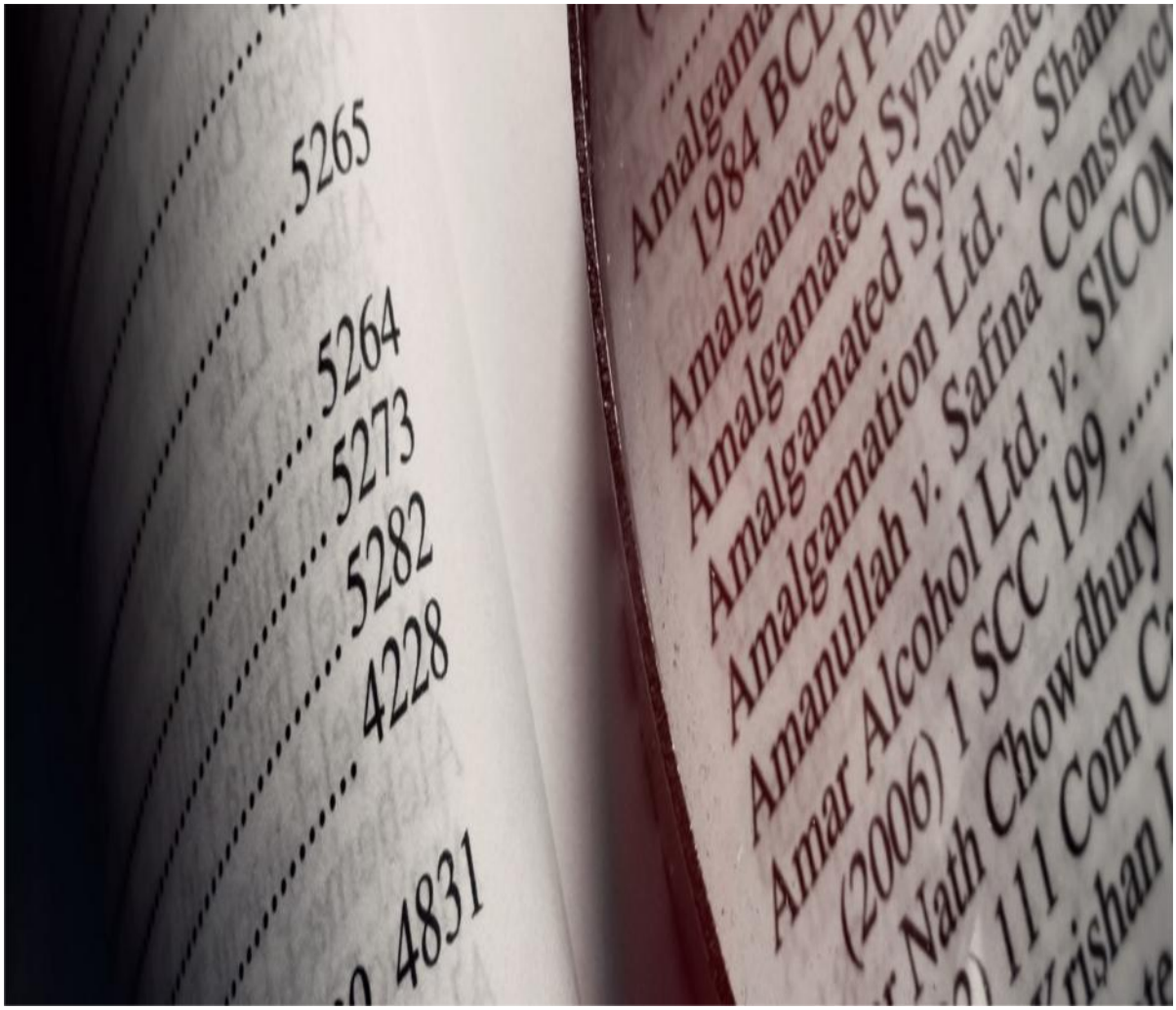

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INTENSIFYING HUMAN TRAFFICKING AND ITS PROBLEM IN THE ERA OF GLOBAL NEOLIBERALISM: CRITICAL ANALYSIS

-- KOKTIBA SANGTAM

Abstract: Over the past two decades, there is an intensifying growth and expansion of human trafficking globally. It has become transnational in character with the liberalisation of trade and growth of market and free flow of people from one region to another. It has become an established sector and turned out to be huge profitable business for many criminal groups. It has also increased many criminal organisations involved in such business posing serious challenge to human life, human rights and law enforcement agencies. Though these problems are not only confined within the Third World states but also seen in the developed states which become an important destination of such business. The underlying question is how the weak states are going to address these issues effectively. As neoliberalism is taking root, along with instability and problems confronting many Third World states, it is important to look into these problems whether neoliberalism has become a solution or part of the problem.

As neoliberalism has ascended globally, there has increased inequality and deepened poverty which has increased in manifold, the illegal business. Neoliberals want states to withdraw from the whole economic sphere in order to provide more space to the market. However, what the neoliberals fail to note is the generation of wealth itself cannot provide security and basic human needs. But what is more pertinent to many states is the equitable distribution of wealth and income for majority of the population to live in dignity. The available evidence suggests that the unfettered functioning of market forces has sharply increased the disparity in wealth and income distribution between rich and poor countries and in within, the rich and poor especially in the Third World countries.

Contemporary debates on the shrinking role of the state in welfare and social provision have to be viewed in the context of neoliberalism. Despite the need for effective state intervention, many states are trapped into the global setting of neoliberal ideas and thereby, fail to fulfil the

aspirations of their citizens. Thus, within states, there is growing fragmentation between the state and its larger populace over these agenda. Some of the underlying factors are the cut back of welfare functions as neoliberals suggest in order to promote more economic growth could possibly do more harm to the states. In particular, within the Third World states, welfare assumes prime importance and the sudden change in this configuration could even lead to a greater crisis.[1]

Regardless of many disadvantages, the neoliberals frequently endorse the idea that neoliberalism is an engine for a country's economic growth and ultimately this will tackle the issue of poverty. Available evidence suggests that over two decades of its operation, there is an increasingly vulnerability of the economic security of the middle and lower classes. They demand more and more state intervention in various economic activities. Instead of addressing these legitimate grievances, states are now siding with corporate agendas and using various coercive mechanisms to contain the legitimate demand of their citizens. Consequently, this squeezes the democratic space for politics. Ultimately, it impacts upon the inclusive notion of citizenship that is becoming more and more exclusive. As a result of numerous exploitations and failure to fulfil the aspiration of the larger populace, many resistance movements have emerged within the state and against the corporate model of development. This also leads to the mushrooming of many illegal business and trade such as human trafficking in many of the Third World states.

Understand Human Trafficking

Human trafficking is not a new phenomenon but today it has become highly intensifying across the countries and has become a global problem. It can be understood as buying and selling of people in order to exploit them in some way. However, from the 1990s onwards, there has been growing international recognition of a contemporary manifestation of slavery, understood and defined as the practice of human trafficking. Trafficking in human beings to some extent has been subject to doubts surrounding data and disputes about definition. Whatever its extent, the

[1] IAN CLARK, GLOBALISATION AND INTERNATIONAL RELATIONS THEORY 184 (Oxford University Press, 1999).

contemporary practice of human trafficking is intimately linked to the working of neoliberal economic globalisation.[2]

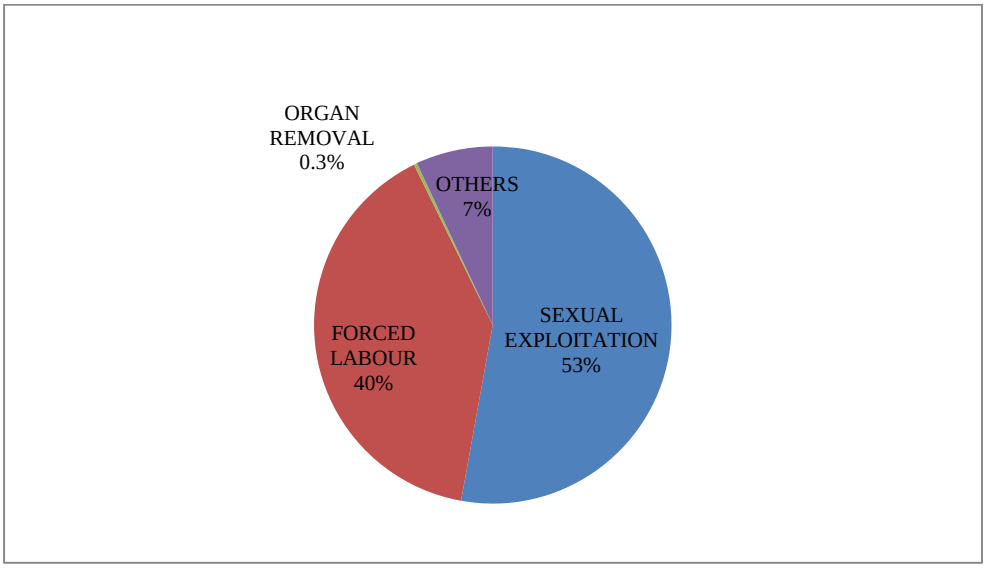
In 2000, the United Nations adopted its Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, commonly known as the 'Palermo Protocol'. This protocol's widely cited definition essentially states that "trafficking involves the movement of persons by means of deceit, fraud, or force, and ultimately their coercion for the purpose of exploitation. This could be sexual exploitation, labour exploitation, slavery, or other kinds of exploitation, such as the removal of organs. The protocol also states unequivocally that a person cannot consent to being trafficked, thus differentiating trafficking from human smuggling where a person pays to be moved knowingly across international borders. The protocol obliges signatories to take action to combat the organised crime behind trafficking, and, in weaker language, it recommends that steps to be taken to protect victims."[3]

Kinds of Human Trafficking

Human trafficking comes under different forms. According to UNODC Global Report on Trafficking in Persons 2014, sexual exploitation and forced labour is highest among all form of human trafficking (see figure 1). Some forty per cent of the victims detected between 2010 and 2012 were trafficked for forced labour. The trafficking for forced labour is a broad type which includes manufacturing, domestic work, construction, catering, cleaning, restaurants and textile production which has growing steadily in recent years. Trafficking for exploitation other than sexual and forced labour is also growing such as trafficking of children for armed combat, and forced begging.[4]

Figure1. Forms of Sexual Exploitation among Detected Trafficking Victims, 2011

[2] JAN AART SCHOLTE AND ROLAND ROBERTSON, ENCYCLOPEDIA OF GLOBALISATION VOL. 2 601 (Routledge, 2007).
[3] Ibid.
[4] United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons 2014.

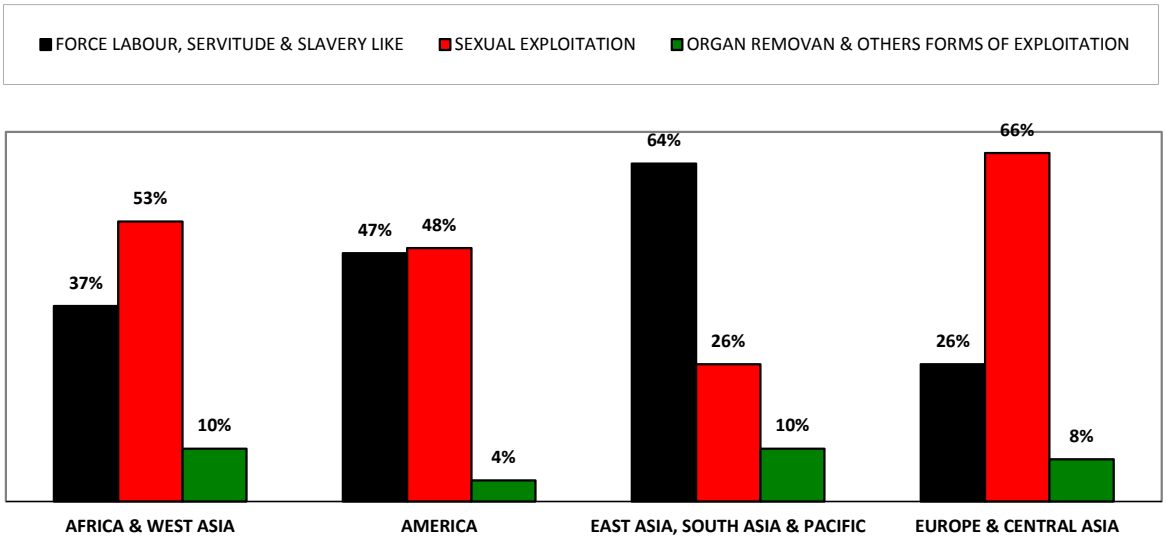


Source: United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2014* (United Nations Publication: Vienna 2014); UNODC Elaboration on National Data.

The report further says that there are considerable regional differences with regard to forms of exploitation (see figure 2). While trafficking for sexual exploitation is the main form detected in Central Asia, East Asia and Europe and the Pacific, it is forced labour. In the US, the two types are detected in near equal proportions.[5]

Figure 2. Forms of Exploitation among Detected Trafficking Victims by Region of Detection, 2010-12 (Or More Recent)

[5] Ibid.



Source: United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons 2014; UNODC Elaboration of National Data.

These different types of trafficking suggest the meaning of interdependence in the current global system. Globalisation has produced new conditions and dynamic particularly, the growing demands for these types of workers by the expanding high income professional workforce. Globalisation also enabled older trafficking networks and practices which used to be national or regional to become global.[6] The profit from trafficking are important when one considers that a victim can earn profits on daily basis while other forms of crime, such as drug trafficking, are a point-of-sale model dependent on a constant replacement to obtain profit.[7]

Human trafficking is increasing at an alarming rate globally. According to international Organisation for Migration Report, the numbers between 700,000 and 2 million suggests the profits from this trade are US $ 7 billion. Alternatively, the US state department estimates that 600,000 to 800,000 people could be trafficked per year across a series of global routes. Of this number, 80 per cent are believed to be women and children, 70 per cent of whom are trafficked

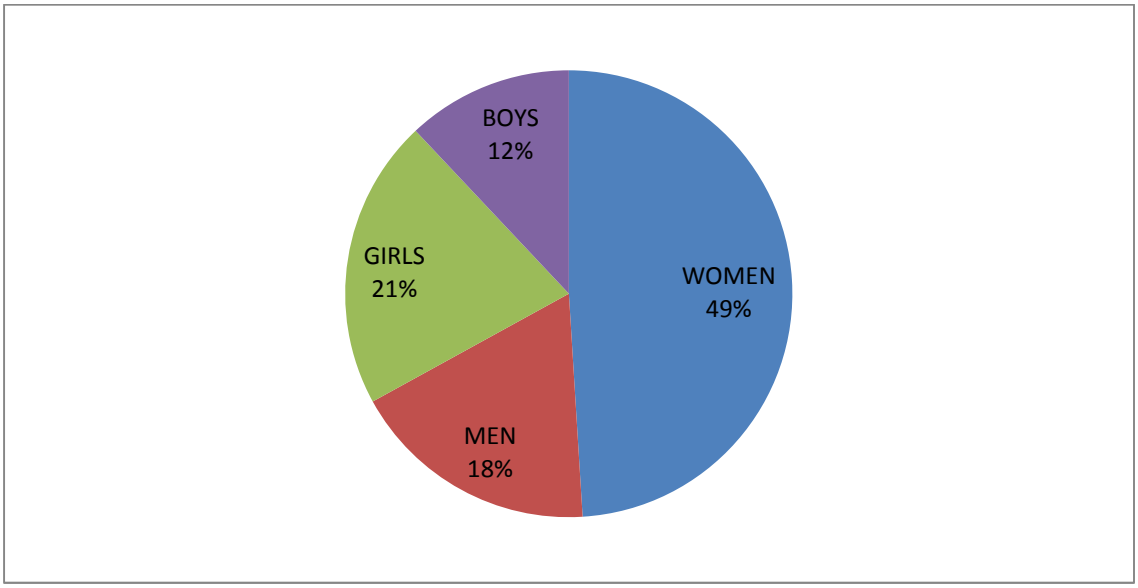
[6] SASKIA SASSEN, IMMIGRATION IN A GLOBAL ERA 454 (Mark Kesselman ed., Houghton Mifflin Company, 2007).
[7] JOHN T. PICARELLI, TRANSNATIONAL ORGANISED CRIME 458 (Paul D. Williams ed., Routledge, 2008).

for the purpose of sexual exploitation. Global trafficking routes connect throughout Southeast Asia, from South America to North America, between West Africa and Europe, from the former states of the Soviet Union to the Middle East and from eastern to Western Europe. Trafficking also occur within countries, as happen in states like Thailand, where people are moved from rural areas to major cities[8] while, United States and Western Europe remain the largest destination for human trafficking.[9]

According to UNODC report 2014, an analysis of the profiles of detected trafficking victims over the 2010-12 periods confirms the broad pattern reported previously by UNODC covering the 2003-10 periods. The vast majority of the victims detected globally are females, either adult women or underage girls (see figure 3). The overall profile of trafficking victims may be slowly changing, however, as relatively fewer women, but more girls, men and boys are detected globally. Adult women continue to comprise the largest group of detected victims, as approximately half of the total numbers are women.[10] Trafficking of woman particularly for sex industry and the growing weight of this trafficking as a profit making options for the traffickers, especially it would seem from the Third World countries. [11]

Figure3. Trafficking in Persons 2014

[8] Scholte and Robertson, Op.cit., 601.
[9] Williams, Op.cit., 458.
[10] UNODC, Op.cit., 29.
[11] Kesselman, Op.cit., 454.



Source: United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons 2014; UNODC Elaboration on National Data

Human Trafficking As Consequence of Economic Problems

Along with rising income inequality, the concerns poverty, hunger, diseases remain widespread, and continue to threaten the world population. Moreover, some of these trends are not confined to the Third World alone. Particularly, since the 1980s and 1990s, the worldwide promotions of neoliberal economic policies by global governing institutions have been accompanied by increasing inequalities within and between states. During this period, many countries of the former Soviet bloc were incorporated into the Third World grouping of states, and millions of people previously cared by the states have been thrown to poverty with the transition to market economies. Within the Third World countries, the adverse impact of neoliberalism has been felt acutely, as countries have been forced to adopt free market policies.[12] Thus, the intensifying economic inequality and income disparity has further promoted deepening of poverty

The issue of poverty remains one of the main global challenges threatening millions of lives today. While it was believed that global economic integration through free trade and the free movement of capital will reduce global poverty and hunger but in reality, this has met with

[12] CAROLINE THOMAS, POVERTY, DEVELOPMENT AND HUNGER 470 (John Baylis and Steve Smith eds., Oxford University Press, 2008).

limited success. In fact, the expansion of the market has helped the relatively wealthy people and rich nations while the needs of the poor are ignored. Equitable distribution of the wealth to the world's poor people to secure their families and communities in terms of basic needs are also diminishing rapidly.[13]

Besides, those living in extreme poverty lead insecure lives and face violent crimes. The hopelessness among the youth today is greatly disturbing because missed opportunities in life and the behaviour that they acquire at an early age becomes difficult to reverse.[14] Extreme poverty also has many impacts. It drains resources, destroys institutions, weaken leaders and hopes leading to insecurity and instability. Weak states can cause violence or collapse, endangering people lives at domestic, regional and global. This may further turned their ungoverned territories a breeding ground for terrorism, trafficking, environmental destruction and disease.[15]

The neoliberal globalisation process has resulted in growing political and social disorder in many Third World states. Disorder is enhanced by the inability of the state to satisfy the people's basic need at a time of political uncertainty and economic hardships.[16] Neoliberal dictates from multilateral donor institutions have supplanted the economic roles of the state by encouraging privatisation or the vending off of state-controlled assets. Instability precipitated by the neoliberal globalisation process has simultaneously led to extreme form of vulnerability while magnifying perceptions of relative deprivation.[17] These problems thrives people to indulge in such kind of business.

Human trafficking is becoming one of the most profitable businesses globally. According to UN, criminal groups in the 1990s generated an estimated $ 3.5 billion per year in profit from trafficking (excluding sex industry). Traffickers may take women from Vietnam, Burma, Laos, and China to Thailand, while Thai women may shift to Japan and US. While there is no comprehensive data, the evidence suggests trafficking in women, including minors, for the sex industry is lucrative business. UN holds that four million women were trafficked in 1998, earning a profit of $7 billion for illegal organisations. The funds include remittances from sex workers

[13] Ibid., 51.
[14] Ibid., 251. Also see JOHN PILGER, THE NEW RULERS OF THE WORLD (Verso, 2002).
[15] LAEL BRAINARD, DEREK CHOLLET AND VINCIA LAFLEUR, THE TANGLE WEB: THE POVERTY-INSECURITY NEXUS 1 (Lael Brainard and Derek Chollet eds., Brookings Institution Press, 2007).
[16] AJAY DARSHAN BEHERA, TRANSNATIONAL TERRORISM 173 (Jasjit Singh ed., Knowledge World, 2001).
[17] Ibid.

earning and payment to the organisers and facilitators in these countries.[18] A group of research at Ritsumeikan University in Kyoto shows how the transnational sex industry operate across borders and that child prostitutes profess to be proud that they are feeding their families and in some cases, such as Meiji-era Japan as well as in parts of contemporary Southeast Asia, national development strategies have promoted prostitution. The students argued that "the sex industry today is a part of the larger problem of how moderate the sometimes cruel process of the globalisation."[19]

Over the past few years, the so-called "entertainment industry" is lawful with earning about 4.2 trillion yen per year in Japan. In Poland, it is estimated that for each polish women delivered, the trafficker receives about $ 700. In Australia, it was estimated that the cash flow from 200 prostitutes is up to $ 900,000 a week. While in Ukraine and Russia, the criminal gangs involved in trafficking earn about $ 500 to $ 1000 per women delivered. These women are likely to make about $ 215,000 per month for the gang.[20] In Central Asia, it is estimated that millions of women's are trafficked. Increase trafficking of women is deeply connected with poverty. High unemployment has been main factor responsible for increasing criminal groups and the growth of trafficking in women. For instance, unemployment rates among women in Bulgaria, Armenia, Russia and Croatia have reached 70 per cent and in Ukraine 80 per cent with the implementation of neoliberal market policies.[21] One analyst writes "while some women know that they are being trafficked for prostitution, for many the conditions of their recruitment and the extent of abuse and bondage only become evident after they arrive in the receiving country. The conditions of confinement are often extreme, akin to slavery, and so are the conditions of abuse, including rape and other forms of sexual violence and physical punishment. They are severely underpaid, and wages are often withheld. They are prevented from using protection methods against AIDS, and typically have no right to medical treatment. If they seek police help they may be taken into

[18] Ibid., 55. Also see R. Barri Flowers, *The Sex Trade Industry's World Wide Exploitation of Children* 575 AN. A.M.-A.C.POL.S.SC. 147, 57 (2001).

[19] James H. Mittelman, Globalisation and Its Critics 71 Richard Stubbs and Geoffrey R. D. Underhill (eds.), *Political Economy and the Changing Global Order* (New York: Oxford University Press, 2006)

[20] Kesselman, Op.cit., 454. Also see Kazuko Watanabe, Trafficking in Women's Bodies, Then and Now: The Issue of Military Comfort Women 186-90 Rhonda L. Callaway and Julie Harrelson-Stephens (eds.), *Exploring Human Rights: Essential Readings* (Viva Books Pvt. Ltd., 2010).

[21] Ibid.

detention because they are in violation of immigration laws; if they have been provided with false documents there are criminal charges."[22]

Human Trafficking and Global Neoliberalism

The intensifying growth of human trafficking over the past few decades can also be connected to global neoliberalism. Despite contestation, there is no doubt that trafficking is a contemporary global phenomenon, and its current stretch is intimately linked to the working of global market and the growth of an entertainment sectors which is seen as a parallel growth and recognition of key development strategy. Tourism over the past few decades has grown sharply and become a major development agenda for a state. In many places, the sex trade as part of the entertainment industry has increased. For instance, "when the IMF and the World Bank see tourism as a solution to some of the growth challenges in many poor countries and provide loans for its development or expansion, they may well be contributing to develop a broader institutional setting for the expansion of the entertainment industry and indirectly of the sex trade."[23]

One cause of trafficking can be traced to the paradox of current globalisation practices, whereby developed states display openness to the movement of capital and finance but not to the movement of people. So, for example, European economies may be globalised but European states remain a "fortress" in relation to the entry of immigrants. Such policies persists despite the evident demand in the developed world, particularly in the global cities that form the nuclei of the globalized economy, for migrant workers to fill low-wage, unskilled jobs in areas such as domestic work or the sex industry. This paradox results in human smuggling and trafficking. The growth of global capital depends on these people as much as it denies them a legitimate existence by preventing their legal migration.[24]

Another facet of globalisation dynamics that contributes to trafficking has been that the application of the neoliberal model of economics has created social dislocation, which again encourages human trafficking. Throughout the former Soviet bloc, for example, the result of economic "shock therapy" were sharply rising unemployment, the removal of social safety nets,

[22] Ibid., 156.
[23] Ibid.
[24] Scholte and Robertson, Op.cit., 602.

and ongoing corruption in a situation of scarcity and radical transition. The criminal organisation of trafficking is further facilitated by the globalisation of technology, communications, and travel. One consequences of the interaction of economic neoliberalism is low-cost air travel, and enhanced communications has increased the sex industry. The demand for global prostitution and sex tourism is another cause of trafficking for sexual exploitation as traffickers operate to meet the demands of a growing market.[25]

The upsurge in trafficking that occurs in relation to armed conflicts and war. That the majority of those trafficked are believed to be women and children and that the most common end is sexual exploitation, draws attention to the manner in which globalisation practices are generated and affect local and global gender order. Many analysts have asserted that in contemporary world, family survival has become feminised. Women are more likely to bear the brunt of unemployment created by economic to suffer the consequences of shrunken social welfare. In certain countries, such as Philippines, women are seen as exportable commodities and a source of vital remittances and foreign currency. In addition, women are liable to experience gender-based violence during times of war and armed conflict. Given all these dynamics, there has been a consequent "feminisation of migration." But again, given the limited legal possibilities for such movement, the likelihood of trafficking is again heightened.[26]

Conclusion

It is true that neoliberalism conveys an ideology and its own agenda is fundamentally a new social order in which over a period of time the wealth of the rich has only increased. Although the Third World states overrode the structural crises, few have managed to come out but majority of them have remained plagued by slow growth, unemployment, and inequality increased tremendously leading to poverty. The economic redistributions scheme has been completely transformed under neoliberalism. The abrupt shift to neoliberal model of development without resolving their other existing problems further compounded their problems. As the issue of socio-economic development is so crucial that any diversification will result negative consequences. The inability and the weakness of the state institutions coupled with state withdrawal from many of its welfare

[25] Ibid., 603.
[26] Ibid.

provisions further led people disillusionment over the state. The proponents of neoliberal globalisation suggest an integration of global economy will relieve poverty and distribute the wealth. Bur what one notices today is precisely the opposite that the poor are becoming poorer while wealthy are become extremely wealthy. Neoliberal globalisation has push up a few segment of society where they have acquired enormous wealth that they are capable of buying everything. These wealth further creates power thereby they can easily influence any government decision making body. The main problem here is global neoliberalism have created a system where there lacks an economic redistribution and the concentration of wealth in few hands at national and global level often led to high inequality and deepening poverty has push further those marginalised sections as victims of human trafficking while on the other, encourages those transnational organised criminals to take advantage over these situation and thereby heighten exploitation.

"LIVE-IN": WOMEN'S RIGHTS IN THE RELATIONSHIP

- **SAIF RASUL KHAN**

Live-in relationships or cohabitation in India though not illegal, is considered socially and morally improper. It is a practice, which is frowned upon by the society, as it is not a part of the cultural and social set up of India. It is against the moral and ethical values that defines India. It is generally in prevalence mostly amongst the metropolitan population. Cohabitation is an arrangement where two people, who are not married live together in an emotionally and/or sexually intimate relationship on a long-term or permanent basis.

The Supreme Court of India, in its judgement in S. Khushboo v. Kanniammal & Anr[27], had thrown its weight behind live-in relationship – a practice that is often discouraged because of what could perhaps be called miscomprehended perception amongst a large chunk of our population on what exactly constitutes morality and ethics. In the judgement, the Apex court had observed that if a man and a woman in love decide to live together as a couple, it is well within their right to life and by no means can be deemed a "criminal offence". The verdict was not welcomed by a large section of the society, as there are many who have different notions of premarital relationships, which is generally discouraged, and is considered a moral sin. However, the Hon'ble Supreme Court's ruling was rather noteworthy because it provided couples living in such arrangement with the much-needed protection of the law of the land.

"If two people, man and woman, want to live together, who can oppose them? What is the offence they commit here? This happens because of the cultural exchange between people," a special three-judge bench of chief justice of India K.G. Balakrishnan, justices Deepak Verma and B.S. Chauhan observed.

[27] S. Khushboo v. Kanniammal & Anr , JT 2010 (4) SC 478.

On May 6, 2015, the Supreme Court dismissed a petition by a man who claimed that since he was already married before entering into the live-in relationship, his partner could not claim, maintenance under Hindu Marriage Act, 1956. The Supreme Court bench, headed by Justice Vikramajit Sen upheld the Hon'ble Bombay High Court's order allowing her to move before the appropriate forum to claim maintenance.[28]

LIVE-IN RELATIONSHIP

Live-in relation, which can also be referred to as cohabitation, in essence, is an arrangement whereby two people agree to live together on a permanent or long-term basis in a sexually and/or emotionally intimate relationship. However, that moniker is typically used to denote unmarried couples who live under the same roof.

"Cohabitation" usually refers to *'unmarried couples who live together without formally registering their relation as a marriage'*.[29] Such arrangements have become common in Western countries during the past few decades, being led by changing social views, especially regarding marriage, gender roles and religion.

Cohabitation or live-in relationships have turned into a common pattern amongst people across the Western world. There are multitudes of reasons why a couple may want to live together. It may be because they want to evaluate their compatibility in a more practical way, or to establish

[28] Article, "Supreme Court upholds maintenance for live in partners", dated May 6, 2015. http://timesofindia.com/india/Supreme-Court-upholds-maintenance-for-live-in-partners/articleshow/47169351.cms

[29] Oxford Dictionary, "Definition of cohabit". www.oxforddictionaries.com.

financial security before officially tying the knot. Apart from that, it may be also due to legal constraints that would not allow them to marry – for example, if they belong to the same sex.

Certain individuals may also prefer to be in a live-in relationship because in their opinion, relationships are their personal and private matters that ought not to be controlled by religious, political and/or patriarchal institutions. Meanwhile, some may prefer cohabitation because such an arrangement does not legally compel them to be in the relationship for an extended period (live-in relationships are often easier to establish as well as dissolve). In some jurisdiction, live-in relationship are viewed legally as common law marriage – it may be applicable after the duration of a pre-specified period, or after the birth of a child, or for certain other legally defined reasons.

LIVE-IN RELATIONSHIPS IN INDIA

In India, live-in relationships have been a taboo right since the British raj. The practice is not accepted by the society and is discouraged. The concept of marriage is still prevalent and is sanctimonious whereas live-in relationships are considered to be against the moral fabric of India. The government, however, has been taking various measures for the past few years with the help of judicial intervention, to protect and preserve the rights of female live in partners to ensure that their rights are not violated. In one such move, the government had extended economic rights to women in live in relation under the Protection of Women from Domestic Violence Act 2005. Similarly, the Maharashtra state government in 2008 granted a proposal suggesting a woman involved in cohabitation for a “reasonable period” should be given the status of a wife.

LEADING CASES

In *S. Khushboo v. Kanniammal & Anr*[30]., the Supreme Court of India, placing reliance upon its earlier decision in *Lata Singh v. State of U.P. & Anr.*[31], held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex.

The Supreme Court on 13 August 2010, in the case of *Madan Mohan Singh & Ors v. Rajni Kant & Anr*[32].,had once again entered the debate on legality of the Live-in Relationship as well as legitimacy of Child born out of such relationship. The Court while dismissing the appeal in the property dispute held that there is a presumption of marriage between those who are in live-in relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship.

In the case of *Bharata Matha & Ors v. R. Vijaya Renganathan & Ors.*[33], the Apex court dealt with the issue of the legitimacy of child born out of a live-in relationship and his succession of property rights. The Supreme Court held that child born out of a live-in relationship may be allowed to succeed inheritance in the property of the parents, if any, but does not have any claim as against Hindu ancestral coparcenary property.

The Delhi High Court in its decision on 10 August 2010, in *Alok Kumar v. State & Anr*[34], while dealing with the validity of live-in relationship held that *"'Live-in relationship' is a walk-in and walk-out relationship. There are no strings attached to this relationship, neither this relationship*

[30] Supra, note 1.

[31] Lata Singh v. State of U.P. & Anr., AIR 2006 SC 2522.

[32] Madan Mohan Singh & Ors v. Rajni Kant & Anr., (Civil Appeal No. 6466 of 2004, decided on August 13, 2010) (Paras 19-22).

[33] Bharata Matha & Ors v. R. Vijaya Renganathan & Ors., (C.A. No. 7108 of 2003; Decided on 17-05-2010).

[34] Alok Kumar v. State & Anr, (Cr. M.C. No. 299/2009, decided on August 9, 2010).

creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time."(Para 6)

The Supreme Court in the case of *D. Velusamy v. D.* Patchaiamma[35]l, held that, a *'relationship in the nature of marriage'* under the 2005 Act must also fulfill the following criteria:

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time, and in addition, the parties must have lived together in a *'shared household'* as defined in Section 2(s) of the Act. Merely spending weekends together or a one-night stand would not make it a *'domestic relationship'*. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.

In the same year, the Ministry of Women and Child Development was urged by the National Commission of Women to include female live-in partners in the definition of wife as described in the Section 125 of Code of Criminal Procedure. The objective of these recommendations was to harmonize various other sections of law with the Protection of Women from Domestic Violence Act, 2005. Justice Malimath Committee of the Supreme Court recommended that this be turn into a law by all states. The committee had observed that, *"if man and woman are living together as husband and wife for a reasonable long period, the man shall be deemed to have married the woman."* The Malimath Committee also recommended that the word 'wife' under

[35] D. Velusamy v.D. Patchaiamma, CRIMINAL APPEAL NOS. 2028-2029 Of 2010.

Code of Criminal Procedure be amended to include any *"woman living with a man like his wife"*.

In the *Payal Sharma v. Superintendent Nari Niketan Kandri Vihar Agra and Others*[36], the Allahabad High Court ruled that *"a lady of about 21 years of age being a major, has right to go any where and that anyone-man and woman even without getting married can live together if they wish."*

LIVE-IN AND MAINTENANCE

A bench of Justices Vikramajit Sen and A M Sapre dismissed a petition by a man who claimed that since he was already married before entering into the live-in relationship; his partner could not claim the status of a wife to be legally entitled to maintenance under Hindu Marriage Act.[37]'Z', challenging the order of the Bombay High Court, filed the said petition. The Bombay High Court had held that his live-in partner of nine years and the child were entitled to maintenance after their relationship ended. 'Z' argued that he was legally married to another woman for the last 49 years; hence, his live-in partner was not entitled to maintenance, as she was well aware of his marital status.

The Supreme Court took serious objection to the contention against the woman that she was a call girl when he met her in Mumbai. *"How absurd is your argument. You want the court to be sympathetic but you brand the poor lady as call girl. You are such an idiot that you went for relationship when you were married."* The couple lived together for nine years and a child was

[36] Payal Sharma v. Superintendent, Nari Niketan Kalindri Vihar, Agra, C.M.H.C.W.P. Appeal No. 16876 of 2001, Allahabad High Court.

[37] Supra note 2.

born to them in 1988. Justices Sen and Sapre slammed 'Z' for referring to his erstwhile live-in partner as a 'call girl' and said he was a philanderer as he was living with another woman despite being married.

In this case, the woman had first approached the family court in Bandra for declaration of their relationship as husband and wife. The Court, however, refused her plea after 'Z' told the court that he was already married to someone else. She then approached the High Court, which adjudged that she was eligible to claim maintenance for herself and her daughter.

The court in its various orders has recognized the concept of live-in relationship in society. It has gone to the extent of saying that if a man and woman *"lived like husband and wife"* for a long period and had children; the judiciary would presume that the two were legally married.

The Apex Court had, in the case of *Gokal Chand v. Parvin Kumari*[38], said continuous cohabitation of a couple would give rise to the presumption of a valid marriage and it would be for the opposite party to prove that they were not legally married.

"*It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party who seeks to deprive the relationship of legal origin,"* The Supreme Court said in a recent judgement by Justice MY Eqbal and Justice Amitava Roy[39]. It referred to judgments in cases of *Badri Prasad*

[38] Gokal Chand v. Parvin Kumari, AIR 1952 SC 231.

[39] Article, The Times of India, "Couple living together will be presumed married, Supreme Court rules", dated April 13, 2015. www.http://timesofindia.com/india/Couple-living-together-will-be-presumed-married-Supreme-Court-rules/articleshow/46901198.cms#_ga=1.41101154.1741438220.1429294543.

v. Director of Consolidation[40] and *Tulsa v. Durghatiya*[41]. The Court also directed him to pay the maintenance for their 27-year-old daughter.

LIVE-IN UNDER THE DOMESTIC VIOLENCE ACT, 2005

In our country, while enacting the Protection of Women from Domestic Violence Act, 2005 the Parliament has taken notice of this new relationship, that is, live-in- relationship.

Section 2(a) of the Act states:

"2*(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent."*

Section 2(f) states:

"2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family".

The Supreme Court in a bench of Justices K S Radhakrishnan and Pinaki Chandra Ghose in the case of *Indra Sarma v. V.K.V. Sarma*[42] laid some guidelines for testing under what

[40] Badri Prasad v. Director of Consolidation, 1978 (3) SCC 527.

[41] Tulsa v. Durghatiya, 2008 (4) SCC 520.

circumstances; a live-in relationship will fall within the expression *"relationship in the nature of marriage"* under Section 2(f) of the Domestic Violence Act. *"The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.*

1) Duration of period of relationship: Section 2(f) of the Domestic Violence Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household: The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements: Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements: Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc. (6) Children Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore,

[42] Indra Sarma v. V.K.V. Sarma, SLP (Cr.L) No. 4895 of 2012.

intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public: Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties: Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship."[43]

The Supreme Court has asked Parliament to bring in proper amendments to the Protection of Women from Domestic Violence Act, or enact a suitable legislation so that women and children born out of live-in relationships are protected, though those types of relationship might not be a relationship in the nature of a marriage.

Making this suggestion, a Bench of Justices K.S. Radhakrishnan and Pinaki Chandra Ghose said, *"Parliament has to ponder over these issues, and bring in proper legislation or make a proper amendment of the Domestic Violence Act."* The Bench said children born out of such relationships *"suffer [the] most, which calls for bringing in remedial measures by the Parliament, through proper legislation."*

Writing the judgment, Justice Radhakrishnan said: *"Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnisation of*

[43] Supra note 13.

the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. Live-in relationship, as such, is a relationship which has not been socially accepted in India, unlike many other countries."

The Bench said: "*Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. Long-standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent but we are afraid that Domestic Violence Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the Domestic Violence Act, which is restrictive and exhaustive."*

In the instant case, the appellant, Indra Sarma, had a live-in relationship with the respondent, V.K.V. Sarma, who was already married with two children. She maintained the relationship for about 18 years and claimed maintenance amount under the DV Act. A trial court awarded Rs. 18,000 a month and this was upheld by a sessions court. However the Karnataka High Court set aside the order. The present appeal is directed against this judgment.

Dismissing the appeal and declining to interfere with the High Court order, the Bench said the appellant was aware that the respondent was married when the relationship began. *" Hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to 'domestic violence' under Section 3 of the Domestic Violence Act."*

Some countries in the world recognize common law marriages. A common law marriage, sometimes called de facto marriage, or informal marriage is recognized in some countries as a marriage though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry. The Supreme Court of India has held that *"relationship in the nature of marriage"* is akin to a common law marriage. Common law marriages require that although not being formally married:

(a) The couple must hold themselves out to society as being akin to spouses.
(b) They must be of legal age to marry
(c) They must be otherwise qualified to enter into a legal marriage including being unmarried.
(d) They must have voluntarily, cohabitated and held themselves out to the world as being akin to spouses for a significant period of time.[44]

The Supreme Court of India has held that *"relationship in the nature of marriage"* under the Protection of Women from Domestic Violence Act, 2005 must also fulfill the above requirements, and in addition, the parties must have lived together in a *"shared household"* as defined in Section 2 (s) of the Act.

"Shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in

[44] Supra note 9.

the shared household. Merely spending weekends together or a one-night stand would not make it a "domestic relationship".

An *"aggrieved person"* under the Act can approach the Magistrate under Section 12 for the relief mentioned in Section 12 (2). Under Section 20 (1) (d) the Magistrate can grant maintenance while disposing of the application under Section 12(1). Section 26(1) provides that the relief mentioned in Section 20 may also be sought in any legal proceeding, before a civil court, family court or a criminal court. Thus, a woman who can prove that she has been in a live- in -relationship with a man as explained above can claim maintenance under the Act.

The Supreme Court of India has said: *"In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel Anna Karenina, Gustave Flaubert's novel Madame Bovary and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya. However, Indian society is changing and this change has been reflected and recognized by Parliament by enacting the Protection of Women from Domestic Violence Act, 2005."*

LIVE-IN AND RAPE

The Delhi High Court has refused to keep live-in relationships outside the purview of rape under the Indian Penal Code[45], saying it would amount to giving them the status of matrimony, which the legislature has chosen "not to do".

[45] Article, "Can't keep live-in relations outside purview of rape HC", http://timesofindia.com/india/Cant-keep-live-in-relations-outside-purview-of-rape-HC/articleshow/46492487.com#_ga=1.263859404.1741438220.1429294543.

The court, made the observation, while hearing a P.I.L., which had sought direction to the government to keep the cases of live-in relationships outside the purview of the offence of rape under the Indian Penal Code (IPC)[46].

"As far as the relief sought, of keeping the live-in relationships outside the purview of Section 376 of the IPC is concerned, the same would amount to giving the live-in relationships, the status of matrimony and which the legislature has chosen not to do," a bench of Chief Justice G Rohini and Justice Rajiv Sahai Endlaw said. *"All that we can observe is, that a live-in-relationship constitutes a distinct class from marriage. It is also not as if the defence of consent would not be available in such cases to the accused. We do not find any merit in the petition and dismiss the same,"* the judge added.

The court was hearing a PIL filed by Anil Dutt Sharma who had contended that according to the records it has been seen that in many cases, courts acquit men accused of rape as the women file false case. *"In more than 70 per cent cases, the accused is found not guilty and other associated family members of the acquitted accused face humiliation in society,"* the plea had said.

It also sought direction to the Centre and Delhi government to secure constitutional rights of the person acquitted from rape charges by the way of compensation and registration of cases against those who misuse the law. It had said that police should not arrest a person only based on an allegation by a woman prior to conducting preliminary enquiry and getting a medical report, but before arrest, a senior officer to avoid false implication should record sufficient cause.

LIVE-IN RELATIONSHIPS IN OTHER COUNTRIES

[46] Section 375 of the Indian Penal Code, “Rape”.

SCOTLAND

The Family Law Act, 2006 for the first time officially identified and legalized cohabitation in Scotland. According to estimates, at the time when the law was passed, almost 150000 people across the country were involved in live-in relationship. In case of such a relationship breaks, a cohabitant enjoys the rights to apply for financial support under section 28. In the event one of the partners die, the survivor has the right to seek financial support from the deceased's estate.

FRANCE

The Civil Solidarity Pact of *'pacte civil de solidarite'*, which was passed by the French National Assembly in October 1999, governs Cohabitation. According to the law, cohabitation in France is defined as a *"de facto stable and continuous relationship between two persons of different sexes or of the same sex living together as couple."*

THE UNITED STATES

Live-in relationship used to be illegal in all states before 1970. However, soon after, it was accepted as a common law subject to certain basic requirements. The first decision on palimony was the well-known decision of the California Superior Court in Marvin Vs Marvin[47]. This case related to the famous film actor Lee Marvin, with whom a lady Michelle lived for many years without marrying him and was then deserted by him and she claimed palimony.

Subsequently in many decisions of the courts in the US, the concept of palimony has been considered and developed. The US Supreme Court has not given any decision whether there is a legal right to palimony, but there are several decisions of the courts in various States in the US. These courts in the US have given divergent views, some granting palimony, some denying it altogether, and some granting it on certain conditions. Hence, in the US, the law is still in a

[47] Marvin v. Marvin, (1976) 18 C3d 660.

state of evolution on the right to palimony. Although there is no statutory basis for grant of palimony in the US, the courts, which have granted it, have granted it on a contractual basis. Some Courts in the US have held that there must be a written or oral agreement between the man and the woman that if they separate the man will give palimony to the woman. Other courts have held that if a man and woman have lived together for a substantially long period without getting married there would be deemed to be an implied or constructive contract that palimony will be given on their separation. The State Legislature of New Jersey has now passed a law in the year 2010 that there must be a written agreement between the parties to claim palimony. Thus, there are widely divergent views of the courts in the US regarding the right to palimony.

CANADA

In Canada, cohabitation is officially recognized as *"common law marriage"*. In many cases, the federal law of the country grants common law couples the same rights as married couples. All common law live in couples enjoy legal sanctity if they have lived together for a minimum of 12 consecutive months, or they give birth to/adopt a child.

UNITED KINGDOM

A man and a woman living together in a stable and consensual sexual relationship is often called *"common law spouses"*. According to the UK laws, live in couples owe one another more than that is worthy of the moniker. In the even, the couple decides to separate; the courts do not have the legal power to override that decision. Cohabitation is in vogue in Britain and it is estimated that by 2016, the majority of births in the UK will be to unmarried parents.[48] The Victorian era of the late 19th century is famous for the Victorian standards of personal morality. Historians generally agree that the middle classes held high personal moral standards and rejected

[48] Article, "Most babies born out of marriage by 2016, trend suggests", dated July 11, 2013, http://www.bbc.com/news/uk-23265810

cohabitation. They have debated whether the working classes followed suit. Moralists in the late 19th century such as Henry Mayhew decried high levels of cohabitation without marriage and illegitimate births in London slums. However new research using computerized matching of data files shows that the rates of cohabitation were quite low—under 5% -- for the working class and the urban poor.[49]

AUSTRALIA

The Family Law Act of Australia suggests that any "de facto relationship" can exist between two people of the same of different sex and also that a person can be in a de facto relationship even when legally in a de facto relationship with (or married to) another person.

IRELAND

Even though living together is legally recognized in Ireland, public opinions are strictly against a new legislation that aims to facilitate legal rights for "separated" cohabitating couples to demand maintenance and/or share their property with the financially dependent partners. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 gives some rights to unmarried cohabitants (under this act same-sex couples can enter into civil partnerships, while long term unmarried couples - both heterosexual and same sex - who have not registered their relation have some limited rights and obligations). The legislation is applicable to same sex unmarried couples as well as couples from opposite sexes, provided they have been conhabitating for at least 3 years (or 2 years if they have children). The government, with this new legislation, plans to fetch financial and legal protection for financially dependent and vulnerable cohabitants in the event of break up or death.

[49] Rebecca Probert, "Living in Sin," BBC History Magazine (Sept 2012); G. Frost, Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England (Manchester U.P. 2008)

ITALY

In Italy, where Roman Catholicism has a strong presence, cohabitation is not as common as in other areas of Europe, yet it has increased in recent years. There are significant regional differences, with non-marital unions being more common in the North of the country than in Southern Italy.

NEPAL

In Nepal, cohabitation does not have the legal sanction. The trend of cohabitation has been picking up but most couples prefer to remain anonymous or pose themselves as married couple.

BANGLADESH

In Bangladesh, cohabitation after divorce is generally punished by the salishi system of informal courts, especially in rural areas.[50]

INDONESIA

In Indonesia, an Islamic penal code proposed in 2005 would have made cohabitation punishable by up to two years in prison.[51] The practice is still frowned upon, and police, for permitting unmarried couples to share a room, have raided many hotels and boarding houses.

CONCLUSION

[50] "Women and Islam in Bangladesh", by Taj ul-Islam Hashmi, page 112.

[51] "Indonesia plans new morality laws", dated February 6, 2005, BBC News. http://bbc.co.uk/2/hi/asia-pacific/4239177.stm

Live-in relationships are in existence in India, however much it may be denied. The new system of family set up is a transformation of the traditional system of marriage, which is primarily due to the changing attitude and outlook of the west to the concept of marriage. In India, there is a need to protect the system from being violated and it being used as a tool for sexual offences and mental harassment against women. The Domestic Violence Act, 2005 does address certain issues relating to live-in relationships and provides protection to women, economically and socially. The recent ruling of the Supreme Court has assured that women can claim maintenance and the same cannot be denied merely due to the lack of a marriage in the traditional sense. Cohabitation or live-in relationship often tends to be a human right issue and concerns an individualistic approach. Despite being highly prevalent in majority of the western countries, the reality with regard to the social fabric of India is drastically different. This can be comprehended from the fact that in India, marriage continues to be the institution that is preferred to any other form of union. However, the same has not deterred unmarried couples from living together under the same roof as a couple, fully realising all the rights and duties like a traditional marriage. Nevertheless, there is a need for a better legislature that shall address concerns and make live-in relationships legal. There is a need for proper detailed legislature to protect the citizens who venture into this system of family. The couples, who wish to elect this system, should not be prohibited or frowned upon for any reason whatsoever. The effort of the Indian Judiciary to protect the interests of the people electing such living arrangements is commendable and is definitely a welcome step for the greater benefits of the society.

APPLICATION OF SUSTAINABLE DEVELOPMENT PRINCIPLES BY SUPREME COURT OF INDIA

DR. VIJAY OAK*

Introduction:

Today a number of states have adopted an aggressive path of development leaving negligible space for environmental conservation. As a matter of fact governments across the world prefer development at the cost of environment. As aptly put by Justice V.R. Krishna Iyer, India today is the victim of development. It has led to the perilous process of environmental injuries, the polluted rivers, the disappearing mountains, the depleting mineral resources, the uprooted tribal, the submerged mother earth and the vast multitude of marginalized human beings who are appalled by the terrorism of development and await their turn to be sacrificed at the inexorably market hungry, altar of poignant, irrevocable 'blood and iron' Development maniacs.[52]

This has led to emergence of concept of sustainable development in international environmental law. The Brundtland Commission in it's report defined sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. This definition has been accepted as an authoritative one.[53] The Indian Supreme Court has played an important role in giving effect to principles of sustainable development.

Salient Features of Sustainable Development:

Although the concept of sustainable development is still evolving, so far the following core features of sustainable development have been identified:

(a)**Intergenerational equity:**

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[52] Quoted in Hussain Monirul, 'Interrogating Development', SAGE (2008), p.16

[53] 'Our Common Future' (1987)

The principle of intergenerational equity is central to sustainable development as it believes in balancing the conflicting interests of present and future generations. According to the principle of intergenerational equity it is the binding duty of the present generation to use the natural resources in a responsible manner so that the safe planet can be handed over to the future generations. The use of natural resources of the present generation should not hamper the ability of future generations to meet their own needs of natural resources. Therefore the policy makers and the government have to ensure that developmental models should not cause undue damage to natural resources. Therefore the present generation shall use the natural resources carefully to ensure that they are not exhausted in this generation only.

The concept is summarized by Edith Brown Weiss in following words:

"The proposed theory of intergenerational equity postulates that all countries have an intergenerational obligation to future generations as a class, regardless of nationality… There is increasing recognition that while we may be able to maximize the welfare of a few immediate successors, we will be able to do so only at the expense of our more remote descendants who will inherit a despoiled nature and environment. Our planet is finite and we are becoming increasingly interdependent in using it. Our rapid technological growth ensures that this dependence will increase. Thus our concern for our own country must, as we extend our concerns into longer time horizons and broader geographical scales, focus on protecting the planetary quality of our natural and cultural environment. This means that, even to protect our own future nationals, we must cooperate in the conservation of natural and cultural resources for all future generations."[54]

The principle of intergenerational equity has found acceptance on international level since a very long time. International Convention for the Regulation of Whaling, 1946 recognized the interest of the nations of the world in safeguarding whale stocks for future generations. Stockholm Declaration 1972 stressed the need to achieve better life for posterity. The preamble to the Stockholm Declaration on the Human Environment expressly refers to the objective of protecting the wellbeing of future generations. The 1975 Charter of Economic Rights and Duties of States

[54] Brown Weiss, E., 'In fairness to Future Generations', UN University Press (1989), pp.26-27

declared that the protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all states. At Nairobi Conference held in 1982 the Governments and people of the world were called upon to discharge their responsibility, collectively and individually, to ensure that our small planet is passed over to future generations in a condition, which guarantees a life in human dignity for all. Principle 3 of Rio Declaration provides for the right to development is to be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Article 3 (1) of the United Nations Framework Convention on Climate Change, 1992 also calls for inter-generational equity to be taken into account. The principle is also incorporated in the Desertification Convention, 1994, and Stockholm Convention on Persistent Organic Pollutants, 2001. Some national constitutions also contain direct references to intergenerational equity or it is implied from provisions guaranteeing a right to a safe and healthy environment. For instance, Article 23 of Constitution of Brazil, Articles 48-A and 51-A (g) of Constitution of India, Article 50 of Constitution of Islamic Republic of Iran and Article 95 of the Constitution of Namibia.

In State of Tamil Nadu vs. Hind Stone[55] the Supreme Court observed that the idea behind this principle is that every generation should leave water, air and soil resources as pure and unpolluted as and when it came to earth. Each generation should leave undiminished all the species of minerals it found existing on the earth. The doctrine of inter generational equity is basically aimed at preserving the nature not only for the present, but also for the generations to come. The doctrine has a shade of morality as it imposes an obligation on the present generation to make modest use of natural resources so that they can be enjoyed by the future generations. Sustainable development recognizes each generation's responsibility to be fair to the next generation, by leaving an inheritance of wealth no less than they themselves had inherited. The doctrine propounds a sense of trusteeship in the present generation, to safeguard the interest of incoming generation.[56] The principle of intergenerational equity implies that the present generation should not look at the earth and it's resources as mere investment opportunity but as a trust passed on to them by the ancestors, to be enjoyed and passed on to the future generations

[55] AIR 1981 SC 711

[56] Desai Ashok A, 'Environmental Jurisprudence',2nd edn. Modern Law House (2002), p. 372

for their use. Each generation holds the earth and it's resources as a steward or in trust for future generation.

The Supreme Court dealt with the concept of inter-generational equity was in the case of Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh[57] in this PIL the question raised was regarding illegal and unauthorized mining damaging and destroying the local environmental system and causing ecological imbalance. The Apex court invoked the principle of intergenerational equity and held that some assets are permanent and should not be exhausted in one generation and also opined that environmental protection and maintaining ecological balance should be placed on the same standing as economic development of the country. The Court after much deliberation ordered the mining work to stop and held that although this would cause economical loss to the laborers but this was a price that had to be paid for protecting and safeguarding the rights of the people to live in a healthy environment with minimal disturbance of the ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment.

State of Himachal Pradesh vs. Ganesh Wood Products and Others[58] a writ petition was filed by Ganesh Wood Products challenging the decision of the Government of Himachal Pradesh to refuse the establishment of katha factories in the state. The Government submitted that such establishment would certainly lead to indiscriminate felling of the khair trees which would adversely affect the environment and ecology of the state. The raw material available in the state, namely the khair trees, for manufacturing katha was not sufficient to sustain the proposed industries. The Court observed that during the years 1992 and 1993 every proposed factory using khair trees was approved by the state authority in charge. This was contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and intergenerational equity. After all, the present generation had no right to deplete all the existing forests and leave nothing for future generations.

[57] AIR 1985 SC 652

[58] AIR 1995 SC 149

In Samaj Parivartana Samudaya & Ors. vs. State Of Karnataka & Ors[59], the Supreme Court observed that the precise extent of illegal mining that took place in the three districts of Karnataka have been noted in detail in an earlier part of this order (para 23)… Illegal mining apart from playing havoc on the national economy had, in fact, cast an ominous cloud on the credibility of the system of governance by laws in force. It has had a chilling and crippling effect on ecology and environment. It is evident from the compilation submitted to the Court by the CEC that several of the Category C mines were operating without requisite clearances under FC Act or even in the absence of a mining lease for a part of the area used for mining operations. The satellite imageries placed before the Court with regard to environmental damage and destruction has shocked judicial conscience. It is in the light of the above facts and circumstances that the future course of action in respect of the maximum violators/polluters, i.e., Category C mines has to be judged. While doing so, the Court also has to keep in mind the requirement of Iron Ore to ensure adequate supply of manufactured steel and other allied products. The Court also opined that Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India.

Despite its articulation in international instruments and world Constitutions, the principle of intergenerational equity has to gain a firm ground on the Indian soil.

In this manner, intergenerational equity imposes a moral responsibility to ensure that today's children and future generations inherit a global environment at least no worse than the one we received from our predecessors. However the concept needs to be incorporated in national legislations.

(b)**Polluter pays principle:**

Another core feature of sustainable development is polluter pays principle. According to this principle it is the polluter who shall bear the cost of environmental remediation. This principle

[59] (2013) 8 SCC 211

goes hand in hand with the principle of absolute liability which does not admit any exception. The industry which has caused environmental pollution is made absolutely liable to restore the environment to its original position. The state is not supposed to bear the cost of such pollution. In 1972, the Organization for Economic Cooperation and Development (OECD) recommended application of polluter pays principle as a method for pollution cost allocation. The principle was discussed also at Paris Summit of 1972 and the Single European Act of 1987 provided the status of binding law to polluter pays principle. The Maastricht Treaty, 1992 resolved that the policy of environment of European community shall be based upon this principle.

It was incorporated in Stockholm Declaration, 1972 and Rio Declaration, 1992. In Vellore Citizens Welfare Forum vs. Union of India[60], Kuldip Singh, J. directed an authority to be constituted under Section 3 (3) of Environment Protection Act, to implement the principle of polluter pays and assess the damage caused by industrial pollution and also the compensation to be recovered from the polluters as the cost of reversing the damaged environment. It means the polluter is required not only to compensate the loss caused but also to pay for reshaping the environment to it's then existing shape.

Polluter pays principle requires that the financial cost of preventing or remedying damage caused by pollution should be borne by the polluting industry and not by the government as it would ultimately burden the taxpayers.[61]

In Indian Council for Enviro-Legal Action vs. UOI & ors.[62], the Supreme Court held that "The Polluter Pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development." In this case a number of private companies operating as chemical companies were creating hazardous wastes in the soil and polluting the village area situated nearby without the

[60] AIR 1996 SC 2715

[61] Shelbour Carolyn, 'Historic Pollution-Does the Polluter pays', Journal of Planning & Environmental Law (Aug. 1974)

[62] AIR 1996 SC 1446

required licenses. The Court ruled on the PIL that " Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently, the polluting industries were held to be absolutely liable for the harm caused by them to villagers in the affected area, etc and they were ordered to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The "Polluter Pays" principle as interpreted by the Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

(c)**Precautionary Principle:**

It is an important feature of sustainable development based upon the saying that prevention is better than cure. Prevention is considered to be the golden rule for environmental protection as often it is not possible to cure environmental injury or damage, the extinction of species of flora and fauna. Therefore if there is a possibility of a developmental project to cause considerable harm to the environment, even in absence of conclusive proof, such project ought to be avoided as a matter of precaution.

The precautionary principle is one of the most contentious principles in contemporary international legal developments. The very fact that it is a principle of international environmental law has been questioned by many legal scholars. However, this does not take away the fact that the precautionary principle continues to be applied widely across sectors both internationally and nationally.[63]

The precautionary principle is central to environmental policy making and is a key element of several multilateral environmental agreements (MEAs); notably, the Cartagena protocol on Biosafety, the preamble of the Vienna Convention on the Protection of the Ozone Layer and the

[63] Chowdhury Nupur and Santanu Sabhapandit, 'The legal regime for application of the precautionary principle in India: future directions for the GM regulatory regime', available at http://works.bepress.com/nupur_chowdhury/6/ as last accessed on 15/05/2015

Montreal Protocol on Substances that Deplete the Ozone Layer. It is reflected in the UN Framework Convention on Climate Change and the Rio Declaration.

Principle 15 of Rio Declaration appeal to the signatory states that they should widely apply the precautionary principle according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

However it does not mean that science is not relevant in judging the existence of risk, or that decision to refuse an infrastructural project can be taken on the basis of mere hypothesis. In Vellore case[64] the Supreme Court explained that in the context of municipal law precautionary principle means three things: One, environmental measures, to be taken by the state or other authorities must be such that it anticipate, prevent and attack the causes of environmental degradation. Two, where there are threats of serious and irreversible damage then any lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. And third, the onus of proof shall be on the actor or the developer or industrialist to show that his action is environmentally benign.

The precautionary principle suggests that an activity, which poses danger and threat to environment, is to be prevented. It also suggests that the state Governments and the Local authorities are supposed to anticipate and then prevent the causes of environmental degradation. It also stipulates that merely because there is lack of scientific knowledge as to whether a particular activity is causing degradation should not stand in the way of the Government. Lastly, the principle suggests that the onus of proof is on the actor or the developer to show that the action is environmental friendly.

Beginning with Vellore Citizens' Welfare Forum vs. Union of India[65] , the Supreme Court has explicitly recognized the precautionary principle as a principle of Indian environmental law.

[64] Supra Note 9

[65] Supra Note 8

In A.P. Pollution Control Board vs. M. V. Nayudu[66] the Court discussed the development of the precautionary principle. Furthermore, in the Narmada case[67], the Court explained that " When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution."[68]

The appeal of the precautionary principle is that it forces a debate about the types and quantities of human-induced harm to the environment that is acceptable. The legal process attached to the application of the principle institutionalizes caution: when there is sufficient evidence that an activity is likely to cause unacceptable harm to the environment, the precautionary principle requires that responsible public and private power holders prevent or terminate the activity.[69] On international level, a number of states have accepted the precautionary principle as a basis for ocean dumping and sustainable development policies, an indication that the precautionary principle is emerging as customary international law.

Conclusion:

Development at the cost of environment will bring us eventually to extinction. Hence developmental projects need to be executed by keeping in mind the environmental interests of future generations. The Supreme Court of India has most of the times remained vigilant in checking indiscriminate damage to environment and has prevented environmentally hazardous projects from being pushed forward by the callous government authorities. However, even the public should express their strong protest against developmental projects that are having adverse

[66] AIR 1999 SC 812

[67] AIR 2000 SC 3751

[68] See .Justice B.N. Kirpal, 'Developments In India Relating to Environmental Justice', available at http://www.unep.org/delc/Portals/119/publications/Speeches/INDIA%20.pdf, as last accessed on 15/05/2015

[69] Cameron James and Juli Abouchar, ' The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment', Vol. 14, Issue I Boston College International and Comparative Law Review available at http://aanyadalmia.blogspot.in/p/natural-elements-horizontal.html as last accessed on 15/05/2015

effect on environment and future generations. Then only we will be able to ensure that environmental interests are not compromised for the sake of development.

ARBITRATION- A MEAN OF DISPUTE RESOLUTION UNDER BITS

-TANVI TAK

INTRODUCTION

With the boom in the Indian sector, today world see India as fastest growing major economy in the world after its reformed Prime Minister Narendra Modi led government changed the way they measure themselves as Asia's second largest economy after China and Japan. Even the statistics displayed India's growth in terms Gross Domestic Product (GDP) to progress faster than China for the December quarter

Thus with the current government, several schemes or initiatives were formulated as Make In India Campaign and others attracting an individual or a private companies of foreign nationals to invest in India. But most importantly is to secure interests and rights of the parties involved. As a matter of fact, the purpose of the host state (state in which an investment is made) is to boost their economy whereas for an individual or private companies of foreign national is to earn maximum profits in their investment in the host state.

Therefore, an International Agreement between countries are made, termed as Bilateral Investment Treaties (BITs) with a task of providing special rights and legal protection or aid to the private companies or even individuals of foreign national whenever they invest in a foreign country.

Since arguments or disputes in negotiations and contracts between the parties having different interests is possible, an effective international dispute settlement mechanism for investment disputes was need of an hour so that a secure and hassle free commerce relations for an investor in a foreign State and host state could be established, if both of their countries have a bilateral treaties signed. Key feature of such treaties is to identify and analyze well in advance all the risks that are involved in the long-term relationship of foreign investment both commercially, with an investor point of view and legally keeping a host state perspective in mind, making it entirely different from that an ordinary trading of goods and money. Basically risks involved are not only

primarily during the investment but also due to certain import or export restrictions, political unrest in the host state, local government issues or even to the worse – riots or wars.[70]

Currently, proliferation of major BITs including investor–state dispute resolution provisions and others were observed, allowing an International Arbitration to overcome any event of investment disputes and preventing foreign investors to sue the host State.

So far, at present there are almost 3000 BITs worldwide involving numerous investors and countries. Among all the countries around the globe, Netherlands being the capital exporting country has concluded maximum nos. of countries (approximately 95).[71]

BITs Overview

As investing in any host state by a foreign national is always risk oriented, with risks more typical or peculiar then the risks involved in investing in own country, BITs are formed. Such Bilateral Investment Treaties are not for just insurance coverage purposes, but to resolve any other disputes or interference observed while investing through or with the aid of prevailing International Laws.

In recent trends, BITs were also signed or concluded between the developing countries or even between two developed countries, displaying the anxiousness or eagerness of the countries to encourage foreign investment in their respective countries. But with due course of time the risks involved in investments were also very significant. If discussed, then major risks involved could be various. To start with, there will be insecurity in an investor of illegally expropriation of assets by the host country or restrictions could be aroused in currency transfers in the host states or there will be favouring of national investor by a host country over a foreign investor.[72]

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[70] Huthoff Buruma, *Role Of Bilateral Investment Treaties*, 2 International Arbitration 12 (2011).

[71] Claudia T. Salomon et al., *Investment Treaty Arbitration: A Primer*, 1563 Latham & Watkins, Client alert-Latham & Watkins International Arbitration Practice (2013).

[72] Zeynep Akgul, The Development of International Arbitration on Bilateral Investment Treaties, Google Books 8 (Universal-Publishers 2008).

Now, as there is no any kind of multinational treaty on investment, BITs are major sources of international investment law. BITs focus is to accelerate and safeguard the investments made by nationals of one contracting state to the host state. Since 1959, when first BIT was signed between Germany and Pakistan, there was a tremendous increase in BITs signed between the countries.[73] This has now revolutionized the foreign investments protection laws on international level.

INDIA AND BIT:

India being the fastest growing economy globally, commenced with enforcing its first BIT with United Kingdom in 1994 and since that India entered into BIT with almost all the European countries including Germany, Italy, Netherlands, France, Belgium, Switzerland, Denmark, Poland, Indonesia and Sweden. Besides them, India after year 2000 also entered into BITs with developing countries of the world as Saudi Arabia, Thailand, Mexico, Argentina and importantly China. This summed up to almost 86 countries since 1994. Moreover, India also signed treaties with certain Least Developed Countries (LDCs) that includes Sudan, Bangladesh, Mozambique and sincere efforts are made to have a Bilateral Investment Treaty with Canada and USA.[74]

Such initiation of BITs by Government of India offered optimum conditions and treaty based protection to all the foreign investors. Certain example depicting the same was India-Singapore Comprehensive Economic Corporation Agreement (CECA) in which exemptions from import duties was granted to the investors for investing in the infrastructure sector. Such kinds of BIT benefits were unique with each and every country. Such uniqueness brought a huge inflow of investment and with that transfer or exchange of technologies and culture.[75]

Although each BIT India entered into was unique with the other BITs there were certain similarities or in common in the form of specific rights for all the BITs. Most important was one

[73] *Supra* note 2.

[74] Prabhash Ranjan, *India and Bilateral Investment Treaties- A Changing Landscape*, 29 ICSID review 419 (2014).

[75] Prateek Bagaria and Vyapak Desai, *Bilateral Investment Treaties and India*, Nitesh Desai Research and Aritcles (Nitesh desai associates). http://www.nishithdesai.com/information/research-and-articles/research-articles.html.

that in which security or protection was given to each investor in their investments and were not put into risks until and unless any reasonable or genuine terms.

BITs of India also have uniqueness in terms of not giving a right to make investment in India. Moreover, India also preserves the freedom to determine sectors in which foreign investments are open and according to what terms and conditions any foreign national can invest in those certain open sectors. According to all the BITs India entered into since 1994, the investments done, established or acquired will be in accordance to the Indian National Laws.

After each and every BIT made between the two States (countries) investments were reciprocally promoted and protected by the individuals or companies of both the States. Therefore, certain clauses becomes essential to be included with the BITs between India and the other, they are first the applicability, secondly Fair and Equitable Treatment and Full Protection and Security, thirdly National Treatment and Most –favoured Nation Treatment, next is expropriation and the lastly dispute settlement mechanism between both States and between Investor and the State. These can be discussed as under:[76]

- **Applicability**: This clause being one of the important parameters describing the uniqueness India has with its BITs with different countries. Like with few states as Egypt, Sweden, Romania, etc. BITs have a very limited scope with applicability is only to the investments that were made only after the BIT came into force, which means any dispute that might arisen before acting of the BIT shall be excluded. Besides that, foreign investors have a special provision of Special Purpose Vehicle (SPV) or Special Purpose Business (SPB) under the circumstance of foreign investor home State being not in BIT with India and he/she is willing to invest in India.
- **Fair and Equitable Treatment (FET) and Full Protection & Security (FPS):** FET principle was strongly attached to the genesis of a BIT. FET principle favours the foreign investors in terms of providing a stable and predictable legal framework and that was needed because majority of the successful investment claims were based on the breach of FET standards. Thus although the FET Standards are elastic standards they vary with

[76] *Supra* note 7.

different treaties. Therefore, with the long period of time, the four basic pillars were developed for the betterment in the dispute resolution system. They are namely as –

- Protection of legitimate expectations of investors.
- Transparency and Stability.
- Non-denial of justice.
- Prohibition of Coercion and Harassment

Another yet close principle of FIT is the Full Protection Security (FPS), which is actually protection from the physical violence against the assets of the investments. In India, there are several BITs which requires the host state to provide full protection and security to the investors. However, unlikely there are certain countries as Sri Lanka, Ghana, Egypt, Australia, etc. which does not have any FPS clause.

- **National Treatment and Most Favoured Nation Treatment:** National Treatment has always been an essential part of the Indian BITs. But with investment chapter of CECA of Singapore and Comprehensive Economic Partnership Agreement (CEPA) with Korea the Most Favoured Nation (MFN) Treatment principal is not present. Where the National Treatment ensures at par treatment to the foreign investor and are not subjected to any unfair treatment the MFN Treatment clauses entitles the foreign investor to claim any favourable right that are available with any other State having BIT with the host State. Still, both the National Treatment and MFN Treatment are not of absolute nature and are subjected to certain restrictions and conditions.
- **Expropriation:** As a well known fact and eve universally recognized that host states posses limited conditions for a right to expropriate investments of foreign investors and a legal expropriation must fulfil the following conditions –
  - It must have a public purpose.
  - It must not be discriminatory or arbitrary.
  - It must be conducted in accordance to the due procedures.
  - It must be accompanied by an adequate compensation.

Such expropriation could be of two types, explained as –

- Direct Expropriation – Whenever any host state formally takes title of the expropriated asset it will be categorised a Direct Expropriation.
- Indirect Expropriation - it happens only after a long drawn-out interference with the investment is there in order to divest the investor of host of incentives.

Indian BITs majorly follows Direct Expropriation and also Indian Constitution entails its principle under Article300A, where else Indirect Expropriation as always remains a highly debatable issue.

- **Investor-State Dispute Resolution:** It is considered to be the most enthusiastic factor for the foreign investors to invest in the host State. According to it, under a BIT an investor can directly proceed with arbitration against a State without approaching to its own government. Although Indian not being a member of the ICSID investors have an option of approaching to the ICSID Convention.

Dispute Settlement under Indian BITS (BIPA)

In India Article 9 and 10 of BIPA deals with dispute settlement under foreign investment and lays down the procedure to be followed in case of any disputes arising. A brief summary of the Articles is:

Article 9[77]: Settlement of Disputes between an Investor and a Contracting Party.

- Any dispute arising between an Investor and a Contracting Party be settled amicably through negotiations.
- dispute which has not been amicably settled within a period of six months may be submitted
  - for resolution
  - to international conciliation under UNICTRAL
- where Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but

[77] Bilateral Investment Promotion and Protection Agreement (BIPA), Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA) - Page 5: Ministry of Finance, Government of India, Art. 9, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=5.

conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration.

Article 10[78]: Disputes between the Contracting Parties.

- Disputes concerning application of this agreement shall be settled by negotiation.
- It must be settled within six months from the time the dispute arose, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

Claims of BITs against India

India stands 11th globally in the number of treaty claims. Although so many of the several other claims against India might not be available in the public domain, there are total 12 known and 17estimated treaty claims against India.[79]

In the first investment treaty award against India, the obligations to provide "effective means of asserting claims and enforcing rights" were breached by India in the tribunal in White Industries v Republic of India. Breaching of obligations was pursuant to 4(2) of the India-Australia BIT, read with 4(5) of the India – Kuwait BIT. Approximately four million Australian dollars with interest were ordered to India as a compensation amount to White Industries. Moreover, the unreasonable delayed Indian court procedure, especially Indian Supreme Court was also attributed by the tribunal. This was the only reason enforced an arbitral award favouring White Industries.[80]

Beside this, the Vodafone B.V. also filed a notice of dispute in 2012. The notice was a prerequisite by the Vodafone B.V. to commence arbitration under the India-Netherlands BIT. The claim was actually against the Indian government decision to enact India Finance Bill 2012. The "fair and equitable treatment" would be at stake due to amendment in the Finance Bill and

[78] *Id*. Art 10

[79] Gavin Pereira, *India's Obligations under Bilateral Investment Treaties (Part A): 'Bilateral Inhibiting Treaty?' — Investigating the Challenges that Bilateral Investment Treaties Pose to the Compulsory Licensing of Pervasive Technology Patent Pools* (2013), http://cis-india.org/a2k/blogs/bilateral-inhibiting-treaty-investigating-challenges-that-bilateral-investment-treaties-pose-to-compulsory-licensing-of-pervasive-technology-patent-pools.

[80] *Id.*

will retroactively tax the 2007 share-purchase agreement between Hutchinson Telecommunications International Ltd. and Vodafone.[81]

Dispute Resolution under India Australia BIT

The India and Australia bit exists from 26th February 1999. It was signed for a period of 10 years and could be terminated by any of the contracting parties after the period of 10 years by serving a 1 year notice. Article 12[82] and 13 of the BIT, state the provisions regarding the settlement of the disputes.

- Article 12: Settlement of disputes between an investor and a Contracting Party.
- Article 13[83]: Disputes between the Contracting Parties.

Whiteline Industry Case under India Australia BIT[84]

White Industries Australia Limited "White", an Australian company in 1989 signed a contract with Coal India Limited "Coal India" a Public Sector Undertaking. The contract was for supply of equipment and development of a Piparwar coal mine for a sum of 206.6 Australian dollars. Coal India encashed the bank guarantee of White at the time of dispute and in response White put forward arbitration proceedings against Coal India.

The arbitration consisted of three members and chaired at Paris before an International Chamber of Commerce (ICC) Tribunal. It was on 27th of May, 2002 that majority of arbitrators rendered AUD 4.08 million award amount as a First Award in favour of White.

Against the award decision by arbitrators, Coal India approached Calcutta High Court in 2002 September. Coal India protested for setting aside the Section 34 of the Arbitration and Conciliation Act, 1996 (Act). Meanwhile, even White approached Delhi High Court for the

[81] *Id.*

[82] Agreement between the Government of Australia and the Government Of The republic Of India On The Promotion And Protection Of Investments, Government of India, Government of Australia.

[83] *Id.*

[84] *White Industries* Australia Limited *v.* The Republic of *India* https://ilcurry.files.wordpress.com/.../white-industries-award-ilcurry.pdf.

enforcement of the award. Moreover, White also moved to Supreme Court of India for transfer of the Calcutta proceedings to Delhi High Court in October 2002, but later on withdrawn their application in January 2003. White also appealed for dismissal of Coal India application for setting aside the first award in Calcutta High Court but was rejected in November 2003. In-spite of rejection, the White again appealed before Division Bench of Calcutta High Court and was again dismissed in May 2004. Still not losing hopes White approached Supreme Court of India against the rejection of application by division bench of Calcutta High Court ("Set Aside Appeal"). This Set Aside Appeal remained pending in the Honourable Supreme Court of India from July 2004 to the December 2009.

White then initiated invoking provisions of the India-Australia BIT by writing to the Government of India. Under the BIT terms, on failure of negotiations between the two parties, the ad-hoc arbitral tribunal is constituted. In our case, one former judge and two international lawyers according to the UNCITRAL Rules of Arbitration were consisted of tribunal and were seated in London.

According to the Tribunal, India was found guilty of breaching its obligations to provide "effective means of asserting claims and enforcing rights" as per the award rendered on 30th November 2011. Thus the tribunal directed Coal India for paying claimable amount of first award as well as the arbitration expenses and the interest ("International Award").

DISPUTE RESOLUTION THROUGH ARBITRATION UNDER BITs

It was during early 1950's that adoption of series of resolutions were discussed in the U.N. General Assembly. Several recommendations were then addressed in order to promote private capital flows for the development of the un-developed and developing countries. As per the reports of the Secretary General several measures to design the assurance against the non-business risks or indemnification of the investor were initiated.[85]

[85] Christopher Dugan, Don Wallace Jr, Noah D. Rubins and Borzu Sabahi, Investor-State Arbitration, Google Books 45(Oxford University Press 2011).

As promoting the flow of private capital was desirable, four multilateral attempts after Second World War were made. To begin with was the Havana Charter on Trade and Employment with intention to create International Trade Organization (ITO).

After ITO setup, second attempt was a private initiative popularly called as Abs-Shawcross Draft Convention on Investments Abroad in 1959, but it failed to gain support from the governments worldwide.

Then direct approach to investment protection was favourable and therefore Draft Convention on the Protection of Foreign Property was the third and most direct attempt in order to promote private capital flows.

Therefore, fourth attempt was made almost at the same time of third attempt. This time it was the World Bank which drafted the multilateral convention on the investment after incorporating all the necessary corrections of previously attempted conventions and hugely relying on the Reports of the U.N. General Assembly. Undoubtedly World Bank was comparatively more productive forum for conducting the studies. Several distinctive features were proposed in the World's Bank dispute resolution mechanism, which lately became the foundation for the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[86]

It was only then in March 1965 that several preparatory efforts were texted as the Washington Convention and then presented among all the members of the World Bank for signature and ratification. Enforcement of the convention was then from 14th September 1966 onwards.

BITs were developed during the New International Economic Order (NIEO) period in order to ensure at least certain definite rules with respect to the foreign investment between the two countries. If such treaties would not have been encouraged then there might have erosion of customary international law in terms of foreign investment. Moreover, to curtail expropriation of foreign investment and to check irreconcilability of the two parties, especially at the multilateral

[86] *Id*. at 46-50.

platform, the treaties were needed. This will also be in the best interest of the developing and developed countries.[87]

This further resulted in ambitious policy framing among the developed countries and concluding reciprocal BITs with the developing countries on an individual basis.

The OECD Draft Convention on the protection of foreign property came as an model treaty or ideal treaty with OECD members incorporating in various bilateral investment treaties even today. Now, standard wordings and definition clauses are practiced among the OECD treaties permitting national control over the admission of foreign investment and substantial standards of treatment.

Therefore, this resulted in formation of own model treaties by some of the developed countries, especially United States of America and United Kingdom. However, they were broadly similar to the OECD text. The 2004 U.S. Model treaty does not follow the conventional OECD Model. It was rather more significantly detailed and complex in terms of development of jurispendence through arbitral awards. Some experts claimed the 2004 US Model to be curtailment of protection available to the investors under the previous models.[88]

Although there was general uniformity prevailing in the BITs and with the evolution of time, the negotiations conflicts were gradually fading with respect to the level of protection among the developed and developing countries. Certain noticeable differences were emerged among the two parties in terms of appropriate scope and nature of treatment standards.

The Course of an Investment Arbitration[89]

In terms of commercial arbitrations, the investment arbitrations resemble in various ways, still they differ with each other. Moreover, sovereign state presence always transforms the nature and tone of the dispute in view of the investment arbitrations.

[87] *Id*. at 51.

[88] *Id*. at 52-53

[89] *Id*. at 117-147.

Waiting Period – Various BITs have a provision for amicably negotiating the dispute arisen among the host and the contracting states. During this waiting period, parties could seek amicable settlement in local courts or administrative tribunals. With certain BITs there is a provision of 'cooling off' period of generally six months that is the time elapsed between the government act that initiated the dispute and the commencement of the arbitral proceedings. Normally looking into the expenses and risks involved investors seeks amicable settlement as a desirable solution.

Local Remedies – According to the Customary International Law, until the available local remedies are not considered by the investor, the home state of a foreign investor cannot adopt the claim of investor. But as an exceptional case, foreign investor is excused from exhausting the available local remedies only if it is proved that the remedies are meaningless.

Nowadays, major BITs have relieved themselves with these exhaustive requirements. Still few BITs have clause of exhaustive requirement.

- **Notice of Claim**

The claim notice is undoubtedly a very simple document that can be filed relatively quicker and may not be required under relevant investment treaty to contract. Still foreign investors encourage it a lot since it gave them a cushion at the time of dispute crisis, making the concerned government aware that international liability could arose.

- **Request for Arbitration**

The "Request for Arbitration" is particularly a set of prescribed documents that must be filed by a claimant once the necessary waiting period or cooling off period for the amicable settlement are exhausted and the claimant is eager to proceed with arbitration procedures. There are several arbitral rules that contain the detailed instructions that needed to be incorporated in Request for Arbitration. Explicitly is provided by the International Centre for the Settlement of Investment Disputes (ICSID) to effect services of process on the host state.

- **Registration or Approval by Arbitral Institution-**

As per the ICSID rules and Washington Convention, the screening requests for arbitration are to be followed before approving arbitration for any case. Under the ICSID regime, its Secretary-General reviews all the cases just in order to analyze if the claimant case is within the jurisdiction of the centre or not. Noticeably, the Secretary-General is not entitled for in-depth analysis of the jurisdictional issues. The only aim for registration is thus to eliminate the frivolous claims, clearly outside the scope of Washington Convention. Interestingly, this whole concept of Registration or Approval by Arbitral Institution is only according to the facts and materials submitted by the claimant in its request. The respondent generally has no chance or opportunity to oppose or reject the registration. No re-appeal or any opportunity is left with the claimant if ICSID Secretary –General refuses to register a Request for Arbitration. The provisions of registration are varying with the different conventions likely ICC and UNCITRAL.

- **Default of a Party**

In rare cases, host state refuses to participate in arbitration process during the course of proceedings. However, submission to arbitrate is applicable for both the parties; the non-corporation of any single party will be non-permissible for the sake of effectiveness of the dispute resolution system. And therefore arbitration will proceed to a "default" ruling despite of the fact that only one party has presented its case.

- **Composition of Tribunal**

    - ***Appointment of Arbitrators-***

    Other than the ICSID regime, majority of the international arbitration tribunals appoints two arbitrators of the choice of both the parties individually. The third arbitrator is appointed by the two-party appointed members, which later on serves as a tribunal chairman. But this result in an increased expertise level, huge breadths of knowledge and consultation that no remedy in stipulated time is met then that of a sole arbitrator.

    Therefore, absent contrary agreement, was something provided by the ICSID Rules and the Washington Convention, according to which, not the party-appointed

arbitrators are jointly to select the chairman of the tribunal. Rather, one party suggests two names to other party to be chosen as potential tribunal chairman and then the other party either accepts one of the names or counter it with two names proposal from their side.

Still if no agreement is reached within 90 days, on request by either of the party, the ICSID Secretariat will appoint the Tribunal Chairman. Generally, ICSID Secretariat is only left with the task of appointing a President of the Tribunal.

- ***Situs of Arbitration-***

Unlikely other regimes, the ICSID and UNCITRAL Conventions, parties are free to choose any arbitral situs with proceedings to be conducted in mutually designated one or more languages. However, if any kind of contrary agreement is not signed between the two parties, the Washington Convention and the ICSID Arbitral Rules mentions that the seat of arbitration will only be at the Washington D.C.

- ***Language of Arbitration-***

In absence of any party agreement, the arbitral tribunal has full discretion to adopt any language as UNCITRAL Rules does not have any default language. Therefore, arbitral tribunal is independent to choose one or more languages for the arbitral proceedings. Meanwhile ICSID Rules specifies French, English and Spanish as their official languages and if any other language is to be selected by the parties then it would be with prior approval from the tribunal. In case of no agreement is reached between the two parties then each arty may select one of the three official languages and the proceedings will be in both the languages.

- **Initial Session of the Tribunal-**

The session which is basically a call to parties to attend either in person, or an initial conference or hearing or telephonic conversation to conform the party's agreement and the decision on tribunal issues of situs, language, arbitral rules and modifications by both the parties. Also, initial sessions are also held to establish briefing schedule among the parties and to receive a Statement of Claim and Statement of Defence from the claimant and respondent respectively. In

fact, under the ICC Rules, in the initial session, the Terms of Reference are also often negotiated, drafted and signed between the two parties. The popular sequence during it is as follows-

1. Arbitrator – Ordered interim relief.
2. Review of invariable case law.
    a. Obtaining evidence.
    b. Securing financial guarantees.
    c. Preserving confidentiality.
    d. Enjoining parallel domestic proceedings and protection rights in dispute.

- **Jurisdictional Phase-**

Soon after commencement of arbitration the tribunal may divide the proceedings into two parts, that is, jurisdiction and merits. Sometimes even in three parts, that is, jurisdiction, liability and damages. This bifurcation or trifurcation may or may not be as per the request by either of the party.

These divisions are designed in order to reduce the cost incurred by both the parties and will be beyond the scope of tribunal competence. Moreover, the diversions also facilitates the tribunal to held discussions or hearings on the particular core issues one at a time and also provides an opportunity to claimant to first overcome the jurisdictional objections and then move ahead with the merits. This effectively reduces arbitration costs, clarifies complex legal questionnaire and most importantly discourages the frivolous claims.

LAWS GOVERNING INVESTMENT ARBITRATION:

Wide range of dispute resolution procedures were laid down in BITs, usually procedures were commencing from time bound negotiations to use of diplomatic measures. On account of failure of these step, International Convention for Settlement of International Disputes ("ICSID Convention") were provided by several BITs for dispute resolution. ICSID Convention restricts the host state's invocation of sovereign immunity defence. It also provided direct enforcement of

awards rendered under its aegis.[90] Washington D.C. is the headquarters for International Centre for Settlement of Investment Disputes ("ICSID") for administering the arbitrations under the ICSID Convention. Even for non-contracting states, ICSID has a set of Additional Facility Rules for disputes settlement.

Although, India not being an ICSID Convention member, its proceedings would be relevant as per Indian context in two situations. First situation is one in which host country is a part of ICSID Convention as an outbound Indian investor. Second is when India agrees to submit to arbitration under the Additional Facility Rules.

Above all, the ICSID Convention is also favoured due to number of published decisions available from disputes submitted prior and thus ICSID Convention remains a focal point in the international investment arbitration development. Arbitrators during an ad-hoc tribunals, also tends to follow the conventional reasoning of prior decisions leading to consistency in the interpretation of the common terms in BITs. Under the UNCITRAL Rules for Arbitration the ad-hoc tribunal is the most likely dispute resolution. The law applied in the proceedings under international treaty is generally public international law along with precedents developed in international investment law.

As an advantage note, BITs and FTAs generally allow investors to initiate arbitration directly against national government of the country, on account of breach of substantive protections and treatment standards highlighted above. Even this dispute resolution is not a real arbitration in true sense, its procedure is referred as "investor – state arbitration".[91]

As once defined by Prof Doug Jones AO, arbitration is a formal dispute resolution process in which two or more parties agree to refer their disputes to an independent third party for

[90] Article 54 of the ICSID Convention: "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*"

[91] Russell Thirgood, *Bilateral Investment Treaties - providing unlimited opportunities*, The Global Legal post (Jan. 7, 2014), http://www.globallegalpost.com/global-view/bilateral-investment-treaties---providing-unlimited-opportunities-58721287/.

determination both domestically and internationally. If compared, the investor-state arbitration under a BIT doesn't arise from an agreement between the investor and a contracting government. The clauses of dispute resolution varies from treaty to treaty while formulation. All those parties contracted with Australia under BITs, first seeks to settle disputes through negotiations or consultation. On failing, investor will be left to decide between dispute resolutions through International Centre for the Settlement of the Investment Dispute (ICSID) or through ad-hoc tribunal arbitration under UNCITRAL Arbitration Rules after elapsing a certain period of time.[92]

Since 14th October, 1966, ICSID Convention (popularly called as Washington Convention) is settling the disputes between States and Nationals of Other States. And as on date almost 145 countries have ratified the Washington Convention and it has emerged as an eminent forum for resolving investor-state foreign investment disputes. Moreover, under investor-state arbitration countries like India and Hong Kong, the UNCITRAL Arbitration Rules are followed as these countries are not signatories to the Washington Convention.[93]

With the time, the ICSID has become the preferable forum for foreign investment disputes resolution, to ascertain the reasons, first is limitation of the review of the ICSID award, under the international arbitration jurisdiction to review the award will only be with the highest court of the host state. Secondly, declaration of no special enforcement procedure requirement for ICSID awards by all the signatories of the Washington Convention.[94]

There are various dispute resolution modes; most commonly is submitting dispute to arbitration under the ICSID Convention rules and regulations. Other mode is ad-hoc arbitration under the rules of United Nations Commission on International Trade Law (UNCITRAL) and arbitration mode through rules of the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce.

[92] *Id.*

[93] *Id.*

[94] *Id.*

International Arbitration under Bilateral Investment Treaties (BITs)[95]

Basically, investors are free to follow any arbitral institutions identified in the treaty, wherever bilateral investment treaty is exists, Most of the BITs allow investors with following arbitration institutes for dispute resolution, namely –

a. International Centre for the Settlement of Investment Dispute (ICSID).
b. International Chamber of Commerce International Court of Arbitration (ICC).
c. Stockholm Chamber of Commerce (SCC).

1. International Centre for Settlement of Investment Disputes (ICSID)

This official body of the World Bank, was established under the 1965 ICSID Convention and is based in Washington D.C. Aim of this convention was just to offer a neutral forum between host states and investors for disputes resolution and stimulate foreign investment. ICSID Conventions just administers arbitration proceedings and functions accordingly. Thus the ICSID awards have a comparatively higher status in recognition and enforcement of awards then the normal awards.[96]

- **ICSID jurisdiction**

As soon as a contract is signed between an investor and the host state, the following are established:

1. A relevant BIT is applicable;
2. Under the BIT, investor is protected;
3. The investor's investment qualifies as an "investment" under the BIT; and

[95] Girard Gibbs LLP and Lazareff Le Bars AARPI, *Investment Arbitration*, internationalarbitrationlaw, http://www.internationalarbitrationlaw.com/investment-arbitration/.

[96] Huthoff Buruma, *Role Of Bilateral Investment Treaties*, 2 International Arbitration 31 (2011).

4. Dispute resolution is applicable as per the ICSID Convention.[97]

- **Regulation and Rules-**

For ICSID to have jurisdiction in case of dispute resolution, the investor must comply with the criteria of the ICSID Convention. As per the Article 25(1) of the ICSID Convention, scope is defined as "The jurisdiction of the Centre, extending to any legal dispute arising between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State in between the investment. After the parties have given their consent in written, no party shall withdraw its consent unilaterally."

Article 25(1) thus is commonly interpreted as requiring the fulfilment of the following -

- **Mandatory criteria[98]:**

1. A legal dispute arising directly out of an investment;
2. The dispute is held between a contracting state and the national of another contracting state; and
3. For dispute resolution, the parties to give their consent in writing to submit the dispute to ICSID.

Even though if the parties have contractually agreed to submit a dispute to ICSID arbitration, if the following mandatory jurisdictional requirements are not met, ICSID must and will refuse to consider a dispute,

The first criterion:

Investment- In contrast to most of the BITs, the ICSID Convention does not include a definition of investment. The ICSID Convention criteria should also met in addition to the

[97] *Id*. at 32

[98] Id. 32-34.

criteria set by the relevant BITs. In general, if an investment meets certain ICSID conventions then they are qualified to have found a project or transaction to qualify as an investment. Based on Turkey-Netherlands BIT, in case of Saba Fakes v. Turkey, the tribunal considered that while Article 25(1) of the ICSID Convention provided an objective definition of an investment. Three criteria namely (i) a contribution, (ii)a certain duration, and (iii) an element of risk is comprised in this definition. 40

The second criterion:

A national of another contracting state – According to the Article 25(2) of the ICSID Convention a specific definition of a national of a Contracting state was specified.41 Unlike various BITS, Article 25(2) is distinguished between natural persons (i.e. individuals) and juridical persons (e.g. companies).[99]

Third criterion:

Consent of the parties – Most often, the consent is not immediately apparent as mostly there is non-existence of contract between the investor and a host state. However, parties express their consent generally in two steps before ICSID arbitrations proceedings. As a first step, in BIT, host state includes a standing offer to arbitrate as per the claims based on investments by nationals or companies of the contracting staff. Secondly, investor consents

[99] **Natural persons –** In order to determine the natural person's nationality; two dates are considered, first on which dispute to arbitration was submitted by the consent of both the parties and another one is that date in which ICSID registers the request for arbitration. Accordingly as per the Article 25(2), jurisdiction is denied to the natural person having on either date nationality of the host state.
Juridical persons – Complications are even more complex in determining the nationality of the judicial person especially where complex investment structures are prevailing. Whether National of a judicial person is of a contracting state or not depends a lot on wording made in the agreement between the parties with relevant BIT. The criteria for Nationality of judicial person, thus varies with the BITs. As in a Dutch model BIT, company's nationality is not determined by where the company was constituted, rather it is determined by natural person having nationality of the contracting state controlling it directly or indirectly or by legal persons constituted under the law of that contracting state. Just for an illustration, Dutch company is acquiring shares in a polish company for the construction of a football stadium for 2012 European Championships. In such a case, Polish subsidiary being treated as a Dutch company shall be granted ICSID jurisdiction for any claim or dispute resolution against Poland. Moreover, as per Article 24(2) of the ICSID convention, companies are felicitated with ample relevant time for determining company's nationality on date at which the parties consented to submit their disputes for arbitration. Also, as usually the case is, if company is considered to be possessing same nationality it must be having same nationality continuously from the date of dispute to the date of registration request for ICSID arbitration

by accepting offer of filing a request for arbitration that is, completing the agreement to arbitrate. In some way it is advantageous for the investors as it makes them independent of having dependency on the government taking up the claim on its behalf, thus inheriting the diplomatic protection.

2. Stockholm Chamber of Commerce Rules[100]

Since its establishment in 1917, the Arbitration Institute of Stockholm Chamber of Commerce (SCC) was considered to be a separate entity within the chamber. It was frequently involved in disputes resolution of the Soviets with the Western companies and was considered as a neutral ground by all the major Eastern Bloc entities for commercial disputes resolution. By the end of November 2006 and downfall of the Soviet Union, plenty of investment arbitration cases were filed at the SCC, majorly involving respondent states of Commonwealth of Independent States or the Baltic region.

3. International Chamber of commerce Rules[101]

ICC being involved as an advocate for multi-national businesses and initiatives before the International organizations and national governments, even including the World Trade Organization (WTO) was formed in 1923 as an International Court of Arbitration. There were several revisions in the ICC Arbitration Rules after its first promulgation in 1923. The amendment made in 1998 was considered to be revolutionary in terms of efficient dispute resolution system. Nowadays ICC Arbitrations are not fashioned and are less popularly involved in small fraction of BITs and national investment. None of the major regional treaties chose an ICC Dispute Resolution rules.

[100] *Supra* note. at 77-79.

[101] *Id.*

Concluding Remarks

The above report submitted the origin of BITs and the India stand on BIT. If journey for BIT in India is mapped then it will reveal that BIT programme was launched years back with an aim to protect and regulate the foreign investments by accepting all the international treaty law. But with due course of time, although foreign investments accelerated at great pace the Indian BIT remain standstill without any review or necessary amendments. It was only after one adverse arbitral award and almost more than half a dozen ITA notices compelled New Delhi to revive its Bilateral Investment Treaties.

Therefore, treaties so formed were inadequate and government then decided to inculcate certain provisions into treaties that would prevent any foreign investor to drag India to arbitration instead of resolving the disputes through prevailing judicial authority. This could have averted the Vodafone Tax dispute and in order to avoid any such future incidences the draft Cabinet note was already circulated by Indian Ministry of Finance proposing the necessary amendments. Moreover, the provisions so made will not be applicable to the taxation measures or issuance of compulsory licence under the rights laws of intellectual property.

Once the new draft proposed by Cabinet gets a nod, government will make an attempt to renegotiate for amendments as per new draft in the already existing 82 treaties and also negotiate for all the upcoming future investment agreements.

The new draft has been setup in accordance to non-consideration of protection to a holding company or an investment company. This will prevent the disputes that arose with the companies that are setup in Mauritius like favourable tax jurisdictions to route their investments into India.

In spite of all, for any sort of legal recourses in India, foreign investors also won't have bilateral investment promotion and protection agreements (BIPA) access if they have a contract signed with the local investor or the local government. On doing so, India will prevent itself from claimants as about 17 companies that even includes Vodafone Holdings BV, Deutsche Telekom,

Sistema, TCI Cyprus Holdings, Children's Investment Fund have served arbitration notices to India under BIPA.[102]

It is because of these notices, worldwide hostile environment from investment prospectus was created in India among foreign investors and investors like White Industries Australia fetched their desirable compensation amount along with interest in the arbitration award.

Such Bilateral Investments Treaties that were framed on assurance of fair and equitable treatment to all investments through provisions like MFN Treatment or National Treatment and by dispute resolution mechanism, the encouragement is generated for an investor to invest in India without facing any sort of indiscrimination.

According to the statement by a senior finance ministry official, the so-called rejuvenated draft Cabinet has already been approved by the distinguished committee of secretaries and opinions or views of the Department of Industrial Policy and Promotion will be put on desk of Cabinet for final drafting of the necessary provisions to be made.

However, the above mentioned so called provisions of the investment agreements will not be extended to measures that are taken under double-taxation avoidance or tax-information exchange agreements.

[102] Deepshikha sikarwar, *New Bilateral Investment Treaties Will Help India Avoid Arbitration*, The Economic Times, Dec. 14, 2014, http://articles.economictimes.indiatimes.com/2014-12-16/news/57112387_1_investment-treaty-coal-india-tci-cyprus-holdings.

SEXUAL VIOLENCE AGAINST WOMEN : A SOCIO-LEGAL STUDY

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INTRODUCTION

Sexual violence against women is often seen as an assault against her body but more importantly it is a negation of her integrity and personhood. The fear of sexual violence has been a powerful factor in restricting women's behaviour and sense of freedom. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It not only negates the human rights of the victim concerned but at a larger level ,affects the society at large by lowering down the development prospects as it directly intrude upon the potential of nearly half of the human population i.e., women.[103] The human rights of women include their right to have control over and decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health ,free of coercion, discrimination and violence[104]. However these promises are yet to be redeemed for women because various forms of sexual violence e.g. Rape, Sexual assault, Domestic violence etc. are the violation of these rights[105].

Our Government's inability to protect women and children from rape and other forms sexual violence undermines its commitment to uphold the rights of Indian Women. International attention to sexual attacks in India led to a new law, but should have spurred the government towards systemic changes to make real progress on this issue, The government has also failed to

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[103] Fatima Ehlesham Siddiqi,(Women and Human Rights), Kanishka Publishers, Distributors, New Delhi, P 569, 2001.

[104] Fourth World Conference ,Platform for Action1995,para 96.

[105] Indira Jaisingh Times of India ,31st December 2012.

keep its promises of reforms to create a responsive police force. Human Rights Watch Report 2013 says that incidents of violence against women and girls continued in 2012, with increased reports of sexual assault, including against those with disabilities, India has yet to enact amendments to reform its penal laws to recognize a wide range of sexual offences.[106] Under the Convention on the Elimination of Discrimination against Women, gender-based violence is recognised as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men[107].

FORMS OF SEXUAL VIOLENCE: Sexual Violence in India manifests itself in various forms, which are mentioned below:

1. **RAPE:** Rape is the most overt, violent and aggressive forms of sexual violence. Rape can occur anywhere, even in the family, where it can take the form of a marital rape or incest. It occurs within the community, where a women can fell prey to any abuser. It is the destruction of dignity through invasion of another person's body without her consent. It is an exertion of power, an act of subjugation, a statement that divests the victim of her right of control over herself and renders her an object. It is meant to objectify her. The dilution of the horror, by using words like "he lost control" is unjustified and is an insult to a woman. The violator does not lose control, but exerts control through the act of unspeakable violence[108]. An increasing trend in the incidence of rape in India has been observed during the periods 2009 - 2012. These cases have reported a decline of 0.3% in the year 2009 over 2008, an increase of 3.6% in 2010 over 2009 and an increase of 9.2% in the year 2011 over the year 2010 and further increase of 3.0% in the year 2012 over 2011. Madhya Pradesh has reported highest number of rape cases (3,425) accounting for 13.7% of total such cases reported in the country. Mizoram has reported the highest crime rate of 20.8 as compared to national average of 4.3. Rape cases have been further

[106] www.economictimes.com ,visited on2nd Feb 2013.

[107] http://www.un.org/womenwatch. visited on 12 January 2014.

[108] Ibid.

categorised as incest rape and other rape cases. There were 24,915 victims of rape out of 24,923 reported rape cases in the country during the year 2012. 12.5% (3,125) of the total victims of rape were girls under 14 years of age, while 23.9% (5,957 victims) were teenaged girls (14-18 years). 50.2% (12,511 victims) were women in the age-group 18-30 years. However, 12.8% (3,187 victims) victims were in the age-group of 30-50 years while 0.05% (135 victims) was over 50 years of age. Offenders were known to the victims in as many as in 24,470 (98.2%) cases. Parents / close family members were involved in 1.6% (393 out of 24,470 cases) of these cases, neighbours were involved in 34.7% cases (8,484 out of 24,470 cases) and relatives were involved in 6.5% (1,585 out of 24,470 cases) cases[109].

2. **MARITAL RAPE:** The term 'marital rape' refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. It is any unwanted sexual acts by a spouse or ex-spouse committed without consent or against a person's will. In the World 51 Countries, have criminalized marital rape but unfortunately India is not one of them. In our country Marital rape is a result of the patriarchal nature of society where man has every right to do as he pleases with his wife. Men want to show their wives that they are the strong ones in the relationship and hence, by forcing them to have sex with them, they shift the power equation in their favour. Another reason is that, in India girls are married at an extremely young age so they do not possess those guts to restrict the husbands behaviour. The prevalent social evils in society also help in contributing to this crime. As the girl child is still not considered to be an important member of society and it has been seen, by the way of studies conducted, that men force their wives to have sex in fervent hope that they may have a son. Forceful sex is also seen as a chastisement if the wife does not bring in enough dowry. Sex is being used as a bargaining tool in most homes.
3. **INCEST:** One common form of sexual abuse of children is incest, which has been defined as sexual contact that occurs between family members. Most incest occurs between older male relatives and younger female children in families. Other instances of

[109] Source: NCRB; www.ncrb.gov.in,visited on 22 March 2014.

sexual abuse of children are most often committed by friends who have access to children within the family setting and by people normally trusted by parents e.g.doctors, dentists, teachers, etc. Incest and sexual abuse of children take many forms and may include sexually suggestive language, prolonged kissing, looking, and petting; vaginal and/or anal intercourse; and oral sex. Incest rape cases have increased by 46.8% from 267 cases in 2011 to 392 cases in 2012 as compared to 3.0% increase in overall rape cases. Maharashtra (77 cases) has accounted for the highest (19.6%) of the total such cases reported in the country[110].

4. **SEXUAL HARASSMENT AT WORKPLACES:** Sexual Harassment is an alternative and indirect form of sexual violence. Employers abuse their authority to seek sexual favours from their female co-workers or subordinates, sometimes promising promotions or other forms of career advancement or simply creating an untenable and hostile work environment. Women who refuse to give in to such unwanted sexual advances often run the risk of anything from demotion to dismissal. Sexual harassment constitutes a form of sex discrimination. It not only degrades the women, but reinforces and reflects the idea of non professionalism on the part of women workers, who are consequently regarded as less able to perform their duties than their male colleagues. Supreme Court in the landmark judgment of Vishaka *v.* State of Rajasthan[111] observed that sexual harassment is the violation of fundamental rights guaranteed under Article 14,15,21 ,19(1) (g) of the Constitution of India. In this case Vishaka, a non-governmental organization, filed a petition following an alleged gang rape of a social worker in Rajasthan. In the absence of any specific law against sexual harassment at workplace, Supreme Court laid down some guidelines. It was after this case that sexual harassment came to be categorized as human rights violation. The Supreme Court defined sexual harassment in the workplace as an unwelcome sexual gesture or behavior, whether directly or indirectly and it includes Sexually coloured remarks, Physical contact and advances, Showing pornography,

[110]Ibid.

[111] AIR 1997 SC 2011.

Demand or request for sexual favours, Any other unwelcome physical, verbal/non-verbal conduct which is sexual in nature

5. **FORCED PROSTITUTION:** Prostitution is promiscuous sexual intercourse by a women for hire, for money or kind. There are various causes of prostitution such as economic, cultural, social, psychological, etc. Children and women from poor families are coerced into prostitution. Nearly two million children are abused and trafficked globally every year. South Asia and South East Asia take the lead in the volume of trafficking in children for sexual exploitation[112]. In India the most tragic is sale of daughters aged between 14-18 years to pimps for money by their fathers knowingly that they will be engaged in prostitution. Trafficking in women and children and put them into forced prostitution is one of the worst form of sexual violence against women and children, and it is grave violation of human rights.
6. **OUTGRAGING THE MODESTY OF A WOMEN:** The Indian Penal Code under section 354 makes assault or uses of criminal force to be a crime. Incidents of Assault on Women with Intent to outrage her Modesty in the country in 2012 have increased by 5.5% over the previous year (42,968 cases). Madhya Pradesh has reported the highest incidence (6,655) amounting to 14.7% of total such incidences. Kerala has reported the highest crime rate (20.9) as compared to the National average of 7.7.[113] In Rupan Deol Bajaj v. Kanwar Pal Singh GIll[114], The Supreme Court held that slapping a woman on her posterior amounted to outraging of her modesty within sections 354 and 509 IPC. The ultimate test for ascertaining whether the modesty has been outraged is the action of the offender such as would be perceived as one, which is capable of shocking the sense of decency of women.

INITIATIVES UNDERTAKEN TO CURB SEXUAL VOILENCE:

[112] The Magnitude of The Problem ,Trade In Human Misery –Asia Region ,An Information Folder ‘,UNIFEM,1998.

[113] Supra Note 7.

[114] (1996) SC 309.

The most important factor for sexual violence is the historically rooted inequality of power relations between men and women. The patriarchal system which control all social institutions and relationships signifies that model of society in which one gender (male) dominates and controls the other (female). But now fortunately, after 16/12 It is heartening to see for the first time, a large number of people on the streets protesting against sexual abuse of women. It is a new generation which brings hope that the tendency for violence against women is about to end as men of future generation will not tolerate such violence.

From the side of Government also it also set up Justice J.S Verma Commission to review current laws on aggravated sexual assault following the brutal gang rape of a young girl in Delhi on December 16 2012. The Commission submitted its report to the government on 23rd January 2013. The committee has taken less than a month to scan hundreds of representations on the issue agitating the country. Before finalizing the report, the committee comprising *former Chief Justice of India JS Verma, Justice Leila Seth (former Chief Justice of Himachal HC) and Gopal Subramanian (former Solicitor General)* met over 100 women's representatives from across India. Importantly, the commission expanded its area beyond the terms of reference the government set for it. The Home Ministry notification had asked it to review the present laws to provide speedier justice and enhanced punishment in cases of aggravated sexual assault. But the committee has looked at the context of sexual assault, including issues of human trafficking, missing children and beggary as factors behind crimes[115]. The commission recommended a comprehensive Criminal Law Amendment Bill that defines sexual assault to address penetrative assault as well as non-penetrative sexual offences such as molestation, stalking and stripping. Marital rape is also likely to be recommended for inclusion in the sexual assault law for the first time. Currently, marital rape is legal. The panel also expected to seek repeal of Sections 354 and 509 of the IPC which contain archaic notions of outraging the modesty of women and recommend their replacement with a clear gradation of non-penetrative sexual offences along with punishments depending on the violation of women's bodily integrity.

[115] The Tribune,24 January 2013.

PASSING OF CRIMINAL LAW (AMENDMENT) ACT, 2013:

The December 16 gang rape was one such criminal incident that had led to wide changes in rape laws in India. The brutal assault on the 23-year-old woman and her subsequent death in a Singapore hospital triggered public outrage leading to a sustained public campaign for women's safety and change in rape laws[116]. Acting on the recommendations of the Verma Committee, Parliament passed the Criminal Law (Amendment) Act 2013 that widened the definition of rape and also provided for death penalty in rape cases that cause death of the victim or leave her in a vegetative state. It also created several new offences such as causing grievous hurt through acid attacks, sexual harassment, use of criminal force on a woman with intent to disrobe, voyeurism and stalking. A Criminal Law (Amendment) Act, 2013 passed to amend the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012[117].

SALIENT FEATURES OF CRIMINAL LAW (AMENDMENT) ACT, 2013:

1. **Acid attack:** For the first time acid attack has been defined as a separate IPC offence. It also defines acid attack as a crime besides granting a victim the right to self-defence. After Section 326 of the Indian Penal code new section 326A and 326B was inserted by the Criminal law (Amendment) Act, 2013. Section 326A imposing a minimum 10-year jail term for perpetrators of such acts. The offence under these Sections is gender neutral. Specific offence Punishable with 10 years or life imprisonment and reasonable fine amount to meet medical expenses. The fine imposed under this section shall be paid to the victim. Section 326B provides punishment for attempt to acid attacks .Imprisonment under this section not less

[116] www.hindustantimes.com

[117] It amends Sections 100, 228A, 354, 370, 370A, 375, 376, 376A, 376B, 376C, 376D and 509 of Indian Penal Code, 1860. It also inserts new Sections 166A, 166B, 326A, 326B, 354A, 354B, 354C and 354D in Indian Penal Code, 1860. It also amends Sections 26, 54A, 154, 160, 161, 164, 173, 197, 273, 309, 327 and First Schedule of Code of Criminal Procedure, 1973. It also inserts new Sections 357B and 357C of Code of Criminal Procedure, 1973. It also amends Sections 114, 119 and 146 of Indian Evidence Act, 1872. It also inserts new sections 53A in Indian Evidence Act, 1872. It also amends section 42 of Protection of Children from Sexual Offences Act, 2012.

than five years, but which may extend to seven years and shall also be liable to fine.

2. **Outraging the modesty of women**: After Section 354 of the Indian Penal Code new sections 354A ,354B, 354C, 354D was inserted by the Criminal law (Amendment)Act ,2013. The punishment under Section 354 ,IPC has been enhanced by the Act of 2013.The Act said that such an offence be punished with a minimum of one year to a maximum of five years of imprisonment and shall also be liable to fine .
3. **Sexual harassment and punishment for sexual harassment**: Section 354A was inserted in Indian Penal Code by the Criminal law (Amendment)Act ,2013 . The offence under this section no longer gender neutral. The offence under this section only committed by man against women. This Section provides that if a man committing any of the following acts –
   a. physical contact and advances involving unwelcome and explicit sexual overtures;
   b. a demand or request for sexual favours;
   c. showing pornography against the will of a women;
   d. making sexually coloured remarks;

   shall be guilty of the offence of sexual harassment. Any person who commits the offence specified in clause(i) or clause(ii) or clause(iii) shall be punished with rigorous imprisonment for a term which may extend to three years or fine ,or with both. Any man who commits the offence of making sexually coloured remarks shall be punished with imprisonment of either description for a period which may extend to one year ,or with fine or with both.
4. **Assault or use of criminal force to woman with intent to disrobe:** Section 354B was inserted in the Indian Penal Code by the Criminal law (Amendment)Act ,2013 . This Sections provides that "whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place, shall be punished with imprisonment of either

description for a term which shall not be less than three years, but which may extend to seven years and shall also be liable to fine"

5. **Voyeurism:** Section 354C was inserted in the Indian Penal Code by the Criminal law (Amendment) Act, 2013. This section provides that "whoever watches a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator, or by any other person at the behest of the perpetrator" would be charged with voyeurism. This will include "a sexual act that is not of a kind ordinarily done in public," besides dissemination of images or other material even if it was taken with the victim's consent. For voyeurism, the panel had recommended imprisonment of 1-3 years with fine on first conviction and 3-7 years for subsequent conviction.
6. **Stalking :** The law, for the first time, defines stalking as non-bailable offences if repeated for a second time.[118]If someone follows the women with her interest and makes her life miserable is an offence then he shall be punishable with 1 to 3 years imprisonment for the first offence which is Bailable offence and if subsequently same offence is committed by same man then he would be punished with imprisonment up to 5 years with fine. (Non-bailable). The law, for the first time, defines stalking and voyeurism as non-bailable offences if repeated for a second time.
7. **Trafficking of persons:** While the old section 370 of IPC dealt with only buying or disposing of any person as a slave the new section will take in its purview buying or disposing of any person for various kinds of exploitation including slavery. This provision includes organ trade. As the explanation further clarifies "exploitation" would also include prostitution. The new section also ensures that persons involved at each and every stage of trafficking chain are brought within the criminal justice system. Also by specifically including that if a person is brought with his/her consent, where such consent is obtained through force, coercion, fraud, deception or under abuse of power, the same will amount to

trafficking, the law has been substantially strengthened. This will cover all situations where girls who happen to be major are duped with promises of marriage and willingly accompany the traffickers who exploit them in various ways.

8. **Rape is Redefined as Sexual Assault:** The Parliament by means of Amendment Act, 2013 has enlarged the ambit of rape by making certain non-penetrative act as offence amounting to rape. Earlier the offence of rape, i.e. 'sexual assault' was a gender neutral offence, while now this offence is women centric. Only a man is assumed to be capable of committing such offence and that too against a woman only With an aim of providing a strong deterrent against crimes like rapes, the new law states that an offender can be sentenced to rigorous imprisonment for a term which shall not be less than 20 years, but which may extend to life, meaning imprisonment for the remainder of the convict's natural life and with a fine. It has provisions for handing out death sentence to offenders who may have been convicted earlier for such crimes. Age of consent has been increased from 16 to 18 years. Where a person is raped by one or more in a group of persons acting in furtherance of a common intention, each of these persons shall be deemed to have committed the offence of gang rape, regardless of their gender and shall be punished with rigorous imprisonment for a term which shall not be less than 20 years , but which extend to life imprisonment (rigorous imprisonment) and fine payable to the victim, that is reasonable to meet medical expenses.[119]

So, no doubt now various laws has been enacted to curb this menace e.g. Sexual violence against women within the domestic spheres has been recognized by the state after the enactment of Protection of Women from Domestic Violence Act, 2005. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been enacted, that seeks to protect women from sexual harassment at their place of work. The Protection of Children from Sexual Offences Act, 2011 has been passed which aims at protecting children against offences of sexual assault, sexual harassment, pornography and provides for

[119] See Criminal Law Amendment Act, 2013.

establishment of special courts for trial of such offences. In spite of these laws it is extremely difficult for women to raise their voice against sexual violence in our society because of the social stigma attached to it.

JUDICIAL APPROACH TOWARDS SEXUAL VOILENCE:

Hon'ble Justice Fazal Ali and Sabyasachi Mukharjee rightly confessed that "Sometimes the law which is meant to import justice and fair play to the citizens or people of the country is so torn and twisted by a morbid interpretative process that instead of giving haven to the disappointed and dejected litigants it negatives their well established rights in law[120]. But still our judiciary plays very important role to curb this sexual violence e.g. in Vishaka v. State of Rajasthan[121] and others, for the first time sexual harassment had been explicitly and legally defined as an unwelcome sexual gesture or behaviour whether directly or indirectly as

1. Sexually coloured remarks
2. Physical contact and advances
3. Showing pornography
4. A demand or request for sexual favours
5. Any other unwelcome physical, verbal/non-verbal conduct being sexual in nature.

It was in this landmark case that the sexual harassment was identified as a separate illegal behaviour. The critical factor in sexual harassment is the unwelcome behaviour, thereby making the impact of such actions on the recipient more relevant rather than intent of the perpetrator which is to be considered. The judgment was delivered by J.S.Verma. CJ, on behalf of Sujata Manohar and B.N.Kirpal, JJ., on a writ petition filed by 'Vishaka'- a non Governmental organization working for gender equality by way of PIL seeking enforcement of fundamental rights of working women under Article.21 of the Constitution. The immediate cause for filing the

[120]Pratibha Rani vs. Suraj Kumar, AIR 1985 S.C. 628 – 630.

[121] Supra Note 9.

petition was the alleged brutal gang rape of a social worker of Rajasthan. The Supreme Court in absence of any enacted law at that time, to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down some guidelines to prevent the sexual harassment at work places

Apparel Export Promotion Council v. AK Chopra[122], is the first case in which the Supreme Court applied the law laid down in Vishaka's case and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article.21 of the Constitution. In both cases the Supreme Court observed, that 'in cases involving human rights, the Courts must be alive to the International Conventions and Instruments as far as possible to give effect to the principles contained therein- such as the Convention on the Elimination of All forms of Discrimination Against Women, 1979 [CEDAW] and the Beijing Declaration directing all state parties to take appropriate measures to prevent such discrimination". The guidelines and judgments have identified sexual harassment as a question of power exerted by the perpetrator on the victim. Therefore sexual harassment in addition to being a violation of the right to safe working conditions, is also a violation of the right to bodily integrity of the woman.

Similarly Supreme Court felt it inevitable to decide the issue on outraging the modesty of women in the case of State of Punjab vs. Major Singh[123] The question for consideration was whether the respondent who caused injury to the private parts of a female child of seven and half months is guilty under Section 354 of the Indian Penal Code for the offence of outraging the modesty of a woman. .A.K. Sarkar, then Chief Justice of India, replied 'I do not think a reasonable man would say that a female child of seven and a half months is possessed of womanly modesty. If she had not, there could be no question of the respondent having intended to outrage her modesty or having known that his act was likely to have that result. I would for this reason answer the question in the negative." A similar question was referred to the Full

[122](1999)1 SCC759.

[123] AIR 1967 S.C.63

Bench comprising of Justice Mehar Singh, S.B.Capoor and Gurdev Singh of Punjab and Haryana High Court[124] "Whether the appellant Major Singh having fingered the private parts of Balvinder, a girl of 7 ½ months, causing injury to those parts, has or has not committed an offence under Section 354 of the Penal Code?" Justice Mehar Singh and Capoor (per majority) held that "so far the girl of the age of 7½ months is concerned, she is physically incapable of having any sense of modesty or propriety of behaviour, and all that can be said is that if she was sufficiently grown-up to have developed such a sense, the act of the accused would have outraged her modesty. The scope of Section 354 cannot be extended in this sense and it is a misnomer to talk of sense of modesty in connection with an infant girl of the age of 7 ½ months." But Justice Bachawat with a serious concern and conviction added that "the essence of a woman's modesty is her sex. Even a female of tender age from her very birth possesses the modesty, which is the attribute of her sex. Under the section the culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. The respondent is punishable for the offence under the section because, by his act he outraged and intended to outrage whatever modesty the little victim was possessed of".

This view was accepted later on in the case of Rupan Deol Bajaj Vs. K PS.Gill[125], where a senior IAS officer, Rupan Bajaj was slapped on the posterior by the then DGP of Punjab Mr. K P S.Gill at a dinner party in July 1988. Rupan Bajaj filed a suit against him, despite the public opinion that she was blowing it out of proportion, along with the attempts by all the senior officials of the state to suppress the matter. The Supreme Court in January, 1998 fined Mr.K P S.Gill Rs.2.5 lacs in lieu of three months Rigorous Imprisonment under Sections. 294 and 509 of the Indian Penal Code.

Similarly in Rape and sexual assault cases, Sessions Court in Mumbai on 25th March 2014 awarded life sentence to the four convicts in the gang rape of a telephone operator at the Shakti Mills compound last year. "The manner in which the offence was committed reflects the depravity of the accused," observed Principal Sessions judge Shalini Phansalkar Joshi while

[124] Major Singh vs. State, AIR 1963 Punjab 443

[125] AIR 1996 SC309

awarding the life term. The crime was not an impulsive act, but the premeditated outcome of a criminal conspiracy. They sexually ravished the girl and left her in a pathetic state. Thus a proper signal has to be sent out to society, though in some cases, mercy is justified but in this case it would be misplaced and would be a mockery of justice"[126]. In this case itself the Court sentenced the three repeat offenders of Shakti Mills gang-rape cases to death under the provision of section 376E of the Indian Penal Code that carries the maximum punishment of death penalty . It is the first time in the country that these repeat rape offenders have been sentenced to death under this section that was brought in by the new Criminal Law (Amendment) Act in 2013 after the brutal Delhi gang-rape case. The fourth convict Siraj Rehman Khan, 24, who was involved in the photojournalist gang-rape case was sentenced to imprisonment for the rest of his natural life.[127] Principal sessions judge Shalini Phansalkar Joshi, while passing the judgment , said if this not the case where death sentence prescribed by law is not valid, which is. She said the gang-rape was pre-planned and not a spontaneous act of lust. While rejecting the defence argument that the survivor is alive and accused did not rob or hurt her the Court observed that the gang-rape accused were not only enjoying the act of sexual assault but also the survivor's helplessness. It was executed in the most gruesome manner with no mercy or show of human dignity to the survivor.

The four convicts in the December16 Delhi gang-rape case were on 13 September 2013 awarded death penalty by a Delhi court which said the gravity of the offence cannot be tolerated. The offence committed by Mukesh (26), Akshay Thakur (28), Pawan Gupta (19) and Vinay Sharma (20) falls under the rarest of rare category warranting capital punishment, Court cannot turn a blind eye to such a gruesome act, the judge said. There should be exemplary punishment in view of the unparalleled brutality with which the victim was gang raped and murdered, as the case falls under the rarest of rare category. All be given death,". "This is a time when serious

[126] www.hindu.com visited on 29 March 2014.

[127] www.hindustantimes.com visited on 7 April 2014.

crime against a woman has come to the fore and now its judiciary's responsibility to instil confidence among the women"[128]

CONCLUSION AND SUGGESTIONS:

In spite of the legislative efforts to provide protection to rape victims, the existing rape law has hardly been able to make even a dent in the societal structure responsible for such violence. Various lacunas in the framework of criminal justice system make the rape law more or less inefficacious. Criminal justice system is not merely incapable to protect women but the processes involved legitimization of male violence. The root cause of such legitimization of sexual violence is that the sexual behavior is socially constructed and supported by group norms. Apart from these societal attitudes, lacuna still existed under these laws itself e.g. Marital rape has not been recognized under the framework of Indian Penal Code even after amendment of 2013. Now it has the peculiar provision that marital rape can only be an offence, if the couple is living separately and the woman complains of sexual assault by her husband without her consent during separation. While that can invite a jail sentence of 2- 7 years, marital rape cannot be termed an offence if the couple lived together. Government sources say 'societal constraints' weighed heavily on the government's mind as it rejected the Committee's recommendation to make marital rape a criminal offence irrespective of whether the couple lived together or separately[129].

To construct a society free from sexual violence it requires support of legal machineries at different levels to work effectively and a strong awareness in eliminating violence against women. Police should tackle the incidents of rape with extra cautious and sensitivity. Considering that 95 out of 100 victims of sexual assault never report the crime due to unfriendly procedures and police harassment and eight out of 10 witnesses turn hostile at some stage, people working on the law say punitive and administrative action is a must against police officers who don't register cases or delay investigations .An FIR must be registered immediately. A police

[128] www.timesof india.com visited on 27 March 2014.

[129] www.ecomomictimes .com visited on 28th March 2013.

officer must be suspended for not doing so.. These groups want mass presence of women officials in police and judiciary, besides case workers to be attached to victims of sexual assault at all police stations. Fast track courts should be established to hear the cases regarding sexual violence. In this regard it is suggested that following Reforms in management of cases related to crime against women suggested by Verma Committee must be adopted:

1. A Rape Crisis Cell should be set up. The Cell should be immediately notified when an FIR in relation to sexual assault is made. The Cell must provide legal assistance to the victim.
2. All police stations should have CCTVs at the entrance and in the questioning room.
3. A complainant should be able to file FIRs online.
4. Police officers should be duty bound to assist victims of sexual offences irrespective of the crime's jurisdiction.
5. Members of the public who help the victims should not be treated as wrong doers.
6. The police should be trained to deal with sexual offences appropriately.
7. Number of police personnel should be increased. Community policing should be developed by providing training to volunteers.

RIGHT DENIED, LIFE DESTROYED-DESTRUCTION

- **DIVYA CHAURASIA**

ABSTRACT

A right which a human has by virtue of being a human. After a very long and comprehensive discussion they came up with universal declaration of human rights on 10th December, 1948 and many other treaties, convention to promote and ensure a man's dignified existence. But question which arises here is, are rights absolute? Of course not, as respecting right of one will encroach on the rights of someone else. So here we enter into a situation of compromise as everyone can't have everything he/she wants. This compromise was perceived by some as alienation of their community in regard to religion or region or race or caste or power or creed, which may or may not be true. This article emphasizes on the above mentioned factors, which has led to incessant terrorist activities. Through this article writer wants to make a point which a prominent writer Rachel Grady, wrote "always put yourself in others shoes" that is to say why to see everything from one side, rather put yourself in others shoes in order to analyse a particular situation in its entirety. This article focuses on the views or reasons because of which a person/group of persons becomes a terrorist.

ARTICLE

Right denied, life destroyed - Destruction

Rights can simply be defined as claim or entitlements[130]. Human rights are rights which a human being has by virtue of being living in society. All human beings are born free and equal in dignity and rights, which are universal, inalienable, interrelated, interdependent and indivisible. Human rights are like fundamental rights which are paramount, sacrosanct, eternal and transcendental in nature and ought to be treated as inalienable and inviolable for preserving the dignity of the people.[131] As in Atharva Veda it has been rightly said that:

[130] *RELIGIOUS FREEDOM AND HUMAN RIGHTS IN INDIA: CONFLICTS AND RECONCILIATION WWW.CEEOL.COM/ASPX/GETDOCUMENT.ASPX?LOGID=5&ID=66B3C8C9*

[131] DAS AND MOHANTY, HUMAN RIGHTS IN INDIA, P.3, 1ST EDITION, SARUP & SONS

"*Man is not an individual. He is a social organism. God loves him only who serves other creatures. His glory lies in being a member of a big family. On the one hand man is bound by blood- kinship and on the other; he is linked with every individual of society whether near or far. It is given to man to link himself with those who constitute his ancestry, and also think who could be his posterity. Man thus lives, works and dies for society possessed of certain inalienable rights."*

EVOLVEMENT OF HUMAN RIGHTS

During the war (1939-45) the Nazis in Germany committed atrocities on the Jews, their own nationals, which surpassed in brutality and barbarity[132]. Over 12 million Jews were estimated to be done to death. The Nazi persecutions of the Jews and their acts of vandalism, loot and plunder in occupied lands gave birth to a new concept in international criminal code, that of 'Crime against Humanity'[133]. After the war was over, the people decided that this level of barbarity must not take place again and there arose demand for world peace should be maintained and a codified and identified code of rights which all nations should respect and act accordingly.

SCENARIO OF UPHEAVEL OF TERRORISM

Origin of rights can be traced back through the Social Contract Theory of John Locke, Hobbes and Rousseau which said, when there arouse a conflict of rights between people they chose a group of people and pooled their rights in them and accepted to live according to their direction and accepted the limited rights allotted to them. Here, in this theory a compromise took place with the consent of people i.e. the right holder but what happened after that was not compromise instead it was suppression, alienation from their right on their right.

In the era of compromise, the distribution and recognition of rights was not properly dealt with, this widened the gap between the people. There were people whose voice was not heard. In addition to it the actions of certain external forces assisted in increasing the gap, which resulted

[132] ASSOCIATIONHUMAN RIGHTS UNDER DEMOCRACY AUTHOR(S): NILANJANA JAIN SOURCE: THE INDIAN JOURNAL OF POLITICAL SCIENCE,VOL. 67, NO. 1 (JAN. - MAR., 2006), PP. 143-152

[133] IBID.

in the feeling of alienation and revenge. When all the non-violent approach to be recognised by others in a society exhausted, they took another path i.e. the path of violence. It forced the disadvantaged group to resort to another path in order to get recognised in the society, a path which was dangerous, against the norms of society and disastrous for mankind.

FACTORS WHICH GAVE RISE TO ALIENATION

There exist various factors/causes before a human does any action i.e. to say there exist a reason for every action he/she does i.e. whether commission or omission of any act. The reason can be personal/internal or external which compels a person to do a particular action whether verbal or non-verbal which can have positive as well as negative effect. Charter of United nation was the first document to use the expression Human Rights and declared the promotion and fostering of human rights as one of the basic goal of United Nations. The International Bill of Human Rights was drawn which comprised of[134]:

1. Universal Declaration of the Human Rights (1948)
2. International Covenant of Economic, Social and Cultural Rights (1966)
3. International Covenant of Civil and Political Rights (1966)
4. Optional protocol providing the rights for individual petition

According to the International bill, there exists a civil, political, economic, social and cultural right for every individual human being.

Civil Rights: These are enforceable rights, which if interfered by another give rise to an action for injury. This rights are those which when violated causes a legal injury. It ensures peoples' physical and mental integrity, life and safety; protection from discrimination on grounds such as race, gender, national origin, colour, sexual orientation, ethnicity, religion or disability; and individual rights such as privacy, right to freedom of thought and conscience, speech and expression, press, religion, assembly and movement.

Political Rights: Rights which individual have that allow them to take part in a self-governing society. These rights include:

[134] DAS & MOHANTY, HUMAN RIGHTS IN INDIA, P.1, 1ST EDITION, SARUP & SONS

Physical integrity, in the form of the right to life and freedom from torture and slavery

Liberty and security of the person, in the form of freedom from arbitrary arrest and detention and the right to habeas corpus

Procedural fairness in law, in the form of rights to due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law

Individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy

Prohibition of any propaganda for war as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law

Political participation, including the right to the right to vote

Non-discrimination, minority rights and equality before the law

Civil and political rights are those rights that protect individuals' freedom from infringement by governments, social organizations, and private individuals, and which ensure one's ability to participate in the civil and political life of the society and state without discrimination or repression.

Economic, Social and Cultural rights: These are socio-economic human rights, such as the right to education, right to housing, right to adequate standard of living, right to health and the right to science and culture.

Civil and political rights were first generation rights, economic, socio and cultural rights were second generation and the third generation rights are known as green rights, which goes beyond civil and political rights and thus houses an extremely broad spectrum of rights which includes

- Group and collective rights
- Right to self-determination

- Right to economic and social development
- Right to a healthy environment
- Right to natural resources
- Right to communicate and communication rights
- Right to participation in cultural heritage
- Rights to intergenerational equity and sustainability

These rights are ensured in the articles of Universal Declaration of human rights. These are soft laws which lack enforcement or it is not legally binding which is the biggest drawback of it.

The reasons for the growth of terrorism and their activities lie around these rights only. Various reasons which can be thought of, which sowed the seed and forced people to do such kind of activities which is barbarous in nature are as follows:

Minority: The people who are in minority feel that they are being alienated of the enjoyment of their rights which may or may not be true, but no action- appropriate action has been taken to make them feel and realize that they are equal and their presence do matter to the society. The feeling which arises here is very hurting and they form a different group and style of getting recognised which stands right in their eyes but it sometimes turns out to be lethal and causes a lot of damages to life, resource(natural resources) and property.

Minority – types

- Religion: It is one of basic identity which a human possess right from his/her coming in the womb of a mother. There are broadly five religions that are Hinduism, Islam, Jainism, Buddhism and Christianity. Most of the terrorist attacks take place because of religion i.e. which religion is superior in spite of knowing the fact that God is one which is present in every religious book. Those who belong to one religion yearn to establish its supremacy and desires to have everyone following that religion only and

in wake of pursuing this people end up adopting such means that they feel will serve their purpose.

But there is one more facet to it which is that there are divisions in a particular religion and in that there exist a hierarchical system which gives a boost to practices like discrimination, suppression, oppression. Like in Hinduism there exists four classes i.e. Brahman, Kshatriya, Vaish, and Shudra and in some, the religion is same but the belief in rituals separate them and they fight among themselves in order to prove themselves like the two sects of Islam i.e. Shia and Sunni.

- Ethnicity: There exists a kind of proud feeling in every person to the region to which he/she belongs but when they go out of their region they have to face a lot of difficulties which other human beings pose on them. They sometime become subject to humiliation because of their dressing sense, way of communication, their physic, colour complexion which leads to discrimination too. Example: Blacks in America were subjected to discrimination because of which they retaliate and they turn out becoming a terrorist at the end in the eyes of others but from their perspective it is the means to get recognised by others.
- Economic condition: The financial condition drives a person to do work, the result of which can be positive or negative and moreover the means to achieve that doesn't matter to them, the only thing which is of prime importance to them is money, money and money. So in order to make money they resort to those activities which is not legal and on the other side of it, it is sometimes that system make them do such things or go on that track. For instance, the policies which a particular government designs, widens the gap between rich and poor which may instigate a group of people to do wrong work and earn more money than earlier.

"Where do people earn the Per Capita Income? More than one poor starving soul would like to know.
In our countries, numbers live better than people. How many people prosper in times of prosperity? How many

people find their lives developed by development?"

Eduardo Galeano, "Those Little Numbers and People"

- Recognition: There are terrorist who for being recognised or for being popular in the society resort to the terrorist activities because for them their recognition matters regardless of the fact whether it is in good sense or not. The other side to it is that may be their happened a flaw in the system of recognition which didn't allow them to show their talent so they went on to do those action which the whole world will see like Osama bin laden was a very good engineer but he was directed towards a wrong way.

"When it is genuine, when it is born of the need to speak, no One can stop the human voice. When denied a mouth, it Speaks with the hands or the eyes, or the pores, or anything at all. Because every single one of us has something to say to the others, something that deserves to be celebrated or forgiven by others". -Eduardo Galeano, "Celebration of the Human Voice/2"

The terrorist attack are increasing at a faster rate and taking place very frequently. Some of the attacks which took place still have its scars in the minds of people which when recalled make them shiver like the attack on Syria on 21st August, 2013, the usage of chemical weapons claimed thousands of life which was planned by the Bashar al-Assad to have its rule to continue; The attack on world trade centre, 11th September 2001 which resulted in the death of thousands of people was a kind of revenge which it accomplished and the incident memory is still there in our mind after almost 14 years of it; Recent attack took place in Corinthia hotel of Libya on 28th January, 2015 resulting in the death of 10 people, which was a revenge of the death of Abu Anus al-Liby, a Libyan jihadist; The Taliban attack on the pupils of school in Peshawar claiming 140 lives and most of them children's, reason being the Pakistani army operation in North Wazristan and Khyber area and the attack in Mumbai on 26th November, 2008 also caused a lot of damage.

These attacks can be remembered because they were lethal and oppressive in nature, which if not handled properly will lead to nowhere. It will go on and on without reaching to a solution.

Terrorists are growing like mushrooms all over the world which along with their attacks is aiding other crimes of serious nature like sexual harassment, rape, oppression of women, poses a danger to a nation's internal as well as economic stability, barbarically treating people who are in their hand which is violating human rights of those also and they are in a way posing a threat to environment in which we are living because of the usage of chemical weapons, which leaves behind a poisonous aura to be lived in which is causing a lot of physical (respiratory problem, etc.) and mental disability, illegal supply of drugs, women trafficking etc.

There are 57 terrorist groups[135] all over the world which so far have been recognised. But the number is of terrorist all over the world, of those who created a bigger impact on the people or in a particular region but what about those which are existing and posing a problem every now and then, just because they are not effective globally they are not counted. We have to take every single organisation into consideration and then work on the solution to the most significant problem which needs to be taken care off.

The possible suggestions which author can think of to combat terrorism are:

Negotiation: Instead of reacting to the attack we should look at the situation from all the possible perspectives and work on the alternatives which can improve the condition and bring harmony between the two opposite minded people or group of people. They should be given a chance to say their point of view and should be invited to work on the problems mutually, otherwise the war will go on and on for years without any conclusion claiming lakhs of causalities and nothing else.

Government policies: There is a requirement for inculcating psychological part to the policies. Policy makers should take into account primarily who is the target, for whom the policies are being framed and the policies should be such which can be implemented i.e. which is practical in nature and is fruitful.

[135] HTTP://WWW.STATE.GOV/J/CT/RLS/OTHER/DES/123085.HTM

Take for instance, poverty or the economic condition which is leading people to the path of terrorism. Here, in this situation we can't eradicate poverty but we can work on such policies which could help in improving the condition of people who are financially weak so that they are not compelled to choose the path which is so gruesome in itself. In this case we can focus on increasing the employment opportunities for every person whether they are skilled, semi-skilled or for that matter unskilled. The government should work on alternatives which can take into its employment ambit everyone to minimise the risk of people turning to a terrorist.

Government through the use of media can communicate to people of their rights and duties and also of policies which are beneficial to them and inculcate the feeling of belongingness in them.

Awareness camps: Non- government organisations and private people should conduct awareness camps to make people aware of their rights and make them realize that they are not being alienated of any rights and they are also a very significant part of the society and make people aware of their duties i.e. duty comes first on their part and then the claim of rights stands. Through street-plays, songs, posters we can convey our message to larger public to not let a seed of terrorism be sown here.

Financial support: Nations have to have such mechanisms, those which can trace out people or organisations supporting these terrorist organisations financially. The government should ensure periodic check on financial transaction taking place. Financial transactions which are taking place in a country should be recorded in detail. Those who will be caught in assisting these organisations should be made subject to rigid laws and harsh punishment.

Last but not the least society as whole has to take the responsibility to, not to let a terrorist being born from among them. There is a requirement for people to change their mind-set and their stereotype behaviour. There is a need to rectify the misconceptions a person or group of persons are holding i.e. the feeling of superiority among people. Everyone in a society has to change its perception and think logically and act accordingly, otherwise who knows who is next to be attacked.

CONCLUSION

World War II was the most defining events of 20th century, which claimed a lot of lives and after effects of the usage of atom bombs on the health of people was a deplorable condition. With the end of war there was a call for codified law in favour of human rights which he/she has. So the Universal Declaration of Human Rights was designed to protect human rights. But in spite of it being there, the activities of terrorist is proliferating at an alarming rate claiming human rights of so many civilians. The cause of their being a terrorist is not they are born terrorist but they were subject to some kind of deprivation and discrimination of material as well as non-material things. They have become terrorist, in the present context violators of human rights because may be they were also at some point of time denied of it. So in order to combat terrorism we need to work out from grass root level i.e. knowing the cause which has lead them to choose this route and then solutions to it. It will be wrong to react at first place without knowing the reason for the act.