in the form of sale deed registered in the name of a female household. People

[572] MHUPA, http://mhupa.gov.in/User_Panel/UserView.aspx?TypeID=1282 (Last Visited on Dec. 11, 2016).
[573] MHUPA, MHUPA Annual Report 2015-2016, 1, 25(2016), http://www.mhupa.gov.in/writereaddata/ANNUAL%20REPORT%20ENGLISH%202015-16$2016Jul22142029.pdf.

who are not eligible for leasehold rights will be covered under rental housing. It also provides for nominal stamp duty and tax for their (EWS & LIG) housing (Acquisition or redevelopment).

This scheme also provides for usage of govt. land and easing restrictive govt. regulations, increasing FSI and subsidization of housing for the poor. It also addresses tenure rights (Masterplan amendments provide for recognition of tenable land titles) and taxation issues for the poor.

A total of 162 projects with a total project cost of Rs. 6,323.04 crore involving Central Share Rs. 3465.91 crore for construction/upgradation of 1,17,707 DUs have been approved and Rs. 1,924.02 crore has been released. During the period, April 2015 to December 2015, 4,472 DUs were completed and 998 were occupied[574]. In the 12th Five-Year plan the govt. has allocated Rs.322.30 Billion for its implementation which is estimated to reach 1 Million beneficiaries.

VIII. IMPLICATIONS OF DEMONETIZATION ON THE REAL ESTATE MARKET:

It is believed that the real sector will be effected by the demonetization because this sector for a very long time has seen corruption and black money because many of them insist on having hard cash as a component of payment and almost 30% of the entire real estate market runs on hard cash. Due to an unorganised and unregulated way of dealing the prices have always remained high in this sector. The cash component was mainly involved in the secondary market because the primary market involves banks and many of the transactions in the primary sector take place in a legal way. It is also expected that there will be a huge dip in the resale of property and sale of land because cash plays a huge role. It is also expected there will be a dip in the prices of new projects because of uncertainty in

[574] MHUPA, *Supra* Note 27, at 37.

the market. The main reason for the real estate prices to go down is the already high level of inventory and the negative impact caused by demonetisation on the demand for housing and as potential buyers are prepared to postpone their demand this would lead to further increase the inventory so, real estate developers will reduce the prices to sell the already existing stock. It is believed that soon there will be a major price correction because illegal investors will be wiped out due to the demonetisation move (especially in the luxury housing sector) and it is also expected that it would attract middle class potential buyers. It is also expected that the home loan rates will go down because of huge cash coming in to the purview of banks. So, when the dust settles it is expected that real estate market will come out more organized and regulated on the back of correction of prices, more transparency and rate cuts. It is expected that it is the start of the revival of the real estate market in India.

CRITICAL APPRAISAL OF SDG 16 AND ITS INDICATORS WITH THE AIM OF IMPROVING ACCESS TO JUSTICE IN INDIA

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I. INTRODUCTION

In January 2016, all countries adopted seventeen Sustainable Development Goals to be achieved by 2030. These Sustainable Development Goals, though not legally binding, are nevertheless given great importance by the United Nations as a blueprint based on which all nation states can conquer poverty, abolish inequalities and ensure justice while tackling climate change, by the year 2030. The nation states are expected to implement certain policy frameworks to achieve the same, keeping in mind that such targets are achieved while ensuring that no one is left behind.

The focus of this paper is on Sustainable Development Goal 16 in particular. Goal 16 is to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

Access to Justice is a major issue in our society today. A large section of the general public remains alienated from our judicial system and believes that the process of attaining justice simply isn't worth the time, energy and money that it requires. This is a result of various barriers faced by those wishing to seek redressal, such as financial difficulties, geographical challenges and social stigma. For this very reason, SDG 16 is an extremely important goal for our nation and the Government of India must make it an absolute priority to meet the targets set, by 2030.

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The goal includes targets such as "significantly reducing all forms of violence and related death everywhere" and "promoting the rule of law at national and international level and ensuring equal access to justice for all". The goal consists of a 10 such targets. And, to accomplish the said targets and check their progress, each target is accompanied by certain indicators like "violent deaths per 100,000 people" and "percentage of people who have experienced physical and/or sexual violence in the last 12 months, disaggregated by sex, age and location" for the first target. The indicators are vital for measuring the developments in each target set by the Goal.

The central focus of the paper will be on the indicators used in Goal 16. The basic idea behind the dissertation is to give a comprehensive analysis of all the indicators, used by the United Nations in Sustainable Development Goal 16 to achieve its set targets, in the Indian context.Given thecomplexity and political nature of many of the globaltargets in Goal 16 and the importance of ownership ofthe national targets and indicators (as highlighted in the2030 Global Agenda), it is particularly important thatthe many diverse constituencies at the national level areinvolved in identifying indicators through nationalconsultations and discussions on national targets. The paper will thus include a criticism of the present indicators and describe how they are appropriate or lacking, as the case may be, in the Indian framework. It will also suggest alternatives to these indicators and steps to be taken to ensure attainment of the targets, keeping the Indian perspective in mind.

With the end purpose of promoting peace in an inclusive society with access to justice for all, this paper aims to help in setting a roadmapon the same, in collaboration with the targets set by the United Nations Development Program, keeping in mind the existing indicators provided along with various suggestions.

In order to attain SDG 16, this paper, in line with the report commissioned by the UNDP, promulgates two forms of interventions that are needed together to achieve these ends: preventive interventions and curative interventions. Preventive interventions include interventions that improve people's standard of living, such as opportunities for employment and growth, labour rights, food security, health, education etc. The second form of interventions is curative interventions, which stem from law enforcement mechanisms such as the police, investigative and intelligence institutions and also the judiciary. Investments in strengthening these institutions may further help in reducing crime in India. While such costs are not calculated in this study, there are several studies that attempt to identify gaps and weaknesses in these institutions and suggest reforms; a financial assessment of these reforms would be useful.

The paper now attempts a target by target appraisal of all the indicators and offers criticism as well as suggestions to ensure optimum and efficient attainment of SDG 16 with the aim of promoting peace and access to justice in India.

SUSTAINABLE DEVELOPMENT GOAL 16

"PROMOTE PEACEFUL AND INCLUSIVE SOCIETIES FOR SUSTAINABLE DEVELOPMENT, PROVIDE ACCESS TO JUSTICE FOR ALL AND BUILD EFFECTIVE, ACCOUNTABLE AND INCLUSIVE INSTITUTIONS AT ALL LEVELS"

II. TARGET 1:

Significantly reduce all forms of violence and related death rates everywhere.

This target emphasises the inverse correlation between violent conflict and the development of a society, specifically addressing violent deaths. As of now there is no global database that counts violent deaths by country, let alone by age or sex, therefore this target could pave the way to tracking violent deaths globally.

Indicator 1.1- Violent Deaths per 100,000 people.

This indicator is used to identify the level of peacefulness and personal security across countries. It is an easy to understand measure as violent deaths are clearly linked to violence and related deaths. The concept is well established that a decrease in violent deaths over time is associated with an increase in peace and reduction in violence. The indicator, however, does not fully measure "all forms of violence", as it would not include assaults, killings by the state, extortion, other threats of violence, etc. However, these other aspects of violence are more nuanced and definitions differ. Homicides and conflict-related deaths are easier to measure and more conspicuous, and therefore a simpler yet sufficiently relevant indicator to capture the target.

Studying the scenario in India regarding violent deaths per 100,000 people in India, a UNOffice on Drugs and Crime Report from 2014 stated that India had a total of 41,623 violent deaths per 100,000 people, a number exceeded only by Brazil. Although the death count in India was considerably higher than almost all other countries it had a violent death rate of only 3.2 which was noticeably lower than many other countries with much lower violent death counts mainly due to India's population size. This raised the pertinent question as to whether such a violent death calculating mechanism is justified as a large number of people in a country should not be a contributing factor to a higher number of

violent deaths and giving India such a relatively lower rating overshadows the fact that over 40,000 people were victims of violent homicide which is not something that is acceptable. Another point of contention regarding this indicator was that the definition of violent deaths differed from country to country as a single widely accepted definition was missing.

Furthermore, under this system of measurement, various alternative criteria were suggested such as number of battle deaths or death in conflict situations or percentage of reported homicides. Moreover, taking suicides into consideration while addressing this indicator was also suggested.

Indicator 1.2: Percentage of people who have experienced physical and/or sexual violence in the last 12 months, disaggregated by sex, age and location.

This is an extremely relevant indicator for measuring people's actual experiences of safety and security through a victimization survey. A change in this indicator within country is highly informative and reflects changing conditions of security. Separate from homicide rates, this indicator looks at different types of violence (responding to the wider target wording 'reduce all forms of violence'), which addresses peacefulness and personal security more broadly. This indicator goes beyond reported crime to look at the full range of violence from the victim's perspective, thereby complementing administrative data on violent deaths.

This remains an extremely crucial indicator to be addressed by India as physical and sexual abuse of women has become a highly debated upon issue in recent times with response still not believed to be adequate. As per the National Family Health Survey, over 40% of Indian women faced some sort of physical or sexual abuse, but more disturbingly over 55% of men and women didn't believe any form of redressal was necessary. If truly this indicator needs to be addressed by our government it is the mind-set regarding such victimization being justified which first needs to be rectified in order to truly

improve the situation, something which is complicated and would take time to achieve, certainly more time than until 2030. Furthermore another problem with the utilization of such an indicator in India is that a vast majority of the time such cases go unreported which means that the calculation of such a percentage will be redundant and almost every time it is guaranteed to be inaccurate. Such lack of reporting is extremely common amongst men who go through any such physical or more importantly sexual abuse in India.

Given the unreported and under-recorded nature of these crimes it is suggested that a different approach which will attempt to strengthen the monitoring framework regarding sexual violence in order to ensure state policies to prevent such crimes are being implemented.

The monitoring policy will include:

i. Maintaining Police statistics which would record the gender of the victim, gender of the perpetrator along with the relationship between the two if any.
ii. Systematic collection of data regarding any health care services availed as a result of such transgressions.
iii. Ensuring questions pertaining to sexual or physical violence against both genders is included in a regular national level survey.
iv. Conducting a widespread survey on the effects of such violence on both genders and sensitizing the public on the same starting from the youth.

III. TARGET 2:

End abuse, exploitation, trafficking and all forms of violence against and torture of children.

This target aims to specifically address all forms of violence and exploitation against children. Being an extremely vulnerable section of society it is necessary for strong policies to be implemented in order

to curb exploitation of children as most of the time they have no recourse or means of redressal owing to the fact that they are not mature enough to even know or comprehend their rights. This target holds greater relevance in India as a result of reports such as one by the Ministry of Women and Child Development which stated that almost 70% of children go through some form of physical abuse.

Indicator 2.1: Percentage of people who have experienced physical and/or sexual violence in the last 12 months - disaggregated by age

This indicator has direct relevance to violence, physical and sexual against children, and is an extension of previous indicators this time segregated specifically by age. This indicator is not only extremely important but also a convenient mechanism for gauging situations in countries as child abuse does not suffer from a time lag as even adults who've gone through such abuse can be surveyed.

Child physical and sexual abuse is something that has recently been addressed in India with acts such as POCSO proving beneficial in many cases. Still various reforms have been suggested while discussing the viability of this indicator. One suggestion emphasized on the need to broaden the spectrum of the indicator by including physical, sexual, emotional and psychological abuse while calculating the percentage. Furthermore it can be argued that a better measurement of the situations in countries would be calculating the proportion of child abuse cases that underwent judicial proceedings as that provides a better indication of how a country and its judiciary is dealing with such instances of abuse.

Indicator 2.2: Number of detected victims of human trafficking disaggregated by type of exploitation.

This indicator addresses victims of different forms of exploitation which may broadly include trafficking of children, child labour, malnutrition of children, child marriage, female genital mutation and child friendly police and judicial proceedings.

All of the aforementioned transgressions are vital indicators of the situation of safety of children in India with instances of child marriages particularly common in India. One phenomenon that is particularly complex in the context of India is child labour and employment of children under the age of sixteen. It is widely been observed that suddenly pulling out all under aged workers from employment will not only be detrimental for the children as many times they are the financial support for their families but it will also have adverse effects on the economy of the nation as various industries such as the diamond making and glass bangle making industries. Therefore in order to balance the situations the government introduced various guidelines to be followed in places where children are employed.

Another extremely vital if not the most vital aspect of this indicator is ensuring child friendly police and judicial proceedings. This has been addressed in the recent Juvenile Justice Act of 2015 which spoke about the presence of child psychologists during the issuing of statements and other similar provisions.

IV. TARGET 3:

Promote the rule of law at the national and international levels and ensure equal access to justice for all.

This target emphasises the importance of a strong and efficient judicial mechanism as a vital component in the attainment of peace in any society. In order to establish and maintain peace and security there has to exist a mechanism to adjudicate disputes and offer appropriate redressal as a

means to prevent any future disruption of peace. Only in the presence of such an efficient system can peace prevail and more importantly be sustained in a nation.

Indicator 3.1: Proportion of those who have experienced a dispute in the past 12 months who have accessed a formal, informal, alternative or traditional dispute resolution mechanism and who feel it was just.

Ensuring immediate and adequate redressal for any one whose rights have been infringed upon is an essential part of creating a peaceful and inclusive society. Thus, the experiences of those who have approached any form of dispute resolution mechanisms is essential.

In India various barriers to access of justice exist for various vulnerable sections of society. The following are the major barriers that the country must address to ensure the fulfilment of this target-

- Economic barriers: Due to economic constraints many times it becomes difficult or even impossible for some to access courts or any other dispute resolution mechanism as the financial burden that follows the redressal process is often just not worth it.
- Socio-cultural barriers: Lack of representation of women, tribal communities, backward castes, the disabled in dispute resolution processes, all of which stem from lack of education, may act as barrier for those groups.
- Systematic barriers: Approaching courts as a means to solve disputes is often an extremely tedious and time consuming method that along with the high economic burden that follows make litigation an unfavorable option. Pendency in litigation leads to a huge delay in justice which most of the time is not worth the high expenditure or the hassle of a long, procedurally complex route to attaining justice.

- Geographical barriers: Geographical barriers are often faced by vulnerable sections of society in access to justice. A major example of such vulnerable groups facing such issues are migrant workers. These migrant workers come from rural areas in search of livelihood and have minimal economic standing which not only often leads to their exploitation but also creates barriers in their access to justice.

These barriers should not only be seen as areas for the government to work upon but can also be seen as indicators as to whether the dispute resolution mechanisms in place are adequate or not.

Indicator 3.2: Proportion of all detainees who are not yet sentenced.

This is a great indicator of the functioning of the judicial structures of a country. It is also anadministrative statistic that is easily attainable and can be easily gauged.

It is important to note that in India if the charge sheet for a criminal is not made within 60-90 days, a criminal has the right to be released on bail. This still remains a fact not commonly known by prisoners and often disregarded by law enforcement.

Further increase in the scope of this indicator can be done by including the measurement of the time gap between the filing of a case and its hearing. Furthermore even instances of unlawful detention could be involved as an indicator under this target.

The Government of India first and foremost needs to address the various barriers that still exist and have been enumerated with regard to access to justice. Once this is done a more substantial set of indicators should be used to ascertain the extent of improvement that has taken place in the judicial system. Some suggested alterations to the existing indicators may include:

i. Percentage of people who have experienced a dispute, and subsequently had access to a dispute resolution mechanism to their satisfaction.

ii. Percentage of people who have knowledge of the various alternative dispute resolution options available to them.

iii. Percentage of people who have confidence in their ability to access legal information and gain knowledge of the required proceduresif necessary.

iv. Percentage of prisoners kept in detention before their trials with respect to the total number of prisoners.

V. TARGET 4:

By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.

This target, while being wide in scope, deals broadly with the prevention of all forms of illicit and unlawful transactions and flow of finances. Various unlawful financial flows fall under the ambit of the target including evasion and avoidance of taxes. The target acknowledges that in the overall quest for sustainable development it is vital to recognise the importance of funds which can primarily be obtained from taxes paid by citizens and any illicit financial flows are detrimental to the development of a nation as it takes valuable funding away from development activities. Furthermore, the target also addresses the issue of funding of terrorism and aims to curb the illicit flow of finances to all terror outfits as it ties into the grander scheme of attaining peace.

Indicator 4.1: Total volume of inward and outward illicit financial flows.

Past UN documents have defined illicit financial flows as the transfer of money that is earned, transferred or spent through illicit means, into or out of a country. They include legally earned monies

that are transferred illicitly or monies that are acquired through illegal activities, such as crime, corruption or tax evasion.

In reference to this indicator the UN Development Programme along with UN Economic Commission for Africa among other global organisations have expressed the need for a concrete methodology to be developed to gauge such illicit activities and have also emphasised on the need for a universal definition for corruption. The Government of India has recently lead the way in the fight against corruption with their crackdown on black money by means of demonetisation of the INR 500 and 1000 currency notes. A major driving force behind this decision by the Government was to help curb illicit financial flows including corruption and funding of terrorist outfits. Keeping aside the legality of this move and even though the implementation of the plans leaves a lot to be desired, the ambitious step clearly shows this to be an issue the Government strongly wishes to address, which is a good step towards achieving the target by 2030.

The international community still requires a strong methodology for measurement, something which the indicators do not address. Looking elsewhere for solutions, India has ratified theUnited Nations Convention against Transnational Organized Crime and its three protocols and the United Nations Convention against Corruption. These conventions offer a comprehensive roadmap to elimination of corruption and other illicit financial transactions and must be adopted as policy by the Government of India in their war against black money and corruption. Some salient features discussed in the aforementioned documents include

i. Definition and standardization of certain terms that are used with altering meanings in different countries

ii. Requires the Government of India to have anti-corruption policies, develop corruption prevention measures, set up anti-corruption bodies and institutions for prevention and enforcement of laws pertaining to corruption;

iii. Establishes specific offences as criminal offences and provides for sanctions against the offences;

iv. The Government must put in place measures that promote international cooperation through extradition, mutual legal assistance, joint investigations etc.;

v. Helps with provisions for training, research and information sharing.

A few other indicators that could be considered in order to fully utilise the scope of this target:

i. Value of illicit production and trafficking of drugs, as a total and as a percentage of GDP.

ii. Drug-related crime per 100,000 of the population.

iii. Number of investigations and convictions against suspicious financial activity relating to organized crime, money laundering, bribery and corruption, and financing of terrorism.

VI. TARGET 5:

Substantially reduce corruption and bribery in all their forms.

This target deals majorly with the world wide issue of rampant corruption in various government institutions. The target recognizes that in order to increase efficiency of any government body it is a prerequisite to ensure transparency in their workings, something which this target aims to achieve.

Indicator 5.1: Percentage of population who paid a bribe to a public official, or were asked for a bribe by these public officials, during the last 12 months.

This indicator directly addresses the first-hand experience of an individual who was required to pay a bribe to a public official with the purpose of getting work done which is the duty of the public official regardless of any payment of money. 'Public official' in the indicator at hand will be taken as defined under the United Nations Convention against Corruption.

This indicator is inherently flawed in the country of India and requires thorough revision and deliberation in order to come up with a more efficient one given the stature of the problem in our nation. This indicator may be feasible in various other countries where only accepting bribes is an offence, but in India given that both giving and accepting of bribes is a crime, this indicator would be redundant and would not be able to gauge the level of corruption given the fact that such transgressions almost always go unreported.

The logic behind criminalization of giving bribes was that by giving a bribe an individual was affectively abetting the act which is a crime and therefore punishment must be administered. Even though this logic seems sound, a drastic change in policy is suggested in order to ensure not only that bribery does not go unreported but that the epidemic of corruption is ended once and for all. This drastic change would be to decriminalize the act of giving bribes. This change would majorly help in curbing situations where a person is forced to pay a bribe by a public official in order to complete a task which he is required to do by law anyway. These types of bribes are referred to by economists as "harassment bribes". Now, if giving of bribes is made legal, in the case of "harassment bribes", it would be in the interest of the bribe-giver to ensure that the bribe-taker is caught, as the bribe-giver getting caught will not only be free of any repercussions for him but also there is a high chance he can retrieve his money. Furthermore in such a case there isn't much wrong the bribe-giver has done anyway and he can instead help a corrupt public official get caught. In such a scenario, the bribe-taker will also be aware of this

and will be savvy to the risks of taking bribes when giving bribes is not illegal, therefore he will be dissuaded from taking bribes in the first place.

Therefore, it is a contention of this paper that a drastic change in policy may be required in order to properly curb corruption and taking of bribes.

With regards to possible indicators to gauge the attainment of this target, the following can be considered as viable given the specific circumstances prevalent in India:

i. Percentage of persons who were asked by a public official to pay a bribe for completion of work required by law.
ii. Proportion of the population admitting knowing someone who has paid bribes or taken bribes.
iii. Existence of a mechanism through which people can easily and safely report incidents of bribery and corruption amongst public officials.

Indicator 5.2: Percentage of businesses that paid a bribe to a public official, or were asked for a bribe by these public officials, during the last 12 months.

This indicator addresses businesses which were required to pay taxes as opposed to individuals. This indicator suffers from all the same shortcomings and thus needs similar policy changes in order to bring about change even for businesses.

VII. TARGET 6:

Develop effective, accountable and transparent institutions at all levels

The target seeks to achieve establishment of efficient and responsible public services at all levels. This talks about the three organs of the government (the legislature, the executive as well as the judiciary) and the services provided at these institutions at all three levels.

Indicator 6.1: Actual primary expenditures per sector and revenues as a percentage of the original approved budget of the government.

This indicator seeks to measure a government's effectiveness by establishing how well it can plan its revenue and expenditure. This indicator therefore signifies the state's capacity to plan its budget and connects such capacity to effectiveness or lack thereof.

However, while this indicator shows the government capacity to plan, it utterly fails to show the state capacity to effectively implement those plans. At most this indicator can signify government capacity to *efficiently* plan, not its capacity to *effectively* direct those plans into action to reach the intended beneficiaries.

Thus, an alternative suggested to successfully measure such effectiveness is "Percentage of budget allocations that actually reached intended beneficiaries". This essentially measures how much success the government had in its budget planning and the resultant allocations – which, in essence, determine its effectiveness.

Indicator 6.2: Proportion of population satisfied with their last experience of public services, disaggregated by service.

The indicator attempts to establish the general satisfaction – or lack thereof – among the populace in their dealings with all types of public services. What is of primary significance in this particular indicator is the disaggregation by service which would specifically determine which public services are

likelier to have greater accountability, transparency and effectiveness and which ones are lagging behind in the area. Moreover, the indicator is relatively simple to comprehend.

However, while being high on the relevance factor, this indicator is not very feasible as it would entail large scale data generation in the form of feedback from the consumers of those services, though the data collected may be relevant on many other platforms as well. Furthermore, the data would again be subjective and mostly qualitative which furthers its unfeasibility.

Nevertheless, this lack of data and problems in collecting it can be conquered by linking National Statistical Organizations (NSOs) and domestic civil society groups with third party civil society and academic actors as well as UN agencies, multilateral and development agencies. They can collaborate on data collection along with consequent monitoring exercises.

These indicators can be made more comprehensive with supplementary indicators like:

i. Number of people that had to bribe government officials to get their work done, disaggregated by service

   This can be used to easily determine the accountability as well as the transparency associated with various services. And the data compilation can be done while collecting the feedback mentioned earlier.

i. Number of people that find public institutions accessible.

   This can be another indicator in the basket of indicators under target 6. This too can be utilized to gauge the effectiveness of these various public establishments. Once more, the data collation can be completed while collecting people'sfeedback on their level of satisfaction from their experience with public service.

VIII. TARGET 7:

Ensure responsive, inclusive, participatory and representative decision-making at all levels

Target talks about the decision makers and the decision making process being "responsive, inclusive, participatory and representative". The phrase "at all levels" in India would entail three levels of the democratic decision making (i.e. the panchayats at the village level; the State legislatures and; the national legislature), the judiciary (again, the three levels, i.e. the District Courts, the High Courts and the Supreme Court along with its ancillaries) and the executive.

Indicator 7.1a: Proportion of positions (by sex, disability, age and ethnicity) in public institutions (national and local legislatures, public services and judiciary) compared to national distributions.

This indicator seeks to measure the "representative" and "inclusive" aspect of the target. Keeping these two aspects specifically in mind, the indicator is relevant and feasible. Relevant as the disaggregation ensures that each section (each gender, caste, age-group, etc.) gets adequate representation and is included. It is feasible as the data of all its employees is already available with the government and only the analysis requires to be focused upon. The indicator is also relatively straightforward and requires only a prima – facie reading to be comprehended. The primary setback of this indicator is that it measures the proportion of distribution of all public positions. This, in turn, does not take into account the upper echelons of the various government undertakings. The implication is that due to this indicator it may be possible to determine whether the employee is, for example, male or female, but it will be impossible to determine whether the employer (who holds the bulk of authority) is male or female. Therefore, the "representative" or "inclusive" characters of authority are not indicated at all.

However, since the indicator seems to adequately cover certain aspects of the target, the authorsaccepts its practicability and its necessity for this target and consequently do not suggest a superior alternative.

Indicator 7.1b:Percentage of population who believe decision-making at all levels is inclusive and responsive

This indicator seems to entail a nation-wide survey asking its respondents to express their opinion on whether they believe the decision making at all levels is inclusive and responsive or not. This, in itself, is extremely impractical keeping in mind India's cosmic population which stands at 1.21 billion (2011 census). And a qualitative survey done on a sample can be highly unrepresentative. Moreover, the respondent is free to agree or disagree based on their notions of "inclusive" and "responsive". Evidently, this indicator is completely qualitative. This makes the indicator highly subjective, and the data thus collected vastly unreliable. A suggested alternative to this indicator, keeping Indian requirements at the forefront would be a survey asking only government employees the following question:

"Being a government employee, how proactive do you think your colleagues/bosses are?"

This successfully shrinks the universe of the survey and makes the data so collected more relevant as the question is aimed at those who are directly involved and have far greater chances of giving accurate information. And while still being subjective, this is exceedingly easy to grasp.

Indicator 7.2: Turnout as a share of voting-age population in national election.

This indicator is vastly irrelevant to the objectives of the target. The Indian reality has long since established that the voter only holds relevance at the time of the election. Moreover, the common

man has no say in the decision making process at all, once those decision makers are appointed. Thus, the voter turnout is absolutely immaterial in the matter, including the disaggregation by age.

Moreover, this indicator completely ignores all levels of decision making except the national.

Indicator 7.3: Legislature conducts public hearings during budget cycle

India's twin major problems – overpopulation and illiteracy – prevent this indicator from being a feasible option. Most of the population does not have access to any information let alone the education required to fully comprehend the national budget and it's far reaching consequences, thus rendering such exercise futile.

A suggested alternative to this is collection of data on how accessible the decision making process is to the common man at the grassroots level – namely, panchayats. It ought to be determined how much the ordinary man is participating in the determination of matters affecting him.

IX. TARGET 8:

Broaden and strengthen the participation of developing countries in the institutions of global governance

Contribution of developing countries in international organizations is often below their relative weight in the world in terms of population or GDP. Especially important financial international institutions like the World Trade Organization tend to lean towards countries contributing more to their funds. This, being impossible for developing countries, deals a blow to their representation in such institutions, even though their dependence on these institutions is much greater. Target 8 seeks to curb the very same menace.

Indicator 8.1: Percentage of voting rights in international organizations of developing countries

This indicator attempts to measure the representativeness of developing countries in international organizations. While the data required for this indicator is relatively straightforward to gather as such voting proceedings are publicly available in the founding document of all international, establishments, such a basic indicator can by no means be used to determine the actual participation of nations in an organization. It is inadequate because, a lot of times, these rights are based either on the financial assistance lent by these nation-states to the organization concerned (as is the case for multilateral development banks) or positions determined earlier (for example, the United Nations Security Council). It is unlikely that this indicator will give the reader a broader or deeper understanding of the target.

An alternative to this could be determination of percentage of voting rights in international organizations of developing countries, compared to population or GDP, as appropriate. Another possible indicator that can be employed to measure the representativeness of developing countries like ours in major international organizations can be the share of senior UN positions (P5 and above) occupied by nationals of developing countries.

This indicator can be made more comprehensive by adding the following supplementary indicators to the basket:

i. Proportion of General Assembly and Security Council resolutions formally initiated/led by developing countries. The information for this supplementary indicator will be absolutely effortless, as the United Nations consistently maintains the record of all such proceedings. Moreover, this can be a direct measure to appraise the contribution of developing nations such as ours in the proceedings of international bodies like the UN.

ii. Decisions taken by international organizations that developing countries found favorable

Similarly, the data gathering for this supplementary indicator will be evidently unproblematic and the data so collected will be extremely relevant to gauge the objectives sought to be attained by the target.

X. TARGET 9:

By 2030, provide legal identity for all, including birth registration

This target seeks to achieve the official registration of all the citizens of the country. This would ensure a consolidated national roster of all its citizens with all their information in one place for the government to access. This would also have far reaching consequences for all government undertakings as after this the government can identify intended targets and its beneficiaries more accurately. The judiciary will evidently find it easier to manage its data as well. Basically, a nation needs accurate data on its population for any successful undertakings. Moreover, ensuring that all its citizens have a legal identity ensures that it becomes increasingly difficult for them to bypass law and indulge in illegalities such as tax evasion.

Indicator 9.1: Percentage of children under 5 whose births have been registered with civil authority.

This indicator seeks to ensure birth registration of children above the age of five, at least. The data available in the national civil registers should be supplemented with surveys conducted to incorporate household not included previously. However, this indicator would make the stream of information available for children above the age of five only, giving it a five year lag.

Moreover, it would not specify the sex, region, religion, or even the age of the child registered. Another major defect is that even though the target gives each nation till 2030 to bring all its citizens within legal recognition, it would be a waste to not use the time and attempt to bring in adults as well under its ambit within the given timeframe.

Therefore, a suggested alteration to this particular indicator is to introduce disaggregation by age, sex, region and religion.

Alternately, it is suggested that the indicator be changed to "percentage of children under the age of 1 whose births have been registered with the civil authority, disaggregated by age, sex, region and religion." This would ensure higher responsiveness and make it more actionable.

For the adult part of the population, it is highly recommended that indicators like percentage of adult population holding an identity document which allows them to access public services and entitlements, conclude a lease, open a bank account, and enter and leave their country of residence, be introduced. This indicator is highly relevant as it lands all necessary data in the hands of the government and brings all the citizens within the information circuit in one way or another. While the data collected will be bulky, it will be comprehensive and cover various aspects of all the citizens, and will go a long way in establishing their legal identity. Another alternative can be "Percentage of people in a nation who have acquired a registered form of legal identification". This is a direct indicator that is simple to understand and is evidently relevant.

This indicator can be accompanied by supplementary indicators like:

i. Percentage of the population with basic national identity documentation, by sex

ii. Existence of a fair, transparent and accessible process for obtaining legal identification exists

XI. TARGET 10:

Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

The Indian Right to Information Act 2005 is a piece of legislation that works towards achieving just the objectives specified in Target 10. It gives the citizens access to all the information available within the public domain. Continuing access and preservation of information is also required for securing rights of the citizen. The Fundamental Rights accorded to the citizens is another constitutional protection to the citizen's fundamental freedom, as desired by the target. However, India is still a long way from having achieved the target despite these beneficial pieces of legislation.

Indicator 10.1: Percentage of budget documents, off budget revenue documents, procurement and natural resource concessions publically available and easily accessible in open data format

This is a highly relevant indicator which directly determines the extent to which the citizens have access to public documents. However, it may be difficult to identify how many total, relevant government documents are available which is the denominator for determining the percentage and this is a major drawback of this indicator.

Another setback can be that it focuses only on revenue and allied fields' documents, ignoring the broader strand of documents that are and/or ought to be in the public domain. However, since the indicator reasonably covers certain aspects of the target, it is appropriate for such determination.

Indicator10.2: Number of verified cases of killing, kidnapping, enforced disappearances, arbitrary detention, assault and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months

Media, the trade unions and the human rights advocates stand for freedom in this particular indicator and actions listed above such killing, kidnapping, arbitrary detention, etc. are evidently curbs placed on such freedom. This indicator attempts to measure the protection, or lack thereof, accorded to fundamental freedoms in a nation.

There are, however, several drawbacks to this measure. First, the three categories specifies, i.e., the journalists or the media, the trade unionists and the human right advocates cannot be used as representatives for a category as broad as "freedom". Freedoms of speech and expression, life and liberty, trade and commerce, etc. are rights that should be accorded to each and every individual. In such cases, it is unfair to leave everyone else from adequate representation in such a case. Secondly, the various kinds of measure to curb those freedoms specified in the indicator are not comprehensive. They address only the aspects associated with the physical well – being and freedom of an individual while completely ignoring the more subtle yet essential rights such as freedom of speech and expression. Thirdly, the data for this indicator will have to be obtained from multiple sources which can make it highly inaccurate. In a country like India, with its vast population where thousands go missing every day and corruption is rampant, it is easy to manipulate and control the flow of information.

It is recommended that a more subjective approach be taken for this particular target. That is, a perception survey be undertaken asking people their opinion on whether they believe their fundamental freedoms are protected.

Indicator 10.3: Percentage of population who believe they can express political opinion without fear.

This is a commonplace perception survey which is regularly undertaken by the media pre – polls or even otherwise. Thus the data is already is available and even updated regularly. Moreover, the

indicator is relatively simple to understand and grasp an understanding of. Furthermore, this indicator is highly relevant to the target and likely to have meaningful change over the time period on the national level.

However, the most apparent drawback of this particular indicator is that it only takes freedom to express "public opinion" in consideration. A true measure of freedom would be one that would determine the percentage of population who believe that they can express their views and opinions without fear of arbitrary action being taken against them. Of course, freedom of expression of political opinion does come a long way in determining all sorts of freedom, however, in a religion - sensitive country like India, freedom to express opinions on religious teaching, for example, might be a more accurate gauge.

An alternative to this could be an appraisal of pieces of legislations enacted by a nation – state to ensure protection of fundamental freedoms of its citizens in keeping with international standards.

XII. CONCLUSION

Promoting peace and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels may seem as a utopian scenario given the circumstances prevalent in our country right now, but no goal or target can be achieved without a comprehensive plan of action and the dedication to follow it, the same goes for the Sustainable Development Goals and more specifically SDG 16.

In 2015, when the member nations decided to adopt these 17 goals and work towards achieving them by 2030, it was not only a global declaration of intent to build a developed future but also a pledge to work tirelessly towards attainment of the goals in the agreed upon time frame. A year removed from that fateful summit in Ney York, the international community is still working on developing the best

possible methodology or roadmap to attain the goals and India must be at the forefront of this. As the Largest Democracy in the world with the fastest growing youth population, India clearly has a primary stake in ensuring global sustainable development for which it must take the lead when it comes to planning and execution. Our nation has already shown its intent in promoting a more sustainable future with their recent crackdowns on illicit financial transactions, regardless of its practicability, it is a clear sign that the Government is willing and ready to work towards achieving the SDG's and more specifically SDG 16.

The paper offered various suggestions which could assist the government in not only gauging the extent SDG 16 is being fulfilled but also help in ensuring the targets are being reached in an inclusive manner if not by 2030 then by the earliest possible time. The onus now rests on the government to draft policy frameworks and develop schemes in accordance to the existing indicators along with the suggestions from the various stakeholders and to ensure attainment of SDG 16 in an optimum manner.

Promoting peace in an inclusive society and ensuring access to justice for all by building effective and accountable institutions are not new concepts envisaged for the first time in 2015, these are age old doctrines that are embedded in the basic fabric of any democratic society. But unfortunately in almost 70 years of our democratic existence we have not succeeded in making this a reality for all sections of the society. This fact must be humbly acknowledged and the SDG 16 must be viewed as a golden opportunity using which our nation will fulfil its democratic duty and bestow upon its people the very basic principles which act as pillars in a free and independent country such as India.

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