NALSAR

STUDENT LAW REVIEW

Vol. 9 & 10 2016

student bar council | nalsar university of Law

NALSAR

STUDENT LAW REVIEW

Vol. 9 & 10 2016

This issue shall be cited as 2016 (10) NSLR <page no.>
ISSN 0975 0216

Contents

EDITORIAL

We are proud to present to you the Xth edition of the NALSAR Student Law Review. The NALSAR Student Law Review is the flagship journal of NALSAR University of Law, Hyderabad. The Xth edition of the NSLR presents a diverse collection of articles ranging from international law to family law to the role of real estate and FDI and the ever controversial judicial appointments bill.

This edition explores the idea of the Dwelling house within Hindu Law, and how it impacts women. The article also delves into a possible reconceptualisation of the same, while taking into account the various laws surrounding the issue.

Unpaid care work has generally escaped the attention of mainstream law and this work is unproportionately been carried out by women. This paper examines how the state has washed off any responsibility of addressing this work and also examines the policies which fall short in accounting for unpaid care work.

FDI in Real Estate and involvement of REITs has been a massive opportunity for foreign investors in India and has impacted the sector greatly. This article examines the recent policy changes to the investment regime which is aimed at ease of doing business in India and to clarify the scope of FDI in Real Estate Sector.

International law is characterised by international organisations. These international organisations trace back their origins to imperialism. This paper seeks to map out past engagements between Third World Approaches to International Law and International Organisations. It argues that the norms, practices, and law followed by International Organisations is a product of Euro-centric domination.

The High Level Meeting UN General Assembly from 15th-16th December 2015 marked the overall review of implementation of outcomes of the World Summit on Information Society (WSIS). The paper argues that giving effect to the notion of interdependence and indivisibility of human rights is a means of realising the goal of an 'internet bill of rights.'

We would like to thank all the contributors, faculty, students, alumni, reviewers and other well wishers of NSLR without whose inputs, this law review would not have been possible.

Editorial Board

THE DWELLING HOUSE IN HINDU LAW: A POSSIBLE RE-CONCEPTUALISATION

Spadika Jayaraj[*]

ABSTRACT

The Dwelling House in Hindu Law has hitherto been viewed through the lens of patriarchy. The pre-2008 Hindu Succession Act did not grant Hindu women the right to partition and claim their share of the dwelling house. This section has subsequently been repealed. However, a mere repeal does not guarantee rights in a cultural context that still views the Dwelling House as a space for the son and his family to reside. As a result, secular laws such as the Transfer of Property Act are still interpreted in a son-centric way. This does little to protect those members of the family who are most vulnerable- the widow, the children and the elderly. Hence, there is a need for a reconceptualisation of the dwelling house as a unit that serves the interests of the most vulnerable. This must be done by analyzing where the laws and the judiciary are failing, as well as by taking a fresh look at newer social legislations such as the Protection of Women from Domestic Violence Act, 2005 and the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

I. INTRODUCTION

It is universally accepted that having a roof over one's head is one of

[*] The Author is completing the B.A LLB [Hons.] at National Law School of India University, Bangalore.

the basic requirements of human life. A dwelling house, which is a common household shared by a family, caters to this basic requirement. But if one were to critically reflect on the rights that various members of the family have traditionally enjoyed with respect to the dwelling house, this simple construct raises a myriad of questions and controversies. The most controversial aspect is regarding the difference in the rights of male and female members of the family.

The dwelling house is a social construct. Physically, it is no different from any other property that is owned by individuals or families. However, personal laws as well as secular laws have looked at the dwelling house as an institution that must be protected in the interests of the family. With 'family' itself being un-definable in absolute and uncoloured terms, law has either been drafted or interpreted in ways that privilege a patriarchal view of 'family'.

It is argued in this paper that the law inadequately protects the rights of women, children and the elderly to the dwelling house and that prevalent conceptions of the dwelling house as an institution to "preserve the family" must be challenged. An alternative model is proposed, where the dwelling house is seen as an institution that protects the livelihood interests of the *vulnerable sections* of the family, such as the deserted wife, the widow, the aged parents and the minor children. A comparison is made with other countries on this front.

A significant part of the paper focuses on Hindu law, as the 2005 Amendment to the Hindu Succession Act has attempted to bring about a

revolution in female heirs' rights to the dwelling house. Whether this amendment changes ground realities is also a question that will be considered. I will also look at the Transfer of Property Act 1882, the Partition Act 1893, and some provisions of social legislations such as the Domestic Violence Act 2005, and the Maintenance and Welfare of Parents and Senior Citizens Act 2007 while analyzing the present patriarchal set-up that the dwelling house has been tangled in. Primary and secondary sources of information have been referred to, and a uniform mode of citation has been used.

II. LOCATING THE DWELLING HOUSE IN HINDU SUCCESSION LAW

In classical Hindu Law, the widow and the daughter did not receive any property through succession or survivorship. With a few exceptions such as in the Bombay state, women only received a 'limited estate'. This meant that they could enjoy their portion of the property to a certain extent, but upon their death, it would go back to the next heir of her husband or father.[1] Section 14 of the Hindu Succession Act, 1956 changed this by conferring full heritable capacity on female heirs.[2]

Hindu society was largely exogamous, which meant that daughters in the family commonly married outside the village to a different family. Hence, it was feared that granting female heirs absolute rights in her natal dwelling house would result in uncomfortable situations where the daughter's 'new'

1 Mulla, PRINCIPLES OF HINDU LAW, 81 (Sunderlal T. Desai Ed., 16th Edn., 1994).
2 §14, Hindu Succession Act, 1956.

family could partition and reside in the dwelling house.[3] Therefore, although the Hindu Succession Act gave female family members inheritance rights, Section 23 of the Act limited these rights with respect to the dwelling house. According to Section 23, where a Hindu intestate leaves behind him a dwelling house with both male and female heirs, the female heirs may not ask for partition of the house until the male heirs choose to do so. Additionally, the female heirs may be granted a right of residence in the dwelling house *only* if she is unmarried, has been deserted or separated from her husband, or is a widow. This provision was also justified by the fact that the property of married women was largely controlled not by them, but by their husbands (who are usually complete strangers to the woman's family in an exogamous setting), and *disruptive influences* would operate if he can effectuate a partition in his wife's family dwelling house.[4]

In patriarchal societies, the death of the male "head of the family" often renders the remaining members helpless and destitute. It cannot be denied that an impartible dwelling house therefore serves as a vital form of protection for the widow and children of a deceased Hindu male. It has been reiterated in various Court decisions that S. 23 of the HSA must be interpreted keeping in mind the importance of preserving the institution of the dwelling house.[5] But in *Narasimha Murthy* v. *Susheelabai*, the Supreme Court made it clear that the objective behind this section was really to privilege the comfort of

---

3 J.Darrett, *The Hindu Succession Act, 1956: An Experiment in Social Legislation*, 8(4) THE AMERICAN JOURNAL OF COMPARATIVE LAW, 485,499 (1959).

4 Mulla, *supra* note 1 at 845.

5 *Srilekha Ghosh* v. *Partha Sarathy Ghosh*, AIR 2002 SC 2500; *Narasimha Murthy* v. *Susheelabai*, AIR 1996 SC 1826.

male heirs over female heirs. It was held that the object behind S. 23 was to "*prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs to cause hardship to the male heirs in occupation of the house*".[6]

This leads to two situations which demonstrate that Section 23 was more about reinforcing female subordination than anything else. *First*, when a Hindu man dies leaving behind a widow and daughters, some married and others unmarried; the married daughters can ask for partition[7] as there are no *male* heirs who will be inconvenienced. This will clearly inconvenience the most vulnerable members of the family, but is not addressed by the section. *Second*, the son of a predeceased daughter may ask for partition.[8] Even though the property devolved to him from his mother in the first place, this gives him a right that his mother never had.

The other discriminatory aspect of S. 23 is that it provided rights of residence only to unmarried, deserted, separated or widowed daughters. This, again as a consequence of exogamous marriage practices, legitimised the belief that married women are not a part of their natal families. Such a practice only ends up justifying the differential treatment of male and female children in the household, as the girl-child is seen only as a liability and a 'temporary' member of the family. While it is important for laws to respect customary beliefs and practices, the law should not ideally be reinforcing a custom that has lead to the systematic discrimination of a section of the population.

---

6 *Narasimha Murthy* v. *Susheelabai*, AIR 1996 SC 1826.
7 Mulla, *supra* note 2 at 845.
8 Mulla, *supra* note 2 at 845.

In the 174th Report of the Law Commission of India, it was recommended that along with making women coparceners in ancestral property,[9] S. 23 of the Hindu Succession Act must be deleted.[10] These changes were subsequently made in the Hindu Succession Amendment Act, 2005. Hindu females now *formally* enjoy an equal right to partition their ancestral home. The question of right of residence is not mentioned in the Act, but it can be presumed that all daughters, regardless of marital status, now enjoy equal right of residence in their natal homes. While this move is commendable, it must not be given more credit than is due. The changes in law may formally grant women *rights* over the property, but these rights are meaningless without the option of exercising the rights and the ability to control any property she may receive.[11]

Cultural norms have an important role to play in determining the efficacy of a law. Presently, dominant Hindu cultural norms are still patriarchal, where women 'leave' their natal families on marriage, which may make the woman herself believe that she does not 'belong' to her natal home after marriage. The norm of the bride's family paying dowry at the time of marriage also has a role to play in a woman not exercising her right over her natal property, as male heirs may argue that she has already taken her "share" of the family wealth. This is reinforced by sexual norms which mandate that being feminine implies being sacrificial and passive to the interests of male care-

9 §5.7.3, 174th Report of the Law Commission of India, Property Rights of Women: Proposed Changes under Hindu Law (2000) (Hereinafter, "Law Commission Report").

10 §5.7.5, Law Commission Report.

11 K. Rittich, *The Properties of Gender Equality* in HUMAN RIGHTS AND DEVELOPMENT, 87, 107 (P. Alston and M. Robinson Eds.,) (Hereinafter, "Rittich").

takers.[12] The sum total of this complex set of norms is that a woman will often not claim her share of property from her natal home, and when she does, it is often not out of her own volition as much as the volition of her husband or his family.[13] The ultimate consequence is that the dwelling house is an institution that primarily protects the already powerful (male) members of the family.

III. S. 44 OF THE TRANSFER OF PROPERTY ACT & S. 4 OF THE PARTITION ACT

Apart from the above analysis of succession laws and gender roles, the conclusion that the dwelling house is an institution that primarily serves patriarchal interests can also be reached from another angle - by looking at the secular laws of property and partition. S. 44 of the Transfer of Property Act prevents the intrusion of strangers into the family residence when a share in the house has been transferred to a stranger. In such cases, the 'stranger' may not claim joint possession or any common or part enjoyment of the house. His remedy is to file a partition suit.[14] When such a suit for partition is filed, if a member of the family is willing to buy the third party's share, S. 4 of the Partition Act mandates that a sale be made to such member.[15]

It is evident that these provisions of law that 'family' is considered an important institution to preserve. However, neither section defines what family

12 *See generally*, Rittich; S. Basu, SHE COMES TO TAKE HER RIGHTS (1999).
13 S. Basu, SHE COMES TO TAKE HER RIGHTS (1999).
14 § 44, The Transfer of Property Act, 1882.
15 §4, The Partition Act, 1893.

is, paving way for the judiciary to interpret what it thinks a family should be. Before the Hindu Succession Act was enacted, the judiciary consistently took a liberal stance of interpretation. In the year 1929, in the case *Pakija Bibi* v. *Adhar Chandra,*[16] it was contended by the petitioners that two sisters living together cannot constitute a 'family' under Section 44 of the Transfer of Property Act, as they are not a Hindu undivided family. The Calcutta High Court held that family need not mean a Hindu undivided family- any persons living under one roof under one head or management can constitute a family. In 1930, in *Mantripragada Sivaramayya*'s case, [17] a family had formally partitioned the dwelling house, but were still living together under one roof. When a third party who was transferred one-third of the property sued for partition, the Madras High Court gave the family the benefit of S. 4 of the Partition Act. It was held that the phrase 'undivided family' is sufficiently ambiguous to justify the construction that is most in consonance with the object of the Act.

However, almost fifty years later, after the Hindu Succession Act, *Ram Bilas Tewari*'s case[18] came into consideration before the Allahabad High Court. The dwelling house in question belonged to Ram Bali, who before his death had executed a gift deed in favour of this daughter Mahdei. On Mahdei's death, the property devolved to her mother, Mangla. On Mangla's death, it devolved on to the remaining two children, Ram Charan and Saheb Dei. After Ram Charan's death, Saheb Dei sold her share of the dwelling house to a third party, Ram Bilas Tewari. Shiv Rani, a widow who resided in the house, claimed

16 *Pakija Bibi* v. *Adhar Chandra,* AIR 1929 Cal 231.
17 *Mantipragada Sivaramayya* v. *Kapa Venkatasubbamma*, AIR 1930 Mad 561.
18 *Ram Bilas Tewari* v. *Shiv Rani and Ors*, AIR 1977 All 437.

protection under Section 44 of the Transfer of Property Act. Here, the Allahabad High Court took a narrow interpretation of "undivided family" to hold that the lone surviving widow cannot claim protection as she is not an undivided family. Such an interpretation is problematic, as the objective behind Section 44 is to protect residents of a dwelling house. A narrow view such as the one taken by the Allahabad Court fails to protect the widow, who is the most vulnerable dweller of the house.

A similar view was taken by the Calcutta High Court in the year 1984, in *Dhirendranath Sadhukan.*[19] Here, a woman lived with her husband and his brother. On the death of the husband, the brother sold his share to a third party. When the third party claimed joint possession, the widow, again, was not granted the protection of S. 44. It was reasoned that there was "*no common bond or cementing factor bringing both of them* (the widow and her brother-in-law) *within the fold of an undivided family"*.

There is also conflicting authority regarding whether Section 44 creates a positive right for members of the family to evict a third person. It appears intuitive that without such a right, S. 44 would serve no purpose. While Courts have recognised such a positive right in some decisions,[20] in *Jogendra Nath Mondal* v. *Adhar Chandra Mondal*, the Calcutta High Court differed and held that a co-sharer can grant *amicable possession* to another co-sharer who is a stranger to the family, and the family members cannot restrain the third party

19 *Dhirendra Nath Sadhukhan* v. *Tinkari Sadhukhan and Ors*, AIR 1984 Cal 397.

20 *Paresh Nath Biswas* v. *Kamal Krishna Choudhury and Ors.*, AIR 1958 Cal 614;*Uma Shankar Chowbey* v. *Mt. Dhaneshwari and Ors.,* AIR 1958 Pat 550.

from enforcing his possession. This virtually renders S. 44 an empty provision, as the implication is that once the stranger has already taken possession of the property, the family has no remedy.

It is found that when such a narrow interpretation of the law is taken, S. 44 does little to protect vulnerable members of the dwelling house such as the widow or the daughter. One can take advantage of such a lacuna in the law to drive out widows from their marital homes, either by seeking joint possession or by partition. This is unfortunate, as given the societal stigma around widowhood that still persists in India; a house to live in is of utmost importance to the widow. Therefore, there is a great need to re-conceptualise the dwelling house as an institution that performs the important social function of protecting vulnerable members of the family. If the law and the Courts keep in mind such a framework, some headway can be made in detangling it from a patriarchal set-up.

IV. RECONCEPTUALISING THE DWELLING HOUSE- PROTECTING THE VULNERABLE

So far it has been demonstrated that though the gender-discriminatory Succession Law has been struck down and that existing partition law is *prima facie* gender neutral, the notion of the Dwelling House remains mired in a patriarchal understanding of what constitutes a family. Such an understanding, in turn, creates pockets of power and vulnerability within units of the same family. However, recognising that a generalisation of certain members of the family as de-facto vulnerable would reinforce

gendered stereotypes, it is important to unpack the concept of vulnerability itself. The 'dominance' approach,[21] propounded by noted feminist scholar Katherine Mackinnon, provides some insight in this regard. Gender neutrality of a law can ignore deeply-rooted power structures in two ways: by emphasising on 'sameness', or on 'difference'. Under the 'sameness' standard, the law would assume that all categories of people are equal and prescribe the same rules for them. The striking down of S. 23 of the Hindu Succession Act to make it 'gender neutral', ignoring existing cultural norms that make its applicability near-impossible is an effect of such a standard. The problem with the sameness standard is obvious, as demonstrated earlier in the paper.

Under the 'difference' standard, the law recognises the innate differences in different categories of persons and makes special provisions for such persons. Affirmative action is born out of such a standard. Allowing for legal reform in the law of the dwelling house to protect the widow, for example, would be a manifestation of the 'difference' principle (it recognises that widows are specially placed, as opposed to widowers). However, a legal recognition of such an inherent difference reinforces stereotypes and harmful cultural norms about women and their vulnerability.[22]

To avoid the pitfalls of either approach, Mackinnon propounds the 'Dominance' approach, which constructs vulnerability not on preconceived categories, but based on the distribution of power.[23] Cultural norms in a

---

21 C. Mackinnon, *Towards a Feminist Theory of the State* (1989). ("Feminist Theory")

22 C. Mackinnon, *Substantive Equality: A Perspective*, 96(1) MINNESOTA LAW REVIEW, 2011.

23 Mackinnon, Feminist Theory, supra 21. (Please footnote correctly)

Hindu family reproduce power in familiar patterns- a male 'head' of the family, dependant spouse, children and elderly parents. However, a dominance approach to analysing vulnerability can also be expanded to protect other persons as well, such as trans* members of a family, partners in homosexual relationships, etc. With respect to the Dwelling House, reform in the law must recognise the mitigation of the suffering of vulnerable persons seen through the lens of dominance. In this regard, three approaches are analysed: the homestead model, a re-reading of social legislations specifically meant to protect women and the elderly, and existing rent-control law.

1. The 'Homestead' Model for the Widow

In a non-legal sense, a homestead is a house where a family dwells.[24] The idea of providing a homestead certain special exemptions in law originated in the State of Texas. The initial conception was that when a house is declared as a homestead, it enjoys exemption from execution and sale for the payment of certain debts. The policy behind such a measure was to recognise the importance of conserving homes and protecting the family.[25] Hence, initially, homestead rights meant that the homestead was protected from external creditors. This was gradually expanded to protect the wife against her husband, with legislations in the USA, Canada and England requiring that both spouses' consent be given while putting any form of encumbrance over the property.[26]

---

24 D. Marshall, *Homestead Exemption- Oregon Law,* 20 OREGON LAW REVIEW, 328, 329 (1940).
25 Marshall, *supra* note 19 at 330.
26 A. Milner, *A Homestead Act for England?* 22(5) THE MODERN LAW REVIEW,458, 463 (1959).

1.1.1. The Model in Other Countries

In several countries, homestead rights have been further expanded to grant a surviving spouse[27] lifetime occupational rights over the homestead.[28] In most parts of Australia, the surviving spouse is granted a life-interest in the dwelling house.[29] This is also true of England, Wales, and several provinces of Canada.[30] In France, if there are children, the surviving spouse can choose between having a usufruct over the entire dwelling house, or ownership of one quarter. If there are no children, he or she is not given the option of taking the usufruct.[31] Moreover, unless expressly prohibited by a Will, a surviving spouse in France will be entitled to live in the dwelling house to the exclusion of other heirs for a period of one year after the death of the other.[32]

In the Canadian province of Alberta, there is a unique provision that protects the surviving spouse against fragmentation of the dwelling house by partition. The spouse is entitled to the entire dwelling house if the value of the estate is less than $40,000. If it is greater than $40,000, the spouse will be entitled to $40,000, and the remaining value of the estate will be divided amongst all the heirs (including the surviving spouse).[33]

---

27 The gender-neutrality is worth noting.

28 Milner, *supra* note 21 at 475.

29 §49G, Australian Capital Territory: Administration and Probate Act 1929; New South Wales:§61D, Wills, Probate and Administration Act 1898; §39A, Queensland Succession Act 1981; South Australia: §72L, Administration and Probate Act 1919, etc.

30 Scottish Law Commission, Discussion Paper on Succession, 131 (2007) (Hereinafter, "Scottish Discussion Paper").

31 Art. 757, French Civil Code.

32 Art. 736, French Civil Code.

33 §s 3, 4, Intestate Succession Act, RSA 2000 (Alberta, Canada).

1.1.2. Viable Model for India?

It is worth considering if such a provision can be transplanted to India, a society where widows are highly stigmatised. Presently, the Hindu Adoptions and Maintenance Act 1956 governs matters of maintenance for the widow. The widow can claim maintenance from her husband's or father-in-law's estate.[34] As importance as this right is, claiming maintenance itself is a resource consuming process that necessarily requires the intervention of the Court. The gender and cultural norms that were previously mentioned in this paper are also factors that may prevent women from approaching the Courts to claim the remedy. Moreover, the amount given in maintenance is based on subjective considerations, and ends up being barely enough to prevent the widow from becoming destitute.[35] Therefore, a homestead model which grants the widow a life estate in the entire dwelling house (in addition to her specific share) is certainly a desirable solution. It provides much-needed security and protects her against strangers claiming joint possession. Moreover, as landholdings become increasingly fragmented in India, property when partitioned often becomes unviable as a dwelling house. Hence, homestead rights offers protection to the widow against partition as well. This suggestion is not even a radical transformation of Hindu personal law, as mentions of the practice of deferring the partition of the family estate until the death of the mother, are found even in ancient Hindu texts.[36]

---

34 §19, Hindu Adoptions and Maintenance Act, 1956.

35 *See generally*, F. Agnes, *Conjugality, Property, Morality and Maintenance*, 44(44) THE ECONOMIC AND POLITICAL WEEKLY, 58 (2009).

36 MAYNE'S TREATISE ON HINDU LAW AND USAGE, 694 (16th Edn., 2008).

In countries such as Australia,[37] New Zealand,[38] Canada[39] and Scotland,[40] the homestead protection is also given to partners of civil unions and "common law" partners, who are merely *de facto* surviving spouses. If the homestead model is implanted to India, not insisting on a *valid* marriage to provide homestead rights to widows in India would be a welcome move towards protecting the second-wife in bigamous marriages as well as same-sex partners. Such a move will not be unheard of, as the Domestic Violence Act (discussed later in the paper) already protects women who are in relationships *in the nature of* marriage.[41] From the lens of dominance and vulnerability, the homestead model may be transplanted into Indian law, providing not only for widows, but also for any other members who would be left vulnerable by the partition of the Dwelling House.

2. A Re-Reading of Social Legislations

The Protection of Women from Domestic Violence Act, 2005 (hereinafter, "The Domestic Violence Act") and the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter, "The Senior Citizens' Act") are social legislations which have been enacted for the benefit of women and elderly citizens respectively. They are liberal legislations providing a plethora of rights for these persons; rights over the Dwelling House can therefore easily be read into these legislations.

---

37 Scottish Law Commission, Discussion Paper on Succession, , *supra* note 30 at 137.

38 Scottish Law Commission, Discussion Paper on Succession,, *supra* note 30 at 141.

39 Scottish Law Commission, Discussion Paper on Succession,, *supra* note 30at 140.

40 Scottish Law Commission, Discussion Paper on Succession,, *supra* note 30 at 28. (Please footnote this correctly)

41 §2(f), Protection of Women from Domestic Violence Act, 2005.

2.1 The Domestic Violence Act 2005

The Domestic Violence Act 2005 was enacted in order to provide effective protection to the Constitutional rights of women when they suffer from violence of any kind within the family.[42] It defines a "domestic relationship" in very broad terms, to mean "*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*".[43] Further, §17 of the Act ensures that every woman in a domestic relationship has a right to reside in a shared household. These two provisions taken together plainly mean that a woman, by virtue of being, or having been in a domestic relationship of any kind, has a right to reside in the shared household. Such a household is no different from a dwelling house. This implies that she can enforce this right by availing of residence orders[44] and protection orders[45] against any family member who attempts to evict her from this household.

The Courts have tried to interpret this right of the woman narrowly as well. In *Batra*,[46] the Supreme Court held that a "shared household" only means a household belonging to or taken on rent by the husband, or a household that belongs to the joint family that the husband is part of. Unfortunately, this is the law of the land at present, and has been affirmed by the Delhi High Court

42 *Preamble,* Domestic Violence Act, 2005.
43 §2(f), Protection of Women Against Domestic Violence Act, 2005 (Hereinafter, "Domestic Violence Act").
44 §2(p) *read with* §19, Domestic Violence Act, 2005.
45 §2(o) *read with* §18, Domestic Violence Act, 2005.
46 *S.R. Batra* v. *Taruna Batra*, (2007) 3 SCC 169.

even as recently as 2013.[47] However, the judgment is clearly bad law as an unreasonably restrictive reading of the scope of any of the sections of the Act is antithetical to its object. As was pointed out in a 2008 decision of the Madras High Court, a necessary implication of *Batra* is that husbands can alienate their property to third parties and then claim that the household is not a shared household.[48] Hence, a reading of the Domestic Violence Act that is in consonance with the intent behind its enactment squarely covers protective homestead rights (both in their marital home as well natal home) to daughters to the extent of a right to residence, if not a life-interest.

2.2 The Senior Citizens' Act 1956

The Senior Citizens' Act was enacted with the object of providing effective provisions for the maintenance and welfare of senior citizens.[49] It enables all senior citizens to file a claim for maintenance from their children,[50] and if they are childless, then from their relatives.[51] The Act defines maintenance to include food, clothing, medical attendance and treatment and *residence*.[52] Furthermore, the Act places an obligation on the children of aged parents to maintain the latter such that they may lead a normal life.[53] Hence, it is easy to make a case on the basis of this legislation, that aged parents can claim a right to residence in the dwelling homes of their children.

---

47 *Barun Kumar Nahar* v. *Parul Nahar*, CS(OS) 2795/2011 (Delhi High Court).

48 *P. Babu Venkatesh, Kandayammal and Padmavathi* v. *Rani,* MANU/TN/0612/2008.

49 *Preamble*, Maintenance and Welfare of Parents and Senior Citizens' Act, 2007 (Hereinafter, "senior citizens' Act").

50 §4(i), Senior Citizens' Act, 2007.

51 §4(ii), Senior Citizens' Act, 2007.

52 §2(b), Senior Citizens' Act, 2007.

53 §4(2), Senior Citizens' Act, 2007.

3. Taking a clue from Rent-Control Legislation

Rent Control legislation in India offers useful insight into what law may look like if crafted through the lens of dominance and vulnerability. As they are enacted by state legislatures, there are several variations in the different state laws. However, a common feature is that of inheritability of tenancy. For instance, S.5 of the Delhi Rent Control Act provides that upon the death of the tenant, the tenancy shall devolve upon the spouse, child, parent or daughter-in-law (if widow of a pre-deceased son) provided that such member were living in the same house and were *dependent* on the deceased tenant.[54] The provision mentions categories of persons who are most likely to be vulnerable, but also mentions dependency as an additional criteria. This particular legislation does not address relationships outside marriage. However, similar protection can be given to members of the Dwelling House while expanding it to include other vulnerable categories of persons as well.

V. **CONCLUSION**

From an analysis of Hindu Succession Laws as well as the secular Transfer of Property Act, it is evident that the law around the dwelling house is currently tangled up in a patriarchal conception of family and women's autonomy. The consequence of this is that on the death of the male 'head' of the family, the dwelling house does not serve the vital function of protecting vulnerable members such as the widow, the daughter and the aged parents.

---

[54] The Karnataka Rent Act, 1999 has a similar provision. In the Maharashtra Rent Control Act, 1999, S.7(15) broadens the scope of such inheritability, stating that *any member* of the tenant's family residing in the premises will be considered a tenant, upon the original tenant's death.

The 2008 amendment to the Hindu Succession Act repealing Section 23 tried to undo this patriarchy. The move is welcome and commendable, although its efficacy is hindered by the juxtaposition of prevalent cultural and sexual norms that dictate women's attitudes towards claiming their share of property.

Hence, apart from waiting for the elusive organic change to take place in society, there are some other measures that the Legislature and the Courts can undertake so that laws reflect non-patriarchal attitudes. Laws relating to the dwelling house must be interpreted with the object of protecting those members who have the most to lose if they lose their rights over the house, rather than with the object of preserving vague notions of family. Two ways to do this have been suggested. First, the patriarchal, narrow view of "family" that Courts have adopted while interpreting Section 44 of the Transfer of Property Act must be changed. Second, law and policy must consciously work towards securing the interests of the most vulnerable members of the family. This can be done by taking lessons from the homestead model that is followed in the West, and by a creative reading of social legislations such as the Domestic Violence Act and the Senior Citizens' Act. The Rent Control regime in some states also provides useful hints on how vulnerability is to be constructed, as it provides tenancy rights to the *dependant family members* upon the death of the tenant.

UNPAID CARE WORK AND INDIAN STATE POLICY

Shrestha Das[*]

ABSTRACT

"Unpaid care work" or the work that is performed within the confines of the household, is mostly undertaken by women and largely left out of the purview of any discussion on what amounts to "work" in an economy. Since, such work occupies a large portion of the day for most women, it is not justified that first, such work is not even considered as performing any work, second, that the burden of such work falls solely on the shoulders of women and third, that the state washes its hand from the wide gamut of tasks that are performed under this umbrella of care labour. This is what has been called as the need to evolve policies based on the three Rs paradigm: Recognition, Redistribution and Reduction respectively. In this paper, the author examines how Indian state policies have fared against this framework with regard to its formulation of unpaid care labour. The paper concludes by noting that although there are some policies which meet the criteria here and there, Indian policies as a whole fall short in properly accounting for unpaid care labour in its policy framework.

I. INTRODUCTION

With the unfolding of industrialization and the absorption of men into the capitalist avenues of paid labour, the work done by women in the confines of the household became increasingly invisible and devalued.[1] To be

* The Author graduated from NALSAR University of Law in 2015 after completing her B.A LLB[Hons.]

1 Dorothy E. Roberts, *Spiritual and Menial House Work* 9 Yale J.L. & Feminism 51 (1997).

considered as a part of the labour force and to be acknowledged as doing "work", wages were required to be earned for the same. However, the work performed by the women in the household increasingly gained association with natural characteristics of "womanhood" and care became synonymous with it, so much so that work done within the household was seen as fulfilling the natural altruistic tendencies of women and a situation of bringing it into the public sphere of "work" was therefore, not fathomable. Compensation was envisaged in terms of emotional reward rather than monetary wages. This strain of thinking continues to get validated through treatment of care work as socially necessary and distinct from the realm of labour law[2], as is reflected in the legislations of many countries.

In most countries even today the vast majority of unpaid care work is undertaken by women. For long, feminists have fought against such invisibilising of women's reproductive labour and the patriarchal agenda behind associating housework with women so as to keep their work unwaged. They have extensively shown that women's work not only sustains the household and enables market participation by other members, but, also increasingly brings down the expenditure which would otherwise have to be incurred if such services were opened up in the market place.[3] Care work,

2 Judy Fudge, *Commodifying Care Work: Globalization, Gender And Labour Law*, LABOUR LAW RESEARCH NETWORK (2013), http://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Fudge.pdf, arguing for an expansion of the domain of labour law to include unpaid work in the household.

3 For example, one scholar notes in the Indian context that the value of unpaid care is estimated as between Rs. 47865- 110028 billions, while person care is estimated as between Rs. 10470-24069 billions, depending on the wage rates used in the valuation. Source?
Rajni Palriwala and N. Neetha, *The Care Diamond: State Social Policy and the Market*, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, (February 2009),

whether paid or unpaid, involves a lot of investment in the capabilities of the recipient and imparts skills, values, and habits to the recipients which not only benefits him/her in terms of earning in the labour market, but, also performing better in all his roles in life be it as a spouse, a parent or a friend.[4] By enhancing the physical, emotional and intellectual capabilities of the recipients, caregivers not only benefit them but also others through them. Feminist scholars have also identified multiple policy options for bringing unpaid care work to the forefront and ensuring that such activities are recognized as "work". The suggested policies are not only aimed at recognition, but, are also aimed at deconstructing the ties which patriarchal society has created between unpaid care work and "womanhood" and have sought to ensure that care work is not thrust upon women and such work is redistributed between members of both genders.[5] The role of the state in ensuring that the reproductive burden is reduced has also been examined.[6]

The conceptual context in which care work is placed is important to understand the various dimensions of care work in differing social policies. Social policies either directly or indirectly must not only ensure that they do not invisibilize the work done by women, but should also be cautious in ensuring that policies do not further accentuate the notion of unpaid care

---

http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/4177D0C917369239C1257566002EA0C7/$file/IndiaRR3.pdf

4 Paula England, *Emerging Theories of Care Work,* 31 ANNU. REV. SOCIOL. 381, 385 (2005).

5 Shahra Razavi, *The Political and Social Economy of Care in a Development Context,* UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT (June 2007), http://www.unrisd.org/unrisd/website/document.nsf/ab82a6805797760f80256b4f005da1ab/2dbe6a93350a7783c12573240036d5a0/$FILE/Razavi-paper.pdf

6 *Id.*

work as natural work of women only. In this context, in the second section I examine the feminist literature on care work, and the frameworks within which they have largely been written about. In the third section I shall analyze the broad contours which have been advocated for setting up or evaluating policies for housework. In the last section I shall review specific policies, plans and laws that can be expected to place within its ambit the issue of 'unpaid care work' as a part of reducing gender disparities. It is important to note that even without categorically referring to unpaid care work, a number of legislations aimed at social welfare, through its stated aim of what the state will do or not do and the conditions on which benefit will be conferred, implicitly carry significant consequences and may unintentionally perpetuate certain social ordering of familial and gendered relationships, and therefore will be considered for review as well. I will conclude with observations as to how the Indian policies match up against some suggested frameworks for incorporating unpaid care labour in the national policies.

II. DEFINING UNPAID CARE WORK

UN Women's Progress of the World's Women 2000, UNIFEM's biennial report defines "unpaid care work" as follows:

> *"The term 'unpaid' differentiates this care from paid care provided by employees of the public and NGO (non government organizations) sector and employees and self-employed persons in the private sector.*

The word 'care' indicates that the services provided nurture to other people.

The word 'work' indicates that these activities are costly in time and energy and are undertaken as obligations (contractual or social)."[7]

Unpaid care work therefore involves cooking, cleaning, caring for elderly, the children and the sick, collecting fuel and water amongst other domestic chores. It also includes voluntary community work.[8] However, for the purpose of this paper reference to "unpaid care work" or "house work" or "women's work" is only in the sense of the former and voluntary community work is not included.

III. LITERATURE REVIEW

The conceptualization of the worker has traditionally been of a white male employed in active production of goods and services that are sold in the market for a price. [9] A worker would have a capitalist boss and be a part of a union. [10] This conceptualization of the worker had the intended or unintended consequence of keeping the housewife away from its purview. In the initial domestic work debates, second wave feminists challenged the manner in which housework is taken for granted, made invisible and

---

7 Progress of the World's Women, 2000 UNIFEM Biennial Report , http://www.unwomen.org/~/media/headquarters/media/publications/unifem/153_chap1.pdf

8 Lopita Huq, *Review of Literature on Unpaid Care Work Bangladesh*, BRAC DEVELOPMENT INSTITUTE (December, 2013), http://interactions.eldis.org/sites/interactions.eldis.org/files/BDI-Research-Report-4-Unpaid-Care-Work-Literature-Review-Bangladesh.pdf.

9 Eva Kaluzynska, *Wiping the Floor with Theory: A Survey of Writings on Housework*, 6 FEM REV 27, 28 (1980).

10 *Id.*

neglected, but, also the assumptions of women's natural and immutable ability and desire to engage in such work.[11] Yet other feminist writers such as Mariarosa Dalla Costa and Selma James conceived of housework as essential for the sustenance of capitalism, whereby the home was equated to a 'social factory' wherein the product of the women's labour was to keep the "workers" in good working condition and yet not be paid for it.[12] For James and Costa, housework was the basis of women's oppression and their lack of power in the society. Other feminist writers like Simon De Beauvoir have assailed housework as being a torture like no other and with 'little affirmation of individuality'.[13]

The writings around unpaid care work can be broadly arranged into four theoretical paradigms: the devaluation theory; the commodification of care theory; and lastly, the love and money paradigm.[14] In the following paragraphs an exposition of the various paradigms has been undertaken.

1) DEVALUATION FRAMEWORK

Devaluation framework states that unwaged nature of care work is largely owing to its close association with women. Cultural institutions have always attributed lower status to women, and by association such devaluation is carried on to the work done by women. This devaluation can be attributed

---

11 *Id.* at 32.

12 *Id.*

13 Fiona Tolan, *Cleaning Gives Me Pleasure: Housework and Feminism in Carol Shields's Unles,* AUSTRALASIAN CANADIAN STUDIES, https://www.academia.edu/700322/_Cleaning_Gives_Me_Pleasure_Housework_and_Feminism_in_Carol_Shieldss_Unless_

14 England, *supra* note 4.

to two primary reasons: a) the public private dichotomy and the private as the sole responsibility of women; and b) care as a "natural" attribute of women

a) THE PUBLIC AND PRIVATE DICHOTOMY

The social constructed bifurcation between the public and the private was a capitalist move to ensure that domestic labour is differentiated from other forms of labour and cordoned off as strictly the business of the private domain and therefore not needing state intervention.[15]

Public policy has generally fostered the public private divide by choosing to not interfere in the realm of the so called private and for a very long time public policy refrained from discussing care and those who provide care. Even the very limited policies on care are based on the male as the breadwinner model, which assumes that men have the primary responsibility of earning while women have the primary responsibility of caring.[16]

b) HOUSEWORK AND CARE AS A "NATURAL" ATTRIBUTE OF WOMEN

Betty Freidan writing in 1963, notes that for many years women were told that "they could desire no greater destiny than to glory in their feminity."[17] They were taught from early girlhood that their role was to seek

---

15 Eric Post, *The Gendered Division Of Labor, The Wages For Housework Movement, And The Law,* GENDER AND THE LAW, https://www.academia.edu/827795/ THE_GENDERED_ DIVISION_OF_LABOR_THE_WAGES_FOR_HOUSEWORK_MOVEMENT_AND_THE _LAW

16 Neetha N, *The Social Organization Of Care Work In India: Challenges And Alternative Strategies*, 53 DEVELOPMENT, 362-367 (2010).

17 BETTY FRIEDAN, THE FEMINIST MYSTIQUE 15 (1963).

fulfillment as wives and mothers.[18] Even now it is assumed that a women's primary role is that of a caregiver. The unpaid care work that is performed by her is then natural because first, nobody had to go out of their way to learn such skills as the skills are passed on from generation to generation owing to our rigid structures of sexual division of labour; and second, because the very essence of being a mother, daughter, wife, sister etc. is hinged on the performance of such duties.[19] Feminist literature has for long exposed the fallacy of these socialization patterns wherein men and women are socialized to perform certain gender roles and then these gender roles become their natural identities, thereby leading to a vicious circle of artificial separation of the roles of a man and a woman.

2) COMMODIFICATION OF CARE

Unlike the other paradigms, the commodification of care argument is not concerned with explaining the low wages of care work but rather with providing a different viewing lens to care work. The commodification of intimate parts of oneself has been at the center of debate of many issues including pornography[20], sex work, surrogacy[21] etc. owing to the alienation that arises from it. However, such claims can be resisted on the grounds that autonomy of women in opting to be paid should be respected[22] and secondly

---

18 *Id.*.

19 Huq, *supra* note 8.

20 *See* Andrea D workin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985) and Catherine A. MacKinnon, *Sexuality, Pornography, and Method: Pleasure under Patriarchy*, 99 ETHICS 314 (1989).

21 *See* Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHILOS. PUBLIC AFF. 71 (1990)

22 *See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists,* 16 L. MED. & HEALTH CARE 72 (1988) and Katherine B. Lieber, *Selling the Womb- Can the Feminist Critique of Surrogacy Be*

because there is no evidence that the alienation is any different from any other form of alienation in the market. Moreover, a proposal that care cannot be commoditized also idealizes care work and fails to fathom the sometimes forced nature of altruism in care work or the pressure to keep care work unwaged or the economic insecurity that unpaid care workers are constantly faced with.[23]

3) LOVE AND MONEY

This line of argument questions the 'oppositional dichotomy between the realms of love and self-interested economic action.'[24] The argument has largely been developed by Julie Nelson and Viviana Zelizer, whereby they posit that because we are culturally acclimatized to view gender in binaries, we are culturally ingrained to see care and private sphere as associated with women whereas the rational and economic world with men. This then causes the worry that introduction of money in care work will necessarily diminish the caring component or the love.[25] Nelson and Zelizer have in fact pointed that such dichotomies are construed on assumptions rather than on actual empirical evidence.[26]

Answered, 68 IND. L.J., 205 (1992) arguing for recognizing the right to consent of women wishing to act as surrogate mothers.

23 Razavi, *supra* note 5.

24 England, *supra* note 4, at 392.

25 *Id.* at 392-394.

26 In fact their theory is backed by other research which finds that when pay is combined with trust and appreciation, the less it drives out genuine intrinsic motivation and in fact unexpected rewards increase intrinsic motivation, thereby demonstrating specific instances of how love and care can be combined rather than assuming a dichotomy between the two.
Id . at 395.

The above writings provide a conceptual setting of how care work is conceived which is of primary importance in understanding what, why, where and how policy intervention must take place.

IV. SETTING A POLICY FRAMEWORK

Indian writing on women and labour laws has largely been restricted to the laws that have come up in the formal sector to enhance greater mobility. In a country, where of the 148 million women workers, 142 million or almost 96% are unorganised workers[27], equality in the formal labour sector, while ignoring care work, has serious repercussions and must be remedied by policy intervention.[28] However differing proposals must ensure economic stability of women engaged in care work while at the same time ensuring that women are 'liberated' from compulsory care work and can achieve economic and political autonomy. In the following section, broad contours of any policy framework shall be discussed.

Policy considerations for unpaid care labour has moved away from demanding wages as the only assuaging solution to evolving multiple solutions that address the problem of unpaid care labour.[29] The foundation

---

27 Padmini Swaminathan, *Outside the Realm of Protective Labour Legislation: Saga of Unpaid Labour in India*, 44 ECON POLIT WKLY 81 (2009).

28 For a general discussion on public policies related to care *see* Deepta Chopra, Alexandra Wanjiku & Padmini Iyer, *A Feminist Political Economy Analysis Of Public Policies Related To Care: A Thematic Review*, Evidence Report No.9 : Empowerment of Women and Girls (July 2013), http://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2795/bitstream?sequence=1

29 Razavi adds her own questions which must be asked when evaluating a policy;
"first, who cares? Whether the care is left to the community or the family? If it is the family then whether the burden is on the women in the household or its shared? ; second, who pays? Is it the family, the state or the employer?;

of any policy on unpaid care work must rest on the three Rs: Recognition, Reduction and Redistribution.[30] Recognition entails acknowledging the unpaid care work done by women as "work" and as "productive" and as much an "economic activity" as any other. This recognition may reflect in policies not only through providing greater compensation for such work (paid care work is valued less owing to the conceptualization of domestic care work as non-work), but also through its recognition while computing other benefits such as pension payments and through its reflection as an economic activity in national statistics.[31] Reduction of unpaid care work would mean that the responsibility of reproductive labour is shifted from the private responsibility of an individual women and the government partakes in it by providing community services.[32] This could be in the form of crèches run by the government or in the Indian context provision of clean drinking water and other resources so that time spent on availing these resources can be reduced. Redistribution means that the components of unpaid care work is shared among different people.[33] One common way of doing it could be ensuring that both maternity and paternity leaves are provided by employers so that the task of child rearing is shared by both parents and does not fall on the shoulders of the woman alone. Other ways of breaking down the sexual division of labour could be provision of jobs by the state so that women

---

third, where is the care provided? Is it in the market place, the family or is it non familial care through public service?"

Razavi, *supra* note 5 at 20

30 *Making Care Visible: Women's unpaid care work in Nepal, Nigeria, Uganda and Kenya*, ACTIONAID (February 2013), http://www.actionaid.org/sites/files/actionaid/making_care_visible.pdf

31 *Id.*

32 *Id.*

33 *Id.* For example in Sweden, parents pay only 13 per cent of costs of extra familial childcare, with the rest coming from the central government and municipalities.

have a chance at trying their hand at something new as well as putting women in position to organize themselves as a collective to put greater stress on division of labour.[34] Based on the experiences of many countries many proposals have been suggested for incorporating these three Rs such as: provision of care allowance and citizens wages[35], pension systems designed in a way to recognize unpaid work as contribution, provision of social security to unpaid care givers and exemption from social security contributions for people employed as carers, provision and designing of health and educational services as well as provision of community based services.[36]

Ultimately the goal is to ensure that care work is a matter of choice and aptitude rather than a compulsion arising from socialization processes.

V. INDIA'S POLICY FRAMEWORK

In this section based on the policy framework highlighted in the previous section and the concerns put forth by feminist writers, an attempt shall be made to evaluate to what extent the concept of care has been incorporated in Indian policy framework. In particular, the Indian policies will be evaluated on their degree of achievement as against the three Rs framework of recognition, reduction and redistribution.

---

34 *Id.*

35 This is a more gender neutral form of paying for care work. One of the outstanding examples of this is the Child Support grant provided in South Africa which has adopted a "follow the child" approach wherein the grant is given to the primary caregiver. This policy is hailed for its gender neutrality and breaking down of social division of labour.
Id.

36 Razavi notes that this not only ensures that care work is valued but provides relatively well protected jobs to women while at the same time freeing up their time to pursue other vocations if they may so desire. It is therefore seen in much favourable light than cash benefits since cash benefits often over very limited benefits and neither do they provide for any social rights.
Razavi, *supra* note 5, at 23-24.

1) THE FIVE YEAR PLANS

A) Twelfth Five Year Plan

In the Twelfth Five Year Plan, while there is a recognition of activities performed by women which was hitherto excluded from economic estimates, the activities which are sought to be included are still in the nature of those activities which produce goods having a sale value in the market.[37] The services performed by women as a part of household chores, continues to evade recognition.

The Twelfth Five Year Plan does provide for initiatives to create avenues for employment through microfinance which is to be made easily accessible to Woman Self Help Groups and therefore addresses the issue of creating employment opportunities for women outside of their homes.[38]

All the provisions seem to be directed at helping women do their housework better, so in that sense there is an effort to remove the drudgery of house work (we can see the operation of the reduction paradigm). However, there is no mention of redistribution or the need to reconceptualize housework as work required to be undertaken by all members of the family and not just the women, and therefore the redistribution paradigm is largely missing. There appears to be an implicit acknowledgment that all these measures are directed at helping women,

---

37 XII Five Year Plan, REPORT OF THE WORKING GROUP ON WOMEN'S AGENCY AND EMPOWERMENT, Ministry of Women and Child Development, Government of India, *available at* http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wcd/wgrep_women.pdf.

38 *Id.* at 12.

reducing the burden of *their* work rather than *overall housework* to be undertaken by all members of the family.

The Twelfth Five Year Plan by taking cognizance of the fact that policies and programs have a differential impact on women and men, also provides for gender budgeting[39] and gender mainstreaming[40] at all level of governance.

Overall, the Twelfth Five Year Plan, while fulfilling the recognition and reduction paradigm to some extent, falls way short of the redistribution paradigm and is in a lot of respects a step down from the Eleventh Five Year Plan

B) Eleventh Five Year Plan

The Eleventh Five Year Plan had also raised similar concerns for provision of micro credits and formation of SHGs as in the Twelfth Year Plan.[41] The Eleventh Five Year Plan similarly provides for gender budgeting and gender mainstreaming and is overall a great initiative, but, the specific direction in which the allotted funds would be used has not been laid down.

However, the Eleventh Five Year Plan makes significant observations

---

39 Gender Budgeting is primarily a way of ensuring that public resources are allocated in equitable ways so as to ensure that the allocation is done in a manner which reflects the concerns of each gender.

40 Gender Mainstreaming in the planning process involves applying a gendered lens to different activities with the stated aim of reducing gender disparities.

41 XI Five Year Plan, REPORT OF THE WORKING GROUP ON EMPOWERMENT OF WOMEN, Ministry of Women and Child Development, Government of India, 14, *available at* http://www.aicte-india.org/downloads/woman_empowerment.pdf.

with regard to the unpaid nature of women's care work which could be attributed to a large extent to the setting up of a Working Group of Feminist Economists to gender the Plan. The Report explicitly recognizes and calls for the need to challenge the "horizontal occupation segregation" or the concentration of women in "feminized jobs" which are based on gender stereotypes of natural traits and abilities.[42] The Plan explicitly recognizes that because these functions are carried out by women they are the lowest paid while at the same time offering no opportunity for advancement.[43] The Report also calls out the absurdity of women being reported as non-workers, considering women spend an average of 8-10 hours a day in domestic chores.[44] The Report goes on to elaborate the need for social security and ensuring regulation in the unorganized sector and also lays down detailed plans for implementation.[45]

The Report also makes some far reaching and well-rounded recommendations.[46] Thus, overall the Eleventh Five Year Plan provides a

---

42 *Id.* at 21.

43 *Id.*

44 *Id.* at 23.

45 *Id.* at 36.

46 Some of the recommendations relevant to the discussion are as follows:
1. Increasing the mainstream financial services available to women;
2. Developing or adapting legal frameworks that eliminate the gender biases of financial institutions;
3. Increasing inclusion of poor women and other vulnerable groups to give them a voice in economic bodies and financial structures;
4. Supporting the incorporation of gender perspectives into budget processes;
5. Undertaking and disseminating gender analyses of economic policies;….
7. The Eleventh Plan should address the unpaid work of women in an explicit manner through a well-designed strategy that will inform all planning and programming for women. The Eleventh Five Year Plan should emphasize the need for collection of comprehensive data on women's paid and unpaid work, women's asset ownership and other sex segregated data.
Id. at 21..

holistic framework for the recognition, reduction and redistribution of work and is an exemplary policy initiative which should dictate further policies and legislations.

2) NATIONAL POLICY FOR THE EMPOWERMENT OF WOMEN

In laying down the framework for the economic empowerment of women, the policy states that the contribution of women to socio-economic development as producers and workers needs to be recognized in both the formal and informal sectors and has included home based workers within the ambit of workers[47]. In achieving this objective, it calls for the reinterpretation and redefinition of conventional concepts of work wherever necessary so as to reflect the true contribution of women to the economy.[48] It also provides for the provision of support services like child care facilities to enable greater participation of women in social and public life.[49] It also discusses the need for provision of safe drinking water and toilet facilities close to the household. This reduces the time spent in household chores.[50] Thus it recognizes that participation of women in public life can be increased by the state taking some responsibilities for the services, which are otherwise often left for women to perform on their own.

However, in terms of recognition of contribution, it alludes to home based workers, but, home based workers are traditionally those workers who work from home to produce goods which are at some point sold in the

47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*

market[51] and therefore the recognition is still in terms of only those activities which are valued in the market. There is no explicit mention of recognizing the work performed by women in the nature of "unpaid care work" as adding any productive value to the economy. The redistribution paradigm is also hardly reflected unless one reads into the stated aim of "changing societal attitudes".

3) NATIONAL COMMISSION FOR ENTERPRISES IN THE UNORGANIZED SECTOR (NCEUS) REPORT ON SOCIAL SECURITY AND THE UNORGANIZED WORKERS SOCIAL SECURITY ACT

The NECUS Report 2007 (Recognition of Work and Promotion of Livelihood in the Unorganized Sector) [*hereinafter* the Report] recognizes the 'double burden of work' which is that while women may not be contributing to the activities which have a price tag in the market, a large part of their time is nevertheless occupied by 'socially productive and reproductive labour.'[52] The Report recognizes that such burden of work being imposed on them is the reason for the low participation rate of women in other activities. In this context the Report notes that while women spend almost 35 hours a week on child care, care of old and the sick at home and on household maintenance

---

51 The definition of 'home based worker in the Unorganized Workers Social Security Act 2009 under Section 2(b) reads as follows:
'home based worker' means a person engaged in the production of goods or services for an employer in his or her home or other premises of his or her choice other than the workplace of the employer, for remuneration, irrespective of whether or not the employer provides the equipment, materials or other input.

52 RECOGNITION OF WORK AND PROMOTION OF LIVELIHOOD IN THE UNORGANIZED SECTOR, National Commission for the Enterprises in the Unorganized Sector, 75 (2007).[NCEUS Report]

activities, men spend less than fours a week on such activities.[53] Furthermore, as against 53% women in rural areas and 65% women in urban areas (in age group of 15- 59 years) being engaged in domestic work as principal status, only 0.4% men were engaged in domestic duties as principal status.[54] The Report also recognizes that activities performed by women help to significantly save household income.

However, despite such recognition for unpaid care work being accorded in the 2007 Report, the earlier NCEUS Social Security of Unorganised Workers Report of 2006 had defined unorganised workers as "all those who are working in the unorganised sector and the workers in the formal sector without any employment security and social security provided by the employer" and therefore explicitly excluded unpaid workers from its domain.[55] In doing so, it failed to recognize the heavy risks that unpaid workers are faced with on an everyday basis and their position as the most exploited lot and failed to provide them with even minimum benefits of health security and old age security or life insurance.[56]

The Unorganized Workers Social Security Act, 2009 draws on the NCEUS Report 2006 and in doing so excludes unpaid workers from the definition of "unorganized workers" to who the act applies.[57] "Unorganized

---

53 *Id.* at 77

54 *Id.*

55 Neetha N., *'Invisibility' Continues? Social Security and Unpaid Women Workers,* 41 ECON POLIT WKLY 3497, 3497 (2006).

56 *Id.*

57 Unorganized Workers Social Security Act, 2009, § 2 (m): "unorganized worker" means a home based worker, self-employed worker or a wage worker in the unorganized sector and includes a

workers" seeks to cover only wage workers[58] who earn remuneration for the work done by them, home based workers[59] and self-employed[60] workers who although not employed by an employer, earn a stipulated amount every month. The Act, similar to the NCEUS Report removes from its ambit unpaid workers.

This has an unproportional impact on women whose work is largely in the nature of unpaid care work and therefore the Report has intentionally or unintentionally excluded a large proportion of women from the ambit of social security.[61] Thus the stated aim of an inclusive approach to provision of social security by the Report, largely remains a distant goal as far as unpaid workers (largely comprising of women) are concerned.

4) *THE MAHATMA GANDHI NATIONAL RURAL EMPLOYMENT GUARANTEE ACT* (MGNREGA)

The Act provides that one third of all workers should be women and

---

worker in the organized sector who is not covered by any of the Acts mentioned in Schedule 11 to this Act

58 Unorganized Workers Social Security Act, 2009, § 2 (n): "wage worker" means a person employed for remuneration in the unorganized sector, directly by an employer or through a contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home based worker, or as a temporary or casual worker, or as a migrant worker, or workers employed by households including domestic workers, with a monthly wage of an amount as may be notified by the Central Government and the State Government as the case maybe.

59 NCEUS Report, *supra* note 53.

60 Unorganized Workers Social Security Act, 2009, § 2(k): "self-employed worker" means any person who is not employed by an employer, but engages himself or herself in any occupation in the unorganized sector subject to a monthly earning of an amount as may be notified by the Central Government or the state Government from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government.

61 Neetha, *supra* note 55.

ensures that both men and women are paid the same wages. It also provides for setting up of crèche facilities where there are more than five children present on the site. It also requires that the work granted to women should be within a five km radius from their house, making it easier for women to take up jobs under MNREGA.

As noted above, one of the ways of ensuring the reduction of unpaid care work is to ensure that there are job opportunities available outside of the home. The MNREGA has provided job opportunities for women, which prior to the scheme was available to very limited women. It has also fostered economic independence in women[62], where none existed earlier, by ensuring that women collect their own wages and have control over how their money is spent and reduces their dependence on the male members.[63] Thus, provision of economic employment opportunities outside of the home increases the bargaining position of women. This increase in bargaining position is evident from the shift in the burden of housework being performed solely by women earlier, to now being shared by both. In a study on the impact of MNREGS, some respondents noted that their husbands are willing to undertake chores such as preparing tea for them, which would earlier not have been possible.[64] Economic independence also allows them to decide where money is to be spent, and it can be seen that women sometimes

62 Amrita Chaterjee, *Employment Guarantee And Women's Empowerment In Rural India,* https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IAFFE2011&paper_id=120 (last visited July 5th, 2015).

63 Reetika Khera and Nandini Nayak, *Women Workers and Perceptions of the MNREGA,* 44 ECON POLIT WKLY 49 (2009*).*

64 Ashok Pankaj and Rukmini Tankha, *Empowerment Effects of the NREGS on Women Workers: A Study in Four States*, 45 ECON POLIT WKLY 45 (2010).

spend it in a way which reduces the drudgery of their housework.[65] Thus it will not be a stretch to say that someday the imbalance in the household will improve if the MNREGA's functioning is improved further.

MNREGA has also provided a forum for the socialization of women and a platform for them to voice their common issues[66] and has helped them to overcome the isolation which the private sphere has for long imposed on women. This can also ensure that women come together to demand the sort of work which will reduce their workload and free up their time.[67]

Another drawback of the enormous time spent by women behind closed doors on household chores was that they had very little time for civic duties. Also, owing to the association of women with the private sphere, such civic engagement was not encouraged. With the advent of the MNREGA, women's participation in Gram Sabhas has increased drastically[68] which can be assumed to be arising out of the acceptance of women in the public sphere, fostered by the MNREGA.

Of course there is a lot of scope for improvement of the MNREGA and it can draw on the Maharashtra Employment Guarantee Scheme for this

---

65 In the study it was found that one woman worker in Kangra used her NREGS income for the construction of a toilet inside her house, which would significantly reduce the time spent in hunting for sanitary facilities, carrying water to such facilities etc.
Id.

66 *Id.*

67 Sukti Dasgupta And Ratna M. Sudarshan , *Issues In Labour Market Inequality And Women's Participation In India's National Rural Employment Guarantee Programme*, POLICY INTEGRATION DEPARTMENT, INTERNATIONAL LABOUR OFFICE (February 2011), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_153042.pdf

68 Pankaj and Tankha, *supra* note 64.

purpose. There can be provision for breastfeeding breaks for lactating women, flexibility in working hours, improved crèche facilities by linking it to other national child care schemes, maternity benefit for women[69], as well as provision of make shift toilets on the work site to name a few.[70] Redistribution of work of women has to go hand in hand with MNREGA if empowerment has to be truly achieved, as it could otherwise lead to a situation of increasing the work of women whereby they have to undertake work both inside as well as outside the household.[71]

The greatest contribution of MNREGA therefore remains in its provision of opportunity for women outside of the house. In fact a study of women in six MNREGA district, notes that in the absence of MNREGA, they would have continued working at home or remained unemployed.[72] Not only has this drastically shot up the number of women engaging in paid labour, it has also had a domino effect within the household as well. It serves the reduction paradigm very well by providing services such as drinking water on site and crèche facilities on site, activities on which women would have otherwise spent a significant amount of their time. Thus, while the recognition and reduction paradigm are served by the MNREGA directly, in its implementation, an impact on the redistribution paradigm can be seen through the sharing of household work by both men and women as a result of increased bargaining power of women. The MNREGA remains one of the

69 Chopra, *supra* note 28.
70 Pankaj and Tankha, *supra* note 64.
71 Chopra, *supra* note 28.
72 Khera and Nayak, *supra* note 63.

most impactful schemes by the Government in terms of dealing with unpaid care work.

5) MATERNITY BENEFIT ACT AND PATERNITY LEAVES

The Act provides for payment of cash maternity benefits for certain cases of confinement[73], grant of leave and other medical facilities besides providing for wages at an average daily wage during the period of actual absence.[74] Maternity benefit is applicable for a maximum period of twelve weeks and during this period the woman cannot be dismissed from work.

However, the Maternity Benefit Act has limited coverage and leaves a vast majority of women in the unorganised sector open to vulnerability. Therefore, based on the recommendations of the Eleventh Five Year Plan, the Government under the Ministry of Women and Child Development, started the Indira Gandhi Matritva Sahyog Yojana to cover all women who are not already covered under the existing maternity benefit provided by the Government to its employees. It is a conditional maternity benefit scheme so as to provide a modest maternity benefit to women in order to partly compensate for their wage loss and to ensure that they do not feel compelled to work till the last stage of delivery.[75] The scheme seeks to provide a cash

---

73 As per the definition of 'confinement' in Section 2 (3) of the Act, a woman is eligible for maternity benefit even if pregnancy results in the birth of a still child if the child is born after 26 weeks of pregnancy.

74 Maternity Benefit Act, § 5 (1)

75 INDIRA GANDHI MATRITVA SAHYOG YOJANA- A CONDITIONAL MATERNITY BENEFIT SCHEME, IMPLEMENTATION GUIDELINES FOR STATE GOVERNMENTS / UT ADMINISTRATIONS, MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA (April 2011), http://wcd.nic.in/schemes/sabla/IGMSYImpGuidelinesApr11.pdf

incentive of Rs.4000 directly to women above the age of 19 years subject to the woman fulfilling specific conditions relating to maternal child health and nutrition. However, the benefits of this scheme are available only on the fulfillment of certain conditions which require a demonstration of "good behaviour" such as registering pregnancy, breast feeding the baby for six months, amongst others.[76] While these conditions have the aim of improving the overall birthing process, they fail to account for various institutional failures and cultural taboos which will have the effect of throwing a lot of women out of its coverage and also reeks of paternalism towards women.

The Central Civil Services (Leave) Rules, 1972 were amended in 1999[77] and vide Rule 43A, provision for paternity leave was included.[78] Under Section 43A, a male government servant (including an apprentice) with less than two surviving children would be granted a period of 15 days of paid paternity leave which can be availed either 15 days before the date of delivery or within six months post-delivery.[79] The Ministry of Personnel via a later notification (No. 13018/1/2009-Estt.(L)) extended this provision of maternity leave even in the case of adoption of a child.[80] The period of 15 days provided under the Indian law falls way short of the paternity leave

---

76 Lakshmi Lingam, Vaidehi Yelamanchili, *Reproductive Rights and Exclusionary Wrongs: Maternity Benefits,* 46 ECON POLIT WKLY 94, 95 (2011).

77 GOVERNMENT OF INDIA, MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS, DEPARTMENT OF PERSONNEL & TRAINING, NOTIFICATION NO. 13018/2/1999-Estt.(L), *available at* http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02est/13018_2_98-Estt(L).pdf

78 The Central Civil Services (Leave) Rules, 1972, § 43A.

79 *Id.*

80 GOVERNMENT OF INDIA, MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS, DEPARTMENT OF PERSONNEL & TRAINING, NOTIFICATION NO. 13018/1/2009-Estt.(L), *available at* http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02est/13018_1_2009-Estt.(L).pdf

granted in many countries of which Sweden has been the leader, encouraging the fathers in the country to take whole two months off to build bonds with the young.[81]

However, there is no uniformity with regard to paternity leave in the private sector with paternity leave ranging from zero days and going up to 12 weeks.[82]

Biological parentage does not equal social parentage, and social parentage does not equal womanhood.[83] Men can take care of children as well as women. As co-parents, rather than primary mothers, women would find more time for work and other interests as men do now.

Thus, the concept of paid paternity leave in India has to be more widely recognized and an extension of the period of leave must seriously be contemplated in pay commission reports and other policies.

6) CRÈCHE FACILITIES UNDER DIFFERENT LEGISLATIONS

Section 48 of the Factories Act, 1948, provides that crèche facilities must be provided in every factory which employs more than thirty female

---

81 While both Germany and USA do not grant any paternity leave, some countries grant paternity leave of 1-5 days (Argentina - 2days, Brazil - 5 days, Indonesia - 2 days, Saudi Arabia -1 day), others between 5-15 days (Denmark - 14 days, France - 14 days, Philippines - 7 days, Portugal - 14 days, UK - 14 days at a fixed amount of 108.85 pounds). Some countries however have given serious consideration to the otion of paternity leave and grant long periods of paternity leave (Italy -13 weeks (80% pay), Sweden - 8 weeks, Norway - 45 weeks (80% pay), Canada - 35 weeks (55% pay)) Aparna.Chandra, *Father, You Are Eligible,* BANGALORE MIRROR, May 8, 2011, at 6.

82 *Id.*

83 Margaret Mead, *Some Theoretical Considerations On The Problem Of Mother-Child Separation*, 24 AM. J. ORTHOPSYCHIATR. 471 (1954).

workers, for children aged below six years. It requires that such children shall be under the 'charge of women trained in the care of children and infants.' It gives the State Governments the right to make rules for provision of additional facilities as well as for requiring the provision in any factory of free milk or refreshment as well as provision of facilities for the mothers of such children to feed them at the necessary intervals.[84]

Rule 44 of The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central Rules, 1980 provides for the establishment of a well-functioning and well ventilated crèche in every establishment where twenty or more workmen are ordinarily employed as migrant workmen and in which employment of migrant workmen is likely to continue for three months or more. The burden of establishing such crèche is on the contractor or alternatively on the principal employer. It is important to note here that unlike the Factories Act, the criterion for the establishment of a crèche is much lower in the sense that the number of workmen required is just *twenty workmen* as against *thirty women workmen* requirement under the Factories Act.[85]

Similar requirements of provision for crèches has also been provided under Section 14 of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 (the provisions are the exact same as that under the Factories Act) as well as under Section 35 of the Building and other

84 Factories Act, 1948, § 48

85 The Inter-State Migrant Workmen (Regulation Of Employment And Conditions Of Service) Central Rules, 1980, Rule 44.

Constructions (Regulation of Employment and Conditions of Service) Act, 1996 (requires the presence of more than fifty female building workers)

Another pioneering scheme by the Central Government is the Rajiv Gandhi National Crèche Scheme for the Children of Working Mothers. Although the Scheme is meant for working mothers, it recognizes that such facilities "*are not only required by working mothers but also women belonging to poor families, who require support and relief from childcare as they struggle to cope with burden of activities, within and outside the home.*"[86] The crèche facilities can be availed by parents whose monthly income do not cross Rs.12,000 in a month at the payment of a nominal fee and is open to children below the age of six years. The crèche facilities are required to be well equipped and provision has also been made for the delivery of nutritional food and safe drinking water in the crèche. It also covers health care facilities and requires the appointment of crèche workers equipped in providing preschool education to the children. Overall the Scheme is a great initiative which completely fulfills the recognition paradigm by noting the work that women are required to do both inside as well as outside their homes as well as the reduction paradigm by noting the Government's responsibility in reducing that burden of child care which solely falls on women in most cases.

86 Rajiv Gandhi National Crèche Scheme For The Children Of Working Mothers, Government Of India, Department of Women & Child Development, Ministry of Human Resource Development, *available at* http://wcd.nic.in/SchemeChildren/RajivGandhiCrecheScheme.pdf

7) DRAFT BILL BY THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT PROPOSING WAGES FOR HOUSEWORK TO BE PAID BY THE HUSBAND.

The Ministry of Women and Child Development had proposed a draft bill for a part of the husband's salary being transferred to the wife's bank account in recognition of all the domestic work performed by the wife all day long. Such a part of the husband's salary was to be tax free and was aimed at providing women finances to run the household and also to provide for personal expenditures of the wife. Such payment was to be seen as an honorarium for the services of the wife which are otherwise rendered free. But does payment of money by the husband to the wife solve the problem of "unpaid care work" as has been outlined in the paper?

A similar effort had been made in the 1990s in the wages for housework movement. A strong lobby of feminists, led by Selma James, Maria Dalla Costa and Silvia Federici, started the Wages For Housework (now called Wages Against Housework) campaign whereby they argued that housework is a task that is not only imposed on women but a very careful strategy of the capitalist patriarchal society by which housework and care for the family is made a natural attribute of a women, an attribute that is essential to realization of our feminine character and has therefore kept us out of the social contract theory.[87] MacKinnon also echoed support for this movement as she felt that men earned wages for their labour which was produced by

87 Silvia Federici, *Wages Against Housework,* http://caringlabor.wordpress.com/2010/09/15/silvia-federici-wages-against-housework/ (last visited on June 10th, 2015)

women who were in turn paid nothing.[88] She also posited that capitalism kept women as reserve capital, calling upon them in times of need of labour and paying them pittance because they are usually used to receiving nothing in return for labour.[89]

Therefore, in demanding payment for unpaid care work, it not only raises the status of women's work but also allows recognizes that women enjoy a degree of autonomy and creativity in housework and should be allowed to pursue it, while at the same time the demand for remuneration would ensure that they are not economically dependent on their families while pursuing their roles as housewives. [90]

However, the proposal, as many feminist writers have come to recognize, is riddled with many problems. First, it offers a very economist and superficial solution, without going to the root of the issue. In touting wages as the ultimate answer to the problem of unpaid care work, it assumes that by monetizing the activities women would be happy doing it.[91] It does not question the gender bias in the society by which such work is thrust upon and made the responsibility of women in the first place. While it recognizes the work done by women, it fails to redistribute by seeing the ultimate solution in the form of wages. Second, it does not indicate the source of funding for the wages.[92] If the wages have to come from the husband then it

88 KATHERINE MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 66-7 (1st ed. 1989).
89 *Id.*
90 Sujata Gothoskar, Rohini Banaji and Neelam Chaturvedi, *Women, Work, Organisation and Struggle*, 18 ECON POLIT WKLY 339, 341-343(1983).
91 Kaluzynska, *supra* note 9.
92 *Id.*

makes the women excessively dependent on the earnings and income status of the husband.[93] It also ignores the question of unpaid care labour rendered by mothers, sisters and other women in the family.

8) SYSTEM OF NATIONAL ACCOUNTS

The National Sample Survey (NSS) still classifies tending to domestic duties as being as activities "not in the labour force." Activity Status Codes 92 and 93, attended to domestic duties only and attended to domestic duties and was also engaged in free collection of goods (vegetables, roots, firewood, cattle feed, etc.), sewing, tailoring, weaving, etc. for household use respectively, were categorized as "not a part of the labour force" in the NSS Report No. 537. [94]

VI. CONCLUSION

For any social policy to be truly successful it must:

i) Indicate recognition of women's contributions through unpaid care work

ii) Reduce the drudgery associated with performing unpaid care; and

iii) Redistribute responsibilities for care.[95]

---

93 One author notes that while this solution may immediately only cause a redistribution of income in the family, in the long run, wage earners will make demand for increased wages from their employers in order to fulfill this responsibility and also seek facilities like crèche allowance *Supra* note 30.

94 *NSS Report No. 537: Employment and Unemployment Situation in India*, at 13-15 (2009-10), http://www.indiaenvironmentportal.org.in/files/file/NSS_Report_employment%20and%20unemployment.pdf

95 Chopra, *supra* note 28.

The following table demonstrates how far the Indian policies have matched up to the 'Three Rs' framework details in the preceding section.

The 3R Paradigm	**Strategies**	**Policies**
Recognition	Recognition as economic activity in collection of statistical information	The NSS classifies domestic duties as not being a part of the labour force
	Provision of Social Security to unpaid care workers	The NCEUS Report 2006 and the Unorganized Workers Social Security Act do not provide Social Security to Unpaid care workers
	Other forms of recognition (recognizing the drudgery of unpaid care work and its unilateral burden on women)	1) Both the Five Year Plans 2) National Policy for the Empowerment of Women 3) NCEUS 2007 Report
Reduction	Crèches	1) Section 48 of the Factories Act, 1948 2) Rule 44 of The Inter-State Migrant Workmen (Regulation Of Employment And Conditions Of Service) Central Rules, 1980 3) Section 14 of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 4) Section 35 of the Building and other Constructions (Regulation of Employment and Conditions of Service) Act, 1996 5) Rajiv Gandhi National Crèche Scheme For The Children Of Working Mothers. 6) National Rural Employment Guarantee Act
	Provision of drinking water	1) Rajiv Gandhi National Crèche Scheme For The Children Of Working Mothers 2) National Rural Employment

		Guarantee Act
	Maternity Benefit	1) Maternity Benefit Act, 1961 2) Indira Gandhi Matritva Sahyog Yojana
Redistribution	Paternity Leave	The Central Civil Services (Leave) Rules, 1972, Rule 43A
	Provision of jobs to break down sexual division of labour	MNREGA

While, the Recognition and Reduction paradigm seem to be visible to a some extent in Indian policies on unpaid care work, policies aimed at redistribution are far and few. Even in the recognition paradigm, there is an urgent need for statistical collection to consider unpaid care work as economic activity as is done in the statistical collection of most countries and international organizations. Even the ones which address the redistribution question do so in a vague and farfetched manner and there has been no attempt to shift the burden explicitly. The sub-text of most programmes has been that even while ensuring the employment of women, there should not be any interfere with their primary responsibilities of care in the domestic domain.[96] Unpaid care work in India continues to remain the domain of women and even while they are making forays into economic employment, the burden of house work continues to rest solely on their shoulders. It is the duty of every state to ensure that public facilities are available to women who wish to ease such a burden. This calls for a whole new outlook to the drafting of policies in India.

96 Palriwala and Neetha, *supra* note 4.

FDI IN REAL ESTATE IN INDIA: LAW, POLICY AND PRACTICE

Abhinav Kumar[*]

ABSTRACT

The Indian real estate sector is among the fastest growing in the world, and one of the most critical sectors for the Indian economy. Recent reports indicate that the sector has begun to generate an increased interest amongst foreign investors. However, from a foreign investment perspective, real estate has historically been one the most jealously guarded sectors, with FEMA regulations and successive FDI Policies establishing an intricate set of controls that heavily regulate the entry of foreign capital into Indian real estate. To illustrate this point, it would be apposite to note that in precise legal terms, "FDI in real estate" is itself a misnomer, since, as prescribed in the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, and each Consolidated FDI Policy of India, "real estate business" is one of the prohibited sectors with respect to FDI. Further, other FEMA Regulations such as the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 impose several controls and procedural requirements for the acquisition and transfer of immovable property in India even by NRIs and Persons of Indian Origin. That being said, foreign investment in real estate has come to be equated with investment in the "construction development sector," which was thrown open to foreign investment in 2005. Recent policy changes introduced by the Government of India, aimed at increasing the ease of doing business for investors, are poised to inject fresh foreign capital into the sector. This, coupled with the introduction of Real Estate Investment Trusts ('REITs'), has combined to create a positive and compelling investment atmosphere in the real estate sector. Accordingly, the purpose of the

[*] The author is studying B.A LLB[Business Laws Hons.] at National Law University, Jodhpur.

present article is to clarify the exact scope and contours of FDI in the Indian real estate sector, with reference to the extant legal regime, government and FIPB policy, the recently introduced changes to law and policy, and certain outstanding legal issues.

I. INTRODUCTION

The Indian real estate sector is one of the most critical and fastest growing sectors of the Indian economy. The size of the Indian real estate market was estimated to be approximately $78.5 billion in FY13 and is expected to grow to approximately $140 billion in FY17.[1] Since it has many stakeholders and is inter-connected with a number of different sectors, growth in the real estate sector has a huge multiplier effect on the economy and is therefore a major driver of economic growth. Not only does it generate a high level of direct employment, but it also stimulates demand in over 250 ancillary industries such as cement, steel, paint, brick, building material, consumer durables and so on. As per recent estimates, its contribution to India's GDP has been 5-6%. [2]

As one of the critical sectors of the economy, the real estate sector requires constant infusion of a large amount of capital, including, in the interests of the sector, foreign investment. However, the real estate sector *per se* is subject to heavy foreign investment regulation under the Foreign

1 Ernst & Young and FICCI, *Brave new world for India real estate: Policies and trends that are altering Indian real estate*, available at: <http://www.ey.com/Publication/vwLUAssets/EY-Brave-new-world-for-India-real-estate/$FILE/EY-Brave-new-world-for-India-real-estate.pdf> (accessed 2nd April 2015).

2 See generally, < http://www.ficci.com/sector/59/Project_docs/real-eastate-profile.pdf> (accessed 2nd April 2015).

Exchange Management Act, 1999 ('FEMA') regime, read with the extant Foreign Direct Investment ('FDI') Policy and other relevant regulations, notifications and guidelines. The sector has witnessed manifold changes in recent times in terms of easing of conditions for foreign investment and introduction of Real Estate Investment Trusts ('REITs'). The present article, therefore, is an attempt to examine the law, policy and practice with respect to FDI in the Indian real estate sector. Part II will clarify the exact scope of "FDI in real estate" in India with reference to the extant legal regime. It is concluded that while FDI in the "real estate business", *viz.* dealing in land for profit is prohibited, real estate in terms of construction and built-up infrastructure is open to 100% foreign investment under the automatic route. Accordingly, Part III will examine the extant norms for FDI in the construction development sector through a comparative table. Thereafter, Part IV will examine the scope of foreign investment in real estate in terms of REITs, in light of the newly introduced Securities and Exchange Board of India (Real Estate Investment Trust) Regulations, 2014, including a discussion on potentially contentious issues. Finally, Part V will offer a brief concluding analysis.

II. Clarifying the scope of "FDI in real estate in India"

Any involvement of foreign investment in the real estate sector leads to host of restrictions under FEMA. Real estate has traditionally been a prohibited sector for foreign investment.[3] As per the 2014 FDI Policy,[4] "real

[3] See, FEMA Notification No. 1/2000-RB dated May 3, 2000 ['FEMA 1'], available at: < http://rbi.org.in/scripts/BS_FemaNotifications.aspx?Id=155> (accessed 1st April 2015). In fact,

estate business or construction of farm houses" is a "prohibited sector"[5] with respect to FDI. However, the ambit of the term "real estate business" cannot be ascertained under this Policy, since it is not defined therein. It is also notable that the term was not defined in the 2013,[6] 2012[7] or 2011[8] FDI Policies. However, a definition can be located in the 2010 FDI Policy,[9] albeit within parentheses, and in an otherwise unrelated sub-Paragraph dealing with the eligibility of resident entities for NRI/PIO investments,[10] which defines real estate business as "dealing in land and immovable property with a view to earning profit or income therefrom." It is notable that after this gap of 4 years, the definition of "real estate business" has been accorded a more

---

the overarching policy of the Government of India has been to limit dealings in Indian land. For instance, the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 ['FEMA 21'] impose several controls and procedural requirements for the acquisition and transfer of immovable property in India by NRIs/PIOs. See, FEMA 21, available at: <https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=175> (accessed 25th June 2015).

4 Consolidated FDI Policy Circular of 2014 (Department of Industrial Policy and Promotion ('DIPP'), Ministry of Commerce & Industry, Govt. of India, 17th April 2014), available at: <http://dipp.gov.in/English/Policies/FDI_Circular_2014.pdf> (accessed 2nd April 2015) ['2014 FDI Policy'].

5 Paragraph 6.1(f), 2014 FDI Policy.

6 Consolidated FDI Policy of India, vide Circular 1 of 2013 (DIPP, Ministry of Commerce & Industry, Govt. of India, 5th April 2013), as available at: <http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf> (accessed 1st April 2015).

7 Consolidated FDI Policy of India, vide Circular 1 of 2012 (DIPP, Ministry of Commerce & Industry, Govt. of India, 10th April 2012), as available at: <http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf> (accessed 2nd April 2015).

8 Consolidated FDI Policy of India, vide Circular 2 of 2011 (DIPP, Ministry of Commerce & Industry, Govt. of India, 1st October 2011), as available at:< http://dipp.nic.in/English/policies/FDI_Circular_02_2011.pdf> (accessed 2nd April 2015).

9 Consolidated FDI Policy of India, vide Circular 1 of 2010 (DIPP, Ministry of Commerce & Industry, Govt. of India, 1st April 2010), available at <http://www.oifc.in/Uploads/MediaTypes/Documents/FDI_CIRCULAR_1_OF_2010_CONSOLIDATED_FDI_POLICY.pdf> (accessed 2nd April 2015) ['2010 FDI Policy'].

10 Paragraph 3.3.2(iv), 2010 FDI Policy.

prominent place in the 2015 FDI Policy,[11] and occurs in the clarifications issued under the construction development sector.[12]

The above definition has been reproduced from FEMA Notification No. 1/2000-RB dated May 3, 2000 ['FEMA 1'][13] read with the RBI Master Circular on Foreign Investment,[14] which, while defining real estate business to include dealing in land and immovable property with a profit motive, *excludes* from its scope *development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure and townships*. Therefore, while real estate in terms of dealing in land has traditionally remained off-limits for FDI, certain other sectors dealing with built-up infrastructure have been distinguished and excluded from the ambit of "real estate business". These sectors were opened up to foreign investment by the path-breaking DIPP Press Note 2 of 2005 [PN 2].[15]

PN2 permitted 100% FDI under the automatic route in townships, housing, built-up infrastructure and construction-development projects (which would include, but not be restricted to, housing, commercial

---

11 Consolidated FDI Policy Circular of 2015 (DIPP, Ministry of Commerce & Industry, Govt. of India, 12th May 2015), available at: < http://dipp.nic.in/English/policies/FDI_Circular_2015.pdf> (accessed 25th June 2015) ['2015 FDI Policy'].

12 Note (i), Paragraph 6.2.11.2, 2015 FDI Policy.

13 *Supra* note 3.

14 Reserve Bank of India, *Master Circular on Foreign Investment in India,* available at: <http://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9006> (accessed 2nd April 2015).

15 Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Press Note 2 of 2005, available at: < http://dipp.nic.in/English/policy/changes/pn2_2005.pdf> (accessed 2nd April 2015).

premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure) subject to fulfilment of certain entity level and project level requirements.

In consonance with the above, the present position with respect to FDI in the real estate sector as outlined in the extant FDI Policy is that, while FDI is still prohibited in the "real estate business", i.e. dealing in land and immovable property with a profit motive, 100% FDI through the automatic route is permitted in the "Construction Development" sector (comprising townships, housing and built-up infrastructure, the ambit of which is identical to that outlined by PN2, as provided above). In spirit, FDI in the broad sphere of real estate is permissible only if it is used for developmental purposes, and not for buying and selling of land.

III. Conditions to be fulfilled for FDI in the construction development sector

While the construction development sector allows 100% FDI through the automatic route, the FDI Policy imposes several conditions pertaining to how foreign investment is to be made. The conditions prescribed by the 2014 FDI Policy mirror those that were introduced under PN2.[16] However, since then, the government – ostensibly in its drive to increase the ease of doing business in India – has systematically liberalized the FDI regime both on the whole, and particularly with respect to the construction development sector. In respect of the latter, this liberalization

16 The salient features of PN2 have been discussed *infra* in Table I.

occurred in two phases: in October 2014 and thereafter, more recently in November 2015.

On October 29, 2014, the Union Cabinet issued a press release titled *Review of FDI in the Construction Development Sector,*[17] outlining several proposed amendments to the conditions in force, aimed at easing the FDI norms. These amendments were notified *vide* DIPP Press Note No. 10 of 2014 ['PN10'],[18] and formed the basis of Paragraph 6.2.11 (which pertains to the construction development sector) of the 2015 FDI Policy.[19]

However, on November 10, 2015, barely six months from the notification of the FDI Policy, the government announced sweeping changes to the existing FDI regime, covering numerous sectors including construction development.[20] These amendments have been notified *vide* DIPP Press Note 12 of 2015 ['PN12'],[21] and the entire Para 6.2.11 has been replaced, incorporating several changes – both insertions and deletions – to the earlier position.

---

17 Press Information Bureau, Government of India, *Review of Foreign Direct Investment policy on the Construction Development Sector*, 29th October 2014, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=110938> (accessed 2nd April 2015).

18 Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Press Note 10 of 2014, available at: < http://dipp.nic.in/English/acts_rules/Press_Notes/pn10_2014.pdf> (accessed 2nd April 2015).

19 *Supra* note 11.

20 See, *Govt. eases FDI norms in 15 major sectors*, Indian Express (11th November 2015), available at: <http://indianexpress.com/article/india/india-news-india/govt-eases-fdi-norms-fipb-limit-raised-from-rs-3000-crore-to-rs-5000-crore/> (accessed 27th January 2016)

21 Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Press Note 12 of 2015, available at: < http://dipp.nic.in/English/acts_rules/Press_Notes/pn12_2015.pdf> (accessed 25th January 2016).

The purpose of this Part is to track and discuss the above developments in detail, in order make the present position with respect to FDI in the construction development sector crystal clear. To this end, Sub-Part A will discuss, in the form of a comparative table with explanatory comments (Table I), the original conditions as prescribed under PN2/2014 FDI Policy and the revised conditions as prescribed by PN10/2015 FDI Policy. Sub-Part B will elaborate upon and analyze the changes wrought by PN12 to reflect the latest position.

VI. TABLE I: POSITION UNDER PN2/FDI POLICY 2014 AND CHANGES INTRODUCED BY PN10/FDI POLICY 2015

S. No.	CONDITION	PN2/FDI POLICY 2014	PN10/FDI POLICY 2015	COMMENTS
1	Minimum area to be developed	a) For serviced housing plots, minimum land area of 10 hectares. b) For construction development projects, minimum built-up area of 50,000 sq. metres. c) In case of a combination project, either of the above 2 conditions should be fulfilled.	a) No minimum land area requirement in case of *serviced* plots. b) For construction development projects, minimum *floor area*[22] of *20,000* sq. metres.	(i) The replacement of "serviced housing plots" with "serviced plots" indicates that companies are now allowed to develop commercial plots.
2	Minimum capitalization	A company seeking foreign investment for construction development projects must be capitalized to a certain extent (USD 10 million for wholly owned subsidiaries and USD 5 million for joint ventures with Indian partners) by the foreign investor. Also, such capitalization should be brought in within 6	The investee company is now required to bring a *reduced minimum* of USD 5 million of FDI within 6 months of the commencement of the project (fixed as the date of approval of the building/layout plan by the relevant authority).	

[22] As per Note (v) of PN10, 'Floor area' will be determined as per the local laws/regulations of the concerned State Government or Union Territory. Further, the Indian investee company is required to procure a certificate from an architect empanelled by any Authority to the effect that the minimum floor area requirement has been met.

		months of commencement of business of the company.	Subsequent tranches of FDI can be brought till 10 years from the commencement of the project or before the completion of the project, whichever expires earlier.	
3	Lock-in /investor exit	a) Original investment was not permitted to be repatriated before a period of three years from the date of completion of minimum capitalization. b) If the foreign investor sought to make an early exit, it was required to obtain prior approval of the FIPB.	a) The investor is now permitted to exit either on completion of the project,[23] or after development of trunk infrastructure (defined as roads, water supply, street lighting, drainage and sewerage).[24] b) The FIPB shall consider, on a case-to-case basis, proposals for repatriation of FDI or transfer of stake from one non-resident investor to another.	It has been specifically clarified by the DIPP that investor exit will be considered on a case-to-case basis by the FIPB even before completion of the project or development of trunk infrastructure.[25]
4	Investor Obligations	a) It was earlier required that at least 50% of the project must be developed within a period of 5 years from the date of obtaining all statutory clearances. b) It was further prescribed that the investor/ investee company was not permitted to sell undeveloped plots and was required to obtain a completion certificate from the concerned local body/service agency before being allowed to dispose of serviced housing plots. c) The investor/investee company was responsible for obtaining all the requisite regulatory	a) This requirement has been deleted. b) It has been clarified that the Indian investee company will be permitted to sell only *developed* plots (defined as plots where trunk infrastructure, i.e. roads, water supply, street lighting, drainage and sewerage, has been made available). c) This requirement, too, has been deleted in terms of the investor; it is now the Indian investee company that is responsible	

[23] As per Note (vi) of PN10, completion of the project is to be determined as per the local bye-laws/rules and other regulations of State Governments.

[24] The completion of trunk infrastructure should be certified by an architect registered with the Council of Architecture. See, Sl. No. 6 in Department of Industrial Policy and Promotion, *Clarification on Press Note 10 of 2014*, available at: <http://dipp.nic.in/English/acts_rules/Press_Notes/Clarification_PressNote10_2014.pdf> (accessed 3rd April 2015).

[25] See, Sl. No. 3 in Department of Industrial Policy and Promotion, *Clarification on Press Note 10 of 2014*, available at: < http://dipp.nic.in/English/acts_rules/Press_Notes/Clarification_PressNote10_2014.pdf> (accessed 3rd April 2015).

		permission.	for obtaining regulatory clearance.	
5	Local Require-ments	a) The project should conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/Local Body concerned. b) State Government/Municipal/ Local Body concerned would monitor the project to ensure compliance with the above conditions.	These requirements have been retained verbatim.	
6	Completed projects	–	100% FDI under the automatic route is allowed for operation and management of townships, malls/shopping complexes and business centres.[26]	
7	Affordable housing	–	No condition in respect of minimum area to be developed and minimum capitalization shall apply to an investee/ joint venture company which commits at least 30% of the total project cost for low cost affordable housing.	

VII. LATEST, LIBERALIZED POSITION: PN12 OF 2015

As stated above, the government recently liberalized several sectors to attract and facilitate foreign investment, and the same have been codified by PN12. Paragraph 21 of PN12 pertains to the construction development sector, and introduces a new Para 6.2.11 of the FDI Policy. The following is a brief analysis of the pertinent changes made in respect of the conditions to

[26] "Business centre" includes where multiplicity of businesses of same or different nature are being carried out from a particular building. See, Sl. No. 9, *ibid.*

be fulfilled for FDI in the construction development sector.

2. Minimum floor area and minimum capitalization requirements deleted

One of the most notable changes brought in by PN12 is the deletion of *all* requirements pertaining to minimum floor area (20,000 sq. metres) and minimum capitalization (of $5 million) under PN10/2015 FDI Policy.[27] As one commentator notes, the earlier conditions – with the minimum floor area and capitalization requirements – tended to favour construction activity only in Tier-I cities, since development at this scale was deemed unviable in smaller cities.[28] Thus, the removal of these requirements would provide a fillip to construction development in Tier-II and Tier-III cities. This certainly appears to be a welcome change, since it is poised not only to invite a larger volume of investment, but also to ensure that the benefits of increased investment are distributed in a more equitable manner.

3. Phases to be considered separate projects

In an interesting insertion, the new Para 6.2.11.2 specifies that "Each phase of the construction development would be considered as a separate project for the purpose of FDI policy."[29] Given that there is no further qualification to this statement, the question that arises is: what constitutes a "phase" of construction development? No doubt the segregation of each

---

27 All allied conditions pertaining to minimum floor area and capitalization under PN10/2015 FDI Policy have also been deleted, such as those relating to definition of floor area, certification of minimum floor area by an architect, etc.

28 Kalpesh Maroo, *New FDI norms: Real gains for real-estate sector,* THE FINANCIAL EXPRESS (16th November 2015), available at: < http://www.financialexpress.com/article/fe-columnist/column-new-fdi-norms-real-gain-for-real-estate-sector/166038/> (accessed 27th January 2016).

29 Paragraph 6.2.11.2, DIPP Press Note 12 of 2015, *supra* note 21 at p. 12.

phase for FDI purposes implies that all investment conditions must be met at each phase, but it is puzzling that "phase" itself has not been defined. It is hoped that the meaning of this term will be provided in the text of the upcoming 2016 FDI Policy, which will provide much-needed clarity to investors.

4. *Lock-in/Investor exit: regime overhaul*

The earlier conditions prescribed that the investor shall be permitted to exit either on completion of the project, or after the development of trunk infrastructure. It was additionally provided that the FIPB would consider proposals for repatriation of FDI or transfer of stake from one non-resident investor to another on a case-to-case basis.

These conditions have undergone a complete overhaul under PN12. The first, general condition – that the investor shall be permitted to exit either on completion of the project or after the development of trunk infrastructure – has been retained [as Paragraph 6.2.11.2(A)(i), hereinafter referred to as "Para (A)(i)"]. However, a new set of conditions has been introduced thereafter *vide* Paragraph 6.2.11.2(A)(ii) [hereinafter referred to as "Para (A)(ii)"], the text of which is reproduced as follows:-

> *Notwithstanding anything contained at (A)(i) above, a foreign investor will be permitted to exit and repatriate foreign investment before the completion of the project under automatic route, provided that a lock-in period of three years, calculated with reference to each tranche of foreign*

> *investment has been completed. Further, transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor any government approval.*[30]

There are two key takeaways from this insertion. *First,* notwithstanding the prescriptions of Para (A)(i), a lock-in period of 3 years with respect to each tranche of investment has been introduced. Once the lock-in period has been completed, the investor is permitted to exit the project, even if it is not complete, without the requirement of government approval. *Secondly,* the earlier restrictions on transfer of stake between non-residents have been done away with: it is now provided that such transfers (so long as the investment is not repatriated) are not subject to any lock-in, and do not require government/FIPB approval.

While the second change with respect to transfer of stake is fairly straightforward, the first condition pertaining to investor exit merits a closer look. Under the earlier requirements (ignoring the possibility of a government-approved exit), the minimum that an investor was bound to do before his exit was develop trunk infrastructure. PN12, however, operates slightly differently in that it lessens investor obligations with respect to development of basic infrastructure prior to an exit. A conjoint reading of Paras (A)(i) and (A)(ii) makes the following position clear: an investor can now exit upon the completion of the project or development of trunk infrastructure; or, due to the presence of the non-obstante clause in Para

---

30 Paragraph 6.2.11.2 (A)(ii), Press Note 12 of 2015, *supra* note 21 at p. 12.

(A)(ii), he can straightaway exit before the completion of the project so long as the investment has been locked in for 3 years.

It must be noted that completing a 3 year lock-in does not guarantee the completion of trunk infrastructure. Thus, the very introduction of the lock-in linked exit option before completion of the project means that the new, lower minimum that an investor has to do before his exit is merely complete the lock-in period, whether or not he completes trunk infrastructure during that time. Therefore, the changes brought in by PN12 essentially signal a win-win for the investor: he is not only permitted to exit before completion of the lock-in if the trunk infrastructure (or the project itself) is completed, but also to leave before even completing trunk infrastructure, so long as he has served out the lock-in period.

In sum, the revised conditions under PN12 have diluted the investor obligations as to development of trunk infrastructure: he may now exit without bringing any tangible benefit to domestic infrastructure, simply by serving out a lock-in period. In its zeal to increase the ease of doing business, the government has gone beyond "striking a balance" between domestic interest and ease of investment: the scales are clearly tilted in favour of investor convenience. Therefore, it is hoped that the government introduces certain minimum development obligations for investors even within the lock-in period, so that domestic infrastructure is assured at least some gains from foreign investment.

5. *Clarification to definition of "real estate business"*

An important clarification that the government has issued in PN12 is

that the earning of rent/income on lease of property – so long as it does not amount to transfer[31] – does not fall within the ambit of "real estate business",[32] and is accordingly open to FDI. This clarification appears to permit foreign investment in completed buildings/assets, so long as the intention is simply to lease them out for the purposes of rental income, and not to buy and sell. This clarifies a long-persisting ambiguity in the policy with respect to FDI in completed assets, and is a welcome move, since it will allow large Indian developers the flexibility to sell their portfolio of developed assets and deleverage their balance sheets.[33] Additionally, it will benefit several operating companies with large real-estate holdings to monetize their non-core real estate holdings.[34]

6. *Completed projects: additional provisions*

As per the earlier position, 100% FDI was allowed in completed projects for operation and management of townships, malls/shopping complexes and business centres. PN12 makes certain additional prescriptions in respect of the same. It is now provided that consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is permitted; however, such investment would be subject to a lock-in period of 3 years (calculated with reference to each tranche of FDI), and transfer of immovable property is not permitted

31 For a definition of "transfer" see Note (v), Paragraph 6.2.11 of Press Note 12 of 2015, *supra* note 21 at p. 13.
32 See Note (i), Paragraph 6.2.11 of Press Note 12 of 2015, *supra* note 21 at p. 13.
33 *Supra* note 28.
34 *Ibid.*

during this period.[35] Thus, the government has brought in drastic changes to the regime for FDI in the construction development sector. The overall aim being to liberalize and make the sector more attractive to foreign investors, it is hoped that the issues and grey areas highlighted above are addressed and the requisite changes or clarifications are made.

VIII. REITs: A New Avenue for Foreign Investment in Real Estate SEBI (Real Estate Investment Trust) Regulations, 2014 ['REIT Regulations']

In a welcome move for all the stakeholders in the Indian real estate sector, SEBI notified the REIT Regulations on September 26, 2014. This has been seen by commentators as a major fillip to the sector, which has been a long time coming.[36] If implemented correctly, the REIT regime is expected to attract a huge inflow of investment, both domestic and foreign, into the real estate sector in India.

An REIT is an investment vehicle which owns and/or operates income-producing real estate assets. REITs are usually listed on the stock exchange, and raise funds by issuing units or shares to a pool of investors, which are then utilized to purchase income-producing real estate assets.[37] A

35 Note (iv), Paragraph 6.2.11 of Press Note 12 of 2015, *supra* note 21 at p. 13.

36 Prior attempts by the securities regulator to introduce REITs (in 2008) and Real Estate Mutual Funds were abject failures, due to issues pertaining to tax, restrictive investment and asset criteria and certain other conditions. For a draft of the 2008 REIT guidelines that failed to take off, see: < http://www.sebi.gov.in/commreport/RealEstateReg.pdf> (accessed 2nd April 2015).

37 See, Knight Frank, *Analysis of REIT Regulations,* March 2015, available at: <http://content.knightfrank.com/research/796/documents/en/analysis-of-reit-regulations-2712.pdf> (accessed 3rd April 2015).

sizeable chunk of the earnings from these assets is regularly distributed amongst the REIT's unit-holders as dividends.[38]

REITs were introduced as in the USA in the early 1960s, and now successfully function in over 20 countries, including *inter alia,* the UK, Australia, Singapore, Hong Kong, France and Japan.[39] The long-awaited introduction of the REIT regime in India has the potential to transform the real estate sector. REITs will help to attract long-term financing from domestic as well as foreign sources, which would improve fund availability for real estate developers and reduce some burden on completed assets by allowing owners of such assets to raise capital from investors against issue of units.[40] As per the latest estimates of Cushman & Wakefield, the REIT sector in India has the potential to reach a market capitalization of USD 20 billion by 2020.[41]

The salient features of the regime established by the REIT Regulations are as follows:-[42]

- REITs shall be established as per the provisions of the Indian Trusts Act, 1882, and shall be registered with SEBI. The parties to an REIT shall be the trustee, sponsor(s) and manager.

---

38 See generally, < http://www.mondaq.com/india/x/336834/Fund+Management+REITs/REITs+ To +Boost+Growth+And+Transparency+In+Indian+Real+Estate+Sector> (accessed 2nd April 2015).

39 *Ibid.*

40 *Supra* note 37.

41 Supra note 38.

42 See generally, <http://vinodkothari.com/wp-content/uploads/2014/08/A_beginning_for_ REITs_in_-India-_-SEBI-_finalises_-REITs_regulations.pdf> (accessed 2nd April 2015).

- The REIT is mandatorily required to be listed.
- At least 80% of the value of REIT assets needs to be in completed and revenue generating properties. The remaining 20% can be invested in: developmental properties (subject to a cap of 10%)
- The investment of an REIT is to be made either directly or through a Special Purpose Vehicle ('SPV') holding at least 80% of its assets directly in such properties; additionally, the REIT shall hold controlling interest and not less than 50% of the equity share capital of such SPV.

The next part shall explore the potential hindrances that foreign investment in REITs face under the current FDI regime.

IX. FDI IN REITS: POTENTIAL HINDRANCES

As discussed above, the REIT regime in general is aimed at attracting investment into the real estate sector, particularly foreign investment. However, despite the introduction of the REIT Regulations, the question of foreign investment in REITs is yet to be resolved. Regulation 14(12) of the REIT Regulations provides that:-

> *The REIT may invite for subscriptions and allot units to any person, whether resident or foreign:*
>
> *Provided that in case of foreign investors, such investment shall be subject to guidelines as may be specified by the Reserve Bank of India*

and the government from time to time.[43]

Currently, however, the guidelines for foreign investment in REITs are awaited.[44] In the interim, it is pertinent to discuss the potential hindrances to foreign investment in REITs under the extant FDI regime.

Foreign investment in an REIT essentially qualifies as foreign investment in a *trust*. As per Paragraph 3.2.4 of the FDI Policy 2014, FDI in trusts other than Venture Capital Fund ('VCF')[45] is not permitted. VCFs are now better referred to as Alternate Investment Funds or "AIFs";[46] however, as prescribed by the FIPB, VCFs should be read as AIFs in the relevant paragraphs of the FDI Policy.[47] Accordingly, with respect to VCF/AIF,

---

43 Regulation 14(12), Securities and Exchange Board of India (Real Estate Investment Trust) Regulations, 2014, available at: < http://www.sebi.gov.in/cms/sebi_data/attachdocs/1411722678653.pdf> (accessed 2nd April 2015).

44 *Supra* note 25 at p. 9.

45 "Venture Capital Fund" is defined at Para 2.1.42 of the 2014 FDI Policy as: *a Fund established in the form of a trust, a company including a body corporate and registered under Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996, which*
(i) has a dedicated pool of capital;
(ii) raised in the manner specified under the Regulations; and
(iii) invests in accordance with the Regulations.

46 This is following SEBI's replacement of the Venture Capital Fund Regulations, 1996 with the Alternative Investment Fund Regulations, 2012. This development has been noted and resolved by the FIPB in its Review 2011-2013, in the following words: *The extant FDI policy only covers Venture Capital Funds (VCFs) and does not refer to Alternate Investment Funds (AIFs). As per the extant FDI Policy, if a Domestic Venture Capital Fund is set up as a trust, a person resident outside India (non-resident entity/ individual including an NRI) can invest in such domestic VCF subject to approval of the FIPB. However, it has been observed that AIFs have been set up under a separate regulation and the AIF regulations have replaced the VCF regulations. FIPB has deliberated at length on this matter. As such, it is necessary that FDI policy should take specific cognizance of the AIF regulations.* Accordingly, the FIPB has approved investments in AIFs subject to a set of 7 prescribed conditions. See, Foreign Investment Promotion Board, *Review2011-2013,* at pp. 17-18, available at: < http://www.fipb.gov.in/Forms/FIPBREVIEW2011-13.pdf> (accessed 2nd April 2015).

47 *Id.* at Para 3.3(a).

Paragraph 3.2.3 prescribes that Foreign Venture Capital Investors ('FVCI')[48] are allowed to invest in VCF/AIF; however, if the domestic VCF/AIF is set up as a trust, then investment by a person resident outside India is subject to FIPB approval. It is notable that the same Paragraph goes on to state that if the domestic VCF/AIF is set up as a company, then investment by a person resident outside India is through the automatic route of the FDI scheme (subject to pricing guidelines, reporting requirements, mode of payment, minimum capitalization etc). These provisions clearly shows that there is an inherent bias against foreign investment in a trust set-up, vis-à-vis that in a company.

If the above is the law with respect to FDI in trusts, FIPB practice makes it amply clear that FDI in trusts is viewed through a prism of suspicion, and is consequently sought to be heavily regulated. For instance, in the 2009 FIPB Review,[49] it was observed that unlike a company, it was difficult to ascertain with whom the ownership and control of a trust lay.[50] It was further acknowledged that the application of DIPP Press Notes regarding downstream investment to trusts is difficult;[51] accordingly, the DIPP expressed concern that trust vehicles are largely unregulated.[52] It is no

---

48 "Foreign Venture Capital Investor" is defined at Para 2.1.16 of the 2014 FDI Policy *as an investor incorporated and established outside India, which is registered under the Securities and Exchange Board of India (Foreign Venture Capital Investor) Regulations, 2000 and proposes to make investment in accordance with these Regulations.*

49 Foreign Investment Promotion Board, *Review 2009,* available at: < http://fipb.gov.in/Forms/FIPBREVIEW2009.pdf> (accessed 3rd April 2015).

50 *Id.* at Para 3.1.2 ("Ownership and Control of a Trust"), at pp. 27-28.

51 *Ibid.*

52 See, for instance, Moumita Bakshi Chatterjee, *FIPB Rejects Forum Synergies' Proposal,* THE HINDU BUSINESS LINE, available at: < http://www.thehindubusinessline.com/todays-paper/tp-corporate/fipb-rejects-forum-synergies-proposal/article1634842.ece?> (accessed 3rd April 2015).

surprise, then, that there have been news reports of proposals for FDI into trusts being rejected because the identity of the beneficiaries was unknown.

In the 2011-2013 FIPB Review,[53] the FIPB clarified that investments made *by* the VCF/AIF would be regarded as FDI and would have to conform to sectoral caps and conditions laid down in the FDI Policy. In the spirit of regulating the investors *into* the trust, the FIPB also seemed to suggest that a VCF/AIF could only raise funds from SEBI-registered FVCIs. Another condition imposed by the FIPB was that the investors must be resident in a country that is a member of the Financial Action Task Force and is a signatory to the International Organization of Securities Commissions' ['IOSCO'] Multilateral MoU.

Accordingly, it is clear that the foreign investment regime in respect of trusts is, at present, heavily regulated. The endeavour of the FDI Policy and the FIPB has been to regulate the *investors* into the trust, by requiring prior approval for all foreign investments,[54] and imposing certain other requirements in the larger interests of establishing safeguards against money laundering, terrorist financing and so on. It is submitted that such heavy regulation of the investment sphere with respect to trusts – with the regulator making it more and more arduous for investors to enter the Indian market – will ultimately have a detrimental effect on the real estate sector, which is riddled with heavy FEMA regulation as it is. Drawing upon this point, a

---

53 Foreign Investment Promotion Board, *Review2011-2013,* available at: < http://www.fipb.gov.in/Forms/FIPBREVIEW2011-13.pdf> (accessed 2nd April 2015).

54 Paragraph 3.2.3, 2015 FDI Policy.

commentator has formulated an attractive analogy to explain the present over-regulation of FDI by trusts, by referring to the *stage(s)* at which FDI Regulations would (and should) apply.[55] As per his analogy, investment in respect of a trust comprises of two "legs". The "first leg" is the issue of trust units to an investor, i.e. pooling or fund-raising. The "second leg" is the downstream investment *by the trust*. With regard to the latter, it is clear that it would be considered as direct FDI and would attract all pertinent restrictions under the FDI Policy, *viz.* sectoral caps, pricing and all other conditions. The problem arises in respect of the "first leg". Since the FDI Policy is silent on this point, it is unclear whether the initial investment (notwithstanding the requirement of FIPB approval) is also characterized as a direct FDI, and whether it must also comply with FDI rules such as pricing guidelines.

In the interests of promoting foreign investment, it is argued that the "first leg" should stand outside the FDI regime, since it is a *pooling of capital* and not a *deployment* of it. If the general purpose is to ensure a minimum amount of regulation, then the same has been met by the mandatory requirement of FIPB approval, and it is submitted that further regulation would merely make foreign investment into trusts more cumbersome and unattractive. The above suggestion, if adopted, would mean that foreign investment *into the trust* would be free from FDI conditions such as seeking approvals and pricing guidelines on purchase and sale/redemption of trust units. It would certainly be desirable if REIT investors were not subject to

55

pricing guidelines.

Therefore, it is clear that the law as it currently stands is marked by a cautious/suspicious approach to trusts as vehicles for FDI, and additionally, there is a discernible regulatory uncertainty with respect to the same. This uncertainty may have a detrimental effect on foreign investment in REITs. Should the channel of trusts as investment vehicles also be closed off to the real estate sector due to the over-enthusiasm of the regulator, it is difficult to fathom how the Indian real estate sector will attract investors and grow in the years to come. In this respect, the aforementioned commentator has suggested that it might be productive to begin from the ground up when laying down rules for investment into REITs and Infrastructure Investment Trusts, rather than trying to integrate these rules into the current FDI framework.[56] It is certainly hoped that the contentious issues highlighted above are addressed – and resolved – in the near future, in order to facilitate a successful introduction of REITs as a viable channel for investment into the Indian real estate sector by foreign and domestic investors alike.

X. CONCLUSION

As is clear from the above discussion, the two major changes that have occurred with respect to foreign investment in real estate have been *first,* the continued liberalization of the construction development sector, and *secondly,* the promulgation of the REIT Regulations. Despite the fact that foreign investment guidelines in respect of the latter are awaited, these

56

developments have had a discernible impact on the real estate sector. For instance, several real estate companies – Indiabulls Real Estate, Godrej Properties and DLF, among others – made substantial gains on the stock markets after the PN12 changes were announced.[57] Further, it was recently reported that global sovereign funds are investing heavily in Indian real estate. GIC (Singapore) has reportedly entered into a joint venture with Delhi-based Vatika group to develop two housing projects in Gurgaon. Similarly, Abu Dhabi's ADIA has reportedly sought to invest $200 million in Indian real estate, in addition to its pre-existing stake in real estate/infrastructure companies such as Infrastructure Leasing & Financing Services and Red Fort Capital (a real estate private equity fund), while other funds such as Temasek (Singapore) and State General Reserve Fund (Oman) have also recently invested in the sector.[58]

With respect to the operationalization of REITs with foreign investment, it was recently reported that the Finance Ministry has floated a draft Cabinet Note for the enabling amendment of FEMA, which would permit foreign investment in REITs. On the strength of these reports, nine major realty stocks (such as DLF, Unitech, Godrej Properties, Parsvnath Developers etc.) made notable gains on the stock exchange. It is therefore clear that, in light of the recent developments, optimism in the real estate sector is high.[59]

---

57 See, *Real estate shares gain as government eases FDI norms,* BUSINESS STANDARD (11th November 2015), available at: < http://www.business-standard.com/article/markets/real-estate-shares-gain-as-government-eases-fdi-norms-115111100424_1.html> (accessed 26th January 2016).

58 *Ibid.*

59 See, *Realty Stocks gain on buzz govt to amend FEMA Act for foreign funds in REITs,* BUSINESS STANDARD (30th January 2015), available at: <http://www.business-standard.com/article/news-

The real estate sector in India has come a long way from the heavily regulated sector it once was. Construction development has not only opened up to foreign investment, but regulatory requirements have also been further eased to invite more foreign funding. Moreover, the introduction of REITs by SEBI is being seen by the industry as a bold and path-breaking move that could rejuvenate the sector by providing a much-needed infusion of capital. While detailed guidelines in this respect are awaited, it is hoped that the same address and resolve the stumbling blocks highlighted above. It is submitted that, the establishment of regulatory clarity coupled with a continuing effort to make the sector more investor-friendly will indeed revolutionize the Indian real estate sector, and take it from strength to strength.

cm/realty-stocks-gain-on-buzz-govt-to-amend-fema-act-for-foreign-funds-in-reits-115013001012_1.html> (accessed 2nd April 2015).

THE THIRD WORLD AND INTERNATIONAL ORGANISATIONS: SETTING THE AGENDA

Raji Gururaj and Aymen Mohammed.[*]

We are at a point in our work when we can no longer ignore the empires and the imperial context in our studies.

- Edward Said[1]

ABSTRACT

International Organisations are intrinsically related to the development of the international legal system. However, International Relations, despite being a discipline that is relevant to all peoples and states, traces its origins to the heart and height of imperialism. Imperialism is characterised by practices of exclusion and is the very antithesis of universal recognition. 'Third World' peoples, in their engagements with International Organisations (IOs), remain as mere passive participants or disrupters in the conversation on development, human rights and neo-liberalism.

Using a framework of Constructivist International Relations (IR) theory and Third World Approaches to International Law (TWAIL), this paper seeks to map out past engagements between TWAIL and IOs, and questions the ideas of statehood and sovereignty as bedrocks of International Law. It argues that the norms, policies, practices and law created by IOs are a product of phallogocentric, Eurocentric domination. IOs

---

[*] Raji is currently studying B.A LLB [Hons.] at NALSAR University of Law, Hyderabad and is in her IVth year. Aymen graduated from NALSAR University of Law Hyderabad after completing B.A LLB [Hons.] course. He is currently working with PLR Chambers.

1 EDWARD W. SAID, CULTURE AND IMPERIALISM 5 (1994).

straddle a world of law and politics characterised by the rise of a highly influential, pervading class independent of State interests, and with its own practices and policies. The suggestion in this paper is that in order for the Third World to articulate its own legal status and political obligations, and to have a voice in the structuring and functioning of IOs, a change in the vocabulary of resistance and reconstruction must arrive from a non-colonialist standpoint - not from Europe, but from the lived realities of Third World peoples. Unless international organisations are subject to a consciously political analysis, there is little scope for Third World peoples to determine their own legal and political choices, and have a say in the structuring and functioning of these organisations.

I. INTRODUCTION

In Ari Folman's *Waltz with Bashir,* [2] the protagonist's friend explains to him the workings of the human mind: if a person is shown a series of pictures that supposedly form a part of their memory (but in fact, the pictures have elements that are concocted), they would begin to believe that they actually experienced the memory as concocted. International Organizations, in a manner, represent the distance between a memory (a historical fact, in this case) and a 'created' memory (how the historical fact is represented). In generating policies, bureaucratic decisions and specialized codes, International Organisations have a bearing on the development and understanding of the international legal system itself.

The 'memories' that International Organisations (IOs) learn from (if memories are factual narratives from the past) are culturally and historically

2 Ari Folman, 'Waltz With Bashir', Sony Classics (2008).

selective. International Organisations cajole and confirm practices that belong to this 'created memory' that is neither owned by the State enforcing it, nor in possession or control of its beneficiaries and not even, perhaps in their interest. Through these 'memories', IOs generate knowledge – technical, bureaucratic, specialized 'guidelines', advisories, treaties, and general comments. This knowledge is generated in the course of a narrative of power - engendered and protected by it. Marginalised peoples are excluded from the process that creates this dominant narrative. 'Third World' peoples, in their engagements with IOs are almost invariably only passive participants in, or disrupters in this great conversation on development, human rights and neo-liberalism.

Colonialism is a continuing project. Its modes have been relocated, but not its behaviour.[3] The binary narratives of colonial oppression and the 'civilizing burden' are always constructed from the White Male's perspective: it differs only to the extent that the eyes belong to the British Soldier or the sympathetic Portuguese Missionary.[4] The supposed supremacy of the Europeans over non-Europeans and 'people of colour' is deeply entrenched in the formal institutions of the international legal order.

TWAIL scholars have, over the years, deliberated extensively on the international legal system and its 'material effects on the third world'[5].

---

3 Jina Moore, *The Peacebuilders: Making Conflict Resolution Permanent*, CHRISTIAN SCIENCE MONITOR (July 5th, 2015), http://www.csmonitor.com/World/Global-Issues/2011/0402/The-peacebuilders-Making-conflict-resolution-permanent.

4 JOHN PARKER & RICHARD RATHBONE, AFRICAN HISTORY: A VERY SHORT INTRODUCTION (2007).

5 Makau Mutua, *What is TWAIL?,* 94 ASIL Proc. 39 (2000).

However, IOs appear as mere reference points, and most authors tend to look at the law as a vehicle for neo-colonial politic.[6] Only Chimni[7] has boldly explored the place that International Institutions (a term broader than simply IOs to include structures that are not strictly 'organisations') occupy, how they have reached a position where their influence has continued to rise, and have entered realms that were hitherto exclusive to the domain of the 'sovereign state'.

Constructivism [8] offers important tools that can be deployed by TWAIL scholars to understand better the role that international institutions play in norm-generation and how actors respond to it. Constructivist scholars have offered meaningful and wide readings of the role that international institutions and organisations play. Nonetheless, little scholarship exists on the question of the Third World. Some attempts, however, are being made both by TWAIL scholars[9] and Constructivist theorists[10] to address this gap.

A more comprehensive commentary comes from *Empire*[11]; *Empire* is a study in how imperialism has merely found different and more complex forms of continuing the project of exploitation, hegemony and domination.

---

6 *Ibid.*

7 B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 E.J.I.L. 1, 1-37 (2004).

8 Nicholas Onuf, *Worlds of Our Making: The Strange Career of Constructivism in IR,* in VISIONS OF INTERNATIONAL RELATIONS: ASSESSING AN ACADEMIC FIELD (Donald J. Puchala ed., 2002).

9 See, for example, Ibironke Odumosu*, ICSID, Third World Peoples and the Re-construction of the Investment Dispute Settlement System*, UNIVERSITY OF COLUMBIA, (July 4th, 2015), https://circle.ubc.ca/bitstream/handle/2429/23482/ubc_2010_spring_odumosu_ibironke.pdf?sequence=1.

10 Laura Landolt, *(Mis)Constructing the Third World*, 25 Third World Quarterly 3, 579–591 (2004).

11 MICHAEL HARDT & ANTONIO NEGRI, EMPIRE, (1st ed., 2001).

Here, Hardt and Negri explore the theoretical renegotiations of the definition of sovereignty – its relocation from the nation-State to the broader 'Empire' in it, which includes structures, organizations, persons and ideologies - Chimni calls it the "Transnational Capital Class (TCC)".[12]

This paper presents a brief review of TWAIL scholarship on International Organisations – some scholars have seen them as sites of possible resistance[13], others such as Chimni and Mutua have been cynical. This is followed with a far more critical analysis of the working of IOs, and how TWAIL scholars have responded to it – whether it is the substantial basis of the 'sovereign nation state' theory, and the question of the material effects of the practices of IOs. To this, a constructivist analysis of norm diffusion, of the interactional theory of international law, and an understanding of the role that IOs play in the third world are necessary. The paper is aimed at presenting a view of how international organisations are historically grounded in practices not inclusive of the concerns of Third World peoples, and continue to remain so in their functioning today.

This broad framework is primarily informed by what is seen as the 'structure of international argument'[14]- the idea that the colonisers of Europe assumed the burden of 'civilising' the peoples they colonised. Edward Said observes, "There was virtual unanimity that [...] one race deserves and has

12 *Supra,* n. 7.

13 Upendra Baxi, *What May the 'Third World' Expect from International Law?*, 27 Third World Quarterly 5, 713-725 (2006).

14 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 356 (2005).

consistently earned the right to be considered the race whose main mission is to expand beyond its own domain."[15] It also relies immensely on the concept of artificially created 'sovereign nation states' that are, in most instances, colonial legacies of people-hood. At the heart of this argument is the questioning of sovereignty itself – who has it, who is it granted by, who is it denied to? Anghie states that Europe is the subject of sovereignty while Non-Europe is its object.[16] For non-Europeans, gaining sovereignty is more about alienation than empowerment.[17]

The paper argues that any resistance 'within' international legal systems is limited in scope unless it suspends the use of a colonial vocabulary to articulate against institutional 'plunder and subordination'[18]. It is necessary to relocate the definitional quality of the 'third world' from the post-colonial *state* to the post-colonial *peoples*. It also becomes necessary to identify the fluidity of the new imperialism - from erstwhile colonial or dominant industrial states to wider institutions and structures. The global 'North' does not operate merely as a monolith collective of States; agreeably, these States face a set of similar concerns, however, it is necessary to locate the operation of Chimni's TCC or Hardt's and Negri's Empire. *Empire* is ominous in its oft cited quote:

---

15 Edward W. Said, *Secular Interpretation, the Geographical Element and the Methodology of Imperialism*, in AFTER COLONIALISM: IMPERIAL HISTORIES AND POSTCOLONIAL DISPLACEMENTS 30 (Gyan Prakash ed., 1995).

16 *Supra*, n. 14 at 102.

17 *Supra*, n. 14 at 108.

18 *Supra*, n. 5.

> *"The spatial divisions of the three Worlds (First, Second, and Third) have been scrambled so that we continually find the First world in the Third, the Third in the First, and the Second almost nowhere at all. Capital seems to be faced with a smooth world - or really, a world defined by new and complex regimes of differentiation and homogenization, deterritorialization and reterritorialization"*[19]

Traditionally, the Third World has been defined in opposition to the First World. What the 'North' is not, the 'South' is; the 'First' is 'developed', the 'Third' is 'developing'. This oppositional definition still relies on the language of sovereign statehood and the rhetoric of 'national interest'. The post-colonial sovereign state continues to colonise other peoples by territorial annexations, subjugating indigenous communities, and denying the very self-determination that it had claimed for itself. In more ways than one, these 'old forms of sovereignty'[20] were just means of empowering the First World in the Third.

It is, therefore, necessary to analyse IOs as straddling a world of law and politics, characterised by the diminishing of state-sovereignty, the rising on the one hand of 'relocated sovereignty' and on the other, a fragmented, autonomous and *expert* bureaucracy, increasingly independent of State interests and with its own practices and policies. International laws, institutions and practices converge to impinge upon the independence of third world nations in favour of transnational capital and powerful States.

---

19 *Supra,* n. 11.
20 *Ibid.*

Unless international organisations are subject to a consciously political analysis, there is little scope for Third World peoples to determine their own legal and political choices, and have a say in the structuring and functioning of these organisations. This paper aims to draw attention to the manner in which international organisations can be so analysed through a view of existing literature on the interaction between IOs and the Third World.

I

The challenge of TWAIL today is to carry that struggle forward, and to realize that the script of resistance and liberation is a historical continuum, taken sometimes in small, localized, and painful steps.

– Makau Mutua[21]

II. TWAIL SCHOLARSHIP ON INTERNATIONAL ORGANISATIONS

TWAIL as an intellectual movement of academics, is relatively young. Nonetheless, TWAIL scholars across the board – from Nyamu[22] to Baxi[23], have read various Third World political resistances as part of the aforementioned 'historical continuum'[24] that goes back to the anti-colonial movement. The Non-Aligned Movement, Jawaharlal Nehru's *Panchsheel* [25]

21 *Supra,* n. 5.

22 Celestine Nyamu, *How Should Human Rights and Development Respond to Culture*, 41 Harv. Int'l. L. J. 381 (2000).

23 *Supra,* n. 13.

24 *Supra,* n. 5.

25 *Panchsheel* refers to the Five Principles of Peaceful Co-existence, first enunciated in the Agreement on Trade and Intercourse between the Tibet region of China and India signed on April 29, 1954.

and the vocal resistance of Julius Nyerere and Dewi Sukarno [26] are all significant points on this continuum.

Our critique of IOs stems from Anghie's reading of the colonialist roots of 'sovereignty' [27] and Koskenniemi's argument on the politics of international legal rhetoric: that it could be used as a double edged sword, to 'apologize' for power and to simultaneously hold an aspirational quality for itself, as a 'utopia'.[28]

> *[….]While the way international law is spoken, and thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation.[….] Though it often empowers the "wrong" people and justifies the "bad" decision, this is by no means necessarily the case [….] every law is a "politics", it is likewise true that every politics can become known, and effective, only as "law", including above all a law that liberates some actors to decide in accordance with their preferences. The question is […] by which law or whose law [?] Which is why the assumption that there might be a sphere of "pure" non-law (of politics, economics, strategy, etc.) is ideological.*[29]

In other words, as Baxi quotes the World Socialist Forum: "other

---

26 Usha Natrajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 Oregon Rev. of Int'l. L. 177, 179 (2012).

27 See generally, *Supra* n. 14.

28 MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

29 *Ibid.*

worlds are possible".[30] The 'politics' that is to be 'legalized' must be reached through a radical departure from Eurocentric international law [31] that masquerades as a universal principle.[32]

III. A HISTORICAL APPROACH

The historical study of Third World resistance to Western or Northern hegemony has been analysed with little criticality, except in instances of rhetoric. Very little is spoken or written about the Third World subject and how she responds to the hegemonic domination of the international legal order. We identify two trends on why this historical resistance has been unable to channelize itself into a transformative, broad and diverse international legal order. The first is the continuous obsession with the colonial construct of a nation-state with bestowed sovereignty. The second is the consistent march of the Empire (or the TCC). Together, they have come to not only represent the erosion of our traditional understanding of sovereignty, but have also caused the displacement of a language of rights and equity that was local, empowering and emancipatory.

The historical narrative of third world encounters with International Organisations has been situated in the broader reconstructionist history of the United Nations and in the context of the cold-war.[33] However, this

---

30 *Supra,* n. 13 at 714.

31 International law "is in its origin essentially a product of Christian civilisation." , L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 4 (Arnold D. McNair ed., 1928).

32 Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1 (1999)

33 Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law* 3(1) Trade L. & Dev. 103 (2011).

reconstruction is lacking: where does one situate the UN Partition plan for the State of Israel?[34] Who can constitute the 'third world'? The Palestinians? Or the Jewish refugees who had survived yet another wave of European anti-semitism? The merits of the partition plan or the narratives of Israeli "Independence" or the Arab '*Nakba*' occupy and require another analysis; what is necessary for this reading, however, is that we understand the meaning of this 'decision'.

IV. QUESTIONING THE SOVEREIGN NATION-STATE

The creation or non-creation of a sovereign state is an imperialist function and has its roots deeply entrenched in colonial domination.[35] Such a conception of a nation state is seen as 'illegitimate in the eyes of certain sub-state groupings'[36]. The broader argument is that statehood – and the host of baggage that it constitutes – is a conception that is Eurocentric and visualises the need to constitute persons as 'citizens' in order for their rights to be recognized[37]. This statehood is not that of self-determining peoples. Instead, boundaries, structures and legal obligations are determined by colonising powers that do not "belong" to the territory or culture, but control it nonetheless.[38]

---

34 GA Res. 181 (II), Future *Government of Palestine,* U.N. Doc. A/RES/181(II) (1947).

35 Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1 (2011).

36 *Ibid.*

37 Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 Theoretical Inquiries in Law, 333-366 (2007).

38 Frantz Fanon, *Concerning Violence*, ZERO ANTHROPOLOGY, (July 5th, 2015) http://zeroanthropology.net/2009/03/12/frantz-fanon-concerning-violence/.

The United Nations has acted just as the erstwhile colonial powers wished for it to act, and not as a corporate body with the democracy of its participants. The creation of the nation-state, a power vested in the erstwhile coloniser, now shifted to a body of States that simply took over as the new mode: from the East India companies, to King Leopold's excesses in the Congo, to the more complex, more difficult to locate body of international lawmaking. Hence, legitimacy now came to be bestowed not by victories in warfare, but by the discourses of 'international' law producing bodies. It is evident that the intractability of the conflict in Palestine (and much of Africa and the Levant) owes much to the denial of voices and erasing of agencies.[39] The project of colonialism merely donned the new robes of an international organisation while it continued to remain a project of 'plunder'[40], and of constituting the 'native' as a mere object, with little agency and no voice.[41]

This obsession with statehood and sovereignty is also at the witness stand in the history of two important UN Conventions: the 1954 and 1961 Conventions on Statelessness and the 1951 Convention on Refugees. The necessity to impose a *legal obligation* upon States to show concern for 'stateless' persons and 'refugees' stems from European notions of the necessity of citizenship in order for rights to exist, and for States to ensure that fleeing persons are protected.[42] The premise behind this obsession with statehood crumbles when we see how Third World communities and peoples

---

39 See generally, Judith Butler, *Is Judaism Zionism?*, in DECONSTRUCTING ZIONISM: A CRITIQUE OF POLITICAL METAPHYSICS, (Gianni Vattimo & Michael Marder eds., 2014).

40 *Supra*, n. 5.

41 *Supra,* n. 38.

42 *Supra*, n. 28.

have continued to host massive refugee influxes even without being part of States that are signatories to the Convention on Refugees.[43] The most number of 'Stateless' persons are found today in the artificially created post-colonial states.[44] As colonialism left the confused legacy of having to combat nationality and citizenship as separate categories, the heterogeneity caused some groupings to always be categorised as the 'other'.[45] While earlier citizenship was a varied, diverse and organic question, it now transformed into one of State Recognition and became conditional upon notions left by the coloniser.[46]

While some have lauded the doctrines of self-determination and equality of states in the UN Charter as successes of the Third World, there is little acknowledgment of the inherent Eurocentrism of the Charter: whether it is the phallogocentric notion of a 'civilized state' or the creation of the UN Security Council as a superior, enforcing body, the only merit of whose permanent membership is victory in war. It is of little surprise, then, that the small victory that was the UN Charter's 'equality of states' doctrine and the recognition of state autonomy over economic affairs[47] would soon be eroded by the Bretton Woods system[48]. Under this new system, policies would be decided by a vote that was allotted according to the capital that State parties

43 RANABIR SAMADDAR, REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000 (2003).

44 M. Gibney, *Statelessness and Citizenship in Ethical and Political Perspective*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW (A. Edwards & L. van Waas eds., 2014).

45 *Supra,* n. 26.

46 *Supra,* n. 4.

47 U.N. Charter art. 1, para. 3; art. 55; art. 56.

48 *Supra*, n. 22.

held and not on a 'one state, one vote' basis. The consequence, specifically of the World Bank, the International Monetary Fund and more recently the World Trade Organization has been the erosion of State autonomy, an 'internationalization of property rights'[49], structural adjustment programs, expert, neo-liberal bureaucratic regimes, and an overwhelming, overarching operation of a free market system.[50]

What most TWAIL scholars in their analysis identify with concern is that these organizations are undemocratic - they have had the consequences of eroding state sovereignty and autonomy, and that they have pushed for neo-liberal reforms. However, very little has been written to comprehend its very *material* effects on third world peoples. This has also begun to change; Nyamu has documented the paradigms of Human Rights and development and how they have approached the question of gender equality and culture[51]. She argues that the articulation of international human rights and developmental efforts have concentrated on indigenous cultures as a barrier to achieving gender equality without actually affording it an opportunity to play a role in the progressive realization of the purpose. In fact, international organizations have caused the introduction of a patriarchal system where none might have existed.[52] While Nyamu does not explore the roots of such

---

49 *Supra*, n. 7.

50 Thomas Sankara, *Speech on Foreign Debt at the OAU,* July 1987 (5th July 2015) https://www.youtube.com/watch?v=DfzoToJEnu8.

51 *Supra*, n. 5.

52 Nyamu gives the example of the right to property as an important agenda of a Structural Adjustment Program, whereas earlier, societies did not necessarily conceive the idea of a private property, they were now supposed to register their possessions in the name of the male member of the household.

a privileging of 'neutral' and 'global' values of gender justice independent of local cultural contexts, it is definitely worthwhile to read its meaning: the historic dialectic that existed in Europe and much of the West concentrated on a binary of 'religion' ('culture' in Third World contexts) and 'progress'. Western thought hence, seeks to generalise its own experiences in all the other territories to which it takes its 'civilizing' mission. Culture, under this mission, was seen as a barrier to progress and it was to be ignored, removed or replaced. In this process, the South's experience of reinventing and renegotiating its culture was disregarded. [53]

Nyamu's broader argument is that the discursive practices of international human rights are 'a state-oriented discipline that focuses on rights violations within the public sphere, particularly state violations of civil and political rights.' [54] Chimni similarly discusses the privileging by international institutions of civil and political rights over economic, social and cultural rights. [55] Such ahistorical, acontextual approaches have been constantly furthered, not only by the Bretton Woods institutions, but also by human rights institutions.[56]

V. THIRD WORLD EXPERIENCES WITH INTERNATIONAL ORGANISATIONS

Before concluding this section, it must be acknowledged that

53 PAULLA A. EBRON, PERFORMING AFRICA 20 (2002).
54 *Supra*, n. 22.
55 *Supra,* n.7.
56 CLAUDE E. WELCH JR., NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE 77 (2001).

encounters of the Third World with International Organizations are, in fact, routine. Sometimes, these encounters have widespread effects of domination, pillage and denial of agency, but on a general, every day basis, they are far more complex. For instance, the UNODC appreciated Iran's countering of its 'drug problem'[57], while another arm of the same organization sought to limit the state practice of awarding death penalties.[58] As Koskenniemi argues, the meaning of international law is unstable because "In the practice of States and international organizations these are every day overridden by informal political practices, agreements and understandings. If they are not overridden, this seems to be more a matter of compliance being politically useful than a result of the 'legal' character of the outcomes".[59]

The drug control 'carrot and stick' policy is also reflected in Nyamu's argument: practices of IOs are generically Eurocentric in their production of norms, and rarely ever factor in local cultures and practices in this good/bad classification that they follow.

Third World experiences with international organisations are hence, graded. While resistance to all other international law is possible, IOs represent permanent law-generating and norm-creating mechanisms that make it difficult for the Third World to effectively adopt modes of resistance.

---

57 *UN Envoy Praises Iran's High Drug Combat Capabilities*, IRAN DRUG CONTROL HEADQUARTERS REPORT (July 5th, 2015) http://dchq.ir/en/index.php?option=com_content&view=article&id=1031:un-envoy-praises-iran-s-high-drug-combat-capabilities&catid=364&Itemid=1138.

58 Faraz Sanei, *Don't praise Iran's war on drugs,* Guardian, August 5, 2011, (July 5th, 2015) http://www.theguardian.com/commentisfree/2011/aug/05/iran-war-on-drugs-international-law.

59 *Supra*, n. 28 at 3.

Through appropriation and the illusion of choice, they delay and ignore the concerns of the suffering.[60]

VI. DEFINING THE 'THIRD WORLD'

The definitional options that have been exercised on articulating, dismissing and discussing the meaning of 'The Third World', all vary only in the details. Mutua's definition of the Third World as a "set of geographic, oppositional and political realities that distinguish it from the west" emphasises the "historical experiences across virtually all non-European societies that have given rise to a particular voice"; however, it is an insufficient explanation of the international hegemonic regime. An oppositional or even geographic situating of the third world is restrictive, undemocratic and exclusionary. Where, for instance, would one locate the post-socialist states of Central Asia and Eastern Europe? Such definitional challenges are best overcome by a specific emphasis on what Okafor calls "common historic experiences."[61] The emergence of Third World-ism is simply explained by Baxi through three different and connected registers: colonialism of the past and capitalism of the present, the Third World as a "vehicle, vessel and visage" of global domination and third, most importantly, through "practices of resistance and struggle by colonially constituted peoples".[62]

The continuing project of colonialism is difficult to explain through a

---

60 Jose Alvarez, *Have IOs Improve Treaty-making,* in INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006).

61 Obiora Chinedu Okafor, *Newness, Imperialism, And International Legal Reform In Our Time: a TWAIL Perspective*, 43 (1,2) Osgoode L. J., 171-191, 179 (2005).

62 *Supra*, n. 13.

mere North-South, or anti-West definitional paradigm. Instead, it becomes necessary to identify the Third World as Hardt and Negri have: as having been scrambled across the world – so that we end up routinely discovering the third world in the first and the first in the third. This is a reality that cannot be wished away merely by identifying it in the post-colonial narrative; it must be identified in the age of the Empire/TCC: globalized economies, relocated sovereignty and newer, more comprehensive and more complex political projects. The oppositional quality of the Third World, then, is the historical continuum: it stands in opposition to the colonial past and the continuation of imperialist domination. However, its oppositional quality is not merely against the erstwhile colonial rulers, but against the colonial project itself. And while the concern of many TWAIL scholars has been that the neo-liberal state might witness an erosion of sovereignty in favour of international institutions and the TCC[63], it shouldn't make us nostalgic "about sovereignty of the past"[64].

II

To a large extent, the models that had presided over the birth of a nation state were simply dusted off and reproposed as interpretive schema for reading the construction of a supranational power. The domestic analogy thus became the fundamental methodological tool in the analysis of international and supranational forms of order

\- *Hardt and Negri*[65] -

63 *Supra*, n. 7.
64 *Supra*, n.11.
65 *Supra*, n.11 at 25.

What is important is the existence of a group of states and populations that have tended to self-identify as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share—not the existence and validity of an unproblematic monolithic third-world category [...] Now, if these states tend to complain about similar things, and speak to similar concerns, it is of course undeniable that, as contingent and problematic as any style they wish to assign to their grouping is, or can be, that grouping—that sense of shared experience—does exist and has been repeatedly expressed.

\- *Okafor* [66]

VII. A CONSTRUCTIVIST APPROACH

Constructivism is the youngest entrant in IR theory.[67] Its greatest contribution has been in identifying norms that have diffused across states in manners and modes that are distinct from the traditional understanding of power and state interests.[68]

The Interactional Theory of International Law seeks to relate the two concepts of Lon Fuller's 'moral law' and the constructivist world-view of international relations. Both hold that law is not so much a generation of a *grund norm* or an outcome of a Sovereign authority. Law, (in Fuller's case) and 'norms' (in the constructivist opinion) are constantly constructed and reconstructed when actors interact and agree upon the rules, and hence, Fuller would argue that law enables not so much governance as it ensures 'communication'. Law provides the context within which this communication

66 *Supra*, n. 61.
67 *Supra*, n. 8.
68 *Ibid.*

takes place. The image of law as a set of rules imposed by power structures in a top-down approach is rejected. The interactional theory of international law assumes, at the most basic level, that relevant actors should be able to participate in the decision making process regarding norms and rules, because it is precisely in the interaction between actors that law arises.[69] The Law can only be legitimate when it is applicable similarly to everyone – and more importantly, when the subjects of the Law accept it as binding.[70]

The promise of constructivism exists, not so much in its emphasis on international institutions or in its emphasis on norms, but in the *kind of norms* that it emphasizes on – unlike the traditional IR theories, it opens up prospects for a gendered, racial, cultural and religious identification of interaction between states[71]. Tickner argues, for instance, that the First World operationalizes the male/female binary when it interacts with the Third World. The Third World is symbolised by the emotional, the unstable and the weak, while the First World is characterised by order, security and rationality.[72] This analysis provides insights into the kind of interactions that might operate in international organizations between States, or the kind of decisions that the UNSC might make. The Third World, then, represents 'nature' that is to be controlled, made to behave and obey. The First World

---

69 E. Hey, *Sustainable Development, Normative Development and the Legitimacy of Decision making*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 19 (Niels M. Blokker & N.J. Schrijver eds., 2003).

70 Jutta Brunnee Toope & Stephen J., *International Law and Constructivism: Elements of an International Theory of International Law* 39 Colum. J. Transnat'l L. (2000).

71 Ted Hopf , *The promise of Constructivism in International Relations Theory*, in 23(1) Internat'l Security, 171-200, 196 (1998).

72 Ann Tickner, *You Just Don't Understand: Troubled Engagements Between Feminists and IR Theorists*, 41(4) Internat'l Studies Quaterly, 611-632 (1997).

sees international law as a tool to control, punish, sanction and extract obedience. This divide serves to maintain the image of the 'other' and creates the context for the development of MDGs, indices, IMF SAPs, etc. on the one hand, and on the other – the perpetuation of an 'emotional Third World'. The Third World is hence prevented from narrating its own experiences and bringing to the table its own solutions.

However, constructivist experience in the Third World context is far more complex. The Constructivist approach provides us with tools to analyse the interaction between the North and the South by enabling a reading of international affairs though what Rajagopal calls "the local"[73]: peasant, feminist, workers and anti-racism movements. However, Landolt[74] argues that constructivism's emphasis on a 'unique adaptation of liberal theory, censorship of material factors, elite focus and tendency to assume a unitary state' harms a more accurate identification of norm diffusion. The fact that constructivists have concentrated immensely on the diffusion of women's suffrage, human rights and gender justice questions in explaining "norm diffusion" from the North to the South is an instance of this lack of criticality. Another problem that western constructivism poses is that of reading norms where they do not exist - motivations of the North towards aid and poverty alleviation – were not driven by any impetus to rectify past injustices, but in order to ensure an indemnity of security against the

73 Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions,* 41(2) Harv'd Int'l L. J. 529 (2000).

74 *Supra*, n. 10.

"disparity in welfare"[75]. Landolt also critically explains the constructivist analysis of IOs:

> *In practice this approach assumes that Western norms such as liberal democracy, free markets and human rights diffuse among states by means of a profoundly independent international social structure, rather than being projected from the domestic level. Constructivism thus assigns greater autonomy to international organisations (IOs) and transnational actors than do other liberal approaches, and both of these actors are essentially severed from state interests.*[76]

Efforts have now been made to rectify the interaction between TWAIL, Constructivist theory and International Institutions. One of the first attempts has been an understanding of the post-colonial 'development paradigm' through the lenses of constructivism and TWAIL to identify the 'influence of particular international organizations, states and actors which perpetuate dominance by the minority'. [77]

Okafor also identifies 'newness' in the light of the UN anti-terror reforms in the post-9/11 era.[78] This newness is nothing but a manner of foregrounding the suffering (and the privilege) of one state and pushing it down other states as policies. What this offers is another perspective of how

---

75 MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996).

76 *Supra*, n. 10.

77 Marsha Cadogan, *Deconstructing Intellectual Property Right Laws link with the Politics of International Relations in Jamaica: the Developing Country Narrative* (July 5th, 2015) http://www.mcgill.ca/humanrights/events/cohen-seminars-international-law.

78 *Supra*, n. 61.

IOs have prioritised the suffering and concerns of one State and used them to cause the 'subtle displacement of third-world suffering from internationalist consciousness.' The broader point in this paper is that it does not matter what vocabulary is used to access the language of international domination and subjugation – sovereignty, statehood, the empire, global governance, globalization or mere inevitability – some States, peoples specifically, will be displaced at the cost of the others.

III

VIII. CREATING SPACES FOR THE THIRD WORLD

The possibility of a creation of a more democratic, normative, intersubjective international order exists only as long as TWAIL politics locates these factors as *independent* of the existing international legal framework, using a vocabulary and language that does not rely on a colonial legacy. While intersubjectivity and constructivism might contribute in the interim and in a manner that might inaugurate the scope of resistances in the instant international legal order, it does little to deconstruct and remake the international order in a manner that is more just and focuses more on peoples movements, on third world *peoples* and not artificially constructed 'sovereign states'.

However, intersubjectivity is indicative of the kind of norms it has produced in the international legal order. Malcolm X's influence went far beyond the United States of America's anti-racism movement; at one time he was an icon for the citizens of newly born States free from colonialism, across the African continent. In the interspersion between the Third and

First Worlds, Malcolm X symbolized the First when he attended the Organization for African Unity (the forerunner for the African Union) as a representative the Organization of Afro-American Unity.[79] The interspersion is also evident in the lawsuit seeking reparations that the CARICOM has instituted against its erstwhile colonial ruler, Great Britain;[80] this is evidently a result of Kenya's successful attempt at claiming reparations from Great Britain over its colonial past in the country.[81]

IX. FIGHTING THE MARCH OF THE EMPIRE

Norm generation, then, is a question of how the communicative actions of States are responded to, understood or acted upon by other actors.[82] Even heavily bureaucratised bodies, and not just International Organisations or Intergovernmental organisations, are spaces where Third World countries can and have exercised their agency to resist the Empire. One instance of TWAIL pragmatism *within* International Organizations is the use of the World Trade Organization's dispute settlement mechanism, which witnessed an interesting ruling in *US-Gambling*[83] where Antigua and Barbuda, a small and vulnerable economy, was permitted to suspend the Intellectual Property Rights protections of the United States and in effect "legalize

79 MALCOLM X, AUTOBIOGRAPHY OF MALCOLM X, Ch. 18 (1965).

80 Philip Sherwell, *Caribbean states demand reparations from European powers for slave trade*, Telegraph, 11th March, 2014.

81 Jason Straziuso & Gregory Katz, *UK Announces Compensation For Kenyans Abused During 1950s Mau Mau Rebellion*, Huffington Post, 6th June, 2013 (5th July, 2015) http://www.huffingtonpost.com/2013/06/06/uk-kenya-compensation_n_3395764.html.

82 *Supra*, n. 28.

83 WTO Dispute No. DS285, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 28th January 2013.

piracy"[84]. Another poignant example lies in Thomas Sankara's refusal to pay debts to imperialist European powers. Debt for him was a form of neo-colonialism, where the colonisers changed the vocabulary to call themselves 'technical assistants'. He calls for his country, Burkina Faso, to abstain from the payment of debts imposed on them during a time of European economic crisis, and speaks against the power and influence exerted by the IMF and the World Bank.[85] Rafael Correa would, 21 years on, also make a similar argument in refusing to pay illegitimate foreign debts imposed on Ecuador.[86]

In order for the Third World to be able to articulate its own political and legal obligations at the international level, we must go beyond the First/Third Worlds as solid, non-fluid identities and move to spaces whose existence is not contingent on geographical or colonial histories, but of 'common suffering' as a category that is self-identifying and based on resisting the project of the Empire. And for this, it must include the Indigenous First Nations of the American continent as it must include the Jarawa of the Andamans. The exclusion is to be of Chimni's TCC: that class of persons that is above sovereign statehood; where they reside is of little relevance, but they do control the flow of information, decision making, education and the policies of States. Resistance, then, must be universally targeted against this wide class of persons.

---

84 *US warns Antigua and Barbuda over 'piracy site' plan*, BBC, 29th January, 2013 (5th July, 2015) http://www.bbc.com/news/technology-21247683.

85 *Supra*, n. 50.

86 Emmanuel Santos, Ecuador's Rising Struggle, Socialist Worker, December 18, 2008 (July 5th, 2015) http://socialistworker.org/2008/12/18/ecuadors-rising-struggle.

The diverse Arab Spring[87] movements and NGOs such as Survival International, Anonymous, Independent Diplomat, etc. resist this transnational class by more 'internationalism' and less 'globalization'. These NGOs have fought on the basis of solidarity and not on the basis of taking over the agency of local struggles, along the lines of the "reconstructionist space" that Attar and Miller [88] saw as an empty space that had one emancipatory contribution: the ALBA initiative. ALBA (The Bolivarian Alliance for the Americas) is aimed at striking a major blow against US hegemony, the IMF, the World Bank, 'free' trade through the imposition of neo-liberal capitalism, and neo-liberalism in general. This has been the closest response to fighting the 'vocabulary of oppression'. TWAIL scholars have elaborated on this need to change the Eurocentric, imperialist language of oppression that continues to pervade through the influence that these very same powers exert over International Organisations.

Mutua identifies three threads of Third World scholars in International Law: the first is the 'betraying class' - scholars who identify themselves with the current order and live by it. The second are the 'creative reconstructionists' and the third are those who believe in the radical idea of 'another world'. [89] He believes that the second class that seeks to resist hegemony from *within* the system isn't as harmful as the first. There can be no 'total change' in the formation of international normative practices unless

87 *Supra*, n. 22.

88 Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 30(3) Third World Quarterly (2010).

89 *Supra,* n. 5.

an emancipatory language replaces that of colonialism, order and power. It is necessary that the new international legal order responds to this with a necessarily deliberative, humane, decentralized international organization. Our energies, then, must be spent on identifying peoples' movements that want to witness the erosion and replacement of undemocratic IOs with people based, equitable bodies that concede *more* and hold back *less.*[90]

[90] Paraphrased from Arundhati Roy's famous phrase "more democracy, not less". See, ARUNDHATI ROY, AN ORDINARY PERSON'S GUIDE TO THE EMPIRE (2004).

JUDICIAL APPOINTMENTS IN INDIA; TOWARDS DEVELOPING A MORE HOLISTIC DEFINITION OF JUDICIAL INDEPENDENCE

Job Michael Mathew[*]

ABSTRACT

This paper discusses the recent controversy pertaining to judicial appointments in India. The Supreme Court of India in Supreme Court Advocates on Record V Union of India struck down the 99th Amendment to the Constitution which had created the National Judicial Appointments Commission to oversee judicial appointments to Supreme Court and High Courts , with the effect that the collegium system of judicial appointments continue to be operative. This paper is divided into three parts. The first part discusses the Constitutional provisions relating to judicial appointments and its interpretation in the initial years of Independence leading up to the emergency and the consequent birth of the collegium system. The second part discusses the National Judicial Appointments Commission and the Supreme Court decision in Supreme Court Advocates on Record V Union of India. The third and final part discusses a few suggestions for the better working of the collegium system drawn mainly from the UK system of judicial appointments.

I. HISTORICAL BACKGROUND

1.1 CONSTITUTIONAL PROVISIONS

Article 124 and 217 of the Indian Constitution gives the President the

[*] The Author is currently completing BA LLB [Hons] from NALSAR University of Law, Hyderabad. He is currently in his second year of law school.

power to appoint judges to the Supreme Court and High Courts of the country respectively. In the appointment of judges other than the Chief Justice of India, the President shall consult the Chief Justice of India in case of Supreme Court and in case of High Courts; in addition to the Chief Justice of India the Chief Justice of the concerned High Court and the Governor shall also be consulted. The makers of the Constitution had envisioned a system of judicial appointments that gave executive the final say. Speaking on the dangers of a system that makes the Chief Justice of India the sole repository of all powers in terms of appointment of judges, BR Ambedkar said –

'*But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day*[1]'

In not giving the Chief Justice of India the final word and by establishing the need to consult the judiciary on part of the President, the Constitution of India laid down a consultative process for appointments to higher judiciary. The preponderance of the executive in judicial appointments that the law guaranteed, however did not translate into reality, at least in the initial years of Independence. It was the Chief Justice of India who played a predominant role in judicial appointments and the role of the President was

1 Constituent Assembly Debates , Volume VIII , Page 258.

limited to making the formal announcement[2]. Therefore the predominance the law gave the executive did not result in political interference in the judiciary but rather served as a check on the judgment of the Chief Justice of India. This was a good model of separation of powers, which worked well as long as both the executive and the judiciary worked with the intention of building an accountable and independent judiciary. This intention was laid to rest by the Government of Indira Gandhi that superseded three senior judges for the post of Chief Justice of India in 1973 and initiated an effort the pack the judiciary with judges committed to the ruling dispensation. During the period of Emergency the case *ADM Jabalpur V Shiv Kant Shukla*[3] and the 39th and 42nd amendments to the Constitution severely affected the credibility and independence of the judiciary. The Government that was elected after Emergency undid the damage done to the judiciary and the Court, perhaps sensing a credibility crisis took on a more activist role in to order to restore some amount of legitimacy after the dark days of emergency[4].

1.2 BIRTH OF THE COLLEGIUM SYSTEM

The experience of the judiciary under the Indira Gandhi regime during the Emergency and even after the Emergency[5], gradually created a

---

2 George H. Gadbois Jr, Selection, *Background Characteristics, and Voting Behavior of Indian Supreme Court Judges, 1950-1959* , in COMPARITIVE JUDICIAL BEHAVIOR , (G. Schubert and D. J. Danelski eds. in press)

3 1976 AIR 1207

4 See , Jamie Cassels , *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,* 37 The American Journal of Comparative Law 3 1989 , pp 495-519 (510-511)

5 See , Life Insurance Corporation of India V D.J Bahadur and Ors , AIR 1980 SC 2181 , See , Bhagwan .D. Dua , *A study in Executive-Judicial conflict : The Indian case,* 23 Asian Survey 1983 , pp 463-483 (473-474)

trust deficit between the judiciary and the executive, which was taken to its logical conclusion in the *Second Judges case*[6] in 1993. In a decision that has been subject to much criticism the Supreme Court held that judiciary will have primacy in judicial appointments with the effect that executive effectively no longer had a say in the process. This case along with the Presidential Reference to the Supreme Court in 1998[7] on the matter of judicial appointments brought to existence the collegium system of appointments, where a close coterie of judges determined appointments to higher judiciary through a process shrouded in secrecy. In spite of the collegiums system being the only system in the world where judges appoint judges, it survived without major challenges for two main reasons. The era of collegiums was also the era of coalition governments at the center and the memories of executive interference in the judiciary was still fresh in the minds of the Indian public. However with a majority Government now in power and members of the Supreme Court[8] speaking out against the collegiums system, a new method of appointing judges seemed inevitable. It is against this background that the NDA Government introduced the National Judicial Appointments Commission Bill in the Parliament, to set up a six member commission with representatives from both judiciary and executive to recommend names for appointments to the higher judiciary.

6 Supreme Court Advocates on Record V Union of India , AIR 1994 SC 268

7 AIR 1999 SC 1

8 Daily News and Analysis , 29th July 2014 , *Collegium system of recommending judges have completely failed : Markandey Katju ,* Hindustan Times , 16th December 2009 , '*Collegium system has done more harm to judiciary'*

II. 99TH AMENDMENT AND *SUPREME COURT ADVOCATES ON RECORD V UNION OF INDIA*

2.1 THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

The National Judicial Appointments Commission is composed of the Chief Justice of India as its Chairperson, two other senior judges next to the CJI, the Law Minister and two eminent persons selected by a committee that includes the Prime Minister, Leader of the single largest opposition party and CJI. One of the eminent persons has to be nominated from the Schedule Caste, Schedule Tribe, and Other Backward Class, Minorities or women. No recommendation can be made to the President if any two members of the commission does not approve of the recommendation. Appointments will be made by the commission not only on the basis of seniority but more importantly on the basis of merit of the candidate. Further the bill gives the commission the power to frame regulations in a wide array of areas that include, `criteria and procedure involved in appointing judges, procedure for transfer of judges from one High Court to any other etcetera. The changes enumerated above was sought to be inserted in the Constitution vide the 99th amendment which brought in Article 124A, 124B and 124C into the Constitution. While Article 124A brings into existence the National Judicial Appointments Commission, 124B gives the commission the authority to recommend names to higher judiciary and 124C regulates the functioning of the said Commission. Predictably the judiciary took a tough stand on the bill with the Chief Justice at the time of passing this bill, stressing the need for separation of powers and independence of judiciary in a number of public

meetings[9] that coincided with the introduction of the bill in Parliament.

2.2 THE CHALLENGE BEFORE THE SUPREME COURT

The challenge to the 99th Constitutional Amendment was heard by the Supreme Court in *Supreme Advocates on Record V Union of India*[10]. The five judge bench struck down the Amendment for being ultra vires the basic structure of the Constitution, with Justice Chelameshwar being the sole dissenting voice. The major question that the Supreme Court had to answer to unravel the controversy was whether judicial primacy in judicial appointments is part of the basic structure of the Constitution. If it is part of the basic structure, then there is no basis for the 99th Amendment for the Parliament does not have the power to amend the basic structure of the Constitution. However if judicial primacy is not part of the basic structure but only a result of the textual interpretation of the Constitution , then it is open for the Parliament to remove the basis of such a textual interpretation by an amendment.

The Union, in the course of arguments had requested the Supreme Court to refer the matter to an eleven judge bench to reconsider the decision of a nine judge bench in the Second Judges case. The Supreme Court while rejecting this plea, agreed to deal with this question while handing down the final judgment. Thus the judgments of Justice Khehar, Justice Lokul and Justice Goel are divided into two parts; one dealing with the referral and the

---

9 The Hindu Business Line , 15 August 2014 , *All organs must have mutual respect for each other : Chief Justice*

10 2015(11)SCALE1

other with the constitutional validity of the amendment. Such an approach has lead to substantial amount of confusion between the reasons for denying the referral and holding the amendment to be unconstitutional. It needs to be noted that the validity of the 99th Amendment has to be seen in isolation and the constitutionality of the collegium system in no way makes the 99th Amendment unconstitutional. However it appears from the majority opinions that the Court has drawn a causal link between the constitutionality of the collegiums system and the unconstitutionality of the 99th Amendment. In order to hold the 99th Amendment to be unconstitutional the Court had to necessarily show that the Second Judges case held that judicial primacy in judicial appointments is part of the basic structure of the Constitution. This is because neither the constitutionality of the collegium system nor the correctness of the Second Judges decision takes away the power of the Parliament to make the 99th Amendment. The majority opinions takes a logical leap from constitutionality of the collegium system to the unconstitutionality of the 99th Amendment with the unsubstantiated underlying premise being that judicial primacy in judicial appointments is part of the basic structure. In order for some feature to qualify as a basic structure of the Constitution it has to be first established to be part of Constitutional law and as such binding on the legislature[11]. In the failure of the majority opinions to establish that judicial primacy in appointments is the only way to maintain judicial independence, such an assumption is '*empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively*

[11] M. Nagaraj & Others V Union of India & others , 2006 8 SCC 212

fallacious apart from being contrary to political theory'[12]. Thus the failure of the majority opinions to establish that judicial primacy in judicial appointments is part of the basic structure independent of the constitutionality of the collegium is a major deficiency of the majority opinions.

2.3 UNDERSTANDING JUDICIAL INDEPENDENCE

The erosion of Judicial Independence by virtue of coming into being of the National Judicial Appointments Commission was the major plank of reasoning in holding the 99th Amendment to be ultra vires the Constitution. It is therefore of utmost importance to understand the broad contours of 'Judicial Independence' to develop a better understanding of the judgment. The Constitution provides for the judges, security of tenure, salaries that are not subject to vote of the Parliament, and prohibits any discussion on the conduct of judges in Parliament. Further the jurisdiction of the Supreme Court cannot be curtailed by Parliament in any manner. It was hoped that such measures would secure independence of the Court and allow it to administer justice without interference from the Government. The 99th Amendment does not alter any of these features but yet has fallen foul of 'Judicial Independence'. Thus judicial independence in the context of the Supreme Court judgment seems to be understood as judicial primacy in judicial appointments to the exclusion of all other conceptions of 'Judicial Independence'.

---

12 Supreme Court Advocates on Record V Union of India , 2015(11)SCALE1 , (J.Chellemeshwar , dissenting)

Such an exclusive conception of 'Judicial Independence' has been in operation since the Third Judges case. Justice Chelameshwer's powerful dissent brings to fourth the dangers associated with such a conception of 'Judicial Independence'. In paragraph 1 of the judgment he wonders if the judiciary has-

'*developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence? Have we acquired independence greater than our intelligence, maturity and nature could digest?'*

The judgment takes notes of some instances in the last one and a half decade which gives weight to the argument that the notion of judicial independence as propounded by the Second and Third judges case is not the best way of safe guarding the interests of the judiciary. Reference was made to statements made by members of the collegiums speaking out against the system[13] and the Supreme Court decisions in *Shanti Bhushan & Another V Union of India & Another*[14] and *P.D Dinakaran V Judges Inquiry Committee*[15] . All this leads credence to the argument that a more holistic definition of 'Judicial Independence' should be considered for the best interests of the judiciary. Independence of Judiciary should not just be seen as Independence from executive pressure but also '*fearlessness of power centers, economic or political and*

13 "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10th November 2011.

14 2009 1 SCC 657

15 2011 8 SCC 380

freedom from prejudices acquired and nourished by the class to which judges belonged[16]*'.*

A study of social backgrounds of Supreme Court judges appointed between the period 1950-1990 reveal that over 40% of them were Brahmin at any point of time while close to 50% were from other forward castes and the percentage of Schedule Caste , Schedule Tribes and Other Backward Class barely crossed 10% at their highest[17]. Not much changed during the period of the collegium system as in the year 2011 the report brought out by the National Commission for Schedule Caste[18] noted that out of 850 judges of 21 High Courts of India , only 24 belonged to SC/STs. Just as the presence of regional diversity in the Supreme Court is hard to explain as chance, the relative homogenization of the Supreme Court in terms of social backgrounds too, is hard to explain as chance[19]. Even though courts have no obligation to be representative the continued absence of people belonging to certain backgrounds can make people to draw the implication that there is an ingrained bias in the judiciary against these backgrounds. The possibility of people making such an implication is in itself a sever attack on the credibility, public confidence and hence the legitimacy of the Court. As Justice Khehar notes in his majority decision, '*people are conscious and alive to the fact that their rights should be adjudicated in consonance to the rules of natural justice*'. Just as a system that allows the executive to weigh in its interests at the stage where

16 S.P Gupta V President of India and Ors , 1981 Supp (1) SCC 87

17 George H Gadbois , *Judges of the Supreme Court of India : 1950-1989*. New Delhi: Oxford University Press 2011

18 National Commission on Schedule Caste , *A Report on Reservation in Judiciary*

19 Madhav Khosla , Sudhir Krishnaswamy , *Inside Our Supreme Court ,* XLVI Economic and Political Weekly 34 , August 20th 2011

the merits and demerits of candidates are discussed is antithetical to the idea of natural justice so is a homogeneous judiciary as far as the disadvantaged and minorities are concerned. Therefore it is important for the Courts to see if such hidden institutional biases have crept in and take measure to break free from them to be truly independent. An exclusivist definition of judicial independence is problematic from two angles ; it makes the judiciary accountable to none and capable of much abuse , and secondly such a scheme will not take into be open to concerns of the homogenization of judiciary as is evident from the last one and half decades.

III. IMPROVING THE COLLEGIUM SYSTEM

3.1 LESSONS FROM UNITED KINGDOM

In the order striking down the 99th amendment one of the components was the consideration of introduction of appropriate measures if any for an improved working of the collegium system[20]. The Supreme Court in showing the willingness to reform the appointments process was however categorical that any reform will be effected within the framework of the collegiums system where judicial primacy is a given. The Court in an order dated 5th November 2015 invited suggestions in four categories, i.e., Transparency, Eligibility Criteria, Complaints and Collegium Secretariat.

The UK system of judicial appointments where an independent Judicial Appointments Commission makes judicial appointments to all

[20] Available at http://onelawstreet.com/wp-content/uploads/2015/11/order-supreme-court-invites-suggestions-to-improve-collegium-system-6-nov-2015.pdf

judicial posts expect senior posts has some lessons in making the collegium system a better functioning model. Even though in the UK system the final say in judicial appointments rest with the executive it still has important lessons pertaining to questions of transparency , eligibility criteria, complaints and putting in place a permanent institution to deal with judicial appointments.

The present mechanism of a close coterie of judges discussing in private and appointing judges without any information as to what guides the appointments process has severely affected the legitimacy of the judiciary. Thus, brining in transparency to a process shrouded in secrecy must be the central goal of the reform process. It is safe to assume that the infusion of transparency in a much publicized process such as judicial appointments will result in accountable practices improving the overall efficiency of the appointments process.

The infusion of transparency to the appointments process should be at three levels. One, vacancies should be advertised widely so that any individual satisfying the Constitutional stipulation of eligibility is afforded the opportunity to be considered for the post being advertised for. This would be a substantial improvement over the present system where from the very beginning certain candidates are excluded from appointments due to reasons shrouded in secrecy. Further as Baroness Usha Paresher , Commissioner of the UK judicial appointments commission which follows the method of advertising vacancies noted , a wider pool of candidates can enhance the

merit of those selected[21]. Two, it is important to develop a simple definition of what constitutes merit and to make it known to the candidate base. Equally important is to develop fair, non discriminatory and effective processes for the application of the merit criteria to achieve desired goals of quality appointments. Though the modalities of this process is beyond the scope of this paper, it would be ideal to devise a system where individuals who are rejected in the process of appointments are given reasons for they being rejected. Assuming that the modalities of such a process involve a preliminary elimination based on applications submitted, this system may not be possible at this stage, considering the number of people who will apply. At advanced stages of selection where the number of people are low enough it would be ideal to give individual feedback. However even at the application stage generalized feedback that identify common mistakes and problems will be a significant step towards making the appointments process transparent. Third, it is equally important to devise measures which will ensure transparency from the applicant's side as well. To that effect, the inclusion of a 'good character' policy like in the UK which makes it incumbent on the applicant to declare anything in her/his past or present circumstances that should be declared or might affect judicial appointments, can foster transparency from the applicant's side and ensure that only applicants with an impeccable record are considered for judicial appointment.

---

21 Professor Jeffrey Jowell QC , Lord Mackay of Clashfern KT , Jonathan Sumption OBE QC , Baroness Prashar CBE, MR. Justice Hickinbottom , Shami Chakrabarti CBE , Her Honour Judge Frances Kirkham , Lady Justice Hallett DBE , *Judicial Appointments Balancing Independence Accountability and Legitimacy ,* at 49 , http://jac.judiciary.gov.uk/static/documents/JA_web.pdf , Last accessed on 14th September 14:56 PM

As important as brining in transparency in the appointments process is understanding the importance of a diverse judiciary. The higher judiciary in India, as has been noted before, is a homogenous body with very little representation from women, minorities and SC/ST. A homogenous body of judges appointed through a secret process sitting in judgment over a highly diverse population, raises important questions of natural justice. Though judges are thought to be above questions of gender, caste, religion, the mere possibility of an individual belonging to a historically disadvantaged group perceiving a homogenous judiciary to be against his or her interests is an attack on the natural justice principal of justice should not only be done but seen to be done. Further the legitimacy of the justice system itself will be in question if it is perceived to be discriminatory towards entry of the historically disadvantaged.

The question of increasing diversity in judiciary is politically loaded and is often retorted by concerns of merit being sacrificed at the altar of political correctness. The very idea of merit principle can be said to be discriminatory towards the historically marginalized[22]. What constitutes merit is not decided in isolation but in relation to the pool of candidates. The candidate pool, or majority of candidate pool belong to the historically advantaged groups, whose kin have previously dominated the same profession. Therefore the whole concept of merit is loaded in favour of the elite to the disadvantage of the historically marginalized whose skill sets

22 See , Kate Malleson , *Rethinking the Merit Principle in Judicial Selection ,* 33 Journal of Law and Society pp 126-140 (135-137)

might vary. An accurate representation of the same was seen during the Second World War, when the concept of merit was radically changed and defined in terms of skills women have in the absence of able bodied men. After the war when the men returned there was a need to accommodate them, and merit was again defined in terms of the skill set of men, leading to the exclusion of women. It is important for the judiciary to be aware of institutional biases that may have crept in to be truly independent. To this effect a mandate to increase diversity in judiciary would be step in the right direction towards increasing the legitimacy of the justice delivery system. This mandate will of course be subordinate to the obligation of selecting the best person for the post. However such a mandate can by itself play an important role in increasing diversity in the judiciary. The importance of a diverse judiciary has been recognized by UK, where the JAC has a mandate to make the judiciary diverse without compromising merit. What such a mandate has done is made the commission aware of the hidden institutional bias against minorities in judiciary. Such awareness has resulted in a 50% increase in women appointments to High Courts[23], through a system that weighs only merit. Further, with the objective of encouraging wider participation in the application of judicial posts, the JAC organizes Candidate Seminars targeting under-represented groups [24] . These seminars are conducted by members of the commission, who explain in detail the selection procedure, and give advice on the selection process such as techniques to ace the final interview. The JAC has also established a

23 Supra Note 21 at Page 51
24 Supra Note 21 at Page 78

Diversity Forum which brings together parties interested in a diverse judiciary to discuss and bounce off ideas to improve diversity in the judiciary. These are important structures India can follow in establishing a diverse judiciary and thereby improving the legitimacy of the justice delivery system.

IV. CONCLUSION

The 99th Amendment was definitely a step in the right direction, considering the urgent need for reform in judicial independence. However, a system that lets the executive to weigh the merits and demerits of each candidate and eliminate inconvenient candidates, as the NJAC would have allowed for is hardly the right method for fixing a broken system. A system like in the UK where the JAC that recommends names is free from executive interference but the executive retains the final say in appointments would have helped achieve the objective of judicial independence and at the same time respect the Constitutional mandate of separation of powers. Such a system would have ensured that the executive cannot eliminate inconvenient candidates at the consultation stage, like the NJAC allowed for. A system like this seems closer to the model of judicial appointments the Constitutional makers envisioned and the country followed in the initial years of independence, where the executive's role was limited to ensuring that no gross injustice was committed by the judiciary in appointments, as pointed out earlier. In the event of the Supreme Court striking down the 99th Amendment it is hoped that the call for suggestions to improve the collegium system will lead to a more transparent and accountable system of judicial appointments that will help achieve the twin objectives of an efficient and diverse judiciary.

HUMAN RIGHTS IN THE WSIS PROCESS: THE NOTION OF INTERDEPENDENCE AND INDIVISIBILITY AS A WAY FORWARD

Puneeth Nagaraj[*]

The High Level Meeting UN General Assembly from 15-16th December, 2015 marked the end of the Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society (WSIS). The Outcome Document[1] that was adopted as a General Assembly Resolution was notable for including a separate section on human rights. This is in continuation of the mandate from the Tunis Agenda which highlighted the importance of human rights to the Information Society. Having a separate section on human rights was an important step. But, the document does not reflect the progress the human rights movement has made in the last decade on human rights and the internet. There is a need for a distinct framework on human rights on the internet and its recognition at the international level is an important first step.

This paper argues that giving effect to the notion of interdependence and indivisibility of human rights is a means of realising the goal of an "internet bill of rights". As the WSIS process moves into the smaller policy making bodies, the realisation of a distinct online framework of human rights can be achieved by embedding human rights into all levels of functioning of the WSIS process.

---

* The author graduated from NALSAR University of Law, Hyderabad in 2013. The author was a Research Assistant at the International Centre for Trade and Development and is currently a Senior Fellow at Centre for Communication Governance.

1 General Assembly Resolution, A/70/L.33.

I. THE WSIS PROCESS AND THE 10 YEAR REVIEW

The idea for a Summit on the information society first emerged as a response from the UN system to the digital divide. However, there was a need to resolve many other issues that related to the global governance of the internet. In 2001, the UN General Assembly,[2] on the recommendation of the International Telecommunications Union (ITU) passed a resolution to hold the Summit over two phases in Geneva (2003) and Tunis (2005).

The first phase in Geneva produced the *Declaration of Principles and Plan of Action* which set out a roadmap for further discussion and identified action lines for to respond to many of the challenges faced by the information society. The second phase in Tunis in 2005 was meant to put these plans into motion by achieving consensus on many contentious issues. The *Tunis Agenda for the Information Society* is a consensus statement that was an outcome of the second phase. The Tunis Agenda established guiding principles for internet governance processes.[3] On human rights, the Tunis Agenda was notable for making a reference to the *Universal Declaration of Human Rights* (UDHR). But the reference was limited to the rights to privacy and free expression. The *Declaration of Principles* from the Geneva phase on the other hand was far more comprehensive, referring to a range of human rights issues and international human rights instruments.[4]

---

2 General Assembly Resolution, A/RES/56/183.

3 William J. Drake. "Encouraging Implementation of the WSIS Principles on Internet Governance Procedures." In, Wolfgang Kleinwächter, ed. The Power of Ideas: Internet Governance in a Global Multistakeholder Environment. Berlin: Marketing fur Deutschland GmbH, 2007, pp. 271-280, at p. 271.

4 Cees J Hamelink, "Human Rights Implications of WSIS", (2005) 18.1 Revue québécoise de droit international, pp. 28-39, at p. 29.

The ten-year review, negotiations for which began in July 2015 offered an opportunity to expand on the human rights language from the first two phases of the WSIS. The six-month long process was meant to take stock of the developments and challenges that have emerged in the Information Society over the last decade. The Outcome Document was seen as a success by many,[5] but as a product of a political negotiation process can perhaps be described as a qualified success. The inclusion of a separate section on human rights- which was a contentious issue between countries and stakeholders- is illustrative of the negotiation process.

The document does acknowledge the growing challenges posed to human rights by the information society. It is also an improvement on the Tunis Agenda which only mentioned human rights twice. But, the outcome document also paid scant attention to a new generation of human rights whose implementation is crucial to the future of the information society. More importantly, it fails to acknowledge the evolution of the discussions around human rights over the last decade with respect to online rights.

II. HUMAN RIGHTS IN A DIGITAL AGE

The expansion of the Information Society over the last decade has raised new challenges to the realisation of human rights. Some rights like

5 See for instance, Constance Bommelaer, "Wrapping Up a Successful WSIS+10 Review", Internet Society Blog, 18th December 2015, available at <https://www.internetsociety.org/blog/public-policy/2015/12/wrapping-successful-wsis10-review>; Byron Holland, "WSIS+10: In Internet Governance, Actions Speak Louder Than Words", Council on Foreign Relations Blog, 14th December 2015, available at <http://blogs.cfr.org/cyber/2015/12/14/wsis10-in-internet-governance-actions-speak-louder-than-words/>.

privacy and free speech which predated the internet, have acquired new significance in the context of internet and ICTs. Other issues like the access and development, which were the focus of rights related discussions, are increasingly dealt with as stand-alone rights. Discussions on these rights have been supported by legal instruments at both the national and international level. The right to access [to the internet] for instance, has been recognised as a right in one form or the other in a number of countries including France, Spain and Greece.[6] But the recognition of a new set of rights is only one facet of the problem.

Enforcement of human rights has been traditionally understood as the prerogative of the State. However, in the information society, corporations like Google, Facebook and Twitter (to name a few) are beginning to take on many of the functions of the states. In processing requests to take down content, they become arbiters of speech. In collecting user data of millions of users, they have become a resource for governments across the world to tap into for law enforcement purposes. However, as private actors, there is no recourse under human rights laws against businesses for the abuse of such powers. With the exception of voluntary codes that companies can sign up for, there are few, if any formal mechanisms to hold businesses accountable for human rights violations.

---

6 David Rothkopf, "Is Unrestricted Internet a Modern Human Right?", Foreign Policy, 2nd February 2015, available at <http://foreignpolicy.com/2015/02/02/unrestricted-internet-access-human-rights-technology-constitution/>.

The challenges described in the preceding paragraphs are not new. As far back as the first two phases of the WSIS, issues like privacy and free expression were debated and brought to the table by civil society actors.[7] This has also resulted in many soft law instruments and coordinated civil society efforts aimed at creating a framework of online rights.

Notable among these efforts is the multistakeholder, Dynamic Coalition for an Internet Bill of Rights, which was launched after the first Internet Governance Forum in 2006. It was one of the earliest efforts at mapping human rights obligations as it related to the internet. The initiative also received the support of the Brazilian and Italian governments who signed a Joint Declaration for the elaboration of an internet Bill of Rights[8]. A similar effort by the Association for Progressive Communications in 2006 produced the Internet Rights Charter.[9] The Charter builds on existing international human rights instruments to identify internet related human rights obligations across 7 themes.

Such human rights campaigns led by civil society/multistakeholder groups have led to recognition of internet related rights by many UN bodies. The UN Special Rapporteur on Freedom of Expression devoted his 2011

---

7 Roy Balleste, 'Rising Toward Apotheosis: The Deconstruction of the WSIS Tunis Agenda for the Information Society', Pittsburgh Journal of Technology Law and Policy 12(1) Spring 2012 1-36, at p. 19. For a discussion on communication rights in the context of the first two phases of the WSIS, see Id Hamelink, pp. 32-34.

8 Wolfgang Benedek, 'Internet Governance and Human Rights' in Wolfgang Benedek et al (eds), "Internet Governance and the Information Society: Global Perspectives and European Dimensions" (2008), at p. 38.

9 Association for Progressive Communications, 'APC Internet Rights Charter', available at <http://www.apc.org/en/node/5677>.

report to access to the internet and highlighted the restriction of access to the internet as being violative of Article 19 of the UDHR.[10] In 2014, the Human Rights Council adopted a resolution[11] on the protection of human rights online which was also adopted by the General Assembly.[12] The resolution primarily called for the protection online of the same rights available offline. On privacy, the High Commissioner of Human Rights on the recommendation of the UN General Assembly produced a report on the 'Right to Privacy in the Digital Age' in 2014.[13] The Human Rights Council has since appointed a special Rapporteur on the Right to Privacy.

Even on the question of holding businesses responsible for human rights, there has been traction at the international level. The Guiding Principles on Business and Human Rights or the 'Ruggie Principles' were approved by the Human Rights Council in 2011. The question of its extension to human rights over the internet, however, is still being contested at various fora.

The human rights efforts in the last decade of the WSIS were successful in bringing attention to internet related human rights issues. Though there isn't a framework for online rights, it seems like the system is headed in that direction. The High Level Meeting in December was an opportunity to recognise this progress and signal a move to a framework of rights. The Outcome document did recognise the recent HRC and General

10 Human Rights Council, A/HRC/17/27, pp. 16-18 ¶ 60-66.
11 Human Rights Council, A/HRC/Res/26/13.
12 General Assembly Resolution, A/Res/68/167.
13 Human Rights Council, A/HRC/27/37.

Assembly resolution on online rights. It did not however highlight the need for a framework of internet rights.

III. INTERDEPENDENCE AND INDIVISIBILITY OF RIGHTS IN THE WSIS PROCESS

One of the criticisms of the Outcome Document has been its focus on Civil and Political Rights without due recognition to Economic, Social and Cultural Rights. The right to expression and its attendant concerns of protection against arbitrary and unlawful detention were recognised. But the right to access, development and education which were highlighted at various stages of the review process found no place in the document.

However, this claim presumes a dichotomy between the two categories of rights which does not exist. While it is true Economic, Social and Cultural rights were not mentioned in the Outcome Document, their absence does not preclude its application as the WSIS discussions move to other fora. The interdependence and indivisibility of rights refers to the idea that commitment to one category of rights (Civil, political or economic, social and cultural) must mean the other category of rights must also be safeguarded. [14] This was first mentioned in the 1968 Proclamation of Teheran[15] and affirmed in the Vienna Declaration of 1993[16].

14 James W. Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights", 30 HUM. RTS. Q. (2008) 984, at p. 985.

15 Proclamation of Teheran, International Conference on Human Rights (1968).

16 The Vienna Declaration and Programme of Action (1993).

The notion of independence and indivisibility easily translates to the information society. For instance, as mentioned in the 2011 Report of the Special Rapporteur on Freedom of Expression, the right to free expression cannot be enforced without a right to access. Similarly, the right to access is meaningless without the right or privacy. However, it must be cautioned that not all rights are interdependent and not all interdependencies need to be recognised or enforced. While some interdependencies are strong (like speech and access), others can be weak.[17] When the interdependence between rights is very strong, the relationship becomes indivisible.[18]

The absence of a recognition of economic, social and cultural rights does not mean they cannot be embedded into the information society. In fact, the Geneva Declaration of Principles makes an explicit reference to the interdependence and indivisibility of human rights and the Vienna Declaration.[19] Thus, the notion of interdependence has already been recognised in the WSIS process. As the process moves into smaller bodies, there is also space for more nuanced human rights discussions, allowing for the implementation of both categories of rights, notwithstanding the bare bones structure that the Outcome document has presented.

As human rights discussions become more prominent in internet governance for a, the push for a framework of internet related rights is likely

17 Supra, Nickel n. 10, at p9. 988-991.

18 An example of this is when a substantive right like freedom of expression is supported by a procedural right like the right to constitutional/legal remedies. In such a case, giving effect to one right in the absence of the other diminishes both rights.

19 Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/4-E, at para 3.

to become stronger. At the IGF and the Working Group on Enhanced Cooperation, which have renewed mandates, informed discussions on human rights can lead to a framework of internet related rights. Even a purely multi stakeholder body like ICANN has accepted its human rights mandate. In these discussions, the notion of interdependence is essential to promote such a framework.

Spadika Jayaraj, *Dwelling House in Hindu Law – A Possible Reconceptualisation*

Shrestha Das, *Unpaid Care Work And Indian State Policy*

Abhinav Kumar, *FDI in Real Estate in India: Law, Policy and Practice*

Raji Gururaj and Aymen Mohammed, *The Third World and International Organisations: Setting the Agenda*

Job Michael Mathew, *Judicial Appointments in India; towards developing a more holistic definition of Judicial Independence*

Puneeth Nagaraj, *Human Rights in the WSIS Process: The Notion of Interdependence and Indivisibility as a Way Forward*

nalsar student law review
nalsar university of law
post box no. 1, nisa hakimpet,
justice city, shameerpet,
ranga reddy district, hyderabad - 500078.
phone : +91 40 23498104
fax : +91 040 23498385
email : studentlawreview@gmail.com

ISSN Number: 0975-0126