VOLUME 4 SPRING 2017 ISSUE 1

NLUJ LAW REVIEW

ISSN: 2326-5320

4(1) NLUJ Law Review (2017)

ARTICLES

The Opportunities for Post-Brexit International Arbitration in London and India

Lord Peter Goldsmith QC & Patrick Taylor

Climate Refugees: Acknowledging the Existence of an Imminent Threat

Swapnil Tripathi

Tax Residency Certificate in Double Taxation Relief: Latency Unravelled

Adarsh Mohandas & Raghvendra Pratap Singh

A Deliberate Critique to Sexual Harassment Law in India

Varun Malik

Rethinking the Indian Sex Offender Registry

Stuti Subbaiah Kokkalera

- A NATIONAL LAW UNIVERSITY JODHPUR PUBLICATION -

NLUJ Law Review

PATRON

Prof. (Dr.) Poonam Pradhan Saxena, Vice Chancellor

STUDENT EDITORIAL BOARD

EDITOR- IN-CHIEF

Shreya Mathur

Co-Editor-In-Chief

Arushie Marwah

Executive Editor

Abhilash Agrawal

MANAGING EDITOR

Sakshi Yadav

CONTENT EDITORS

Amrita Shivaprasad
Ashlesha Mittal
Avantika Arun
Chandni Ghatak
Sanjana Yadav
Subbalaxmi S.

COPY EDITORS

Abhimanyu Sharma
Amanee Kadakia
Kartikeya Sharma
Krishnan Sreekumar
Kumar Shubham
Pallavi Singhal

FACULTY ADVISORS

CHIEF EDITOR

Ms. Nidhi Gupta, Asst. Prof. (Law)

ASSISTANT EDITOR

Mr. Deepankar Sharma, Teaching Asst. (Law)

TABLE OF CONTENTS

ARTICLES

The Opportunities for Post-Brexit International Arbitration in London and India

Lord Peter Goldsmith QC & Patrick Taylor…………..…………...………………..…………1

Climate Refugees: Acknowledging the Existence of an Imminent Threat

Swapnil Tripathi..21

Tax Residency Certificate in Double Taxation Relief: Latency Unravelled

Adarsh Mohandas & Raghavendra Pratap Singh 35

A Deliberate Critique to Sexual Harassment Law in India

Varun Malik...46

Rethinking the Indian Sex Offender Registry

Stuti Subbaiah Kokkalera 56

Lord Peter Goldsmith QC & Patrick Taylor, *The Opportunities for Post-Brexit International Arbitration in London and India*, 4(1) NLUJ Law Review 1 (2017)

THE OPPORTUNITIES FOR POST-BREXIT INTERNATIONAL ARBITRATION IN LONDON AND INDIA

LORD PETER GOLDSMITH QC & PATRICK TAYLOR*

ABSTRACT

The United Kingdom's recent vote in favour of Brexit has raised speculation about whether London would continue to be a preferred forum for arbitration of India-related disputes. Over the years, the support for arbitration in India has grown immensely. This is reflected through the opening of the Mumbai Centre for International Arbitration, the pro-arbitration amendments to the Indian arbitration law and the minimum interference approach adopted by the Indian courts. Given the increasing inclination of parties to India-related disputes to opt for arbitration, the author seeks to examine the impact of Brexit on the attractiveness of London as a centre of arbitration, and whether this would affect the growth of arbitration in India. London has always flourished as a hub of arbitration, independent of its membership in the EU. The applicability of principles of English law, and the consistency that they represent, have always made London a favourable seat of arbitration, particularly for Indian parties. Thus, while India seeks to become a leading player in international arbitration, London shall retain its attractiveness as a centre for arbitration of India-related disputes.

* **Lord Goldsmith** is London Co-Managing Partner and Chair of European and Asian litigation at Debevoise & Plimpton. Lord Goldsmith has served as United Kingdom's Attorney General from 2001-2007. He may be contacted at **phgoldsm[attherate]debevoise[dot]com**.
Mr. Patrick Taylor is a Partner in the International Dispute Resolution Group at Debevoise & Plimpton. He may be contacted at **ptaylor[attherate]debevoise[dot]com.**

TABLE OF CONTENTS

I. INTRODUCTION 3

II. THE IMPRESSIVE GROWTH IN INDIA-RELATED ARBITRATION 4

A.The Pivot Towards Arbitration 4

B.Recent Indian Law Developments 5

i. India's new arbitration law 6

ii. The pro-arbitration approach of the Indian Supreme Court 8

III. THE NON-IMPACT OF BREXIT ON THE ATTRACTIVENESS OF LONDON AS A SEAT OF ARBITRATION 10

A.Brexit and International Arbitration in London: Business as Usual 10

i. Law 10

ii. Judiciary 11

iii. Legal expertise 11

iv. Education 11

v. Right to representation 11

vi. Accessibility and Safety 11

vii. Facilities 12

viii. Ethics 12

xi. Enforceability 12

x. Immunity 12

B.Brexit: Potential Benefits for International Arbitration 14

IV. THE NON-IMPACT OF BREXIT ON THE EFFECTIVENESS OF ENGLISH LAW AS THE PROCEDURAL LAW OF ARBITRATIONS SEATED IN LONDON 15

A.The Doctrine of Illegality 16

B. Malicious prosecution 18

V. CONCLUSION 20

I. INTRODUCTION

Overcoming recent challenges to its success, arbitration may finally be emerging in India as a popular method of international dispute resolution. The latest changes to the Indian Arbitration Act, and the opening of the Mumbai Centre for International Arbitration **["MCIA"]** in October 2016, are laudable for facilitating the arbitration of India-related commercial disputes. Furthermore, over the last few years, major international arbitration institutions have seen a significant rise in the arbitration of disputes involving Indian parties. London, in particular, has been one of the preferred venues and seats for India-related arbitrations.

The majority vote in favor of Brexit in the United Kingdom's recent referendum on its membership of the European Union, has given rise to speculation about the appeal of London as a center for international arbitration. In this article, we consider what effect (if any) Brexit has, and is likely to have, on London's appeal as a forum for the arbitration of India-related disputes.

This article is structured as follows: First, the author shall outline the growing success of international arbitration in India-related matters, and how that process has been supported by recent developments in Indian law that have contributed to the reduction of court intervention in international arbitration processes. Second, we consider the effect of Brexit on London as a seat of arbitration. Third, we examine the effect of Brexit on the effectiveness of English law, including as the governing law of international contracts involving an Indian party or as the law of the arbitration of India-related disputes. This includes consideration of two important recent decisions of the Supreme Court of the United Kingdom, which changed the law in two areas: the doctrine of illegality[1] and the tort of malicious prosecution[2]. Both cases were heard, exceptionally, by a panel of nine Justices instead of the usual five Justices. The decisions in both are examples of clear and well-formulated developments in

---

[1] Patel v. Mirza, [2016] U.K.S.C. 42 [hereinafter Patel v. Mirza].
[2] Willers v. Joyce, [2016] U.K.S.C. 43.

English law, which Indian parties could benefit from having at their disposal when arbitrating their disputes either in London, or in India under a contract governed by English law.

II. THE IMPRESSIVE GROWTH IN INDIA-RELATED ARBITRATION

A. THE PIVOT TOWARDS ARBITRATION

Foreign investors often prefer to have their disputes resolved in venues perceived to be more neutral than local courts. Historically, Indian-seated arbitrations were shunned as a method for international dispute resolution. Today, arbitration is proliferating as a viable method of resolving international commercial disputes connected with India. Investors in the Indian market have displayed a growing sense of comfort with agreeing to arbitration in, among other places, London and Singapore, both seats with strong common law traditions.

Aside from the perceived neutrality of arbitration, the likelihood of local court delays also informs the decisions of parties to opt for arbitration over other dispute resolution mechanisms. The Indian courts are thought to have the world's largest backlog of cases, with nearly 30 million proceedings currently pending. It is also estimated that the average lawsuit in India takes between 10 and 15 years to be fully adjudicated.[3] This is not as much the fault of the courts, as the product of overwhelming demand for court services. However, this endemic delay in court proceedings has fuelled the demand for arbitration as an alternative to the courts available to commercial parties.

The shift towards arbitration is exemplified by the launch of the MCIA on 8 October 2016; a momentous step in the growth of international arbitration in India. The MCIA promises to be a first-of-its-kind Indian arbitral institution. Its aims include providing a much-needed impartial and effective framework for institutional arbitration in India, and meeting the high standards set by leading international institutions elsewhere. Some leading arbitration practitioners have already lent their support to the MCIA.[4] Whilst, as with all

---

[3] Summary Report of India, National Judicial Data Grid, *available at* http://164.100.78.168/njdg_public/main.php.

[4] MCIA Council, *available at* http://mcia.org.in/about/organisation/mcia-council/.

arbitral institutions, it will take time for the MCIA to establish itself on the worldwide stage, there is every reason to be optimistic that it can do so successfully.

The opening of the MCIA will help to plug the gap left by the withdrawal of the London Court of International Arbitration **["LCIA"]** from India. LCIA India blazed a trail for arbitration institutions well before the Indian market had an appetite for it. The establishment of the MCIA has been well timed, coinciding beautifully with the liberalisation of the arbitration law in India.

The pro-arbitration shift taken by the Government of India and Indian courts has contributed to the growth of India-related arbitration internationally. 91 of the 271 new cases filed before the Singapore International Arbitration Centre **["SIAC"]** in 2015 (*i.e.* around one in three) involved an Indian party. Indian parties made up the highest proportion of parties from any one State.[5] In addition, the LCIA and the International Chamber of Commerce **["ICC"]** have seen significant increases in arbitrations involving Indian parties.[6] London in particular has enjoyed considerable success as both a venue and seat for international arbitrations connected to India; particularly where one party is European and the other party is Indian. When selecting a European seat, the preference for London stems from its historic links with India, the similarities between their common law systems, the availability of experts with sound legal knowledge of both jurisdictions, and the well-established pro-arbitration legal framework in the UK.[7]

B. RECENT INDIAN LAW DEVELOPMENTS

Until recently, the fundamental challenges to the success of arbitration in India have been formidable and well documented. These included the relatively dated character of India's arbitration law, compounded by the interventionist tendencies of the Indian courts.

---

5 SIAC Annual Report 2015, *available at* http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf.

6 Arjun Gupta et al., *An Overview of Litigation and Dispute Resolution in India*, INDIA LAW NEWS, Vol. 8:1, Alternate Dispute Resolution Issue, at 21 (Spring 2016).

7 Ludovic de Walden et al., *Arbitration for Indian companies – the London connection*, Prepared for the City of London Corporation (Oct. 2012), https://www.cityoflondon.gov.uk/business/support-promotion-and-advice/promoting-the-city-internationally/india/Documents/ArbitrationIndianCompaniesOct2012.pdf.

Faced with the recent upswing in arbitration, and increasing demand from commercial parties, the Government of India has taken significant steps to address both these difficulties.

i. India's new arbitration law

On 31 December 2015, the President of India gave formal assent to the Arbitration and Conciliation (Amendment) Act, 2015 **["the Amendment Act"]**, which substantially amended and reformed India's arbitration law.[8]

The Amendment Act modernised India's arbitration law by bringing it into line with global best practice, curtailing the scope for intervention by the Indian courts. This followed the 246th report of the Law Commission of India,[9] which in 2014 had recommended these amendments, aiming to make arbitration the preferred method for the settlement of commercial disputes in India. To achieve that aim, arbitration had to be more user-friendly, cost-effective and expeditious. The Law Commission Report aimed to promote institutional arbitration in India, balance judicial interventionism and judicial restraint, safeguard the neutrality of arbitrators and provide wide powers to arbitrators to grant interim relief.[10] The Amendment Act made numerous important changes to Indian arbitration law in these areas. The four aspects of the new law that are anticipated to be particularly welcome by international parties are highlighted below.

First, the Amendment Act restricts the grounds on which arbitral awards can be challenged in India. This has been achieved by narrowing the definition of the often misused or abused notion of "Public Policy of India" – which has been the most common ground for challenges to arbitral awards in India. The Indian courts had regularly afforded the concept of "Public Policy of India" an overly broad interpretation that led to findings of "patent illegality" wherever an award was deemed inconsistent with any aspect of Indian law.[11] In

---

[8] Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016, (Jan. 1, 2016), §1, Extraordinary, Part II, (Ind.) [hereinafter Amendment Act][The Amendment Act came into force on 1 January 2016, when it was published in the Gazette of India, although it was deemed effective as of 23 October 2015].

[9] Amendments to Arbitration and Conciliation Act, 1996, Report no. 246, Law Commission of India, http://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter Report].

[10] Report, *supra* note 9, at Chapter II.

[11] Report, *supra* note 9, at §34.

practice, this ground of challenge was invoked to invite the courts to reconsider the merits of the dispute and to substitute the courts' determination of the merits for that of the tribunal. The public policy objection was a low threshold for challenging an award, and it denied the parties to a contract the benefit of their contractually agreed bargain that disputes relating to that arrangement were to be finally resolved by arbitration. Furthermore, court decisions on challenges would often take years to reach, further undermining a key benefit of arbitration, namely, its relative expeditiousness in resolving disputes, particularly as compared to the Indian courts. The Amendment Act clarifies that "patent illegality" as an element of public policy applies only to domestic and not international arbitration. The Amendment Act also expressly prevents Indian courts from reviewing awards on their merits under the cover of the "Public Policy of India" umbrella.

Second, the Amendment Act confirms the availability of interim relief to support arbitral proceedings. Following the *BALCO* decision of the Indian Supreme Court (discussed below),[12] parties participating in foreign seated arbitrations could no longer apply to the Indian courts for interim measures in support of such proceedings. While the *BALCO* decision was helpful insofar as it reduced court interference with arbitration, it had the unfortunate effect of making any form of interim relief extremely difficult to obtain, even where it was appropriate for the courts to exercise such power. The new law rectifies this. Indian courts now have jurisdiction to grant interim awards in support of arbitrations and to assist in the taking of evidence even when the seat of arbitration is not in India,[13] so long as it is in a country recognized by India as a reciprocating country.[14] For example, Indian courts may grant interim awards for arbitrations seated in the UK and Singapore, but not the United States.

Further, an arbitral tribunal seated in India is now empowered to grant interim measures similar to a court. Such measures are then deemed enforceable in the same manner

---

[12] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Co*.,* 2012 (9) S.C.C. 552 (Ind.) [hereinafter BALCO].
[13] Alison Ross, *India – a new law for a new year*, GLOBAL ARB. REV. (Jan. 4, 2016).
[14] Amendment Act, *supra* note 8, at §9.

as if they were an order of an Indian court.[15] This amendment should significantly reduce the time and cost involved in approaching courts in India for interim measures. Moreover, this should prevent parties from misusing courts to sidetrack and prolong the arbitral process. This could prove to be a significant step towards shortening the duration of India-related international arbitrations.

Third, the mere filing of an application challenging an award will no longer automatically stay its execution.[16] This should eliminate unnecessary court proceedings required to vacate automatic stays. It should also assist in dissuading parties from challenging an award merely to delay its enforcement.

Fourth, a new comprehensive costs regime is intended to dissuade frivolous arbitration claims.[17] This regime will be applicable both to the arbitration and related court processes.

Whilst still in its early days, India's new arbitration law is likely to fuel the growth in India's popularity as a seat of arbitration. The next few years will be critical in determining whether or not the new law operates as intended, or whether further legal reforms are necessary. In the meantime, international parties should feel encouraged that arbitration of Indian-related disputes will operate more effectively and efficiently than previously.

ii. The pro-arbitration approach of the Indian Supreme Court

Over the last few years, the Indian Supreme Court has also shifted its stance to one that is noticeably more pro-arbitration. Following the lead of the Supreme Court, other Indian courts have become less interventionist, affording greater deference to the integrity of the arbitral process. The landmark decision in the *BALCO* case heralded this change,[18]

---

[15] *Id.* §17.
[16] Amendment Act, *supra* note 8, at §36.
[17] Amendment Act, *supra* note 8, at §31A.
[18] BALCO, *supra* note 12 [Prior to the Supreme Court's ruling in BALCO, the Indian courts appeared to have considered it their responsibility to oversee and intervene in arbitral proceedings as the sole protectors of the proper application of Indian law. This micro-management of the arbitral process from the outside was of concern to parties that had deliberately contracted out of litigation before India's courts. This occurred perhaps

preventing India's courts from using India's domestic arbitration law to exercise supervisory jurisdiction over foreign-seated arbitrations.

A significant limitation of the *BALCO* decision was that it applied, by its own terms, only to arbitrations conducted pursuant to agreements concluded after 6 September, 2012. However, in the *Reliance* case,[19] the Supreme Court clarified this and held that the pre-*BALCO* regime would not be applicable to foreign-seated arbitrations at all. This meant that even if an arbitration agreement was concluded prior to 6 September, 2012, the Indian courts would have no supervisory jurisdiction over the arbitration under the pre-*BALCO* regime.

In another landmark decision, the Indian Supreme Court held that cases involving allegations of fraud could be heard by arbitral tribunals.[20] This overturned the previous decisions of the Supreme Court, which had consistently held that, in the interests of justice, cases involving allegations of fraud must be heard by the courts.

Finally, in another, recent pro-arbitration decision, *Sasan Power*,[21] the Indian Supreme Court refused to intervene in a London-seated ICC arbitration governed by English law taking place between two Indian parties. Instead, the Supreme Court directed the party seeking the Court's assistance to honor its arbitration commitments, decisively rejecting any attempt to derail the ICC arbitration and awarding costs against the party seeking the Court's assistance.[22]

The combination of India's increasingly pro-arbitration judiciary and pro-arbitration laws should significantly improve the arbitration landscape in India. In the short-term, it is likely that foreign parties will still approach arbitration in India with some circumspection. Established international seats, including London, will continue to be of great relevance whilst commercial parties adapt to the new arbitration reality in India. But in the near future it

---

most frequently in circumstances where an Indian court would grant interim relief in relation to a foreign seated arbitration, which in turn frequently frustrated one of the core purposes of the arbitral process (i.e. resolving disputes before private tribunals with minimal domestic court intervention)].

[19] Union of India v. Reliance Industries Limited & Ors, (2015) 10 S.C.C. 213 (Ind.).

[20] Swiss Timing Limited v. Organisation Committee, (2014) 6 S.C.C. 677 (Ind.).

[21] Sasan Power Ltd v North American Coal Corporation India Private Ltd, A.I.R. 2016 S.C. 3974 (Ind.).

[22] Douglas Thomson, *Indian Supreme Court orders London Arbitration*, GLOBAL ARB. REV. (Aug. 26, 2016).

can be expected that India will challenge London and Singapore for market share as a seat for the arbitration of these disputes.

III. THE NON-IMPACT OF BREXIT ON THE ATTRACTIVENESS OF LONDON AS A SEAT OF ARBITRATION

While the new arbitration landscape in India beds in and users wait to see how the MCIA develops, the question arises that whether Brexit, will impact the attractiveness of London as a seat for the arbitration of disputes, including India-related disputes.

While the debate over the implications of the Brexit decision continues, commercial parties should be reassured that London's position as a preferred seat for international arbitration is unlikely to be shaken. Indeed, it is possible that London could benefit from the UK's decision to leave the EU.

A. BREXIT AND INTERNATIONAL ARBITRATION IN LONDON: BUSINESS AS USUAL

Last year, during its centenary conference in London, The Chartered Institute of Arbitration published a list of 10 features necessary to make for a safe, effective, and above all, successful seat for arbitration.[23] These were drawn up after a detailed consultation process with experienced arbitrators and arbitration lawyers,[24] and can be discussed as follows:

i. Law

There must be a clear effective and modern international arbitration law that recognizes and respects the parties' choice of arbitration as the method for settlement of their disputes.

[23] CIArb London Centenary Principles, Chartered Institute of Arbitration, http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4.
[24] *Id.*

ii. Judiciary

There must be an independent judiciary, competent, efficient, possessing the expertise in international commercial arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes.

iii. Legal expertise

An independent, competent legal profession with expertise in international arbitration and international dispute resolution, providing significant choice for parties who seek representation in the courts of the seat or in the international arbitration proceedings conducted at the seat.

iv. Education

An implemented commitment to the education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of international arbitration and to the further development of learning in the field of arbitration.

v. Right to representation

There must exist a clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the seat.

vi. Accessibility and Safety

Easy accessibility to the seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, and counsel in international arbitration, and adequate safety and protection of the participants, their documentation and information.

vii. Facilities

There must be functional facilities for the provision of services to international arbitration proceedings including transcription services, hearing rooms, document handling and management services, and translation services.

viii. Ethics

There must be professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

xi. Enforceability

Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the seat in other countries.

x. Immunity

A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

London fulfils every one of these ten criteria independent of UK's membership of the EU. Moreover, London is expected to continue to embody all these attributes notwithstanding the UK's exit from the EU. Coupled with its historical reputation for high standards of judicial integrity, the independence of its legal profession, and the efficiency of arbitral dispute resolution, for decades parties have chosen, and will continue to choose London as a preferred seat of arbitration.

Arbitration in London has also flourished independent of the UK's membership of the EU. The Arbitration Act 1996, which includes the framework for domestic and international arbitrations conducted in the UK, has already been tested and implemented by

highly qualified judges well versed in arbitration law, both in practice and on the bench.[25] Moreover, the UK and, in particular, London has a cadre of well-supported and highly experienced arbitration specialists.

The 1996 Act also allows for limited, but supportive intervention by the English courts. There is well developed case law, which demonstrates in practice the combined strengths of the Act and the English courts' pro-arbitration attitude. Importantly, since the Act does not incorporate EU law, this will be unchanged following Brexit. Indeed, it can be expected that the continuity and certainty provided by the Act post-Brexit will appeal to international parties.[26]

The 1958 Convention on the Recognition and Enforcement of Arbitral Awards[27] **["New York Convention"]**, is the most widely used tool for enforcing international arbitration awards. The effectiveness of international arbitration and enforceability of awards in London seated arbitrations arises from its adherence to the New York Convention, which will continue post-Brexit. Accordingly, London-based arbitral awards will continue to be enforceable in all countries that are signatories to the Convention including India and the 27 Member States of the EU. Finally, London is home to world-renowned institutions such as the LCIA, and provides a neutral forum in which parties of different nationalities can arbitrate disputes.

Clearly, the success of London arbitration is not parasitic upon the UK's membership of the EU. London was a leading arbitration centre for many years prior to the UK joining the EU. It will continue to be so after it leaves.

---

[25] The Arbitration Act 1996, C. 27 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents.

[26] Chloe Smith, *Arbitration hindering development of common law – LCJ*, Law Society Gazette, (Mar. 21, 2016) http://www.lawgazette.co.uk/law/arbitration-hindering-development-of-common-law-lcj/5054358.fullarticle.

[27] Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

B. BREXIT: POTENTIAL BENEFITS FOR INTERNATIONAL ARBITRATION

Brexit may in fact be beneficial for London as a global hub for international arbitration. The precise extent of any such benefits should become clearer during the UK's negotiations to leave the EU, and the nature of the relationship which is ultimately established upon exit. The nature of the relationship, including UK's membership of the single market, will impact the extent to which EU law retains a role.

The scope of the UK's future agreement (if any) with the EU should make clear which obligations the UK must continue to abide by. This includes which European regulations must be maintained, and which European directives must be implemented under UK statutes. If, for example, the UK maintains the Brussels Regulation (or a statute very similar to it), then the UK may not be able to reinstate the right of its courts to award anti-suit injunctions in relation to proceedings in EU Member State courts. Certainly, the English courts' ability to issue anti-suit injunctions would be cast into doubt if the UK becomes an EEA EFTA member.[28] However, if the UK remains outside of the EU and the EEA and applies WTO trading rules, UK courts' ability to issue anti-suit injunctions directed at European court proceedings would not be restricted, if the injunction is obviously, *in personam*. Thus, London's offering to Indian parties facing disputes with European counterparties would be improved.

Anti-suit injunctions are commonly used by the English courts to protect arbitration agreements. By way of example, in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, the UK Supreme Court granted an anti-suit injunction in respect of proceedings brought in breach of an arbitration agreement, where no arbitration

[28] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano), 28 ILM 620 (1989) [The Lugano Convention, which sets out rules on jurisdiction for European Free Trade Association ("EFTA") states (including Iceland, Norway, Switzerland), does not have an equivalent to the provision in the Brussels (Recast) Regulation which appears to still prohibit anti-suit injunctions to be granted to uphold an arbitration agreements. However, it is unclear whether the EFTA Court would follow the Court of Justice of the EU's jurisprudence on anti-suit injunctions when interpreting the Lugano Convention].

proceedings had been brought or contemplated.[29] In contrast, the legality of anti-suit injunctions in EU Law is uncertain as the EU Law does not permit restrain of proceedings in the EU, but allows Member States' courts to restrain proceedings brought in breach of an arbitration agreement outside of the EU.[30] Post-Brexit, there might be a move within the English courts to re-establish the use of anti-suit injunctions in respect of proceedings before EU Member States' Courts. At present, if an Indian party and, say, an Italian party have a contract agreeing to arbitration of disputes in London, the Italian party could obtain an anti-suit injunction against the Indian party for commencing court proceedings in India, but the English court could not issue an anti-suit injunction against the Italian party if it commences litigation in the courts in Italy. After Brexit, equality of arms may be restored.

IV. THE NON-IMPACT OF BREXIT ON THE EFFECTIVENESS OF ENGLISH LAW AS THE PROCEDURAL LAW OF ARBITRATIONS SEATED IN LONDON

Brexit should not impact the attractiveness of English law as the law governing arbitral proceedings seated in London. As stated above, the 1996 Act remains effective and certain. Further, recent post-Brexit developments in English common law may have made English law a more attractive *lex arbitri* for parties arbitrating India-related disputes. These developments include both reform to the doctrine of illegality (an issue which arises frequently in international arbitration); and the potential new counterclaim of malicious prosecution in relation to wrongfully brought proceedings.

---

[29] Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP, [2013] U.K.S.C. 35.

[30] Brussels (Recast) Regulation governs the jurisdiction of EU Member courts over civil and commercial matters and provides guidance on resolving conflicts of jurisdiction between courts of the various Member States. In Allianz SpA and Ors v West Tankers Inc (CJEU Case C-185/07) the CJEU controversially held that it was incompatible with the earlier, 'non-recast' Brussels I Regulation "for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement." This decision has been overturned by Gazprom OAO v Lithuania (CJEU Case C-536/13). The recast Regulation includes Recital 12 which states that there is an absolute exclusion of arbitration from its scope. However, it still remains to be seen whether West Tankers will survive under the recast Brussels I Regulation after Gazprom.

A.THE DOCTRINE OF ILLEGALITY

On 20 July 2016, the Supreme Court of the United Kingdom issued judgment in *Patel v. Mirza*.[31] The judgment changed the scope of the application of the doctrine of illegality (*ex turpi causa non oritur actio*), thereby updating the common law and highlighting its ability to adapt to changing circumstances.

The classic formulation of the doctrine of illegality is attributed to Lord Mansfield CJ. in *Holman v. Johnson*: "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.*"[32] Where the seat of the arbitration is London, even if the governing law of the contract is different, the doctrine of illegality may be applicable where the overriding mandatory provisions of English law, as the *lex fori*, are engaged.

Assuming that a tribunal seated in London were to accept that the doctrine is applicable to the matter before them, until recently, the law on illegality was unclear and difficult to apply. Historically, the English cases applying the doctrine have been difficult to reconcile. As Gloster LJ. commented in her judgment in the Court of Appeal in *Patel v. Mirza*, "*any hapless law student attempting to grapple with the concept of illegality knows* [that] *it is almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts.*"[33]

Before the Supreme Court's decision, the pre-dominant test for the application of the doctrine of illegality as formulated in *Holman v. Johnson* was the reliance rule, as applied by the majority of the House of Lords in *Tinsley v. Milligan*.[34] The test under the reliance rule was whether the party seeking to enforce its rights, contractual or otherwise, was relying on its own illegal conduct in advancing its claim. If a party was relying on its own illegal conduct to advance the claim, the defence of illegality could be established with the effect that the court or tribunal would refuse to enforce the claim. The reliance rule had been criticised as

---

[31] Patel v. Mirza, s*upra* note 1.
[32] Holman v. Johnson, (1775) 1 Cowp 341, 343.
[33] Patel v. Mirza, *supra* note 1, at ¶47.
[34] Tinsley v Milligan, [1993] U.K.H.L. 3; See also the Court of Appeal's decision in Bowmakers Ltd v. Barnet Instruments Ltd [1945] K.B. 65.

unjustifiably inflexible and as leading to unfair results as between the parties.[35] Since the decision in *Tinsley v. Milligan*, there had been numerous proposals to reform the law on illegality, including two Law Commission Consultation Papers.[36]

The Supreme Court in *Patel v. Mirza*, by a majority of six to three, held that the criticisms of the reliance rule as rigid and as giving rise to arbitrary outcomes were justified, and that the rule should no longer be followed.[37] Lord Toulson, giving the lead judgment for the majority, held that the courts should adopt a more flexible assessment of whether allowing a claim, which is in some way tainted by illegality, would be contrary to the public interest on the basis that it would be harmful to the integrity of the legal system. His Lordship held that the court must consider a range of factors in order to determine whether to allow the claim, including: (a) the underlying purpose of the prohibition which was illegally contravened; (b) any other relevant public policies which may be rendered ineffective or less effective by denial of the claim; and (c) whether denial of the claim would be proportionate, keeping in mind that the civil courts were not concerned with punishment.[38]

The decision in *Patel v. Mirza* represents a thorough review of one of the most complicated areas of English law, highly relevant to international disputes in which English law is applied.[39] That the appeal was heard by a panel of nine shows that the Supreme Court wanted to ensure a thorough debate between its members, and was particularly faced with the prospect of departing from a previous decision of the House of Lords. Although, the reasoning split the court and faced criticism of a number of commentators, the judgment does provides clarity regarding the approach to be followed regarding the doctrine of illegality.

---

35 Nelson v. Nelson [1995] H.C.A. 25; (1995) 184 C.L.R. 538: Toohey J at 595-7, McHugh J at 609-13 [See, for example, the criticisms of the High Court of Australia].
36 *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, LCCP 154 (1999) and *Consultative Report on the Illegality Defence*, LCCP 189 (2009).
37 Patel v. Mirza, *supra* note 1, at ¶110.
38 *Id.* at ¶10.
39 *Id.*

B. MALICIOUS PROSECUTION

In the second judgment to be discussed, the UK Supreme Court highlighted once again the adaptability of English law by extending the reach of tortuous liability to those who wrongfully bring claims. The prospect of defending litigation (including international arbitration) has never been enticing, particularly where there does not appear to be any justifiable basis for the claimant's action. It is not unheard of that claimants bring proceedings for bad faith reasons: perhaps as an ill-conceived tactical weapon in a commercial battle, or simply to damage the reputation of another.

In *Willers v. Joyce*,[40] a bare 5:4 majority of the UK Supreme Court held that the tort of malicious prosecution is available in respect of all wrongfully brought civil proceedings. Historically, this tort has provided redress for the wrongful pursuit of criminal proceedings, with some exceptions of its application in the civil context. The Supreme Court's decision changes that, and we are likely to witness litigation defining the contours of the tort in the coming years.

In order to claim under the tort of malicious prosecution, a party must satisfy the separate requirements of showing an absence of reasonable and probable cause for the bringing of proceedings on the one hand, and the presence of malice on the other. The majority of the Supreme Court perceived this to represent a "*heavy burden*" for a potential claimant to meet.[41] Essentially, proof that the defendant/respondent deliberately misused the process of the court or, presumably, of an arbitral tribunal is needed – the "*critical feature*" being that the proceedings "*were not a bona fide use of the court's [or arbitral tribunal's] process*".[42]

As claims are eventually brought in the English courts for malicious prosecution of civil proceedings, and potentially before international arbitral tribunals for malicious prosecution of international arbitration, it will become clear just how heavy this burden is. The minority of the Supreme Court expressed concerns that, following the majority

---

[40] Willers v. Joyce, [2016] U.K.S.C. 43, 44.
[41] *Id.* at ¶56.
[42] *Id.* at ¶55.

judgment, liability will arise simply "*if the claimant's 'dominant' motive is to injure, even if [the claimant] believes the claim to be well-founded and intends to 'injure' the defendant by pursuing it to judgment*".[43] Exactly what constitutes a "*dominant motive*" in this context will likely be the subject of future litigation, including whether a claimant must have an actual appreciation that the original claim is unfounded.

In the light of this decision, claimants will need to conduct their English law-governed litigation and arbitration in a manner which will not give rise to such claims being made against them in the event they are unsuccessful. Equally, respondents ought to consider whether such claims can legitimately be threatened during the course of proceedings, and if there are any grounds to bring such claims on their conclusion. In the arbitral context, it is possible that a respondent might now seek to advance a claim for malicious prosecution by way of counterclaim. Although, the Supreme Court's decision does not conclusively establish the availability of tortuous relief in the context of arbitral proceedings, it can be envisaged that the broad scope of arbitral jurisdiction, which encompasses torts relating to the contractual relationship between the parties, could be deemed to cover a counterclaim for the tort of malicious prosecution of a claim under the contract.

The English courts already have several mechanisms at their disposal, such as strike-outs, summary judgments, indemnity costs, and the enforcement of cross-undertakings, to bring wrongful litigation swiftly to an end, or punish those who have pursued it. In international arbitration, such mechanisms are notably absent, and the frustrations of innocent respondents are thereby magnified. This could make actions for malicious prosecution in arbitration more common than for court litigation. In international arbitral proceedings, where it is very difficult to have a claim decided on a summary basis, this would finally give the victims of malicious claims a weapon to fight back.

Again, this development may have the effect of making London-seated arbitration more popular, with the greater protections from abuse now potentially available under English law as the *lex arbitri*. However, it is still to be tested whether and, if so, how the law

[43] *Id.* at ¶139.

on malicious prosecution will be applied, and how it will be applied specifically in the arbitration context.

V. CONCLUSION

The growth in the popularity of arbitration for the resolution of India-related disputes is due in significant part to the efforts of the Government of India to liberalize the arbitration market through the introduction of India's new arbitration law. This growth should enable new India-based arbitration institutions such as the MCIA to flourish, and older centres such as London to continue to serve as neutral seats for the resolution of India-related disputes. Brexit changes nothing as the effectiveness and popularity of London as an arbitration seat and venue owes nothing to the UK's membership of the EU; it is owed to London's own institutions and characteristics and to English law and language. It is not the New York Conventionthat underpins London's effectiveness.

As we look forward to the continued effective resolution of international disputes, we can be confident of two things. First, the rebirth of arbitration in India, founded on the recent legislative reforms, judicial encouragement for arbitration, and the opening of the MCIA, should ensure that India becomes a major player in the international arbitration scene. Second, irrespective of Brexit, London will remain a leading arbitration hub, and a willing partner to India in the promotion and success of arbitration as a means of resolving India-related disputes.

Swapnil Tripathi, *Climate Refugees: Acknowledging the Existence of an Imminent Threat*, 4(1) NLUJ Law Review 21 (2017)

CLIMATE REFUGEES: ACKNOWLEDGING THE EXISTENCE OF AN IMMINENT THREAT

SWAPNIL TRIPATHI*

ABSTRACT

A former Secretary General of the UN General Assembly stated in a press conference that the world is expected to have over 50 million refugees by 2020. Issues relating to refugees have existed since the conclusion of the World War-II, however its nature has changed. Today, displacement is not just caused by threat of persecution by home State, but also by extensive climate change, a ground which is not recognized for the grant of refugee status under the Refugee Convention. States cite the Convention as a justification for refusing entry to these individuals. However, the winds of change have given rise to the concept of environmental refugees which presents an emerging change in jurisprudence surrounding the subjects, thereby demanding the inclusion of people displaced by climate change, under the definition of refugee. The present article delves into this new phenomena and attempts to find an answer to this demand raised in light of the recent events in the world, while also proposing remedies for a proper mechanism.

* The author is a fourth year Constitutional Law (Hons.) student at National Law University, Jodhpur and can be contacted at **swapnil[dot]tripathi221[attherate]gmail[dot]com**.

TABLE OF CONTENTS

I.INTRODUCTION 23

II. REFUGEE UNDER INTERNATIONAL LAW: REVISITING HISTORY AND UNDERSTANDING THE PRESENT 24

III. THE EMERGENCE OF ENVIRONMENTAL REFUGEES 25

IV. STATE RECOGNITION OF ENVIRONMENTAL REFUGEES: STATE PRACTICE, SOVEREIGNTY AND HUMAN RIGHTS 27

A. The Floodgate Argument 28

B.The Self-Defence Argument 29

C.The Sovereignty Argument.. 29

A.The Non-Refoulement Argument... 30

B.The Human Rights Argument.. 30

C.The Recognition Argument.. 31

V.THE CURE TO 50 MILLION ENVIRONMENTAL REFUGEES: RECOMMENDATIONS AND SUGGESTIONS 31

A.Setting up Similar Initiatives as Nansen 32

B.Reorienting the Definition of Refugee 32

C.Resolving the Dichotomy Between Natural and Man-Made Induced Natural Disasters 33

D.Forming Solution Alliances.. 33

I.INTRODUCTION

"The world will have over 50 million refugees by the year 2020."

-Ban Ki Moon (Former Secretary General, United Nations)[1]

In common parlance, one would use the term "*refugee*" to mean a person who has fled his home country due to a threat to his life, but the term "*environmental refugee*" appears to be alien to the general population. The reason for the same is the novel nature of the term. This term has been held to mean exodus from the home country due to natural disasters.[2]

Internationally, refugees are granted certain protections under the Convention Relating to the Status of Refugees, 1951 **["CRSR"]**[3] and the Protocol Relating to Status of Refugees **["PRSR"]**.[4] Article 1(A)(2) of these conventions provide that a person is a refugee if he/she is fleeing persecution from their home country on grounds of race, nationality, religion etc. and only the fulfilment of these grounds entitle a person to attain refugee status, thereby availing the privileges that come with it. However, the CRSR and PRSR, being conventions that were drafted around six decades ago, do not take into account persons who flee their country on grounds of natural calamities, as the drafters did not envision that natural disasters could also cause a mass-displacement of individuals. As a result, environmental refugees were excluded from the purview of these conventions. The wrath of such exclusion has primarily been faced in the Eastern African region which, due to its deplorable natural condition, gives rise to the maximum environmental refugees in the world. The lack of an updated definition not only denies them the protection offered to refugees

[1] UN Secretary General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants: Rep. Of the Secretary-General*, U.N. Doc. A/70/59 (Apr. 21, 2016).
[2] U.N. High Commission for Refugees, *Climate Change, Natural Disasters and Human Displacement: a UNHCR Perspective*, (prepared by Antonio Guterres), *available at* http://www.unhcr.org/4901e81a4.pdf.
[3] United Nations Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150 (adopted on July 28, 1951 by the U.N. Conf. of Plenipotentiaries on the Status of Refugees & Stateless Persons convened under U.N.G.A. Res. 429 (V) (Dec. 14, 1950),entered into force Apr. 22, 1954)[hereinafter Refugee Convention].
[4] United Nations Protocol Relating to Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (adopted by U.N.G.A. Res. 2198 (XXI) (Dec. 16, 1966) entered into force Oct. 4, 1967) [hereinafter Refugee Protocol].

under the conventions but also makes it difficult for them to return to their home country after they leave it.

The author, through this paper, attempts to build a case for the environmental refugees and puts forth arguments for their inclusion in the definition of "refugees" under the Conventions, with a special focus on the condition in eastern Africa. **Part II** of the paper discusses the history of refugees under international law. **Part III** sheds light on the emergence of the concept of environmental refugees. **Part IV** puts forth the arguments for and against the inclusion of the environmental refugees in the conventions. **Part V** concludes the paper with a discussion on the eastern African situation and incorporating the requisite suggestions.

II. REFUGEE UNDER INTERNATIONAL LAW: REVISITING HISTORY AND UNDERSTANDING THE PRESENT

A refugee in the most primitive form was referred to as someone who flees due to fear of persecution or is expelled from his country and seeks asylum in a different country.[5] The history of refugees goes back to the medieval era wherein the Church performed the function of granting protection to individuals who had been persecuted in their home countries. Then, in the post medieval and modern times, these individuals were termed as refugees by the League of Nations High Commission for Refugees in 1921.[6] Later, the regulating body for refugees i.e. the United Nations High Commissioner for Refugees **["UNHCR"]** was established by the General Assembly, which worked in collaboration with countries to formulate and draft the CRSR and the PRSR.

The two conventions defined a "refugee" as a person who flees persecution from his home country on grounds of race, religion, nationality etc.[7] The convention when drafted was primarily directed towards catering to the European refugees facing the wrath of the second world war and was hence short-sighted. Its main objective was to provide protection to these

---

[5] BLACK'S LAW DICTIONARY 1306 (Bryan A. Garner, 8th ed., 2004).
[6] James E. Hassell, *Russian Refugees in France and the United States*, 81 American Philosophical Society 96 (1991).
[7] Refugee Convention, *supra* note 3, at Art. 1.

migrants and to ensure the adherence to their human rights as required by the Universal Declaration of Human Rights **["UDHR"]**.[8] It placed an obligation on every State to admit persons who fulfil a criterion under the convention as a refugee in their territory and fulfil their basic human rights.

The convention was successful in achieving its purpose for a decade or so but, could not keep up with the dynamism persistent in the international scenario. The major area wherein this lack of dynamism in the conventions was observed was in its criteria of persecution. When the conventions were drafted the meaning of persecution was restricted to treatment that was violent, cruel on grounds of religion and race,[9] as such kind of treatment was common during the world wars and was the primary reason why people fled their countries. However, with the passage of time the international scenario saw emergence of other grounds for the fleeing of citizens. One such ground was change in natural environment i.e. climate change, droughts, famines etc.[10] Due to the restrictive nature of the definition of the refugees, the people fleeing countries due to these reasons were not termed as refugees per se and were not granted any kind of protection.[11] Lack of recognition on part of the States led to the emergence of the concept of environmental refugees and the demand for their recognition within the conventions.[12]

III. THE EMERGENCE OF ENVIRONMENTAL REFUGEES

Even though there are numerous Conventions on refugees, none of them grant protection to people fleeing their home State due to environmental disasters. However, multiple jurists came up with the demand of expanding the meaning of the term persecution on grounds that the same was outdated and needed modification,[13] as the reasons for

[8] Universal Declarations of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948).
[9] Briefing Paper: *Refugees and the Third World*, (Overseas Development Institute: London 1983) *available at* https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6678.pdf.
[10] ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT, 93 (2013).
[11] James C Hathaway, *Food Deprivation: A Basis For Refugee Status?*, 81 SOC. RES., no. 2327-39(2014).
[12] "International Law on Refugees — Contemporary Challenges" — Seminar at the Madras Bar Association, (1996) 2 LW (JS) 57 (Aug. 3, 1996) [hereinafter Seminar on Refugees].
[13] RV Anuradha, *On A Displaced Person,* 6 STUD. ADV. 52 (1994) [hereinafter Displaced Person].

displacement today are more complex and permanent[14] as compared to those envisaged under the Convention.[15] They contended that a person, who has no water from drought, has no food due to flooding, is left with no choice but to flee.[16] Hence, grounds of natural disasters like famine and drought were suggested to be included in the definition of refugee,[17] following a rights oriented approach,[18] i.e. the rights under ICCPR, CESCR.[19]

A term identifying these people was coined by Prof. Lester Brown,[20] who termed them as environmental refugees, signifying people that are forced to leave their home due to changes in the environment around them, compromising their well-being and livelihood. The presence of these refugees became so widespread that as per the Internal Displacement Monitoring Centre **["IDMC"],** one out of two displaced persons was so by virtue of a disaster, and an average of 22.5 million had been displaced in the world due to the same.[21] Despite such daunting figures, the issue of environmental refugees did not receive any attention from the States.[22] However it did receive recognition from the UNHCR.[23]

With the passage of time not just the UNHCR, but even the European Commission **["EC"]**, has agreed on the impact of climate change on human migration and termed it as a "crisis in the making",[24] thereby calling for an academic inquiry on the same.[25] Today, such a

---

14 Nesrin Algan, *Transboundary Population Movements: Refugees, Environment and Politics*, 75 TURKISH YEARBOOK OF INTERNATIONAL RELATIONS 2 (1998).
15 Adrienne Millbank, *The Problem with the 1951 Refugee Convention*, (Parliament of Australia: 2000-01) *available at* http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.
16 GARY GARDNER, TOM PRUGH, STATE OF THE WORLD 2015: CONFRONTING HIDDEN THREATS TO SUSTAINABILITY, 118 (The World Watch Institute: 2015).
17 Seminar on Refugees, *supra* note 12.
18 Displaced Person, *supra* note 13.
19 International Covenant on Economic, Social, and Cultural Rights, GA Res. 2200A (XXI), Dec. 16, , 999 U.N.T.S. 171 at art. 11.
20 LESTER R.BROWN, TWENTY-TWO DIMENSIONS OF THE POPULATION PROBLEM, 102 (1976).
21 U.N.H.C.R., *Climate Change and Disasters*, (Dec. 14, 2009) *available at* http://www.unhcr.org/climate-change-and-disasters.html [hereinafter Climate Change UNHCR].
22 Stefan Lovgren, *Climate Change Creating Millions of "Eco Refugees," UN Warns,* NAT. GEOG. NEWS (Nov. 18, 2005) *available at* http://news.nationalgeographic.com/news/2005/11/1118_051118_disaster_refugee_2.html.
23 United Nations High Commissioner for Refugees (UNHCR), *Statement by Sadako Ogata, United Nations High Commissioner for Refugees, at the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro* 2 (June 10, 1992).
24 James Hollifield, Idean Salehyan, *Environmental Refugees,* WILSON CENTRE (Dec. 21, 2015) 4*available at* https://www.wilsoncenter.org/article/environmental-refugees#sthash.eN1Wv3lS.dpuf.

broad definition stands accepted by Convention Governing the Specific Aspects of Refugee Problems in Africa[26] and the Cartagena Declaration.[27] However, such recognition carries an ambiguity with respect to the degree of climate change and in determining the required effect of climate or natural disaster to categorize one as an environmental refugee, otherwise every person fleeing their country would take environmental disaster or threat as an alibi.

This problem has been answered with a four step test laid down by Professor Irene Khan, that states a person is qualified as an environmental refugee if he (or she) by (i) voluntary movement, (ii) crosses international boundary, (iii) due to a rapid trigger, (iv) which is linked to climate change.[28] Also, it is mandated that such migration should necessarily have environmental reason as the main factor for the flight,[29] any sort of politicisation and corruption was held not to be environmentally induced[30] and was not protected under migration management regimes.[31]Following the same, the refugees who migrated from Liberia during the civil war were not termed as environmental refugees due to lack of a direct connection between the war and deforestation (an outcome of climate change).[32]

IV. STATE RECOGNITION OF ENVIRONMENTAL REFUGEES: STATE PRACTICE, SOVEREIGNTY AND HUMAN RIGHTS

A primary issue that arises with respect to environmental refugees and their international recognition is the unwillingness of States to accept the same in their territory on

---

[25] JAMES MC ADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW, 15 (2012).

[26] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on Sept. 10, 1969 by the Assembly of Heads of State and Government, CAB/LEG/24.3 (entered into force on June 20, 1974) art. 1.

[27] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, in Cartagena, Colombia, 19-22 Nov. 1984, Concl. III, 5, reprinted in 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (1995).

[28] IRENE KHAN, THE UNHEARD TRUTH: POVERTY AND HUMAN RIGHTS, 15 (1st ed., 2009).

[29] *Id.*

[30] Anna Lindley, *Questioning drought displacement: environment, politics, and migration in Somalia,* 45 FMR 39 (2014)*available at* http://www.fmreview.org/crisis/lindley.html.

[31] Michelle Leighton, OHCR, *Forced Displacement in the Context of Climate Change: Key issues for legal protection of migrants and displaced person climate change and displaced person*, 8 *available at* http://oppenheimer.mcgill.ca/IMG/pdf/Leighton_MAH_EditsV2.pdf [*hereinafter* Forced Displacement].

[32] SIERRA LEONE, OFFICE OF THE PRESIDENT, SIERRA LEONE: 12 YEARS OF ECONOMIC ACHIEVEMENT AND POLITICAL CONSOLIDATION UNDER THE APC AND DR. SIAKA STEVENS, (1980).

grounds of the CRSR and PRSR. The recent judgment of the New Zealand Supreme Court in the case of *AF (Kiribati)* is pertinent to this discussion.[33] In the referred case, the Court rejected an application for the grant of refugee status on grounds of climate change in the Pacific Island nation of Kiribati.[34] The reasoning of the Court was based on the lack of environmental degradation as a ground under the Refugee Convention. However, New Zealand was not the first State to refuse entry to an environmental refugee; this has previously been done by the Australian Courts,[35] and even the Indian government.[36]

It is noteworthy to mention here that the New Zealand Court failed to take account of the limited capacity of Kiribati to take care of its population because of the ongoing crisis. Such failures, giving rise to refugees, raises questions on the justification given by States to deny entry to people who are displaced on environmental grounds. The author, in this part of the paper, will analyse such reasoning of the State, while also countering the same with arguments in favour of these refugees.

A. <u>THE FLOODGATE ARGUMENT</u>

The most common reasoning that was also adopted by the Court in *AF Kirtibati,* was the "floodgate reasoning", wherein States contend that if they accept a person who amounts to an environmental refugee, the same would open doors for millions who are facing similar deprivation, accepting whom would not be economically feasible for the State[37] as witnessed in the Macedonia case where the country refused to grant entry to the refugees on the ground of lack of resources to cope with the influx.[38] This argument appears untenable on the face of

---

33 AF (Kiribati) [2013] NZIPT 800413 at 39 (New Zealand).

34 *Id.*

35 Mohammed Matahir Ali v. Minister of Immigration, [1994] FCA 887 (Aus.).

36 HANS GUNTER BRAUCH, FACING GLOBAL ENVIRONMENTAL CHANGE: ENVIRONMENTAL, HUMAN, ENERGY, FOOD, 303 (2009).

37 Jessica Rodger, *Defining the Parameters of the Non-Refoulement Principle, LLM Research Paper in International Law (LAWS 509)*, Faculty of Law Victoria University of Wellington, 2001, *available at*: http://www.refugee.org.nz/JessicaR.htm [hereinafter Non- Refoulement Principle]; Jessica Rodger, *Defining parameters of the non-refoulement principle*, LLM Research Paper at Victoria University of Wellington, *available at* http://www.refugee.org.nz/JessicaR.htm#1.

38 *Macedonia using Refugees as Lever*, BBC, (May 6, 1999) *available at* http://news.bbc.co.uk/2/hi/europe/336774.stm.

it as the UNHCR has pledged to provide for funds to countries who accept such refugees, thereby making the contention of the States completely invalid.[39]

B.THE SELF-DEFENCE ARGUMENT

The most cogent argument relied on by the States is the self defence argument. Article 51 of the United Nations Charter **["UN Charter"]** allows a member State the right of self-defence if it anticipates an armed attack.[40] However, the States have contended that the same is not just restricted to mere armed attacks,[41] and include massive exodus of refugees as a threat too.[42] The States relying on the conventions state that there exist justifications for departure if the persons pose a danger to the security of the country.[43] Therefore, the States use this argument to contend that refugee flows have the capability of threatening the stability of the receiving countries,[44] which is why they do not allow the same. This argument despite being the most tenable falls short of taking into consideration the basic human right of life and survival, to which every individual is entitled. This shall further be discussed through the subsequent part of the article.[45]

C.THE SOVEREIGNTY ARGUMENT

The States raise respect for sovereignty as a ground for rejecting refugees and argue that they have the sole discretion to determine whether a foreigner should be given entrance to their dominion.[46] Thus, they justify the act of not granting entry to environmental refuges as an exercise of their sovereignty.[47] So much so, that States also try to evade the principle of *non- refoulement*, which obligates every State to protect an individual whose life is threatened,

[39] *Resettlement*, UNHCR, *available at* http://www.unhcr.org/resettlement.html.
[40] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XV, art. 51.
[41] NEYIRE AKPINARLI, THE FRAGILITY OF THE FAILED STATE PARADIGM: A DIFFERENT INTERNATIONAL LAW PERCEPTION OF THE ABSENCE OF EFFECTIVE GOVERNMENT, 128 (2010).
[42] UN Security Council, Security Council resolution 688 (1991) [Iraq], 5 April 1991, S/RES/688 (1991).
[43] Refugee Convention, *supra* note 3 at art. 1(f) & 33.
[44] Charles B Keely, *How Nation States Create and Respond to Refugee Inflows*, 30 INT'L MIGRATION REVIEW 1046 (Winter, 1996).
[45] *Infra*, at pt. C, 8.
[46] Nishimura Ekiu v. US, 142 US 651 (12 S.Ct. 336, 35 L.E.d. 1146)(U.S.).
[47] Forced Displacement, *supra* note 31.

on grounds that the same is applicable for refugees in the territory of the host States[48] and not the border,[49] thereby terming their acts of refusing entry valid if the refugees are at the border.

The States no doubt raise compelling arguments to support their stance of non-entry to the refugees but the same fall short on humanitarian grounds, as sovereignty of a State cannot be a justification for it to commit human right violations and non-entry to these refugees in a way leads to their human rights being violated.

The author now presents arguments put forward by the supporters of environment refugees:

A.THE NON-REFOULEMENT ARGUMENT

The principle of *non-refoulement* provides for the protection of refugees from being returned to places where their lives are threatened.[50] This principle, which has not only attained the status of customary international law[51] but also a *jus cogens* norm,[52] obligates the States to protect such refugees.[53] Therefore, by virtue of the binding nature of the principle, every State is bound to allow an environmental refugee entry into their territory whose life is threatened due to the existence of a natural disaster.

B.THE HUMAN RIGHTS ARGUMENT

Since refugee law is concerned with the identification and guaranteeing the rights of refugees, it has a fundamental link with human rights law.[54] Especially in cases of mass influx, the States have been held to have a minimum obligation to ensure admission for safety,

---

48 Catherine Phuong, *Identifying States' Responsibilities towards Refugees and Asylum Seekers*, Esil Research Forum, International Law: Contemporary Problems, Geneva, 2005*available at* http://www.esil-sedi.eu/sites/default/files/Phuong.PDF.
49 Sale, Acting Commissioner, INS v Haitian Centers Council (1993) 113 S.Ct 2549 (U.S.).
50 GUY S GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW, 117 (2nd ed., 1996) [hereinafter GILL].
51 *Id.*
52 E. LAUTERPACHT, THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION, cited in E. FELLER, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 149 (2003).
53 GILL , *supra* note 50, at 167.
54 Catherine Phuong, *Identifying States' Responsibilities towards Refugees and Asylum Seekers, University of Newcastle*, UK available at http://www.esil-sedi.eu/sites/default/files/Phuong.PDF.

security[55] and respect for basic human rights.[56] These basic human rights have not been held subordinate to peace and security,[57] as the basic necessary rights of individuals prevail over rights of security. Hence, refuge cannot be denied on grounds of peace and security.

C. THE RECOGNITION ARGUMENT

The Conventions on refugees when enacted did not cover natural disasters i.e. events occurring due to unstable environment.[58] However, the concept of these environmental refugees today has received international recognition as the UNHCR has undertaken steps to help them,[59] thereby, indicating their inclusion under the definition of the convention.[60]

A scrutiny of the above arguments supporting the inclusion of environmental refugees in the definition of refugees presents a better case as they primarily rest on humanitarian grounds rather than private concerns of the State. The author, in the next part, concludes the paper by providing recommendations to make the existing model more efficient and effective.

V. THE CURE TO 50 MILLION ENVIRONMENTAL REFUGEES: RECOMMENDATIONS AND SUGGESTIONS

The present paper discusses the concept of refugees and how the definitions required an expansion to include environmental refugees too. However, after discussing arguments from both sides, it is clear that there needs to be dynamism while interpreting the term refugees and States need to accept these individuals in the interests of upholding the basic tenets of human rights. Despite the same, the current model is not fool proof and has certain

---

[55] Non- Refoulement Principle, *supra* note 37.
[56] International Maritime Organization (IMO), International Convention for the Safety of Life At Sea, 1 November 1974, 1184 UNTS 3.
[57] ANTHONY C., INTERNATIONAL LAW AND THE USE OF FORCE, 118 (1993).
[58] Friends of the Earth, *A citizen's guide to climate refugees*, 1 (2005), *available at* www.foe.org.au/download/CitizensGuide.pdf (noting climate change as cause of EDPs).
[59] Climate Change UNHCR, *supra* note 21.
[60] Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENWrL. L.J. 480, 484 (1998).

lacunae. The author now provides certain recommendations to improve the working of the system, so that it achieves the purpose behind the same:

A.SETTING UP SIMILAR INITIATIVES AS NANSEN

The UNHCR in furtherance of its initiative to protect refugees has come out with multiple initiatives. One such initiative was the "Nansen initiative" wherein they aimed at protecting the people who were displaced across borders in context of disasters induced by climate change.[61] Nansen organises and facilitates inter-governmental regional consultations, fosters the discussions surrounding climate refugees and also advocates States to accept these. It was the Nansen Conference on Climate Change and Displacement in Oslo (June 2011) that ultimately led to Norway and Switzerland pledging at the UNHCR Ministerial Conference in December 2011 to address the need for a more cogent approach for protection of climate refugees. However, given the restriction of this initiative to 9 countries, similar initiatives can be undertaken by the other states or the UNHCR so as to uplift and address the condition of the refugees and ensure that they get refuge.

B.REORIENTING THE DEFINITION OF REFUGEE

A major hurdle faced by an environmentally displaced person is the lack of environment as a ground under the conventions. Considering the volume of such people and their plight, the definition of refugee should be expanded so as to include climate change as a ground for persecution. An alternative option could be the establishment of a new category which grants legal status to individuals that lose homes due to climate change. Even if these people are not granted the same protection as refugees, they can be offered certain basic temporary reliefs in the form of entry in the borders, till the situation in their home country improves.

[61] Nansen Initiative, *Disaster Induced Cross-Border Displacement, available* at https://www.nanseninitiative.org/what-we-are-learning/.

C. RESOLVING THE DICHOTOMY BETWEEN NATURAL AND MAN-MADE INDUCED NATURAL DISASTERS

A mistake that has been committed by the propounders of the concept of environmental refugees is treating natural factors in the same manner as man-made induced natural factors.[62] The convention needs to clearly bifurcate the two as the former is a permissible ground for categorisation as ERs while the latter is not.

D. FORMING SOLUTION ALLIANCES

The States opposing ERs justify the same on grounds of economic considerations and self-defence. These concerns can be handled in form of alliances which facilitate the economic concerns mentioned. This demand for alliance has previously been raised by the UN Office for the Coordination of Humanitarian Affairs **["UNOCHA"]**.[63] Such an alliance could be achieved by developing a quota of such environmental refugees which will be accepted by every country.[64] Second, pooling of financial resources could be another alternative to tackle the economic concerns of the States.

The concept of environmental refugees which was once alien to the world has become a legal conundrum today. These refugees might not have recognition under the Refugee Conventions, but there has been persistent demand for expansion of the definition. Arguments of *non-refoulement* and humanitarian considerations have been put forward to justify this stance. This demand is striking especially in Africa which is most vulnerable to climate change;[65]so much so that the UNHCR has estimated that over 700,000 Sudanese nationals

---

[62] Antonio Guterres, *High Commissioner's Dialogue on Protection Challenge, available at* http://www.unhcr.org/admin/hcspeeches/567139aa9/high-commissioner-dialogue-protection-challenges-understanding-addressing.html.

[63] SUSAN F. MARTIN, INTERNATIONAL MIGRATION: EVOLVING TRENDS FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT, 214 (2014).

[64] Brian Palmer, *There is no such thing as climate change,* Nov. 16, 2015, *available at* https://www.nrdc.org/onearth/theres-no-such-thing-climate-change-refugee.

[65] John Vidal, *Sudan – battling the twin forces of civil war and climate change,* THE GUARDIAN, Nov. 21, 2011, *available at* https://www.theguardian.com/environment/2011/nov/21/sudan-civil-war-climate-change.

have fled the State following years of chronic drought.[66] These individuals have been granted refugee status in countries like Eritrea, Ethiopia, Somalia and Uganda,[67] but every refugee in the world is not as privileged as the Sudanese migrants, as even today States deny entry to refugees citing the above mentioned conventions as a reason. Therefore, there exists an imminent need for recognition of these environmental refugees as refugees under the convention.

The present scenario of environmental refugees can be briefly summarised in the words of present Secretary-General of the United Nations, Antonio Guterres *"Refugees are not terrorists, they are often the first victims of terrorism."* Let us hope that the States do take note of the plight of these environmental refugees who are forced to leave their home countries for reasons beyond their control.

---

[66] United Nations Environment Programme, *Population Displacement and the Environment, available at* http://postconflict.unep.ch/publications/sudan/05_displacement.pdf.
[67] *Id.*

Adarsh Mohandas & Raghavendra Pratap Singh, *Tax Residency Certificate in Double Taxation Relief: Latency Unraveled*, 4(1) NLUJ Law Review 35 (2017)

TAX RESIDENCY CERTIFICATE IN DOUBLE TAXATION RELIEF: LATENCY UNRAVELED

ADARSH MOHANDAS & RAGHAVENDRA PRATAP SINGH*

ABSTRACT

For the first time, a tax residency certificate requirement for claiming benefits under Double Taxation Avoidance Agreements was introduced by the Parliament in the Income Tax Act, 1961 through the Finance Act, 2012. Such requirement was a necessity considering the prevalent situation of treaty shopping; whereby, third party non-residents of contracting countries claimed unintended treaty benefits. However, the amendment that brought in the residency certificate requirement failed to consider the fundamental distinction between 'avoidance' and 'relief' as evolved by the courts of law. Through this paper, the authors seek to underscore this distinction by referring to interpretative tools used in taxation jurisprudence and by providing a comparison of the relevant amendments on the tax residency certification requirement. Since the parliament has failed to include the term 'avoidance' in the requirement provision, such an inadequacy is bound to create confusion and increase litigation. The solution to remove such inadequacy lies with the Legislature, since Indian courts are constrained by principles of fiscal interpretation. As the adage goes, prevention is better than cure, it is hoped that the Parliament will put the issue to rest.

* The authors are both B.A. LL.B. (Hons.) graduates of The National University of Advanced Legal Studies, Kochi and can be contacted at **tpadarsh[dot]Mohandas[attherate]gmail[dot]com** and **raghavendra[dot]p[dot]singh94[attherate]gmail[dot]com**, respectively.

TABLE OF CONTENTS

I.INTRODUCTION 36

II. HISTORICAL BACKGROUND 38

III. COMPARATIVE ANALYSIS OF 2012 AND 2013 AMENDMENTS 40

IV. INTERPRETATIONAL ISSUES 42

V. CONCLUSION 45

I.INTRODUCTION

'Tax avoidance is legitimate whereas tax evasion is illegal', is a fundamental concept under the law of taxation.[1] Tax avoidance is the planning of tax liability within the framework of law in such a way that a tax payer has to pay minimum tax. On the other hand, tax evasion is a fraudulent method adopted by a tax payer, to circumvent tax laws and minimize tax liability.[2] The Income Tax Act, 1961 **["the Act"]**, also provides a legal recourse under Sections 90 and 90A to avoid some tax burden in cases of double taxation.

The case of double taxation arises when the income of a taxpayer is taxed across different jurisdictions on the same activity due to the application of different taxation principles by respective States.[3] In such cases, the taxpayer may be taxed twice by the two countries on the same transaction which is called double taxation. Such a double taxation has significant impact on the trade of goods and services and affects transnational activity as it creates an unjust burden on the taxpayer.[4] In light of this, it is important that national taxation

[1] Vodafone International Holdings B.V. v. Union of India & Anr., (2012) 6 S.C.C. 613.
[2] Mc Dowell & Company Limited v. Commercial Tax Officer, (1985) 3 S.C.R. 791; 1 ARVIND DATAR, THE LAW AND PRACTICE OF INCOME TAX 58 (10th ed.2014) [hereinafter DATAR].
[3] 1 D.P. MITTAL, INDIAN DOUBLE TAXATION AGREEMENTS AND TAX LAWS 1.84 (5th ed., 2008) [hereinafter MITTAL].
[4] ASIF QURESHI &ANDREAS ZIEGLER, INTERNATIONAL ECONOMIC LAW 568 (3rd ed. 2011).

be aligned in such a manner so as to permit free trade of goods and services across nations,[5] since the power to tax lies with the sovereign state.[6]

Double Taxation Avoidance Agreements **["DTAA"]** are international agreements entered between the contracting countries for the avoidance of double taxation. The effect of these agreements depends on its enforcement for which countries generally follow two different schools known as monist and dualist.[7]Since the Constitution of India is based on the concept of parliamentary sovereignty, the country follows the dualist doctrine wherein an international agreement becomes a part of the domestic law only when it subsequently gets legislative approval.[8]The power to enter into DTAAs stems from Section 90 and Section 90A of the Act. However, these provisions provide a special authority to the Indian Government to enter into agreements for relief of tax or avoidance of tax as the need arises. This is done to circumvent the long-drawn process of legislative approval by the passage of a bill, through a notification in the Gazette of India.[9]

In order to claim treaty benefits under Section 90, a Tax Residency Certificate **["TRC"]** requirement was inserted vide an amendment through Finance Act, 2012.[10]However, an ambiguity can be observed from a plain reading of Section 90(4) which incorporates the TRC requirement. In the case of the DTAA, a taxpayer mainly claims benefits by seeking relief or avoidance of tax. Here, the TRC requirement exists for claiming 'any relief', and thus, the meaning of the term 'relief' assumes immense significance here. Since the Act does not provide for a definition of 'relief', there exists ambiguity as to the meaning of this phrase itself. The moot point is thus, whether the phrase 'any relief' includes the avoidance of double taxation given under Section 90(1)(b) or it only means the two types of reliefs provided under S.90(1)(a)(i) and S.90(1)(a)(ii).

---

5 MITTAL, *supra* note 3, at 1.85.

6 PETER HARRIS & DAVID OLIVER, INTERNATIONAL COMMERCIAL TAX 14 (2010).

7 *Id.* at 20.

8 1 ROY ROHATGI, BASIC INTERNATIONAL TAXATION 35 (2nd ed. 2007) [hereinafter ROHATGI].

9 Union of India v. Azadi Bachao Andolan, (2004) 10 S.C.C. 1 [hereinafter Azadi Bachao Andolan].

10 The Finance Act, No. 23 of 2012, §§ 32(b) and 33(b), Indian Curr. Cen. Leg. (2012), vol. 38 [hereinafter The Finance Act, No. 23].

To answer this moot point, the article first addresses the evolution of TRC in India and the objective sought to be achieved through its introduction. Next, it moves on to the different issues that arose out of the introduction of TRC which necessitated the Parliament's intervention through amendments and the analysis of the respective amendments. Finally, the article points out the inadequacy in the successive amendments through tools of interpretation applicable to fiscal statutes and concludes by calling for an immediate intervention by the Parliament.

II. HISTORICAL BACKGROUND

In order to grasp the logic behind the introduction of TRC, it is pertinent to delve into its historical evolution. TRC was introduced only recently in India, through the clarification issued under the India-Mauritius DTAA.[11] Therein, doubts had arisen as to the taxability of capital gains at the hands of investors from Mauritius in Indian enterprises. Hence, a circular was issued by the Central Board of Direct Taxes **["CBDT"]** to clarify that the benefits arising out of the DTAA could only be claimed once a certificate of residence is submitted.[12] Such a certificate of residence issued by Mauritius authorities, constituted sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA.[13] The idea was to plug revenue leakage due to indiscriminate claiming of benefits under the treaty by non-residents holding beneficial ownership in companies outside Mauritius and thereby routing foreign money through Mauritius for tax evasion purposes.[14] In the landmark case of *Union of India v. Azadi Bachao Andolan*,[15] the Supreme Court upheld the above mentioned Circular as intra vires Section 90[16] and S. 119[17] of the Act, and clarified that

---

[11] *Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC),* CBDT Circular no. 789/2000, 243 I.T.R. (St.) 57 (2000).
[12] *Id.*
[13] *Id.*
[14] Avinash Narvekar, *Tax Residency Certificates: The Road Ahead for Foreign Companies in India, available at:* http://www.internationaltaxreview.com/Article/3220765/Tax-residency-certificates-The-road-ahead-for-foreign-companies-in-India.html (June 19, 2013) [hereinafter NARVEKAR].
[15] Azadi Bachao Andolan, *supra* note 9.
[16] *'Agreement with Foreign Countries or Specified Territories'*, The Income Tax Act, No. 43 of 1961, §90, A.I.R. MANUAL (1961), vol. 27.

such TRC submission shall be sufficient evidence to claim treaty benefits under India-Mauritius tax treaty.

It was observed in recent times that several non-resident tax payers started claiming unintended tax treaty benefits under various Indian DTAAs.[18] In order to curb the misuse of treaty benefits, certain amendments under sections 90 and 90A were introduced, whereby the submission of a certificate containing such particulars as prescribed by CBDT, was made a necessary but not a sufficient condition.[19] The CBDT inserted Rule 21AB vide Income Tax (Twelfth Amendment) Rules, 2012, specifying certain particulars like Status, Nationality among others, to be included in the certificate.[20] These specified particulars raised concerns in the minds of foreign taxpayers such as the certificate's finality in deciding the applicability of the treaty, difference in format of TRC issued by other nations and the absence of provisions for issuance of TRC in some nations.[21] These apprehensions were subsequently addressed by the Finance Act, 2013 amending Sections 90 & 90A and Income Tax (Eleventh Amendment) Rules, 2013 amending Rule 21AB.[22]

The Finance Act, 2013 via an amendment to sections 90(4) and 90A(4) of the Act, substituted the words 'a certificate of his being a resident' for 'a certificate containing such particulars as may be prescribed of his being a resident'.[23] The requirement to submit the TRC in the prescribed format was deleted and any TRC obtained from its resident country constituted sufficient evidence for the purpose of this sub-section.[24] However, other sub-sections 90(5) and 90A(5) were added, requiring the assessee to submit such other documents

---

[17] *'Instructions to Subordinate Authorities'*, The CBDT has been conferred the power under this section to issue orders, instructions and directions to income tax authorities for the proper administration and execution of this Act., The Income Tax Act, No. 43 of 1961, § 119, A.I.R. MANUAL (1961), vol. 27 (Ind.).

[18] *Memorandum of Finance Bill, 2012-13*, INDIA BUDGET, 22, http://indiabudget.nic.in/budget2012-2013/ub2012-13/mem/mem1.pdf(last visited Aug. 26, 2016).

[19] The Finance Act, No. 23, *supra* note 10, at §§ 32(b) and 33(b).

[20] Income-Tax (12th Amendment) Rules, 2012, Gazette of India, part II § 3(ii) (Sept. 17, 2012) [hereinafter Income-Tax (12th Amendment) Rules].

[21] Shailesh Monani et al., *Tax residency certificate – An Indian perspective*, 13 I.L.T. 361, 362 (2015).

[22] The Finance Act, No. 17 of 2013, §§ 23(c) and 24(c), Indian Curr. Cen. Leg. (2013), vol. 39 [hereinafter The Finance Act, No. 17].

[23] *Id.*

[24] NARVEKAR, s*upra* note 14.

and information as may be prescribed by CBDT.[25] Subsequently, the Board prescribed certain particulars under Rule 21ABvia the Income Tax (Eleventh Amendment) Rules, 2013,[26] and such information along with TRC constitutes sufficient evidence for obtaining tax treaty benefits.

III. COMPARATIVE ANALYSIS OF 2012 AND 2013 AMENDMENTS

The 2012 amendment to sections 90 and 90A of the Act brought in a condition to submit a certificate of residence containing particulars as prescribed by the CBDT. The following particulars[27] were prescribed by the Board in Rule 21 AB of the IT Rules, 2012:

i. Name of the assessee;
ii. Status (individual, company, firm, etc.) of the assessee;
iii. Nationality (in case of individual);
iv. Country or specified territory of incorporation or registration (in case of others);
v. Assessee's tax identification number in the country or specified territory of residence or in case no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory;
vi. Residential status for the purposes of tax;
vii. Period for which the certificate is applicable; and
viii. Address of the applicant for the period for which the certificate is applicable.

Any non-resident person claiming benefit under DTAA has to obtain a TRC from the country where he/she/it claims to be a resident. Only a certificate containing all the above particulars constitutes a valid TRC and evidence of his/her/it being resident of that country. However, different countries have their own format for issuance of TRC as per their domestic laws, which is not in consonance with the Indian requirement. For example, a certificate of residence from German tax authorities contains: the name of the contracting states, a declaration as a resident of the Federal Republic of Germany, the time period of such

[25] The Finance Act, No. 17, *supra* note 22, at §§ 23 (d) and 24(d).
[26] Income-tax (11th Amendment) Rules, 2013, Gazette of India, part II § 3(ii) (Aug. 1, 2013) [hereinafter Income-tax (11th Amendment) Rules].
[27] Income-Tax (12th Amendment) Rules, *supra* note 20.

residency.[28] Therefore, a TRC issued by the German authorities may not be accepted by the Indian income tax authorities as TRC for the purpose of Sections 90(4) and 90A(4)of the Act since it does not contain the prescribed particulars.

This ambiguity was subsequently removed by the Finance Act, 2013 amendment,[29] as the prescribed particulars on TRC were removed. Henceforth, any residency certificate (not necessarily adhering to the Indian format or containing the earlier prescribed particulars), issued by the competent authorities of other countries, will now be accepted. This is done provided that such non-resident also submits the information prescribed under sub-section 5 of sections 90 and 90A respectively, in case such information is not already present in the TRC possessed by them.[30] In essence, for the purpose of proving residence, a non-resident need only submit a certificate issued by its State's authorities certifying the residence in that state. The Board via an amendment to Rule 21AB[31] prescribed the following information to be furnished in Form 10F to the Indian income tax authorities:

i. Status (individual, company, firm etc.) of the assessee;
ii. Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
iii. Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;
iv. Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and
v. Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.

---

[28] *Certificate of residence for the purpose of tax relief according to the Double Taxation Convention between Germany and Name of the other Contracting State*, FORMULAR-MANAGEMENT-SYSTEM (FMS) DER BUNDESFINANZVERWALTUNG [Forms Management System (FMS) of the Federal Finance Administration], https://www.formulare-bfinv.de/printout/034450.pdf (last visited Jun. 19, 2017).
[29] The Finance Act, No. 17, *supra* note 22, at §§ 23(c) and 24(c).
[30] Income-tax (11th Amendment) Rules, *supra* note 26, at Sub-rule 2 of Rule 21AB.
[31] *Id.*

The assessee is also required to maintain such documents which can substantiate the information (not present in the TRC), provided under section 90(5) or section 90A(5) as the case may be and the income tax authorities have power to inspect the same[32] as their authenticity has not been certified by the assessee's parent state.

IV. INTERPRETATIONAL ISSUES

The TRC requirement under section 90(4) and section 90A(4) is for claiming reliefs under the treaty agreement. Though the term 'relief' has not been defined under the act, it can be understood in the context of Section 90.[33] As per Section 90(1),the Central Government can enter into four types of agreements with any country or any specified territory outside India, for the purpose: 'of granting relief',[34] 'of avoidance of double taxation',[35] 'of exchange of information and investigation of cases for the prevention of evasion or avoidance of income-tax'[36] and 'of recovery of income tax.'[37] The Act also contains a beneficial provision for the assessee.[38] If the Central Government enters into an agreement for granting relief of tax or for avoidance of double taxation, then, the assessee gets right to choose between the agreement and the Act whichever is more beneficial to him.[39] If no tax liability is imposed under this Act, the question of resorting to the agreement would not arise because any provision of an agreement cannot fasten a tax liability where the liability is not imposed by the Act.[40] However, if a tax liability is imposed by the Act, the agreement may be resorted to for negating or reducing it.[41]

The two concepts of 'relief' and 'avoidance' differ to a considerable extent which has been pointed out by courts in various instances. In the case of relief, the assessee undergoes

---

[32] Income-tax (11th Amendment) Rules, *supra* note 26, at Sub-rule 2A of Rule 21AB.
[33] Tarlochan Dev Sharma v. State of Punjab, A.I.R. 2001 S.C. 2524.
[34] The Income Tax Act, No. 43 of 1961, § 90(1)(a), A.I.R. MANUAL (1961), vol. 27 [hereinafter The Income Tax Act, No. 43 of 1961].
[35] *Id.*, § 90(1)(b).
[36] *Id.*, § 90(1)(c).
[37] *Id.*, § 90(1)(d).
[38] *Id.*, § 90(2).
[39] ROHATGI, *supra* note 8 at 4; DATAR, *supra* note 2 at 1727,1728.
[40] Commissioner of Income Tax v. R.M. Muthaiah, (1993) 202 I.T.R. (Kar.) 508 (Dec. 11, 1992).
[41] *Id.*

the ordeal of assessment at both places and seeks a refund of any excess tax paid after the completion of the assessment as envisaged by the tax credit system[42]. While in the case of avoidance of double taxation, the assessee need not pay the tax initially and then apply for relief in the form of refund.[43] Tax avoidance happens when the tax is payable on income under the Act as well as under the corresponding law in that country and the countries agree to tax in one country.[44] This happens even before payment of any tax.[45]

The interpretational ambiguity arises under Sections 90(4) and 90A(4) of the Act because these provisions require TRC submission only for claiming tax 'any relief'. The provision does not state that the assessee shall not be entitled to claim avoidance under such agreement without the submission of TRC. However, the Parliament's intention behind enacting the TRC condition is for availing any benefits under the agreement, which would include 'relief' and 'avoidance'.[46] Thus, there arises confusion as to whether TRC requirement is with respect to 'relief' only or it applies for 'avoidance' also. Such ambiguity cannot be rectified by any court because 'avoidance of double taxation' is nowhere mentioned in sub-section (4),[47] and it being a taxing statute has to be construed strictly.[48] There is no scope for any equity or intendment in a fiscal statute[49] and the court cannot supply any assumed deficiency.[50] Hence, the court cannot declare that 'relief' also means 'avoidance'.

Another argument is that the word 'relief' is preceded by the word 'any', and therefore it includes 'relief' and 'avoidance' within its ambit. However, in this context it is pertinent to note that there are two types of reliefs under sections 90(1)(a) and 90A(1)(a), which justifies the inclusion of term 'any'. The first one is where income-tax has been paid by the assessee

---

[42] Commissioner of Income Tax v. Vr. S.R.M. Firm, (1994) 208 I.T.R. (Mad.) 400 (Mar. 15, 1994) [hereinafter C.I.T. v. S.R.M. Firm].

[43] Commissioner of Income Tax v. Carew and Co. Ltd., (1979) 120 I.T.R. (S.C.) 540 (Jul. 8, 1971).

[44] Wipro Ltd. v. Deputy Commissioner of Income-tax, Central Circle 1(3), Bangalore, (2016) 382 I.T.R. (Kar.) 179 [hereinafter Wipro Ltd. v. Deputy Commissioner of Income Tax].

[45] *Id.*

[46] *Memorandum of Finance Bill, 2012-13*, INDIA BUDGET, 22, http://indiabudget.nic.in/budget2012-2013/ub2012-13/mem/mem1.pdf(last visited Aug. 26, 2016).

[47] The Income Tax Act, No. 43 of 1961, *supra* note 34, at § 90(4).

[48] Saraswati Sugar Mills v. Haryana State Board, (1992) 1 S.C.C. 418.

[49] Cape Brandy Syndicate v. IRC, (1921) 1 Eng. Rep. 64 (K.B.); referred to in Commissioner of Central Excise Pondicherry v. ACER India Ltd., (2004) 8 S.C.C. 173, 183.

[50] Commissioner of Sales Tax, U.P. v. Modi Sugar Mills Ltd., A.I.R. 1961 S.C. 1047.

under this Act and under the corresponding law in the other country or specified territory,[51] then the relief is given by giving credit of the tax paid in the foreign country to the assessee in India (through DTAA).[52]

The second relief[53] has evolved to promote mutual economic relations, trade and investment.[54] This applies to a case where the income of an assessee is chargeable under the Act as well as the corresponding law in force in the other country and the assessee does not pay tax at both places.[55] Though the income-tax is chargeable under the Act, it is open to the Parliament to grant exemptions under the Act from payment of tax for any specified period (as in the case of Special Economic Zones).[56] The Central Government by negotiations with the other country could then also request them to grant the same exemption. If the contracting country agrees to extend the said benefit, then the assessee gets the relief.[57] In case the contracting country does not extend such exemption, another agreement can be reached by the respective countries for giving credit to the assessee on the amount of tax paid in the other country. Thus, for the payment of income tax in the foreign jurisdiction, the assessee gets the benefit of its credit in India.[58] Hence, it can be inferred that 'any relief' includes these two types of reliefs only and not avoidance, which does not satisfy the Parliament's intention in bringing TRC requirement.

It is clear from the above analysis that the TRC requirements under Section 90 and 90Ahave not been couched in appropriate terms in the Act. By this, we mean that avoidance is distinct from relief and it shall not be construed in the same manner. To elucidate this point, it is pertinent to refer to Section 90(2) of the Act. The sub-section demarcates avoidance and relief of double taxation in express terms by including the phrase 'for granting relief of tax, or as the case may be, avoidance of double taxation'. It is felt that the legislature

---

[51] The Income Tax Act, No. 43 of 1961, *supra* note 34, at § 90(1)(a)(i).
[52] Wipro Ltd. v. Deputy Commissioner of Income Tax, *supra* note 44.
[53] Substituted vide Finance Act, No. 25 of 2003, Indian Curr. Cen. Leg. (2004), vol. 3.
[54] The Income Tax Act, No. 43 of 1961, *supra* note 34, at § 90(1)(a)(ii).
[55] Wipro Ltd. v. Deputy Commissioner of Income Tax, *supra* note 44.
[56] *Id.*
[57] *Id.*
[58] *Id.*

has overlooked a crucial aspect pertaining to the difference between the two concepts, mistaking them as one. This conclusion can be drawn from the fact that the phrase 'or as the case may be avoidance of double taxation' found in sub-section (2) is absent in sub-section (4).

V. CONCLUSION

Although the courts have not yet faced this issue in principle, it will be interesting to know how they deal with this matter. However, we insist that such a loophole cannot be removed by any judicial intervention in light of the strict interpretation to be followed in taxing statutes. The courts cannot substitute words in fiscal statutes while removing any ambiguity.

Therefore, the Parliament must step in and cure this ambiguity through an amendment to these Sections. The amendment should ideally insert the phrase 'or as the case may be, avoidance of double taxation' after the phrase 'any relief' in sub-sections 4 of Sections 90 and 90A, through which there shall finally be some certainty in taxation of cross-jurisdictional transactions.

Varun Malik, *A Deliberate Critique to Sexual Harassment Laws in India*, 4(1) NLUJ Law Review 46 (2017)

A DELIBERATE CRITIQUE TO SEXUAL HARASSMENT LAWS IN INDIA

VARUN MALIK*

ABSTRACT

Sexual Harassment of Women at Workplaces (Prevention, Prohibition and Redressal) Act, 2013 was legislated 15 years after the Vishakha judgement. The author argues that the sexual harassment law in India has not been deliberated enough despite the fact that the Parliament took more than a decade to enact it. This is unfortunate, considering that the legislature failed to take into consideration the vast amount of legal debates and opinions that provide more effective solutions to the issue of sexual harassment. The sexual harassment legislation is an example of a typical Indian enactment, which could be curatively improvised upon, but was not originally enacted to manage the issue in an effective manner.

*The author is Assistant Professor of Law at the National Academy of Legal Studies and Research (NALSAR) University of Law and can be contacted at **varunmalik92[attherate]gmail[dot]com**.

TABLE OF CONTENTS

I. INTRODUCTION 47

II. LACK OF DELIBERATIONS ON SEXUAL HARASSMENT LAWS 48

III. WORKPLACE HARASSMENT LAWS – A POSSIBLE MODEL..52

IV. CONCLUSION 55

I.INTRODUCTION

Though the issue of sexual harassment of women at their workplace has been a relevant subject for academic discussion across the world for several years,[1]deliberations over this topic in the legal arena, only began around 1979 in United States of America.[2] India, however, recognized sexual harassment as a legal injury only in 1997, in the landmark Supreme Court pronouncement of *Vishakha v. State of Rajasthan* **["Vishakha Judgement"]**,[3] where the court held that as there existed a void as far as the legal provisions related to workplace harassment of women is concerned, the guidelines issued by the Court in the case shall be applicable till the time the Parliament does not come up with a legislation on the topic.[4] It was only 15 years after the Vishakha Judgement that the Parliament of India succeeded in passing the legislation concerning the issue through the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 **["the Act"]**.[5]

In the present paper, the author seeks to propose that despite the fact that the Indian Parliament took almost fifteen years to enact the legislation concerning the sexual harassment of women at workplaces, neither the public sphere (viz. the exchange of ideas and rationale amongst the citizens as to what should the legislation on Sexual Harassment in India

---

[1] LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978).
[2] CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).
[3] Vishakha and others v. State of Rajasthan, A.I.R. 1997 S.C. 3011 [hereinafter Vishakha case].
[4] *Id.* ¶ 16.
[5] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (Ind.).

look like or what all aspects should it consider), nor the power sphere (viz. the parliament) deliberated the issue much. It is further alleged that the issue could have been deliberated to a greater extent as there exist several debates on the topic in the international sphere along with the experience of other nations that have implemented the Act much before India.[6] Secondly, the author contests that the Act too is a typical Indian legislation which waits for some untoward incident to occur so as to improvise upon the existing provisions of the Act.[7] The author then goes on to illustrate that the failure of the workplace sexual harassment law in India to encompass various dimensions that it ought to have covered is due to the lack of deliberations directed towards the making of the law on the topic.

In order to illustrate the proposition made in the above paragraph, the paper has been divided into two parts. The first part of the paper i.e. Part I, illustrates the claim that the making of sexual harassment law in India lacks the discursive dimension. Part II of the paper deals with what the workplace harassment law in India would have looked like had proper deliberations taken place on the topic, and how that law would have been much more efficient in tackling the current harassment scenario at workplaces.

II. LACK OF DELIBERATIONS ON SEXUAL HARASSMENT LAWS

In the year 1992, a female worker, Bhanwari Devi, employed under the rural development scheme of the Government of Rajasthan was gang raped by some members of a higher caste in the society on account of her efforts to stop the practice of child marriage in rural Rajasthan.[8] The matter was disposed of by the trial court in favour of the accused. The

---

[6] Margaret Thornton, *Sexual Harassment Losing Sight Of Sex Discrimination*, 26 MELBOURNE UNIVERSITY L. REV. 422-444 (2002) [hereinafter Thornton]. (Margaret Thornton discusses in her article 'Sexual Harassment Losing Sight Of Sex Discrimination' that how the workplace harassment laws in Australia have lost their strength because of a shift from Sex Discrimination paradigm of harassment to Sexualisation of workplace harassment and how the later reduced the scope of wrongs which could be covered and be held punishable under the law.)[hereinafter Margaret Thornton]; L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from French,* Nov. 23, 2016 *available at:* http://ssrn.com/abstract=2228653 (Further L. Camille Hébert in 'Divorcing Sexual Harassment from Sex: Lessons from French' addresses the debate of dignity paradigm v. Discrimination Paradigm to tackle workplace harassment. The debate is prevalent in entire Europe. The Article, but is written from French Viewpoint).

[7] Similar examples are amendment in rape laws after the Delhi Rape Case and re-enactment of Companies act after the Satyam Scam.

[8] INDIRA JAISINGH, LAW RELATING TO SEXUAL HARASSMENT AT WORKPLACE (2014)[hereinafter INDIRA].

court observed that the accused were respectable members of the higher caste and could not have indulged in such a heinous crime against a woman who belonged to a lower caste.[9]

In the aftermath of the incident, various NGOs under the banner of 'Vishakha' with an aim of ensuring gender justice at workplaces and doing away with sexual harassment at workplaces, filed a writ petition in the Supreme Court of India alleging that such practices violate Article 14 (right to equality), Article 21 (right to live with dignity) and Article 19(1)(g) (right to freely profess any occupation)[10] of the Constitution.[11] The Court, accepting the claim of the petitioners, held that in absence of a domestic law on the topic international instruments are significant enough to ensure gender equality in the workplace and to ensure that every woman is perceived as a dignified person at the workplace.[12]

In light of the above arguments, the Court issued certain guidelines to combat the menace till the time a suitable legislation was enacted on the issue. The court defined 'sexual harassment' as "an unwelcome sexually determined behaviour such as a demand or request for sexual favours, physical advances and contacts, showing pornography, sexually coloured remarks or any other verbal, non-verbal or physical act sexual in nature".[13] The Court further entrusted the employer with a duty to ensure a safe working environment for women workers.[14] The employer was required to illegalize sexual harassment at their workplace,[15] and to include prohibition of sexual harassment in the standing orders for the workplace.[16] Most importantly the Court directed the employers to establish an internal complaint committee to look into matters of sexual harassment.[17]

---

[9] JUSTICE J.S.VERMA ET. AL, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 15 (2013) [hereinafter JUSTICE J.S. VERMA REPORT].
[10] India's Law on Prevention of Sexual Harassment at Workplace (May 1, 2017), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf.
[11] INDIA CONST. art.14, 21 and 19(1)(g).
[12] Vishakha case, *supra* note 3, ¶ 7.
[13] *Id.* ¶ 16(2).
[14] *Id.* ¶16(1).
[15] *Id.* ¶16(3)(a).
[16] *Id.* ¶16(3)(c).
[17] *Id.* ¶16(7).

The Apex Court in the Vishakha matter performed a commendable job in passing a landmark judgment, it was evident from the guidelines issued by the Court that there was an existing void in the law on sexual harassment. The legislature was expected to come up with a much more comprehensive legislation on the topic, competent enough to tackle all forms of workplace harassment. The Parliament instead came up with an enactment on the topic which, though in line with the observation of the Court in the Vishakha Judgement, didn't further improvise upon the guidelines laid down by the court.

In fact, the scheme of the Act was so similar to the Vishakha Judgement that it seems that all the perspectives to tackle the sexual harassment at workplace were overshadowed by the approach taken by the Supreme Court. The fact that the Bill was passed by the Lok Sabha without any debate over it[18] further strengthens the author's claim that the legislators did not want to consider any approach other than what was taken by the Court in the Vishakha Judgment. The implication of non-deliberation on the topic is that though we have a separate legislation, the ways to tackle the menace are still the same as they were prior to the legislation coming into effect. If the Act was to replace the Vishakha guidelines that were already in force, why was the enactment needed at all?

It is also not the case that the legislators were not aware of the fact that certain changes were required to be made in the Bill while it was pending in the Parliament. The report of the Justice J.S. Verma Committee **["the Committee"]** on the amendments to criminal law dedicated a separate chapter (viz. chapter 4 of the report) to the issue of sexual harassment at workplace. The Committee in the said chapter suggested certain changes to the Bill while it was pending before the Rajya Sabha.

The Committee proposed that the Section 10(1) of the Bill, which suggests conciliation between the victim and the person charged must be done away with as such a provision undermines the dignity of the women even more.[19] Secondly, the Committee observed that Section 14 of the Bill which punishes a woman for filing a false charge must be

---

[18] INDIRA, *supra* note 8, at 119.
[19] *Id.* ¶ 21, Chapter 4, 128.

deleted as the provision might nullify the object of the Act.[20] Thirdly, the Committee recommended insertion of provisions granting compensation to the victim.[21] Lastly, and most importantly, the Committee advised doing away with the internal complaint committee and establishing an employment tribunal instead to deal with the complaint under the Act, as the domestic committees could not be expected to implement the intent behind the law effectively.[22] However, none of the suggestions given by the Committee were reflected in the Act on sexual harassment at workplaces.

The Parliament, in passing the Bill, seemed satisfied with its effort to comply with the intent of the Court in the Vishakha Judgment. However, it is the author's contention that had the deliberations in the public and power sphere taken place, the above discussed insufficiencies and many more could have been identified and the Act, which at present is being alleged of being under deliberated by various stakeholders[23]could have served its original purpose better.

The reason why this matter needs to be addressed urgently is because the legislators behind the Bill on sexual harassment, passed in the aftermath of incidents that lead to the formulation of the Justice J.S. Verma Committee, did not deliberate on the issue seriously or consider the recommendations of the Committee set up for this purpose. This is in clear contrast with the 2012 Nirbhaya rape incident, where the legislators realised the existing lacunae and failure of the rape laws and immediately brought about amendments in the law based on the report of the Committee. This provokes any legal professional to think about what the legislators were waiting for to enact a more effective law on sexual harassment. Was it necessary for another incident reflecting the failure of the legal machinery to occur, before serious deliberations on a particular issue took place? Shouldn't the deliberations have been initiated by anticipating the worst possible example of a particular illegal act (say sexual harassment in the instant case) so as to make the Act comprehensive enough to tackle it?

---

[20] *Id.* ¶22.
[21] JUSTICE J.S. VERMA REPORT, *supra* note 9.
[22] *Id.* ¶23.
[23] Rica Bhattacharyya & Maulik Vyas, Criminal law bill needs more deliberation: Experts, ECONOMIC TIMES (March 18, 2013).

These are some of the questions that remain unanswered in the present law on sexual harassment at work places.

III. WORKPLACE HARASSMENT LAWS – A POSSIBLE MODEL

In Part I of the paper the law on sexual harassment at workplace in India has been discussed, which was not at all deliberated sufficiently thereby causing various errors to creep into it. In this part, those major errors have been listed, which have emerged in the legislation because of non-deliberation and what the result could have been if due deliberations, both in the public and power sphere had taken place before the passing of the Bill.

The major lacuna that the present Act suffers from is the way in which it defines sexual harassment. Section 2(n) of the Act defines sexual harassment in a way similar to that of the Vishakha Judgement.[24] The definition of sexual harassment under the Act has an effect of 'sexualizing' the sexual harassment viz. the acts which are perceived as related to sex (such as physical contact or advances, pornography etc.) are considered as sexual harassment. The author believes that if the deliberations had taken place regarding the way in which the Act defines 'sexual harassment' taking a cue from countries like the United States (which consider sexual harassment as "any sex based discrimination") or Israel (which defines sexual harassment as "an act affecting the dignity of women"), the definition of sexual harassment would have been a more comprehensive one. If such deliberations would have been made and either of the "dignity" or "discrimination" paradigms considered in defining 'sexual harassment', we would have escaped the consequences of overtly sexualizing the sexual harassment.

In this context, Margaret Thornton[25] argues that sexualizing sexual harassment has the effect of ruling out various claims of workplace harassment that don't have sexual connotations. She argues that many a times the workplace harassment is motivated by hatred

---

[24] Sexual harassment includes unwelcome sexually tinted behaviour, whether directly or by implication, such as (i) physical contact and advances, (ii) demand or request for sexual favours, (iii) making sexually coloured remarks, (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

[25] Margaret Thornton, *supra* note 6.

(that men have for women who wish to enter a service sector which had been dominated by males for century) and not by sexual desires. She further argues that such claims are much better substantiated by a 'sex based discrimination' paradigm rather than through a 'sexual acts' paradigm. This has also been affirmed by Professor L. Camille Hebert,[26] who goes a step ahead and argues that focus on loss of dignity of the victim of harassment makes the legal system capable enough to adhere to a large variety of claims of workplace harassment, such as typical heterosexual harassment, same-sex harassment, moral harassment and even the harassment of gays and lesbians at workplaces. Further many scholars like Anita Bernstein[27] argue that using the discrimination and dignity approaches complementary to each other would be the best way to tackle workplace harassment.

From the above discussion on the legal theory of sexual harassment laws, it is clear the 'sexual acts based' paradigm of harassment is much narrower than the 'sex-based discrimination' paradigm which in turn is narrower than the 'individual dignity' paradigm. The lack of deliberations and the commitment of the legislature to produce a legislation in-line with the Vishakha Judgment guidelines with no improvisations has landed us into a situation wherein we are focusing on one of all the facets of harassment endured. A claim against a harassing act which is not sexual in nature could easily be rejected by the Indian Courts merely on the ground that it was not sexual, without any actual consideration of whether the act was 'harassment' under the current scheme of the Act.

Moreover, the lack of deliberation is evident from the fact that the Preamble to the Act makes references to the dignity and equality of women under Article 14 and 21 of the Constitution of India as well as to the Convention on Elimination of all forms of Discrimination Against Women (1979),[28] but the definition of the conduct prohibited under

---

[26] L. Camille Hebert, *Divorcing Sexual Harassment from Sex: Lessons from French*, 21(1) DUKE JOURNAL OF GENDER LAW & POLICY 1-44 (2013).
[27] Anita Bernstein, *Treating Sexual Harassment with Respect,* 111HAR. L. REV. 445 (1997); Anita Bernstein, *Law, Culture, and Harassment,* 142 U. PA. L. REV. 1227, 1262-64(1994).
[28] The Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

the Act i.e. sexual harassment, does not have any dimension of loss of dignity or discrimination against women at workplaces due to harassing conduct.

Thus, it is evident that if adequate deliberations had taken place to eliminate all forms of sexual harassment, the legislation on this issue would have been much more comprehensive than what we have today and perhaps, this would have been more effective in combating the realities of workplace harassment.

The second major blunder was the refusal of the Parliament to incorporate the recommendations of the Justice J.S. Verma Committee on sexual harassment laws.[29] The inclusion of recommendations would have aided better enforcement of the intent of the legislation. The inclusion of Section 14 (despite the recommendation of the Committee that the provision isn't in line with the intent of the Act), which imposes a penalty on false complaints, would have an effect of excluding the genuine victim from exercising their rights as they would be afraid of the penalty in case they were unable to succeed in the proceedings. Moreover, the recommendation of the Committee regarding the establishment of an employment tribunal was also not discussed by the Parliament. If a tribunal would have been constituted, the intent of the legislation would have been better served as the cases would have been adjudicated by persons with a legal background. The ignorance of Parliament in deliberating on the concerns raised by the Committee has further weakened the law which already suffers from a major lacuna viz. choosing the wrong paradigm to tackle the harassment cases.

The above discussed shortcomings in the sexual harassment law of India are sufficient to prove the other provisions of the Act redundant. The first aspect, adhering to the sexual acts paradigm instead of sex based discrimination or individual dignity, limits the scope of the Act to traditional heterosexual conception of sexual harassment. As illustrated, this approach of the Parliament excludes the claims of moral harassment, same sex harassment, harassment of gays and lesbians and any other harassing act like cyber bullying at a workplace, which do not have any sexual connotations but are nonetheless discriminatory

---

[29] INDIRA, *supra* note 8.

against women. The Act therefore looks at a very specific aspect of sexual harassment excluding the others. In the same line, the second set of lacunae focuses on the hurdles that the implementation of the Act would suffer from. Empowering a non-legal body to administer the law can have effects which were never intended by the legislature and in such a situation penalizing the women if her claim isn't accepted by the Internal Complaint Committee may lead to low reporting rates of the cases of workplace harassment.

IV. CONCLUSION

In a democracy, deliberations play a very important role. Every conduct which is prohibited through a law or every right which is granted is required to be deliberated both by the citizens and the representatives in the legislature. The author wishes to convey, through the example of sexual harassment law in India that non-deliberations can cause blunders and may make a given piece of legislation redundant. Further, deliberations should not only stem from an earth-shaking event depicting the lacunae in the existing legal system. The legislature and citizens in a democracy shouldn't have a corrective approach wherein the deliberations begin only after the flaw in the legal system is highlighted through the grave conduct of some person (though that should be done if even after enacting the best possible enactment an incident reflecting its limitations occur), rather a preventive approach must be adopted viz. the enactment of legislation must include deep deliberation wherein almost every aspect of the law is discussed, taking into consideration the worst situation which might arise, which was not done in the case of the law on sexual harassment.

Stuti Subbaiah Kokkalera, *Rethinking the Indian Sex Offender Registry*, 4(1) NLUJ Law Review 56 (2017)

RETHINKING THE INDIAN SEX OFFENDER REGISTRY

STUTI SUBBAIAH KOKKALERA*

ABSTRACT

While crime control has for long been the agenda of the central government, it is critical to assess whether the establishment of a National Sex Offender Registry is the best way to deal with both crime control and sexual offenders. Clearly inspired by its American and English counterparts, the Indian Sex Offender Registry will also include biographical and personal information about individuals who have committed sexual offences. The proposed policy, as introduced in the media, and the problems arising out of the same, can be analyzed in light of criminological theories and available empirical research on sexual offending. From this perspective, two broad implications emerge, first, the proposal to include juveniles who have committed sex offences is potentially counter-intuitive and second, the central government's initiative to include individuals who have been charged, but not convicted of any crime in this public database, undermines the due process rights and the Fundamental Right to be tried fairly. This paper examines how the central government can learn from the American experience with Sex Offender Registries and reconsider the inclusion of such individuals.

*The author (B.A. LL.B., LL.M.) is third year doctoral Ph.D. student at the School of Criminology and Criminal Justice, Northeastern University, Boston, MA and can be contacted at **kokkalera[dot]s[attherate]husky[dot]neu[dot]edu**. The author wishes to thank her advisor, Dr. Simon I. Singer for his comments on the initial drafts of this article.

TABLE OF CONTENTS

I. INTRODUCTION 57

II. THE AMERICAN SEX OFFENDER REGISTRY 58

A. The History and use of the Sex Offender Registry in the U.S. 60

i. Pre- 2006 60

ii. Post-2006 62

III. AMERICAN COURTS, THE SOR AND JUVENILE OFFENDERS 64

IV. CRIMINOLOGICAL PERSPECTIVES 67

A. Labeling Perspectives 67

B. Deterrence Perspectives 70

V. CRIMINOLOGICAL RESEARCH SURROUNDING REGISTRATION AND NOTIFICATION 73

VI. POLICY IMPLICATIONS ON ADULT AND JUVENILE OFFENDERS 75

A. The real costs of implementation 76

B. The social costs of crime control 76

C. Due Process Violations 78

VII. CONCLUSION 79

I. INTRODUCTION

The rampant use of technology, and particularly, increasing access to the Internet, has spurred numerous criminal justice reforms, allowing countries to gather information and learn from other governments about their efforts towards crime control and social control. Thus, it is not surprising that the Indian government has been inspired by some of the laws in other countries while formulating its own laws and policies. In early 2016, the Union Home Ministry announced its intention to set up a National Sex Offender Registry, similar to those

established across the United States of America **["U.S."]** and the United Kingdom **["U.K."]**.[1]

In this paper, the use of Sex Offender Registries **["SOR"]** and whether this is a good criminal justice policy for India, has been discussed, especially with regard to the inclusion of juvenile offenders. In order to give a background, the U.S. policies on SORs are used as examples. A brief overview of the history and use of SORs in the U.S. has been provided, along with a discussion on the differences between registration and community notification. Following this, the use of sex offender registries for both adult and juvenile offenders has been evaluated while laying an emphasis on its impact on juvenile offenders through Criminological and Sociological theories of crime and deviance. Using these theoretical propositions, the potential effects of the establishment of a National SOR in India has been determined. Based on the available empirical research in this area, the social and legal consequences of a national SOR have been discussed. Finally, recommendations have been made to the Indian Government and policy makers in an attempt to move forward in countering sexual violence.

II. THE AMERICAN SEX OFFENDER REGISTRY

The SOR is a relatively new phenomenon. It involves two aspects, that of registration and the subsequent notification of the registration of sex offenders. The goals of a SORs are to: (i) deter potential sex offenders; (ii) reduce recidivism of known sex offenders; (iii) track offenders in the community; (iv) assist investigation carried out by law enforcement agencies and (v) provide community residents information to help protect their children.[2] In India, the horrific gang rape in 2012 prompted the then-UPA government, to constitute a committee to suggest criminal justice reforms, which included the introduction of newly defined offences and an urgent need for expediency in trials.[3] It also encouraged discussions regarding the

---

[1] Suryatapa Bhattacharya, *India Considers Introducing Sex Offender Register*, WALL ST. J. BLOG, (Apr. 29, 2016), http://blogs.wsj.com/indiarealtime/2016/04/29/india-considers-introducing-sex-offender-register/.

[2] Elizabeth J. Letourneau, *Legal Consequences of Juvenile Sex Offending in the United States*, *in* THE JUVENILE SEX OFFENDER 277 (Howard E. Barbaree and William L. Marshall, eds. 2006) [hereinafter Legal Consequences].

[3] Justice J.S Verma et al., *Report of the Committee on Amendments to Criminal Law*, Jan. 2013 [hereinafter Amendment to Criminal Law].

possibility of a National SOR. In May 2016, the Ministry of Home Affairs, clarified that consultations were underway with respect to the setting up of the SOR, and that this would require the registration of individuals convicted for offences like rape, voyeurism, stalking and aggravated sexual assault, and would also potentially include registration of offenders below the age of 18 years.[4] Information such as the names, addresses, photographs, PAN card details, Aadhar card number, fingerprints and DNA samples of the offenders would be included in such a registry.[5]

Unlike in India, criminal justice policies in the U.S. are a result of more decentralized processes. This means that individual states have the right to legislate their own criminal laws and procedures, as long as they do not violate the Federal and State Constitutions.[6] The Federal Government can mandate certain actions from the states however; such compliance is usually enforced through financial persuasion. Before 1990, very few states in the U.S. had sex offender registration laws, and these laws were restricted to adult sex offenders. By the mid-1990s, following extensive media coverage of high-profile cases of violent sex crimes committed by juveniles, many state SOR laws were drafted to include children adjudicated delinquent of sex offences in juvenile courts as well as children tried and convicted of sex offences in criminal court.[7] The resulting policies swept youth sex offenders into a system created to regulate the post-conviction lives of adult sex offenders. Youth sex offenders were caught at the convergence of two increasingly harsh 'tough on crime' policy agendas; one targeting persons convicted of sexual offences, and the other targeting youth accused of violent offences, who were often portrayed at the time as 'super-predators'- a notion that has since been discredited.[8]

---

[4] *Lok Sabha*, *Response to Unstarred Question*, No. 2548 to be answered on 10.5.2016., GOVERNMENT OF INDIA: MINISTRY OF HOME AFFAIRS (May 10, 2016) *available at* http://mha1.nic.in/par2013/par2016-pdfs/ls-100516/2548E.pdf.

[5] *Id.*; Special Correspondent, *Govt. to set up Sex Offender Registry*, THE HINDU, (Apr. 28, 2016).

[6] This is derived from the Tenth Amendment to the U.S Constitution in 1791: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

[7] Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S* (2013), ¶4 [hereinafter HRW].

[8] *Id.*

A. THE HISTORY AND USE OF THE SEX OFFENDER REGISTRY IN THE U.S.

The history of the SOR in the U.S. can be classified into two time periods: pre-2006 and post-2006. Before 2006, there was no federal mandate that required states to establish SOR's. After the passing of the Adam Walsh Child Protection and Safety Act of 2006 **["AWA"]**, 9 states that sought federal funding were required to comply with Title I of the AWA, called the Sex Offender Registration and Notification Act **["SORNA"]**. The SORNA mandated the compulsory registration and community notification of adult sex offenders,[10] and for the first time instructed the inclusion of the names of juvenile offenders who had committed certain sex crimes to the SORs in their respective states, which were also subjected to community notification or access to their information in an online database like adults.[11] Only States that chose to comply with the Act in a substantial manner would receive federal funding.[12]

i. Pre- 2006

Before 2006, few states had SOR and notification laws.[13] In 1994, with the introduction of the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act,[14] states were required to set up sex offender registries to receive federal funding. In 1996, this Act was amended by Megan's Law,[15]which went a step further and

---

9 42 U.S.C. §16911 (2006).

10 42 U.S.C §113(a): "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence" [hereinafter Section 113a].

11 42 U.S.C §111(8): "Convicted as including certain juvenile adjudications- The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense".

12 42 U.S.C §125(a): "For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.)".

13 California was the first state to have such a law in 1947 and the next state that had a specific law targeting sex offenders was Washington in 1990.

14 42 U.S.C. § 14071.

15 42 U.S.C. § 14071 (amended) based on New Jersey Stat Ann. § § 2C 7-1 to 2C: 7-11.

required public dissemination of registered sex offenders. These two laws together created the following requirements: "(i) Registration,[16] under which an offender must follow a set of procedures, in terms of disclosing current information to law enforcement, like his/her residence, employment and drug use;[17](ii) Community Notification, through which information is transmitted to the public in different ways, including website links, and door to door communication by registrants,[18] and (iii) Residency Restrictions,[19] whereby restrictions are imposed on registered offenders, for instance, they are not allowed to live near a school."[20]After the passage of these laws, at least thirty-eight states had some type of sex offender registration statute on their books.[21] Generally, the laws followed a similar pattern, with variations in specific provisions such as the specific offences that trigger registration requirements, the penalties for failure to register, and the type of information contained in the registry. The degree to which the statutes allowed public access to the registry also varied from state to state.[22] This allowed for states to have their own risk management systems for

---

[16] 42 U.S.C § 113a, *supra* note 10.

[17] 42 U.S.C §114(a): "The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry: (1) The name of the sex offender (including any alias used by the individual). (2) The Social Security number of the sex offender. (3) The address of each residence at which the sex offender resides or will reside. (4) The name and address of any place where the sex offender is an employee or will be an employee. (5) The name and address of any place where the sex offender is a student or will be a student. (6) The license plate number and a description of any vehicle owned or operated by the sex offender. (7) Any other information required by the Attorney General".

[18]42 U.S.C §118(a): "Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General".

[19] *Per* 42 U.S.C §638(a)(1), individual states may undertake a study to determine which areas may be restricted: "The Attorney General shall conduct a study to evaluate the effectiveness of monitoring and restricting the activities of sex offenders to reduce the occurrence of repeat offenses by such sex offenders, through conditions imposed as part of supervised release or probation conditions. The study shall evaluate- (1) the effectiveness of methods of monitoring and restricting the activities of sex offenders, including restrictions- (A) on the areas in which sex offenders can reside, work, and attend school; (B) limiting access by sex offenders to the Internet or to specific Internet sites; and (C) preventing access by sex offenders to pornography and other obscene materials; (2) the ability of law enforcement agencies and courts to enforce such restrictions; and (3) the efficacy of any other restrictions that may reduce the occurrence of repeat offenses by sex offenders".

[20] HRW, *supra* note 7, ¶ 3.

[21] Abril R. Bedarf. *Examining Sex Offender and Community Notification Laws*. 83 CAL. L. REV. 885, 886 (1995)[hereinafter Abril].

[22] *Id.* at 887.

sex offenders, allowing for more discretion in terms of releasing information, especially of juvenile sex offenders, whose access to information was limited to law enforcement.

ii. Post-2006

Unlike previous federal laws, SORNA required juvenile offenders (those below the age of 18 but not below the age of 14), to be put on the registry and be subject to the same level of notification as adults if they commit the same sex offences.[23] SORNA sets up a three-tier system of registration and notification with each higher level indicating more requirements from those convicted for particular sex offences, including juveniles.[24] This categorization is as follows:

i. Tier I sex offenders are those who are convicted of "least serious offences", and are required to register for 15 years and expected to renew their registration annually.[25] These also include misdemeanors,[26] along with felony offences[27] that do not qualify as a "sex offence".[28]

ii. Tier II sex offenders are required to register for 25 years and expected to renew their registration every six months. A person previously convicted of a Tier I offence and who subsequently commits a Tier II offence, will automatically be classified as a Tier II

---

[23] 42 U.S.C §16911(8): "The term "convicted" or a variant thereof, used with respect to a sex offence, includes adjudicated delinquent as a juvenile for that offence, but only if the offender is 14 years of age or older at the time of the offence and the offence adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offence".

[24] *See* 42 U.S.C §111 (2); (3) and (4).

[25] 42 U.S.C §111 (2): "The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.", read with 42 U.S.C §115(a)(1) "A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is- (1) 15 years, if the offender is a tier I sex offender".

[26] Misdemeanors are relatively minor offences that carry less than a year of imprisonment and often carry fines.

[27] Felony offences are more severe offences, typically categorized as crimes, which are punishable with more than one year of imprisonment.

[28] Definition can be found under 42 U.S.C § 16911 and includes any offence that involves a sexual act or sexual contact with another; any offence against a minor; certain federal offences under title 18 (criminal code); specified military offences and attempt or conspiracy to commit any such acts. The only exceptions to these acts are foreign convictions obtained without due process rights and offences involving consensual sexual acts.

sex offender.[29] Tier II offences include crimes under state statutes, offences involving minors in prostitution, sexual contact with minors, use of minors in sexual performances and production and distribution of child pornography.[30]

iii. Tier III sex offenders are required to register for life and expected to renew their registration every three months.[31] A person previously classified as a Tier II sex offender who subsequently commits any sex offence is automatically classified as a Tier III sex offender.[32]Tier III sex offences are those punishable by more than one year of imprisonment and involve crimes of sexual acts by force or threat, sexual acts with an unconscious person or anyone incapable of appraising the nature of the act, sexual acts with a child under the age of 12 and non-parental kidnapping of a minor.[33]

At all three tiers, offenders in the registry must provide personal information to the registry officials (name, residence, number of vehicles, social security, car plates); their DNA samples, finger and palm prints and are also subject to community notification through an online database.[34] There are no exceptions for intra-familial cases of sexual abuse. On the other hand, the only exception is the so-called "Romeo and Juliet" clause, which exempts registration of individuals convicted of sex offences involving "consensual" sexual activity between a victim who is at least 13 years old and an offender not more than four years older than the victim, who are unrelated to each other.[35]Additionally, there are no provisions for

[29] 42 U.S.C §111 (3)(C): "The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and- (C) occurs after the offender becomes a tier I sex offender".

[30] 42 U.S.C §111 (3)(A).

[31] 42 U.S.C §115(a)(3) A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is (3) the life of the offender, if the offender is a tier III sex offender.

[32] 42 U.S.C §111 (4)(C): "The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and- (C) occurs after the offender becomes a tier II sex offender".

[33] 42 U.S.C §111 (4)(A).

[34] Lori McPherson. *Practitioner's guide to the Adam Walsh Act*, UPDATE: NATL CTR FOR PROSECUTION OF CHILD ABUSE, 20(9) (2007) *available at* http://www. ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf [hereinafter Adam Walsh Act].

[35] *Id.* at ¶ 3.

risk assessment hearings, for either adults or juveniles who are subjected to SORNA requirements, thus, signifying a significant shift from risk assessment to offence assessment.[36]

Not all states have adopted the AWA fully. As of 2016, only 17 states out of 50, have substantially complied with SORNA.[37] Eleven states and the District of Columbia, do not register any juvenile offenders who have been adjudicated delinquent in juvenile courts; however, these 12 jurisdictions require registration for children convicted of sex offences in adult courts.[38]

III. American Courts, the SOR and Juvenile Offenders

Despite the skepticism surrounding the use and efficacy of the SOR, the U.S. Supreme Court is yet to disregard its value. In *Delbert W. Smith and Bruce M. Botelho v John Doe*,[39] the Supreme Court by a 6:3 majority upheld Alaska's SOR law, stating that it was a civil statute that did not intend to be punitive. According to the Court, the registration and dissemination of information about convicted offenders was in the interest of public safety, and hence the Act was constitutional.[40] Similarly, in the case of *Connecticut Department of Public Safety v John Doe*,[41] the Court unanimously decided that Connecticut's SOR law was not based on an offender's dangerousness, and relied solely on prior convictions, and therefore, disclosing or publicly disseminating information about an offender on the registry without a hearing did not violate any due process rights. In *Thomas Carr v U.S.*,[42] the Supreme Court by a 6:3 majority held that SORNA did not apply to conduct, in terms of registering and updating information, prior to its enactment. The dissenting judges argued that this contradicted the premise of the Act, by treating similarly situated convicted sex offenders differently. Additionally, there is a significant lacuna in SORNA. Under the Act, sex offenders who intentionally do not register and update their information when they have been ordered

---

[36] Association for the Treatment of Sexual abusers (ATSA), *The Registration and Notification of Adult Sex Offenders*, (2010) http://www.atsa.com/registration-and-community-notification-adult-sexual-offenders.
[37] SMART, *SORNA Implementation Status* (Sep. 26, 2016) http://ojp.gov/smart/sorna-map.htm.
[38] Abril, *supra* note 21, at ¶ 32.
[39] Delbert W. Smith and Bruce M. Botelho v. John Doe & Ors.,538 US 84 (2003).
[40] *Id.*
[41] Connecticut Department of Public Safety v. John Doe,538 US 1 (2003).
[42] Thomas Carr v. U.S.,560 US 438 (2010).

by the court to do so, can be said to have committed a federal crime.[43] However, if they exit the country, then there is no onus on them to register or update their whereabouts because it would not fall within the meaning of "jurisdiction" under SORNA;[44] thus, effectively rendering the SOR meaningless if an individual chooses to abscond and commit crimes in another place.

The constitutional validity of the applicability of the SOR to juvenile offenders has been diverse. The main issue is whether the application of SOR laws on juvenile offenders is justified under the proportionality principle of the Eighth Amendment of the Constitution,[45] which states that "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*" The central issue is whether the registration and notification of juvenile offenders on a SOR amounts to cruel and unusual punishment, making it unconstitutional. Though it is yet to reach the Supreme Court, previous decisions in *Roper v Simmons*,[46] *Graham v Florida*[47]and *Miller v Alabama*,[48]indicate that the Court could follow a similar trajectory and hold lifetime registration and notification requirements for juvenile sex offenders as unconstitutional under the Eighth Amendment.[49] Specifically in *Roper*, the Court found three differences between juveniles and adults that diminish the juveniles' culpability: (i) lack of maturity and sense of responsibility among juveniles; (ii) greater susceptibility to negative influences and peer pressure; and (iii) the 'transitory' character and personality of juveniles. These differences were discussed again in *Graham* and *Miller*, re-establishing that there is a

[43] 42 U.S.C §113(e): "Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title."
[44] Lester Ray Nichols v. United States, 136 S.Ct. 1113.
[45] Rebecca Shepard, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders*, GEORGIA STATE U. L. REV., 28(2) 529 (2012).
[46] Roper v. Simmons, 543 U.S 551 (2005)[In this case, the Supreme Court held that capital punishment for offenders below the age of 18 is unconstitutional under the 8th Amendment clause and qualifies as cruel and unusual punishment if allowed to continue on the books].
[47] Graham v. Florida, 560 U.S 48 (2010) [In this case, the Supreme Court held that a sentence of life imprisonment without parole for non-homicide offences committed by juveniles is unconstitutional].
[48] Miller v. Alabama, 567 U.S. (2012) [In this case, the Supreme Court extended their ruling in *Graham* and held that life imprisonment without parole for all juvenile offenders is unconstitutional under the 8th amendment].
[49] Robin Walker Sterling, *Juvenile Sex Offender Registration: An Impermissible Life Sentence*, U. CHI. L. REV. 82, 295 (2015).

difference in culpability between adults and children. If children are tried differently when they are charged with homicide, thereby not facing a possible sentence of life without parole, they must also be tried differently when they are charged with sex offences and should not have to face the possibility of mandatory lifetime sex-offender registration.[50]

Unlike the federal Supreme Court, some state Supreme Courts have been more forthcoming in determining whether the provision to include juvenile offenders in a SOR as per the SORNA mandate is constitutional. For instance, in 2015, the Supreme Court of the State of Pennsylvania struck down its SORNA provision,[51] which required juveniles to be put on the registry because it serves as an irrebuttable presumption. The Superior Court of Pennsylvania pointed out that "irrebuttable presumptions are violative of due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact is available".[52] The Pennsylvania Court held that the provision, in so far as it applied to the registration and notification of juvenile offenders, was unconstitutional on three grounds: (i) The law did not give juveniles the opportunity to challenge the presumption that they will reoffend, and thus, clearly violated their due process rights; (ii) The high risk of reoffending is not universally true for all offenders, especially in the case of juvenile offenders; and (iii) There are alternative means to assess a juvenile's risk to offend, as opposed to automatic registration and notification.[53] Similarly, the Ohio Supreme Court ruled that automatic lifetime registration for juveniles is unconstitutional under both the US and Ohio constitutions.[54] On the other hand, the Illinois Supreme Court upheld the mandatory lifetime sex offender registration under both state and federal constitution, in that the registration does not affect any fundamental right and is for public

---

[50] *Id.*

[51] 42 Pa.C.S. § 9799.13(8): "An individual who, on or after the effective date of this section, is a juvenile offender who was adjudicated delinquent within this Commonwealth or was adjudicated delinquent in another jurisdiction or a foreign country and: (i) has a residence within this Commonwealth; (ii) is employed within this Commonwealth; or (iii) is a student within this Commonwealth. (8.1) An individual who is a juvenile offender who is adjudicated delinquent in this Commonwealth on or after the effective date of this paragraph but who does not have a residence within this Commonwealth, is not a transient, is not employed in this Commonwealth or is not a student within this Commonwealth must register with the Pennsylvania State Police in accordance with section 9799.19 prior to leaving this Commonwealth."

[52] In the Interest of R.M; Appeal of: R.M, a Minor. 2015 Pa. Super. Unpub. LEXIS 2820. 120 A.3d 380, 1, 24.

[53] *Id.* 24-26.

[54] *In* Re C.P, 967 N.E. 2d 729, 732 (Ohio 2012).

safety.[55] Furthermore, the Illinois Court added "there is a rational relationship between the registration of juvenile sex offenders and the protection of the public from such offenders. Requiring the registration of juvenile sex offenders, even where the offender is only 12-years-old and the duration of registration is for life, is reasonable in light of the strict limits placed upon access to that information. Whether there are better means to achieve this result, such as limiting the duration of registration for all juvenile sex offenders including juvenile sexual predators, is a matter better left to the legislature".[56] Thus, there is clearly a mixed judicial response among American courts towards SORs.

IV. CRIMINOLOGICAL PERSPECTIVES

Sex offender registration and notification creates labels, which in turn, affects how individuals see themselves and how they are perceived by their communities. Such labels end up, further penalizing individuals, as opposed to helping them re-enter their communities. Sex offender notifications are primarily geared towards shaming offenders, which results in labeling them as such for life, whereas the ultimate goal of this type of punishment should be deterrence or reduction of sex crimes. Through criminological theories, the impact of being labeled as a sex offender and whether such a label actually prevents an individual from offending or reoffending can be assessed.

A. LABELING PERSPECTIVES

Labeling theories discuss the impact of labels on individual behavior. The basic principle of labeling theories is that repeated acts of deviance is a result of being labeled as a deviant, even if the initial act of deviance was due to some other factor.[57] However, before the creation of labels, there is a symbolic interaction, or a transaction involving the interaction between two or more individuals.[58] It is a process by which shared meanings, behavioral

---

[55] *In* Re J.W, 787 N.E.2d 747, 760 (Ill 2003).
[56] *Id.* at 758.
[57] DONALD J. SHOEMAKER, THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR (2005).
[58] GEORGE H. MEAD, MIND, SELF AND SOCIETY (Daniel R. Huebner & Hans Joas eds. 1934).

expectations and reflected appraisals are built up in interaction and applied to behavior.[59] This means that individuals influence each other, take on roles and make appraisals from their standpoint of a particular situation, their own self and possible lines of action. Individuals who are confronted with delinquent behavior as a possible line of action are likely to imitate each other through verbal and non-verbal cues.[60] An individual takes on or assumes the organized social attitudes of the given social group or community or some section and governs his own conduct accordingly.[61] Therefore, those who see themselves (from the standpoint of others) as persons who engage in delinquent behavior in certain situations are more likely to engage in delinquency.

Further, the use of labels creates a distinction between two groups. Sociologist Howard Becker, set up this distinction as occurring when social groups create deviance by making the rules whose infraction constitutes deviance and by applying those rules to particular people and labeling them as 'outsiders'.[62] Thus, any action becomes deviant when it is labeled as such. Whether an act is deviant or not is dependent on how people react to it. If someone has committed an infraction, it does not necessarily mean that others will treat it as one. The opposite scenario is also true; persons who have not violated any rule may be treated as offenders in certain situations.[63] The latter scenario is true for those who will be labeled as sex offenders for years, and sometimes till the end of their lives, where the label endures, despite them not committing another infraction. In the Indian scenario, this is even more troubling because the SOR policy, as has been reported in the media,[64] is being drafted to include individuals who have not been convicted of any sex offence in the registry. Not only is the use of such a label problematic, it is how individuals cope with such labels, which is the primary concern. The process of justifying deviant behavior due to the meaning attached to such labels was explained by Edwin Lemert, who introduced the concepts of primary and secondary deviance. According to him, primary deviance is the origination of

---

[59] Ross L. Matsueda, *Reflected Appraisals, Parental Labeling and Delinquency*, AM. J. SOC, 97(6) 1577, 1580 (1992).
[60] *Id.*
[61] Adam Walsh Act, *supra* note 34, at 156.
[62] Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance*, AM. J. SOC. 69(4), 6 (1963).
[63] *Id.* at ¶ 8.
[64] Amendment to Criminal Law, *supra* note 3.

deviant behavior and secondary deviance is how deviant acts are symbolically attached to persons and the effective consequences of such attachment for subsequent deviance on part of the person.[65]According to Lemert, secondary deviance serves as a mechanism through which individuals justify their deviant behavior.

However, all labels do not result in deviance, or rather secondary deviance. But it is more likely that a person will indulge in criminal behavior when a label attached to such behavior is a stigma. By definition, a person with a stigma is believed to be 'not quite human',[66] and this is especially so in the case of serious offenders. Erving Goffman defines stigma as when an individual with an attribute that is discredited by his or her society is rejected as a result of that attribute.[67] Consequently, this stigma deeply impacts a person's identity. Goffman's main concern is not regarding the type of stigma, but how individuals cope in terms of their identity when a stigma is attached. He explains the difference between the 'discredited' and 'discreditable' where a discredited person is one whose stigma is evident to the others around him, whereas for a discreditable person whose differentness is not immediately apparent.[68] This 'differentness' is characterized as a gap between an individual's actual identity and a virtual one and it is the management of this gap that becomes difficult for either the discredited or the discreditable. Goffman's analysis of how an individual relates to his own identity when a stigma is attached is critical in understanding the impact of criminological labels. An individual, who is categorized as a sex offender, before having committed any subsequent offence or in the Indian scenario, with possibility of not having committed any offence at all, may become uncertain of his own identity and in turn adopt the perception of himself as a sexual deviant.

Therefore, labeling theory tells us that labels, whether informal or formal, may not be the most appropriate way of punishing individuals, though it may be the most common method of punishment. However, the role of shame in punishment has been a powerful mechanism through which offenders can take responsibility for their actions. This is

[65] EDWIN M. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS AND SOCIAL CONTROL, 48 (2nd ed., 1967).
[66] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY, 5 (1963).
[67] *Id.* at 6.
[68] *Id.* at 42.

highlighted in Australian criminologist John Braithwaite's theoretical model of re-integrative shaming that discusses the role of shame in punishment.[69] However, labels that shame run the risk of counter-productivity when it shades into stigmatization.[70] Therefore, there is a distinction made between re-integrative shaming and disintegrative shaming or stigmatization. Re-integrative shaming can result in effective deterrence as opposed to stigmatization, which is how most offenders are treated. He further posited that shaming is more likely to become re-integrative in societies that are communitarian[71] and as a result, such societies witness lower rates of crime. On the other hand, shaming that is stigmatizing, makes criminal subcultures more attractive to the rejected individuals, thereby increasing the likelihood of crime.[72]Additionally, any systematic blockage of legitimate opportunities for critical factions of the population fosters these criminal subcultures[73] Therefore, when registration and notification of sex offenders is viewed from this perspective, shaming is stigmatizing, more so for juvenile offenders who have weaker ties in their communities and includes them in a fraction of the population that faces systematic blockages of legitimate opportunities (if they were not already from such a fraction). In order to overcome this, labeling perspectives implicitly suggest the use of treatment and rehabilitative programs that are non-stigmatizing, re-integrative and non-disfiguring.

B.DETERRENCE PERSPECTIVES

The rationale behind SOR laws is that attaching such labels will deter individuals who have already committed a sex crime from committing crimes in the future. Additionally, the likelihood of being punished with such a label will deter individuals from committing these crimes in the first place. This is an example of the policy implication of the rational choice or deterrence theory. Deterrence perspectives assume that offenders exercise rational judgment and are reasonably aware of the potential costs (punishment) and benefits (gains) associated with criminal acts. This assumption reflects two points: "(a) aggregate crime rates in an

---

[69] JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).
[70] *Id.* at 55.
[71] *Id.* at 102.
[72] *Id.* at102-103.
[73] *Id.* at 103.

ecological region can be curbed by the crime control activities of the criminal justice system (i.e., by increasing the potential costs and probable risks for criminal behavior) and (b) Such activities may come in the form of more rigorous police practices (e.g., crackdowns, increasing clearance rates), prosecuting offenders more efficiently, and/or legislatively increasing the severity of certain criminal sanctions."[74]

Results of previous empirical research on deterrence effects have been limited in their approach. A meta-analysis of macro-level predictors of crime in the U.S. found that deterrence or rational choice theories generally have a weak empirical status.[75] The most common predictors utilized in this study were: (i) the incarceration effect (imprisonment); (ii) police effect;[76] and (iii) effect of 'Tough on Crime' policies, which in its wide ambit included SOR laws. Of these indicators, only incarceration received a high rating for stability and strength in predicting crime.[77] However, it is difficult to determine whether the incarceration effect as a stable predictor is due to its unique deterrent impact as policy makers would like to believe or because of imprisonment that incapacitates individuals from committing crimes.[78] Supporting sex offender registration based on this research is tricky because the sanctions of registration and notification, occurs in addition to imprisonment. Furthermore, Professor Daniel Nagin argues that there is also a theoretical and empirical gap in understanding a sanction, and its effect on deterrence. There are two dimensions, the legal authority for different types of sanctions, and the way in which those sanctions are administered.[79] These two dimensions combine to determine certainty, severity and celerity of sanction options for punishment but theories of deterrence specify sanction threats in the singular and not plural and hence do not provide the basis for considering the differential deterrent effect of different types of sanctions.[80]

---

[74] Travis C. Pratt& Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-analysis*, CRI. & JUS.32 373, 415 (2005) [hereinafter Macro Level].
[75] *Id.*
[76] *Id.* at 391.
[77] *Id.* at 397.
[78] *Id.* at 417.
[79] Daniel S. Nagin, *Deterrence in the Twenty-First Century*, CRI. & JUS. 42 199 (2013).
[80] *Id.* at 253.

The problem of studying the deterrence effect on juvenile offenders who commit sex crimes is more complicated. Beginning in the 1980s, states across the U.S. began introducing harsher laws for juvenile offenders, adopting the idea of "adult time for adult crime" but in some states, laws ended up being passed when juvenile crime was already declining.[81]Evaluation of multiple deterrence studies, found three broad concerns regarding juvenile offenders: (i) the effect of deterrence varies by age with juveniles showing less deterrence than adults perhaps due to impulsivity;[82] (ii) assessing deterrence is a complex multistep process which would require juveniles to identify themselves as capable of committing sexual offences, expecting to be caught and punished and that such punishment would involve registration;[83] and (iii) the presumption that juveniles understand a registration and notification policy and its repercussions.[84] For instance, a study conducted with a relatively smaller sample size, found that adolescents who are least aware of the registration-related consequences of sex offences might be at the most risk for experiencing some of the negative consequences of registration.[85] In addition to that, the nature of sex offences is complex.[86] They are often committed in secret but are also more difficult to prove in terms of physical evidence. In the U.S., sexual assault is one of the most underreported crimes, with only 34% of cases getting reported to the police in the year 2014.[87]

Several studies also support that sexual offence recidivism rates are underreported and more so when it involves cases of intra-familial abuse.[88] Despite these issues, one study examined whether South Carolina's SOR policy,[89] reduced the number of first-time juvenile sex crimes by looking at the rate of sex crime charges between 1991 and 2004, and found that

---

[81] Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, THE FUTURE OF CHILDREN, 18(2): 15, 18 [hereinafter *Adolescent Development*].
[82] Legal Consequences, *supra* note 2, at ¶ 278.
[83] *Id.* at ¶ 278
[84] *Id.* at ¶ 279.
[85] Margaret C. Stevenson et al., *Knowledge of Juvenile Sex Offender Registration Laws Predicts Adolescent Sexual Behavior*, J. CHILD. SEX. ABUSE, 22(1) 103, 112 (2013).
[86] Legal Consequences, *supra* note 2, at ¶ 279.
[87] Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2014*, BJS 7(2015).
[88] Tim Bynum et.al, *Chapter 19: Recidivism of Sex Offenders*, in CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS 240 (Ed. 4, 2001).
[89] *See* S. Carolina CODE OF LAWS, Title 16: Crimes and Offenses (2010).

the policy change in 1995, did not deter juvenile sex offenders.[90] They found that after the passage of the 1995 Act in South Carolina, the rates of sex crimes and robbery crimes dropped significantly, but were attributable to a legislative change that moved prosecution of older youthful offenders from juvenile court to adult court. Thus, there was no evidence that SORNA itself had a general deterrent effect on sex crimes committed by juveniles.[91]

V. CRIMINOLOGICAL RESEARCH SURROUNDING REGISTRATION AND NOTIFICATION

In India, there is a vacuum in empirical research on the effect of laws on sex offenders and thus, empirical research in the U.S. has been relied on. Results from such research have been treated with caution due to two broad reasons: (i) the general underreporting of crime,[92] and (ii) problems with determining recidivism rates. Furthermore, four broad factors affect the determination of sex offender recidivism rates: (i) the population of sex offenders is ostensibly heterogeneous; (ii) the different operational definitions of recidivism, whether it means subsequent arrest, conviction or imprisonment; (iii) the types of offences considered; and (iv)the length of follow-up or the time considered for offences to recur.[93]

Moreover, empirical research has indicated that sex offender laws: "(i) do not reflect the scientific research on sexual victimization, offending and risk; (ii) do not focus on the victim's recovery or healing processes; (iii) are driven by singularly horrific 'perfect storm' cases, which are awful, but rare outliers when compared to the most common types of sexual assault and molestation cases; (iv) are politically popular, overbroad and simplistic; and (v) provide a superficial reassurance to the public on a profoundly complex, deeply vulnerable

---

[90] Elizabeth J. Letourneau, *Do Sex Offender Registration and Notification Requirements deter Juvenile Sex Crimes?*, CRIM. JUS. & BEH. 37(5)553, 556 (2010) [hereinafter *Registration and Notification Requirements*] ("South Carolina's SOR policy was first enacted in 1995 and was then modified to include online notification in 1999. The policy subjects juveniles convicted of certain sex crimes to registration and notification requirements regardless of the youth's age or risk of recidivism. Information about all registered juveniles is provided to their schools, their victims, and nearby child-centered businesses (e.g., daycare centers).

[91] *Id.*

[92] Kelly K. Bonnar-Kidd, *Sex Offender Laws and Prevention of Sexual Violence or Recidivism*, AM. J. PUB. HEALTH, 100(3) 412 (2010).

[93] Legal Consequences, *supra* note 2.

and personal fear (that of rape and sexual victimization).[94] These problems are exacerbated by the inclusion of juvenile offenders. Researchers have argued that the addition of juvenile sex offenders in SOR's and subjecting them to community notification, appear contrary to the juvenile courts tradition goal of non-punitive intervention.[95] In the Indian context, Juvenile Justice Boards **["JJB's"]**[96] are akin to juvenile courts, established to provide measures of guidance and rehabilitation for the child, protection for the society, and not to fix criminal responsibility, guilt and punishment.[97] Essentially, the juvenile justice system has been set up to protect juvenile offenders and do what is best for them in terms of treatment and supervision, but having them register as juvenile sex offenders conflicts with that goal.[98] Lifetime retribution for juvenile offences is antithetical to the philosophy of the juvenile justice system, which strives to balance community safety with the rehabilitative needs and rehabilitative potential of juveniles.[99]

Furthermore, the post-release environment for newly released sex offenders is highly stigmatized and isolated. Although, it is vital for the released offender to be reintegrated into a given community in a way that allows him or her to find employment and form positive adult supportive relationships, the intense stigma and shame surrounding the offender's prior behavior as well as the persisting label of a sex offender make these crucial adjustments extremely difficult and stressful.[100] This is seemingly worse for juvenile offenders. In the 2013, a study conducted by Human Rights Watch **["HRW"]**, among the 281 youth offenders and family members of 15 additional youth offenders, indicated that most (250 people, or 84.5 percent), described the negative psychological impacts that they attributed to their status as a registrant, such as depression, a sense of isolation, difficulty forming or maintaining

---

94 Richard G. Wright, *Introduction: The failure of sex offender policies*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, 2 (Richard G. Wright ed., 2006).
95 Lisa C. Trivits& Dickon N. Reppucci, *Application of Megan's Law to Juveniles*, AM. PSYCH.57(9): 690 (2002).
96 §6, Juvenile Justice (Care and Protection of Children) Act, 2015.
97 Kent v. U.S, 383 U.S 541, 544 (1966).
98 Franklin E. Zimring. AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING.(2004); Sarah W. Craun & Poco D. Kernsmith ,*Juvenile Offenders and Sex Offender Registries: Examining the Data Behind the Debate*, FED. PROB. 70(3) 45 (2006).
99 *Registration and Notification Requirements*, *supra* note 90, at ¶ 556.
100 William Edwards & Christopher Hensleyet, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, INT'L. J. OFF. THERAPY & COMP.CRIM. 45(1) 83, 89 (2001).

relationships, and suicide ideation. Nearly one fifth of those interviewed (58 people, or 19.6 percent), said they had attempted suicide; three of the registrants whose cases were examined did commit suicide.[101] Thus, the consequences of registration and subsequent notification can significantly impact the way individuals view themselves, especially juveniles.

VI. POLICY IMPLICATIONS ON ADULT AND JUVENILE OFFENDERS

Based on the theoretical suppositions and current empirical research in the U.S., the Indian government's decision to introduce a national SOR is extremely troubling. The intention behind establishment of SORs is to deter potential sex offenders and specifically deter those who have previously committed sex crimes from reoffending.[102] Research in recidivism of offenders in the U.S. has shown that this focus on recidivism is erroneous because sex offenders are among the least likely to reoffend.[103] Individuals labeled as sex offenders have extremely low recidivism rates when compared to persons convicted of robbery, non-sexual assault, burglary, larceny, motor vehicle theft, fraud, drug offences, and public order offences.[104] According to HRW, studies conducted so far have shown lower recidivism rates for juveniles than for adult offenders.[105] Therefore, this idea that registration and notification is justifiable in order to control recidivism of adult and juvenile sex offenders is misguided. However, the SOR itself could potentially serve as a useful tool for law enforcement. Police and other law enforcement agencies could create a private database to keep track of repeat adult offenders and expect such offenders to keep them updated of their whereabouts. However, these should be individuals who have been convicted of a sex crime. Ideally, this should not extend to individuals below the age of 18 years whose risk of offending can be mitigated through proper rehabilitative interventions.

More importantly, the American experience with SOR laws, and their impact on communities can and should serve as important lessons for the Indian criminal justice policy.

---

101 HRW, *supra* note 7, at ¶ 51.
102 Legal Consequences, *supra* note 2, at 278.
103 *Adolescent Development,* supra note 81.
104 Patrick A. Langan & David J. Levin, *Recidivism of Prisoners released in 1994*, BJS (2002); *See also* HRW, *supra* note at 7, at ¶ 22.
105 HRW, *supra* note 7, at ¶ 30.

There are three aspects that the Indian government should consider before establishing a national SOR.

A. THE REAL COSTS OF IMPLEMENTATION

Despite the political popularity of SORNA, states in the U.S. that are typically seen as being tough on crime, are opposed to implementing the federal mandate due to one main reason: costs. The cost of setting up registries in line with SORNA ends up being more burdensome for states, and the promise of the federal funds for setting up the registry in compliance with the federal act is hardly an incentive.[106] Because states choose to forego the additional federal funds, other state law enforcement agencies and local agencies that rely on federal funding end up losing substantial amounts of money for their own projects.[107] By setting up a national SOR, the Indian government must consider if the actual cost of establishing such a registry is worth circumventing the same expenditure on other projects and departments. In the 2016 Union Budget, the Indian government plans to spend INR 250 crores on modernizing police forces,[108] and it would serve the government well if such modernization plans included prison infrastructure development and provision of educational and mental health programs to ensure that individuals in prisons are effectively rehabilitated. This would ensure that the released individuals are capable of contributing to society, as opposed to more crime control measures like the SOR that may be counterintuitive.

B. THE SOCIAL COSTS OF CRIME CONTROL

The Indian government can learn an important lesson from the American crime control experiment. Beginning in the 1970s, American crime control policies focused on incapacitating individuals as a way to control crime. This increased public spending on prisons and other detention facilities. This was further stimulated by the rapid changes in

---

[106] *Some States Refuse to Implement SORNA, Lose Federal Grants*, PRISON LEGAL NEWS (Sept. 19, 2014), https://www.prisonlegalnews.org/news/2014/sep/19/some-states-refuse-implement-sorna-lose-federal-grants/.
[107] Gabe, *Feds Begin Penalizing States that haven't Adopted U.S Sex Offender Law*, THE CRIME REPORT (Apr. 12, 2012), http://thecrimereport.org/2012/04/12/2012-04-sorna/.
[108] *Major Programmes under Central Plan*, UNION BUDGET (2016-2017) at ¶ 16, http://indiabudget.nic.in/ub2016-17/bag/bag42.pdf.

more punitive laws, such as mandatory minimum sentences for offenders,[109] truth-in-sentencing laws,[110] three-strike laws,[111] and youthful offender laws,[112] which continued to drive public spending on correctional agencies. But it took over forty years for the federal government and state governments to realize that this punitive turn has failed to curb crime.[113] Until 2015, 11 states were found to have spent more on their corrections department than higher education.[114]

In 2003, advocacy groups started to push for 'justice reinvestment'. It aimed to "redirect some portion of the $54 billion America spends on prisons, towards rebuilding the human resources and physical infrastructure- the schools, healthcare facilities, parks, and public spaces- of neighborhoods devastated by high levels of incarceration.[115] With fiscal pressures, the true model of justice reinvestment is yet to take shape but this model holds promise. Similarly, instead of increasing public spending on setting up SORs and diverting

---

109 *Federal Mandatory Minimums*, Families Against Mandatory Minimums (Aug. 6, 2012), http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf[Federal Mandatory Minimum Sentences have been established for a range of offences including drug possession].

110 The Violent Crime Control and Law Enforcement Act, H.R. 3355 (1994) § 20102(a)(1) to receive state truth-in-sentencing grants, a state must show that it: "has in effect laws which require that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed; or 2) since 1993- (A) has increased the percentage of convicted violent offenders sentenced to prison; (B) has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison; (C) has increased the percentage of sentence which will be served in prison by violent offenders sentenced to prison; and(D) has in effect at the time of application laws requiring that a person who is convicted of a violent crime shall serve not less than 85 percent of the sentence imposed if-(i) the person has been convicted on 1 or more prior occasions in a court of the United States or of a State of a violent crime or a serious drug offense; and (ii) each violent crime or serious drug offense was committed after the defendant's conviction of the preceding violent crime or serious drug offence".

111 John Clark, et al., *"Three Strikes and You're Out": A Review of the Legislation*, NIJ RESEARCH BULLETIN (1997), https://www.ncjrs.gov/pdffiles/165369.pdf [For an exhaustive list of states that have three strikes laws].

112 *For e.g.*, in Massachusetts, M.G.L Ch. 119 §52: "Youthful offender", a person who is subject to an adult or juvenile sentence for having committed, while between the ages of fourteen and 18, an offense against a law of the commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison, and (a) has previously been committed to the department of youth services, or (b) has committed an offense which involves the infliction or threat of serious bodily harm in violation of law, or (c) has committed a violation of paragraph (a), (c) or (d) of section ten or section ten E of chapter two hundred and sixty-nine; provided that, nothing in this clause shall allow for less than the imposition of the mandatory commitment periods provided in section fifty-eight of chapter one hundred and nineteen".

113 TODD C. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA (2014).

114 Katie Lobosco, *11 States spend more on prisons than on higher* education, CNN (Oct. 1 2015), http://money.cnn.com/2015/10/01/pf/college/higher-education-prison-state-spending/.

115 Susan Tucker & Eric Cadora, *Justice Reinvestment*, IDEAS FOR AN OPEN SOCIETY, 13/3, 3 (2003); Macro Level, *supra* note 78, at ¶ 177.

police resources to keep up with registration and notification, if the amount of money kept aside for SORs is instead diverted towards helping communities, it would prevent an adverse impact on social order and social control. Such spending could be diverted towards sex education in schools, sex offender treatment programs, after school programs, community and family counseling and sensitization training for law enforcement, lawyers and judges- all of which, are necessary and have been neglected.

C. DUE PROCESS VIOLATIONS

The most troublesome aspect of the Indian government's decision on setting up SORs is the possible inclusion of those individuals who have merely been charged with a sex crime, but have not yet been tried in a court of law. The Supreme Court of India has previously pointed out that "*denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm*".[116] Without a trial, punishing someone as a sex offender, especially a juvenile, is an egregious violation of his/her Fundamental Right of due process. The role of the court is to ensure that a guilty man does not escape, but also that no innocent man is punished.[117] Furthermore, the Supreme Court has also pointed out that the American notions of due process and the proportionality clause of the Eighth Amendment are especially relevant in death penalty cases, where such considerations have been incorporated in our Constitution, and are virtually articulated through the procedural safeguards of Section 235(2) read with Section 354(3) of the Code of Criminal Procedure, 1973.[118] Depriving any person of life and personal liberty must be "just, reasonable and fair".[119]

If the Indian SOR does go forward with the guidelines as disclosed by the media, then it would clearly undermine the constitutional right to a fair trial. It could also potentially reduce the actual reporting of crime because regardless of the intended target of a SOR law (adult or juvenile), such a law ignores the victims' perspectives especially in the case of

[116] National Human Rights Commission v. State of Gujarat and Ors, (2009) 6 S.C.C. 767.
[117] Dayal Singh and Ors. v. State of Uttaranchal, CRIM. APP. No. 529/2010, decided on 03.08.2012.
[118] Rajesh Kumar v. the NCT Government of Delhi, (2011) 13 S.C.C. 706.
[119] *Id.* at ¶ 80.

familial sexual abuse. Incest victims who have experienced criminal justice involvement are particularly reluctant to report new incest crimes because of the disruption caused to their family.[120] There is a very real threat of the family being exposed to community rebuke because of the registration and notification of an individual as a sex offender. It is also unfair to non-offending persons whose lives are impacted negatively by the advertising of their relative or spouse as a sexual offender. These laws have tremendous potential to victimize non-offending citizens.[121] A study in New Jersey, where SOR and notification laws were first enacted, found that there was a decrease in the reporting of both incest and juvenile sex offences by victims and by family members who do not want to deal with the impact of a public notification on their family.[122]

VII. CONCLUSION

It is understandable that the Indian Government wants to reduce the number of crimes against women. By setting up a national SOR, the Indian government stands to face the same problems as the U.S. Instead, the concern should be about assessment: how good are we are at assessing real offending risks? Does a blanket, one-size-fits-all policy, for sex offenders eliminate such risks? With SOR laws, the way they are, and the way they are being framed, assessment of actual risks is not even a consideration when it should be.

The American experience with SORs presents a roadmap of how not to deal with the prevention of sexual violence. Sexual violence needs to be tackled from multiple avenues, and not just through crime control measures. The impact of sexual violence must be understood from a victim's perspective. Local, State and Central law enforcement need to recognize that sexual violence is often committed by those who know their victims intimately. The lack of recognition of marital rape as a sexual offence is also troubling, but it also highlights the fallacy of setting up a national SOR. Will a wife be willing to call out her husband as a sex offender to her family and community? The questions, issues and concerns raised in this paper must be addressed by the Indian government before coming up with policies that are

---

[120] *Adolescent Development, supra* note 81, at ¶240.

[121] Robert E. Freeman Longo, *Feel Good Legislation: Prevention or Calamity?*, CHIL. AB. & NEG 20(2) 95, 96 (1996).

[122] *Id.* at ¶ 99.

inspired by other countries. What is observed to work in one country does not necessarily mean it will work in another. More importantly, there is need to understand punishment and its role in society. As Beccaria astutely stated, "punishment is neither to torture a man nor to undo a crime already committed. The object of punishment is simply to prevent the criminal from injuring anew his fellow citizens and to deter others from committing similar injuries".[123] Therefore, based on both, theory and empirical research, it is unlikely that a National SOR is the appropriate way to punish a sexual offender.

---

[123] MARCELLO MAESTRO, CAESAR BECCARIA AND THE ORIGINS OF PENAL REFORM, 26 (1973).

National Law University Jodhpur Law Review (2017)

ISSN: 2326-5320

Published By-

The Registrar

National Law University, Jodhpur

NH-65, Mandore

Jodhpur-342 304

Rajasthan (INDIA)

E-mail- lawreviewnluj@gmail.com, nlu-jod-rj@nic.in