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From the Editor's Desk

Dear Readers,

The years 2020 and 2021 went past us, with Covid-19 pandemic creating havoc in each individual lives and we are now in first quarter of 2022. Even while we hope that we are edging towards the end of the pandemic, the battle is still ongoing. These past two years took us through an unprecedented pandemic, the scale of which is yet to be comprehended by generations who are living through the aftermath of Covid-19. The process of knowledge sharing and education must continue in spite of the adversities posed, even during a pandemic. It is the commitment and responsibility of every academician, professional and educator towards our future generation.

Amity Law Journal serves as a literary platform to academicians, researchers, and practitioners to share their knowledge, experience, perspectives, opinions and research works. This edition of the journal showcases a wide array of topics such as digital justice delivery during the pandemic, public health strategies, food sovereignty, African feminism, commercial and investment law, international criminal law, human rights, intellectual property, consumer protection law, influencer advertising on social media; and legal thrillers in crime fiction.

We embark on this literary journey with Maquelin's article on digital justice delivery during the pandemic, where the author evaluates how virtual courts can be used in conjunction with conventional courts even after the pandemic and suggests necessary steps to be taken to implement digital measures in the judiciary. In the next article, the authors Christian and Walter make a comparative study on the approach to commercial and investment laws in UAE and Peru. Meena Kumary's paper analyses how achieving food sovereignty will entail a fundamental shift away from the industrial and neo-liberal paradigm for food and agriculture thereby ensuring the peoples' right to food sovereignty as a specific and full right, guaranteed by the United Nations. The rights based article continues with gender specific rights by Obadina, who proposes that in dealing with challenges confronting African women attempting to tackle their age-long discrimination, oppression, and subjugation in deeply patriarchal African societies, especially to enforce their fundamental rights as equal beings in the society; there is a need to develop an African theoretical basis for conceiving of African women's problems in an African way. Arjun and Amrutha have performed an evaluation of India's existing consumer protection legislation and suggest some policy reforms for effectively regulating influencer advertising through social media platforms. The other articles also bring to the readers interesting insights into the various aspects of law and related discipline.

We hope you enjoy all the papers!

Dr. Sagee Geetha Sethu

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DIGITAL JUSTICE DELIVERY IN THE PANDEMIC: KEY TAKEAWAYS FOR THE FUTURE

Maquelin Pereira*

Abstract

The aftershocks of the pandemic are being felt across every sector in the economy from employment to healthcare, and justice delivery is no exception. Most countries around the world imposed restrictive measures to curb the spread of COVID-19. With the objective of providing a forum for citizens amidst the chaos caused by the pandemic, the judiciary has adopted virtual courts allowing video-conferencing, e-filing, etc. as alternate methods for the delivery of justice. The steps taken by the judiciary have ensured that citizens are given an opportunity to approach the courts despite physical restrictions on movement. The ability and willingness of the courts to adapt to these technological advances are to be commended.

The lessons we have learned from the pandemic will help us along the way in our journey towards the attainment of 'speedy justice'. The researcher in this paper evaluates how virtual courts can be used in conjunction with conventional courts even after the pandemic. The technology-backed alternatives to regular court hearings, if made available to the litigants, would provide a multi-faceted solution to all the parties involved in litigation. 'Digital Justice', as it has been termed in the Parliamentary Standing Committee Report, has an abundance of benefits to citizens which will be discussed in the paper. While the author strongly believes that the digitization of courts is a much-needed solution for effective justice delivery, it is acknowledged that technology is not free of its challenges. Thus, the paper also suggests necessary steps to be taken to implement digital measures in the judiciary.

Keywords: COVID-19, speedy justice, virtual courts, digitization.

I. Introduction

The need for the implementation of Information and Communication Technology (ICT) within the judicial system in India is not recent. Various studies have highlighted the various technological advancements both necessary as well as implemented, within the legal system. The ICT measures that can be used in the delivery of justice are manifold, from document management, digital signatures to e-filing and videoconferencing.¹

Important steps have been taken in this regard by the Indian government, with the National Informatics Centre (NIC) taking a lead beginning with the computerization of Indian courts and moving vigorously to the e-Courts project. Early on, in 2005, a National Policy and Action Plan for Information and Communication Technology for Enablement of the Indian judiciary was formulated. Currently, we are in Phase II of the ICT project which is to be implemented in the country in three phases.

II. Considerations of 'Access to Justice'

'Access to justice' is at the core of the constitutional framework in India. The judiciary has been an active proponent of change in the conventional methods of approaching the courts. To this extent, a mere letter has been recognized as sufficient for instituting an action in the Supreme Court. Various such advancements have been brought about because of the active role taken by the judiciary in recognizing and protecting access to justice. It was this very judicial function that saw an initial suspension and subsequent reformation during the pandemic.

Like all other countries, the justice delivery system of India was also disrupted due to the unprecedented consequences of the pandemic. While India's Supreme Court normally disposes of as many as 3,500 cases per month, from March 23 to April 24 this year, it only completed 215 cases.² With the declaration

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¹ Bibek Debroy, *Justice Delivery in India- A Snapshot of Problems and Reforms*, INSTITUTE OF SOUTH ASIAN STUDIES WORKING PAPER NO. 47, 31 JULY 2008.

² Blake Candler, *Courting a Virtual World*, INDIA LEGAL LIVE (June 6, 2020), <https://www.indialegallive.com/top-news-of-the-day/courting-a-virtual-world/>

of lockdown by the Central Government, in March 2020, the judicial system of the country had been put to a halt. The first and foremost question was for how long it would be possible to suspend the administration of justice. A few weeks into the lockdown, the Supreme Court passed directions for the use of video-conferencing for judicial proceedings across the country.³ The order, passed on 6th April, *Suo Motu Writ (Civil) No 5 of 2020*, stated the Supreme Court and all high courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies.

Before long, the apex court of India passed an order to move the system online. Even the district courts were also instructed to go virtual. An Interim Report on Functioning on Virtual Courts/ Court proceedings through Video Conferencing: 103rd report of Parliamentary Standing Committee of Personnel, Public Grievances and Law and Justice was tabled on September 2020 that described the process and progress of the virtual means adopted to dispense justice. The committee had studied and covered all possible details of the subject, which helps to understand and highlight the issues in the current scenario.⁴ There has been support from the Union Law Minister who acknowledged the need to make digital systems within the justice delivery more robust.⁵ Even before the pandemic, India grappled with overburdening of the courts and a backlog of cases.

III. Historical Background of Use of Technology

Technology has had a pervasive impact on our modern world, and in the legal sector, technology has played an important role in case management and contract management. Video conferencing is one of the ways in which courtroom hearings can be conducted which would connect parties from different locations to meet at a virtual place. Judge Herbert Dixon in his article from 2013, pointed out the various ways in which virtual hearings would be carried out in American Courts, also identifying the use of geolocation data, e-filing, and technology-assisted deception detection which would all aid in the delivery of justice.⁶

When we speak about the impact of technology in the courtroom, there are primarily two distinct areas that need to be covered. On the one side, is the internal or back office where storing court documents for record keeping for the future reference, which is especially relevant in common law countries which value precedent.⁷ The internal division, though it seems mundane, forms the backbone of the system. The digitization of the back-end work is underway with the courts project and is not the focus of this paper. On the other side, we have the external or front of house perspective, which refers to the representation and hearing of disputes by the judge. This aspect deals with virtual hearings and the use of videoconferencing as an alternative to physical hearings. It is pertinent to note that to move on with the digitization of courtrooms, the back office must be also digitized. Imagine a litigant who is attending a hearing through virtual means but doesn't have the facility to digitally store or upload any documents with the court. This system is bound to fail without the digitization of court documents, e-filing, and necessary software in place to carry out said activities.

³ Rajat Mohan, *Justice goes online: Coronavirus lockdown shows why courts must go digital to resolve issues*, FINANCIAL EXPRESS, (June 2, 2020), <https://www.financialexpress.com/industry/justice-goes-online-coronavirus-lockdown-shows-why-courts-must-go-digital-to-resolve-issues/1978347/>

⁴ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *103rd Report on Functioning of Virtual Courts/Court Proceedings through Video-conferencing*, Sep. 2020.

⁵ Time to make digital systems in justice delivery more robust: IT Minister, ET GOVERNMENT (May 11, 2020), <https://government.economictimes.indiatimes.com/news/digital-india/time-to-make-digital-systems-in-justice-delivery-more-robust-it-minister/75670229>

⁶ Judge Herbert Dixon Jr, *Technology and the Courts: A Futurist View*, (July, 2013), https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/summer/technology_and_the_courts_a_futurist_view/

⁷ Chief Justice Allsop, *Technology and the future of Courts*, SPECIAL LECTURE SERIES ON TECHNOLOGY AND THE FUTURE OF THE LEGAL PROFESSION, (March 26, 2019), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190326>

IV. The Scope of Virtual Courts

Virtual courts can be classified as courts that use a remote working system with the aid of specific software and tools. Virtual courts work to eliminate the requirement of human presence in the court so that the adjudication of cases can be carried out without any delays, irrespective of the physical presence of the litigant, the client, or the court staff. E-courts are a further categorization within virtual courts, and they refer to the websites and other technology used to assist the functioning of virtual courts.⁸

In virtual courts, written filings, including as complaints and other papers such as vakalatnama, are filed online. Court fees are paid electronically; evidence is submitted digitally; arguments are heard over videoconferencing; witnesses give their testimony remotely over videoconferencing and the judge decides the case online either presiding from the physical courtroom or some other place. A copy of the order/ judgement is made available on the website of the court or through some electronic means.⁹

Video conferencing can be used for criminal proceedings and to record statements from persons in prison. However, the literature suggests that video conferencing may have a negative impact on perceptions of the defendant.¹⁰ Video conferencing is not new to the Indian judiciary. During the pre-covid period, electronic-video linkages were used as an alternative method for various cases, especially in producing remand prisoners in court. But many challenges and risks were pointed out for this setup. Even though there were various foreseen challenges and risks, the Supreme Court granted videoconferencing legal status by issuing an encompassing decision using Article 142 of the Indian Constitution, which applied to all High Courts in the nation. With model rules and guidelines given to the High Courts, district courts, judges, and lawyers, the VC system for the first time connected the bench and the bar. In this new normal judicial system, plaint and all other important documents like Vakalatnama, and written submissions are filed electronically.

In a recent case at the High Court of Madras, the proceedings were held through video conferencing. The court, while considering a writ petition contesting a government order and the consequential works in the tender notification by Tamil Nadu, Department of Highways and Minor Ports ruled "*To consider the respective pleadings and submissions of the respective parties, this Court is of the view that such final hearing cannot be done by way of video-conferencing mode.*"¹¹

The Bar Council of India has expressed concerns about the lack of facilities available to lawyers especially from small towns and has requested the state to provide laptops to facilitate filing. The BCI has further urged that physical court hearings must be resumed where the situation is under control. The Council emphasized that the rollout of virtual hearings must be carried out in a phased manner as a good percentage of the legal community is not well-versed with the complexities of such technology.

Another important concern that the judiciary has to keep in mind is that the implementation of virtual courts has to be in line with democratic principles, rule of law, and constitutional principles.¹² Therefore,

⁸ Digant Raj Sehgal, *Future of Virtual Courts in India after COVID-19 crisis*, IPLEADERS BLOG, (April 14, 2020), <https://blog.ipleaders.in/future-virtual-courts-india-covid-19-crisis/>.

⁹ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 103rd Report on Functioning of Virtual Courts/Court Proceedings through Videoconferencing, Sep. 2020.

¹⁰ Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, TULANE LAW REVIEW, Jan. 2004.

¹¹ Nikitha, *Impact of Video Conferencing on Court Proceedings with Respect to Litigants and Lawyers*, BNB LEGAL, (Aug. 14, 2020), <https://bnblegal.com/article/impact-of-video-conferencing-on-court-proceedings-with-respect-to-litigants-and-lawyers/>

¹² Judge Jose Igreja Matos, *Access to Justice in times of Judicial Lockdown*, UNODC, <https://www.unodc.org/dohadecclaration/en/news/2020/03/access-to-justice-in-times-of-judicial-lockdown.html>

the development of a system respecting the principles of public hearing, fairness, and justice is important in a democratic country like India.

V. Harmonization of Technology into the Courts

The author agrees with Justice Chandrachud's statement that virtual courts will not replace or substitute for physical courts.¹³ It would be imprudent to advocate for an overhaul of the courts and replace them with virtual courts and this is indeed not going to solve any of the problems associated with justice delivery. But a future in which technology can work hand in glove with traditional dispute resolution is what is encouraged.

The concept of 'hybrid courts' would be a feasible option¹⁴, where a categorization has to be done on matters that would be suitable for virtual courts, with other disputes being traditionally adjudicated in physical courts.

In Italy, the digitization of courts in the civil and administrative process was underway even before the pandemic, whereas in the criminal courts, there is limited use of virtual means. Though prisoners in jail can participate through video conferencing, the ability to file documents and evidence in criminal cases is restricted.¹⁵

The United Kingdom has experimented with virtual courts since 1999, with primarily two tools in use: 'live link' which allows police officers to give evidence from police stations, and the 'virtual court' program which allows prisoners to appear in court from police stations.¹⁶

Though the courts globally have been embracing technology during the pandemic, there is a wide disparity of the tools and technology used for the purpose even within a single country. During the pandemic, most courts in the US have resorted to Zoom or Microsoft Teams for convening the hearing through video conferencing. There is a need for the establishment of a secure court management platform that will serve as a one-stop destination for filing, storing case records, docketing, collecting evidence, and audio-video conferencing.¹⁷

The introduction of the virtual court system by the Delhi District Courts in 2019 which was primarily used for payment of traffic challans by the litigants, has proven to be a success in as far as the litigants who physically approached the court were reduced.¹⁸

Currently, virtual court participants generally see themselves and other participants arrayed in boxes on a single screen. A more immersive setting might enhance the design of the court, involving multiple screens (including separate screens for documents), camera angles, and multidirectional speakers to simulate eye contact and audio direction.¹⁹

¹³ Murali Krishnan, *Virtual Courts are not a substitute to physical courts*, (May 24, 2020), <https://www.hindustantimes.com/india-news/virtual-courts-not-a-substitute-to-physical-courts-justice-dy-chandrachud/story-8YrTg4dmP2IKzFJMnDrdqK.html>

¹⁴ Gearoidin McKenna, *The future of virtual justice: Is there still a place for brick and mortar courts?*, LEXISNEXIS BLOG, (Nov. 23, 2020), <https://www.lexisnexis.co.uk/blog/future-of-law/the-future-of-virtual-justice-is-there-still-a-place-for-brick-mortar-courts>

¹⁵ Valeria Logrillo, *Digital Courts during Covid-19: Italy edition*, (May 1, 2020), https://www.lexisnexis.co.uk/research-and-reports/bar/digital-courts-during-covid19-italy-edition.html?utm_source=content&utm_medium=FOL&utm_campaign=the-future-of-virtual-justice-is-there-still-a-place-for-brick-mortar-courts

¹⁶ Jamie Young, *A Virtual day in Court: Design Thinking & Virtual Courts*, Dec 2011, <https://www.thersa.org/globalassets/pdfs/reports/a-virtual-day-in-court.pdf>

¹⁷ <https://www.legalexecutiveinstitute.com/virtual-courts/>

¹⁸ Aditya Sethi and VS Pravallika, *Virtual Courts: Is it Time to Embrace the Much-Required Change in India?* (*The RMLNLU Law Review Blog*, 24 May 2020) <<https://rmlnlulawreview.com/2020/05/24/virtual-courts-is-it-time-to-embrace-the-much-required-change-in-india>> 19th March 2021.

¹⁹ Meredith Rossner, *Virtual Justice and the future of Courts*, <https://njca.com.au/virtual-justice/>

It was observed by the Supreme Court “*it is appropriate to use videoconferencing technology where both the parties have equal difficulty due to lack of place convenient to both the parties. Proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person, wherever one or both the parties make a request for use of videoconferencing.*”²⁰

This judgment, however, has been overruled in the case of *Santini v. Vijaya Venketesh*,²¹ wherein it was held that video conferencing may not be permitted in a transfer petition. During the pandemic, owing to the lockdown and need for social distancing, video conferencing has been permitted according to the guidelines of the Supreme Court and respective High Courts. It remains to be seen what the position of the judiciary is on video conferencing after the pandemic.

VI. Challenges in the implementation of Virtual Courts

Technological advancement also gives rise to challenges such as data security and cyber threats. The safety of the systems and protection of data is an important consideration. Some of the challenges which need to be considered are mentioned below.

Digital Divide: One of the main concerns with the rolling out of virtual courts is the lack of broadband connectivity in all parts of the country. Moreover, not all advocates and litigants are familiar with technological tools, and this would be a hindrance to lawyers in towns or rural areas. It would also weigh favourably towards tech-savvy lawyers of large firms in urban areas. Even concerning the general public and the availability of the internet, India is still lagging, especially in the rural areas. Statistics suggest that up to 2017, nearly 72% of the population did not have any internet access.²² Moreover, even where there is connectivity, the slow speeds in many areas are a hindrance for implementing technology in public functions such as adjudication of disputes.

Security Concerns: One of the challenges faced in the implementation of virtual courts is the security threats posed by virtue of different third-party applications. A challenge to the use of videoconferencing applications by Indian courts was filed in the Supreme Court, on the basis that the applications such as Zoom and Video Mobile in use currently, are owned by foreign companies and threaten national security.²³ Insufficient connectivity and bandwidth to simultaneously operate multiple courts also seriously reduce India’s capacity to hear cases. The panel also advised that Blockchain technology should be leveraged to improve the reliability of evidence and security of transactions and to fortify the digital security of case files.²⁴

Reliability of Witnesses and Evidence: The issue of the manner of taking witness testimony and evidence in a virtual courtroom setup definitely needs to be investigated. Physical presence can go a long way in the determination of truth during cross-examination.²⁵ In the event of video conferencing, there may be issues such as delayed streaming which may not accurately portray facial expressions or voice and thus prove detrimental to the entire process. In criminal matters at the very least, the conventional courtroom and the necessary environment created by the courts might enable a more accurate and truthful testimony.

Data Protection Laws: The lack of a data protection regime in India is a multi-faceted issue that affects several areas of the economy, and so, virtual justice delivery needs a robust data protection law. Since litigation and the documents submitted before a court is highly sensitive and confidential, there is a

²⁰ *Krishna Veni Nagam vs. Harish Nagam* Transfer petition [(CIVIL) NO. 1912 OF 2014]

²¹ TRANSFER PETITION (CIVIL) NO.1278 OF 2016

²² Aarati Krishnan, How many Indians have internet?, The Hindu, 26 March, 2017 <https://www.thehindu.com/business/how-many-indians-have-internet/article17668272.ece>

²³ Blake Candler, Courting a Virtual World, 6 June 2020, <https://www.indialegallive.com/top-news-of-the-day/courting-a-virtual-world/>

²⁴ Third Party Software for Virtual Courts poses Security Risk, 11 Sept. 2020. <https://ciso.economictimes.indiatimes.com/news/third-party-software-for-virtual-courts-poses-security-risk/78058320>

²⁵ Pramod Kumar Dubey, Virtual Courts: A Sustainable Option, 12 April 2020, <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option>

great need to protect such information from potential wrongdoers who could use it to commit crimes such as identity theft or digital fraud, etc.

VII. Conclusion

While the future remains uncertain in light of the pandemic, the increasing importance of technology in today's world is certain. It is no longer possible to disregard the benefits of technology or harp on the ill effects of using virtual means. There indeed remain various challenges in the harmonization of technology in the courtroom, but baby steps in this direction are the need of the hour.

It is recommended that the judiciary makes a clear demarcation of processes that are suitable for virtual hearings and those that are not. Disputes concerning traffic violations and cases of petty violations can be considered for digital means. Furthermore, since court hearings are divided into different stages, virtual means can be utilized at least for preliminary matters, whereby the litigants can file the plaint and make preliminary submissions through digital mode and subsequent matters, such as cross-examination, the testimony of witnesses, and arguments, can be carried out through physical courts.

Finally, all necessary safeguards; such as a data protection law, guidelines by the judiciary for use of virtual courts at the appellate as well as the district level and security concerns must be addressed. In fulfilment of the requirements, there can be a rolling out of video conferencing in phases over a period. Importantly, there must be a synchronization of rights of the judges, lawyers, and litigants as well as drawing closer to the goal of reducing judicial backlogs.

AN APPROACH TO THE COMMERCIAL AND INVESTMENT RELATIONSHIPS BETWEEN THE UNITED ARAB EMIRATES (UAE) AND THE REPUBLIC OF PERU

Christian Armando Carbajal Valenzuela^{*} & Walter Luis Del Águila Cáceres[#]

Abstract

The geographical advantages within the framework of the international maritime trade of the Persian Gulf, as well as the production of high-value goods, together with a considerable level of political and economic autonomy, have allowed the United Arab Emirates (UAE) to become an important center of trade and international relations. Diplomatic relations between Peru and the UAE were strengthened between 2011 and 2016 and trade relations had a very important growth in 2019. The investment made in Peru by Dubai Ports World (DP World) in 2008, is the largest from the UAE in Peru. The Summit of Heads of States and Governments of South America and Arab Countries (ASPA), led to the signing of the Framework Agreement for Economic, Trade, Technical and Investment Cooperation between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC), held in Lima on 1 October 2012, which may be the basis for a future Free Trade Agreement between Peru and the UAE.

Keywords

Commercial and Investment relationship Peru – UAE; Framework Agreement on Economic, Commercial, Technical and Investment Cooperation between Peru and GCC.

I. Introduction

This article has as its starting point a historical approach, from the early development of the Emirates, to the eventual formal relations with Peru through the 20th Century with the United Arab Emirates (UAE), where we propose a journey in the history of the UAE, from the tribal origins of the Persian Gulf, through the maritime tribe of the Al Qasimi. We remember the journey of the Portuguese Vasco Da Gama through the Persian Gulf, making a more detailed description of several historical events that occurred during the nineteenth century. Finally, we develop relevant dates of the twentieth century, until the political events of the late 60s, that led to the constitution of the United Arab Emirates (UAE), managing to establish itself as a mercantile and economic power in the Middle East.

Likewise, we refer to important dates in Peru's trade relations with the United Arab Emirates (UAE), reviewing important information from the World Bank (WB) and the United Nations (UN), related to GDP per capita and the Human Development Index (HDI) of both countries.

Similarly, we analyze data and figures related to the level of commercial exchange between Peru and the United Arab Emirates (UAE) and refer to the only case initiated before the International Centre for Settlement of Investment Disputes (ICSID) in 2011, involving an investor from the UAE, for a significant amount, which was finally suspended in April 2020. We also refer to Peru's participation in Expo 2020 Dubai, where the Peruvian representation has been praised by the organizers and the audience.

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this Agreement should be the basis of a future Free Trade Agreement between Peru and the United Arab Emirates (UAE).

Finally, we analyze the Framework Agreement on Economic, Commercial, Technical and Investment Cooperation between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC), signed in Lima, on October 1st, 2012, still not in force, developing the articles that make it up, where a series of commitments are established between the contracting parties, having as its main objectives, the economic, commercial, investment and technical cooperation between the parties, as well as the exchange of information and technical knowledge in these areas. Undoubtedly,

II. A historical approach from Peru to the United Arab Emirates (UAE)

The United Arab Emirates (UAE) can trace its farthest origin in the various tribes of the Persian Gulf. In this region, for many centuries, great empires have disputed dominion over these lands. By the nineteenth century, both the Ottoman Empire and the British Empire claimed these lands as part of their sphere of influence, however, Ottoman rule over this territory was diluted with the decline of the Empire towards the nineteenth century.

Long before, the tribes of the Persian Gulf had enjoyed widespread independence. The Al Qasimi, a maritime dynasty, maintained a strong presence in the Gulf. Since the sixteenth century, great empires had been interested in the wealth and commercial importance of the Gulf, with varying degrees of success and permanence. One of the first expeditions to venture into the coastal cities of the Gulf was that of the Portuguese, Vasco Da Gama, through which Portuguese explorers were given to piracy against Arab merchant ships, but neither contacts nor permanent diplomatic relations were established between the nascent Portuguese Empire and the tribes of the Gulf.¹

Already in the early nineteenth century, meanwhile, the growing British Empire took advantage of its presence in the Middle East and India, expanding its influence over the lands of the Persian Gulf. During this period, piracy in the gulf was on the rise, with the aggressive naval incursions of the Al Qasimi tribe. It was between 1809 and 1820 that British military campaigns tried to establish a greater presence and control over the area, in order to protect their routes and merchant ships to and from the Indian Ocean. The first expedition resulted in a military campaign in 1809, led by General Sir Lionel Smith. The campaign culminated in a peace treaty, which as soon as 1815, was again broken and hostilities resumed.²

In 1819, a second military campaign began, which finally led to a permanent peace treaty between the Al Qasimi, the various states and kingdoms of the Gulf and Great Britain, in which a legal framework for trade in the Gulf was concretely established, as well as legal and bureaucratic mechanisms for cooperation and mutual navigation between the British and Arabs. Trade within the Indian Ocean, which expanded greatly in the nineteenth century, turned this area into an important point of supply and maritime trade, following the general treaty of 1820. Trade through the Suez Canal saw an increase in commercial transit to the Victorian Era, when trade relations with the emirates' lands were increased by the exploitation of pearls, which were collected from the rich reefs near the coasts of Dubai and Sharjah. The popularity of these precious jewels remained on the rise towards the second half of the nineteenth century. The importance of these ports for the British Empire was such, that in 1892 they achieved the signing of a treaty of exclusivity of trade, although always the various emirates maintained a wide political independence, since the character of this treaty was essentially maritime³⁴.

¹ Fernandez-Armesto, Felipe (2006). *Pathfinders: A Global History of Exploration*.

² *Gazetteer of the Persian Gulf. Vol I. Historical. Part IA & IB. J G Lorimer. 1915.*

³ Heard-Bey, Frauke (2005). *From Trucial States to United Arab Emirates: a society in transition*.

⁴ "General Treaty for the Cessation of Plunder and Piracy by Land and Sea", 5 February 1820.

Important Indian trade continued to increase into the early twentieth century, and these products, such as pearls, jewelry, luxury fabrics like silk and damask, as well as Dubai's gold trade, continued to increase, leading to the export of these luxury goods on a global scale. With the beginning of the 30s and the mechanization of transport and industry in Britain, oil exploration activities began in the area. The first oil began to be extracted in the 30s, and the volume increased with the end of World War II, together with the recovery of industry in Europe. One of the largest oil exploitations in the area was that of the D'Arcy company in Abu Dhabi. This combination of a growing and rich trade, in both luxury goods and oil, led the Emirates to become a major center of trade and navigation globally.⁵

Thus, towards the 60s, with the discovery of new oil deposits in Abu Dhabi, the Sheikhs of the various emirates began a broad political campaign of unification, and debate was entered into in Britain in 1966, about the feasibility of continuing their presence in the Persian Gulf. The conclusion of the British parliament was to recognize that the political independence of the United Arab Emirates was simply a fact. This was due to the broad political and legal independence of each emirate.

Thus, finally in 1968, with the declarations of the then Prime Minister Harold Wilson, and subsequently the ratification of his successor Edward Heath in 1971, it was decided to withdraw the British presence from the Emirates. This eventually led to the Union of the Emirates between 1971 and 1972, which despite various frictions and claims with neighboring Iran, and some political uncertainty, managed to establish itself as a mercantile and economic power in the Middle East.⁶

III. Commercial and investment relationships between Peru and the United Arab Emirates (UAE)

While it is true that to date there is no bilateral investment treaty (BIT) or a free trade agreement (FTA) that regulates trade relations between Peru and the United Arab Emirates (UAE), it is also important to specify that, on October 1st, 2012, a Framework Agreement for Economic, Trade, Technology and Investment Cooperation was signed, between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC), formed by the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait.

This Framework Agreement formalized the commercial exchange between Peru and the United Arab Emirates (UAE), the same that had already been developing in practice. It is interesting to note that, despite the fact the United Arab Emirates (UAE) is a relatively young nation (1971), 14 years after its independence they formally established diplomatic relations with Peru (June 17th, 1986), developing an important increase in these relations, whose objective is to promote and strengthen the commercial exchange between both countries.⁷ Another relevant date to take into account is constituted by the opening (operation) of the General Council of the Republic of Peru in Dubai, in the month of June 2011.

Likewise, another important date has to do with the inauguration of the Commercial and Investment Office of Peru in Dubai in 2012, with the aim of consolidating political, economic, cultural and social relations between both countries. Finally, it is also important to note that the United Arab Emirates (UAE) opened its Embassy in Lima in March 2016.

According to information provided by the World Bank (WB), the United Arab Emirates (UAE) had a GDP per capita for the year 2019 of 69,957.6 US dollars, in contrast to Peru, which for the year 2020, had a lower GDP per capita of 11,879.2 US dollars.⁸

On the other hand, in relation to the Human Development Index (HDI) prepared by the United Nations, the United Arab Emirates (UAE) is ranked 31, corresponding to the classification, according to the HDI,

⁵ Morton, Michael Quentin (July 2016). "The Search for Offshore Oil Abu Dhabi". AAPG Explorer.

⁶ Heard-Bey, Frauke (2005). From Trucial States to United Arab Emirates: a society in transition.

⁷ UAE Embassy in Lima-Bilateral Relationship, mofaic.gov.ae

⁸ GDP per capita, PPP (\$ at current international prices) | Data (bancomundial.org)

as "Very high human development", while Peru is ranked 79th, corresponding to the classification, according to the HDI, as "High human development".⁹

The Ranking Doing Business from the World Bank mentions that the United Arab Emirates (UAE) is located in the 21st position among 190 countries, being one of the best business environments in the Middle East and in the world¹⁰.

According to sources from the Embassy of the United Arab Emirates (UAE) in Lima, the volume of commercial exchange between the United Arab Emirates (UAE) and Peru reached more than 900 million US dollars in 2019.¹¹

Also, according to the Guide of Multisectoral Market 2019 – United Arab Emirates (UAE), prepared by the Department of Market Intelligence from PROMPERU (Peruvian governmental promotional agency), Peru was the 62nd supplier of UAE in the world and the 4th from Latin America. The exports from Peru to UAE in 2018 amounted to 444 million US dollars, from which 97% were products belonging to traditional sectors (such as gold, zinc, coffee, oil derivatives, among others) and 3% to non – traditional sectors (such as agricultural and fishing products, chemical, non-metallic mining, textiles, woods, and papers, among others)¹².

In what refers to foreign direct investments, the sectors in Peru in which UAE investors could be more interested are: Agricultural, Oil & Gas, Communications Infrastructure, and financial, among others¹³.

Also, in relation to UAE's investments already made in Peru, it is worth mentioning the signing of a concession contract to build and operate a new container terminal within the port of Callao in Peru¹⁴, the biggest and most important in the country. Its construction began in 2008, with Dubai Ports World (DP World) owning 100% of the operations, having been inaugurated in 2010.¹⁵ This investment ended up in an investment arbitration proceeding in 2011, before the International Centre for Settlement of Investment Disputes (ICSID), for more than 200 million US dollars, initiated formally under BIT Peru – United Kingdom. This proceeding was discontinued in April, 2020¹⁶.

Finally, it is noteworthy the outstanding participation of Peru in the Expo 2020 Dubai, from October 2021 until March 2022, which allows the promotion of Peruvian and UAE exports and reciprocal direct investments¹⁷. The Peruvian pavilion at Expo 2020 Dubai has been especially praised for its beauty and majesty.

IV. Framework agreement on economic, commercial, technical and investment cooperation between the Republic of Peru and the member states of the cooperation council for the Arab states of the Gulf (GCC)¹⁸

⁹ [hdr2020_es.pdf \(undp.org\)](#)

¹⁰ PROMPERU, Department of Market Intelligence. Guide of Multisectoral Market 2019 – United Arab Emirates (UAE), pag. 4.

¹¹ <https://www.mofaic.gov.ae/es-PE/Missions/Lima/UAE-Relationships/Economic-Cooperation>

¹² PROMPERU, Department of Market Intelligence. Guide of Multisectoral Market 2019 – United Arab Emirates (UAE), pag. 3, 8 and 9.

¹³ García, Jaime. Economic and Commercial relations between Peru and Arab countries. In: Agenda Internacional, PUCP, year XVII, No. 28, 2010, pag. 57.

¹⁴ García, Jaime. Economic and Commercial relations between Peru and Arab countries. In: Agenda Internacional, PUCP, year XVII, No. 28, 2010, pag. 54.

¹⁵ <https://www.mofaic.gov.ae/es-PE/Missions/Lima/UAE-Relationships/Economic-Cooperation>

¹⁶ <https://www.bilaterals.org/?dp-world-retira-su-demanda-contra&lang=en>

¹⁷ <https://peruexpodubai.com/>

¹⁸ https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=129EA

On the occasion of the III Summit of Heads of States and Governments of South American - Arab Countries (ASPA Summit), the "Framework Agreement for Economic, Trade, Technical and Investment Cooperation between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC)" was signed in Lima on October 1st, 2012.

This agreement is based on the recognition of the importance of the friendly relations already existing between the contracting parties, where the parties also express a desire to develop and improve economic, commercial, technical and investment cooperation, based on equality and mutual benefit, all this, taking into consideration the regulations of each country.

In the first article of the Framework Agreement, the contracting parties undertake to promote economic, commercial, investment and technical cooperation between them, with the corresponding exchange of information and know-how in these areas.

Now, with regards to the second article of the Framework Agreement, it is important to emphasize that all the countries that intervene in such agreement are members of the WTO, and by virtue of this, there is already a previous commitment by such multilateral instrument to liberalize trade. What is important is that a commitment by each party is established, to assess the feasibility of a Free Trade Agreement between Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC).

In the third article of the Framework Agreement, four lines of action are established to create a favorable environment for the expansion of trade between the parties, namely:

- 1) Promote and facilitate trade and cooperation to solve trade barriers.
- 2) Promote business communication, especially between institutions and organizations related to foreign trade.
- 3) Facilitate training and technology transfer.
- 4) Exchange information on trade, as well as economic and trade statistics and methodology.

Article Four of the Framework Agreement establishes the commitment of the contracting parties to take appropriate measures to encourage the flow of capital between them, through joint investment projects, facilitating corporate investments, as well as scientific and technological exchanges, in the different fields of economy, trade, tourism, energy, agriculture and industry.

In Article Five of the Framework Agreement, the contracting parties undertake to encourage the exchange of visits by representatives, delegations and economic, commercial and technical missions between them, organizing exhibitions and providing the facilities and assistance necessary for this purpose.

It is important to highlight the commitment assumed by the contracting parties in Article Six, which establishes the Joint Committee on Economic, Trade, Technical and Investment Cooperation, which will be co-chaired by the Ministry of Foreign Affairs of Peru and the rotating presidency of the Cooperation Council for the Arab States of the Gulf (GCC), together with the General Secretariat of the Gulf Cooperation Council, its functions being the following:

- 1) Monitor the implementation of the provisions of the Framework Agreement and other bilateral agreements or protocols.
- 2) Address any difficulties or differences that may arise from the interpretation or enforcement of the provisions of the Framework Agreement.
- 3) Adopt recommendations to improve economic, trade, technical and investment cooperation between the contracting parties and to promote economic relations and increase the volume of trade.

Regarding the "General Provisions" of the Framework Agreement, it is important to highlight article seven, which establishes the authority of the Member States of the Cooperation Council for the Arab States of the Gulf (GCC) to carry out bilateral activities with Peru individually, under the Framework Agreement, or to conclude bilateral agreements with Peru and vice versa.

Finally, it is important to mention that in accordance with the official information provided by the Ministry of Foreign Affairs of Peru, the internal proceedings for the entry into force of the "Framework Agreement on Economic, Commercial, Technical and Investment Cooperation between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC)" are still in process.

V. Conclusion

- 1.- The United Arab Emirates (UAE) has historically been an important center for international trade for several centuries. The development of eastern trade across the Indian Ocean made the Persian Gulf an important intermediate point of global trade since the time of the British presence in the region. Likewise, the coasts of the Persian Gulf have historically been an important point of extraction of resources of high commercial value. First, it was the pearl trade, a very precious commodity in the West over several centuries, and today it is oil, which since the 30s has been an important export commodity.
- 2.- While it is true that diplomatic relations between Peru and the United Arab Emirates began in June 1986, it is also important to mention that, between June 2011 and March 2016, diplomatic relations between the two countries were consolidated, with the opening of the Consulate General of Peru in Dubai (2011) and the Embassy of the United Arab Emirates (UAE) in Lima (2016).
- 3.- The analyzed information of the World Bank (WB) on GDP per capita and the analyzed information of the United Nations (UN) in relation to the Human Development Index (HDI), allows us to conclude that both, Peru and the United Arab Emirates (UAE), have economies that can be complementary to each other.
- 4.- On the trade issue, the exchange figures for the year 2019, published by the Embassy of the United Arab Emirates (UAE) in Lima, are very encouraging for entrepreneurs from both countries, who wish to start or expand their international trade activities.
- 5.- The signing of the concession contract to build and operate a new container terminal within the port of Callao in Peru, held in 2008 between Peru and Dubai Ports World (DP World), constitutes the most important foreign direct investment by a company from the United Arab Emirates (UAE) in Peru.
- 6.- The conclusion in Lima, on October 1st, 2012, of the Framework Agreement on Economic, Commercial, Technical and Investment Cooperation between the Republic of Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC), despite not yet in force, has been a starting point for the formalization of trade and investments between Peru and the United Arab Emirates (UAE).
- 7.- The second article of the Framework Agreement turns out to be perhaps the most important of the commitments assumed by the contracting parties, which establishes the commitment by each party to analyze the feasibility of a Free Trade Agreement involving Peru and the Member States of the Cooperation Council for the Arab States of the Gulf (GCC).

FOOD SOVEREIGNTY: TOWARDS A SUSTAINABLE FUTURE

Dr. Meenakumary S*

Abstract

Food sovereignty is a paramount issue in the modern agricultural debate. The world economy is being driven by the corporate food regime. With the adoption of neo-liberal economic policies and developmental models, local food systems had been marginalized and undermined. Trade policies that favor huge farms and agribusiness are thus displacing small-scale producers everywhere. Additionally, non-sustainable agricultural practices contribute to climate change, which in turn impacted food security to a larger extent. The principle of food sovereignty entails the sustainable care and use of natural resources, especially land, water, seeds, and livestock breeds. Protecting the human's right to food and nutrition means supporting small-scale food producer; in realizing their livelihoods and accessing natural resources. It ensures that consumers and producers are prioritized before profit-making multinational corporations and organizations .i.e., the producers produce, retain, distribute, and consume in a healthy and culturally appropriate manner and the consumers can choose from these options. In short, the farmers' right to practice sustainable management of natural resources and preserve biological diversity needs to be safeguarded. Governments have to make long-term investments of public resources in the development of socially and ecologically appropriate rural infrastructure. This paper analyse; how achieving food sovereignty, will entail a fundamental shift away from the industrial and neo-liberal paradigm for food and agriculture; ensuring the peoples' right to food sovereignty as a specific and full right, guaranteed by the United Nations. Food sovereignty is, therefore, the citizens' vision of a sustainable world, envisaged through a collective strategy at the international level.

Keywords: Agriculture, Food Sovereignty, Rights, Sustainable, Small-Scale, Technological, Trade.

I. Introduction

Food is a basic human right. The International Covenant on Economic, Social, and Cultural Rights, which forms an integral part of the International Bill of Human Rights, recognizes the right to adequate food as essential to the adequate standard of living.¹ It also explicitly recognizes the fundamental right of everyone to be free from hunger.²

According to the *Food and Agriculture Organization of the United Nations (FAO)*, more than one billion people across the world are undernourished. Over two billion suffer from a lack of essential vitamins and minerals in their food. About six million children die every year from malnutrition or related diseases, which is half of all preventable deaths. The majority of those suffering from hunger and malnutrition are smallholders or landless people, mostly women and girls living in rural areas without access to productive resources.³ Although many people might imagine that deaths from hunger generally occur in times of famine and conflict, the fact is that only about ten percent of these deaths are the result of armed conflicts, natural catastrophes, or even exceptional climatic conditions. The other 90 percent are the victims of long-term, *chronic lack of access to adequate food*.

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¹ Art.11 (1), The Constitution of India.

² Art.11(2), The Constitution of India.

³ Burch, David, and Geoffrey Lawrence. 2009. "Towards a Third Food Regime: Behind the Transformation." *Agriculture and Human Values* 26 (4): 267–27.

However, combating hunger and malnutrition is more than a moral duty or a policy choice; in many countries, it is a legally binding human rights obligation. *The right to food is recognized in the 1948 Universal Declaration of Human Rights as part of the right to an adequate standard of living and is enshrined in the 1966 International Covenant on Economic, Social, and Cultural Rights.* It is also protected by regional treaties and national constitutions. Furthermore, the right to food has been recognized in several international conventions. All human beings, regardless of their race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status have the right to adequate food and the right to be free from hunger.⁴

In India, the judiciary has recognized the right to food as a right flowing from the right to life⁵ guaranteed under the Constitution of India in various judgments. The right to life imposes upon the state the constitutional obligation to ensure that there is no violation of the right to food. More specifically, freedom from hunger is one of the most elementary needs for human existence, therefore the right to food is an integral part of the basic feature of the constitution and is protected from all legislative interference that aims to dilute or abrogates the right⁶. Each nation should declare that access to food is a constitutional right. This right can only be realized in a system where food sovereignty is guaranteed.⁷ Food sovereignty in turn is a precondition to genuine food security.⁸

II. The Concept of Food Sovereignty

The term food *sovereignty* was coined by the International Peasant Movement, La Via Campesina at the World Food Summit in 1996.⁹ La Via Campesina was born as a global platform for the coordination of peasant movements. In this conference, the platform defined its primary objectives. One was the formation of relationships of solidarity between peoples and especially among peasants' organizations. Another was, in acknowledgment of the diversity of the peasantry worldwide, the construction of a model of agricultural development that guarantees food sovereignty as the right of the people to define their agricultural policies. It also called for the preservation of the environment and the protection of biodiversity.

The objectives defined by the then newly founded Via Campesina¹⁰ had a clear strategy to oppose agribusiness, the standardization of cultures, productivity above all else, mono-cultures, and the model of agro-exploitation that characterize the agribusiness development model. It is important to contextualize that these ideas did not come from the enlightened minds of peasant leaders and NGO accessories who participated in the conference as invitees, but rather from the political and economic conditions that characterized that period. The decade of 1990 saw the most aggressive implementation of the capitalist model all over the world. Mainly through the work of the International Monetary Fund, neoliberalism, which sought to advance domination over nations and models of agricultural production, imposed legislative changes in nation-states which allowed for a larger circulation of goods between countries through lower costs and the removal of customs restrictions.

⁴ 1 FAO, *The State of Food Insecurity in the World 2009: Economic Crises - Impacts and Lessons Learned* (Rome, 2009)

⁵ Article 21 of the Constitution of India.

⁶ Right to Food under Indian Constitution and its Present Scenario, <https://www.legalserviceindia.com/legal/article-2384-right-to-food-under-indian-constitution-and-its-present-scenario.html> accessed 15 November 2021.

⁷ <https://viacampesina.org/en/the-1996-rome-food-sovereignty-declaration-in-postcards/> accessed 15 November 2021.

⁸ Ibid.

⁹ Borras, Saturnino M. 2004. "La Via Campesina: An Evolving Transnational Social Movement." Amsterdam: Transnational Institute.

¹⁰ 2008. "La via Campesina and its Global Campaign for Agrarian Reform." *Journal of Agrarian Change* 8.

Neoliberalism promised total openness of borders to permit the free circulation of goods.¹¹ It imposes on poor and developing countries processes aimed at diminishing the involvement of the State in the economy, thereby weakening states with methods like privatizations, especially those targeting public services and state-owned enterprises. With the influence of the World Trade Organization, food became a commodity negotiated on stock exchanges beyond the control of agricultural workers who produced it.¹²

Food sovereignty mainly focuses more on the creation of a food system that helps people and the environment rather than creating profits for multinational companies.¹³ In addition to being a precondition to genuine food security, food sovereignty is the right of each nation to maintain and develop its capacity to produce its basic foods respecting cultural and productive diversity.¹⁴

The food sovereignty movement, therefore, pits itself against and considers itself an alternative to the 'neo-liberal agricultural policies imposed by the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF). In comparative terms, food sovereignty appears to be deeper than food security in that it seeks not only to guarantee access to food but proposes that people and corporate monopolies make food-related decisions. In fact, the origin of the food sovereignty movement lies partially in dissatisfaction with the term 'food security' and its attendant assumptions. However, food sovereignty differs from food security in a certain way. Food sovereignty, on one hand, is rooted in grassroots- food movements and usually fights for a food system that works democratically; one that involves inputs from the citizens, thus increasing their role in the system. Food security, on the other hand, aims to protect and distribute the existing food systems. *In other words, food security is a goal while food sovereignty is a way to reach there.*¹⁵ The definition went through major refinement in *The State of Food Insecurity 2001*; Food security is a situation that exists when all people, at all times, have physical, social, and economic access to sufficient, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life.¹⁶ One crucial starting point is to effectively uphold the laws, policies, agreements, and human rights instruments intended to support food sovereignty, food security and ensure sustainability.¹⁷ Food sovereignty is characterized by sustainable development, environmental conservation, genuine agricultural reforms which are not engulfed by market forces, and mutual dependency on local, small-scale community prosperity. It is unacceptable that there are 868 million people hungry and malnourished, and up to 2 million ill from lack of nutrients, the majority being children and women. It is the clearest signal that our current development model is wrong. The current model of industrial agriculture, intensive animal husbandry methods, and overfishing are destroying traditional farming and fishing patterns, and the variety of ecosystems that sustain the planet's production. *Agro-ecological models should become the dominant production model to help sustain the cultural and biological diversity of the planet, as well as create a sustainable use of terrestrial and marine ecosystems.*

¹¹ Mattison, E. H. A., and K. Norris. 2005. "Bridging the Gaps between Agricultural Policy, Land-Use and Biodiversity." *Trends In Ecology & Evolution* 20 (11)

¹² <https://www.brasildefato.com.br/2021/07/28/article-food-sovereignty-a-challenge-to-25-years-in-the-making>

¹³ Supra note 7.

¹⁴ Carolan, Michael. (2014). "Getting to the core of food security and food sovereignty: Rationality with limits?" *Dialogues in Human Geography* 4, no. 2, pp. 218-220.

¹⁵ Boyer, Jeff. 2010. "Food Security, Food Sovereignty, and Local Challenges for Transnational Agrarian Movements: The Honduras Case." *Journal of Peasant Studies* 37 (2): 319–351.

¹⁶ FAO. 2002. *The State of Food Insecurity in the World 2001*. Rome

¹⁷ Wittman, Hannah (ed.) (2011). *Food sovereignty: reconnecting food, nature & community* (Oxford: Pambazuka Press).

III. Goals

The first six pillars of food sovereignty were developed at the International Forum for Food Sovereignty at Nyeleni, Mali in 2007.¹⁸ And the seventh pillar was added by the members of the Indigenous Circle during the People's Food Policy Process.¹⁹ These seven pillars include;

- *Focus on food for people:* It puts people's need for food at the center and states that food is not just a commodity.
- *Build Knowledge and Skill:* It uses research as a tool to empower and pass knowledge to future generations and also discards those technological developments which threaten the environmental balance.
- *Work with nature:* It means optimizing the contribution of the ecosystem and improving resilience.
- *Values food providers:* It means supporting sustainable livelihoods and respecting the work ensured by the food distributors.
- *Localizes food system:* It reduces the distance between food producers and consumers and also withstands or reduces dependency on distant and unanswerable corporations.
- *Encourages local control:* It places control in the hands of local food producers and combats the privatization of local resources.
- *Food is sacred:* This principle recognizes that food is not just a commodity but a gift of life and should not be dissipated or wasted.²⁰

Food prices in domestic and international markets must be regulated and reflect the true costs of producing that food. This would ensure that peasant families have adequate incomes. It is unacceptable that the trade-in foodstuffs continues to be based on the economic exploitation of the most vulnerable—the lowest-earning producers, and the further degradation of the environment.²¹ Systematic transformation in all aspects can lead to the horizontal spread and further scaling up of food sovereignty, which includes these four aspects of change.

- *Ecological:* Waste and water management to achieve Sustainable Development Goals within particular territories.
- *Economic:* Introducing unbiased and just forms of economic organization for farmers and peasants and also enhancing their security in the sector.
- *Political:* It involves increasing gender participation in the reciprocal co-production of knowledge, institutions, and policies for the democratic and fair governance of food systems.
- *Search for new modernity:* It includes repudiating the notion of progress as an ever-expanding process of commodification of nature and social relations, which leads to exploiting nature to its very core. Also trying our level best to fulfill our desired goals and aspirations.

IV. Challenges

Around 2.5 billion people live directly from agricultural production systems i.e., half of the working people are farmers.²² The livelihoods and incomes of a huge number of rural and urban dwellers are thus dependent on the local manufacture of farm inputs and the local storage, processing, distribution, sale, and preparation of food. People associated with localized food systems thus live in, and often sustain, ecosystems of vital importance for human well-being and the future of life on Earth. But with the adoption of neo-liberal economic policies and developmental models, local food systems have been

¹⁸ Goulet, Richard. 2009. "Food Sovereignty: A Step Forward in the Realisation of the Right to Food." *Law, Social Justice and Global Development Journal* 1 (13): 1–21

¹⁹ <https://weseedchange.org/food-sovereignty> accessed 14 November 2021.

²⁰ Nyéleni Forum for Food Sovereignty. 2007. Declaration of the Forum for Food Sovereignty. Selingué, Mali, 23–27

²¹ Guthman, Julie. 2004. *Agrarian Dreams: The Paradox of Organic Farming in California*. Berkeley: University of California Press,

²² FAO 2005.

marginalized and undermined. Trade policies that favor huge farms and agribusiness are thus displacing small-scale producers everywhere. The liberalization of trade and other economic policies have globalized poverty and hunger in the world and are destroying local productive capacities and rural societies. These corporate agendas take no account of food security for people. It is an inequitable system that treats both nature and people as a means to an end with the sole aim of generating profits for a few. Simply put, peasants and small farmers are denied access to and control over land, water, seeds, and natural resources²³. This has become a serious issue all over the world.

Conditions of political oppression and marginalization, together with a lack of access to effective legal protection, leave people vulnerable and with little opportunity to improve their economic and social conditions²⁴. Moreover, today's industrial food and agriculture sector is generating high levels of environmental degradation and its ecological footprint is expanding. Industrial and newly industrializing food systems are by far the most costly in terms of social and environmental impacts. Food sovereignty is seen as having the capacity to fight global hunger and malnutrition hence it is deeply rooted in SDGs 1 and 2.²⁵ Ending poverty in all its forms everywhere forms the first goal of the 2030 Sustainable Development agenda. It calls for ensuring social protection, enhancing access to basic services, and building resilience against the impacts of natural disasters which can cause severe damage to people's resources and livelihoods.

According to the *World Food Programme*, 135 million people suffer from acute hunger largely due to man-made conflicts, climate change, and economic downturns.²⁶ The COVID-19 pandemic could now double that number, putting an additional 130 million people at risk of suffering acute hunger by the end of 2020. With more than a quarter of a billion people potentially at the brink of starvation, swift action needs to be taken to provide food and humanitarian relief to the most at-risk regions. At the same time, a profound change of the global food and agriculture system is needed if we are to nourish the more than 690 million people who are hungry today – and the additional 2 billion people the world will have by 2050. Increasing agricultural productivity and sustainable food production is crucial to help alleviate the perils of hunger.²⁷

Although they yield and market large volumes of agricultural commodities, modern food systems are also associated with malnutrition, food insecurity, deepening poverty, and social exclusion in many parts of the world. Forced migration is an increasingly common outcome of modernized food systems as the opportunities for large numbers of people to make a decent living no longer exist²⁸. It is high time “to examine new and alternative models for agriculture and trade, such as that provided by the vision of food sovereignty, which places priority on food security and the right to food, for all people at all times”²⁹.

Food sovereignty emerged as a reaction to globalization, unemployment, low wages, farmer bankruptcies, and the depletion of rural economies. As a way to challenge the status quo, it offers a way of thinking which celebrates diversity and values the work of food production in all societies and places.³⁰

²³ Supra note 4.

²⁴ ECOSOC, 2007; Ziegler, 2007.

²⁵ <https://www.newsday.co.zw/2020/09/exploring-food-sovereignty-for-sustainable-development> accessed 15 November 2021.

²⁶ Borras, Saturnino M., Marc Edelman, and Cristóbal Kay. 2008. “Transnational Agrarian Movements: Origins and Politics, Campaigns and Impact.” *Journal of Agrarian Change* 8 (2–3): 169–204.

²⁷ <https://www.un.org/sustainabledevelopment/hunger> accessed 16 November 2021.

²⁸ Martínez-Torres, Maria Elena, and Peter M. Rosset. 2010. “La Via Campesina: The Birth and Evolution of a Transnational Social Movement.” *Journal of Peasant Studies* 37 (1): 149–175.

²⁹ McMichael, Philip. 2004. *Development and Social Change: A Global Perspective*. Thousand Oaks, CA: Pine Forge Press.

³⁰ Alonso-Fradejas, A., Borras Jr, S. M., Holmes, T., Holt-Giménez, E., & Robbins, M. J. (2015). Food sovereignty: convergence and contradictions, conditions and challenges. *Third World Quarterly*, 36(3), 431-448.

V. On achieving Food Sovereignty

Food sovereignty is a condition for the full realization of the right to food. At the national level, food sovereignty has been recognized in several constitutions and national framework laws. At the international level, it could be understood that as a requirement for democracy in food systems, the possibility for communities to choose which food systems to depend on and how to reshape those systems should be addressed. Indigenous peoples and other communities with customary tenure systems face similar human rights violations and should receive the same protection from international law.

Within the negotiations on the adoption of the UN Declaration, stakeholders must find creative ways to recognize the right to food sovereignty. The UN Food Systems Summit, held during the UN General Assembly in New York on September 23, set the stage for global food systems transformation to achieve the Sustainable Development Goals by 2030:

(1) Adopting food sovereignty as a policy framework towards adequate, safe, nutritious food for all, including policies and investments to support small-scale farmers and women producers;

(2) Adopting human rights-based approaches in the sustainable development goals.

However, those examples also stress the need to look carefully at the risks and vulnerabilities of the food systems and at the need of exploring food policy interventions aiming at local or global sustainable development dynamics.

Steps include:

- ❖ Democracy and greater citizen participation in framing policies for food and agriculture; respecting and including the voices of the poor and the marginalized.
- ❖ Federations of elected citizen-based local councils linking villages, towns, neighborhoods, local economies, and ecological units act as a significant counter-power to the state and transnational corporations.
- ❖ Democratized research and strong networks of local innovators.
- ❖ Reformed and equitable access and resource use rights, including land, water, forests, seeds, and the means of production.
- ❖ Re-localized and resilient food systems based on agro-ecology, eco-literacy, and circular economy models.
- ❖ Developing a collective and global strategy to ensure that the right of peoples to food sovereignty is recognized as a specific and full right and that its defense is legally binding for states and guaranteed by the United Nations.
- ❖ Enabling national policies and legislation; global multilateralism and international policies etc.
- ❖ Eradicating hunger requires a radical shift from dominant food system models and development paradigms, towards addressing the food system as a whole, and creating enabling public policies that address key issues affecting food insecurity and malnutrition. Mainstream monitoring of food security and nutrition fails to address the critical questions around the social control of the food system, and in particular natural resources, and proposes solutions based on the current industrial model of production that feeds a global and inherently unequal economy.

Protecting the human right to food and nutrition means supporting small-scale food producers in realizing their livelihoods and accessing natural resources, supporting women's rights, and creating the conditions in which communities and groups most impacted by food insecurity are at the center of decision-making.

VI. Food Sovereignty in Indian Context

Food sovereignty in India has been a topic of concern since the independence period. India is rich in natural resources and is among the top countries in the world in the production of major food commodities e.g. food grains, fruits and vegetables, milk, eggs, and fish. But the country is yet to harness these resources rationally for ensuring the food and nutrition security of its large population, many of them being undernourished and living below the poverty line.³¹ The food sovereignty movements in India started in the early 20th century. The Food Sovereignty Alliance, India (FSA) is one amongst several such sites of resistance and assertion. The Alliance was formed in 2013 to build solidarity towards a common vision of food sovereignty in defense of sovereign rights to food, the rights of Mother Earth, and those of future generations. Food sovereignty is about building a just world and is about a society free of oppression and inequality. This is the only way forward to secure our right to food in our homes and communities, through defining our autonomous food and agriculture systems, and thereby resist and dismantle the corporate food and trade regimes.³²

Case Studies

- Manipur has had a history of two historic people's democratic movements against artificial food scarcity; in December 1939, popularly known as Anisuba Lopi Nan or Second Women Agitation called Nupi Lan, which means *women's war in Manipuri*, is one of the important movements in the history of Manipuri women. It sowed the seeds of new economic and political reforms for a new Manipur in the early 1940s. The role of Manipuri women in the agrarian economy is a crucial one to reckon and they protested for agrarian and economic reforms in stringent policies made by the ruler of Manipur. Their movement, which started as an agitation against the banning of rice exports, later on led to constitutional, political, and economic reforms in Manipur. The next movement started on August 27, 1965, popularly known as *Chaklam Khongchat (Hunger Marchers' day)*. This day is observed under the aegis of the All Manipur Students' Union.
- This movement was the first instance of a public upheaval against the tyranny of the regime in which the students' community alone took the lead. At that time, the public distribution system was controlled by the civil supply officer and, due to an erroneous system of distribution adopted by the then administration, the most essential foodstuff; rice, was not available in the market. This created a sense of public fear and led to non-violent agitation by students.
- *Navdanya* is one of those organizations which have led the national and international movement for biosafety and against the disastrous consequences of using Genetically Modified Organisms (GMOs). They work alongside citizens' movements, grassroots organizations, NGOs, governments, and have made considerable contributions to the Convention on Biological Diversity and Biosafety Protocol. Navdanya promotes bio-organic farming which further promotes food sovereignty and food and nutritional security. It also promotes the farmer's income and sense of security. Since 1991, it has been working against Genetically Modified (GM) crops and making people aware of their harmful effects. *Their motto* has been Freedom from GM crops. Since 1997, it has kept track of GM-related activities and their growth in India and has also conducted field surveys, and has proved several companies fallacious. It has filed a PIL in 1999 against the US seed giant MONSANTO and Indian authorities for the illegal and unwarranted ways by which GMs have been introduced in India and field trials were conducted which proved that there was a gross violation of environmental laws. It has been working with other organizations as well as demanding the government to fulfill its obligations towards Indian farmers, producers, and consumers and also take care of the environment and maintain the ecological balance.³³

³¹<https://www.legalbites.in/food-sovereignty-in-india-by-nisheeth-chandrachoor> accessed 15 November 2021.

³² Akram-Lodhi, A. Haroon. 2007. "Land Reform, Rural Social Relations and the Peasantry." *Journal of Agrarian Change* 7 (4).

³³ Department of Agriculture, Cooperation and Farmers Welfare, Annual report 2018-19,3.

- Even amid such devastation, there have been seeds of resistance and assertion by Adivasis, Dalits, peasants, and pastoralists.³⁴ Their common plan includes democratic governance of resources like land, water, forests, and territories; nurturing life in our soils and producing culturally appropriate, healthy, and agro-ecological crops and the right of consumers to decide what to consume; a reciprocal system of co-sharing of labor, knowledge and produce; empowering local food markets that connect consumers and producers and the diversification and revival of food crops. The members of the Food Sovereignty Alliance have evolved a mutual strategy to assert their visions of sovereignty.³⁵
- In the Adivasi areas of Telangana and Andhra Pradesh, Adivasi communities have organized themselves under a collective voice 'Adivasi Aikya Vedika', and assert their rights to their homeland and territories by invoking customary laws, and community and habitat rights. Industrial production also took place in these areas. For example, in Mahboobnagar, people were lured by government schemes and started producing GM crops and cotton. But they soon realized that there was a decline in food production and soil fertility plummeted and the number of honey bees also drastically reduced. Through critical reflection and discussion, the community mapped their seasonal food cycles, flora, fauna, and biodiversity. The cycle was a visual method that helped them in establishing their relationship with the forests and was also used as a way to track climate change impacts. This process inspired those who cultivated cotton to again start producing food crops.³⁶
- *The Dalit Mahila Sangham in the Chittoor district of Andhra Pradesh* has been fighting for the right to land. They assert that once the land is in their hands, they will nurture the land agro-ecologically through their wisdom and practice to build soil health, their strong community knowledge, and re-establish food diversity. This has helped them to strengthen their fight against patriarchy, violence, and discrimination.
- The *Deccani Gorrela Mekala Pempakadarula Sangham*³⁷ has organized itself to protect the unique black-wool Deccani sheep breed, critical for shepherding livelihoods in the region. In the late 90s, the government introduced the heavier and faster-growing Nellore sheep breed into the Deccani Flocks resulting in a mixed breed with no wool. Since then, they have focused on reviving the breed by convincing the mixed-breed owners to replace these Nellore rams with Deccani rams.
- Their core assertion to food sovereignty also involves defending their grazing rights, prevent the cutting of acacia trees, sustaining their common property grazing resources, and also pressurizing the government to stop the privatization of the healthcare of animals. In 2011, the Sri Gopi Rythu Sangham in Andhra Pradesh, decided to resist the dominance of corporate dairy processors, by organizing their milk market. The Sangham members collectively decide the milk prices and also grow diverse food crops like millets, pulses, oilseeds, and vegetables. After keeping enough for themselves, they sell the surplus in the market.
- A food safety movement called *India for Safe food* expects farmers, consumers, and the government to work together and ensure that people have access to safe food, free of any toxicity. It is headed by ASHA, Alliance for Sustainable and Holistic Agriculture, an informal network of hundreds of organizations and individuals across 20 states.

However, the status of food sovereignty in India is still not good despite these efforts. The farmers have no land or very little land to grow on. They don't produce a surplus to sell in the market; therefore, they have meager incomes. And also they don't enjoy food security. They are always tempted by the thought

³⁴ Altieri, Miguel A. 2009. "Agroecology, Small Farms, and Food Sovereignty." Monthly Review-an Independent Socialist Magazine 61.

³⁵ Borowiak, Craig. 2004. "Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds." Politics & Society 32 (4): 511-543

³⁶ Wittman, Hannah (ed.) (2011). *Food sovereignty: reconnecting food, nature & community* (Oxford: Pambazuka Press).

³⁷ Anderson, Molly D. 2008. "Rights-Based Food Systems and the Goals of Food Systems Reform." Agriculture and Human Values 25

of producing cash crops rather than food crops. Even the customers do not enjoy food sovereignty.³⁸ The customers do not have a wide variety of choices. All the products today available in the market are either adulterated or sub-standard goods, where quality is compromised.

More than 53% of India's 1.3 billion citizens rely on farming for their livelihood. For decades, they have sold their products in their home states. These 'reforms' would undo this system and benefit large corporations, having widespread repercussions. Over the past few months, we have seen a monumental display of solidarity between farmers and a wide call for Food Sovereignty in India. Farmers in India have been protesting the government's proposed neoliberal agriculture laws and have won the battle after a year by repealing these laws. Those who came to the streets to protest have come together in the largest grassroots demonstration in history. There are, however, several steps taken by the government to ensure food sovereignty.

Solutions

The National Food Security Act is an important law that is supposed to guarantee the right to food to every citizen as well as to ensure food sovereignty in the country. Food sovereignty requires that the government procure food grains from farmers at fair prices based on Minimum Support Price (MSP), to provide to the poor. Farmers' rights to fair prices are therefore structural in the Food Security Act. Merely being a promise in the year 2009, the act has come a long way from its earlier versions. It, for instance, has prioritized vulnerable groups such as children under the age of 6 and pregnant women, thus encouraging the allocation of balanced diets. It has also widened its ambit by including millet, a coarse grain, in the list of its food grains. The main problem with the act was its highly centralized Public Distribution System (PDS). This act tends to take some more progressive steps like decentralization of PDS and also prioritization of Panchayats, Self Help Groups (SHGs), and Co-ops and the establishment of storage facilities at the block, district, and the state level. The bill, unlike its previous versions, doesn't mention the general category but marks a distinction between sixty-seven percent and the rest of the population. It uses the Above Poverty Line (APL) and Below Poverty Line (BPL) classification.

Decentralization of PDS also requires hand-to-hand reforms in the agricultural sector. The bill mentions some of the agricultural reforms and the secured interest of small and marginal farmers. In the interest of food security, every village will be able to produce several crops in an agro-ecological and sustainable manner. There are several examples of decentralized PDS. The Chhattisgarh PDS order 2004 shifted the task of management of ration shops to community organizations like SHGs and Panchayats from the hands of private dealers. All ration shops were either moved into Panchayat or PDS buildings. These steps helped fill the loopholes in the distribution of food grains and ensured greater accountability and transparency in the system. The *Jan Jagrit Adivasi Dalit Sangathan (JADS) and Right to Food Campaign*, for example, have advocated zonation. This scheme advocated dividing the country into different zones and encouraged that food grains must be procured, stored, and distributed in the same zone in which the production of grains takes place. In case of any shortage, grains can be procured from adjacent zones. Central zones should be accessed only in case of a calamity. But decentralization doesn't mean the end of the government's responsibility. The government would still have to procure grains, offer a reasonable MSP, create storage facilities and support the ration shops. Also, it means that the state delegates power to the people, which allows them to play a greater role in the decision-making process.

The government has also taken several other steps like starting schemes like *Mahatma Gandhi National Rural Employment Guarantee Scheme*, which provides guaranteed employment to workers for 100 or more days. Also, it extends reasonable MSP to the farmers after their procurement. It also ensures that the consumers receive unadulterated and standard goods by establishing FSSAI to check the quality of the products. Also, supporting organic farming in all the states so that they can achieve greater ecological balance.

³⁸ Bonanno, Alessandro. 1991. "From an Agrarian to an Environmental, Food, and Natural Resource Base for Agricultural Policy: Some Reflections on the Case of the EC." *Rural Sociology* 56 (4)

Although the bill ensures several provisions for the establishment of food sovereignty and food security, it still is silent about ensuring the safety of farmers' livelihoods, offering reasonable MSP after the procurement of grains, and increasing food production- which are quintessential elements of food security. The bill continues the inequitable approach in distribution, preferring a Targeted Public Distribution System over a universal one, therefore, targeting only sixty-seven percent of the total population. Another problem with the Act is its highly centralized Public Distribution System. The PDS is highly centralized in its procurement, storage, and distribution. For example, the crops produced in Punjab are procured by the Food Corporation of India and later distributed in Jharkhand. So, the period during which it is procured and distributed leads to the rotting of these crops. The establishment of decentralized PDS would alleviate these problems.

Hence to increase crop production, the government should start monetary incentives to promote traditional agricultural systems. Agrarian reforms should encourage more small-scale farmers to grow a variety of crops. For this, they have to address the extremely low earnings of the people involved in agriculture. This NFSA bill mentions decentralized storage facilities at the block, state, and district levels. The storage facility could be created out of locally available materials like mud, cow dung, and ash. To ensure food sovereignty, the government should extend reasonable MSPs to the farmers so that they can be incentivized on producing more. The extreme centralization of the PDS has led to deterioration in the quality of food products. So the decentralization of the Public Distribution System will lead to a reduced distance between the place of storage and the place of distribution, leading to less perishability of food crops. Also, the government must ensure more transparency and accountability in the ration system. Usually, ration crops are withheld by private shop keepers, which leads to the deprivation of poor people. So, the state and the central government must ensure that ration shops function accordingly and they don't resort to malpractices. Also, the government must ensure consumers have a wide variety to choose from. Usually, the products which are available in the market are sub-standard adulterated goods, leaving the people with little to choose from. Therefore, the products must go through a strict quality check to ensure that they are at par with the quality. Also, food sovereignty means that the crops are produced agro-ecologically without harming the environment and maintaining a balance. So, the people and even the government must ensure that the production is done in such a way the environmental balance is not endangered and that sustainability is maintained. For example, the Green revolution was highly criticized on the ground that it used a high-yielding variety of seeds and pesticides which diminished the soil fertility and adulterated the crops. So, producers must ensure that they use organic manure and fewer fertilizers in producing crops. Also, the level of the water table and other sources must be maintained.

VII. Conclusion

Food Sovereignty or Anna Swaraj is the right and freedom to grow diverse and nutritious food and also have access to safe, affordable, and healthy food at our convenience,³⁹ which requires acknowledging and understanding of how our social conditions overlap with our food relationships. The economic, political, and cultural goals become the connected foundations of our interpretations of the food system.⁴⁰

Food sovereignty tends to promote consumers and producers rather than multinational corporations making profits. It ensures that producers produce, retain, distribute, and consume in a healthy and culturally appropriate manner and consumers have a choice from these options. It emphasizes ecologically appropriate production, distribution and consumption, social-economic justice, and local food systems as ways to tackle hunger and poverty and guarantee sustainable food security for all peoples. It also advocates trade and investment which serves as the collective aspirations of society. It promotes community control of productive resources; agrarian reform and tenure security for small-scale producers; agro ecology; biodiversity; local knowledge; the rights of peasants, women, indigenous

³⁹ Forthcoming. "Food Sovereignty: A Radical Alternative." in *Critical Perspectives in Food Studies*, ed. Mustafa Koc, Jennifer Sumner, and Tony Winson. Toronto: Oxford University Press.

⁴⁰ Social Gastronomy and Food Sovereignty — Social Gastronomy Movement
<https://www.socialgastronomy.org/sgm-stories/2021/2/12/social-gastronomy-and-food-sovereignty>

peoples, and workers; social protection, and climate justice⁴¹. Moreover, it also ensures that these steps maintain the ecological balance and use agro-ecological methods to do so.

Decolonising and emancipatory intergenerational and inter-cultural popular education processes are building blocks of organizing for food sovereignty. It is through this rainbow of assertions that we bypass and free ourselves from the clutches of the food and agriculture empires, assert our autonomy, and defend our rights to diverse food cultures, towards a just future lived in harmony with each other and Mother Earth.⁴² It, therefore, represents a radical alternative to the food security paradigm, which holds central to the benefits of free food markets and seeks to solve the problem of world hunger through scientific innovation and increased market liberalization.⁴³ Food sovereignty in this context describes the relationships among a person and their community, their identity, their traditional food structures, and their activities of gathering, hunting, and fishing as well as a person's or community's relationship to policies for food grown, collected, hunted, gathered, or fished to feed people within that community⁴⁴; prioritizes local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal-fishing, pastoralist-led grazing, and food production, distribution, and consumption based on environmental, social, and economic sustainability.⁴⁵

The farmers' right to practice sustainable management of natural resources and preserve biological diversity needs to be safeguarded. While governments have to make long-term investments of public resources in the development of socially and ecologically appropriate rural infrastructure.

In short, Food Sovereignty is about building a just world and is about a society free of oppression and inequality. This is the only way forward to secure the right to food in our homes and communities, through defining our autonomous food and agriculture systems and thereby resisting and dismantling corporate food and trade regimes.⁴⁶ Social justice is central to the idea of food sovereignty, and hence breaking the unjust structures of caste, class, and patriarchy are the core elements of the movement.⁴⁷

⁴¹ <https://counterview.org/2021/10/22/food-sovereignty-an-important-aspect-for-poverty-alleviation> accessed 14 November 2021.

⁴² Patel, Raj. (2009). Food sovereignty. *Journal of Peasant Studies*, 36:3, 663-706

⁴³ Food Sovereignty – global social theory accessed 16 November 2021.

⁴⁴ Quarterly summer 2021 ed. *The World We Want: In Search of New Economic Paradigms*.

⁴⁵ Fairbairn, Madeleine. 2010. "Framing Resistance: International Food Regimes and the Roots of Food Sovereignty." Pp. 15–31 in *Food Sovereignty: Reconnecting Food, Nature and Community*, ed. Hannah Wittman, Annette Desmarais, and Nettie Wiebe. Halifax: Fernw.

⁴⁶ Seeds of resistance for food sovereignty – Leisa India accessed 16 November 2021.

⁴⁷ Andrée P, Ayres J, Bosia MJ, Mássicotte MJ. (eds.) (2014). *Globalization and food sovereignty: global and local change in the new politics of food* (Toronto: University of Toronto Press).

African Feminism as an Alternative Tool: Challenges and Prospects of Feminist Approaches to Women's Sexual and Reproductive Rights in Africa

Obadina I A.*

Abstract

This paper proposes that in dealing with challenges confronting African women attempting to tackle their age-long discrimination, oppression, and subjugation in deeply patriarchal African societies, especially to enforce their fundamental rights as equal beings in the society, there is a need to develop an African theoretical basis for conceiving of African women's problems in an African way. Developing such a theoretical framework requires identifying the different approaches that feminists have historically dealt with African women's identity, challenges, and subordination in society. This research examines four approaches to dealing with African women's problems i.e third world feminist movements, transnational feminism, post-colonial theory, and post-modern feminism, as well as the challenges and prospects of these theoretical frameworks for African women. Although these theories are useful for addressing the historical and existing challenges faced by African women, using maternal health as a case study, I argue that developing an African feminist framework, despite its unsettled existence among African scholars and feminists, offers a more coherent and bespoke solution as it views African women from a more contextual and culturally specific standpoint. Examining the Protocol of the Rights of Women in Africa's approach (Maputo Protocol), This paper recommends that in line with traditional feminist reasoning, there is a need for African feminist thought and a consistent gender-sensitive approach in dealing with cases that may have particular historical implications for women rights.

Keywords: *African Feminism, Alternate Framework, Women's Rights, Mainstream Feminism*

I. Introduction

Feminism in Africa has been at a crossroad of divergent views and courses of action. It faces an uncertain presents and prospects regarding its identity and relevance in capturing the myriad of heterogeneous experiences of African women. Feminism has three goals: to reveal the diverse experiences of women's lives; to show the factors that have been responsible for their invisibility; and lastly, to seek a methodology that will lead to social change and better the situation of women.¹ Feminists have developed different frameworks for understanding and achieving the goal of addressing the various kinds of discrimination suffered by women, including African or third world women. Feminists have identified and critically examined different sets of methods to achieve these purposes². These techniques are grounded in women's experiences of exclusion, feminist practical reasoning, and consciousness-raising.³ These critical and constructive methods help to reveal features of a legal issue generally overlooked when discussing socio-cultural and legal issues⁴. The focus of Western feminists has been economic subordination, racism and other forms of political oppression, African feminists are confronted rather with tackling cultural, socio-economic, and reproductive oppression. Hence, the significance of African feminist identity; aimed at situating the experience of African women and how to reform the socio-cultural and political landscape for effective societal equality and justice. This essay thus seeks to explore the different frameworks of feminism in dealing with the social and cultural

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¹ Marjorie De Vault, 'Talking Back to Sociology, Distinctive Contributions of Feminist Methodology' (1996) 22 *Annual Review of Sociology*, 29-50.

² Katharine T Bartlett, "Feminist Legal Methods," (1990) 103 *Harvard Law Review* 837 at 848.

³ Katharine T Bartlett, "Feminist Legal Methods," at 2.

⁴ Katharine T Bartlett, "Feminist Legal Methods," at 2.

discrimination against women in Africa, and the potential limitations faced by these approaches. While acknowledging the varieties of theoretical frameworks developed by feminists, four approaches by African feminists in my view would seem to validate that of other third world and mainstream feminists to understand gender and feminism as a tool to resolve power relations, cultural and social discriminations in the region and to make sense of the contextual problems they face and their lived realities.⁵

One of the methods of achieving the feminist goal is deconstructing African feminine identities.⁶ Notwithstanding the age-long debate about whether there is such a thing as African feminism, this essay takes the position that African feminism exists with its own discrete body of scholarship and experts.⁷ Feminist epistemology has an African orientation as well, although it does not mimic its western counterpart in its search to address African specificities.⁸ It is a movement that validates the experience of women of Africa and of African origin against a mainstream feminist discourse.

II. Third World Feminism

Firstly, evolving from the need to reflect the experiences of African women in a more realistic manner, the *Third World Feminist* category emerged. This category seeks to address specific problems of African women including Third-World women in the diaspora. This theory of feminism sees international feminism as a social category and challenges the misrepresentation of the Third-World as representing “underdevelopment, oppressive traditions, high illiteracy, rural and urban poverty, religious fanaticism, and ‘overpopulation’”, and challenges assumptions about women’s experience, “interests and desires”¹⁰, no matter their location in the hierarchy. It advocates for “proof of universality”¹¹ of goals and aspirations; and the “homogeneous notion of the oppression of third world women as a group”.¹² This theoretical framework opines that by engaging with issues from the experiences of third-world perspectives, African and Third World feminists ask better questions that positively engage with their “multiple oppression” and common problems.¹³

Using this approach for legal research would mean that one would engage with issues of the effectiveness of the legal institutions and framework that establish and regulate the social integration and development of women in all their endeavors. Prominent in this category is the International Human Rights (IHR) regime which reflects the ideologies of the Western North¹⁴ and the tension of universality

⁵ Sylvia Tamale, *When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda* (Westview Pr. 1999) 3.

⁶ Amina Mama, ‘Challenging Subjects: Gender and Power in African Contexts’ (2001) 5.2 *African Sociological Reviews*, 63-73; Allison Drew, “Female Consciousness and Feminism in Africa” (1995), 24

⁷ Amina Mama, ‘Challenging Subjects: Gender and Power in African Contexts’ *supra* note 6.

⁸ O. Oyewumi, “Visualizing the Body: Western Theories and Africa subjects” in Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis University of Minnesota Press, 1997)

⁹ Chandra Mohanty at 46. Mohanty’s study focuses on Third World women.

¹⁰ Chandra Mohanty at 46.

¹¹ Chandra Mohanty at 46.

¹² Chandra Mohanty at 46.

¹³ Mikell Gwendolyn, *African Feminism: The politics of Survival in Sub-Saharan Africa* (Philadelphia: University of Pennsylvania Press, 1997).

¹⁴ Ahmed An-Na’im, “Toward Cross-Cultural Approach to Defining International Standards of Human Rights,” in Abdullahi Ahmed An-Na’im & Francis M. Deng (eds.), *supra* note 12; Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6. *Human Rights Quarterly* 400; The universalism /cultural relativism debate has now receded but questions relating to the relevance of the dominant conception of human rights discourse to the Third World remain current.

and relativism.¹⁵ IHR attempts to raise consciousness by seeking alternatives to Western terminologies and incorporating African cultural experiences as the most dominant concepts. However, African countries still perceive the continued application of the regime of IHR as a form of neo-colonialism, which is believed to have the negative effect of eroding the existing cultural heritage¹⁶ due to its colonial past. Hence, the call for cultural transformation, which does not seek to eradicate African culture, is rather a modification in line with IHR standards within its confined spaces without evoking further tension. This is not impossible since, according to Abdullahi An-Naim and Jeffrey Hammond, culture is not static and is constantly changing through the interactions of different actors and factors in any given society¹⁷. Although Post-Modernist scholars tend to deny the fact that IHR is an activist movement, the truth remains that IHR exists as both an activist movement and as a body of ideas. It advocates for a positive transformation of society where women are not marginalized but recognized and respected.¹⁸

A limitation of this perspective is its divisive, segregating and conceptual focus on “Third World” women beyond Africa. It extends the reach to women in the diaspora, including women in developed countries who have varied challenges and experiences from African women. It denies feminism as the tool of common voice to addressing patriarchal domination. This approach is limited as it generalizes and universalizes the experiences and problems of African women with Third World women as common and the same.

III. Transnational Feminism

Additionally, it is indisputable that the patriarchal subjection of women transcends borders, peoples, and cultures. Hence, another important framework adopted by African feminists to address the issues of women is *transnational feminism* which advocates for women’s emancipation as a catalyst to socio-economic development. As a theory, transnational feminism concerns itself with engagement with differences, identity politics, the commodification of knowledge, globalization, and its effects.¹⁹ This explains why the detrimental effects of patriarchal oppression on the lives of many African women occupy center stage in feminist literature. This framework demands a combination of personal experiences of the inequalities directed towards their sex. Sharing similarities with post-colonial feminists, transnational feminism examines how the powers of colonialism, modernity, postmodernity, globalization and construct gender norms, or normative conceptions of masculinity and femininity affect the Third World, and colonized women²⁰. It seeks collaboration from advocates and feminists across the globe on a theory or framework that creates solidarity among women while recognizing their subjectivity and differences and clarifies the different understanding and conceptions of women from different cultures²¹. This framework advocates for solidarity in fighting inequality and the exploitative tendencies of modern patriarchy being perpetrated by global capitalism.²²

This perspective, unlike post-modern theories, canvasses for a form of “*sisterhood*” across the globe that works to understand the role of gender, the state, class, race, and sexuality in criticizing and

¹⁵ An-Naim & Hammond, note 14 at 30.

¹⁶ James Thuo Gathii, “Imperialism, Colonialism, and International Law” (2007) *54 Buffalo L. Rev.* 1013, 1015.

¹⁷ An-Naim & Hammond, note 14 at 30.

¹⁸ Banda, Fareda “Human Rights in Africa.” *Women, Law and Human Rights: An African Perspective*. (London: Hart Publishing, 2005), 41–84; An-Naim & Hammond, note 14 at 30.;

¹⁹ Inderpal Grewal & Caren Kaplan *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices*, (1994) Minneapolis: University of Minnesota Press. The term “Transnational Feminism” was coined by the authors.

²⁰ Disch, Lisa; Hawkesworth, Mary “The Oxford Handbook of Feminist Theory” (Oxford University, 2016), 1.

²¹ Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press Books, 2003). Analyses the dangers of geopolitical inequalities facing transnational feminists.

²² Inderpal Grewal & Caren Kaplan *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices*, (Minneapolis: University of Minnesota Press, 1994)

resisting structures of patriarchal, capitalist power.²³ It also places emphasis on labor issues, imperialism, racism, and nationalism and the effects of these areas on the development of international human rights regime.²⁴ It argues for a cultural understanding of the differences and perspectives of the respective groups and deemphasizes the passivity, helplessness, and the uninformed narrative of Third World women.²⁵ This framework is useful in addressing economic issues which affect the low economic status of women thereby contributing to the lack of autonomy on reproductive decisions. Adopting this approach to health will expose some of the negative political structures such as Structural Adjustment Programs and other government economic policies driven by international organizations with negative effects on the economic status of men and women in Africa. However, *Transnationalism* focuses majorly on the economic realities of women and how capitalism perpetuates the domination of women. A key limitation of this approach is a challenge in locating the different categories of women even within a region along political and economic lines²⁶. For maternal mortality, the existing urban and rural divide, education, and other components of intersections identifying the cultural experiences of different women will further create a form of elitist approach in discussing the challenges women face in protecting their reproductive rights.

IV. Post-modern Feminism

Thirdly, in the light of the rejection of mainstream feminism as a western construct and innovation without regard to the cultural realities of Africa, *Post-modern Feminism* questions the acceptability and validity of notions, and principles of law, especially feminism and human rights norms, as they affect women²⁷. They reject certain characteristics of the structures and political system that have a potential negative influence on African women and canvass for reforms.²⁸ This approach of cultural realities is essential considering the diversity of cultural experiences in African settings, which denies a homogeneous approach. It also concerns different types of women who may be victims of social problems e.g rural and urban women, educated and uneducated black and white.²⁹ Nevertheless, although feminism has been severely attacked by African critics as a purely Western ideology by post-modernists, the movement certainly plays an indispensable role in the African woman's struggle to rise above the gloomy waters of patriarchal dominance. Mohanty observes that 'third world women have always engaged with feminism, even if the label has been rejected in a number of instances.³⁰ Scholars like Oyewunmi, amongst others in this school, deny the existence of women as a social construct,³¹ championing the nonexistence of a gender, but the natural biological woman.

²³ Herr, R.S. "Reclaiming Third World Feminism: or Why Transnational Feminism Needs Third World Feminism". (Meridians: Feminism, Race, Transnationalism. 2014). 12:1, 1–30.

²⁴ Lorde, Audre "Age, Race, Class, and Sex: Women Redefining Difference" In McClintock, Anne (ed.). *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives*. (Minneapolis: University of Minneapolis Press, 1997), 374–380.

²⁵ Mohanty, C.T. "Transnational Feminist Crossings: On Neoliberalism and Radical Critique" *Journal of Women in Culture and Society*. (2013) 38:4, 967–991.

²⁶ Conway, Janet "Troubling transnational feminism(s): Theorising activist praxis". *Feminist Theory*. (2018). 18 :2, 205–227 at 210.

²⁷ Narnia Bohler-Muller, "Other Possibilities – Postmodern Feminist Legal Theory in South Africa" (2002) 18 *South African Journal on Human Rights* 624.; Judith Butler, "Contingent Foundations: Feminism and the Question of Postmodernism" in Judith Butler & Joan W Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992), 4.

²⁸ Bartlett note 2 at 848.

²⁹ Narnia Bohler-Muller, "Other Possibilities – Postmodern Feminist Legal Theory in South Africa" (2002) 18 *S. Afr. J. on Hum. Rts.* 624.

³⁰ Chandra Talpade Mohanty, "Cartographies of Struggle: Third World Women and the Politics of Feminism" in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds.), *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991); at 7

³¹ Oyewumi Oyeronke, *The Invention of Women; Making an African Sense of Western Gender Discourses* (Regents University of Minnesota, 2003) ,78.

One limitation with this approach is the nature of sexualities in Africa³². Although my research applies solely to women, the recognition of other forms of sexualities must be acknowledged. Denying the existence of the categorization of women will also be detrimental to the analyses of maternal mortality and the understanding of female sexuality in Africa. This recognition will allow for effective analysis of the actual discrimination and power relations within the different and specific cultural settings in Africa society.³³ This approach will assist in analyzing issues of maternal health and indeed maternal mortality from the lived experiences of Nigerian women who might be facing specific age-long subordination and experiencing diverse challenges from other narratives and conceptions of power relations. It will also allow my research to appreciate the different intersections that may be involved in addressing maternal health issues and how issues such as geography, economic status, and religion affect maternal mortality. It is useful in testing legal principles and doctrines, especially human rights principles, exposing certain aspects that are detrimental to women. It explains feminism, but its limitations include diversity in interpretation, cultural values, and experiences of different societies. These might contribute to denial of autonomy to women and how to present a holistic approach to dealing with the problems: for example, the denial of “feminism” “identities” by some cultures.

V. Post-Colonial Feminism

Finally, the historical experience of Africa with imperialism and some of its aftermath, especially on various social and legal structures, also results in post-colonial theorists approaching the problem of African women with different lenses. To address the social, cultural and legal issues affecting women, scholars have also identified the need to address African women’s issues from a post-colonial perspective. A post-colonial feminist theory, “seeks to account for women’s subordination within the conditions of colonialism”.³⁴ This perspective requires the criticism of extant laws, structures that have deep colonial influence, and that in handling issues relating to women and ‘culture’ the law should not only look back to the past but should also pay attention to the positive aspects of colonial legal and surviving social-cultural structures which persist and remain relevant today. The advantage of this approach lies in its ability to assist in developing a comprehensive and all-encompassing, acceptable solution to issues confronting African women in a post-colonial world. This theory will assist in understanding the historical foundations of gender and how colonialism has evolved and perpetrated the understanding of social relations of power in the traditional settings.³⁵

This framework is useful as it allows for the critical exposition of “forms of rule, influence, control, exploitation, exclusion, inequality or violence” with colonial traces that are still surviving and have differential effects on women in post-colonial societies.³⁶ A historical analysis and examination of existing legal and political structures will be carried out to highlight the nature of these regimes, how colonialism has continued to influence them, and the nuances existing within the region especially international human rights regime. Other aspects of the legal system and structure will also be factored in, to understand how colonialism has influenced women including in the area of maternal health. The post-colonial theory is also an effective tool to boost the understanding of the history of issues affecting African women. The purpose is not only to deemphasize the colonial contribution or Western influence and ideas but to further appreciate how the various understandings of legal principles and knowledge production can be effectively mobilized to address maternal health issues, especially post-colonialism. Contrary to this approach, postmodern feminism does not sufficiently question the “colonial trappings and hegemonic first world formations” of the extant legal regime which have survived the post-colonial era. This represents a clear departure in the two frameworks.³⁷ Postmodernism also fails to consider

³² Oyewumi Oyeronke, “The Invention of Women” note 31 at 11.

³³ Seyla Benhabib, *Feminist Contentions: A Philosophical Exchange* (New York: Routledge, 1970).

³⁴ Philipp Dann & Felix Hanschmann, “Post-colonial Theories and Law” (2012) 45:2.

³⁵ Philipp Dann & Felix Hanschmann note 34 at 123.

³⁶ Philipp Dann & Felix Hanschmann note 34 at 123.

³⁷ Inderpal Grewal & Caren Kaplan, “Introduction” in Inderpal Grewal & Caren Kaplan, eds, *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (Minneapolis: University of Minnesota Press, 1994) 1–33.

how the colonial past is still relevant in the “postcolonial present, contemporary relationships of domination and subordination, and understandings of difference”.³⁸

It is important to note that women in Africa have been rendered passive by a collection of colonial and postcolonial historical entanglements, including traditional and cultural calligraphies that hold influence over how their sexuality is perceived and protected. One limitation of the post-colonial approach is a deep concentration on historical analysis, in resolving contemporary post-colonial problems. For maternal health, a challenging issue is that most of the causes and factors responsible are not largely due to colonial legacies. Rather they are a result of pre-colonial social and cultural beliefs and post-colonial legal structures. Most of the legal problems are due to the pluralist nature of the extant laws in the various legal systems. Of course, some of the problems are a reflection of colonial structures and institutions that continued after independence, especially, as these issues relates and affect cultural values. Sufficient approaches exist to deal with the colonial past through law reforms.

VI. Relevance of Western Theoretical Frameworks

While the idea that feminism is a Western concept may hold sway, African feminism lacks the impetus to reject feminism because it emanates from the West. Feminism remains an indispensable political tool in addressing systemic discrimination and resolving unequal power relations in African societies. It is a tool that can be reconstructed to acquire meaning within any given culture, but, it has limitations in addressing the social, cultural issues, and inequality in the society. First is that while these frameworks are rooted in the principles of equality for women in a highly patriarchal system and have a positive outlook. They also raises different dynamics of marginalization through the suppression and exclusion of the voices of different categories of women, such as poor and uneducated women. More often, feminist scholars, including health experts, formulate their elitist perspective and construct new forms of challenges in the women’s struggle. A typical example is the neglect of rural women from discussions on maternal health when facilities and infrastructure are concentrated in urban areas. Second, although the International human rights regime seeks to transform international norms within local settings, much of the discussions on rights and culture is focused on the meta-levels of rights as expressed within international conventions and the state constitution. Yet local communities have fundamental ideas of justice and when these have been transgressed especially with respect to issues like reproduction (including maternal health) and the legal institutions to implement policies. Scholars agree on the need for a coordinated approach but are however faced with the challenge of reforming the extant institutions and laws. The practical process of achieving the reform is too long, unclear and theoretical. This is also a challenge for the adoption of a feminist approach to my research. Considering the diversity of cultures in Africa, critics have strongly questioned the practicality of pursuing feminist ideals in the face of deeply entrenched, almost sacred, traditional values.

African feminism is a weighty intellectual discourse as it has demonstrated itself as “an ongoing process of self-definition and re-definition”, and the diverse frameworks try to identify means of domesticating the problems of African women and seek to localize the methods adopted in addressing the issues of women. However, certain factors in maternal health, such as autonomy, understanding of sexuality and reproductive rights, cultural experiences, economic disparities etc., confronting African women in African post-colonial settings which explain the disparities between the peculiarities of African feminism and its Western counterparts must be addressed. Hence, African feminism must resist aspects of the theoretical construct of western feminism which have failed to reflect their lived experiences and localized realities.

VII. Search of African Feminism-A Theoretical Imperative

African feminist theorists have noted that ‘gender construction’ is critical to feminist thinking. Feminists like Oyewumi, deny the existence of feminism and argue that gender is a construction of

³⁸ Inderpal Grewal & Caren Kaplan, *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* note 37 at 6.

Western feminist scholars. She argues that by analysing a particular society with a gender construct, scholars create gendered categories and ‘formulate gender into that society’. Oyewumi contends that the process of making gender visible is also a process of creating gender; she, therefore, sees gender as a creation of the imagination and rather calls for a cultural context-dependent feminist analysis that is not abstract but conscious of African women’s realities.³⁹ In contrast, other feminists from Africa argue that gender is essential to feminist discourse, even within Africa. Mama theorizes that the analogy that there are no feminist or gender concepts within African cultural settings, invents an imaginary African community that forecloses the existence of gender. Ample evidence exists that gender has long been one of the central organising principles of pre-and post-colonial African societies, and that all identities are gendered.⁴⁰

There have undoubtedly been several misconceptions about the construction of gender in an attempt to find an identity. Tamale’s contribution to gender construction within Africa is more succinct – while she agrees that gender is crucial in African feminist discourse, she posits that gender analysis in the African context must integrate a critique of the imperialist and colonial notion of gender and the effect of neo-colonialism on gender relations.⁴¹ She argues there must be a multi-focal approach to gender analysis in Africa, which must recognise the dialectical relationship between gender, class, ethnicity, religion, imperialism, and neo-colonialism.⁴² Tamale’s contention is buttressed by Hooks’ analysis of black Americans, where she argues that feminism cannot rid society of sexist oppression and male domination if it fails to eradicate the ideology of domination that ‘permeates western culture on various levels, as well as [a] commitment to reorganizing the society so that the self-development of the people can take precedence over imperialism, economic expansion and material desires’.⁴³ Hooks argues further that any analysis devoid of these lacks merit and is superficial.⁴⁴ Such a background conceptualisation is extremely useful for the analysis in legal research, especially for health. It allows for a comprehensive interrogation of factors supposedly responsible for the subordinations and marginalisation of women’s experience in expressing their health, sexuality and reproductive needs.

Mutua follows this analysis in disapproving the western description of the situation of the African woman within a human rights normative framework – he contends that images of African women project them as ‘victims’ and men as ‘savages’.⁴⁵ Thus, while women in the West no doubt suffer oppression as a result of their gender and class, Third World women suffer the same marginalisation along with oppression based on race and imperialism.⁴⁶ Third World feminists argue that in tracing the impact of Western feminism on global development, the Third World and in particular its women have not benefited from feminist intervention, since the conditions of ordinary citizens have not changed as much.⁴⁷ Thus, there is a need to canvass for a form of feminism that speaks to everyone.⁴⁸ Nzegwu argues that while it is acknowledged that feminism has made important contributions in redefining gender relations, its individualistic conception of equality remains ‘a non-liberatory concept’ for the dual sex systems of many African societies. She notes that patriarchy is endemic and has installed an ideology of dominance creating a dichotomy in human activity into the public and private spheres, and

³⁹ Oyewumi Oyeronke, *The Invention of Women; Making an African Sense of Western Gender Discourses* (Regents University of Minnesota 2003) 78.

⁴⁰ Amina Mama, ‘Challenging Subjects: Gender and Power in African Contexts’ (2001) 5.2 *African Sociological Reviews* 63-73.

⁴¹ S. Tamale, *When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda* (Westview Press 1999) 3.

⁴² *Ibid* at 3.

⁴³ Bell Hooks, *Feminist Theory from Margin to Center* (Pluto Press 2000) 26.

⁴⁴ *ibid* 26.

⁴⁵ M. Mutua, ‘Savage Victims and Saviours: The Metaphor of Human Rights,’ (2001) 42 *Harvard International Law Journal* 201-245.

⁴⁶ J. Oloka-Oyango and S. Tamale, ‘The Personal is Political or Why Women’s Rights are Indeed Human Rights: African Perspectives on International Feminism’ (1995) 17.691 *Human Rights Quarterly* 725-730.

⁴⁷ Amina Mama, ‘Critical Connections feminist studies in African Context’ in Andrea Cornwall and Elizabeth Harrison (eds), *Feminism in Development, Contradictions, Contestations and Challenges* (Zed books 2006) 150.

⁴⁸ Hooks note 43 at xii-xiv.

putting women in subordinate positions.⁴⁹ The Third World discussions made immense contributions to the feminist debates; focus subsequently shifted to gender and gender roles as constructed through race, class, culture, and the need for a diversity of feminist approaches.⁵⁰

Furthermore, a feminist perspective also broadens our understanding and worldview by removing the ‘covers and blinders that obscure knowledge and observation’.⁵¹ In this instance, the thesis contemplates a critical assessment of the law and institutions supporting post-conflict gender reconstruction and reintegration processes. Feminist legal theory will therefore uncover the role played by law and institutions in furthering gender inequality and discrimination, even for health inequalities. One of the effects of armed conflict on women in Africa has been the feminisation of poverty and the general socio-economic status of women and the manners it affects the attainment of sexual and reproductive health of women. For several decades, Africans and developing countries have experienced high maternal mortality because of low socio-economic and political marginalization either directed at women or due to geography. Thus, any feminist discourse addressing health inequalities in the African context must take into consideration issues of socio-economic rights and gender justice within African patriarchal society. This form of intervention echoes Tamale’s observation that the feminism emerging in Africa is ‘distinctly heterosexual, pro-natal and concerned with bread, butter and power issues’.⁵²

Another strong challenge for African feminists in developing a coherent body of feminism is the idea that the conception of feminism evolved from the colonial to the postcolonial has resulted in a limited application of rights to women within cultural communities to the “tension between universality and relativism”.⁵³ Within the African context, the “suspicion of the motives of former colonial powers and their allies remains a strong factor in all cultural interchange between African and western societies”.⁵⁴ There is a genuine sense of “moral indignation” felt by most Africans over colonial rule and post-colonial Western exploitation”.⁵⁵ This situation is also exacerbated by the fact that in order to realize a certain level of “international legitimacy, states in Africa are required to remake their internal legal and political processes” in order to conform to international principles.⁵⁶ As a result, because the legitimacy of the postcolonial legal framework is largely dependent on “international agreements”, we see that this process has taken “the discourse of rights and protection further away from those who experience wrongs”.⁵⁷

VIII. State of Women’s Sexual Rights in Africa

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)⁵⁸ made pursuant to the African Charter⁵⁹ aims to address the age-long discrimination against women and gender inequality in Africa especially within the continent’s cultural settings and values.⁶⁰ The Protocol aims to localise universal ideals, adapting international norms to the needs and

⁴⁹ Nkiru Nzegwu, ‘Gender Equality in a Dual-Sex system: The Case of Onitsha’ (1994) *Jenda; A Journal of Culture and African Women Studies* 73-95

⁵⁰ Linda Alcoff, ‘Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory’ (1988) *13:3 Signs* 405-436

⁵¹ M. Millam and R. Moss Kanter, *Another Voice: Feminist perspectives on Social life and Social Science* (Doubleday 1975) viii.

⁵² Tamale “When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda” note 5 at. 7.

⁵³ Abdullahi A An-Naim & Jeffrey Hammond, “Cultural Transformation and Human Rights in African Societies” in Abdullahi An-Naim, ed., *Cultural Transformation and Human Rights in African Societies* (London: Zed Books Ltd, 2000) 29

⁵⁴ *Ibid.*

⁵⁵ Daniel Norman, *The cultural Barrier: Problems in the Exchange of ideas* (Edinburgh: Edinburgh University Press, 1975) at 22-23.

⁵⁶ Norman, note 55 at 22-23.

⁵⁷ An-Naim & Hammond, note 14 at 29

⁵⁸ Protocol to the African Charter on Human and Peoples’ Rights and on the Rights of Women in Africa, adopted 11 July 2003, 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXX) (entered into force 25 Nov 2005) art 23.

⁵⁹ The African Charter on Human and Peoples’ Rights adopted in 1981 and came into force in 1986, art 2.

⁶⁰ Article 2 of the African Women’s Rights Protocol.

specific experiences and peculiarities of women in Africa. Any attempt to evolve a feminist theory and framework must guarantee the dignity of women, security of their person, socio-economic independence, and reproductive rights. These rights are reflected in the spirit, language and scope of the Protocol. This may be attributed to sustained political engagements and concerted efforts of feminist voice across Africa. It is an offshoot of the global feminist movement which resulted in the enactment of the CEDAW.⁶¹ To what extent has the provisions of the Protocol reflected the aspirations of African feminists and legal scholars regarding women's reproductive rights?

For two decades the protocol has offered in principle, legal protection and advocacy for sexual and reproductive health rights (SRHR). Although the binding effect of its provisions across the region is yet to complement the African regional goal of guaranteeing equality and dignity of women, as several states have yet to transform and domesticate the instrument in accordance with their local laws.⁶² Hence, the difficulty is holding governments accountable specifically for the existing gender inequality and violations of the rights of women and girls in Africa. In fact, several countries entered reservations on one of the prominent provisions of the protocol in Article 14, which mandates states to ensure that women's rights to sexual and reproductive health are respected and promoted, including protection of the right to access to medical abortion in cases of sexual assault, rape and incest.⁶³ In several member states the Protocol provisions against sexual and gender-based violence including harmful cultural practices that severely disadvantaged women and girls have not been enacted into law⁶⁴. Issues such as child marriage, Female Genital Mutilation (FGM) and unsafe abortion resulting from highly restrictive and criminal abortion provisions and lack of reproductive autonomy are still in contention.⁶⁵

These factors continue to stand in the way of an African feminist framework on the continent, and until the social and economic, cultural, and religious factors affecting most women on the continent are addressed and women take a rightful place in terms of active participation in the decision-making process, especially on issues affecting women, the quest for women to have comprehensive access to sexual and reproductive health care and indeed women's sexual rights will remain unattainable. The implication of the lack of a working feminist framework in Africa is evident in the continent's high maternal mortality and morbidity rates, unmet contraception needs, unsafe abortions, high rates of sexually transmitted infections (STIs), particularly HIV/AIDS which is still prevalent in the region.⁶⁶

The lack of political will by the various conservative political elites, which are male-dominated in most countries, reinforces the need for an active feminist movement and recognition of a legitimate framework outside the global and mainstream movement which is seen as questioning African values and cultural supremacy. Indeed, the African feminist movement has also suffered resistance from religious or faith-based organizations in the region and groups; which focus on the need to preserve the institution of marriage and the division between the public and private sphere.

The protocol, from its provisions, has the power to transform feminist rights in the African region if effectively engaged and implemented. Unlike the CEDAW, which states perceive with some sort of

⁶¹ UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) 'General Recommendation No. 19: Violence against women' (29 January 1992) UN Doc A/47/38.

⁶² Out of the 55-member countries in the African Union, 49 have signed the Maputo Protocol, and 42 countries have ratified it.

⁶³ African Commission on Human and Peoples' Rights (ACHPR) 'General Comment No. 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (adopted 28 November 2014). Art. 14 Maputo Protocol.

⁶⁴ E Durojaye 'Involuntary Sterilisation as a Form of Violence against Women in Africa' (2017) 53(5) *J of Asian and African Studies* 721.

⁶⁵ C Ngwena 'Inscribing Abortion as a Human Rights: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 785.

⁶⁶ O, Afulukwe-Eruchalu 'Accountability for non-fulfilment of human rights obligations: a key strategy for reducing maternal mortality and morbidity in sub-Saharan Africa; in C Ngwena and E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 119-151.

moral indignation to have both colonial and Western influences on the rights of women, it is an attempt to capture African women's experiences and challenges which must be complemented with a theoretical framework or standpoint.⁶⁷ The theory will inspire and compel a successful implementation of sexual and women rights through engaging women's domination from an African feminist and decision makers perspective. It is "a critical component of attaining the right to the highest attainable standard of health of women." An African feminist theoretical framework further must contend with the contextual challenges and limitations of women's sexual and reproductive health rights within the Maputo Protocol under article 14. The theory must grapple with developments globally of definition of sexual rights/orientation which extends beyond those assigned female at birth, must encompass rights originally acceptable to African settings but are legitimately within the conceptual definitions such as rights of African Transgender and LGBTs individuals in accordance with internationally recognized standards and best practice. The framework must also recognize and accommodate obligations on state parties to guarantee reproductive health rights, including women's right to abortion, family planning, sexual orientation, expansive sexual autonomy in different instances. It must provide the scope of cultural and state obligations and identifies violations of sexual and reproductive health rights along with the strategic design of remedies.

IX. Conclusion

Little research has been conducted on the ability of the mainstream framework adopted by feminists to examine the rights of women in Africa and their various shortcomings. Although they are aimed at achieving the goal of advancing the economic, social and political rights of women and the historical marginalization that they experience within African communities and those residing in developed countries, they nonetheless have different forms and perspectives in achieving their purposes which have implications for African women and determines whether the goal is achievable. While the Western feminist preoccupation has been on racism and political rights and would need a theoretical expansion to accommodate third-world women's perspective, African women focus on challenges of reproduction, poverty, and how the intersections of cultural and social factors shape their lived experience. Although, the strategy of the African feminist to focus on most pressing need is significant, the most important aspect of the African feminist struggle in my view is the identity and recognition of "the African feminist framework" from a multiple, decolonizing, legal and regional human rights perspectives, which will serve as a foundation for resolving further and larger problems of marginalization confronting African women especially their reproductive rights. This approach admits the shortcoming of piecemeal and limited focused approach to women's oppression. By merely focusing on the immediate problems of African women's reproductive challenges, it assumes the existence of larger problems which the present limited scope is not capable of redressing. Hence, the argument for a comprehensive African feminist framework capable of reflecting the myriad challenges confronting African women, and indeed such a framework may be adopted through regional frameworks like the African Charter and the African Women's Protocol on the Rights of Women and other third world countries facing similar identity and sisterhood crises.

⁶⁷ Afulukwe-Eruchalu & Durojaye 'Developing norms and standards on maternal mortality in Africa: lessons from UN human rights bodies' (2017) 1 African Human Rights Yearbook 82-106.

INDIA'S CONSUMER PROTECTION LAWS AND INFLUENCER ADVERTISING ON SOCIAL MEDIA PLATFORMS

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Abstract

The COVID-19 pandemic has forced business houses worldwide to devise innovative means to reach out to their customers and understand their purchase culture and lifestyles to keep themselves active in the highly competitive market. Social media with enhanced technologies have made this task easier and this has made companies largely dependent on the online world. Thus, with the increasing relevance of social media in the modern market economy, social media influences are emerging to be key advertising players by marketing a wide range of products from fashion to luxury goods. Though this opens up a wide range of opportunities to both the consumers and the companies, the lack of advertising standards that regulate social media platforms exposes consumers to the risk of making uninformed choices because of misleading advertisements.

Social media influencers are aware that they have a significant influence over their followers and that their statements are capable of having a magnified and profound impact in society. Followers place a significant degree of trust in social media influencers and may hence act upon their statements without any second thought. Cases of misleading advertisements involving social media influences are making headlines on a regular basis. Social media influencers with large fan bases earn huge amounts of money by promoting various products online with their personal endorsements. It is interesting to observe that most social media influencers advertise various products by accepting rewards on the pretext of making genuine reviews out of their expert opinions and personal experience. Hence, guidelines and rules intending to regulate advertising through digital platforms by social media influencers should aim to instill a sense of responsibility in them and establish a distinction between paid promotions and genuine reviews made by them.

The Consumer Protection Act, 2019, is the only primary legislation dealing with misleading advertising and endorsements of products by social media influencers. The guidelines issued by the Advertisements Standards Council of India (ASCI), a non-governmental voluntary organization of the advertising industry in India, on Influencer Advertising which provides for self-regulation by social media influencers, also serves as a significant step in this regard. This paper aims at evaluation of India's existing consumer protection legislation and suggests some policy reforms for effectively regulating influencer advertising through social media platforms.

Keywords: Advertising, Consumer, Influencer, Misleading, Social Media.

I. Introduction

With the advent of information technology and the emergence of social media platforms, endorsement and marketing of brands have been elevated to a peculiar and personalised level of practice. The public at large are influenced not only by mainstream media advertisements but also the personalised promotion of brands and products through social media platforms and such other media. Influencer marketing is highly instrumental to modern marketing campaigns and has grown exponentially by marking its own space in a short span of time. Reports by law enforcement agencies investigating crimes linked with influencer marketing show that there exists a need for drawing up rules and regulations to protect the rights of both the influencers and consumers. The complexity of the online world and the lack of proper legal agreements describing the liability of the brand and the influencer endorsing the brand, in case of an injury caused to a consumer using the product, makes consumers largely vulnerable to influencer advertising. Although there exist a legal duty on the brands and the influencers to comply with the law in hand and protect the interests of consumers, the consumers' right to spend their hard earned money in a diligent manner is taken lightly by the law enforcement agencies.

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Influencer advertising refers to advertisers paying popular social media influencers in exchange for brand endorsement. Social media influencers have a large number of followers who share common interests with them and look up to them for advice in the area of their interest. Studies conducted by various agencies like the HyperAuditor and Influencer Marketing Report of 2019 reveal that social media influencer marketing has enormous scope in effectively influencing consumer preferences, as it has an extremely positive outlook. Misleading and deceptive influencer advertising is one of the important concerns in influencer marketing. Brands and influencers are supposed to comply with consumer protection laws which address deceptive and misleading advertisements in their influencer marketing strategy. Consumer protection laws prohibit misleading advertisements that have a tendency to deceive the consumers in making their choices. Brands have a responsibility to make sure that the influencers whom they are paying for advertising their products are transparent with their audience about the commercial nature of their endorsements. Thus influencers are ethically expected to disclose their commercial relationships with the brands they are endorsing in order to prevent consumers from being misled or deceived.

Endorsements from social media influencers are largely believed by the consumers in making their choices. However, there have been instances of misleading promotions by social media influencers. In a paper titled “Influencer Marketing with Fake Followers,” a group of professors from the Indian Institute of Management has observed that influencer advertising has led to the emergence of parallel businesses like ‘click farms’ and unfair trade practices. ‘Click farms’ refers to businesses that offer to inflate the number of likes, followers, and comments for the influencers. Influencers often avail the services of these business groups to claim more payment from the brands for endorsing products.¹ This indeed raises serious consumer rights and cyber security concerns.

Though social media influencers are duty bound to observe due diligence to avoid financial or any other kind of harm or loss to other individuals or property, in most cases they fail to do so. The claimed quality and safety of the product and brand endorsed are not seriously looked into by the influencers by conducting background research on the same. Further, often existing laws and regulations fail to effectively regulate the influencers and brands to prevent possible abuse. The lack of proper legal contract between the endorser and the brand further complicates the issue as it becomes difficult to determine the extent of liability of the brand and the endorser for the harm caused to the consumer, owing to the use of the product contested.

It is interesting to observe that all the players of the market, including the business entities, social media influencers, and consumers are equal partners in social media marketing. Thus, the regulatory agencies are to take steps necessary to tame the untamed in order to protect the best interests of the consumers to make informed choices. The Consumer Protection Act of 2019, the Draft Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines of 2020, the Code for Self-Regulation of Advertisement established by the Advertising Standards Council of India are the major initiatives taken by the regulatory agencies to regulate unfair advertising practices prevalent among social media influencers. These laws and regulations primarily aim at protecting the interests of consumers without diluting the marketing opportunity provided by influencer marketing strategies. Consumer protection legislation dealing with influencer marketing thus provides a legal framework for the influencer marketing sector to avoid harm to the consumers. This paper attempts to analyze and evaluate the legal and policy frameworks on social media influencers in marketing, along with certain case studies.

¹ *Id.*

II. Case Studies

The case of Bhoomi Trivedi ²

A police complaint filed by the famous singer Bhoomi Trivedi with the Mumbai Police exposed fake 'like' scams in social media platforms. Her complaint raised questions about the unethical practice of buying made-up virtual likes and followers. The complaint exposed stunning information about agencies that offered services creating fake followers and likes for artists on social media platforms. Agencies who engaged in this serious social media marketing fraud were found to be operating fake social media accounts by using the identities of renowned personalities and also involved in the sale of fake followers and likes to genuine social media accounts for a fee. The fake followers and programs created through the computer programs were generally referred to as bots. Police identified websites like followerskart.com which offered this unethical service and more than 18 people, including famous celebrities such as film directors, choreographers, models and singers were alleged to have used the service of such websites to earn fake likes and followers for their social media accounts.

Section 120-B and Section 420 of the Indian Penal Code which deal with criminal conspiracy and cheating, respectively, and Section 66 D of the Information Technology Act which deals with punishment for cheating by personation are stringent provisions of law to deal with these unethical practices of influencer advertising. However, the ambiguous liability of the companies and social media platforms, jurisdictional issues, and the difficulties faced by the investigating agencies to collect evidence, which is mostly circumstantial in nature, and the fact that the identities offered by social media platforms to the fraudsters are fake, often make it difficult for the agencies to effectively regulate social media platforms to protect the interests of the consumers.

HyperAuditor survey

The HyperAuditor influencer income survey of 2021, which was conducted among a population of 1865 Instagram influencers, revealed the scope of influencer marketing through social media platforms.³ The survey revealed that about 48.49% of influencers earn an average of \$ 2970 per month from their account on social media platforms by spending more than 24 hours per week maintaining their account to keep their followers engaged. The survey found that the more the followers, the more is the chance for the influencer to earn. The survey covered brand promotion rewards, personal brands created for attracting consumers to their businesses, and the earning of money through subscription services. The HyperAuditor survey of 2020 had looked into the issue of influencer fraud dynamics and revealed some interesting findings which disclosed that new growth tricks, such as stories of mass looking (a method of gaining large amount of Instagram profile views and followers) and mass polling and other anomalies are increasing at a rapid pace.⁴ The study also revealed the dominance of inauthentic followers on social media platforms.

The study conducted by HyperAuditor reveals the possibility of influencer advertising-related consumer frauds. High incentives received by influencers through advertising often tempt them to resort to anomalous practices. Law enforcement agencies are required to take stringent actions against influencer advertising frauds that affect the consumers' interests.

III. Provisions under existing Legislations

The concept of advertising and the medium through which it is delivered has changed dramatically over time. Without the presence of celebrities, such as actors and athletes, who formerly dominated the advertising industry, the digital era, and its vast cyberspace make advertising simpler and more appealing. Because of social media, traditional advertising strategies have suffered a setback. Consumers have the right to know whether the influencers have been paid, incentivised, or compensated in any way to endorse or review a product, since influencers' persuasiveness about a product stems from

²Harhit Rakheja, *Mumbai Police Unravel Dark Underbelly of Influencer Marketing*, INC42 (July 21, 2020), <https://inc42.com/buzz/mumbai-police-unravel-dark-underbelly-of-influencer-marketing/>.

³Nick Baklanov, *Data from our Survey of 1865 Instagram Influencers*, HYPERAUDITOR (Jun 28, 2021), <https://hypeauditor.com/blog/data-from-our-study-of-1865-instagram-influencers/>.

⁴*The State of Influencer Marketing 2020: Influencer Fraud Dynamics*, HYPERAUDITOR (Jun 2020), <https://hypeauditor.com/blog/state-2020/>.

unbiased perceptions and personal experiences. Influencer postings that lack proper disclaimers have a tendency to skew and influence the purchase preferences of unwary customers. From this angle, it can be considered as an "unfair trade practise." The influencer postings can be considered as 'advertisements' in the following situations:

- i. Paid-for Space: Influencer posts appearing in 'paid-for-ad space', for example, banner ads, paid-for research results and sponsored/promoted posts.
- ii. Affiliate Marketing: Influencer posts promoting products containing a brand hyperlink or influencer discount code or arrangements where the influencer gets paid for every 'click-through' or sale that can be tracked back to the influencer's post.
- iii. Advertorials: Influencer posts for which brands have either (i) paid, rewarded or incentivized the influencer; or (ii) exercised some form of editorial control over the content.

Social media influencer marketing becomes highly relevant in recent days of the COVID-'19 pandemic, as social networking sites draw more individuals. Thus, it creates greater interest for publicity influencers. Various jurisdictions have established regulatory organisations and issued rules and laws to oversee the influencer marketing business and its activities in order to protect consumer interests and make influencer marketing more visible to all parties involved.

Table: Codes of practice followed by some of the jurisdictions⁵

Jurisdiction	Governing Bodies	Legislations Or Guidelines	Sanctions
USA	The Federal Trade Commission (FTC)	Disclosures 101 for Social Media Influencers	Non-compliance may attract enforcement actions or civil lawsuits such as orders to cease and desist, with fines up to \$43,792 per violation, Injunctions by federal district courts. Violations of some Commission rules could also result in civil penalties of up to \$40,654 per violation etc. Further, violations of court orders could result in civil or criminal contempt
UK	The Advertising Standards Authority (ASA), The Committee of Advertising Practice (CAP) The Competition and Markets Authority (CMA)	UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code)	Non-compliance may attract withdrawal of membership from trading bodies, adverse publicity spotlighting mal-conduct on the ASA's official website etc.

⁵ Diva Rai, *Regulatory Concerns and Rights Available for Social Media Influencers under the Law*, IPLEADERS (Aug 18, 2021), <https://blog.ipleaders.in/regulatory-concerns-and-rights-available-for-social-media-influencers-under-the-law/>.

India	The Advertising Standards Council of India (ASCI), Central Consumer Protection Authority (CCPA)	Influencers Advertising on Digital Media Platforms	Contravention of guidelines may attract impositions of penalties such as a fine to the tune of INR 10, 00, 000 and an imprisonment term for two years. In cases of subsequent violations, the fine, as well as the term of imprisonment, may be further increased to INR 50, 00, 000 and five years respectively.
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IV. Indian Legal provisions to regulate Influencer advertising

The Consumer Protection Act, 2019

The Consumer Protection Act 2019 makes provisions for regulating ‘advertisements’ and ‘endorsements’.⁶The Consumer Protection Act's major goal is to strengthen consumer protection and to provide a robust framework for resolving consumer complaints.⁷ The Consumer Protection Act aims at ensuring that consumers have the right to prevent the sale of items that are dangerous to people or property. It also aims to safeguard consumers from unfair trade practises, to inform them about the quality, quantity, potency, purity, standard, and price of goods. Further, it attempts to ensure, whenever feasible, competitive access to an authority of products, to hear consumers' concerns and to ensure that they are taken into account in relevant forums, to seek remedy for unethical business activities or exploitation of people and also consumer education. The revised Consumer Protection Act of 2019 (CP Act 2019), which was notified on August 9, 2019, has added numerous provisions to strengthen the existing consumer protection legislation.

The establishment of a regulating authority, tougher fines for deceptive ads, and rules for e-commerce and electronic service providers are just a few of the highlights of the newly enacted Act. The e-commerce⁸, digital marketing, and advertising standards will all be affected by the new Act. The Consumer Protection Act of 2019 is the first statutory framework for consumer protection which has included, and targeted advertising and marketing activities carried out by influencers. Influencers and companies who operate social media campaigns should be aware of recent regulatory developments in order to avoid liability and ensure compliance. The Consumer Protection Act of 2019 not only expands the definition of "misleading advertisement," but it also allows authorities to enforce fines for inaccurate and misleading marketing. ' Misleading advertising'⁹: (a) falsely describes a product or service; or (b) gives false guarantees or is likely to mislead consumers as to the quality of a product or service; or (c) conveys a representation that would constitute an unfair trade practice; or (d) deliberately conceals

⁶ The Consumer Protection Act, 2019, § 2(1)(1), No. 35, Act of Parliament 2019.

⁷ The Consumer Protection Act, 2019, § 2(7), No. 35, Act of Parliament 2019.

⁸The Consumer Protection Act, 2019, § 2(16), No. 35, Act of Parliament 2019.

⁹The Consumer Protection Act, 2019, § 2(28), No. 35, Act of Parliament 2019.

important information. Further, the Consumer Protection Act of 2019 enables consumer protection agencies to investigate complaints regarding advertisements that are inaccurate, deceptive, or harmful to consumers' interests.

The authorities can issue orders to stop misleading ads and can levy a fine of up to rupees one lakh for the first time and up to rupees five lakh for repeated offences¹⁰. It is important to understand that such fines can also be levied on a product or service endorsement. If an endorser commits many infractions, he or she may be barred from participating in endorsement activities for a period of one to three years.¹¹

The Draft Guidelines, 2020

After enacting the Consumer Protection Act 2019, the Government of India realised that simply enacting a legislation to safeguard the interests of consumers is insufficient. As a result, the Ministry of Consumer Affairs published a draft of the Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020, (hereinafter referred to as 'the Draft Guidelines') to keep a close eye on all types of advertisements and marketers regardless of the media utilized. With the rise of the influencer marketing sector, many micro influencers have been advertising for personal motives such as self-improvement and money, by neglecting the interests of the purchasing public. Hence, to keep a check on this the Ministry had made it mandatory to conduct due diligence on the product or at least research the facts of the product before endorsing or advertising it, for the sole purpose of authenticity and the best interest of the public.

Though these guidelines are yet to come into force they will soon be implemented. Although the proposed directives are well meaning, enforcement difficulties are likely to develop. There are no clearly defined words like "advertising agency," "dealer," "endorser," "bait advertising" or "surrogate advertising" in this legislation or the draft. This might make it difficult to grasp the applicability and content of the proposed Guidelines. In addition, comparable obligations are imposed on manufacturers, service providers and advertising agencies in the draft guidelines. This does not take into consideration the differences in the life cycle of the product or service rendered by each of these organisations. Differentiated duties for everybody concerned must be imposed in the Draft Guidelines. Some sections in the proposed guidelines are phrased broadly, which may lead to over-censorship. One clause, for example, states that authorised ads must not violate "commonly recognised norms of public decency." Another bans advertising that represents "dangerous practices" of people of any gender, religion, race, caste, creed, or sex in an "unfavourable manner." These words have not been defined and may be construed in an orthodox sense, limiting creative speech. As a result, the limitations must be reframed in such a manner that is compatible with the Constitution's legitimate restraints on expression. The proposed Guidelines impose responsibilities that are disproportionate to the damage that is being addressed in certain instances. Advertisements that are "of interest to minors" are subjected to regulation under one clause. This sentence is quite ambiguous and because of this ambiguity, manufacturers, service providers, and advertising agencies may need to assess whether or not their product or service will appeal to children. All parties involved will be subjected to onerous responsibilities as a result of this.

Many of the above-mentioned difficulties can be remedied by clarifying the current uncertainties in the proposed directives by the Central Consumer Protection Authority (CCPA). The CCPA must cooperate with the industry to guarantee the efficacy of these guidelines. In nations like USA, Great Britain and Singapore, this paradigm is followed. In these nations, the regulators offer firms and marketers advice to enable clear standards to be enforced by all interested players. India should take a positive step towards improving its consumer protection regime by adopting a similar strategy.

V. Guidelines by Advertising Standards Authority

A social media influencer is someone who has a good understanding of what his niche is and utilizes this knowledge to persuade people to believe and to subscribe to the same set of ideas or views he

¹⁰ The Consumer Protection Act, 2019, § 89, No. 35, Act of Parliament 2019.

¹¹ The Consumer Protection Act, 2019, § 2(18), No. 35, Act of Parliament 2019.

strives to disseminate through social media. This is because of the fact that social media has a genuine influence, and it implies that one can influence people, shape attitudes, and can change themselves and others for the better and sometimes, even for the worse. Thus, the tremendous power of social media develops into an influencer's duty. Influencers should subject themselves to self-regulation in order to perform their duty towards society. One must identify questions about influencers, such as how trustworthy they are and how accountable they are.

- The Advertising Standards Council of India (ASCI), a voluntary self-regulatory organisation committed to protecting consumers' interests in India through self-regulation in advertising, is responsible for regulating influencer marketing in India.¹² The ASCI, on May 27, 2021, released a set of guidelines for 'Influencers Advertising on Digital Media Platforms' which came into force on June 14, 2021.¹³ The guidelines require influencers to report that the submitted information is a commercially driven advertisement. The Guidelines also outline how disclosures are to be made, labels are to be used and criteria to be followed in evaluating, among other things, whether or not disclosures are needed. The Guidelines proposed some important definitions such as influencer, virtual Influencer, material connection, and digital media. Furthermore, the prologue to the guideline emphasises the background and aims of such a guideline. With distinctions between content and ads blurring, it is essential for consumers to discern when something is being pushed in an attempt, for an immediate or possible commercial advantage, to influence their opinion or behaviour.
- The key elements of ASCI's Guidelines can be summarized as:¹⁴
 - i. Determining the need for disclosures: Disclosure is needed when there is any material relationship between the advertiser and the influencer, even if the valuations are impartial or have been entirely made by the influencer as long as the substantial connection exists between the advertiser and the influencer.
 - ii. The disclosures must be upfront and prominent: The disclosure should never be positioned as hard to miss and it shall not be buried in a collection of hashtags.
 - iii. The disclosure must be made in a manner that is well understood by an average consumer: Influencers are encouraged to use a list of acceptable disclosure labels, the language used in disclosures must either be English, or the language used in the advertisement itself. The Guidelines provide for specific disclosure requirements for video and audio content such as duration of appearance of disclosure for video content as well as the placement of disclosure announcement in respect of audio content.
 - iv. Virtual influencers: They must reveal to customers that they are not communicating with a real person. This communication must be evident.
 - v. Responsibility of disclosure of material connection: The connection between seller and advertiser must be fully disclosed in cases where there exist a connection between the advertiser and the seller of the product that is capable of affecting the credibility of endorsement given by the advertiser.

VI. Conclusions and Suggestions for Reforms

While the Guidelines do not specifically mention the complaint redressal mechanism, ASCI's official website provides for filing complaints in case of non-adherence to ASCI Guidelines.¹⁵ Complaints may be made via phone or through ASCI's website. The regulatory framework on influencer marketing, including the ASCI guidelines, seems to be sufficiently thorough to satisfy current advertising requirements. Both influencers and marketers must cooperate for the successful execution of the rules in order to guarantee that all essential actions are done to achieve compliance with the standards. The brands should guarantee that their commitments are clearly stated and comply with disclosure standards.

¹²Common Cause (A Regd Society) v Union of India and Ors 2017 (2)

¹³ THE ADVERTISING AND STANDARDS COUNCIL OF INDIA, <https://asci.social/guidelines> (last visited Sep 25, 2021).

¹⁴ Kanupriya Grover, Janarth Visvanathan & Aman Taneja, *India: Summary of the Guidelines for Social Media Advertising by Influencers*, MONDAQ (Mar 4, 2021), <https://www.mondaq.com/india/social-media/1042692/summary-of-the-guidelines-for-social-media-advertising-by-influencers->

¹⁵THE ADVERTISING STANDARDS COUNCIL OF INDIA, <https://ascionline.in/index.php/how-to-complaint.html> (last visited Sep. 25, 2021).

I Influencers should also oppose in response to any brand directions which contravene the ASCI Guidelines. In addition, social media platforms should try to emphasise, improve, and develop integrated methods to enhance transparency. These platforms may also consider creating a system that acknowledges that any post including a sponsored advertisement should not be posted by the creator or influencer without meeting the necessary conditions for publication. Finally, in the event of recurrent defaults, the ASCI and the CCPA should do periodic inspections of conformity in order to monitor the extent to which these guidelines are observed.

Although 'celebrity' advertising regulations are already covered by the parent code, the guidelines appear to establish digital media regulations for the social media category that are not normally considered to be 'celebrity'. However, it is reasonable to conclude that celebrities who advertise via digital media may also have to comply with the Guidelines, in addition to influencers, the bar for influencer qualification is kept relatively simple and without specific criteria and would generally fit all celebrities. It is also appropriate to state that ASCI is an agency without the force of a statute as a voluntary and self-regulatory governing organisation, and hence the regulations may not be statutory. The ASCI Code is, however, occasionally recognised by courts in India and is primarily recognised as an industrial practice. It's broad to reach customers and its capacity to influence consumer behaviour with information lasting as little as 15 seconds provides for sufficient supervision of the way in which they operate and achieve business advantages.

The Supreme Court and various High Courts through their judgments described "social media influencers" as an emerging population of persons who have gained a substantial social media base and the reputation in its domain.¹⁶ The decision also emphasised the need to impose certain liabilities on influencers, taking into account the capacity they exercise on their audience and the public's faith in them. Now as the Central Consumer Protection Authority (CCPA) has also come into force, regulations are likely to get more stringent. All these agencies taken together are bodies which have some teeth. What ASCI can do, and has done in some cases, is to give intimations to ministries or government departments with regard to non-compliances.

However, sensibly speaking, one can come to the conclusion that, in spite of all the regulations and the legal stipulations in place, it is in the consumers' power to use reason and wisdom to keep safe away from unethical and unscrutinised social media influencers and money induced marketing strategies.

¹⁶Marico Limited v. Abhijit Bhansali, (2020) (81) PTC 244 (Bom).

PUBLIC HEALTH STRATEGIES: LEGAL INTERVENTIONS

Dr. Bhupinder Singh*

Abstract

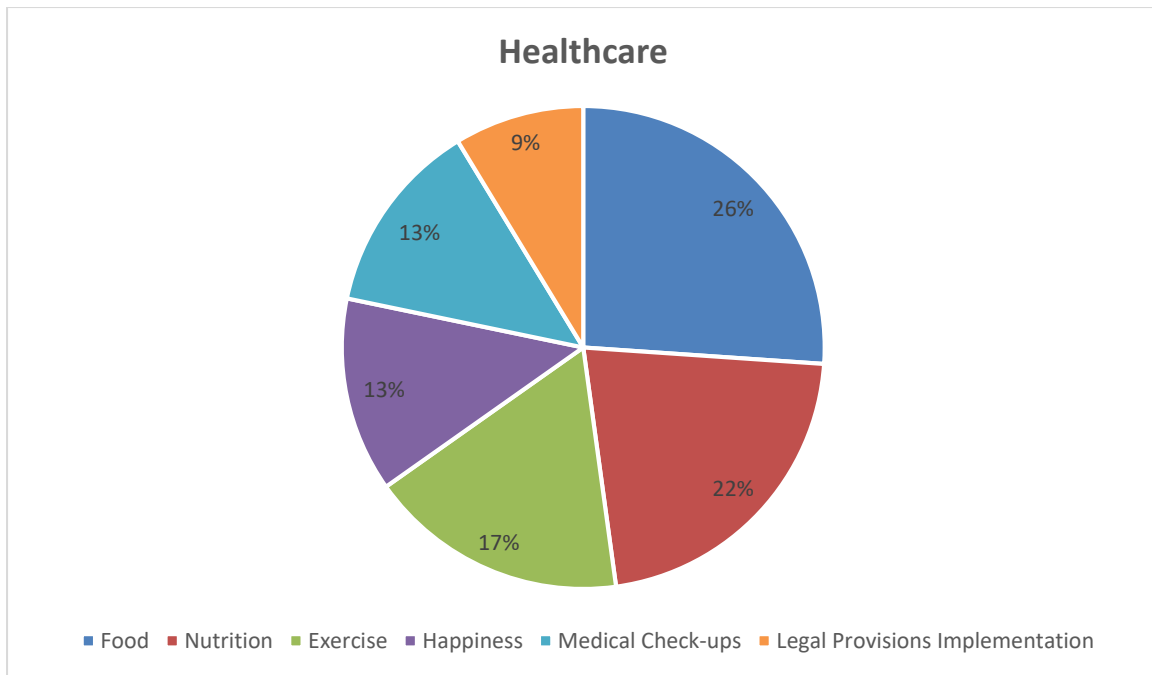
Happiness, livelihood, mental wellbeing, and many other aspects of a life full of contentment and accomplishment are all dependent on good health. Indeed, public health is the most significant economic and societal value, and public health priorities should not often be compromised in favor of other goals. The medical facilities are an essential component of a healthy society and medication is just one factor in overall wellbeing and it is most likely a minor one. Medical care accounts for almost all national health spending with just a small amount going to population-based public health programs. The current interest in global health has much focused on potentially catastrophic threats to the public's health which includes- emerging infectious diseases, bioterrorism and chronic diseases caused by human lifestyle for e.g., high-calorie diet, tobacco, and sedentary lifestyle. Public health law at global and national level has focused on the government's responsibility to advance the public's healthcare; the population outlook; communities participation; strong organisation, legislative, policies, programs mechanism. The field of law that deals with applying common and statutory law to hygiene and sanitary science concepts is known as public health law. The creation of conditions that enable people to live healthier and safer lives can be aided by legislation.

Keywords: Health, Happiness, Diet, Medical Facilities, Legislations

I. Introduction

Public health is the most significant economic and societal value, and public health priorities should not often be compromised in favour of other goals. The medical facilities are an essential component of a healthy society and medication is just one factor in overall wellbeing and it is most likely a minor one. Medical care accounts for almost all national health spending with just a small amount going to population-based public health programs. Peoples must be able to fully engage in health promotion activities, according to public health authorities. While some public health programmes are tailored to people with disabilities, the majority are designed for a wider audience. Individuals with impairments also it can benefit from public health services. The following are common modifications: (1) ensuring system and physical accessibility, (2) inclusive messaging and accessible communication materials, (3) disability awareness and sensitivity training, and (4) addressing and customising to the specific requirements of certain functional impairment types.

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This table presents examples of public health strategies that may be used to address the following healthcare as- food availability, nutrition, exercise, happiness, regular medical check-ups and proper implementation and enforcement of legal provisions for the protection and Improvement of human healthcare both physical and mental.

II. Problem

Public health, growth and development of human being are inseparable and survival is just one of many issues relevant to quality healthcare. Vast disparities exist worldwide in human's chances of survival, with low- and middle-income countries disproportionately affected. The leading causes of deaths include respiratory infections, diarrhoeal diseases, depression, malaria, malnutrition including communicable and non- communicable diseases. With the implementation of better nutrition, diet, adequate care at home, healthcare services like timely medical check-ups helps a lot to prevent deaths. Still, many of the life-saving interventions are beyond the reach of the world's poorest people.

III. Background

Good health and healthcare is closely linked to other rights such as the right to food, clothing, shelter, education. World Health Organisation defines health as "*a state of complete physical, mental and social well-being and not merely an absence of disease or infirmity.*" United Declaration of Human Rights, 1948 specifies about prime importance of healthcare as "*right to a standard of health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, along with motherhood and childhood are entitled to special care and assistance*". There are different organizations, conventions, declarations, protocols at the international level which provide healthcare protection and a shield against maltreatment, exploitation, violations, etc. to the peoples. A framework within which law for healthcare could play their part is required, as is an agreed minimum core of protection.

IV. Objective of Research

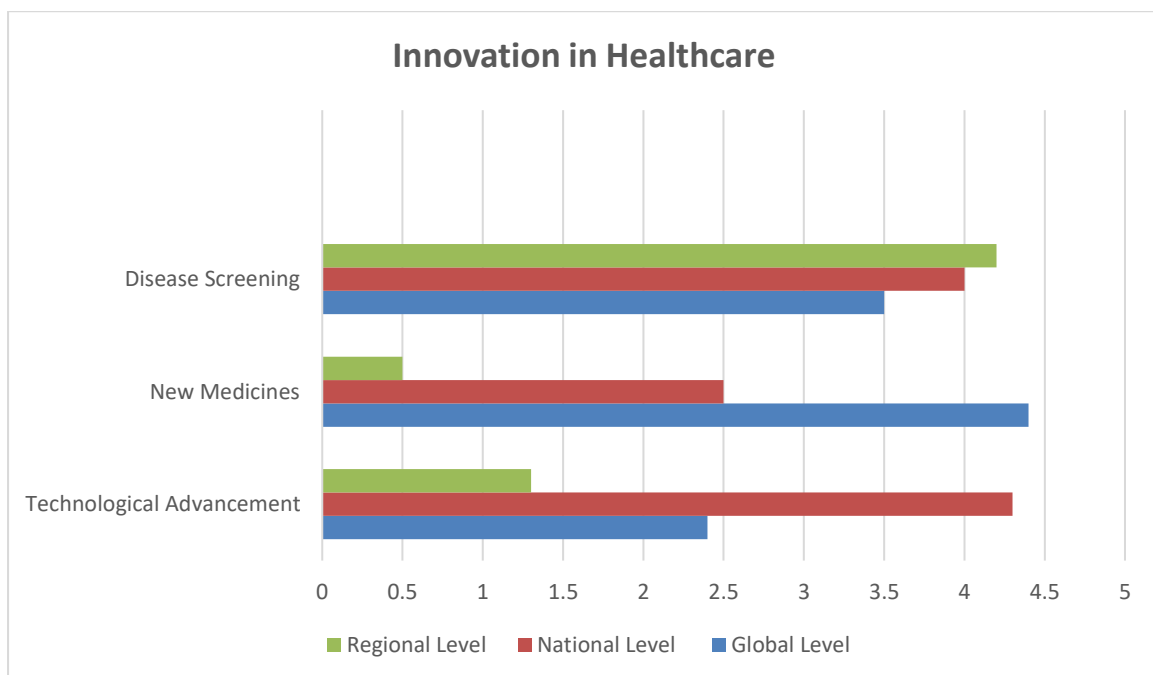
A framework of various facets for public healthcare that adhering to human healthcare, protective laws, minimum core rights, impact of progressive realization from the perspective of health is discussed. An analytical study of International Conventions/ Declarations, Constitutional and Statutory aspects with ground realities, is undertaken to find suitable amendments.

V. Methodology

This study is a mixture of data collected from a variety of sources for the completion of a research paper on public health strategies and interventions from the legal field for the protection and improvement of public healthcare.

VI. Innovation in Public Health Strategies/ Healthcare

Innovation is vital to the creation of the evidence base needed to build and enhance the technical elements of effective programme implementation in all parts of public health policy and programme development. A previously unachievable aim can be made possible by a breakthrough diagnostic technology, therapy, or vaccination. New microbial genome sequencing and bioinformatics technologies may make it possible to detect epidemics that are presently undetectable, as well as better prevent and control the spread of infectious illnesses. Science and medicine aren't the only fields where innovation may be found. Information systems, data collecting, communication strategies, and problem framing innovations can boost political commitment while also being necessary for advancement. Operations innovations can help with programme refinement and enhancement based on real-world experience. Program evaluation innovations can help expand the evidence base for interventions by identifying which ones aren't functioning as predicted and which ones are effective and ready to scale up.



This graphical presentation shows the innovation in healthcare can be achieved via different measures from global level to regional level. There are three different parameters applied here for proper understanding as working on such as- Technological Advancement, New Medicines and Disease Screening. These parameters will help to reduce the risk of communicable and non-communicable diseases.

VII. Food and Nutrition Linkage with Public Health

From hunger to obesity, chronic disease to climate change, food is at the heart of many major public health challenges. Food policy has largely avoided dealing with these challenges, preferring instead to

focus on nutrition, food choice, and biomedical health. Ignoring broader aspects of the food system, such as concerns of ecology and sustainability, limits public health nutrition's understanding.¹

Nutrition is an important aspect of one's overall health and development. Better nutrition is linked to better health in newborn, child, and mother, stronger immune systems, safer pregnancy and delivery, a decreased risk of non-communicable illnesses including diabetes and cardiovascular disease, and longer life expectancy. People who receive appropriate nourishment are more productive and can help to break the cycle of poverty and hunger over time. Malnutrition, in every form, presents significant threats to human health. Today the world faces a double burden of malnutrition that includes both undernutrition and overweight, especially in low- and middle-income countries. The World Health Organisation is providing scientific advice and decision-making tools that can help countries take action to address all forms of malnutrition to support health and wellbeing for all, at all ages. This explores the risks posed by all forms of malnutrition, starting from the earliest stages of development, and the responses that the health system can give directly and through its influence on other sectors, particularly the food system.² Many public health efforts are based on nutrition as a key cause of disease. Trace minerals or vitamins have been added to the food or water supply as for example-

- (a) adding iodine to salt to prevent goitre or, in some remote areas, adding iodine to water to prevent cretinism
- (b) regulating fluoride levels in public water systems to reduce the prevalence of dental caries
- (c) adding vitamin D to milk to prevent rickets
- (d) supplementing refined flours and cereals with Bcomplex vitamins and iron to prevent deficiency diseases such as pellagra.³

Natural foods are abundant in a healthy diet. Fruits and vegetables, especially those that are red, orange, or dark green, should make up a significant component of a balanced diet. Whole grains, such as whole wheat and brown rice, should be included in your diet as well. Dairy products for adults should be fat-free or low-fat. Lean meat and chicken, fish, eggs, beans, legumes, and soy products like tofu, as well as unsalted seeds and nuts, are all good sources of protein.⁴

VIII. Legal Interventions and Public Healthcare Protection/ Advancement

The World Health Organization (WHO) defines health as a condition of complete physical, mental and social well-being, not only the absence of disease. The WHO goes on to say that it is the state's legal responsibility to ensure that all citizens have equal access to "timely, acceptable, and affordable health care of appropriate quality, as well as the underlying determinants of health, such as safe and potable water, sanitation, food, housing, health-related information and education, and gender equality." This right, which is a logical result of supporting public health in India, is guaranteed in many ways under the Indian Constitution.

Part III of the Indian Constitution does not explicitly mention the right to health as a basic fundamental right. However, this has been incorporated into the basic right to life and personal liberty⁵ by judicial interpretation and is now deemed an inseparable aspect of the Right to Life. Human trafficking is prohibited by Article 23 of India's Constitution, which indirectly helps to the protection of the right to health.

The Supreme Court of India has played an important role in safeguarding the public's health. The Supreme Court has frequently stated that the term "life" in Article 21 refers to a humane life, not only

¹ Caraher, Martin, and John Coveney. "Public health nutrition and food policy." *Public health nutrition* 7, no. 5 (2004): 591-598.

² <https://www.who.int/health-topics/nutrition>.

³ Mahaffey, Kathryn R. "Nutrition and lead: strategies for public health." *Environmental Health Perspectives* 103, no. suppl 6 (1995): 191-196.

⁴ <https://www.healthline.com/health/food-nutrition#Good>.

⁵ Article 21 of the Constitution of India, 1950.

survival or animal existence according to the case law of *Francis Coralie v. The Administrator, Union Territory of Delhi*.⁶ The right to life encompasses a wide range of issues, including the right to a better quality of living, sanitary working conditions, and leisure. As a result, the right to health is an intrinsic and unavoidable aspect of living a decent life. Also, the Supreme Court held that every doctor at government hospital or otherwise has the obligation to provide emergency medical aid and care to the patient for protecting life.⁷

There are specific sections in Indian Penal Code, 1860 where it focussed upon the protection and well-being of human healthcare via specifying offences relating to adulteration of drugs and cosmetics, environment protection, medicines and allied provisions.⁸

IX. Conclusion

The obligation to protect the right to health requires countries to adopt all legal measures to conform with health rights standards when providing health care services; prevent women from undergoing harmful traditional practices; prohibit female genital mutilation; environmental health and ensure the accountability of health professionals. The improvement and enhancement concerning public health also find a place in India's perspective as per Article 21 of the Constitution of India, 1950 which includes emergency care and medico-legal provisions. There are multifarious specific legislations that safeguard the interest of the people from all around the corner such as healthcare, food safety, hygiene, sanitation, etc. Countries have the primary obligation to respect, protect and promote the human health of the people living in their territory and all accountability mechanisms must be accessible, transparent and effective. The implementation of healthcare rights at the domestic level is crucial because international law does not prescribe an exact procedure for domestic mechanisms of redress and accountability.

⁶ AIR 1981 746.

⁷ *Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

⁸ Chapter XIV "Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals".

A FICTION OF LAW: LEGAL THRILLERS IN CRIME FICTION

Narayan Radhakrishnan *

Next to lawyers, I have always held writers in the highest esteem. But a lawyer who is also a writer, now that was something. In my impressionable mind, anyone who had the ability to argue a case before a jury, and write compelling fiction was a true renaissance person.

Legal thrillers have become the in-thing in popular fiction since the Nineties, replacing the spy thriller and the techno-thriller. John Grisham and Grishamian style of novels have taken the publishing world by storm and in the last thirty years or so we have seen many a lawyer breaking into print. Why has there been such a move towards legal thrillers? Why have so many lawyers taken to legal fiction and why do legal mysteries fascinate us?

In the words of Yale Law Professor Fred Shapiro:

‘The legal arena has always contained many of the elements of great literature- conflict, suspense, high drama, and human tragedy. Indeed the courtroom is a stage on which the noblest passions and basic instincts are played out before a jury, who, much like the reader of a story or novel must interpret the evidence and formulate a judgment. It is not surprising then that law has attracted writers from Sophocles to Joyce Carol Oates and that some of the most compelling moments in fiction arise from legal conflicts....’

Even from the days of William Shakespeare and later Charles Dickens, stories and dramas portraying legal themes and brilliant lawyers have enjoyed great popularity. Who can forget the takes of King Solomon the Just, or the brilliant Portia in *The Merchant of Venice*? The last thirty years have witnessed legal thrillers carving their own niche as a sub-genre of crime fiction. As famed legal fiction specialist William Bernhardt points out:

“Crime fiction has always been concerned with right and wrong; when the detective apprehends the murderer, there is a sense that the world has been reclaimed from chaos, that order has been established. Legal fiction takes this idea even further, as the characters struggle to understand not simply right and wrong but *justice*— a far more elusive and difficult concept. The desire for justice in a world that seems unjust in the extreme is shared not only by lawyers but also by the common man, and this may be the major reason why legal fiction has taken a lead ahead of contemporary crime fiction. “

But why are so many lawyers dabbling in fiction? West Virginia University Prof. James R. Elkins opines:

“Legal case opinions are the primary "texts" for learning law. The only stories most students of law are asked to read are those found in judicial opinions. During the course of a legal education, you are asked to read hundreds of these case stories.... Reading lawyer stories along with cases takes you along the back-roads of legal education and offers a somewhat different view of the world. There is a sense in which reading lawyer stories is like reading law cases: a case is read, another case involving a different configuration of facts, and then another and another. A case can be read as an autonomous, stand-alone text (e.g., it might be read in this manner by a litigant), but this is not what you are asked to do as a student; it is not the way lawyers and judges read cases. A case cites other cases; the judge relies upon existing cases to create the case opinion to resolve the dispute before her. The meaning of the case, the new case and the old cases, is always read in light of cases that preceded it. (Cases can, of course, also

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be read with an eye to cases that might follow it). Law students learn to read cases, looking backward, looking forward. Reading and writing lawyer stories follows a similar path”.

John Grisham offers a more pragmatic opinion as to why so many lawyers have turned their attention to legal thrillers...some even becoming full-time writers.

“There are several reasons. First, every lawyer has a good story. We lawyers get involved with people who have messed up their lives, and their mistakes make fascinating stories. Street lawyers see the underbelly of society. Corporate lawyers see high-stakes shenanigans. And since law school and bar exams require some measure of talent with the written word, lawyers think they can add a twist here and a subplot there and produce a real thriller. Second, most lawyers would rather be doing something else. The profession is overcrowded and the competition is fierce. Most of the work is terribly boring. There is tremendous dissatisfaction within the profession, and almost every lawyer I know is looking for a way out. Third, lawyers dream of big, quick money. A gruesome car wreck, an oil spill, a fat fee for a leveraged buyout, a large retainer from a white-collar defendant. It just goes with the turf. A nice advance against royalties, some foreign rights, maybe a movie deal, and suddenly there is cash galore.”

Though nuances of the criminal law are the popular favourites for the lawyer novelist- issues concerning torts, military law, sports law, entertainment law, environment, intellectual property *etc.* too have made their way into legal thrillers in the form of novels, dramas and short stories.

I. LEGAL THRILLERS THROUGH THE AGES

Scandalous trials were often the subject of many stories even in the early 1600's. Actual cases presented as stories were first brought together by German lawyer Georg Harsdorffer in *Der grosse Schau-Paltz jammerlicher Mord-Geschichte (A Gallery of Horrible Tales of Murder)* in 1650. Later in 1661, another German lawyer, Matthias Abele Von Und Zu Lilienber turned the cases of the French Parliamentary Courts into book form, in *Metamorphosis telae judicariae (Metamorphosis and Unusual Law Cases)*, a five-volume collection, which fascinated the European reading public. However, the most popular author who dabbled in legal fiction during this period was Parisian lawyer Francois Gayot DePitaval, who compiled *Causes Celebres et Interessantes, avec les Jugemens qui les ont Decidees (Famous and Interesting Cases)* in 1735. Similar in style to the DePitaval works were the English *Newgate Calendars*, which detailed the lives, dastardly deals, executions, speeches and confessions of notorious English criminals. Though the first volume appeared in 1734, the most popular volumes were published between 1824 and 1828 by lawyers Andrew Knapp and William Baldwin.

The Eighteenth Century also witnessed many writers taking into detective fiction. Barrister- Magistrate Henry Fielding's *The Life of Mr. Jonathan Wild the Great* (1743) and German lawyer Ernst Hoffman's *Das Fraulien von Scuderi* (1818) were masterpieces in crime and detection written during this period. Lawyer Samuel Warren's *The Experiences of a Barrister and Confessions of an Attorney and Ten Thousand a Year*, two works of collected short stories on crime and lawyers published in 1846 was also a bestseller. Charles Dickens's *Bleak House* was a dead-on satire of lawyers and the Byzantine legal system of London.

Barrister Wilkie Collins's *No Name* (1862) dealt with the rights of illegitimate children; *Armada* (1866) with prostitution and abortion. and *Evil Genius* (1886) divorce and child custody. However, the classic Collins work in this realm is *The Dead Alive* based on the first wrongful conviction case in America. Lawyer- author superstar Scott Turow considers this work as the first modern-day legal

thriller. Lawyer Melville Davisson Post was another strong voice. His work *The Strange Schemes of Randolph Mason*, (1896) featured Randolph Mason, a skilled lawyer who uses his knowledge of law and familiarity with legal loopholes in the interest of his clients.

Erle Stanley Gardner was the acknowledged superstar in this realm of writing from the Thirties to the Seventies and his creation - lawyer Perry Mason, became a cultural icon. Gardner can no doubt be called the architect of modern legal fiction and the acknowledged master in this genre. The 82 Mason adventures from *The Case of the Velvet Claws* (1933) to *The Case of the Postponed Murder* (1973) were characterized by breakneck pacing, involuted plots, firework displays of courtroom tactics, and gripping readability. Henry Cecil was another major voice. However, Cecil was more interested in legal issues and loopholes in the law rather than in courtroom dramas or in flamboyant lawyers. *Tell You What I'll Do*, *No Bail for the Judge*, and *According to Evidence* are fascinating examples of Cecil's creativity.

Anatomy of a Murder (1958- Robert Traver) and *To Kill a Mockingbird* (1960- Harper Lee) took the reading world by storm. Traver's work featured attorney Paul Beigler defending a soldier accused of killing a man who raped his wife and was a thriller of the first order. Lawyer Atticus Finch, the protagonist of *To Kill a Mockingbird* has become a cultural institution and this Pulitzer award-winning novel remains one of the classic works of all time. Both these books and the movies based on the same are a must-read/ watch for any student of law. George V. Higgins, Barry Reed and Sara Woods were other major authors in this realm from the Sixties to the Eighties. Barrister John Mortimer with his Rumpole series of humorous stories too had an exceptional fan following.

The late Eighties and early Nineties witnessed a colossal shift in legal fiction writing with the arrival of Scott Turow and John Grisham into the scene. Till then, inevitably all lawyer novels were set inside the courtroom. Grisham changed that and explored that side of law and legal profession that are fascinating but has nothing to do with court. The publication of Turow's *Presumed Innocent* in 1987 and Grisham's *The Firm* in 1991 electrified the genre. Both Grisham and Turow's novels featured more of the lawyer protagonist's personal and professional life. There was still the whodunit/ whydunit element, but the life inside the law was being more focused and the profession's increasingly prominent role in popular culture was brought across in the works. Together with the blockbuster movies that followed- legal thriller genre became the biggest sub-genre in popular fiction and in movies and television shows. Dozens of lawyers soon joined the bandwagon and a full-blown publishing phenomenon emerged which continues strongly to date. Lawyers Steve Martini, Richard North Patterson, Jodi Picoult, Lisa Scottoline, Sheldon Siegel, *et al.* are hot in-demand authors for the past 25 plus years.

II. The Scenario in India

Legal thrillers are still in their infancy in Asia. Though Perry Mason novels and those of John Grisham enjoy immense popularity in India, few Indians have explored the thrilling side of the law in literature. Of course, law and lawyers have been part of many a social novel, particularly amongst various vernacular novels.

One of the famous courtroom dramas from our heritage is the 1st Century work- Sudraka's *Mricchakatika*, (meaning *The Little Clay Cart*). It is a courtroom drama and explores the effect of a false alibi on a trial. Even before *Mricchakatika*, many of the *Jataka Tales* featured stories of Buddha as lawyer, judge, and investigator, demonstrating Buddha's concept of justice. However, for the purpose of this article- only thrillers written in English are highlighted.

The first legal thrillers in English appeared in the late Sixties. The pioneer in this realm was P. Parameswaran Nair. Inspired by the Perry Mason mysteries, which the author himself is quick to admit, Parameswaran Nair wrote a series of mysteries featuring a police officer- lawyer duo of Sam Laxter and Stewart Sangster. The stories followed a stereo formula. A crime is committed, Laxter makes an arrest, the criminal lawyer Stewart Sangster comes to the rescue of the accused, proving that Laxter was wrong and hasty in making the arrest, and gets the accused off. Laxter re-investigates and finally the real culprit is brought to the dock. In *The Case of the Traveling Toxin* the author presented a strange case where a poison powder, sent by post results in the death of the addressee. Though the author doesn't use the phrase "Anthrax"- it seems that the fiction turned a reality 25 years later, when incidents of Anthrax poisoning through the post created havoc in the country. Other novels in the series included *The Case of the Spookish Spouse*, *Case of the Innocent Accomplice etc.* In *The Case of the Broken Belt* - the last of the series, the author did a 'reverse Sherlock Holmes'- instead of killing of the character, the author decided that the character should kill the author. Nair presented himself as one of the characters, and asks Laxter whether he can solve the crime the author had committed- he just says that he has committed a crime- what, where, who, why- *etc.*, Laxter will have to find it out and prove it. Laxter succeeds- but before he can arrest Parameswaran Nair (the character) he kills himself. Though most books featured heavy courtroom action, the same bordered on ludicrousness. However, poor marketing, insipid printing, and a bland narrative style had affected the popularity of the works and none of them are available in print today. Yet, as the creator of the first modern day legal thrillers from India, Parameswaran Nair deserves mention herein. Lawyer Harsh Bahadur of Delhi also wrote a Perry Mason pastiche in 1977 titled *The Case of the Sprightly Widow* (Sterling Paperbacks, 1977) - featuring Advocate S.H. Jung, a Della Street Secretary, Nina Sinha and a detective *ala* Paul Drake, Peter Aylmer. The work, a murder mystery, was rich in courtroom action. K.P. Bahadur's contributions to thriller writing were *The Case of the Poisoned Cat* and *Murder in the Delhi Mail*, (Sterling Paperbacks 1974-76) both featuring lawyer- detective Kumar. Though the protagonist is a lawyer, both books were prototypes of the popular Agatha Christie mysteries, and *Murder in the Delhi Mail*, is the *desi* version of Christie's *Murder in the Orient Express*. Lawyer K.L. Gauba's thriller stories based on real events including *The Shamim Rahmani Case and Other Famous Trials*, *Famous Trials for Love and Murder*, *Sensational Trials of Crime* and *The Pakistani Spy and Other Famous Trials* were popular during the Sixties and Seventies but are now out of print.

The last twenty years have seen some fine thrillers hit the market. Dr. L. Prakash of Chennai wrote four hard-hitting thrillers- *The Absent Minded Lawyer*, *Witness*, *Trial* and *Circumstantial Evidence*. *The Absent Minded Lawyer* is the story of a lawyer Swaminathan, who decides to change his career from insurance law to criminal law after reading a John Grisham novel and the hullabaloo that follows. *Witness* has ace criminal lawyer Altaaf defending a man accused of killing a young starlet. Altaaf soon realizes that the accused has been made a scapegoat. But with crooked cops, a corrupt prosecutor and a biased judge standing in the way, it proves to be an uphill task for the lawyer. *Circumstantial Evidence* also features Altaaf as the protagonist. *Trial* too is set in the world of crooked prosecutors and innocent people becoming scapegoats. Vish Dhamija- a law school dropout's *Deja Karma* and *Unlawful Justice* became bestsellers. Both are sensational courtroom dramas set in the fractured world of power, money and crime and Dhamija successfully emulated the Grisham formula. Patna lawyer Dinesh's *God Loves Daryaganj* is a tale of love between a brilliant Dalit girl from Haryana and an extremely superstitious student of Law from Bihar, set against the backdrop of the book bazaars of Daryaganj in New Delhi.

Though not a thriller *per se*- it's a good read. Meenakshi Lekhi's *The Delhi Conspiracy* follows a young lady, a parliamentarian, in whose presence a senior scientist is murdered. In his dying words he says that there is going to be an attempt to assassinate the prime minister. The novel is all about the thrills that follow in trying to find out the would-be assassin. Sujatha Massey's Perveen Mistry series of novels were inspired in part by the woman who made history as India's first female attorney, *The Widows of Malabar Hill* has Perveen joining her father's law firm, becoming one of the first female lawyers in India. She is called to execute the will of a wealthy mill owner who has left three widows behind and finds something strange that puts her life in danger. *The Satapur Moonstone* and *The Bombay Prince* are other Mistry mystery novels. Aditya Sudarshan (*A Nice Quiet Holiday*- cozy mystery), Kalyan Kankanala (*Road Humps and Sidewalks and Pirates of Bollywood* – thrillers based on intellectual property laws) too have tasted success in the past few years.

But have we found our own fictional lawyers like Perry Mason, whose exploits are eagerly devoured, or an author like John Grisham? Not yet seems to be the verdict.

III. Conclusion

Legal thrillers now are in the zenith of their popularity. Many law schools in the West have introduced Law and Literature (or Law in Popular Culture) as part of their course curriculum. But, will legal fiction remain popular forever? Grisham opines that “to retain popularity the genre as a whole has to satisfy a ceaseless hunger for novelty. Every book must offer something new- a new kind of problem, a new kind of motive, an unconventional style, a twist in the tail or a turn of the screw; otherwise, the popularity will ebb down.”

Let me conclude with the words of Marlyn Robinson, scholar in Law and Popular Culture studies; “The ambiguous and paradoxical universe of the law has intrigued us for centuries and will no doubt continue to do so. The lawyer's ability to manipulate language and truth is both suspect and a cause of hope to the client. Fictional lawyers will continue to reflect our feelings of ambivalence towards real lawyers as facilitators of both good and evil, and lawyer/authors will continue to foster those feelings. While we yearn to be represented by the likes of Perry Mason, we are convinced that our opponent's counsel is Randolph Mason. The lawyers who write these books recreate themselves as Perry Masons and their antagonists as Randolph Mason. Popular Culture mirrors life; life mirrors popular culture.”

INTERNATIONAL CRIMINAL LAW: PROSPECTS OF THE PURSUIT TO ACHIEVE ITS GOALS

Adv. Rabi George Mathew*

I. Introduction

International law originated from the urge and necessity of mankind to have peace and order in the international community. Modern international criminal law (hereinafter referred to as “ICL”) developed in the aftermath of World War II as an alternative to the proposal, espoused by Winston Churchill among others, that major Axis war criminals be summarily executed on sight¹. Thus international law, including ICL, originated and exists as a response to global social needs. The much-avowed goals of ICL are set by the international community itself from its past experiences and out of its need. [†]These goals are definitely achievable at least to a substantial extent and require to be achieved:

- a). for creating accountability for those who indulge in genocide, war crimes, crimes against humanity etc.
- b). for preventing the repetition of catastrophic incidents like world wars, war crimes, crimes against humanity, genocides etc. that have marred the history of mankind,
- c). for protecting human rights that are sacrosanct
- d).for progressing as a civilised society and
- e).for the development and peaceful co-existence of states.

The degree of determination, urgency, and sense of need exhibited by the international community to achieve the goals of ICL offers a true yardstick to assess its growth as a “civilized” society. As stated *supra*, these goals are definitely achievable, at least substantially, and undoubtedly need to be achieved for the good of mankind.

II. Goals of International Criminal Law

ICL is founded on the assumption that it produces enhanced accountability and promotes the “creation of an international rule of law”. [‡] ICL aims to infuse accountability among states, bring peace to the world, enforce international humanitarian law, offer reconciliation and deterrence, provide justice for victims, fair trial to the accused, and create historical records[§].

This essay makes an attempt to analyse how far these goals are achievable.

II.a. Accountability, Peacemaking and enforcement of international humanitarian law

The primary object of ICL is to make states accountable for their acts, thereby fostering peace in the international community and enforcing international humanitarian law.

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[†] Robert D. Sloane, The Expressive Capacity Of International Punishment: The Limits Of The National Law Analogy And The Potential Of International Criminal Law; 43 Stanford Journal of International Law 39 (2007)

[‡] Shane Darcy; Imputed Criminal Liability and the Goals of International Justice; Leiden Journal of International Law/Volume 20/Issue 02/June 2007 pp 377-404

[§] Mark Klamberg; What are the Objectives of International Criminal Procedure?- Reflections on the Fragmentation of a Legal Regime; Nordic Journal of International Law, Vol. 79, No. 2 (2010) 279-302; Mirjan R.Damaska, "What is the Point of International Criminal Justice?" (2008). Faculty Scholarship Series. Paper 1573 (http://digitalcommons.law.yale.edu/fss_papers/1573)

It is a fact that the history of mankind is the history of conflicts, invasions, and wars. It is therefore pertinent to note that since the genesis of modern ICL as an aftermath of the Second World War, the world has not witnessed another world war. **Even though the world has come to the verge of witnessing such wars especially during the period of the Cold War, the sense of accountability infused among international states by ICL had played a significant role in averting it. Identifying and defining various criminal acts condemned by the world community as well as codifying law relating to the same had made states cautious of their conduct, lest they will be held accountable. ICL had thus prompted concerned states to act responsibly in the interest of international peace, order, and security. The concept of “state accountability” brought in by ICL had imposed limitations upon “state sovereignty” which was once considered to be absolute and un-amenable to any restrictions^{††}. International criminal courts are adopting a “human-being-oriented” approach rather than a “state-sovereignty-oriented” approach^{‡‡}.

Despite this, it should not be lost to sight that the world has witnessed and is still witnessing wars and armed conflicts in some of its regions such as the Europe, Middle East, Africa, etc. Nonetheless, the development of ICL through customs, international conventions, treaties, and judgments of international criminal courts and tribunals had brought about an international opinion against wars and armed conflicts. There is a near-unanimous consensus among states that wars are to be avoided and arms and ammunitions, especially weapons of mass destruction, should be used responsibly. States that engage in wars and armed conflicts invite international criticism, sanctions, and also the possibility of international criminal prosecution for alleged international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression. This has reduced the relevance of reprisal as a means for enforcing international humanitarian law^{§§}. Instead, it has enhanced the relevance of ICL as a means for enforcing international humanitarian law^{***}.

** See- Articles 5 to 8 of the Rome Statute; Genocide Convention, 1948; Geneva Conventions of 1949 and its Additional Protocols

†† Eamon Aloyo; Improving Global Accountability: The ICC and Nonviolent Crimes against Humanity; Global Constitutionalism/Vol:2/Issue 3/November 2013/pp.498-530 at p. 523 & 524

‡‡ Claus Kreb; The Crime of Genocide Under International Law; International Criminal Law Review; 6: 461-502, 2006; See also: *Prosecutor v. Dusko Tadic*, Decision of the Appeals Chamber of ICTY on the defence motion for interlocutory appeal on jurisdiction, IT-94-1-AR72, 2 October 1995, para.97 (accessed through <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>)

§§ Antonio Cassese; On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law-; European Journal of International Law 9 (1998), 2-17.

*** Supra N. 7

The Nuremberg^{†††} and Tokyo^{‡‡‡} trials are the most classic examples of ICL being successfully used as a potent tool for enforcing international humanitarian law. The fag end of the 20th century witnessed the world community giving a permanent institutionalised setup to ICL by establishing the International Criminal Court (hereinafter referred to as the “ICC”). This is a big stride made by the global community in its pursuit of attaining the cherished goals of ICL. ICC is the surrogate accountability holder^{§§§}. The ever-increasing prosecutions conducted at the ICC, as well as prosecutions conducted by the International Criminal Tribunals for former Yugoslavia, Rwanda, Extraordinary Chambers in the Courts of Cambodia, Special Courts in East Timor, Sierra Leone, etc. eloquently demonstrates that the ICL is significantly fulfilling its goals of (a) imposing accountability upon the perpetrators of international crimes (b) enforcing international humanitarian law and (c) peacemaking.

Statistics give evidence that non-violent crimes against humanity, such as causing poverty, starvation, malnutrition, withholding medical care, etc. have caused severe harm to mankind just like violent crimes^{****}. Hence, there is a clarion call to widen the jurisdiction of ICC to bring non-violent crimes against humanity within its ambit so that accountability can be

12 imposed upon those involved in such deadly acts^{††††}. Anti-corruption scholars and crusaders around the world have called for the expansion of the International Criminal Court's mandate to include

††† Series of 13 trials held in Nuremberg, Germany, by the International Military Kuo and Lim Si Wei; *International and Comparative Criminal Justice: A Critical Introduction*, p.20 (Routledge, 2013).

‡‡‡ Trials conducted by the International Military Tribunal for the Far East regarding crimes that occurred during the period from the 1931 Japanese invasion of Manchuria to Japan’s surrender at the end of World War II in 1945.

§§§ . “Surrogate Accountability” occurs when a third party sanctions a power wielder on behalf of the accountability holders because accountability-holders cannot sanction the power-wielder. See; Jennifer Rubenstein; *Accountability in an Unequal world*; *The Journal of Politics*; Vol. 69, No.3, August 2007, pp. 616-632. As the surrogate legal accountability holder, ICC acts on behalf of victims to sanction the delinquents. Following the “principle of complementarity” enshrined in the preamble and Art. 17 of the Rome Statute, ICC acts when the domestic legal accountability mechanism is blocked.

†††† . Frank Dikotter; *Mao’s Great Famine: The History of China’s Most Devastating Catastrophe, 1958-1962*, (1st U.S. edn., Walker Publishing Co., 2010). Frank Dikotter reports that Mao Zedong’s policy associated with the “Great Leap Forward” killed nearly 45 million people in China during the period 1958-1962 mostly by starvation. This is of the same magnitude as the number of people killed in World War II.

Tribunal against Nazi war criminals. The findings at Nurmberg contributed to the framing of United Nations Genocide Convention (1948), Universal Declaration of Human Rights (1948) and the Geneva Convention on the Laws and Customs of War (1949). See also: Mark Findlay, Louise Boon Kuo and Lim Si Wei; *International and Comparative Criminal Justice: A Critical Introduction*, p.20 (Routledge, 2013).

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†††† Supra N. 5. (Authors like Eamon Aloyo are of the view that “crimes against humanity” need not always be related to armed conflicts).

prosecution of grand corruption^{****}. These demands for widening the focus and jurisdiction of ICC are eloquent testimonials for the potency of ICL in imposing accountability.

With more state cooperation and participation, the degree of achievement of the primary goals of ICL can be raised to new heights.

II. b. Reconciliation, Retribution, and Deterrence

Putting an end to impunity is one of the major objectives of ICL. It is believed that punitive justice can contribute to peace and reconciliation. Punishment for an infraction or abuse of law is considered an important process in a post-conflict society to attain reconciliation^{§§§§}. The transition from a conflict-ridden to a stable society can be meaningfully attained only if justice is rendered to the victims by punishing the delinquents. Prosecution of delinquents is a clear statement of the will of the international.

Punishment is therefore considered necessary to do justice and prevent further recurrence of gruesome human rights violations. It will break the cycle of impunity. Prosecution and conviction of those responsible will deter those tempted to commit new violations in the future. In the judgment of the Nuremberg International Military Tribunal it was held that “crimes are committed by men, not abstract entities, and only by punishing individuals....can international law be enforced” The very existence of an ICC and tribunals that hands out stringent punishment within the framework of law to the perpetrators of human rights violations itself will act as a deterrent.

This concept is always controversial. However, the example of municipal legal systems which hands out severe punishment to those who offends law and thereby keeps the crime rate to a minimal level, supports the theory that retribution can be a deterrent.

It is to be admitted that in reality ICL did not deliver its full potential to act as a deterrent by administering retributive justice. As a result, armed conflicts, genocides, war crimes, etc., are happening still, at least in certain parts of the world. This is primarily due to the lack of effectiveness with which ICL now operates, due to insufficient state cooperation. Consequently, delinquents who enjoy the patronage of powerful non cooperating states remain untouched. The inability to execute the arrest warrant issued by ICC against Sudanese President Omar al-Bashir is a testimonial for this predicament.

Therefore, achieving the goal of deterrence by ICL seems to be a difficult but not an impossible task. If ICL and ICC stretch their arms to all parts of the world and dispense justice objectively, then it will send a strong signal to all that no one will be spared. Such an approach is necessary to disprove the criticism that ICC is a “neocolonialist” institution and prosecutes and indicts only Africans. Prosecution and handing out of punishment to suspects of crimes against humanity who are now considered to be beyond the grab of ICL, will enable ICL to attain its goal of acting as a deterrent.

II. c. Justice for victims

**** Sonja B. Starr; Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations; Northwestern University Law Review, Vol. 101, 2007; Harvard Public Law Working Paper No. 133. (accessed through <http://ssrn.com/abstract=934470>) See also: Prosecuting Grand Corruption as an International Crime (Discussion Paper dated 01-11-2013 of the Global Organisation of Parliamentarians Against Corruption; accessed through [www. http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf](http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf))

§§§§ Report of the Secretary-General to the UN Security Council, “The rule of law and transitional justice in conflict and post-conflict societies”, 23 August 2004, UN doc. S/2004/616, § 8.) community to *rompre avec le passé* (break with the past) by punishing those who have deviated from acceptable standards of human behaviour¹⁷. Punishment through the process of ICL will help to prevent private vengeance, which is necessary for sustaining stability in a post-conflict society.

As in the case of any domestic criminal system, the international criminal system also aims to administer justice to victims for violations of their human rights. In fact the credibility of ICL depends to a large extent in fulfilling this goal.

Identifying, prosecuting and appropriately punishing offenders is traditionally thought to give a feeling to the victims of crimes that they have been rendered justice. However, this is considered to be only one facet of justice. There are different kinds of justice *viz.* retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice and restorative justice^{****}. Justice in situations of transition is not self-defining. It is about what is required and what is possible in a given situation.^{††††} The transitional justice process must acknowledge and address the needs of victims.

Realising this, the Statute of the ICC and its Rules of Procedure and Evidence grant a series of rights to victims. The most important among them is the right of victims to participate in international criminal prosecutions. This flows from an increasing awareness that judgments and prosecutions alone are not enough to redress victims' suffering. Justice should be a process and not just a judgment. Participation in the justice process could bring recognition to victims and be an important factor in their healing and rehabilitation. This reinforces the argument that justice should be restorative as opposed to having a strictly punitive objective. By incorporating victim participation, the international criminal justice system has transitioned from a system aiming exclusively at retributive justice to one that also embraces a restorative approach.

However, from a practical perspective, it should be admitted that victim participation offers new challenges to the smooth conduct of international criminal prosecutions. Conflict between the strategies and interests of the prosecution and victims, the difficulty in managing and addressing the interests of victims who are innumerable, the policy of "focused investigations and prosecutions" adopted by the ICC Prosecutor,^{****} which leaves several victims out of the scope of proceedings, the difficulty in processing ever-increasing victim applications, which is tedious and cumbersome, pose serious realistic and practical challenges.

Nevertheless, it is too early to conclude that the goal intended to be achieved by victim participation is entirely unachievable. Indeed, by increasing cooperation among the prosecutor and the victims, ensuring adequate consultation with the victims at all stages, increasing the resources of the ICC to deal with victim applications, adopting a unified and consistent procedure to administer the application process, etc., the obstacles faced can be overcome to a significant extent³¹.

It is rightly criticized that justice in ICL is selective. ICC and tribunals can try only a small group of the accused. Only victims of such cases can become participants of the prosecution process and thereby recipients of justice. Often those who are tried are not the most responsible but only the most available in the country. In such a context, "Truth Commissions" are suggested not as a panacea for all the challenges of transition, or an alternative, but as a complementary way to be used by broken societies, in order to bring the benefits of justice to the victims and to the political culture.

Article 75 of the Rome Statute recognizes reparation as a measure for administering justice to the victims. Article 79 of the Rome Statute provides for the establishment of a TRUST FUND for "...the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims". Effectively pressing this measure into service can contribute a lot in improving the potency of ICL to deliver justice to the victims.

**** Yav Katshung Joseph; The relationship between the International Criminal Court and Truth Commissions: Some thoughts on how to build a bridge across retributive and restorative justices (accessed through https://www.iccnw.org/documents/InterestofJustice_JosephYav_May05.pdf)

†††† Supra N. 21

****. Office of the Prosecutor, Report on the Prosecutorial Strategy (2006); Office of the Prosecutor, Prosecutorial Strategy 2009–2012 (2010)]

It is to be borne in mind that law is never static. This is true in the case of ICL also. Improvements and improvisations from experience will enable a determined global community to attain, at least substantially, if not fully, the goal of providing justice to the victims. The concept of justice, in this context, should not be interpreted and understood using a straitjacket formula. Adopting a contextual interpretation and understanding will be more pragmatic and effective. §§§§§

II. d. Fair trial for the accused

The concept of a fair trial is closely linked to the concept of “due process of law”. A fair trial is clearly a recognized objective in international criminal procedure. The objective of a fair trial may be attained by attributing upon the parties, primarily the defence, a set of rights. It is

It is essential for ICL to preserve objectivity in its prosecutions to attain universal acceptance. This can be attained by following the principles of fairness which include the presumption of innocence for the accused until proven to be guilty, providing a fair hearing to the accused, ensuring the impartiality of the court/tribunal, the right of the accused to know the charges against him, and the right to have legal representation^{*****}. The credibility of ICL is dependent on its ability to ensure fairness in trials. This is certainly a goal achievable by the ICL and needs to be achieved in its letter and spirit to dispense justice in a manner suiting a civilized society.

II. e. Creation of History

An important goal of international criminal prosecutions is considered to be creating an accurate record of history^{†††††}. Facts recorded by an international criminal court are treated to be objective as they have passed the rigorous test of judicial scrutiny^{†††††}. It is therefore impartial. The Nuremberg tribunal documented Nazi crimes during the Second World War. In *Prosecutor v. Radislav Krstic* the ICTY elaborately narrated the finding of facts to create a ‘clear record of the Srebrenica massacre’^{§§§§§}. However, the limitation in attaining this goal is that the facts presented before the courts need not always be the only facts or complete facts. Nevertheless, it is considered that ICL has considerably achieved this goal as evidenced by the works of the Nuremberg Tribunal and ICTY. The courts will have to do a fine balance between delivering criminal justice and providing a historical narrative.

III. Conclusion

As in the case of any other branch of international law, the effectiveness of international criminal law is dependent upon state cooperation. It is optimistic to note that despite having divergent interests, the cooperation among states is slowly but consistently increasing.

International criminal law is rooted in the commitment of states to protect human rights. All civilised states treat human rights as basic and sacrosanct rights. The Universal Declaration of Human Rights, 1948, is now part of customary international law. Prohibition of genocide has been recognized by the International Court of Justice as *jus cogens*^{*****}. More and more states are incorporating these

§§§§§ Dinah L. Shelton & Thordis Ingadottir; The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79) Recommendations for the Court Rules of Procedure and Evidence (accessed through http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF)

***** Supra N. 3

††††† Supra N. 3

††††† Supra N. 7

§§§§§ *Prosecutor v. Radislav Krstic* ICTY-Case No. IT-98-33-T, judgment pronounced on 2nd August 2001 (accessed through <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>)

***** See Judgment of the ICJ dated 03-02-2006 in *Democratic Republic of Congo v. Rwanda*, para. 64 (Case concerning armed activities on the territory of Congo, Jurisdiction of the court and admissibility of the application), See also Supra N. 6.

principles into their constitutions and domestic legal systems. Several states have enacted municipal laws^{††††††††} based on the notion of “universal jurisdiction” (*aut dedere aut judicare* principle), which enables a state to bring criminal proceedings, irrespective of the location of the crime and the nationality of the perpetrator or the victims, so that crimes of concern to the international community will not go unpunished^{‡‡‡‡‡‡‡‡}. Domestic courts should be more enlightened, sensitized and equipped to handle heinous crimes against humanity on the basis of the universality principle.

Ardent critics of ICL cite the ineptness in imposing accountability upon the superpowers as a major obstacle for fully attaining the goals of ICL. However, the ongoing proceedings in the ICC against Israel, raging discussions in the international community about the prospects of trying Tony Blair, George W. Bush, Dick Cheney, Donald Rumsfeld, etc., for war crimes and crimes against humanity are encouraging and indicates that the aforesaid criticism will be proved wrong in the course of time.

With the number of states pledging their commitment to protecting human rights gradually increasing, the prospects of attaining the goals of ICL, at least substantially, seems to be a realistic possibility.

^{††††††††} Act on the Punishment of Grave Breaches of International Humanitarian Law enacted by Belgium in 1993; [International Crimes and International Criminal Court Act of 2000](#) enacted by New Zealand; [Crimes Against Humanity and War Crimes Act](#) of 2000 enacted by Canada; International Crimes Act of 2008 enacted by Kenya are few examples of domestic legislations based on the principle of universal jurisdiction.

^{‡‡‡‡‡‡‡‡} See; Preamble of the Rome Statute; See also; Kenneth C. Randall; Universal Jurisdiction Under International Law; 66 Texas Law Review, pp. 785-788 (March 1988); Xavier Phillippe; The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?, International Review of the Red Cross, Vol. 68, No. 862, June 2006, pp. 375-398; Report dated 25-01-2005 of the International Commission of Inquiry on Darfur to the UN Secretary General (pursuant to Security Council Resolution 1564 dated 18-09-2004), para. 612.

CHILD LABOUR AS A HUMAN RIGHTS ISSUE

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“Safety and security don’t just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear”.

Abstract

All human beings are born free and equal in dignity and rights. Everyone, everywhere, has the same rights as a result of our common humanity. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Article 32 of the Convention on the Rights of the Child, ILO Convention 182 on the Elimination of the Worst Forms of Child Labour and ILO Convention 138 on Minimum Age of Employment recognize the right of every child to be protected from economic exploitation and from performing any work that is likely to interfere with the child’s education or harm the child’s health.

Child labour reinforces intergenerational poverty, threatens national economies and undercuts rights guaranteed by the Convention on the Rights of the Child. Unlike activities that help a child to develop, such as contributing to housework for a few hours a week, or taking on a job during school holidays, child labour interferes with schooling and is harmful to a child’s physical, mental, social and moral development. Child labour is a combined product of many factors, such as poverty, social norms condoning it, lack of decent work opportunities for adults and adolescents, migration and emergencies. It is not only a cause, but also a consequence of social inequities reinforced by discrimination.

The last two decades have seen significant strides in the fight against child labour. But the COVID-19 pandemic poses very real risks of backtracking. Positive trends may falter, and child labour may worsen, especially in places where it has remained resistant to change. These risks require urgent action to prevent and mitigate the tolls the pandemic takes on children and their families. The full impacts and length of the crises, and how different people will fare, remain uncertain. But some of the fallout is already obvious. The pandemic has increased economic insecurity, profoundly disrupted supply chains and halted manufacturing. Tightening credit is constraining financial markets in many countries. Public budgets are straining to keep up. When these and other factors result in losses in household income, expectations that children contribute financially can intensify. More children could be forced into exploitative and hazardous jobs. Those already working may do so for longer hours or under worsening conditions. Gender inequalities may grow more acute within families, with girls expected to perform additional household chores and agricultural work. Temporary school closures may exacerbate these tendencies, as households look for new ways to allocate children’s time.

Effective action against child labour must address the full range of vulnerabilities that children face, and requires the implementation of policies and programs that can contribute to the elimination of the child labour through sustainable solutions to address its root causes”

KEY WORDS: *Child Labour, Covid-19, Vulnerabilities, Sustainable solutions, International standards.*

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I. Introduction

Human Rights carry with them the sense of entitlement on the part of the right holder. Central to the concept of human rights is the notion of a “public order of human dignity”, a public order “in which values are shaped and shared more by persuasion than by coercion, and which seeks to promote the greatest production and the widest possible sharing, without discrimination irrelevant of merit, of all values among all human beings”.

This notion of public order is embedded in the preamble of the 1948 Universal Declaration of Human Rights (UHDR), which proclaims the concept of human rights to grow out of “recognition of inherent dignity of all members of the human family” as the foundation of freedom, justice and peace in the world. Thus, in the struggle against child labour, a right-based approach signals more than the alleviation of child abuse and exploitation per se. It signals also that notion of non-discrimination and justice and dignity must be central in all aspects of a working child’s life, including provision for her or his education, health, and spiritual, moral or social development. Treating freedom from abusive, exploitive, and hazardous child work as a human right thus raises the stakes against those who would put children in harm’s way. It transforms the struggle against child labour into a struggle for human dignity and thus better captures responsible attention and heightened pressure in the search for enduring solutions.

The Article 10(3) of 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that “Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”. According to Article 32(1) of United Nations Convention on the Rights of the Child (CRC) “State Parties should recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”. Article 32(2) of the Convention on the Rights of the Child requires the state parties to take “legislative, administrative, social and educational measures” in respect of the foregoing and gives formal muscle to this human rights injunction.

Since the 1990s, the ILO has led a global effort to raise awareness of the child labour problem, to encourage member states to put in place appropriate legal and policy frameworks, and to ensure that appropriate attention is paid to child labour in wider development policies and programmes.

The ILO’s International Programme on the Elimination of Child Labour (IPEC) was created in 1992 with the overall goal of the progressive elimination of child labour, which was to be achieved through strengthening the capacity of countries to deal with the problem and promoting a worldwide movement to combat child labour.

IPEC’s work to eliminate child labour is an important facet of the ILO’s Decent Work Agenda. Child labour not only prevents children from acquiring the skills and education they need for a better future, it also perpetuates poverty and affects national economies through losses in competitiveness, productivity and potential income. Withdrawing children from child labour, providing them with education and assisting their families with training and employment opportunities contribute directly to creating decent work for adults.

When speaking of child labour, it is important to go beyond the concepts of work hazard and risk as applied to adult workers and to expand them to include the developmental aspects of childhood. Because children are still growing, they have special characteristics and needs, and in determining workplace hazards and risks their effect on children’s physical, cognitive (thought/learning) and behavioural development and emotional growth must be taken into consideration

II. Concepts and Definitions

Three main international human and labour rights standards – the Convention on the Rights of the Child, the ILO Minimum Age for Admission to Employment Convention (No. 138) and the universally ratified ILO Worst Forms of Child Labour Convention (No. 182) – set legal boundaries for child labour and provide grounds for national and international actions to end it. The international community has been concerned about child labour for a long time and attempted to curb it at the first session of the International Labour Organisation (ILO) in 1919 by establishing fourteen years as the minimum age for children to be employed in industry.

International Programme on the Elimination of Child Labour (IPEC) *aims at the progressive elimination of child labour worldwide, with the eradication of the worst forms being an urgent priority*. Since it began operations in 1992, IPEC has worked to achieve this in several ways: through country-based programmes which promote policy reform, build institutional capacity and put in place concrete measures to end child labour; and through awareness-raising and mobilization intended to change social attitudes and promote ratification and effective implementation of ILO child labour conventions. These efforts have resulted in hundreds of thousands of children being withdrawn from work and rehabilitated or prevented from entering the workforce.

III. Child labour

The term “child labour” is often defined as work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development. It refers to work that: is mentally, physically, socially or morally dangerous and harmful to children; and/or interferes with their schooling by depriving them of the opportunity to attend school; obliging them to leave school prematurely; or requiring them to attempt to combine school attendance with excessively long and heavy work.

Whether or not particular forms of “work” can be called “child labour” depends on the child’s age, the type and hours of work performed, the conditions under which it is performed, and the objectives pursued by individual countries. The answer varies from country to country, as well as among sectors within countries.

In more technical terms, child labour encompasses work performed by children in any type of employment, with two important exceptions: permitted light work for children within the age range specified for light work; and work that is not classified as among the worst forms of child labour, particularly as hazardous work, for children above the general minimum working age.

Employment: encompasses any form of market production and certain types of non-market production (principally that of goods such as agricultural produce for own use). Employment includes work in both the formal and informal economy, inside and outside family settings, for pay or profit (cash or in-kind, part-time or full-time) and domestic work outside the child’s own household for an employer (paid or unpaid).

Permitted Light Work: The concept of permitted light work stems from Article 7 of ILO Convention No. 138, which states that national laws or regulations may permit the employment or work of persons from 13 years of age (or 12 years in countries that have specified the general minimum working age as 14 years) in light work that is not likely to harm their health or development. It should also not limit school attendance, participation in vocational orientation or training programmes, or the capacity to benefit from instruction.

The worst forms of child labour: comprise categories set out in Article 3 of ILO Convention No. 182. These entail all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including forced or compulsory

recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and work that, by its nature or circumstances, is likely to harm the health, safety or morals of children.

Hazardous work refers to work that, by its nature or circumstances, is likely to harm children's health, safety or morals. When a country ratifies ILO Convention No. 138 and ILO Convention No. 182, they commit to determining their own hazardous worklist.

While the list is decided by individual countries after consultation with organizations of employers and workers, the ILO Worst Forms of Child Labour Recommendation, 1999 (No. 190), supplementing ILO Convention No. 182, urges consideration of work that exposes children to physical, emotional or sexual abuse; work underground, underwater, at dangerous heights or in confined spaces with dangerous machinery, equipment and tools, or that involves the manual handling or transport of heavy loads; work in an unhealthy environment that may, for example, expose children to hazardous substances, agents or processes or to temperatures, noise levels or vibrations damaging to their health; and work under particularly difficult conditions, such as for long hours or during the night, or that does not allow returning home each day.

IV. **Child Labour in the global development agenda:**

SUSTAINABLE DEVELOPMENT GOAL (SDG) TARGET 8.7: Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

The international community has recognized the importance of ending child labour as part of achieving SDG 8 on decent work and economic growth. Under this goal, target 8.7 is to end child labour in all forms by 2025. Ending child labour will also contribute to progress on many other SDGs, especially on education and health.

V. **Issues with Child Labour**

Child labour remains unacceptably common in the world today. At the start of 2020, prior to the outbreak of the COVID-19 pandemic, 160 million children – 63 million girls and 97 million boys – were in child labour, or 1 in 10 children worldwide. Seventy-nine million children – nearly half of all those in child labour – were in hazardous work directly endangering their health, safety and moral development.

Recent history provides cause for concern. In the last four years, for the first time since 2000, the world did not make progress in reducing child labour. The absolute number of children in child labour increased by over 8 million to 160 million while the proportion of children in child labour remained unchanged. Children in hazardous work mirrored these patterns. The share remained almost unchanged, but the number rose by 6.5 million to 79 million. The pace of progress has varied dramatically across regions. The proportion and number of children in child labour have declined consistently since 2008 in Asia, the Pacific, Latin America and the Caribbean. Similar progress has proved elusive in sub-Saharan Africa, where child labour has actually gone up since 2012, a trend especially pronounced over the last four years when the region accounted for much of the global increase. At present, the world is not on track to eliminate child labour by 2025. In order to meet this target, global progress would need to be almost 18 times faster than the rate observed over the past two decades. According to pre-COVID-19 projections based on the pace of change from 2008 to 2016, close to 140 million children will be in

child labour in 2025 without accelerated action. The COVID-19 crisis is making these scenarios even more worrisome, with many more children at risk of being pushed into child labour.

The impact of child labour on children's physical and mental development has been well documented. Working children have higher rates of hospitalization than their non-working counterparts. Epidemiological studies reveal that children exposed to toxic agents at a young age have higher mortality and morbidity rates than adults exposed to the same agents. Working children using hand tools designed for adults have a higher risk of fatigue and injury than adults. A study of Indian child workers found that many have stunted physical growth with delayed genital development¹. The adverse mental health consequences are also great. A World Health Organization (WHO) study noted, "Long hours and days of uninterrupted work have a stultifying effect on the child, narrowing his horizons and often crippling him emotionally." Children in certain occupations are also vulnerable to physical and sexual abuse. Finally, working deprives children of their chance to benefit from normal development. Child labour competes with and often replaces education. In some circumstances, it also separates children from their families at the most critical stage of their lives.

VI. The Impact of Covid

The intersection of the COVID -19 pandemic with child labour globally offers substantial cause for concern. In 2020, the pandemic increased the number of children in income poor households by an estimated 142 million, adding to the 582million children already in poverty in 2019. Their families have suffered job and income losses, seen cuts in remittances and experienced a host of other shocks.

In such circumstances, a large body of evidence affirms that families may turn to child labour as a coping mechanism. School closures during lockdowns add to the risks, especially for children in vulnerable situations, as they are even more likely to work when going to school is not a viable option. When children leave school and enter paid employment, it can be very difficult for them to resume their education.

Growing anecdotal evidence sheds light on how the COVID-19 crisis is affecting children. Human Rights Watch, for example, collected testimonies from 81 children in Ghana, Nepal and Uganda who have been newly pushed into labour or endure more difficult work circumstances. Some indicated that their families no longer had sufficient food and they were working to get enough to eat. Children said that their work was frequently long and arduous-one third in each country had to work for at least 10 hours a day and some described working for as many as 16 hours. Those already working before the crisis struck said that they were working more since the closure of schools.

The model predicts 8.9 million more children in child labour by end of 2022. Young children aged 5 to 11 account for over half (4.9 million) of the total predicted additional children in child labour. This escalation reflects only the poverty effects of the crisis; the calculation likely understates the total impact of COVID-19 on child labour, such as through unprecedented disruptions to children's education.

Yet the increase in child labour is by no means a foregone conclusion. Globally, the goal for social protection is much more ambitious, calling for nationally appropriate social protection systems and measures, including social protection floors, for all.

VII. Universal Ratification of ILO Child Labour Convention

In August 2020, the Worst Forms of Child Labour Convention (No.182) became the first ILO convention ratified by all member states. This historic first means that all children now have legal protection against the worst forms of child labour. It reflects a global commitment that those worst forms, such as slavery, sexual exploitation, the use of children in armed conflict or other illicit or hazardous work that compromises children's health, morals or psychological wellbeing, have no place in our society". Importantly, this may also mark the beginning of the end of child labour as we know it.

The Challenge:

The ILO's work on child labour for the first 60 years or so focused on the adoption of conventions on the minimum age for admission to employment in specific industries or occupations, culminating in the Minimum Age for Admission to Employment Convention (No. 138) in 1973. But the record of ratification and implementation through national laws and practices remained disappointing. Even the much acclaimed and comprehensive ILO Convention No.138 was, by the 1990s, ratified by only 49 countries, most being industrialized, with only a few from Africa and Latin America. None were from Asia where half the world's child workers were found. It was clear by the mid- 1990s that the ILO had reached a cul-de-sac of sorts.

ILO Convention No.138 was a marvellous intellectual construct- long on vision and robust in its conception and practical relevance in a world with varying levels of development and cultures. It was explicit in its goal and held the moral high ground in calling for the eventual abolition of child labour. It was a model par excellence in its realism and conception as an international legal instrument. It gave a central recognition to differences in economic conditions and the reality of resource constraints and to the determination of varying minimum wages for employment to guide national policy. One seldom finds an international convention with such an elegant intellectual architecture, simple in its stated objective but quite varied and rich in its articulation of obligations and guidelines for action. Yet this richness was also one of the major reasons for its low and slow ratification. Even where there was political will, policymakers were overwhelmed by the enormity of the problem, the magnitude of the task and the challenge of where to begin.

VIII. Child Labour and Education

More than one-third of all children in child labour are excluded from school. Hazardous child labour constitutes an even greater barrier to school attendance.

There is rarely a single reason why children are in child labour instead of attending school. In many cases, the work demands so much time and energy that it becomes impossible for children to enter, persist and succeed in schooling. In other instances, children work because they lack access to quality, free schools providing a worthwhile alternative. Decisions concerning children's education can be influenced by family perceptions of its importance and the potential returns in the labour market.

For every child in child labour who has reached compulsory age for education but is excluded from school, another two struggles to balance the demands of and work. They face compromises in education as a result and should not be forgotten in the discussion of child labour and education. Children who must combine child labour with schooling generally lag behind non -working peers in grade progression and learning achievement and are more likely to drop out prematurely.

The percentage of children in child labour is highest in low-income countries. This is not surprising given a strong two-way link between child labour and national income. High levels of child labour hinder current income growth by reducing unskilled wages and discouraging skill-intensive technologies. They also dampen future growth by interfering with children's education and physical

development, leading to a less productive adult workforce. Rising national incomes improve the ability of families to make adequate livelihoods and cope with shocks without resorting to child labour.”

Child labour is by no means strictly a low-income country problem, however. Three of every five children in child labour live-in middle-income countries. For greater national wealth to translate into reduced child labour, economic growth must be inclusive, and its benefits equitably distributed. The tax revenues it generates must be invested in programmes and services that make a difference for children, above all in education and social protection.

That large pockets of child labour persist even in relatively rich countries points to important remaining policy changes.

Countries with high levels of institutional and social fragility tend to have child labour, triple the global average. While this simple correlation should not be overinterpreted, it underscores the importance of stability, policies for social inclusion and equity, and robust public institutions to prevent child labour.

We are at a critical juncture in the worldwide drive to stop child labour. Recent trends affirm we have fallen far behind on our collective commitment to ending all forms of child labour by 2025. In 2021, the United Nations International Year for the Elimination of Child Labour, we must urgently put progress back on track.

The first imperative is to prevent further regression amid the COVID-19 crisis. The pandemic has clearly heightened the threat of child labour. This stems from a sharp rise in poverty and school closures that have denied families logical alternatives. To reduce these risks, expanded income support measures for families in situations of vulnerability, through child benefits and other means, will be critical. So are back-to-school campaigns and stepped up remedial learning that bring children back to classrooms and help them make up for lost learning, as conditions permit.

Make social protection universal Most children who work do so because their families depend on their wages, production or domestic work (including unpaid, often by girls) to make ends meet. Household economic shocks and the loss of a parent or caregiver can increase the chance that a child will go to work.

The pandemic exacerbated child poverty, with the number of children in income-poor households increasing by over 142 million in 2020. Adequate social protection mitigates the socioeconomic vulnerability underpinning child labour and offsets poverty, gender inequality and deprivation in childhood.

Universal child benefits offer one critical component of the solution. Defined as cash (or tax) transfers provided on a regular basis to all families with children, these benefits are a simple and proven means of cushioning children and their families from poverty and improving access to education and health care. They can incentivize birth registration, making children and their physical whereabouts more visible to state institutions, and can contribute to integrated social and child protection systems. As children grow, benefit payments can be linked with care services and provide further incentives for families to stay in contact with state institutions and services. This allows for better planning and resource allocation for these services, including child protection systems. Quasi-universal child benefits, designed to exclude only the wealthiest families, are another option.

An effective social protection floor for children involves a combination of social insurance and tax-financed benefits. Elements of comprehensive systems that benefit children include unemployment protection, old-age pensions, maternity/ parental leave benefits, sick leave and disability benefits. All stem the chances that families will resort to negative coping mechanisms, including child labour, in the face of shocks.

Safeguarding and advancing children's education. COVID-19 has dealt an enormous setback to education. At their peak, pandemic-related school closures affected over 90 per cent of the world's students. Substitute remote learning failed to reach 463 million learners. This education emergency could spiral into a child labour emergency. Since schools provide crucial services, such as school meals, interruptions can intensify household food insecurity and financial stress, which increase the risk of child labour. Once children are out of school and enter paid employment, it can be very difficult to get them back.

The reopening of schools is an opportunity to reimagine education that is higher quality and helps young people develop skills for work and a productive life.

Digital learning should be integrated into education for every child and young person so that never again are the world's disadvantaged children left on the wrong side of the digital divide. For children not reached by remote learning, catch up and remedial programmes will help prevent them from dropping out of school and entering work prematurely. Even before COVID-19, more than 258 million children and youth were out of school worldwide. Many were in child labour or at risk of it. This group must not be forgotten.

There are some well-known solutions for getting and keeping children in school. These include aligning the minimum working age and the end of compulsory schooling, and establishing early childhood development, childcare and pre-primary education, which increase the chance that students not only stay in school but also succeed. Abolishing school fees and eliminating costs for books, uniforms and transport keep education affordable. Universal child benefits can help offset such costs.

Register every child at birth. Birth registration gives children a legal identity so they can enjoy all of their rights from birth. A birth certificate with proof of legal identity and age is often required to access social services, including social protection, health, education and justice. Without this, children are at risk of multiple deprivations and vulnerable to violence, abuse and exploitation, including the worst forms of child labour.

To register all children from birth, states should adopt policies and laws for free and universal registration; link civil registration to other systems, including for identity management, health, social protection and education as entry points for identifying and registering children; invest in safe and innovative technology to facilitate birth registration and ensure timely, accurate and permanent records; and engage communities and families, especially the hard-to-reach, to encourage registration for every child through communication on its benefits.

End gender norms and discrimination Gender roles often determine the type, conditions and hours of work performed by boys and girls. Within families, girls typically perform more household chores, a burden likely to increase during school closures. When the calculation of child labour factors in such chores, the gender gap in child labour prevalence is reduced. Girls are also more likely to engage in domestic work in third-party households. This form of child labour is normally hidden from public view and beyond the scope of labour inspectorates, leaving children especially vulnerable to abuse.

Explicit laws, enforcement mechanisms and child protection interventions are needed to counter the risks faced by girls and boys engaged in domestic work. Social or public works programmes can include information and behaviour change components to prevent gender-based violence and other abuses.

Community-based dialogue, social and behaviour change interventions, and parenting programmes can help counter unequal gender norms that encourage overburdening girls with household chores in their own homes. Cash transfers and other social assistance programmes, which help reduce the economic insecurity that leads to child labour, can be explicitly designed to diminish financial barriers to quality learning for girls.

The education sector has a crucial role in overturning harmful gender norms and stereotypes that influence child labour. Girls need support to pursue an education that leads to equal employment opportunities in all sectors, including in fields such as science and technology. Governments must increase flexible learning paths so that all girls and boys benefit from quality education, including in humanitarian crises. Schools should deliver gender-transformative education programmes that build job skills and counter gender bias for certain types of work, generating incentives to keep both girls and boys in school.

Other important measures encompass a better distribution of female and male teachers from pre-primary through secondary education, gender-responsive policies advancing the careers of both male and female teachers and investing in professional development that equips teachers with skills to create safe learning environments and transform harmful gender norms in the classroom and beyond.

Orient child protection systems around prevention and response Eliminating child labour requires actions on multiple fronts. Child protection systems, which bring together different actors, can catalyse policies and legislation to reduce child labour risks. They can mobilize human and financial resources, service delivery structures, coordination mechanisms, and monitoring and data systems to identify vulnerabilities.

Brokering links among education, health, social protection and justice systems can trigger comprehensive, large-scale prevention of and responses to child labour. The COVID-19 crisis, however, has further stretched already resource-constrained child protection systems. Pandemic response and recovery plans must prioritize strengthening them, including by investing in the social service workforce so that it can sustain child protection and other essential services.

Responding to child labour also calls for aligning child protection systems with systems to enforce labour standards. Both child protection and labour laws should extend adequate legislative protections, and child protection services and labour inspectorates should work in tandem to detect and respond to child labour. Effective coordination is especially urgent given the concerning increase in hazardous child labour.

Children, families and communities are central to child protection systems and efforts to stop child labour. Well-functioning, community-based mechanisms can stir awareness of the harms of child labour and promote care and positive parenting. They can help child protection services to identify vulnerable children and families and make links to other services, such as those to end poverty and diversify rural livelihoods.

Expand decent work and accelerate the transition to formality The COVID-19 crisis has cast a glaring light on the vulnerability of workers in the informal economy, where rights routinely go unprotected. Workers in the informal economy, often in self-employment and subsistence work, have little opportunity to organize and bargain collectively, have limited or no assurances of occupational health and safety, and lack adequate social protection, all of which amplify the devastating impact of the pandemic. At the height of the first wave of the virus, an estimated 1.6 billion informal economy workers were labouring in the hardest-hit sectors and/or suffered income losses from lockdown measures.

The ILO Centenary Declaration for the Future of Work, 2019 was adopted at the 108th International Labour Conference. It calls for investing in people through a human-centred approach to the future of work. This means investing in jobs, skills and social protection, and actively advancing gender equality. It requires investing in labour market institutions so that wages are adequate, working hours are limited, and safety, health and fundamental rights at work are ensured. Policies must systematically back sustainable enterprises, economic growth and decent work for all.

Address child labour in conflicts, disasters and other crises Worldwide, one in every four children lives in a country struck by conflict, fragility and/or disaster. The resulting displacement and disruptions to livelihoods, schooling, social protection, family support networks and the rule of law all heighten the risk of child labour. The COVID-19 pandemic has dealt another blow to families already in acute distress.

Child labour concerns must inform all phases of humanitarian action: crisis preparation and contingency plans, humanitarian responses and post-crisis reconstruction and recovery. Before a crisis hits, preparedness planning should draw on existing data on prevalent forms of child labour, the strength of economic markets, the reach of social protection and essential services, and community-based supports.

Measures to prevent and respond to child labour during a crisis should make links among the humanitarian, development and peace dimensions. They should help build social cohesion, resilience and peace, and strengthen existing government, economic and social structures. Supporting meaningful economic and livelihood opportunities for adult members of families in crisis situations is essential. The ILO Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) calls for inclusive measures to promote decent work and income generation, including through employment-intensive investment strategies such as public employment programmes. Universal child benefits make practical sense in fragile places with limited capacities and very high shares of vulnerable children. They can help lay the foundations for elaborating a social protection system later on.

Responses to child labour should build on, strengthen and adapt existing humanitarian and development coordination mechanisms, partnerships and plans. The same applies to government and economic structures. Important resources to guide this work include the Minimum Standards for Child Protection in Humanitarian Action and the Inter-Agency Toolkit on Preventing and Responding to Child Labour in Humanitarian Action, both produced by the Alliance for Child Protection in Humanitarian Action.

Reduce heightened risks of child labour in domestic and global supply chains. Child labour is more common in domestic production but appears also in global supply chains. The pandemic should not add to this risk. Governments need to continue strengthening laws and enforcement mechanisms that require transparency and human rights due diligence in business operations and supply chains for firms of all sizes, nationally and internationally. This includes governments in wealthy countries where many international firms are based.

Adopt adequate legal frameworks and promote compliance:

The ILO Centenary Declaration for the Future of Work, 2019 was adopted at the 108th International Labour Conference. The declaration calls for investment in people through a human-centred approach to the future of work. This means investing in jobs, skills and social protection. It means supporting gender equality. It also means investing in the institutions of the labour market so that wages are adequate, working hours are limited, and safety and health, as well as fundamental rights at work, are ensured. And it means adopting policies that promote an enabling environment for sustainable enterprises, economic growth and decent work for all.

Ratification of international legal standards on eliminating child labour is a powerful statement of government intent. In 2020, ILO Convention No. 182 became the first ILO convention to achieve universal ratification. The United Nations Convention on the Rights of the Child has almost reached universal ratification, while 173 states have ratified ILO

Convention No. 138. Relevant Optional Protocols to the Convention on the Rights of the Child has also been widely ratified by 170 countries for the Optional Protocol on the involvement of children in armed conflict and on the sale of children, and 176 countries for the Optional Protocol on child prostitution and child pornography.

Real progress, however, requires translating these intentions into national laws that are then used as a springboard for action. Laws and policies must also connect the array of different rights upholding freedom from child labour. They must protect and promote birth registration; ensure social protection; provide quality education, health care and nutrition; and extend protection from violence, abuse, neglect and exploitation. Laws must be carefully aligned, avoiding situations such as where the minimum working age is below the age for completing compulsory education. National laws and practices should reflect the close interconnection between ILO Convention No. 138 and ILO Convention No. 182. A unified approach to their application means, above all, recognizing that combating the worst forms of child labour does not override the imperative to end child labour in general. Children may not be in hazardous or the worst forms of labour but are still simply too young to work.

The legal architecture should safeguard other human rights in the world of work as child labour is intertwined with these. As enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, these rights include: freedom of association and the right to bargain collectively, freedom from forced labour, and from discrimination in employment. While definitive in progress against child labour and towards decent work and social justice more broadly, these rights are at heightened risk of being undercut by the pandemic.

Realizing the promise of international cooperation and partnership. COVID-19 has shown the world at large that the problems we face will not be solved without international cooperation and partnership. This is as true for ending child labour as for other priorities across the 2030 Agenda for Sustainable Development. Countries must work in line with the spirit of Article 8 of the universally ratified ILO Convention No. 182, which stipulates enhanced international cooperation and/or assistance for social and economic development, poverty eradication and universal education.

Partnerships to prevent the exploitation of children in armed conflicts are integral to ending child labour. The Paris Commitments and Principles on Children Associated with Armed Forces or Armed Groups and the related Paris Principles Steering Group, the Global Coalition for Reintegration of Child Soldiers and the Task Force on Children Associated with Armed Forces and Armed Groups of the Alliance for Child Protection in Humanitarian Action each bring together governments, practitioners, donors, advocates, United Nations entities and technical experts determined to stop children from fighting wars, as one of the most egregious types of child labour.

Exchanging experiences and good practices among countries can accelerate change. The Pathfinder Country initiative⁹¹ includes over 20-member countries from the Global North and South. They commit to going further and faster towards achieving target 8.7, and to documenting and sharing experiences and lessons in ending child labour, forced labour and modern slavery.

IX Conclusion

We have made a promise to children to end child labour. There is no time to lose. Universal ratification of ILO Convention No.182 is one important step in the global effort against child labour. Yet it is only one step. We must also defend and promote ILO Convention No. 138 to achieve universal ratification of this foundation instrument on child labour. And we must continue the hard work of implementing these conventions, everywhere, all together.

The challenge of child labour continues, in old forms and new. There are still many pockets of exploitation and abuse that remain hidden, such as child domestic work and child trafficking. There are also emerging problems of sexual abuse and exploitation associated with the reach of the internet and other technologies. Children will remain vulnerable for one reason or another. It is our duty to stay vigilant and establish mechanisms to detect monitor and take effective action for their protection.

Poverty remains a persistent and ever-present danger, to borrow from the language and spirit of the ILO 1944 Declaration of Philadelphia concerning the aims and purposes of the International Labour Organisation. We have to think big and have the courage to envision a world free from child poverty, one that provides social protection for all from cradle to grave. Only then will children truly be protected from the scourge of child labour.

Diverse mechanisms and measures drawn from multiple disciplines, founded on core human rights principles, maximally fine-tuned and coordinated, and guided by the values of transparency, accountability, participation, and non-discrimination offer, humankind's best hope for righting the wrong of child labour.

JOURNEY AND SCOPE OF THE TRADEMARK ACT, 1999 IN INDIA

Savitha Krishnan*

“An image is simply not a trademark, a design, a slogan or an easily remembered picture. It is a studiously crafted personality, profile of an individual, institution, corporation, product or service.”-Daniel J Boorstein

Abstract

In today's competitive world, trademark protection is indispensable as every producer or creator of a product or service will want his product to be unique and novel. In this process, the producer or creator creates a mark that distinguishes his product from that of others. This is a challenging and arduous task. After creating a mark, if an infringement takes place, it is a difficult situation for the creator of the mark and that's when legislation that protects the rights of the creator plays a significant role. Before 1940, in India, issues related to infringement and its proceedings were dealt with by applications of Section 34 of The Specific Relief Act and then by obtaining a declaration for ownership of the trademark under the Indian Registration Act 1908. Eventually, the first Statute on trademark was passed in India in the year 1940. This act was replaced by the Trademark and Merchandise Act 1958. Subsequently, the Trademark Act of 1999 was passed by parliament, thus repealing the Trademark and Merchandising Act 1958. The Trademark Act 1999 deals with protection, registration, and prevention of fraudulent use of trademarks. This previous act got replaced with the Trademark Act, 1999 by the government of India so complying with TRIPS (Trade Related Aspects of Intellectual Property Rights) obligation recommended by the World Trade Organization. The aim of the Trademark Act is to grant protection to the users of trademarks and direct the conditions for application of Intellectual property and also provide legal remedies for the implementation of trademark rights. Intellectual Property Rights (IPR's) are the product of the human intellect including creativity concepts, innovations, symbols, brands, names, trademarks songs etc.

KEYWORDS: Trademark, Infringement, Passing off, Protection, Prevention

1. Introduction

Right before we plunge into understanding the journey of The Trademark Act in India, it is imperative to know the definition of the word trademark. It simply can be defined as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging, and combination of colors.” In simple words, a trademark is a visual symbol in a word form, in a label on certain products that are kept for sale. The trademark helps to differentiate a product from any other product that are similar. The Trademark Act gives the creator of a product the exclusive right to use the trademark with regard to that product.

Such a right of the use of mark is recognized as a trademark and can seek protection under common law or by registering it under the Trademarks Act 1999 which has come over the earlier existing Trade and Merchandise Marks Act 1958. The Trademarks Act, 1999 and the Trademarks Rules, 2002 govern the law relating to trademarks in India. The Trademarks Act, 1999 protects trademarks and protects them in cases of infringement.

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The Act protects a trademark for goods or services, on the basis of either use, or registration, or on the basis of both elements. In the case of trademarks, unlike other IPRs, it is not necessary that the term or symbol chosen to be the mark should be out of an invention which is novel, unique and previously unknown.

The mark chosen for business can be a non-invented and can be an adopted one as well. For e.g.: Apple, Tata. These marks may or may not necessarily be registered to claim ownership by their rightful owners.

The definition of a trademark as described in the Trademarks Act 1999 is as below: Section 2(1) (m): Trademark must be a mark which includes a device, a brand heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof; Section 2(1) (zb): i. Trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors; and ii. In relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as creator or by way of the permitted user, to use the mark whether with or without the indication of the identity of that person, and includes a certification trademark or collective mark. The concept of a trademark is based on three broad factors:

- A. Capable of distinguishing or distinctive / unique character
- B. Near resemblance of marks or deceptive similarity or similarity
- C. Similarity of goods or same description of goods.

The purpose of the Trademark Act is to prevent the use of fraudulent marks, or to provide for registration and better protection of trademarks of goods and services. A trademark must be considered to be a comprehensive term including within itself “trade name” as also mark; “business name” as also 'name' under which articles, goods, etc. are sold. This forms the definition of “trademark” and of “mark” as per the Act.

1. It has been a long and interesting path, so let us wander backward for a bit and marvel at how trademarks have transformed and evolved over the years. *Trademarks have come a long way, from a simple mark left by an ancient artist, through the centuries.* Those early craftspeople could not have

predicted just how far trademarks would come, or just how many of them the average human would one day be capable of filing away inside a single brain. Humans have been trademarking things since before there was even a word for it. Two thousand years ago, Roman workers left their distinctive marks on pretty much everything they made — tableware, brickwork and roof tiles, decorative vases, gravestones, lead slingshot ammunition, and even plumbing. Those early trademarks had no evolution of trademarks, real legal clout, though. They were mostly just a way to claim creative ownership over their work. A talented craftsman could use the mark as a stamp of quality. The Romans were not the only ones doing this. Ancient trademarks can be found on Egyptian and Chinese objects, too, and the Lascaux cave paintings — which predate the Roman empire by around 15,000 years — seem to show that people were using personal marks to claim ownership of livestock long before such a thing became standard practice for craftspeople. Prehistoric paintings depicted large wild animals and traces of human hands that some believe to be a form of personal claim over livestock.

People generally tend to think that trademark law is a relatively recent development. After all, hundreds of years ago, people were not walking around wearing branded clothes or shoes without it actually dawning on them that they had paid for the privilege of being free advertising, so it is not like branding was a major commercial force. That is not to say that trademark infringement never happened, but there were not any laws governing the use and misuse of a trademark, so if you wanted to sell inferior goods with a hijacked mark, the owner of that mark could not turn to the courts for help in attaining justice. That did change, though, and in the year 1266, King Henry III of England passed the world's first known trademark law, which required bakers to add a distinctive mark to all bread sold because evidently bread fraud was huge in the mid-1200s. Bakers who failed to comply with the Bakers Marking Law risked heavy fines and the possibility of having to forfeit all unmarked bread. This was because medieval bakers sometimes engaged in the shady practice of making their loaves a little smaller than they were supposed to be. The mandatory mark meant bakers who cheated their customers out of an ounce or two of rye could be tracked down and brought to justice. That probably never resulted in any unfair convictions.

Gradually many European countries felt the need for a trademark legislation and the world's first comprehensive modern trademark law was initiated by the French Manufacture and Goods Mark Act, passed in 1857. In 1862, England too passed the Merchandise Marks Act which established consequences for companies that sold products with fake trademarks, but it did not pass a comprehensive set of trademark laws until much later, in 1905. United States trademark law went through various forms before arriving in modern times. The 1870 federal trademark regime was struck down by the Supreme Court and replaced by a new act in 1881. In 1905 the law was revised, and in 1946 the Lanham Act spelled out federal trademark protection and registration rules.

2. Evolution and History of the trademarks act:

The origin of the Indian Trademarks Act dates back to the UK's Trademarks Act of 1875. The drafted bill was introduced and passed in 1940 after its introduction in the Central Legislative Assembly. Before that trademarks were governed by common laws i.e., under Section 54 of the Specific Relief Act of 1877. Registration could be obtained under the Indian Registration Act of 1908. The Act of 1999 replaced the Trade and Merchandise Act of 1958 owing to fast-paced globalization and flow in trade and commerce and incorporated in it the requirements laid down by the TRIPs Agreement. India is a signatory to this agreement, owing to which it is obligatory for it to conform to the guidelines laid down by the TRIPs.

The replacement of the Trademarks and Merchandise Act, 1958 gave rise to the Trademark Act 1999 by the Government of India so that the Indian Trademark Law became compliant with the TRIPS obligation on the recommendation of the WTO. The objective of the 1999 Act was to confer protection to the user of the trademark on his goods and prescribe conditions of acquisition, and legal remedies for enforcement of trademark rights. For the first time, it provided protection for service marks and give provision of registration for collective marks. It also differentiated between well-known trademarks and trademarks in general. Additionally, special treatment and rights were envisaged for well-known trademarks. The act of 1999 gave police the right to arrest in case of infringement. There are some changes present between the 1958 act and 1999 acts. It can be said that the 1999 act is a modification of the 1958 act, it has provided exhaustive definitions of terms frequently used, enhanced punishment for offenders, an increased period of registration, registration of non-traditional trademarks. The rules of this act are called Trademark Rules 2002. Both the act and its set of rules came to effect on 15 September 2003. The Trademark Act 1999 and Trademark rules 2002 presently govern Indian Trademark Laws in India. Trademark Act, 1999 identified other type of Trademarks as:

Service mark: Service marks are marks or names used by businesses rendering various kinds of services. The new definition of 'service' has been included for the benefit of service-oriented establishments such as banking, communication, education, insurance, hospitality, etc. A service mark is the same as a trademark except that it identifies and distinguishes the source of a service rather than a product.

Normally, a mark for goods appears on the product or on its packaging, while a service mark appears in advertising for the services.

- Certification mark: Provisions are also made in the act for registration of certification marks, whose function is not to indicate trade origin, but to indicate that the goods have been certified for certain characteristics in it. E.g.: HALLMARK for Gold jewelry indicating a particular level of quality.
- Collective mark: Trademarks Act, 1999 has also made provisions for registration and protection of Collective marks, which is a mark owned by an association of people for producing certain goods. E.g.: AMUL, MAPRO, etc. The new definition of 'collective mark ' has been provided for the benefit of members of an association of persons, but not partnership.
- Over a period of time, trademarks gradually evolved into the following:
 - Well-known trademarks: Being a signatory to the Paris Convention and TRIPS, India recognizes the concept of well-known trademarks. Under Section 2(1)(zg) of the Trademarks Act, 1999 “well-known Trademark”, in relation to any goods or services, means a mark which has become a substantial segment of the public which uses such goods or services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the GST-mentioned goods or services. GST is Goods and Services tax that is an indirect tax used in India on the supply of goods and services.
 - Generic Trademark: The value of a trademark, whether registered or not, can be maintained only if the proprietor uses it and takes prompt action against infringement or passing-off. In certain situations the mark ends up being a generic name, and the distinctiveness of the mark will be lost or eroded, or diluted if other traders use the same or similar mark in relation to the same or similar goods or sometimes even different goods. E.g.: Dalda, Bisleri, Xerox, etc. were registered trademarks but over time the overwhelming popularity and unchecked use or reference of the mark by others resulted in losing its distinctiveness and became generic.
 - Domain name Trademark. Modernization and the development of the Internet saw the evolution of a new concept of domain name trademark. Every business on the internet has a domain name which is a unique address in cyberspace at which the website is located. A user on the Internet will find the domain name highly useful while searching for goods or services of a particular company on its website with the designated domain name identifying it. E.g.: information about the organization Tata and all its products and services can be found on its website with domain name www.tata.com
 - Trade Dress: Trade dress refers to a combination of elements that make up the look, feel, or environment of a product or business. The term can refer to individual elements of a product or business image as well as to the image the combination of those elements creates as a whole. Trade dress is non-functional physical detail. Trade Dress may include a few important features like: size, shape, design, color, etc.

- Smell mark and sound mark also evolved with time to differentiate products of particular origin with a distinct and identifiable smell and/or sound which is publicized in advertising to educate the consumers about this differentiating factor of the product.

In India, proprietary protection for marks is ancient. Around the 10th century, a mark known as a "merchants' mark," appeared, and symbols among traders and merchants increased significantly. These marks, which can be considered one kind of "proprietary mark," essentially were used to prove ownership rights of goods like marking cattle, pottery, trading emblems on currencies, etc. In the Middle Ages, craftsmen and merchants affixed marks to goods in order to distinguish their work from the makers of low-quality goods and to maintain trust in the guilds. These production marks served to maintain monopolies. These production marks helped consumers to identify and assign responsibility for inferior products, such as: goods short in weight, goods comprised of poor-quality materials, and goods made with inferior craftsmanship. The Anglo-Indian trademark law's origin dates back to 1266. It was also called the Bakers Marking Law. In the 20th century, prior to 1940, there was no official Trademark Law in India. Numerous problems arose on infringement, passing-off, etc., and these were solved by application of section 54 of the Specific Relief Act 1877. Registration was adjudicated by obtaining a declaration for the ownership of a trademark under the Indian Registration Act, 1908. To overcome the above difficulties the Indian Trademarks Act was passed in 1940, this corresponded with the English Trademarks Act. After this trade and commerce continuously grew, and there was an increasing need for more protection of trademarks. The replacement to this act was the Trademark and Merchandise Act, 1958. India became a party to the WTO at its very inception. One of the agreements in that related to Intellectual Property Rights (TRIPS). In December 1998, India acceded to the Paris Convention. Meanwhile, the modernization of the Trade and Merchandise Marks Act, 1958 had been taken up keeping in view developments in trading and commercial practices, the increasing globalization of trade and industry, the need to encourage investment and transfer of technology, the need for simplification of the trademark management system and to give effect to important judicial decisions. To achieve these purposes, the Trademarks Bill was introduced in 1994. The Bill pointed towards changes which were contemplated and were under consideration of the Government of India, but it lapsed in 1994. A comprehensive review was made of the existing laws in view of developments in trading and commercial practices and the increasing globalization of trade and industry. The Trademarks Bill of 1999 was passed by the Parliament and received the assent of the President on 30 December 1999 as Trademarks Act, 1999 thereby replacing the Trade and Merchandise Mark Act of 1958.

3. What is protected under the trademarks act?

Trademark usually protects various aspects of a brand like a logo, shape, device, color, word or even a sound. The mark acts as a source identifier of the business and differentiates its goods/services from those of others. Trademark Protection provides a distinct identity to your business and also distinguishes it amongst your competitors. However, the ownership of a trademark can be established on a first-to-use basis.

Trademarks are one of the most important intellectual property assets of a business. Once a trademark is registered, it provides an exclusive protection right to the owner for the use of the mark (word mark, logo, device, etc.) in relation to the commercial identity of goods or services. As per Section 28 (1) of the Trademarks, Act, 1999, a trademark protects exclusive rights to the registered proprietor to use the mark in relation to the goods or services and also obtain relief in case of infringement.

For instance, Yahoo has several registered marks such as:

- The name 'yahoo'
- The logo
- The 'yodel' sound

The IP INDIA REPORT 2016-2017 elaborates that the acceptance of trademark applications or registration has increased by over 40%. This underlines the fact that entrepreneurs now are more concerned about their brand identity and its protection. The type of Trademarks which can be protected are Word Marks: These marks are usually a distinct text-only name of the company, product or institution which are used for branding or marketing. Once the mark gets registered, the proprietor can use it in any format or font regardless of the style. Any stylized representation of the name is not protected as a word mark. Only the text is protected. Example: The names of brands such as 'Air Vistara', 'Tata Motors', etc.

Device Marks: Under device marks, you can trademark a printed or painted design, image or character. It can not include any numerals, words or letters. Usually, they contain logos for different products or services. Example: The Nike Swoosh Symbol that acts as the Logo.

Product Marks: These marks are used to identify a particular product of a company. For instance, a name of the product can be registered as a trademark. Example: Burger King has different products such as Salsa whooper Burger, and Flame Grilled Burger. The company has registered the trademark for both the name of the product and the associated product logo.

Service Marks: There is a thin difference between a trademark and service marks which can be confusing for entrepreneurs. In India, there are different classes under which a service mark can be registered. These classes help to specify the type and category of service which you wish to register. While countries like the USA use the 'SM' symbol to denote service marks, there is no such differentiation in India. Only the 'TM' symbol is used even to identify service marks in India.

Collective Marks: These marks are used by members of an association or organization to identify with the quality, origin, precision or any other attribute set by them. They indicate the source of the individual and can be used not only by individuals but, multiple traders in case they belong to the registered association or organization. Example: "CA" logo used by the Institute of Chartered Accountants (ICA).

Certification Marks: These marks define the standards of goods or services of a particular business entity. They reflect that the manufacturer has met with the set standards of quality through a regular audit for his/her products.

Certification marks differentiate a brand/company from others and provide an edge in the market. Example: Agmark certification mark employed on agricultural products in India.

Unconventional Trademarks

Unconventional trademarks include shape marks, packaging trademarks, moving logos, color combinations, taste marks, smell marks etc. As per the changes to the Trademark Rules in 2017, sound marks and 3D marks have become easy to register in India.

1. Shape Marks

Shapes form part of the visual characteristics that help distinguish a product. For a shape of a product to be registered as a trademark the shape should be distinctive and should not act as a functional element of the product.

Example: The Coca-Cola bottle has acquired a trademark for its shape to protect its distinctiveness and identity.

2. Sound Marks

The sound must be relatable with the products or services and can be presented graphically as notations. The logo can contain words, sound graphics, and musical notes.

The critical aspect is the immediate recall by customers for the concerned product or service after hearing the sound.

Example: ICICI Bank has a sound registration for its corporate jingle

3. Color Marks

As per Section 10 of the Trademarks Act, 1999, a trademark can be limited wholly or in a combination of any colors, which will be decided by the registrar keeping in mind the distinctiveness of the mark.

Indian trademark law only recognizes a combination of colors which can be registered as trademarks. It is extremely difficult to trademark single colors as it would create a trade monopoly.

Color combinations that help differentiate a brands' goods and services can be registered as a color mark.

Example: Colgate has a trademark over the red and white color combination.

4. Packaging

Distinctive packaging that is used to contain the product, also known as the trade dress, can be trademarked.

Example: The design of the product label.

4. What cannot be registered under the trademarks act of India?

- Trademarks in India are registered under the Trademarks Act, 1999 .The general procedure is that an application is filed to the Registrar of Trademarks for registration. The registrar may accept the application and proceed to register the trademark. He can also reject the application if he finds any fault in it. The act also provides a list of trademarks which cannot be registered.
- **Absolute Grounds for Refusal of Registration:** Section 9 of the act lists down the absolute grounds for refusal of registration. If any trademark comes under the grounds listed in this section, it cannot be registered.
- **Relative Grounds for Refusal Of Registration:** Section 11 of the Act provides relative grounds for refusal of registration. This section provides exceptions to the grounds of refusal. If the exceptions are complied with, then the trademarks can be registered.
- **Things that cannot be trademarked:**
There are a few exclusions which have to be kept in mind while deciding a mark for business. They are:
 - The names of cities, countries, god, goddesses or religious books
 - The surname of any individual.
 - Generic Words like fridge, scooter etc.
 - The names of cnstitutional or government posts
 - Vulgar or immoral acts.
 - Geographical location

5. Rights and legal protection for a registered trademark

As per Section 28, of the Trademarks Act, 1999, registration of a trademark shall provide trademark protection from infringement –The exclusive right to the registered proprietor to use in context with the goods or services for which the mark is registered and can obtain legal protection in case of infringement.

A mark will be considered as infringed, in case, it is identical or similar to the registered trademark and falls in the same CLASS OF GOODS OR SERVICES as the registered mark. (Section 29 [1])

According to Section 134, in such a situation, a suit of infringement can be filed by the registered owner in the court of law to seek relief and damages. Remedies available against infringement under the Trademarks act are:

- Civil remedies
- Administrative remedies
- Criminal remedies

Civil Remedies:

The party whose rights have been infringed can approach the court and avail a grant to stop the use of the applied mark. They can seek damages caused by loss of profits earned from the use of the mark. They may receive order by the court to conduct a public search for the use of the mark or seize evidence without warning the infringer.

Criminal Proceedings:

Criminal remedies are available under the Trademarks Act, 1999 under section 103 and 104. A criminal suit can be initiated in an event of passing off or infringement, provided the court finds sufficient to initiate criminal action against the violators.

6. Rights of an unregistered trademark

Trademarks that are not registered as per the Trademarks Act fall under this category. Under Section 27 of the Trademarks Act, no infringement suit can be filed for unregistered trademarks. However, unregistered trademarks can be protected under common law. The owner of the mark can file for damages if there is sufficient proof of passing off by showing proof of 'prior use'.

The court considers the following factors in a passing-off suit.

1. The plaintiff has to be a user of the mark.
2. The general public must recognize the mark and use the same to identify the brand's goods or services.
3. There must be misinterpretation on the part of the defendant to view the plaintiff's goods as his own

7. Scope of Trademark and its expanding boundaries:

Domain name

Every company on the internet has a domain name with a different address in cyberspace wherein the website is located. After the impact of COVID, nowadays E-commerce has become the order of the day such that every company is going global. The other purpose is that the Internet has become an essential

tool in marketing. The Domain Name System was invented as an aid to help categorize different types of intellectual property. A user of the internet will find the domain name very useful in finding the goods or services that he expected to find. But sometimes a distinct name of a highly commended business may be allowed and passed off as the original one, For example, Tata, Google and Maruti. People visit a website or domain name through a website or a URL. A domain name has to be related to the property in question and it has to be unique. Both the parties have the legal right to forming the words for the domain name in use.

Smell

It is a non-traditional type of trademark. There is a large problem in registering this type of trademark as there is no physical representation. Due to its high level of distinctiveness, for example, the smell of a perfume strawberry it is difficult to register this kind of trademark. Smell marks are accepted if they are represented with a graphical representation. But this provision is only in some countries. Smelling the trademark is protected under copyright. In some instances, a particular scent is also a commodity by itself. In other circumstances it is a scent used or attached to the commodity, not the natural smell of the product itself.

Sound

A sound may be a trademark and can also be registered. A sound mark is a sound or a theme with a different identification effect. A well-known sound mark is music owned by Hemglass. When applying for a sound mark the mark can be expressed by a sound file or by a description of the sound in notation.

Shape

Distinguishing one product from another assures that the customer doesn't get confused by similar products. A shape is working if it affects the use or performance of the product. Thus, if a certain shape is useful and serves no purpose then it may be registered.

8. Conclusion:

Intellectual property reflects the meaning that its subject body is the product of the mind or the intellect. As it's the product of a productive and creative mind, it can be traded, purchased, given and reserved. All this can be done but there are issues related that to be dealt. Trademarks are very important aspects of intellectual property so, the protection of the trademark has become essential in the present day because every creator of a good or service will want his mark to be different, eye-catching and easily distinguishable from others. Designing a mark like this is difficult and after this, when infringing of the mark takes place, it will cause maximum difficulty to the producer. The reason for intellectual property protection is that it can arouse creativity and discovery and prevent the exploitation of inventions. Public policy here points at keeping an intellectual property system that promotes innovation through protection initiatives, while at the same time assuring that this is not at the value of societal interests. In this meaning, the challenge for the World Intellectual Property Organization would be to include public policy effects in applications carried out with developing countries, such as increasing awareness of flexibilities in existing international intellectual property treaties.

Intellectual property is not an unusual concept, in fact, it is a concept which is discussed in everyday life whether movies, books, plant varieties, food items, cosmetics, electrical gadgets, software, etc. It has become a pervasive concept in everyday life. World Intellectual Property Day is celebrated on 26th

April every year. Trademarks are an important part of intellectual property and every business head must mandatorily register their mark in order to avoid later complications. Registering a trademark is easy and cost-effective. Trademark protection provides numerous advantages to one's business.

- **Builds brand name:** A trademark helps to build brand and create goodwill for the business by engaging more audience and increasing sales. People connect more with a brand when we provide quality to them.
- **Edge over the competitors:** With a registered brand name, you can differentiate your products or services from others. This adds to your business identity and popularity amongst the general public. You can also use an 'R' with the mark.
- **Valuable business asset:** A trademark is a valuable business asset for every entrepreneur. It can be transferred, sold or even licensed. The Trademark Registration is valid for 10 years and can also be converted into cash.
- **Gateway for Global registrations:** Owning a trademark in India will help you to **ensure many benefits**. In case you wish to apply for trademark in different territories.