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From the Editor's Desk

While it may be a commonplace statement, it is nevertheless true to state that we live in an age of vast and increasing complexity in the areas of science, technology, finance, economics and law, and this complexity can at times be overpowering. Long gone are the days when even the gifted layman could hope to retain a scholarly understanding of current developments in such areas. Such a realization tempts us all to give up any attempt at understanding and to leave such matters to the experts. However to yield to that temptation is to place yourself in the hands of the knowledgeable, and the knowledgeable are not always the wise. The experience of the last few years, at the very least, suggests that experts too can get it wrong, often spectacularly so the public should be better educated about matters of fundamental importance to their lives, particularly in the area of legal understanding.

This Journal provides a really exciting opportunity to consider the truly interdisciplinary nature of law and legal matters and its existence in various fields and countries justifying its extended scope and subject matter. This fourth issue of the Amity Law Journal is proud to have contributed to the academic discipline of law as it focuses on many areas of subject matter such as Crowdfunding as a way to earn successful capital, Role of drug menace in society, Food security in South Asia and the prospects of SAARC food bank, The myth of restitution applicable to airline passengers in Nigeria, and various other matters related to law.

By any measurable standard, our exclusively journal has been successful as we have seen a steady increase in readership, article and research paper submissions, and citations to our published articles. However, we have also grown in less quantifiable ways: our reputation and visibility in the academic community continues to broaden, and our editorial board constantly reassesses and revises the editorial process to ensure the most efficient and satisfying experience for readers as well as authors.

It is due to the support of our faculty advisors, the hard work of our editorial committee, and the interest of our readers that we are able to celebrate our success and making this journal possible, and we hope that this tripartite support continues in the future.

The editorial committee recognizes and thanks the authors from different countries, without whose tenacity, resolve and enthusiasm for research, this journal would not have been possible. The editorial committee also places its deep sense of gratitude to the reviewers for their insightful opinions to the authors, which have been valuable in magnifying the quality of the papers and bringing out the journal in its present form.

We hope that this Journal will prove to be an invaluable reference, and a rich source of notice and direction to all researchers from academia, corporate, and those in practices.

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IN SEARCH OF FOOD SECURITY IN SOUTH ASIA, THE PROSPECTS OF SAARC FOOD BANK

Ravi Prakash Vyas* and Yugichha Sangroula*

Abstract

Once an exemplary granary in the world, South Asia is today a region where one of three people sleeps with a hungry stomach. Millions of people suffer from chronic poverty in the region. Statistics reveal that development indicators, both collective and individual, are far from desirable. The region ranks the lowest in hunger and development indexes. It is the common responsibility of the nations of the region to work towards getting rid of poverty and its ailments in the region to foster sustainable food security. Such common responsibility should be met by regional collaborations such as the SAARC food bank. Although the bank should not be taken as a messiah who would zap away food insecurity in the region, its scope to provide aid in emergencies and drive price mechanism in the region is very considerable. However, the existing impediments; technical, economical and legal should be tackled before the operationalization of the food bank which is due since 2009. Lessons should be learnt from failure of the previous food reserve as well. In the end, nothing can undermine the necessity of a dependable collective food reserve while South Asia is doubly coping up with the changing climate and its adversities.

Keywords Chronic poverty, Ailments, SAARC, Food bank, Food reserve

I Introduction

Hunger is the most undesirable problem globally as demonstrated by the fact that its eradication is the first MDG. However, the 2009 *World Declaration on Food Security* notes that “while strides have been made, the overall efforts so far have fallen short of achieving the MDG”¹ which is confirmed by the 2012 *GHI* which shows that overall progress in reducing the proportion of hungry people in the world has been tragically slow.² According to the Index, hunger on a global scale remains “serious.” 20 countries still have levels of hunger that are ‘alarming’ or ‘extremely alarming’.

Among the world’s regions, South Asia and Sub-Saharan Africa continue to have the highest levels of hunger. These results represent extreme suffering for millions of poor people. The GHI track for South Asia is the worst. South Asia and Sub-Saharan Africa, the two regions have the highest GHI scores with 22.5 and 20.7 respectively³. This means that South Asia is the most hunger-stricken part of the world. Best estimates show that about one-third of the poor population in South Asia is chronically poor - between 135 and 190 million people.⁴

There are marked similarities among the South Asian nations apart from their geographical proximity and socio-cultural affinities. All of the nations of this region have HDI rank excess of 100 with India at 134, Pakistan at 145, Bangladesh at 146, Nepal at 157, Bhutan at 141, Maldives at 109, Afghanistan at 172, with the exception of Sri Lanka which is at 97.⁵ 2012 *World Development Indicators* (WDI) has pointed out that over

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¹ *World Declaration on Food Security* (2009)

<http://www.fao.org/fileadmin/templates/wsfs/Summit/Docs/Final_Declaration/WSFS09_Declaration.pdf > at 10 November, 2012.

² See IFPRI, *2012 Global Hunger Index, The Challenge of Hunger, Ensuring Sustainable Food Security under Land, Water and Energy Stresses* (2012) 3.

³ *Ibid* 11.

⁴ CPRC, *Understanding chronic poverty in South Asia* <<http://www.pide.org.pk/pdf/foodsecurity/research/FS3.pdf>> at 11 November, 2012, 1.

⁵ World Bank, *Human Development Indicators* (2011) <http://hdr.undp.org/en/media/HDR_2011_EN_Table1.pdf> at 10 November, 2012.

80% of the employed people in South Asia are in vulnerable employment.⁶ More disaggregated indicators of human development, i.e., infant mortality rate, maternal mortality rate, illiteracy or life expectancy at birth tell the same story.⁷

Food insecurity and hunger are Siamese twins. “High hunger rates in South Asia are due to a complex combination of factors, including food availability and access, disease and inadequate dietary intake.”⁸ There are considerable, albeit limited progresses in addressing these concerns domestically, however there is a huge potential for cooperation and complementary action. One of such areas, i.e. The SAARC Food Bank shall be discussed in this paper. The authors envision such regional collaboration to supplement country-level action.

SAARC was founded on December 8, 1985, in order to seek and promote the intra-regional cooperation and reciprocal assistance in economic, social, cultural and scientific fields.⁹ The *SAARC Social Charter* mentions nutrition and food security as two of the core agendas of the organization¹⁰. However, the manifest challenges like those aforementioned nudged SAARC member states to reaffirm their resolve to ensure region-wide food security and make South Asia, once again, the granary of the world during the 15th SAARC Summit held in Colombo on 2nd and 3rd August, 2008.¹¹ The *2008 SAARC Declaration on Food Security*, which was adopted by the Extraordinary Session of the Agriculture Ministers at New Delhi recognizes that sharing of best practices in food security is also of strategic importance to the SAARC region.¹²

Meanwhile, a dramatic increase in food prices from mid-2007 to mid-2008 brought in sharp focus the critical need for ensuring food security in most developing countries especially to protect the poor and vulnerable households.¹³ The FAO food price index rose on average by 56% in this period and an estimated 75 million people joined the number of hungry in 2007.¹⁴ Speakers at the 15th SAARC Summit warned during the second day of the discussion that due to a shortage of staples, 17 percent and 35 percent of the total population of South Asia might face the worst forms of food insecurity by 2050 and 2100 respectively. Accordingly, urges were made to take urgent action to ensure food security and the SAARC Food Bank was placed as a top agenda at the 15th SAARC Summit.¹⁵

The Food Bank was supposed to operationalize the year following the summit.¹⁶ Meanwhile agriculture in the south Asian region is caught in a low equilibrium trap with low productivity of staples, supply shortfalls, high prices, low returns to farmers and area diversification and all these factors are threat to food security. The effects of a dysfunctional food bank have been most profound in the times of crisis, including natural calamities.

⁶ World Bank, *Regional Highlights, WDI* (2012) 10.

⁷FAO, *Food Security In South Asia* (2010) <<http://www.fao.org/docrep/004/ab981e/ab981e0a.htm#bm10.1>> at 10 November, 2012, 3.

⁸ The Humanitarian Center, ‘Report, Seminar on Food Security and Hunger in South Asia’, Hughes Hall, Cambridge, (27 February 2010) 5.

⁹ Muhammad Saleem Mazhar et al., ‘Revisioning SAARC’ (2011) 3(1) *Interdisciplinary Journal of Contemporary Research in Business* 734.

¹⁰ *SAARC Social Charter*, SAARC Doc SAARC/SUMMIT.12/SC.29/27, preamble. Observing that regional cooperation in the social sector has received the focused attention of the Member States and that specific areas such as health, nutrition, food security, safe drinking water and sanitation, population activities, and child development and rights along with gender equality, participation of women in development, welfare of the elderly people, youth mobilization and human resources development continue to remain on the agenda of regional cooperation

¹¹ Muhammad Iqbal and Rashid Amjad, *Food Security in South Asia, Strategies and Programmes for Regional Collaboration* (2010) <<http://www.pide.org.pk/pdf/foodsecurity/research/FS3.pdf>> at 11 November, 2012, 10.

¹² SAARC Declaration on Food Security (5 November 2008), declaration 4.

¹³ Iqbal and Amjad, above n 11, 1.

¹⁴ FAO, *World Food Situation: Food Prices Indices* (2010)

<<http://www.fao.org/worldfoodsituation/FoodPricesIndex/en/>> at 11 November, 2012.

¹⁵ ‘SAARC leaders urged for food security’, The Kathmandu Post (Kathmandu) 27 April 2010.

¹⁶ *Ibid.*

Faruque Ahmed opines that global food and commodity market, as dominated by several multinational oligarchies, has become a vital weapon of exploitation these days, no matter it aggravates the suffering of the nations in supply crisis. It especially pushes the poor in this situation to starvation in absence of either an adequate supply in the network or due to its exorbitant price beyond the affordability of the common people. South Asia has several rice producing nations close to its border like Myanmar, Thailand, Vietnam or Cambodia. But buying of stock is not always an easy task conditioned by bulk order and forward booking of harvest by big parties like China or for exorbitant price that sellers may charge to exploit the emergency situation. Thus a common regional approach to food security can only save the nations in supply crisis and the SAARC leadership should prove that they can do it keeping beyond their parochial politics.¹⁷

The paper shall examine the factors that led to formulation of the SAARC food bank, its roles and potentials while also discussing on the prospects of such an institution to fortify food security in the region.

II The concept of food security and the current scenario in South Asia

In the mid-1970s, as rapidly increasing prices caused a global food crisis, food security emerged as a concept.¹⁸ Right to food secured a respectable place in article 11 of the *1966 International Covenant on Economic, Social and Cultural Rights*.¹⁹ The instrument considered sustainability and adequate foods as part and parcels of food security.²⁰

The *1996 World Summit on Food Security* enumerates on its conceptual framework as:

Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. In this regard, concerted action at all levels is required. Each nation must adopt a strategy consistent with its resources and capacities to achieve its individual goals and, at the same time, cooperate regionally and internationally in order to organize collective solutions to global issues of food security.

The *2006 National Commission on Farmers* of India elaborates that:

Every individual has the physical, economic, social and environmental access to a balanced diet that includes the necessary macro and micronutrients, safe drinking water, sanitation, environmental hygiene, primary healthcare and education so as to lead a healthy and productive life.

The concept of food security encompasses four essential dimensions, which have been discussed below:

a) Availability (Producing Enough To Eat)

Availability of food is measured across five indicators: sufficiency of supply, public expenditure on agricultural research and development, agricultural infrastructure, volatility of agricultural production and political stability risk.²¹

b) Accessibility (Having Enough To Eat)

The accessibility to food depends on factors like incomes, sources of income including remittances, income disparities, real food prices, landlessness, gender, literacy, and employment status.²²

¹⁷ Faruque Ahmed, *SAARC Food Bank: When Will It Kick Off Business* (2010) 1.

¹⁸ World Bank, *What are the links between agricultural production and food security?*

<http://siteresources.worldbank.org/INTWDR2008/Resources/2795087_1192112387976/WDR08_07_Focus_C.pdf> at 12 November, 2012.

¹⁹ International Covenant on Economic Social and Cultural Rights (1996) 993 UNTS 3, article 11(1). The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.

²⁰ UN Economic and Social Council, General Comment 12 to International Covenant on Economic Social and Cultural Rights, para 8.

²¹ EIU, *Global Food Security Index* (October 2012).

²² Iqbal and Amjad, above n 11, 6.

c) Utilization (Converting Access To Food Into Nutritional Well-Being)

This is measured across five indicators: diet diversification, government commitment to increasing nutritional standards, micronutrient availability, and protein quality and food safety.²³

d) Stability (Having Continued Access)

This implies that the people have all time access to adequate food without involving any risk of losing physical availability and economic access to it as a result of economic shocks and resulting higher prices, natural disaster (floods, droughts, earthquakes, cyclones, and tsunamis), and wars. At a time when global food prices show wide fluctuations this is an important challenge faced by countries in South Asia especially in balancing the need for food security with that of providing price incentives for farmers to increase productivity and output.²⁴

The state of food security in South Asia are reflected in the figures below:

A. GDP Growth Rate²⁵ and Agriculture, value added (% of GDP)²⁶

Indicator	Afganistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
GDP Growth Rate	8.1	6.6	8.4	6.8	7.5	3.8	2.3	8.9
Agriculture, value added (% of GDP)	30	18	19	17	3	38	22	14

B. Affordability

Indicator	Assessment Parameter	Bangladesh	India	Nepal	Pakistan	Sri Lanka
Food consumption share of household expenditure	% of total household expenditure	53.81	49.5	70.8	47.6	39.6
Proportion of population under global poverty line	% of population living under \$2/day PPP	76.5	68.7	57.3	60.2	29.1
Inflation	%	6.3	7.9	10.4	18.9	N/A
Agricultural import tariffs	%	17.6	31.8	14.1	17	26.3

²³ EIU, Above n 21.

²⁴ Iqbal and Amjad, above n 11, 6.

²⁵ World Bank, WDI (2011).

²⁶ World Bank, WDI (2007-2011).

Presence of food safety net programs	Qualitative assessment(0-4)	2	3	1	1	2
Access to financing for farmers	Qualitative assessment (0-4)	3	3	1	2	2

Source: GFSI, 2012 and WDI, 2011

C. Availability

Indicator	Assessment Parameter	Bangladesh	India	Nepal	Pakistan	Sri Lanka
Average food supply	kcal/capita/day	2281	2353	2360	2293	2361
Dependency on chronic food aid	Qualitative assessment (0-2)	0	1	1	1	1
Political stability risk	(0-100)	70	25	65	65	45

Source: GFSI, 2012

D. Nutrition

Indicator	Assessment Parameter	Bangladesh	India	Nepal	Pakistan	Sri Lanka
Prevalence of undernourishment	%	26	19	17	25	20
Percentage of children underweight	%	41.3	43.5	38.8	31.3	21.6
Intensity of food deprivation	kcal/person/day	290	240	130	280	250
National Nutrition Plans or Strategies	-	1	1	1	1	1

Source: GFSI, 2012

E. Overall Score

Country	Score	Rank (out of 105)
Sri Lanka	46.3	63
India	44.2	66
Pakistan	37.6	76
Nepal	34.5	79
Bangladesh	33.9	81

Source: GFSI, 2012

III Conceptualization of SAARC Food Bank

A Food Security Reserve for SAARC was established in 1988 to address the problem of food insecurity in the region.²⁷ The proposal for holding a regional food reserve was first put forward by the then Indian Prime Minister, Rajiv Gandhi, during his inaugural speech at the Third Session of the Council of Ministers of the SAARC member countries in New Delhi in June 1987.²⁸ The proposal was motivated by two complementary goals, India's probability of emerging as a net supplier of food grains to the needy fellow members in the region, an expectation arising out of its growing self-reliance, and a general desire to mobilize regional efforts in meeting occasional food crises brought about by natural disasters and calamities.²⁹

However, the regional scheme fell short of various essential preconditions like "agreement on domestic food policies, on emergency buffer stocks, and on sharing the financial burden"³⁰, political commitment and desire, realistic assessment of the regional food requirements and the potentials of the member countries, compounded by managerial and economic problems regarding its implementation.³¹

The Food Bank replaced the earlier Food Security Reserves which was established in 1988.³² At the 15th summit in Colombo in August, 2008, the lessons learnt from the failure of the Food Security Reserve was put to use by SAARC members in their efforts to operationalise the Food Bank.³³ The *Agreement on Establishing the SAARC Food Bank* pronounces the objectives of this forum under article II as:

*to act as a regional food security reserve for the SAARC Member Countries during normal time food shortages and emergencies; and to provide regional support to national food security efforts; foster inter-country partnerships and regional integration, and solve regional food shortages through collective action.*³⁴

The reserve of the bank was agreed upon to remain the property of the member country that has earmarked it and be maintained by that member country³⁵ and draw on food grains forming part of the Reserve in the

²⁷ RB Singh, *Towards a Food Secure India and South Asia : Making Hunger History* < <http://www.apaari.org/wp-content/uploads/2009/08/towards-a-food-secure-india-making-hunger-history.pdf>> at 11 November, 2012, 42.

²⁸ Narayan Khadka, 'Regional Cooperation for Food Security in South Asia' 15(6) 492 *Food Policy* 492.

²⁹ Ibid.

³⁰ See generally World Bank, *Poverty and Hunger Issues and Options for Food Security in Developing Countries* (1986). Any regional scheme is incomplete without the precursors stated above.

³¹ Khadka, above n 28, 2.

³² Surabhi Mittal and Deepti Sethi, ' Food Security in South Asia: Issues and Opportunities' (Working Paper 240, ICRIER, 2009) 21.

³³ Ibid.

³⁴ *SAARC Agreement on Establishing the Food Bank* (2008), article II.

³⁵ Ibid, article III (2).

event of a food emergency and/or shortage.³⁶ The cross-cutting included determining the prices and methods for movement and delivery of food grains.³⁷

The SAARC Food Bank's board met for the first time in Colombo in October 15-16, 2008. While India remains the largest contributor to the bank, both Pakistan and Bangladesh will offer 40,000 tons each. Nepal and Sri Lanka will provide 4,000 tons each followed by Afghanistan (1,420 tons), Maldives (200 tons) and Bhutan (180 tons).³⁸ The meeting of the South Asia Civil Society Forum, convened by the Nepal-based South Asia Watch on Trade, Economics and Environment (SAWTEE) in October, 2008 suggested to the SAARC Secretariat nine measures to simplify the operation of the food bank.³⁹

The agreement on the food bank is to enter into force on a date to be determined by the Council of Ministers upon completion of all requisite formalities, including ratification by all the Member Countries and issuance of a notification thereof by the Secretary General of SAARC.⁴⁰ However, such determination has not been made till date.

The 17th SAARC Summit concluded in 2011 by adopting a very promising 20-point agenda including making efforts to resolve the operational issues related to the SAARC Food Bank by the next session of Council of Ministers with a view to ensuring its effective functioning.⁴¹ However, in the fifth special meeting of the food bank board, it was stressed upon that that issues like prices of foods, concession rate and operational modalities are yet to be finalized for the food bank, since the member nations did not take any unilateral stance over those issues.⁴² *The Fourth Conference of the Association of SAARC Speakers and Parliamentarians* became forum to raise the issue of the failure to launch a SAARC food bank since the idea came up seven years ago.⁴³

IV Impediments in its Operationalization

It is learnt that the SAARC Food Bank is visibly facing setback this time from the absence of ratification of the agreement by the Afghan government.⁴⁴ The slow move of the Kabul government has put on hold the entire process at a time when all remaining seven members of the group have already ratified it.⁴⁵

SAARC Food Bank's functioning is quite vulnerable to several procedural issues; although it has already traveled quite a long distance. Lack of political will remains the biggest impediment coupled with a negative attitude of bureaucracy. Again cooperation by the bureaucracy in member states is equally significant to implement decisions at political levels. These are the identified problems that every member state should understand and take step to remove the snags.⁴⁶

³⁶ Ibid, article V (1).

³⁷ 'Cooperation sought to make SAARC Food Bank a success', *The Daily Sun* (Bangladesh), 14 May 2012.

³⁸ 'SAARC nations plan food bank to ward off crisis', PTI (India), 5 November 2008.

³⁹ a) periodically estimate food demand; b) undertake measures to increase the storage capacity available in member states; c) undertake regional food mapping in terms of vulnerable regions and populations to improve access to food in remote and inaccessible areas; d) ensure greater political co-operation, establish a dispute settlement mechanism and put together public-private partnerships as integral parts of the Bank's procurement modality; e) improve member countries' responsiveness to the needs of those in crisis through quicker decision making and simplified procedures; f) adopt less rigid procedures and norms for price setting; g) maintain an apolitical, non-partisan distribution system that is responsive to seasonal food insecurity; h) ensure quicker movement of food grains and i) reduce storage and transportation costs and losses.

⁴⁰ Food Bank Agreement, n 34, article XIV (1).

⁴¹ 'Sarc sumiteers adopt promising 20-point agenda', *The Nation*(India), 12 November , 2011.

⁴² Above n 37.

⁴³ Bijoy Patro, 'SAARC Parliamentarians discuss food bank', *OneWorldSouthAsia*, 7 November, 2012.

⁴⁴ Faruque Ahmed , SAARC Campaign Brief: *SAARC Food Bank: When Will It Kick Off Business* (January 2011) 1.

⁴⁵ Patro, above n 43.

⁴⁶ Ahmed, above n 44, 2.

V The Road Ahead

With reference to ADB's recommendations to cope up with the challenges for the ASEAN plus Three Emergency Rice Reserve, in summation, the Food Bank has to overcome following challenges:

Technical Issues: The first set of challenges relates to technical issues on the release and storage of stocks. A strategy of raising a suitable level of stockpiled reserve as well as identifying the appropriate forms and locations of storage, to provide immediate assistance for disaster victims in the throes of a food emergency would be beneficial.⁴⁷

Financial and Economic Issues: While countries have agreed to support the overhead costs of APTERR, providing funding for programs and operations is a different matter. The challenge now is to mobilize strong financial support from all member countries, based on supported by India, with significant support from others. A broader base of participation is called for.⁴⁸

Legal and Institutional Issues: Both the regional reserve and the national stock agencies should achieve some level of organizational capacity; on the distribution side, the logistic and market infrastructure should also meet some minimum standards for intended benefits to be realized once a release from the reserve is made. The institutional prerequisites also cover the harmonizing of laws, policies, and regulations among the member countries to facilitate food security cooperation and the rapid movement of grain stocks.⁴⁹

This organization has procedural flaws that need to be resolved quickly. One such problem is deciding on supply intervention, when and how quickly. The second problem relates to price fixation.⁵⁰ The SAARC Food Bank should agree to a price mechanism which would offer reasonable, humane and concessional price, closer to open market price without passing the overhead cost of economic inefficiencies on the buyers. Harmonization of quality is also a big challenge. Another problem may create impediment relating to food statistics.⁵¹

Similarly, the terms of reference of the Food Bank and the authority of its board of governors may also be made more pragmatic to produce quick results in short time.⁵² Also, a committee of experts (from member states) should determine the optimal size of such reserves as well as build consensus about development of needed infrastructure and operational modalities. The committee should also pursue the member states for greater political backup and economic cohesion in this regard.⁵³

The summary of the proceeding and recommendations of the Fourth South Asia Economic Summit For speaks out that for effective implementation of SAARC Food Bank, trigger mechanisms should be made clearer, price fixation policies should be revised, and operational procedures should be simplified.⁵⁴

In a different light, South Asia is a disaster prone area. According to German watch (2010), Bangladesh tops the Global Climate Risk Index. The World Bank (2009b) gives an idea of the scale of disaster damage in South Asia, saying "between 1990 and 2008, more than 750 million people, 50% of the region's population, were affected by a natural disaster, leaving almost 60,000 dead and resulting in about \$45 billion in damages."⁵⁵

⁴⁷ Roehlano M. Briones, 'Regional Cooperation for Food Security: The Case of Emergency Rice Reserves in the ASEAN Plus Three' (Sustainable Development Working Paper 18, Asian Development Bank, 2011) 16.

⁴⁸ Ibid, 16.

⁴⁹ Briones, above n 47, 17.

⁵⁰ People's Campaign on 17th SAARC Summit, *Briefing Paper For Building Opinion: SAARC Food Bank: Will It Be Enough Broad Based* (November 2011) 4.

⁵¹ Ibid.

⁵² Ahmed, above n 44, 1.

⁵³ Iqbal and Amjad, above n 11, 34.

⁵⁴ CPD, *Summary of the Proceedings and Recommendations, Fourth South Asia Economic Summit* (October 2011), 17.

⁵⁵ Duryog Nivaran Secretariat, *South Asia Disaster Report, Changing Climate, Impeding Risks, Emerging Perspectives* (2010) 28.

Operationalization of the food bank is met with the urgency of increasing food supply to the disaster stricken areas since SAARC Food Bank is not visible nowhere, not even symbolically.

VI Conclusion

The SAARC food bank is not the messiah of a largely food insecure south asia, but one of the areas for regional cooperation. It is one of the few regional collaborations to foster food security in the region (the concept of a SAARC seed bank is a different story altogether) and when we say region, we visualize a hunger free south Asia, which is the common responsibility of all the member states of SAARC. However, despite its enlarged scope, the food bank is met with similar impediments that the earlier 1988 food reserve succumbed to. The impediments in this regard are lack of political will, including non ratification by Afghanistan till date. However, these are not the only matters to be taken care of prior to kick-starting of the food bank. Matters like simplification of procedures, fixation of price and its mechanism, determination of a more purposive size of the reserve and others should be sorted out. Also, regional cooperation fuels every regional institution. It is in the hands of the member states to convince each other to enhance support to the food bank.

The bank is yet to prove its worth in the region. Once it starts operating, its effectiveness in the times of crisis shall determine whether it is sustainable or not. The best practice shows that such organizations should be flexible in their design and route to make necessary alterations. However, the food bank should not be treated as a Noah's ark in the times of crisis. National food reserves and the food bank should jointly endeavor tackling such crisis.

CROWDFUNDING: A SUCCESSFUL WAY OF RAISING CAPITAL?

KRATI RAJORIA*

Abstract

Crowdfunding though not as popular in the western worlds is slowly catching up with other sources of raising capital in India. It can be seen “as the practice of raising various small sums of money from a large number of people through online platforms (crowdfunding platforms) to fund a project, cause or business.” The article analyses the risks that the start-ups face and along with them the investors too. It also discusses the risks involved in investments through crowdfunding and whether it is worth it in long run long with the need for its regulation. The article further discusses UK’s, USA’s, Australia’s and Italy’s models of regulation for crowdsourcing and protecting the interest of investors. These models are just few of the leading models in the world and they can serve as a source of valuable information to SEBI so that it can figure out the ways to proceed with the task for regulating them ensuring the protection of investors’ interests. More importantly, they show that if SEBI plays its cards right, it can foster the right environment for growth of this unorthodox method of investing as well as MSMEs and start-ups that are the chief beneficiaries of crowdfunding. The article concludes with the suggestions on methods to strike a balance between the well-being of start-ups and investors.

Keywords Online platforms, risks, models of regulation, SEBI, investors

I Introduction

Crowdfunding entails the practice of raising various small sums of money from a large number of people through online platforms (crowdfunding platforms) to fund a project, cause or business.⁵⁶ There are various categories of crowdfunding – by way of donations (donation crowdfunding); by way of expecting a return in terms of service/product (reward crowdfunding); peer-to peer lending; or an equity ownership in a business (equity crowdfunding). This essay shall focus on equity crowdfunding, the risks and recommendations for its mitigation.

The history of the crowdfunding term can be understood as part of the broader historical and entrepreneurial narrative of the Internet and, particularly, of the Web 2.0 and social media. Its roots can be traced to the notion of “crowdsourcing” that became popular in the first decade of the twenty-first century. “Crowdsourcing” consists in leveraging the power of larger groups of individuals (“crowds”) to obtain ideas, feedback, and solutions to develop corporate activities.⁵⁷ Proponents of “crowdsourcing” built on the so-called “wisdom of the crowd” argument developed by James Surowiecki (2004). According to this argument, a larger group of individuals can be more efficient than a single individual or small team in solving problems, forecasting, and taking decisions thanks to the power of collective thinking. Wise crowds are characterized by diversity of opinion, independence, decentralization, and aggregation.⁵⁸ It is precisely this “crowd,” understood as individuals with access to the Internet and spare money, the one that is tapped by creators/entrepreneurs in order to raise financial capital for their projects in the crowdfunding process.

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⁵⁶ Steven Bradford, *Crowdfunding and the Federal Securities Laws*, COLUMBUS BUSINESS LAW REVIEW 1, 10 (2012)

⁵⁷ J. Howe, *Crowdsourcing. Why the Power of the Crowd is Driving Future of Business*, Three Rivers Press, New York (2008)

⁵⁸ James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations*,

II Risks in the Equity Crowdfunding

Risks are inherent in every start-up initiative, leaving alone the substantially sound markets. Crowd funders are usually subject to high amounts of risk

The market being young and deal value being small, the first of such risks is dealing with the risk of an early-stage investment. Typically, every company raises money through their family and friends and then move on to those angel investors or sophisticated investors, and further to the venture capital. In countries where there is a lack of angel investors to serve those company's needs to get that early stage capital to really grow and prove their concept. Really serves to bridge that gap. Investing in a start-up company inherently involves risks of higher magnitude than investing in established companies, so much so that nearly half the startups will not survive beyond five years.⁵⁹ An ideal example of such a situation is the case of Bubble and Balm- a fair trade soap company. It was the first company to acquire funding via Crowdcube (an equity crowd-funding platform) in 2011. After issuing 15% of the company's equity, the business closed overnight in 2013, *sans* any method of recovering the losses.⁶⁰

The next category of risk is the lack of liquidity. The investors are unable to get back their reaped investments owing to the non-trading of crowdfunded securities. Investors cannot expect any returns from their investments anytime soon after their investment, since start-ups aim at long term benefits.⁶¹

Thirdly, a disincentive for creators is entailed in the disclosure requirements, as bringing out their innovative initiatives in front of the entire general public may leave their business idea as vulnerable. This may further result in issue of patent protection and aggravates the failure of negotiation. When the public is able to see and gauge precisely, the amount of money spent on raising a crowd-funded startup, they will try getting maximum leverage on the negotiations put forward.⁶²

Fourthly, one drawback of inexperience in equity crowdfunding is issuers possessing the power to misguide and cheat crowd investors by virtue of information asymmetry (issuer knowing his business better than the crowd investors), thereby leaving the investors vulnerable.⁶³ The general norm is that the investors do not indulge into the in-depth intricate review of the project they are investing in, thereby giving the fundraisers an opportunity to hide from the investors an information *sine qua non* to the project.⁶⁴

Fifthly, a lack of incentive and the adequate skills can prove to be contagious. It can be inferred that after having invested a huge amount of money, the fundraisers fall out on unique entrepreneurial and monitoring skills, hence fail to do justice to the investment.⁶⁵ The investor is not well-versed with the indoor management of the project, therefore there is nothing he can do, even if comes to know of the concealment of a pertinent fact. The investors hold too small a share in the equity to possess any voting rights against the company.⁶⁶

Since at the end of the day, the investors to the equity crowd-funding are mere inexperienced non-urbane stock of people, it is quite illogical to expect any sort of monitoring and crisis-resolving skills from their side. This incidentally results in lack of coordination and cooperation with the agencies, thereby thwarting the very essence of corporate governance.⁶⁷

⁵⁹ Kirby, Eleanor and Shane Worner, *Crowd-funding: An infant Industry Growing Fast*, Staff Working Paper of the IOSCO Research Department (2014).

⁶⁰ L. Warwick-Ching, T. Powley, and E. Moore, *Alarm bells for Crowdfunding as Bubble Pops for Soap Start-Up*, FINANCIAL TIMES, July 31, 2013.

⁶¹ Hu Ying, *Regulation of Equity Crowdfunding in Singapore*, SINGAPORE JOURNAL OF LEGAL STUDIES (2015).

⁶² Markowitz, E., *When Kickstarter Investors Want Their Money Back*, Inc. January 10, 2013.

⁶³ Fink, Andrew C., *Protecting the Crowd and Raising Capital Through the CROWDFUND Act*, UNIVERSITY OF DETROIT MERCY LAW REVIEW, 2012.

⁶⁴ Agrawal, Ajay A., et al., *Some Simple Economics of Crowdfunding*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER 19133.

⁶⁵ Shibani Mahtani, *The Other Facebook Founder*, THE WALL STREET JOURNAL, May 17, 2012.

⁶⁶ Jason Parsont, *Crowdfunding, the Real and the Illusotry Exemption*, 4 HARVARD BUSINESS LAW REVIEW. 281.

⁶⁷ Schwartz, Andrew A., *The Digital Shareholder*, MINNESOTA LAW REVIEW, 100: 609-85 (2015).

SEBI's proposal on restricting this market only to "accredited" investors who should not only possess the sufficient knowledge and skills but also wealthy enough to bear the brunt of losses⁶⁸, seems to make equity crowd funding a distant dream to achieve. This is so because the "crowd" in equity crowd-funding comprises nothing more than mere retail investors.

While coping with the issuer restrictions, it should be made compulsory that the company be registered in India, and also that maximum directors/shareholders be residents of India. This ensures that the Indian investors are able to track the economic growth of the company they have funded. Owing to the highly unreliable nature of the equity crowdfunded projects, a cap on the per capita investment made is desirable. This will ensure that the investors do not lose more than what is at stake, lest the company incurs complete losses as investors tend to be overly optimistic.⁶⁹ It is the investor's right to have access to more streamlined disclosure requirements, to further the investment in a better funding project after weighing the pros and cons. Also, effective communication is the key, because this renders wisdom to the crowd on the inconsistencies of information provided and effective performance by the crowd. There is strength in the power of crowd, therefore crowdfunding investors in India should be effectuated with voting right wherein they exercise their right to vote at Extraordinary General Meetings(EGMs)/ General Meetings in appointing a director. This as a group influences the company's decisions.

III Risk Mitigation Recommendations

In the Consultation Paper too, SEBI recognized that the entire essence of equity crowdfunding will be lost if it is bound by the same shackles that restrict the traditional routes of investments in a complex and heavily regulated regime. Still, we can clearly see the hazard these inexperienced, unsophisticated investors may venture into unguided. And one should never let their guard completely down. But even if the balance between too much regulation and too little regulation is a precarious one, it is still achievable. Thankfully, there are many regulation models around the world that SEBI can take lessons from.⁷⁰

It would be appropriate to begin these lessons from United Kingdom which has become a hot bed of crowdfunding platforms in Europe.⁷¹ There is no exclusive piece of legislation dealing with crowdfunding in United Kingdom, a position similar to most other countries. Financial Services Authority oversees crowdfunding under somewhat imprecise regulation of Financial Markets Act of 2000. The word 'financial promotion' is used for any kind of invitation to invest. It prohibits unregistered and unauthorized persons, legal or natural, from giving equity offerings to the general public.⁷² But exemption is granted to equity investment from kin, kith or connections. Other investment inducements can be made through FSA authorized crowdfunding portal. Securities can be offered otherwise to high-net worth individuals, who can better bear loss of small sum of investments and to sophisticated investors, who has expertise on and connection with the wider financial industry.⁷³ The interested investors can get a certificate of qualification. Theoretically, according to this all the crowdfunding websites will have to restrict securities-based crowdfunding on their websites to certified users, hiding behind a click wrap page. But this may be a potential turn-off for many investors but it will be worth it if it results in development of better investing trends in crowdfunding. Up to 150 people can invest on an offering with an upper limit of 5 million Pounds.⁷⁴ This is another way of minimizing risks.

In south, in Italy, crowdfunding resembles angel-investment because of the large amount of funds raised in most projects. Some of them are registered as limited liability companies, others as public corporations and then few are non-legal entities listed in their Company Register. The potential investees are limited to high-

⁶⁸ SEBI 2014. Consultation Paper on CROWDFUNDING IN INDIA.

⁶⁹ Cass Sunstein (eds), *Behavioral Law and Economics*, Cambridge University Press (2000), Chap 1.

⁷⁰ Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735, 1745 (2012)

⁷¹ Financial Markets Act, 2000 (UK)

⁷² Financial Conduct Authority Regulation on equity crowdfunding, 2014 (UK).

⁷³ R.S. Weinstein, *Crowdfunding in the US and Abroad*, 46 CORNELL INTERNATIONAL LAW JOURNAL 434 (2013).

⁷⁴ Gerrit K.C. Ahlers, *Signaling in Equity Crowdfunding*, YORK UNIVERSITY WORKING PAPER NO. 21 (2012).

tech businesses.⁷⁵ This can achieve two things: firstly, it would give Italian equity market time to get more comfortable around crowdfunding and allow the securities regulator to better educate investors. In order to ensure that only SMEs and start-ups benefit from this investment route, there is a limit on companies on basis of how old they are and how much output they have. Every crowdfunding round will have to undergo scrutiny of more experienced investors and before taking this route, business will have to attempt to attract investors through traditional route.⁷⁶

Down under, Australia's example is unique enough to warrant a closer look. It's organized on the lines of a typical stock market under Australian Corporations Act.⁷⁷ A separate Board hosts unlisted companies which offer freely transferable equity shares. Non-sophisticated investors are not allowed to exceed 20 in number in a financial year to whom the offers are made through professional experts called "sponsors".

In USA, it is the Jumpstart Our Business Startups Act (JOBS Act) which has enabled and encouraged the exploration of a new world of crowdfunding. It has given start-ups the much needed boost. It can be of two kinds: retail and accredited crowdsourcing. Individual investor is limited in the amount of equity he can acquire through investment and individual project by the amount it can raise in a year. The securities issued are non-transferable except back to original issuer or to an accredited investor, in a registered offering or family.⁷⁸

Looking at the above models, some valuable lessons can be drawn. The first task should be to allow only authorized crowdfunding platforms. Here, the question is whether they should be registered as brokers, since they act as middlemen between the start-ups and their investors or should they be allowed to model themselves on Italy and register as public or limited liability corporations. As the idea of stock brokers is not completely foreign to Indian securities scene, the former should be preferable. Strict eye should be kept on them and while the sums involved will be of low value, SEBI should not hesitate to crack down on them in case of violations.⁷⁹

On the potential investees, it should be kept in mind that the point of this entire enterprise of crowdfunding is to facilitate small-time businesses to meet small-time investors through the most convenient method i.e. online so that these small time businesses, if they have it in them, can blossom into the next Flipkart or Infosys when they cannot find any nurturing through banks or angel-investors.⁸⁰ Big and established businesses should not be allowed to use this source of funds when others have failed. Thus, this investment route should be limited to young fledglings and MSMEs. Then an upper cap should be imposed on number of investors, specially unsophisticated investors in a year and the sum raised through this method. They should be asked to keep their share pricing transparent to avoid fraud. But again, they should not be buried beneath red-tape so much that they drown.

Investors can be divided into sophisticated ones or with big money and unsophisticated ones. The former need some less looking and caring after. The unsophisticated ones maybe completely banned from crowdfunding platforms or they may be allowed where the experienced investors are there to overlook entire process. In our opinion, banning is a huge step and if investors are loaded and willing, they should be allowed freedom to invest after due caution. After all, Indians are obsessed with safe investments and they will not lightly throw their money away. They may be quizzed on their risk apprehension and appreciation before allowing them to invest.

⁷⁵ L. Warwick-Ching, T. Powley and E. Moore, *Alarm Bells For Crowdfunding As Bubble Pops For Soap Start-Up*, FINANCIAL TIMES (2013).

⁷⁶ Decreto Crescita Bis, 2012 (Italy)

⁷⁷ Corporations Act, 2001 (Australia)

⁷⁸ Jumpstart Our Business Startups Act (JOBS Act), 2012 (USA)

⁷⁹ Vidhi Centre for Legal Policy, *Responses to SEBI Consultation Paper on Crowdfunding* (2014).

⁸⁰ E. Kirby and S. Worner, *Crowd-funding: An Infant Industry Growing Fast*, IOSCO RESEARCH DEPARTMENT, STAFF WORKING PAPER NO. [SWP3/2014]).

Another idea can be to limit investment through crowdfunding to be limited to some specific kinds of businesses, such as Information Technology companies.⁸¹ This will allow SEBI to better monitor and experiment with the right kinds and amount of restrictions.

IV Conclusion

Just few of the leading models in the world have been discussed and they can offer to SEBI a wealth of information on how best to proceed with the task in front of them. More importantly, they show that if SEBI plays its cards right, it can foster the right environment for growth of this unorthodox method of investing as well as MSMEs and start-ups that are the chief beneficiaries of crowdfunding. Established start-ups can be a powerful boost to India's economy, and therefore there is urgent requirement that equity crowdfunding be facilitated in India. Investor protection measures minus the existing barriers shall result in effective funding of such start-ups, success of which is the need of the hour.

⁸¹ Usha Rodrigues, *Securities Law's Dirty Little Secret*, 81 *FORDHAM L. REV.* 3389, 3405–06 (2013).

“WHISTLE BLOWER; A SWEET FRIEND OR A SOUR ENEMY”

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Abstract

Corruption, which today has become a plague ruining the economical and ethical environment at the industrial level in India, often goes unchallenged when people are frightened to raise voice about it. Initiations to a committed Whistle-blower Policy will provide an invaluable insight into corruption. From exposing high profile scandals to financial scam, whistle-blowers play a critical role in saving both resources and lives. Timely disclosure of wrongdoing can also help to protect human rights. A whistle-blower is an employee that reports an employer's misconduct. There are laws that protect whistle-blowers from being fired or mistreated for reporting misconduct. One of these laws is the Whistle-blower Protection Act. This lesson explains the whistle-blower Protection Act and other laws that protect whistle-blowers. But today, in a country blowing the whistle can result into high personal risk because in the current state there is no legal procedure against an unauthorized expulsion, humiliation or even physical abuse related to whistle blowing conduct. Whistle-blowers often face retaliation, from the group or organization, which they have accused, and sometimes under the law. Discussions of whistleblowing whether in academic literature or in more popular media have tended to very one-sided assessments of the moral worth of the act? Indeed, much of the current literature concentrates on psychological or managerial aspects of whistleblowing while taking for granted this or that moral position or eschewing any normative commitment on the question.

Keywords Corruption, Unchallenged, Personal risk, Popular media

I Introduction

In the realm of philosophical writing, whistleblowing normally has been identified as an action taken by an employee, alerting society to potential or actual damage to the public as a result of present or future actions of the firm. Philosophical writers have presented a strong moral case for internal reporting of actions to be taken by a firm which will not be in the public good, defining these actions as "dissent." Only those who go outside the organization to report wrongdoing are termed "whistle-blowers." from a managerial perspective, whistleblowing is defined somewhat more generally, and ultimately must include both internal and external reporting. Rongine defined whistleblowing as "communication to the public of the illegal or conduct of one's employer that is likely to result in unnecessary harm to third parties." James stated that "whistleblowing may be defined as the attempt by an employee or former employee of an organization to disclose what he or she believes to be wrongdoing in or by the organization."⁸² Such definitions, although somewhat immoral different, all establish broad parameters within which the reporting of organizational wrongdoing may be considered as "whistleblowing" and clearly allow for either internal or external reporting.⁸³

Questions relating to the design and implementation of internal whistleblowing policies/procedures have become urgent, as many corporate governance codes around the world today prescribe whistleblowing policies/procedures as part of best practice. However, corporate governance principles or regulations do not prescribe in detail how such internal whistleblowing provisions ought to be designed and implemented. Responding to the need for some guidance on this, a number of authoritative bodies have issued guidance

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82 Miceli, M.P.&J.P.Near (1984), 'The relationship among beliefs, organizational position, & whistleblowing status: A discriminant analysis', *Academy of Management Journal*, 27, 687-705.

⁸³ labs.jstor.org/sustainability/content/10.2307/27799960.pdf

on internal whistleblowing policies/procedures.⁸⁴ This article offers a critical review of the content of recent guidelines on the design and implementation of whistleblowing policies and procedures. It is important to note that we do not set out or think it appropriate to endorse any particular guideline as being suitable from either a whistle-blower or management perspective. The aim of this paper is purely comparative and not prescriptive. Rather, the focus of this article is on the extent to which the policy documents agree on the various issues and which of the policy documents have gaps on some of the issues and why.

II Internal and External Whistleblowing

Various writers have provided specific differentiation of internal and external whistleblowing and imposed limits upon these categories of activity. According to Nader, internal whistle-blowers follow a formal, prescribed company policy for bringing to the attention of upper level management potentially wrongful actions by the firm which could endanger the public.⁸⁵

If the supervisors to inform higher management of wrongdoing." employee follows a prescribed process of reporting (up the chain of command), internal whistleblowing has occurred, regardless of the success of that reportingness of that reporting.

However, if the employee discloses an organizational wrongdoing to outside sources, such as the media, public interest groups, or regulatory agencies, the whistleblowing is external. In some cases, public law may exist which will protect the employee who has exhausted all internal reporting mechanisms unsuccessfully. In such cases, the employee may be able to continue employment with the firm, while still blowing the whistle externally. In the absence of a statute or court ruling which protects an external whistle-blower, the employee must first resign and then blow the whistle publicly if he is to remain in the classification of a whistle-blower. External whistleblowing, in the absence of specific mechanisms to facilitate it, may be construed as a violation of the privilege of employment with a firm.

III Permissible and Obligatory Whistleblowing

In addition to the internal/external dichotomy, whistleblowing has been categorized as permissible (also labelled justifiable or defensible) and obligatory. Both Bok and Cavanagh have established norms which outline the legitimacy of whistleblowing. These norms include the essence of morality of purpose for the benefit of the common good; the necessity for a specific, important event to be under consideration; certainty of information regarding the issue under consideration; proper internal efforts to correct the situation; and the absence of personal gain for the whistle-blower if the action does take place in the public sector delineates quite clearly the necessary guidelines for both permissible (or justifiable) and obligatory whistleblowing, if they have a moral foundation.

The criteria for morally justifiable action are as follows:

1. There is serious concern on the part of the whistle-blower as to the infliction of harm to the public at large,
2. The matter is reported to the next supervisor in the line of managerial command,
3. In the absence of appropriate action by this supervisor, the line of command is notified in ascending order.

According the action following is required:

- There is morally obligatory immediate danger to the public, which could inflict serious harm,
- The next supervisory level is notified,
- Lack of action at this level results in the objection being carried upward through the line of command,
- Documentation is available, and
- The managerial whistle-blower has sufficient reason to believe that if external reporting arises, such

84Miceli, M.P. & J.P. Near (1989), 'The incidence of wrongdoing, whistleblowing, & retaliation: results of a naturally occurring field experiment', *Employee responsibilities & Rights Journal*, 2, 91-108

85Nader, R., P.J. Petkas & K. Blackwell (eds) (1972), *Whistleblowing: The Report of the Conference on Professional Responsibility*, New York: Grossman.

action will affect the necessary public.

IV Approaches to whistleblowing

1. Protection of whistle-blowers is a protection against discrimination. Actions against a person's status, such as gender, racial group, sexual orientation or disability are all strands of discrimination. It is a particular form of discrimination, since it protects not a category of person but acts done by a person in particular mind-set. To that extent the protection can be grouped with that afforded to those who carry out a trade union activity, and who raise a health and safety issue. Raising complaints of wrongdoing by those in authority is now developing from a boutique cottage in globalized undertaking. Viewing reprisals against whistle-blowers as a form of discrimination offers correctives to our insight. It confronts the insouciant treatment of whistle-blowers as bloody-minded, troublemakers and wasters. Just consider how repugnant such expressions would be when applied to a woman asking for time off for childcare or a disabled person seeking reasonable adjustments.

2. The second approach is to view the sacking of a person for making a protected disclosure as a form of unfair dismissal. The effect of doing so is to provide the comfort blanket of established law on what the reason for dismissal was and what was reasonable.⁸⁶

In both approaches two touchstones are to be kept close at hand. The title of the Act is instructive: 'An act to provide individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimization; and for the connected purposes'.⁸⁷

The Ministry of Internal affairs appoints the members of Integrity Commission. Concerns can be made with Integrity Commission if the following conditions are met:

- Raising the concern is done in a written form; confidentiality will be provided when requested by the whistle-blower;
- The concern has been raised internally without satisfactory result; and
- Directly to the commission if there are good reasons not to raise the concern internally.

The law covers persons reporting malpractices within public authorities and public institutions at central and local level, education, health and social assistance institutions, and state owned corporations. The law protects those who make 'public interest warnings'. This means reporting in good faith any fact involving a violation of law, of professional deontology or of principles of a good administration. In order to be covered by the legislation, the whistle-blower must provide data or facts concerning the reported malpractice. Reports can be made to:

- The superior of the person who breached the legal provisions or norms;
- The manager of the organization in which the malpractice occurs;
- Disciplining committees within the public sector;
- Judicial bodies;
- Bodies mandated to search for and investigate conflicts of interest;
- Parliamentary commissions;
- Mass media;
- Professional bodies, trade unions or employer's organizations;
- Nongovernmental organizations (NGOs).

86 Walters, K.D.(1975), 'Your employees' right to blow the whistle', *Harvard Business Review*, 534, 26-34. 161-2.

87Collaham, E.s., T.M. Dworkin&D. Lewis (2004), 'Whistleblowing: Australian U.K., & U.S. approaches to disclosure in the public interest', *Virginia Journal of International Law*, 44, 879-912.

The law further stipulates that good faith is assumed until the contrary is proven. Courts can annul disciplinary or administrative sanctions if these are a result of a concern being raised in good faith.⁸⁸

If the person suspected of wrongdoing is a direct or indirect superior of whistle-blower, the disciplinary commission must keep the whistle-blower's identity secret. A unique legislative measure is that if a whistle-blower is investigated for disciplinary reasons he or she has the right to demand that the press or a union representative be present at the disciplinary meeting. In general, internal disclosure prior to external whistleblowing is not required, except for the Employment Permits Act 2006 which prescribes an advance internal notification of one's intended external whistleblowing. Nor is raising the issue internally suggested by explicitly mentioning it, except in the Safety Health and Welfare at work Act 2005 where internal or external disclosures are protected explicitly, and the Child Abuse Act 1998 and Health Act 2007 where disclosure to an authorized person (to regulators). Matters can be raised directly with an external component body. Matters can be raised directly with an external component body if:

- There is an immediate danger to the lives and health of the people and society;
- There is criminal actions involved;
- Not reporting will imply complicity in the wrongdoing;
- One has good reasons to assume internal reporting would be to no avail.
- The employer takes no action to correct the malpractice after the matter was raised internally;
- There are good reasons to believe the employer will not take those actions;
- Prosecution for wrongdoing would otherwise be impossible(cover-ups); and
- There is danger.

V The current financial crisis and whistleblowing

As was the case in the failure of Enron, WorldCom and other companies in the last decade, greed, fraud and overreaching have again led to financial crisis and calls for regulation and transparency. This time, though, the impact has been much greater and more global. In what has been called the worst crisis since the Depression, the financial situation has led to the failure of some banks, buyouts of others, an unwillingness to lend, collapse of the US housing market, partial nationalization of the biggest banks and the auto companies and bankruptcy of many businesses with resultant job losses. The chaos has also generated reports of wrongdoing and much finger pointing. The failure of whistleblowing was highlighted by the Madoff scandal. The cycle of failure of US whistle-blower protection needs to be broken. If the proposals above are enacted in a statute that protects all whistle-blowers, whistleblowing will rise and whistle-blowers will be better protected. If the desire to increase transparency and oversight is to be achieved and future disaster prevented, the whistleblowing legislation should be more effective and protection apply to all.⁸⁹

VI Proposed Solutions

1. Educate Employees - Employers should be required to effectively educate their employees on their rights as whistle-blowers, how to blow the whistle, and the organization's record for dealing with reports. Organizations can encourage the use of internal channels to report problems by setting up an internal reporting system, instructing employees on how to use the system, and assuring that reporters will not suffer retaliation. There should also be more than one recipient to whom the whistle-blower can report. Thus, if the main designated recipient is part of the problem, an alternative can be used. Most organizations already have a sexual harassment policy that works along these lines, and would not be unduly burdensome to adapt it to include other types of reports.

The information dissemination process should be mandated to take place at least once a year, and for every new employee when hired. This should be done in a format more interactive than merely posting it on a bulletin board or simply including it among the numerous pages of forms and documents new employees

88 Bercy, P.H.(2002), 'Private Justice', *Southern California Law Review*, 76, 1-160.

89 Luchetti, A. (2009), 'On Street, reluctance to blow the whistle', *Wall Street Journal*, 12 Feb, C4

typically receive. The organization should be required to report on the types of wrongdoing alleged, and how the allegations were resolved. This has several benefits, including indicating that the organization supports whistleblowing, which is a major spur to reporting, and helps inform potential whistle-blowers about the likelihood of success.

2. Empower Employees - Whistle-blowers should have a choice of where to take a claim if they suffer retaliation. The statute should provide that the whistle-blower can bring a claim for wrongful termination in the state court, or can pursue the remedies sought out in the statute. One advantage of the state suit is that punitive damages are usually available. The statute should also provide that the employer cannot condition employment on signing an arbitration agreement, an increasingly common practice by employers that denies the employee from taking a claim to court. To the extent that punitive damages and publicity about suits and large awards deter wrongdoing by the sued organization as well as others, arbitration defeats this.⁹⁰ Another important part of giving employees control is giving them sufficient time in which to bring their retaliation claims. Ideally, the limit should be one or two years as is common in tort suits.

3. Reward whistle-blowers - The whistle-blower should be rewarded for the risks involved in bringing forward useful and novel information. While some might decry large rewards as promoting growth, they can also be seen as enabling a risk-benefit analysis that tips the scales toward taking the risk of the job and career that whistleblowing can entail. Additionally, if the whistle-blower provides information to social interests, motive should be secondary to gaining that information.

VII what types of disclosures should be protected?

There is a great range of types of wrongdoing which could trigger the current legislation. There has emerged a common menu of issues that should ideally be covered by public sector whistleblowing legislation. They include:

- Illegal activity (corruption, fraud, abuse of power and so on);
- Maladministration (including wastage of public funds, breach of public trust);
- Official and scientific misconduct (including breaches of applicable codes of conduct);
- Dangers to public health, public safety, the environment; and
- Reprisal action against a person who makes a public interest disclosure.

1. Protection and redress mechanisms- The legislation protects whistle-blowers with a number of mechanisms:

- Relief from criminal liability for breach of statutory secrecy provisions;
- Relief from civil liability for defamation or breach of confidence;
- Protection against disciplinary or other workplace sanctions, such as reduction in salary or reclassification or termination of employment; and
- Legal redress for any detriment suffered as a result of making a disclosure.⁹¹

In an increasingly market oriented society, one of the most efficient and reliable ways to ensure that managers are aware of the whistle-blower protection obligations, and act to fulfil them, is by demonstrating that serious financial costs that could fall to the organization if they fail to do so. Such an approach would provide organizations with incentives to prevent reprisals against persons who report wrongdoing.⁹²

The increase in research on various aspects of whistleblowing in recent years is promising. The focus has been on *inter alia* the nature and dynamics of the phenomenon as well as on the analysis of particular cases

90 Kelton, E.A.(2009), 'Letter to the Editor: Encouraging Whistle-blowers, discouraging fraud', *Washington Post*, 2 March, A12

91 Kohn, S.M. (2007), *Concepts and Procedures in Whistle-blowers Law*, Westport, CT: Quorum Books.

92 Callahan, E.S. & T.M.Dworkin (1994), 'who blows the whistle to the media and why:organizational characteristics of media whistle-blowers', *Ameriacan Business Law Journal*, 32, 151-84.

of whistleblowing. An important dimension of whistleblowing research involves the legislative framework which has come into being and within which the whistle-blower has to operate in order to be able to enjoy legal protection. An underlying assumption is that whistleblowing is here to stay and that processes should be put in place to support, strengthen and protect the whistle-blower. The appropriate role of legislation should be considered in achieving the goals.

VIII SUGGESTIONS

Finally, in assessing how to react to the guidance that now exists on the contents of whistleblowing policies/procedures, employers should also consider the impact of anti-corruption legislation. In the UK for example, the Bribery Act 2010 Section 7 makes the failure by a commercial organisation to prevent bribery a criminal offence but it is a defence to prove that there were in place “adequate procedures designed to prevent persons...undertaking such conduct”. Meanwhile, guidance published by the UK Secretary of State Mentions internal speak-up procedures as an example of adequate procedures, but does not go into detail about what these should look like (Ministry of Justice, 2011). In our opinion, a key question for employers is whether to have in place an anti-corruption policy/procedure alongside a general whistleblowing policy/procedure.

An alternative view would be that there is a danger of procedural overload and that all wrongdoing should be reported through the same channel on the basis that the recipient of concerns will be trained to refer them to an appropriate person for investigation. To some extent the answer will obviously depend on the nature of the official guidance that is eventually provided by the relevant authority in a particular state (for the UK that is the Secretary of State), but employers would be well advised to consider the general issue of procedural overlap. For some time now empirical research has suggested that whistleblowing procedures are already being used where grievance, health and safety and equal opportunity procedures etc. would seem to be more appropriate Lewis, 2006. There could be many reasons for this, including the absence of a specialized procedure, the fact that it is perceived to be ineffective, or that it has been invoked but failed to satisfy a particular individual. It could also be argued that other procedures are not taken as seriously and that employers respond more carefully when the whistleblowing procedure is invoked because of compliance concerns and the fear of external disclosures. Whatever the causes, it cannot be in anyone’s interest to have confusion about how concerns should be raised so we would urge employers to think carefully about both the contents of whistleblowing policies/procedures and their relationship to other workplace procedures.

The world can be a hard place. One can do everything in her power and still end up having to choose between blowing the whistle on her organization and sitting by while innocent people suffer harm she can prevent. The whistle-blower is a tragic character. Her decency pushes her to bring great suffering on herself and those about whom she cares most. Her only alternative, sitting by, would save those she cares about most from harm-but at an incalculable cost (failing to do what she has a duty to do). Her organization will probably be better off in the Long run? If it survives. But, in the short run, it too will suffer. When events leave only this choice, most of us-at least when we are not directly involved-would hope the person upon whom that choice is forced will find the strength to blow the whistle. Heroism is the best we can hope for then. But, looking up from this chain of unhappy events, we can see how much better off everyone would have been had heroism been unnecessary.

IX CONCLUSION

Even though we have not taken a prescriptive approach to our review, we feel that our comparison of the various guidelines has been revealing. While identifying areas of consensus and convergence, we have also discovered contradictions and omissions. Given the different purposes for which the guidance has been produced, perhaps we should not be too surprised that there is no uniformity of approach in these documents. Equally, in the light of the empirical research and other published material available to the various drafting bodies, it is rather disappointing that there are some serious omissions in relation to crucial aspects of the management of whistleblowing. Indeed, it does not seem unfair to conclude that, perhaps with the exception of the BSI, the authors of the guidelines seem to have fallen into the trap of focussing on the whistle-blower rather than the process of handling his or her concerns. In a way this is understandable because historically much attention has been paid to the individual who discloses information about

wrongdoing rather than how management should respond. However, given that many countries now have whistleblowing legislation in place, and that the implementation of internal whistleblowing policies/procedures is increasingly mentioned in corporate governance codes, there is an urgent need to concentrate on the process rather than the person.

Combating Rape in Bangladesh: A Socio Legal Study

Farzana Faruq* Zelina Sultana**

Abstract

Rape is a devastating crime and increasing terrifically in Bangladesh. This is the worst form of intimidation used by men to demonstrate their dominating position. In Bangladesh rape victims are hated socially, their families are faced dishonour and most cases committed suicide. However, the social taboo surrounding sexuality, shame and loss of honour etc. prevent women from seeking justice. If the government is really serious about curbing this kind of violence some legal and social changes are essential. Our positive attitudes towards rape survivals and the prosecution process must be friendly and prompt. Thus, the key issue of this article is to discuss the struggle of rape victims for social and legal justice.

Keywords *Dominating position, taboo, loss of honor, struggle*

I Introduction

*“One is not born, but rather becomes, a woman... It is civilization as a whole that produces this creature....which is described as feminine.”*⁹³ Truly a human becomes a woman by the way she is brought up in the family, by following the restrictions regarding her behavior; by the restrictions on her mobility and work; by the discrimination and violation of equal rights in the family, in the society or even in the state, and she becomes a woman by the abuse and violence inflicted on her because of her sex. Islam metaphors women as princess and in Hinduism females are the face of deity. But in Bangladesh women are in peripheral position in the society.⁹⁴ Traditional philosophical views emphasized men’s qualities as superior over women’s qualities. And these views create many types of violence against women. In recent times inadequacy of certain laws regarding oppression against women become debatable in view of radical changes in socio-economic conditions. Oppression against women is manifested in several forms and rape is the worst forms. It is a humiliating event in a women’s life which leads to a fear for existence and a sense of powerlessness.⁹⁵ It has now emerged as one of the major human rights concerns in Bangladesh.

In Bangladesh for social taboo maximum rape case is not reported. Those which are reported victims have to bear a misery, disrespect and no legal remedy. Most time vulnerable victims are not seeking any punishment because of fear or for the sake of family’s honor. In many times victim family come with the harasser in mutual decision and sometimes they get married. Given the traditional backdrop in Bangladesh where chastity in a woman is of utmost importance, victims of rape suffer in silence rather than protest against such practice, which would only invite unwarranted attention that would be socially demeaning. The number of incidence of rape is not only on rise but also is diversified in its forms and cruelty. Gang rape, serial rape, killing after rape, and minor girl or child rape are most common incidences. Videoing of rape occurrence and circulating it through internet, mobile phone are new additions. As a result, women irrespective of their age, race, class, education and location are in an endless fear. However, the legal and social protection of Bangladesh against rape is failed to prevent this crime. Here it is a try to focus the legal remedy as well as social justice available for combating rape. The general objective of this paper is to address the issue of rape in Bangladesh. And the specific objectives are:

1. To focus of rape with the definition and social impacts of rape.
2. To analyze the legal provisions against rape.

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⁹³ Simon de Beauvoir, *‘The Second Sex’*, Vintage Reissue edition, France, 1949.

⁹⁴ Rashida A. Khanam, *Contemporary Gender Issues*, 1st ed. (Dhaka: A. H. Development Publishing House, 2012), p. 53.

⁹⁵ Ved Kumari, *‘State’s Response to the Problem of Rape and Dowry’*, in Lotika Sarkar and B.Sivaramayya, (eds.), *Women and Law Contemporary Problems* (Dhaka: Academic Publishers,1994), p.106.

3. To suggest the possible social and legal reforms to ensure justice for rape victims in Bangladesh.

II Concept of Rape

Rape is defined as sexual intercourse that is forced on a person without his or her permission. It may involve physical force, the threat of force, or it may be done against someone who is unable to give consent. To put simplest definition of rape is having sexual intercourse with a woman or girl without her consent.⁹⁶ Sexual intercourse may be vaginal, anal or oral, and may involve the use of a body part or an object.⁹⁷ Rape can happen to both men and women of any age. The U.S. Federal Bureau of Investigation (FBI) defines rape as: "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."⁹⁸ A rapist uses actual force or violence or the threat of it to take control over another human being. Some rapists use drugs to take away a person's ability to fight back. Rape is a crime, whether the person committing it is a stranger, a date, an acquaintance, or a family member.

Section 375 of the *Penal Code 1860*⁹⁹ of Bangladesh gives a definition of rape. Rape is sexual intercourse by a man with a woman when it commits: against her will, or without her consent, or with her consent when her consent has been obtained by putting her or any other person in whom she is interested, in fear of death or hurt; or with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man whom she is or believes herself to be lawfully married, or with or without consent, when she is under fourteen years of age. And in all cases penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. From the definition given above, it is clear that "rape" is forcible ravishment of man against woman, and the essence of the crime consists in the act being done against the will or without the consent of the woman. *The Prevention of Oppression against Women and Children Special Act 2003 (Nari O Shishu Nirjatan Daman Bishesh Ain 2003)* retained the definition of rape as provided for in the Penal Code and it only provides stringent punishment for rape, gang rape and custodial rape by Sec.9.

III Rape Incidents in Bangladesh and Its Consequences

With the emergence of urbanization, the society is changed and here technology plays an important role. In Bangladesh, rape is not uncommon. In 1971, 200000 women are raped brutally by the Pakistani military and their allies.¹⁰⁰ Since its birth it is struggling for justice of those raped women. The raped women were declared by the leader of the nation, Sheikh Mujibur Rahman, as war heroines, '*Birangona*' to make them accepted in the society. However, Bangladesh always tries to do justice with the rape victims and made many legal provisions for preventing this heinous crime. Until now, this crime is happening every day and cannot be checked. The dimension, brutality, forms become very dangerous in Bangladesh. There is deep anxiety about the security of females in the country nowadays. Even in far developed and most civilized countries like France, Germany, Russia, Sweden and Japan, rape takes place or the percentage of rape is quite high in other countries comparing to Bangladesh. But if considered implementation of laws, inflicting punishment, treatment and rehabilitation of the victim, compensation to the victim and social security of victim's family, the country is lagging far behind. It is sometimes quite surprising and embarrassing that rape victim receives lashes instead of justice in Bangladesh.

Ain O Salish Kendra (ASK) reports 512 rape incidences of which 121 women between 7 to 12 years age, 26 death by rape and 7 suicide from January to September 2016.¹⁰¹ According to a report of 'ODHIKAR' (A Human Rights Organization), during the period January to December 2012, a total number of 805 females were

⁹⁶ *Wasim Miah & Others v. The State*, 12 BLT (HCD) 2004, pp 40-50.

⁹⁷ [<http://www.nlm.nih.gov/medlineplus/ency/article/001955.htm>, last visited on 30 March.2013.]

⁹⁸ [<http://www.kidshealth.org › Teens › Staying Safe>, last visited on 30 March.2013.]

⁹⁹ *Penal Code, 1860* (Act No. XLV of 1860). THE PENAL CODE, 1860 ACT NO.

¹⁰⁰ Research conducted by the Liberation War Museum of Bangladesh in 1999 July-December 2000, http://www.newworldencyclopedia.org/entry/Bangladesh_War_of_Independence, last visited on 30 March, 2015.

¹⁰¹ Violence against women-Rape: January – September, <http://www.askbd.org/ask /2016/10/08/rape-january-september-2016/>, last visited on 10th November 2016.

reportedly raped. Among them 299 were women, 473 were children below the age of 17 and the age of 33. Among them, 31 were killed after being raped and 101 were victims of gang rape. Out of them 473 were child victims, 39 children were killed after being raped, 84 victims were victim of gang rape and 10 children committed suicide as a result of the mental stress after the crime.¹⁰² The BNWLA statistics show that 789 rapes reported in 2014, 719 in 2013, 836 in 2012, 603 in 2011 and 411 in 2010.¹⁰³ A report prepared by Bangladesh Mahila Parishad shows that about 2,079 incidents of violence against women occurred in 2015. Of them 99 incidents are gang rapes and 46 incidents of killing after rape.¹⁰⁴ In a survey in Asia-pacific UN reported that in rural Bangladesh 47.4% of rapists perpetrated more than once, 3.7% had four or more victims, and 40% first raped as a teenager. 82% of rural Bangladeshi and 79% of urban Bangladeshi men cited entitlement as their reason for rape. 61.2% of urban Bangladeshi men who had raped did not feel guilty or worried afterwards, and 95.1% experienced no legal consequences. 3.7% of men in rural Bangladesh had raped another man. 89.2% of urban Bangladeshi men answered 'agree' or 'strongly agree' to the statement 'if a woman doesn't physically fight back, it's not rape.'¹⁰⁵

Statistics show that in rape cases, after a complaint is registered or a case is filed, the trial of the cases hardly ever take place. Fourteen years' worth of data collected by the One Stop Crisis Centre in Dhaka showed that at least 5,321 females sought help at the center after being emotionally or sexually harassed, but a mere 43 people received punishment in these cases.¹⁰⁶ The victims keep silent rather to want justice for social and legal limitations in Bangladesh. Thus, the following social and legal consequences are found after a rape incident.

- Rape breaks down women's mental and psychological strength,
- Both social taboo and patriarchal mindsets are responsible for increasing this crime and a tendency to hide this crime,
- Society undermine the victim's family rather the offender's,
- Sometimes victim's family is harassed by social leaders and the powerful offender's family,
- The victim loss her demand in case of marriage as she lost her chastity,
- Sometimes Imam and Moulavi evaluate this in divine perspective and get lost the family from the village for protecting the residence of village from commit more sins. However, perpetrator may still remain in the village,
- Male dominating society like Bangladesh firstly thinks about women's faults in rape as if she is ultra modern with her dress or she leads a reckless life.
- It poses the most serious threat to women's economic as well as social empowerment,
- For poverty and fear of loss of respect and social punishment, they compromise with the offender.
- The NGOs and newspaper focuses on rape incidents and forms rather to focus its impact on victims and her families.
- Lastly, to protect her family from these social injustices she is bound to commit suicide.
- The very common legal limitation to file a rape case is for its employment of the "two-finger test" in rape investigations. This test consists of a physical examination of women who report rape during which a doctor inserts two fingers in the woman's vagina to determine whether the woman is "habituated to sex". This examination has its origin in the country's British colonial-era laws dating back to 1872. It is a common obstacle for women from reporting rape.¹⁰⁷
- With the fear of police investigation with harassing questions,
- To face the offenders in open court again and again in every dates,
- Sometimes could not bear the huge expenses of the court.
- Become hopeless to get the judgment of the court.

¹⁰² Human Rights Report 2012 ODHAKAR Report on Bangladesh January 12, 2013 page.81.

¹⁰³ <http://www.dhakatribune.com/crime/2015/maqy/31/rape-rape-murder-rising>, last visited on 21 April 2016.

¹⁰⁴ <http://www.observerbd.com/2015/07/07/98517.php>, last visited on 21 April 2016.

¹⁰⁵ "Why Do Some Men Use Violence Against Women and How Can We Prevent It?" (PDF) Unwomen-asiapacific.org. Retrieved 2013-12-03.

¹⁰⁶ <http://www.dhakatribune.com/crime/2015/maqy/31/rape-rape-murder-rising>, last visited on 21 April, 2016.

¹⁰⁷ http://en.wikipedia.org/wiki/Rape_statistics#Bangladesh.

- The proceeding of a rape case is nothing short of humiliation for the innocent victim, as the cases are heard in open courtroom and in public. It is indeed disgraceful for a woman to describe in public the story of the violation of her body and person.
- Moreover, it becomes really difficult when the woman herself has to prove that she has been raped, rather than the culprit to prove the contrary. This English colonial method of burden of proof is a major drawback of our criminal justice administration

Thus, the common reasons for most of the perpetrators going with impunity are precisely lack of cogent evidence, improper and poor forensic examination of the victim, corruption by police and a section of judicial officials, witnesses' fear reprisal by accused, and legal complexity etc. Usually women who fall victim to rape dare come forward aiming at protecting themselves and their families from social disgrace, embarrassment and further humiliation.

IV Combating Rape through a Better Legal and Social Means

Rape cannot be checked without combine social and legal efforts. As its consequences are greatly attached to the social taboo and customs, people of society can make a radical change of this problem. Legal means are nothing but a protection of women in Bangladesh from this heinous crime. If the social protections are not strong legal protection would become meaningless. The solution of such oppression requires a bottom-up approach, efforts from the very family level to police level. However, the Constitution of Bangladesh clearly mentions about state's responsibility to ensure women's participation and equal rights in all sphere of social, political and public life.¹⁰⁸ It also prohibits all kinds of cruelty and torture.¹⁰⁹ Moreover, Bangladesh is the first country that ratified *CEDAW*¹¹⁰ and *CRC*.¹¹¹ These two international Conventions have made state's obligation to take required measures for protection of women and girls from all forms of discrimination.

V Penal Laws

The long standing strategy of this country is to pass hard laws for giving penalty to the offenders. The first penal law relating to punishment of rape is *the Penal Code 1860*. According *Penal Code* rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.¹¹² With the increasing of crime against woman and child, Bangladesh has passed more hard law in 2000 which has been amended in 2003 named *the Prevention of Oppression against Women and Children Special Act 2003*. The usual punishment for rape under the Act is life imprisonment but if the victim later dies or the rape is committed by more than one man (i.e. gang rape), then the maximum punishment is death penalty.¹¹³ The result of this hard penal law is not satisfactory and this offence is increasing. Death penalty does not agony an offender since it allows very little time to the miscreant to repent for his misdeeds. A continuous period of rigorous imprisonment for more than twenty years may be imposed. The result of this hard penal law is not satisfactory and this offence is increasing. Death penalty does not agony an offender since it allows very little time to the miscreant to repent for his

¹⁰⁸ *The Constitution of the People's Republic of Bangladesh*, Article 10 and 28.2.

¹⁰⁹ *Ibid* Article (Article 35.5).

¹¹⁰ *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, adopted in 1979.

¹¹¹ *Convention on the Rights of Children*, 1989, adopted in November 1989.

¹¹² *The Penal Code 1860*, Section 375

¹¹³ *Nari o Shishu nirjadon Damon Ain 2000* Section, 9

misdeeds. A continuous period of rigorous imprisonment for more than twenty years may be imposed. Bangladesh can consider alternative penal laws like Indonesia.¹¹⁴

In Bangladesh the existing legal frame work that supports a rape victim is very limited. For instance, still the traditional view of the *Penal Code* and the *Prevention of Oppression against Women and Children Special Act 2003 (Nari O Shishu Nirjatan Daman Bishesh Ain 2003)* uphold the notion that rape cannot be committed by the husband unless the wife is minor. The law presumes that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsists between them. Marital rape was made a criminal offence in England in 1991 and many other countries in the world also followed suit in this regard. Marriage in those countries is not considered to give the husband the right of marital intercourse once and for all.¹¹⁵ If we make such provisions probably it cannot be accepted in our country for the social and religious context. So to put it in a different way, the law can be made that during sexual intercourse if any husband's violent or nonconsensual act of intercourse results into an offence; undoubtedly he is liable to be punished under *the Penal Code*. In *the Majority Act 1875*¹¹⁶, the legal age of majority is 18 and a person cannot enter into a contract unless he or she is 18 years of age. Since marriage is a form of a contract, it seems logically indefensible to assume that a minor girl is capable of giving consent to marriage or sexual intercourse long before she legally possesses the capacity to enter into a contract.¹¹⁷

Another weak point in existing laws is that, they only recognize women and children as victims of rape. The Penal Code as well as the Act of 2003 does not expressly recognize transgender persons (generally known as hijra in Bengali) as potential victims of rape.¹¹⁸ The definition of rape should apply to male, female or transgender (hijra).

VI Proving Obligation and section 155(4) of the Evidence Act 1872

It is mentioned that burden of proof in criminal justice system under *the Evidence Act 1872* is the main obstacle for rape victims to claim justice. *The Evidence Act of 1872* in Section 155(4) says, in case of rape the victims can be interrogated about her character and lifestyle. The accused, conversely, is presumed to be innocent till proved guilty. Therefore, when a man is prosecuted for rape or an attempt to ravish, one can try and prove that the victim was of an "immoral" character. For instance, if a girl is engaged in any flirting or other kind of relationship with another man, the court might rule out her accusation as she is capable of getting into a sexual relationship with another man. This law needs to be changed in Bangladesh. India has already inserted this provision in the *Indian Evidence (Amendment) Act, 2002* by the new section 114-A.¹¹⁹ It is submitted that keeping in view the social and economic status of the woman and to give a boost to her image, her statement of absence of consent must be presumed to be true till proved otherwise by the accused. So it is suggested for Bangladesh that the onus of proving that the women had consented to the act must be on the accused. Section 155(4) should only become possibly relevant where the accused first admits that he had sexual intercourse with the alleged victim. Otherwise, a better solution would be the complete repeal of section 155(4).

¹¹⁴ (Indonesia has passed severe new laws against sex offenders following the gang rape and murder of a teenage girl. Paedophiles can now be castrated, micro-chipped or executed, depending on the severity of their crimes.

<http://metro.co.uk/2016/10/14/new-law-to-castrate-and-execute-paedophiles-after-gang-rape-of-14-year-old-girl-6191760/>, Last visited, 31 December, 2016

¹¹⁵ Ved Kumari, *ibid.*, p.98.

¹¹⁶ *The Majority Act, 1875 (Act No. IX of 1875)*.

¹¹⁷ 'A Critical Appraisal of Laws Relating to Sexual Offences in Bangladesh', a study commissioned by the National Human Rights Commission Bangladesh, p.19.

¹¹⁸ 'Hijra' is a Bengali expression to denote the transgender or hermaphrodites persons. On 11 November 2013, the Government of Bangladesh officially decided to address these people as Hijra.

¹¹⁹ N.V.Paranjape, *Criminology and Penology*, 10 th ed. (Allahabad: Central Law Publications, 1999), p.12.

VII Procedural difficulty relating to police

Many victims of rape do not want to register a police complaint due to the cumbersome procedures that it involves, and the unsupportive atmosphere at police stations. They are always psychologically harassed in open courts, undergo long, delay trials, and are forced to repeatedly describe their traumatic experiences in front of people who view their testimony with suspicion. So reforms must be needed in dealing with the procedure of investigation in relation to the offence of rape. During interrogation victims should not be subjected to repeat awkward questioning by different police officials. It should not also be permissible to put questions in cross-examination about the general moral character of the rape victim. The recording of the statement of the victim should be conducted at the residence of the victim or in the place of her choice and, as far as practicable, by a woman police officer in the presence of her parents or guardians or near relatives or social worker of the locality. Total privacy at the time of recording the statement of the victim by female police officer may reassure her safety and security from the offender. Rape cases must be investigated only by women police officers and when no women police officers available they should be interrogated only in presence of a woman social worker. The statement of the victim should be taken in private and each police station should have a 'trauma room' for this purpose. An emergency 24-hour public telephone helpline for women in distress operated by Home Ministry may be launched and it should be connected with all the police stations across the country in which rape victim or anyone on her behalf can easily and directly report such incident either before or after the occurrence.

VIII Complex Court Procedure

The court needs to apply victim centric approach for women to encourage their access to justice which includes right to information to victim, right to confidentiality, not asking insensitive questions etc. Many times it is debated a lot in the court about rape victim's consent but how relevant is the consent in rape cases? To get justice in this dreadful crime the right based approach legislation needs to be developed which demands that the rights of the rape victim from all prospective are respected and protected by legal provisions. Judges should not think prejudicially (judges as human being and for social taboo may think the victims dresses or life-styles) rather to concentrate the justice for the victims and treated her as claimant. The court should also be staffed with judges and investigation officers having adequate knowledge not only in legal sector but also in related medical jurisprudence for doing justice.

Reported rape cases should derive more acute attention besides regular criminal trial process. Court must ensure speedy and separate trial in rape cases. Most of the rape cases filed in ordinary criminal Courts languish for month. Although, according to the provisions of *the Prevention of Oppression against Women and Children Special Act 2003*, such cases must be tried within 180 days, the rape cases being more sensitive, should be tried more expeditiously and, if possible, in less than 180 days. A separated judicial inquiry commission headed by a retired judge of the High Court Division should be established to look into every rape cases. The commission should submit its report within one month and such report should be tabled in the Parliament along with action taken by the Government.

IX Forensic Test Method and Facilities

Forensic test report is a key tool for law enforcement's investigation and prosecution of rape cases. However, the existing procedures for the medical examination of rape victims are very much out of date. Most cases the presence of the male doctor, as an examiner is itself a trauma for the victims, especially in the country where social values and religion play an important role in their lives. According to Naripokkho,¹²⁰ 23 of 29 rape victims on which it conducted a survey refused to be tested by male.¹²¹ Thus, it is suggested that in case of physical examination of rape victim, the female doctor/forensic expert should perform certain tests to determine the possibility of forceful sexual intercourse. These tests include i) rupture of the hymen ii) marks of violence on the genitals of the victims iii) the presence of semen or blood in the vaginas iv) other indications

¹²⁰ A Human Rights Based NGO of Bangladesh.

¹²¹ *The Daily Star* (15 February 2004).

of penetration v) venereal disease and vi) age of the victim.¹²² Moreover, there is no rule of medical examining of the accused. In addition, by amending of section 32 of the Act should include mandatory medical examinations of the accused person.

Adequate equipment's and forensic facilities must exist in all district hospitals of the country so that proper information about the physical condition of the victims can be expeditiously and effectively collected by the on-duty female doctors of the hospitals. The forensic labs should be modernized and forensic institute should be established to provide proper knowledge and adequate training on forensic science. Hospitals are required to cooperate with the police and preserve the samples including DNA till such time and such manner that the police officers are able to complete their paperwork.¹²³ The medical examination should be carried out without any delay and a "reasoned" report be prepared, recording the name and address of the accused, the person by whom she was brought, the age of the accused, marks of injury if any, a description of materials collected from the accused for DNA profiling, other material particulars in reasonable detail, and the exact time of commencement and completion of examination. The report should state the reasons for each conclusion arrived and this report should be forwarded without any delay to the investigating officer who in turn shall forward it to the Magistrate concerned.

X Attitude of Doctor's

Doctor's reluctance to appear in the court is the major obstacle in acquiring justice in rape cases. Female doctors feel discouraged to do the forensic job to avoid the hassle of standing as witness in rape cases. The major causes of such unwillingness, as have been identified by doctors are: most of the cases drag for years and the witnesses are to appear in court on their expenses. Trial dates change a lot causing more problems to the witnesses. In addition, doctors face unnecessary question of opposite advocate in the court room; sometimes a doctor has to stay long day for hearing into the court and in most cases doctors feel insecure for being a witness for the pressure of powerful persons of the society. In many other countries, the doctors need not to go to court. They only send the reports to court.¹²⁴ In Bangladesh, this system should be introduced. Doctors are often lured by the greed of making good earnings through providing false and fabricated medical reports. They are also reluctant in providing autopsy reports. After death, correctly prepared autopsy reports are essential to understand and confirm the causes of death and thus ensure the correct punishment. Thus, they are not even interested to abide by law to give the medical certificates to the complainants or the victims.

XI Social Protection

Rape in fact makes a woman a living death.¹²⁵ The case of raped woman is worse because rape is not just a physical violence or injury, its significance lies in the physical repugnance, mental and emotional trauma and the severe social repercussions. In the process she ceases to be a person or a social being, she merely becomes a rape victim.¹²⁶ Moreover, sometimes it seems as sin of the victim and not the perpetrator. However, section 13 of the *Prevention of Oppression against Women and Children Special Act 2003* secures the social position of the child born as a result of rape and interestingly not the position of the victim mother. Thus, it may be a repression for the woman who does not want to have any connection with the rapist. Whether rape makes a woman a living death, this provision will compel her to bear with the stigma permanently. Law should protect woman who chooses not to have child born as a result of rape and, therefore, abortion in circumstances should be legalized. It may release her from such unacceptable position and enhance woman's dignity as human being.

¹²² Modi's Medical Jurisprudence and Toxicology, K Mathiharan & Amit K Patnik (eds.), 23 rd Ed. (Nagpur: Lexis Nexis Butterworths Wadhwa , 2007), p.923

¹²³ DNA (Deoxyribonucleic acid).

¹²⁴ *The Daily Star* (15 February 2004), p.23.

¹²⁵ Dr. Naima Huq , Reflections on the Perception of Consent in Rape Cases , *The Dhaka University Studies , Part- F* Vol.XVI(2),December 2005 p.84.

¹²⁶ Shobha Saxena,1995, Crimes against Women and Protective Laws, Deep and Deep Publications, New Delhi,p.82.

In majority of the rape cases in Bangladesh, neither the victim nor the victim's family receives any compensation from the rapist or from the Government. Mere imprisonment of the offender serves interests of the society but cannot secure the future of the victim. Sometime victim's family becomes ruined and concentrates alone. Thus compensation may a great relief for the victim for their survival. Therefore, in addition to the imprisonment, payment of compensation is the best possible means to indemnify the victim. In fixing the amount of fine the court must consider the present and possible future loses or injury to the victim, victim's social status and educational qualification, her age, magnitude of the offence, previous crime record and financial capacity of the offender.

It is sometimes an established practice in the country that the rape victim is compelled to marry the rapist or compromise since it is taught to her that no man will marry her. Such illogical and inconsistent practice is prevalent in mostly rural areas of Bangladesh during dispute settlement or conciliation by village head-men. It must be stopped immediately because it accelerates rape by the socially powerful men instead of reducing it. Social protection must be strong in favour of the rape victims. Community sentencing shall be introduced for the benefit of the victims and for better social protection. Offenders thus punished to bear all maintenance, educational and marriage expenses of the victim depend on victim's age, social status of her family, rapist age and financial capacity. Social welfare service shall be increased for rape victims.

Religious norms and ethical values should be imparted to the children since their childhood by their parents or near relations either inside or outside the family. We shall speak about sexual education thus they can understand the good and bad one. Hear educational institution, NGO and media can play a positive role to learn public in general about the good sexual relation, social belief about rape and rape victims, their behavior towards victims and offenders, legal punishment etc. Combating rape does not mean to combat legally but socially also. Both electronic and press media have to play key role in this respect in order to raise awareness among the common people against rape and sexual aggressions. Therefore, publication of the name of the victim of rape should be prohibited. It should also be banned on printing or publishing trial proceedings of rape.

Attitude of the people and the society towards the women should be changed. People must possess a positive outlook for women that they are human beings having equal status like men. Their performances should be evaluated and they also deserve dignity and status. Legal literacy must be increased with the help of social workers and funds and other aids must be made available for the purpose. Government should pay more attention to bringing about changes in the attitudes of women through proper education and by making them bold, confident and by proper training making them economically independent.

XII Concluding Observations

Law itself has no utility unless it is made to work and implemented. Mere enacting laws will bring no justice to sufferers unless they are properly and effectively enforced. Implementation of law is certainly necessary to help the victims and her family to overcome the trauma caused by the violence. The Government has so far taken a number of steps to stop heinous sexual offence. It has tried to modify and modernized various existing laws. Government as well as other law enforcing and monitoring authorities and organizations have been engaging legal ventures to tackle rape. But every time some loopholes are remaining there. It needs continuous assessment to make the legal procedures up to date. All the time legal weapons cannot be availed by the common women and rape victims. Besides strengthening legal procedure and implementing law in maximum term, social awareness, empowerment of women through proper education and modern, liberal views of society to women and every such attitude to women themselves are essential. Such progressive moves will gain momentum to accept positive changes towards providing legal and social justice to victims of rape. So there is every reason for an overhaul and comprehensive review of rape laws to take place, given the reality in Bangladesh of rape survivors not being able to get redress in these cases.

THE MYTH OF RESTITUTION IN THE COMPENSATORY REGIME APPLICABLE TO AIRLINE PASSENGERS IN NIGERIA

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Abstract

The airline industry is full of complaints bordering on cases of death, loss of baggage, damage to baggage and cargo, flight delay, flight cancellation and sundry others. Due to the heavy regulatory character of civil aviation, there exist both domestic and international legal provisions on passengers' compensation on any of the above-enumerated areas of conflict between airlines and passengers. The two regimes are exclusive in nature as compensation bordering on air flights are to be settled on the provisions of the Montreal Convention of 1999 or its modified version as contained in the Nigerian Civil Aviation Act, 2006. In spite of the exclusive nature of the Convention, it recognizes the concept of restitution, at least in theory. This paper argues that the multifarious inadequacies of the Montreal regime, due to its textual absurdities, leaves injured or aggrieved airline passengers inadequately compensated or totally remediless. Consequently, the passengers' compensation losses translate to the airlines' gains. What the airlines are supposed to pay to the passengers eventually go back to the airlines, which put the passengers under an avoidable detriment. The paper recommends a suitably effectual restitutory intervention in the compensatory regime of airline passengers. In the alternative, the paper recommends that the International Civil Aviation Organisation should set a robust machinery in motion to amend some provisions, particularly Article 17, of the Montreal Convention of 1999.

Key words Myth, Restitution, Regime, Compensation, Injury and Airline.

I Introduction

Airline travel is a common form of navigation for long-distance passengers and cargo consignment, and it has been considered as the only viable option when time is of the essence.¹²⁷ Therefore, the nature of air navigation renders it susceptible to many liabilities.¹²⁸ The most frequently encountered liability is airline liability for passengers' death, bodily injury, flight delay, loss of, and damage to, baggage and cargo as well as liability for damage caused to third parties by foreign aircraft on the surface.¹²⁹

The thrust of this paper is an examination of the unreal and illusory nature of the compensatory regime affecting airline passengers in the Nigerian civil aviation industry. The paper argues that the inclusion of the word "restitution" in the Preamble to the Montreal Convention of 1999 is of no or little consequence as its inclusion does not translate to an equitable and fair treatment of injured or aggrieved airline passengers, including injured innocent third parties, in the Nigerian civil aviation industry in cases of claims for compensation.

In order to properly address the issues involved, the paper is divided into six parts. Part two will examine the various instances when compensation may be payable to airline passengers, and occasionally third parties. Part three discusses the applicable legal and institutional regimes for airline passengers' compensation in Nigeria. Part four justifies the basis for a suitably effectual restitutory intervention in the compensatory regime of airline passengers in Nigeria. Part five briefly explains the principle of restitution while part six deals with the conclusion and recommendations.

¹²⁷ Edward J. Bardi, et al, *Management of Transportation*, Thomson Corporation (2006) Page 158.

¹²⁸ Some peculiar forms of liability in the airline industry include contractual liability, tortious liability and product liability.

¹²⁹Articles 17 & 19, Montreal Convention, 1999.

II COMPENSABLE CASES IN THE AIRLINE INDUSTRY

There are many instances that can give rise to, or form the basis of, passengers' compensation in international air transport. They include the death of a passenger, flight delay, cancellation of flight, loss of, and damage to, baggage, damage to cargo and damage to innocent third parties on the surface. An attempt will be made to briefly discuss each of them.

1. Flight Delay - This occurs when an airline fails to keep to its flight schedules. When this happens, the aggrieved passengers cannot get to their destinations as previously planned by them. Even though the airlines may adduce reasons for this lapse, there is usually a resulting harm or damage to the passengers.

The law awards compensation to an aggrieved air passenger who has suffered damage as a result of a delayed flight. Even where an employer buys tickets for, and on behalf of, its employees or agents, the employer will get compensation from the defaulting airline.¹³⁰ The European Court of Justice recognized this position in the case of *Air Baltic Corporation AS V Lietuvos Respublikos Specialiuju Tyrmy Tarnyba*,¹³¹ which involved Baltic Air and the Specialist Investigation Service of the Republic of Lithuania (SIR). In this case, the European Court of Justice had a rare opportunity to interpret Articles 19 and 22(1) of the Montreal Convention, 1999. The facts are not in dispute. The Special Investigation Service of the Republic of Lithuania bought from Air Baltic two tickets to transport two of its agents from Vilnius to Baku. The airline had a number of stops *en route* and the agents were delayed. The Special Investigation Service of the Republic of Lithuania, therefore, incurred additional costs on the two agents. The ECJ ruled that Air Baltic was under an obligation to compensate SIR, as the contracting party.

Flight delay may occur before embarkation; it may also occur on board, especially when the aircraft engages on a frolic of unnecessary stops *en route*. Flight delay may also be caused by overbooking, which may eventually lead to bumping.¹³² In the United States of America, after a tarmac delay of three hours, affected passengers must be allowed to deplane. The airline may, however, ride on the excuses bordering on safety, security threat or advice of the air traffic control unit to the pilot. Where a tarmac delay occurs, the airline must provide adequate refreshments and conveniences within two hours of the tarmac delay.¹³³

The US position is commendable. The Montreal Convention of 1999, however, appears to have flown at a detrimental tangent against the interest of airline passengers. According to the relevant provisions of the Convention, a carrier shall be held liable for damage caused by delay except it is able to establish that all reasonable steps to avoid the delay have been taken.¹³⁴

The Convention has created a leeway for defaulting airlines in cases of delay as they can defend themselves in the terms spelt out in Article 19 of the Convention. When this happens, it cannot be said that the principle of restitution contained in the same Convention is being honored in observance. There is, therefore, the need for an effectually robust restitutory intervention.

2. Cancellation of Flight - This is a common occurrence in developing aviation industries. The airlines do cancel flights at will in many countries, especially in Africa. There is a general consensus in the airline industry that

¹³⁰ Nicholas Hammond, "Airline Liable to Employers for Compensation for Delay-Romania", available at: <https://www.hg.org/article.asp?id=37925>, accessed on 31/7/2017.

¹³¹ ECJ, Case No. C-429/14, referred to by Nicholas Hammond in his article above, *supra* note 4.

¹³² Bumping is an airline practice in which affected passengers agree to be re-scheduled for a later flight for a valuable consideration. Where it is not voluntary, the passenger must be compensated. See HG Firm of Solicitors "What Are My Legal Rights if My Flight Gets Canceled or Delayed", available at: <https://www.hg.org/article.asp?id=31564>, accessed on 31/7/2017

¹³³ HG Firm of Solicitors "What Are My Legal Rights if My Flight Gets Cancelled or Delayed?", available at: <https://www.hg.org/article.asp?id=31564>, accessed on 31/7/2017.

¹³⁴ Article 19 of the Montreal Convention of 1999, which is *in pari materia* with Article 19 of the modified version of the Convention as contained in the Nigerian Civil Aviation Act, 2006. Section 48(1) of the said Civil Aviation Act domesticates the Montreal Convention of 1999 and makes it applicable to international flights, while Section 48(2) modifies the "original" Convention and makes it applicable to domestic flights.

airlines hardly guarantee their schedules due to the vagaries of weather, unexpected mechanical problems, air traffic delay, or a number of some other factors that could affect flight schedules.¹³⁵ Again, the airlines do claim that they reserve the right to delay, re-schedule, or cancel flights in their sole discretion.¹³⁶ As a form of palliative, the airline may re-book the flight or pay for reasonable meals and accommodation. What remains unresolved is the damage the passenger must have suffered in terms of missed appointments or opportunities arising from such flight cancellations. If the Montreal Convention lies prostrate on this critical state of things, then the principle of restitution must be actively invoked.

3. Loss of, and Damage to, Baggage and Cargo - This is another compensable phenomenon in international air navigation. Where the passenger suffers damage to his baggage or a loss to his baggage, he may be compensated by the defaulting airline. The conditions attached to the compensation are a bit complex.¹³⁷

4. Death or Bodily Injury - This also constitutes another important heading or sub-heading under which a passenger may be compensated in the event of death or infliction of bodily injury on a passenger.¹³⁸ This particular aspect of airline liability appears to be the most controversial in the determination of air carrier's liability.¹³⁹

5. Damage Caused by Foreign Aircraft to Third Parties on the Surface -This is another instance where compensation is payable to a third person who has suffered damage from a foreign aircraft. This situation is regulated by international treaties. The first of such treaties was the International Convention for the Unification of Certain Rules relating to Damage Caused by Aircraft to Third Parties on the Surface.¹⁴⁰ This was followed by the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.¹⁴¹ The Rome Convention of 1952 has also been followed by a Protocol,¹⁴² both of which now appear to be the applicable laws on the subject-matter, as the 1933 Rome Convention has been superseded.¹⁴³

Some of the provisions of the Rome Convention of 1952 and the Montreal Protocol of 1978 are in favour of the affected aircraft operators. A third party who is not under a contract with the aircraft operator has been put at a disadvantage by the relevant provisions of the Rome Convention of 1952. Firstly, the Convention allows defences against innocent third parties who suffer damage.¹⁴⁴ Secondly, the Convention gives time limitation within which the aggrieved and injured third parties can bring their claims for compensation, thereby limiting their chances of getting compensated at all.¹⁴⁵ Again, the Convention seems to exclude complaints on damage caused by domestic aircraft to third parties on the surface. This means that the injured third parties may suffer without compensation. This makes the intervention of the principle of restitution imperative.

¹³⁵ See HG Firm of Solicitors, "The Airline Cancelled My Flight Can I Sue for a Refund?", available at: <https://www.hg.org/article.asp?id=34627>, accessed on 31/7/2017.

¹³⁶*ibid.*

¹³⁷Article 17(1) of the Montreal Convention, 1999.

¹³⁸Article 17(1), Montreal Convention, 1999.

¹³⁹ It will be more elaborately discussed later in this paper.

¹⁴⁰ This Convention was signed in 1933.

¹⁴¹ The Convention was signed in 1952.

¹⁴² Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952, which was signed at Montreal, on 23 September 1978, otherwise called "Montreal Protocol 1978".

¹⁴³Article 29 of the Rome Convention of 1952.

¹⁴⁴Article 6 of the Rome Convention of 1952.

¹⁴⁵Articles 19 & 21 of the Rome Convention of 1952.

III LEGAL FRAMEWORK FOR COMPENSATING INJURED PASSENGERS

The entire aviation industry will be chaotic if air passengers' compensation is not properly regulated. To avoid a state of chaos, therefore, a robust legal framework exists both at domestic and international levels for the compensation of airline passengers. Since the international legal regime provides a veritable template for the domestic one, an attempt will first be made to discuss the international aspect.

1. International Legal Approach to Airline Passengers' Compensation - The most prominent international treaty here is the Warsaw Convention of 1929. It is a product of two conferences in Paris in 1925 and Warsaw in 1929.¹⁴⁶ The purposes of the Convention were to aid the infant international airline industry by establishing uniform rules governing international air carriage and to limit carriers' liability for potentially ruinous losses, thereby enabling the air carriers to obtain insurance and financial support. In return for this liability limit, the carriers accepted a presumption of liability in suits filed against them under the Convention.¹⁴⁷ The Convention set out to achieve uniformity in air carrier liability and facilitation of air travel among member countries.¹⁴⁸

The Warsaw Convention severally underwent amendments and modifications now culminating in the Montreal Convention of 1999.¹⁴⁹ The Montreal Convention is a kindred international treaty that sought to put an end to the fragmentary nature of the Warsaw system.¹⁵⁰ It applies to all international flights, and this is clear from the provisions of the Convention.¹⁵¹ The Montreal Convention of 1999 shall take precedence over any other Conventions applicable to air flights that had been previously laid down by the Convention for the Unification of Certain Rules relating to International Carriage by Air,¹⁵² the Hague Protocol,¹⁵³ the Guadalajara Convention,¹⁵⁴ the Guatemala City Protocol¹⁵⁵ and the Montreal Protocols.¹⁵⁶

The Convention of 1999 is an improvement on the Warsaw regime as it significantly introduced a two-tier liability scheme, especially in cases of death or bodily injury. First, it sets out that the carrier shall be bound by the liability limit that does not exceed 100, 000 SDRs.¹⁵⁷ This provision has entrenched a strict liability regime, notwithstanding the carrier's fault, the moment an aggrieved passenger has established their claim under the relevant provisions of the Montreal Convention of 1999.¹⁵⁸ Under the second tier, any damages beyond 100,000 SDRs may still be recovered by a claimant except the carrier puts up some defenses.¹⁵⁹ This position renders passengers' right to compensation illusory, especially where the strict liability ceiling is insufficient to assuage the aggrieved passengers. This calls for a result-oriented restitutory intervention.

2. Domestic Legal and Institutional Approach to Airline Passengers' Compensation - Nigeria has principal aviation legislation and civil aviation regulations. This is in fulfillment of the International Civil Aviation

¹⁴⁶ Carol Lynne Tomeny, "Compensation under the Warsaw Convention for Victims of Hijackings and Terrorist Attacks" 3 *Brooklyn Journal of International Law*, (1977) Pages 31-56, at 31.

¹⁴⁷ *Ibid.*

¹⁴⁸ Tory A. Weigand, "Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention" 16 *Am. U. Int'l L. Rev.*, (2001) Pages 891-968, at 892.

¹⁴⁹ James C. Duncan, "Battling Aerial Terrorism and Compensating the Victims" 39 *Naval Law Review* (1990) Pages 241-268, at 260-261.

¹⁵⁰ Article 55 of the Montreal Convention, 1999.

¹⁵¹ Article 1(1) of the Montreal Convention, 1999.

¹⁵² This Convention was signed in 1929.

¹⁵³ This was done in 1955.

¹⁵⁴ This was signed in 1961.

¹⁵⁵ This was signed in 1971.

¹⁵⁶ These Protocols were signed in 1975.

¹⁵⁷ Article 21(1) of the Montreal Convention, 1999. It should be noted that Article 21(1) of the modified version of the Convention, made pursuant to Section 48(2) of the Nigerian Civil Aviation Act, 2006, replaces "100, 000 SDR" with "\$100, 000".

¹⁵⁸ Andrew Field, "International Air Carriage, the Montreal Convention and the Injuries for which there is no Compensation" 12 *Canterbury Law Review*, (2006) Pages 237-252, at 243.

¹⁵⁹ Article 21(2) of the Montreal Convention, 1999. See also Andrew Field, *supra* note 32, at page 243.

Organisation's requirements for a safe aviation system.¹⁶⁰ The primary aviation legislation in Nigeria is the Civil Aviation Act, 2006, which contains ample provisions on compensation for airline passengers in the country.¹⁶¹ The Act, having passed the constitutional test in the Nigerian grundnorm,¹⁶² has incorporated the 1999 Montreal Convention for the compensation of airline passengers in international air carriage.¹⁶³ The Act incorporates as well as contains the modified version of the Montreal Convention, 1999, for the compensation of airline passengers in domestic flights within the Nigerian airspace and airports.¹⁶⁴

Article 17 of the "modified Convention" is essentially the same with Article 17 of the "original Convention". Therefore, the interpretational challenges of the latter necessarily confront the former. The aggrieved passengers or their dependents may stand remediless under both versions due to the problem of ascribing precise legal meanings to certain words in their provisions.¹⁶⁵ Again, the provisions in the Civil Aviation Act, 2006, bordering on compensation seem to have only negligible impact, if any.¹⁶⁶ This calls for a restitutory intervention.

In addition to the above legal provisions in the Nigerian civil aviation industry, the Nigerian Civil Aviation Authority has a department. It is the Consumer Protection Department. It has not lived up to its mandate in meeting the demand of the airline passengers.¹⁶⁷ The Department is directly under the directorate of air transport regulations.¹⁶⁸ It ensures that all consumer complaints received are addressed expeditiously on the principle of fairness as well as resolves disputes between airlines and passengers, Cargo Operator/Shippers, among airlines, airlines and others service providers. This department creates awareness among consumers of aviation services of their rights and how to seek redress when these rights are violated. The department of consumer protection also screens all advertisements that are likely to affect the travelling public as well as ensures that the services provided by the service providers in the Nigerian aviation industry are in accordance with the prescribed service level. The mission of the consumer protection department is to ensure an efficient and seamless civil aviation system in Nigeria.¹⁶⁹ The objective of the consumer protection department is to generally complement the regulatory efforts of the Nigerian Civil Aviation Authority and other aviation agencies in Nigeria. The department of consumer protection has devised some strategies to achieve its objectives, which are the production and massive circulation of consumer enlightenment through many avenues.

Unfortunately, the department has not done much to address the needs of airline passengers who have suffered one form of damage or another under the Montreal terms. One is quick to suggest that in view of the consumer-prone stance of this department, it should be made a separate Directorate so that consumer protection can have its own director. This will facilitate an easy execution or implementation of the lofty objectives and goals of the department.

¹⁶⁰ The International Civil Aviation Organisation has eight critical elements for measuring a State's aviation safety status. They are: primary aviation legislation and civil aviation regulations; civil aviation organization; personnel licensing and training; aircraft operations; airworthiness of aircraft; air navigation services; aerodromes and; aircraft accident and incident investigation. See the 2011 State of Global Aviation Safety Report of the International Civil Aviation Organisation, available at :[http://www.icao.int/safety/Documents/ICAO State-of-Global Safety web EN.pdf](http://www.icao.int/safety/Documents/ICAO%20State-of-Global%20Safety%20web%20EN.pdf), accessed on 26/8/16.

¹⁶¹Section 48 of the Civil Aviation Act, 2006.

¹⁶² See Section 12(1), Constitution of the Federal Republic of Nigeria, 1999.

¹⁶³ Section 48(1) of the Nigerian Civil Aviation Act, 2006, and the Second Schedule made pursuant to the Act.

¹⁶⁴ Section 48(2) of the Nigerian Civil Aviation Act, 2006, and the Third Schedule made pursuant to the Act.

¹⁶⁵Article 17(1), Montreal Convention, as modified, Civil Aviation Act, 2006.

¹⁶⁶ Section 71, Civil Aviation Act (Nigeria), 2006.

¹⁶⁷ The Nigerian Civil Aviation Authority (NCAA) is the regulatory body for civil aviation in Nigeria, a body similar to the US Federal Aviation Administration and many other countries' aviation regulatory authorities.

¹⁶⁸ The Nigerian Civil Aviation Authority has many directorates through which it functions. See Section 30(7)(a)-(i) of the Civil Aviation Act, 2006.

¹⁶⁹ www.ncaa.gov.ng.

IV JUSTIFICATION FOR A SUITABLY EFFECTUAL RESTITUTORY INTERVENTION

The shortcomings of the Warsaw and the Montreal regimes, including the ineffective domestic compensatory mechanism in Nigeria, call for an alternative approach. First, the Montreal regime has established a monetary ceiling of \$100,000 in cases of passengers' death or injury. This has been considered inequitable because it is not in all cases that the ceiling can adequately compensate the aggrieved claimants.¹⁷⁰ Secondly, it appears that the compensatory regimes under both the Warsaw and Montreal Conventions strictly treat as compensable complaints bordering on wounding or other bodily injury to the exclusion of mental distress. According to Carol L. Tomeny: "The soundest view, therefore, appears to be that mental distress without physical injury or manifestations is not compensable, as was held in *Rosman*."¹⁷¹ This view has been shared by many other authors.¹⁷² Besides, it appears that there are some countries where the Warsaw and Montreal Conventions do not provide for compensation for injury or death on domestic flights. The aggrieved victims will have to seek redress under the traditional negligence principles, which may reduce their chances of success. This situation may arise where the country concerned fails to domesticate the Montreal Convention of 1999, and does not also have an alternative legal framework for airline passengers' compensation.¹⁷³ Moreover, both regimes - Warsaw and Montreal - impose a two-year limitation period within which a suit may be commenced against the carrier.¹⁷⁴ This may not be in the interest of the affected passengers or dependants.¹⁷⁵ In addition, in cases where the aggrieved passengers fails to formally lodge a complaint for loss or damage to baggage or cargo, or delay, as required by the Convention, the passenger may forfeit or lose the compensation.¹⁷⁶ The most serious of all these shortcomings is the interpretational controversy surrounding Article 17(1) of the Montreal Convention, which tends to limit the chances of the dependants' claims¹⁷⁷ and aggrieved passengers' claims.¹⁷⁸ According to the relevant provisions of the Treaty, an air carrier shall be held liable for death or bodily injury of a passenger if the death or injury results from an accident which occurred on board an aircraft or during the rituals of enplaning and deplaning.¹⁷⁹

The success or failure of deceased passengers' dependants' claims depends on the judicial interpretation of the vexed expressions "on board the aircraft" and "in the course of the operations of embarking and disembarking".¹⁸⁰ Again, the expression "bodily injury" used in Article 17 of the Montreal Convention excludes mental injuries such as psychiatric or psychological type, and this has received judicial approval from the US apex court in the case of *Eastern Airlines V Floyd*.¹⁸¹ In this case, aggrieved air passengers brought claims for emotional distress. The US Supreme Court dismissed their claims on the ground that bodily injury excludes emotional distress.

¹⁷⁰Carol Lynne Tomey, *supra* note 20, at page 31.

¹⁷¹*Ibid.* at page 46.

¹⁷²One of them is Abby L. Pozefsky. See Abby L. Pozefsky, "Air Law- Warsaw Convention and Montreal Agreement- Hijacking Victims May Recover Damages from Airlines" 6 *N.Y.U. Journal of International Law & Policy*, (1973) Pages 555-568, at 565-566.

¹⁷³ Michael Gottsegen, "Are the Skies Really Friendly? Proposed Theories of Relief for the Injured Hijacked Passenger" 5 *Southwestern University Law Review*, (1973) Pages 430-457, at 432 & 442.

¹⁷⁴Article 35 of the Montreal Convention, 1999.

¹⁷⁵ Andrew Field, International Air Carriage, the Montreal Convention and the Injuries for which there is no Compensation 12 *Canterbury Law Review*, (2006) pages 237-252, at 245.

¹⁷⁶Article 31 of the Montreal Convention, 1999.

¹⁷⁷ In cases where the deceased passenger is survived by some family members

¹⁷⁸In cases of flight delay, loss of, or damage to, baggage and cargo.

¹⁷⁹Article 17(1), Montreal Convention, 1999.

¹⁸⁰ See the US case of *Day V Trans World Airlines* 393 F Supp 217 (SDNY.1975) and the English case of *Phillips V Air New Zealand*[2002] 2 Lloyds Rep 408, both of which were cited and referred to by Andrew Field in his article, *supra* note 49, at pages 245 and 246 respectively.

¹⁸¹ 499 US 530 (1991); the facts are more elaborately set forth by Andrew Field, *supra* note 49.

It seems that a claim for mental injury is maintainable if the mental injury results from physical injury. In the case of *Merris V KLM*,¹⁸² an aggrieved female air passenger sued for clinical depression, linking it to her flight. The House of Lords dismissed her claim as she failed to establish any physical or bodily injury done to her.¹⁸³ The implication of this is that passengers who are victims of serious jetlag or Deep Vein Thrombosis (DVT) may not be compensated because either of the experiences results not from an “accident” but the passenger’s own personal reaction to the usual, normal and expected operation of the aircraft.¹⁸⁴ This fact of the Montreal Convention’s non-recognition of mental injuries and the resulting frustration have been well described in the context of the New Zealand civil aviation industry.¹⁸⁵

The effect of the above is that there are instances when an airline passenger will not be able to get any compensation for any injuries from mental or emotional complaints. Should such passengers be left without any remedy? They should be rescued by the principle of restitution.

V AN EXAMINATION OF THE PRINCIPLE OF RESTITUTION

Restitution seeks reimbursement from another who had benefited from his actions, services or property without legal justification.¹⁸⁶ In order to be granted restitution, the plaintiff must show that the defendant received a benefit and that by the receipt of that benefit, he was unjustly enriched at his expense and that circumstances were such that in good conscience, the defendant should make compensation. Restitution being made is regarded as a form of corrective justice for cases of unjust enrichment.¹⁸⁷

The expression “unjust enrichment” and Restitution” are often used interchangeably or together in most jurisdictions. Unjustly enriching oneself will lead to an accrual of a cause of action. Restitution will form part of the reliefs. Where a party unjustly enriches himself at the expense of another, the court makes him disgorge the enrichment by way of restitution.¹⁸⁸ In some jurisdictions, restitution is otherwise called a gains-based recovery.¹⁸⁹ Restitution seeks to strip a person of ill-gotten enrichment. Many factors may precipitate restitution.

However, the essential parts of the law of unjust enrichment and restitution deal with disgorgement for wrong-doing and autonomous or subtractive unjust enrichment.¹⁹⁰ The award of restitutionary remedies consequently operates as a mechanism to secure corrective justice by rectifying an imbalance between the claimant and the defendant.

1. Nature and Scope of the Law of Unjust Enrichment and Restitution - In the United States of America, the *North Dakota Supreme Court* has ruled that five elements must be established to prove unjust enrichment. They are:¹⁹¹

- 1 An enrichment;
- 2 An impoverishment;
- 3 A connection between the enrichment and impoverishment; and
- 4 Absence of justification for the enrichment and impoverishment; and
- 5 An absence of a remedy provided by law.

¹⁸² [2002] UKHL 7; the facts are more explicitly captured by Andrew Field, *supra* note 49.

¹⁸³ It is even doubtful whether “caressing and touching” can be interpreted to mean “accident”.

¹⁸⁴ Andrew Field, *supra* note 49, at page 249.

¹⁸⁵ *Ibid.* at page 248.

¹⁸⁶ J.P. Dawson, *Unjust Enrichment*, Little Brown & Cos (1959), p. 5.

¹⁸⁷ E.J. Weinrib, *The idea of Private Law*, Mass Harvard University Press (1995) pp. 18-19.

¹⁸⁸ In Common Law countries, the law is known as Law of Restitution, and in the civil law countries, the law is known as Law of Unjust enrichment or unjustified enrichment.

¹⁸⁹ *Supra*, note 61, p p. 18-19.

¹⁹⁰ L. D. Smith, “The Province of the Law of Restitution”, 71 *CAN. Rev.* (1992) P. 672.

¹⁹¹ Visited at www.court.state.nd.us/court/opinions on unjust enrichment, accessed on the 15th April 2016.

In Canada, the apex court has recently reviewed and analyzed the applicable legal principles on unjust enrichment in the case of *Garland v. Consumers' Gas Co.*¹⁹² As recognized by the court, a cause of action in the law relating to unjust enrichment comprises an enrichment of the defendant, a corresponding deprivation of the claimant and want of a legally acceptable reason for the enrichment.¹⁹³ It is our views that the Canadian approach had incorporated the other two elements as provided under the American Law and this has also been adopted also in this paper.

In spite of the rather straight forward legal bases of the notions of unjust enrichment, their applications have given rise to difficulties. Many jurists and legal experts agree with the first and second elements of unjust enrichment. However, the third element has been incapable of an agreed meaning because of the phrase "absence of juristic reason".¹⁹⁴

i. An Enrichment of the Defendant

There must be some enrichment or benefit to the party against whom the claim is made. This may take the form of a direct addition to the recipient's wealth, such as the receipt of money, or an indirect one, for instance, where an inevitable expense has been saved.¹⁹⁵

ii. A Corresponding Deprivation of the Plaintiff or to the Plaintiff's Detriment

Having established that the defendant had been enriched by the conferment of a benefit, the plaintiff must be able to show that the enrichment is to his detriment arising from the defendant's breach of his duty to the plaintiff.¹⁹⁶

iii. An Absence of Juristic Reason for Enrichment

The phrase "no juristic reason" means the same as no lawful reason.¹⁹⁷ The court, per Cory J., held that a juristic reason will exist when a claimant owes an obligation arising from a statute or contract. The court, in *Garland's case*, held that the proper approach to the juristic reason analysis is in two parts: the plaintiff must show the absence of any juristic reason from an established category.¹⁹⁸ In doing this, the court must have regard to reasonable expectation of the parties and public policy consideration. The third prong of the analysis has received more elucidations.¹⁹⁹

In some jurisdictions, the third prong of the unjust enrichment test has been interpreted and applied. For instance, in *Sorochem v. Sorochem*,²⁰⁰ a case concerning the property; rights of common law spouses, Dickson C.J.C held that the third requirement will be deemed to exist where a party suffers a loss to the unjust gain of another.

In another case in JPMG (*Trustee in Bankruptcy of Ellingsen*) v. *Hallmark Ford Sales Ltd*,²⁰¹ Lambert J.A. of the British Columbia Court of Appeal held that the principles of equity must be called in aid to measure the injustice or otherwise of an unjust enrichment.

The principle of restitution rests on three important prongs. The first is that a party has taken undue advantage of the other by enriching himself at the expense of that other. The second is that the other party has suffered a detriment and the third one is that there exists no justification for the enrichment. In cases where airline passengers have missed business opportunities or other important appointments, or where

¹⁹²[2004] S.C.J. No 21; 2004 SCC 25

¹⁹³The similar elements were stated by the Illinois *Supreme Court in Health care Services Inc. v. Mt Vern on Hospital, Inc. (supra)*

¹⁹⁴See W. E. McNaily, and Bottom Line Research & Communications: 'Recent Development on Unjust Enrichment', accessed on www.wikipedia.com on 6th April 2016.

¹⁹⁵*Kelly v. Solari*[1841] 9 M & W 54.

¹⁹⁶ See *Foskett v. Mckeown*[2000] 3. P. ER 97.

¹⁹⁷B. Oni, "Restitution and Equity: An Analysis of the Principles of Unjust Enrichment" 3 *UNILAG – Current Law Series*, (2009) p. 109.

¹⁹⁸The established categories include a contract, disposition of law, a donative intent and other valid common law, equitable and statutory obligations.

¹⁹⁹*The Law of Restitution* (Sweet and Maxwell (12nd ed.) (1900)) p. 53.

²⁰⁰ [1986] 29 D.L.R. (4TH) 1 (S.C.C)

²⁰¹ [2000] 190, D.L.R. (4th) 47 (B.C.C.A.)

innocent third parties have suffered damage from domestic aircraft, the principle of restitution stoutly provides that the defaulting airline must not profit from its own wrong doing.

2. Rationalizing Restitution to Claims in Airline Compensation - There is no doubt that the kind of restitutionary compensation envisaged by the Montreal Convention of 1999²⁰² is the one that operates on the principles of equity which make it unconscionable for the airlines to either enrich themselves or take benefits at the expense of their passengers without adequate compensation. The great concern here is that the application of the principle of restitution is shrouded in uncertainty and the uncertainty will linger for long unless its causes are addressed.²⁰³

Disgorgement in Passenger's restitution is either based on unjust enrichment cases or restitutionary claims without unjust enrichment. Most airline passengers may allege that airlines have actually been enriched where there are cases of delay in flight, cancellation of flight, body injury, damages to baggages or any transaction at all or will it be enough to show that airlines have obtained a benefit (at the passenger's expense) to which he has an insufficient legal entitlement? In some cases, admittedly, the answer to this question will determine only how an airline's liability is explained; but in others, it will decide the issue of liability first. For instance, a passenger alleging an outright cancellation of his flight, which ordinarily amounted to a fundamental breach of contract on the part of the airline and who had incurred a great loss due to inability to meet up with an important business appointment may have either a valuable claim in restitution or else no claim at all, depending on whether the function of restitution is to unwind certain imperfect transactions or to prevent enrichment:

The arguments of the principal authorities for the unjust enrichment conception, including most notable Restatement²⁰⁴ itself, appear to accept the idea that the act of restoration forms at least a subsidiary part of the law of restitution, despite the fact that the restoration remedies operate without regard to the defendant's enrichment. Leading American scholars²⁰⁵ of restitution, moreover, have questioned whether unjust enrichment is even central to this body of law. Notable contributions have been made to the field in the literature.²⁰⁶ Most of the challenges of restitution remedies do not depend on any showing that the defendant has been enriched in the ordinary sense of the word.

Douglas Laycoul²⁰⁷, who accepts the standard account of the unjust enrichment side of restitution, argues that it constitutes only half the picture. He sees the restoration remedies or restitution *in specie*, as part of the core concept of restitution conceptually equal to avoidance of unjust enrichments. It is our views that restitution, when employed as a remedy for breach, constitutes restoration of the non-breaching party to the *status quo ante*. We strongly associate with this position on the premise that if all cases of restitution are based on unjust enrichment, it would be a myth for a passenger to sue airlines for restitution in cases of flight delay, flight cancellation, injury resulting from accident, among others. If restitution is limited to the cases of unjust enrichment, it would be axiomatic that no liability could be asserted in restitution other than the one referable to the unjust enrichment by the airline.

We also argue that there are many instances where a passenger could maintain an action in restitution against an airline without the latter being enriched unjustly. These are cases of restitution without enrichment. The heart of Dawson's article is a catalogue of cases in which a liability described as restitutionary was imposed on defendants who could realistically deny that the transactions in question, had enriched them. With Dawson's argument, one can give typical examples, like death of a passenger, flight delay, benefits conferred by mistakenly releasing to somebody else a third party passenger's baggages, among others. It is our views that there is no enrichment to the airlines in any of these examples listed above. Nevertheless, a third party or a passenger can maintain an action in restitution without the need to establish enrichment on the part of the airlines.²⁰⁸

²⁰²B.A. Oni, "Restitution and Equity: A 'Critique of the Principle of Unjust Enrichment'" 3(1), *Unilag Current Law Series*, Faculty of Law, University of Lagos, (2009) Pages 109-123, at 109, 111, 114 & 116.

²⁰³Andrew K. 'Rationalizing Restitution, . 83. O. 5, *California Law Review* (October 1995) pp. 1191 – 1242.

²⁰⁴*ibid.*

²⁰⁵ The American Law Institute's Restatement of the Law of Restitution: Quasi Contract and Constructive Trusts: (American Law Institute Publishers, 1937) p. 1.

²⁰⁶ *Ibid.*

²⁰⁷John P. Dawson: Restitution Without Enrichment 61 *B.U.L Rev.* (1981) 563, 577:

²⁰⁸ Douglas Laycoci; The Scope and Significance of Restitution 67 *Tex. L. Rv.* 1208.

In view of the above, it is submitted that the use of the word restitution in the Montreal Convention appears too general to include both forms of restitutionary remedies either in cases of unjust enrichment-based restitution or non-enrichment restitution. Irrespective of the argument we have adopted, it is crystal clear that the application of restitution in airline compensation regime will depend on the nature of claims before the court. If one should go by the argument of renowned scholars on the scope and nature of restitution, which restricted its understanding to unjust enrichment cases, it might be a myth for a passenger to sue by a sole reliance on the law of restitution where it is clear that there was no case of enrichment to the airline concerned. However, until the linguistic confusion that bedevils the law of restitution is resolved, passengers' suits in restitution will be a myth.²⁰⁹

VI CONCLUSION AND RECOMMENDATIONS

The Montreal Convention of 1999, including its modified version, which is applicable to domestic flights in the Nigerian civil aviation industry, is exclusive in its application to cases of death, bodily injury, loss of, or damage to, baggage and cargo arising from air navigation.²¹⁰ This limits available avenues for compensation by passengers. Ironically, the Convention purports to be operating on the principles of equity and restitution by "RECOGNISING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for *equitable* compensation based on the *principle of restitution*."²¹¹

As of today, it remains a myth that airline compensation in Nigeria operates on the principles of equity and restitution. The textual absurdities in the Montreal Convention create a leeway for the airlines to avoid paying compensation to the aggrieved airline passengers. The institutional mechanisms put in place are also not effective.

The International Civil Aviation Organization (ICAO) must set a robust machinery in motion for the amendment of Article 17 of the Montreal Convention. This important step will remove the ambiguities surrounding the interpretation of certain expressions like "bodily injury", "accident" and "any of the operations of embarkation and disembarkation". These expressions, as currently contained in the Montreal Convention of 1999, make the operation of the principle of restitution a myth in the Nigerian air transport industry. Alternatively, where the Convention fails to achieve justice and equity, the principle of restitution should be fully enlisted. This is to avoid the various instances in which injured airline passengers and dependents fail to get compensated for complaints arising from airline wrongful acts.

²⁰⁹Supra note 77.

²¹¹ See the third leg of the Preamble to the Montreal Convention of 1999. The italicized expressions are singled out for emphasis.

Role of Drug Menace in Decaying Society and Youth²¹²

A.Manikyamba*

Abstract

Drugs are as old as mankind. The use of drugs can be traced from the primitive society as a mind altering substance. In Vedas mention of drugs can be traced. In religious ceremonies like Holi, God Dathatreya pooja or Shiva rathri drugs are consumed with utmost devotion. Consumption of alcohol and smoking tobacco was common in ancient India among rulers and merchants. It was even widely used by ancient Indian Kings and Merchants. It was used as a symbol of status and to showcased hospitality. The Convention on the Rights of the Child clearly states that Children have the right to live and governments should ensure that children and develop healthily²¹³. Drugs on one side are badly ruining the lives of children with their evil effects. The Constitution of India 1950 promulgated rights included in the UN Convention on the Rights of the Child in Fundamental Rights and Directive Principles of State Policy. Drug abuse has social, cultural, biological, geographical, historical and economic aspects. It effects persons nutrition, sleep, education, employment, relationships, reduced capacity in making decision, violence, communicable diseases and even indulgence in criminal activities. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and SAARC Convention on Narcotic Drugs and Psychotropic substances 1988 are some International conventions in trafficking drug menace. Some Indian laws exercised to control drug trafficking are Narcotic Drugs and Psychotropic Substances Act 1985 and NDPS (Regulation of Controlled Substances) order 2013

Keywords Vedas, symbol of status, violence, communicable diseases, United Nations conventions

I USE OF DRUGS IN ANCIENT INDIA

Drugs are as old as mankind. The use of drugs can be traced from the primitive society as a mind altering substance. The Vedas considered *Cannabis* as one of the five sacred plants which was considered as a source of pleasure, joy-giver and liberator to attain delight which releases stress. Atharva Veda *Cannabis* is mentioned as "*sacred grass*" which is socially accepted. Even today *Cannabis* is used and consumed with utmost devotion in religious ceremonies like Holi, God Dathatreya pooja or Shivarathri in the form of *ganja*, *bhang* or *charas*. Consumption of alcohol and smoking tobacco was common in ancient India among rulers and merchants. It was even widely used by ancient Indian Kings and Merchants. It was used as a symbol of status and to showcase hospitality.

Recent stories of drug addiction in newspapers, television, radio or a gossip point everywhere is triggering point how school and college going innocent children/teenagers are becoming a pray for the drug addiction. A drug in general is a chemical substance used in curing ailments which is purchased upon prescription over a counter. But now, the drugs which are effecting the lives of young generation of India is something different from the original purpose. Drugs are produced for medicinal use, even alcohol contents are there in cough syrups. But the same alcohol or any kind of drug for pain relief if taken in excess becomes a drug abuse and addiction.

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²¹³ Article 6 of the Convention on the Rights of the Child 1989

II WHAT IS A NARCOTIC DRUG?

Narcotic drug²¹⁴ means coca leaf, cannabis (hemp), opium, popy straw and includes all manufactured drugs²¹⁵. “Psychotropic substances” are substances act on central nervous system, which alters brain function, resulting in temporary changes sensitivity, mood, consciousness and performance ability. They are either natural or synthetic substances which once experimented for recreation and relaxation develop into a compulsion habit.

III WHAT IS DRUG ABUSE?

Drug abuse is non-medical use of drugs or use of drugs by self-administration without medical advice²¹⁶. Addiction to these abused drugs can be due to chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite of known harmful and destructive consequences. The commonly used products like nail polish remover, hairspray and deodorant are quickly available for children and teenagers. Use of these kind of substances can affect the central nervous system, slow down the vital functions like heartbeat, respiration and metabolism of the teenagers.

IV REASON FOR THE EVIL EFFECT OF DRUGS ON YOUNG INDIANS

Absence of parental love and care, more freedom, drastic changes in the lifestyle etc., are leading to a rise in the number of drug addicts who take drugs to escape hard realities of life. Adolescent boys or girls are highly using drugs to reduce stress, ease depression, moving from schooling to college. Even athletes use drugs like steroids for improving their performance to ease the pressure to win medals. Our Indian athletes were rejected many times for using steroids at international sport events. Synthetic drugs such as cocaine, heroine, methamphetamine, mandrax are consumed more by youth which is the main hurdle for national health, economy and security.

- 1. DRUG MENACE IN SOCIETY** - Drug abuse is causing menace in the society with the number of high school going students and youngsters, the budding India is getting addicted to the narcotic Drugs. The peddlers are mainly targeting this section of society for financial gains and are least bothered about the harmful effects. There has been an alarming raise in the illicit drug trafficking despite of the stringent actions taken by the lawmakers and executive bodies. The serious nature of the drug menace has to be tackled urgently.
- 2. DARK WEBS** - Dark webs are also helping in drug trafficking. High school children are buying drugs through dark webs. Bitcoin and digital currencies are helping Indian youth to buy illegal drugs through dark web. India lacks stringent legislations to tackle illegal activities taking place on the dark web. Though the Information Technology Act 2000 prohibits illegal activities on web. But it is difficult to trace dark webs.
- 3. STATISTICS OF DRUG ABUSE** - In a survey revealed by NGO, about 63.6% of treatment is given to drug addicts who are below the age of 15 years and 13.1% of treatment is given to drug addicts who are below the age of 20 years²¹⁷. The data of the National Crime Records Bureau indicates that around 23000 people have committed suicide due to drug abuse/addiction between 2010-

²¹⁴ Derived from Greek word “narkoticos’ meaning ‘numbing’

²¹⁵ Section 2 (xiv) of Narcotic Drugs and Psychotropic Substances Act 1985

²¹⁶ Restricted by Indian Medical Association

²¹⁷ Source: childlineindia.org.in/children-affected-by-substance-abuse.htm

2015. The suicides recorded in some of the states are Andhra Pradesh 162, Chattisgarh 1129, Kerala 2092, Tamil Nadu 2115, Madhya Pradesh 3079, Maharastra being highest with 8943.

The main object of the paper is to analyze the laws at national and International level to combat with the drug menace in India and role of International Convention in enforced stringent anti-drug laws and policies. Here is a glance of Anti-Drug Laws at international and national level:

V UNITED NATIONS TACKLING DRUG MENACE

The Convention on the Rights of the Child clearly states that Children have the right to live and governments should ensure that children and develop healthily²¹⁸. Drugs on one side are badly ruining the lives of children with their evil effects. United Nations General Assembly in its twentieth special session in September 1998 recognized alternative development as "a process to prevent and eliminate the illicit cultivation of plants containing narcotics and psychotropic substances through specifically designed rural development measures in the context of sustained national growth and sustainable development efforts in countries taking action against drugs, recognizing the particular socio-economic characteristics of the target communities and groups, within the framework of a comprehensive and permanent solution to the problem of illicit drugs."²¹⁹ United General Assembly has established in 1997, United nations Office on Drugs and Crime (UNODC) to fight against illicit drugs and international crime. UNODC which is monitoring body in World Drug Report 2017 reported in market analysis of synthetic drugs reported that India also reported seizures of more than 10 tons of ephedrine and 8.5 tons of pseudoephedrine in 2016²²⁰ and India is among the source counties which is in the importation of precursor chemicals. Following are the International Conventions adopted by General Assembly to drug crimes:

- Single Convention on Narcotic Drugs of 1961 amended in 1972
- Convention on Psychotropic Substances of 1971
- United nations Convention against Illicit Traffic in Narcotic Drugs and Psycotropic Substances of 1988
- SAARC Convention on Narcotic Drugs and Psychotropic substances 1988

International Narcotics Control Board²²¹ was established in 1968 in accordance with the Single Convention on Narcotic Drugs, 1961. It is an independent and quasi-judicial monitoring body, which proposes appropriate remedies to the Governments for violation of treaties.

VI CONSTITUION OF INDIA IN TACKLING CHILD RIGHTS AND DRUG MENACE:

Under the Constitution of India children enjoy Fundamental Rights of equality (Art 14), Right against discrimination (Art 15), Right to personal liberty and due process of law (Art 21), Right to be protected from trafficking (Art 23). Further, it guarantees right to facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment (Art 39(f)). Article 47 envisages that it is the duty of the state to raise the level of nutrition and the standard of living and to improve public health. The State shall regard the raising o the level of nutrition and the standard of living of its people and the

²¹⁸ Article 6 of the Convention on the Rights of the Child 1989

²¹⁹ <https://www.unodc.org/unodc/en/alternative-development/overview.html>

²²⁰ http://www.unodc.org/wdr2017/field/Booklet_4_ATSNPS.pdf

²²¹ <https://www.incb.org/incb/en/about/mandate-functions.html>

improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health. The Government of India has enacted the various Laws in accordance with the UN Conventions and Constitution of India, exercising its power to make law for the country for implementing "any treaty, agreement or convention or decision made at international conference"²²².

VII ANALYSIS OF LEGISLATIONS ON ANTI-DRUG LAWS IN INDIA

1. Narcotic Drugs and Psychotropic Substances Act 1985(NDPS Act)²²³:

The NDPS Act came into force replacing the Opium Acts and the Dangerous Drugs Act 1940 which were enacted to regulate the medical use of drugs such as cannabis and opium. The Act mainly deals with requirement of limiting the use of narcotic drugs and psychotropic substances for medical use and scientific purposes as well as preventing the abuse of the same. The NDPS Act mainly views offences relating to drug very seriously and advocates stringent penalties. It also prescribes quantum of punishment depending upon the offences pertaining to small, commercial and intermediate quantities of narcotic drugs and psychotropic substances. The Punishment for commercial quantities of drugs is minimum penalty of ten years rigorous imprisonment which may be extended to twenty years. Special Courts are constituted for speedy trial of the offences by an official Gazette²²⁴. It is an anti-drug law, which prohibits:

- cultivation of opium poppy, cannabis and coca plants.
- Production, manufacture, possession, sale, purchase, transport, warehousing, use, consumption, import, export or transshipment of any narcotic drug or psychotropic substance except for medical and scientific purposes as per the rules or orders and conditions of license issued.

Authorities under the NDPS Act²²⁵:

The NDPS Act empowers the officers of Central excise, narcotic, customs, revenue intelligence or any other department of the Central Government including para-military and armed forces; revenue, drug control, excise, police or any other department of the state government empowered to:

- To search any building, conveyance or place by day or night²²⁶
- To Search without warrant any building, conveyance or place between sunset and sunrise under certain circumstances²²⁷.
- Can seize drugs, materials used in their manufacture, controlled substances, conveyances, evidentiary material etc²²⁸.
- Can detain, search and if he thinks proper, arrest, any person whom he has reason to believe to have committed an offence punishable under the Act²²⁹
- Can attach illegally cultivated opium, cannabis or coca plants and order their destruction²³⁰

²²² Article 253 of the Constitution of India.

²²³ NDPS Amendment Act 2014

²²⁴ Section 36 of the NDPS Act

²²⁵ Section 4, 5, 9 68D of the NDPS Act

²²⁶ Section 41(2) of the NDPS Act

²²⁷ Section 2 of the NDPS Act

²²⁸ Section 42 of the NDPS Act

²²⁹ Section 42(1)(d)

²³⁰ Section 48 of the NDPS Act

The persons Immune from suits, prosecution and other legal process in Drug Cases:

- Authorized Officers discharging their duties in good faith under the Act²³¹.
- Addicts charged with consumption of drugs or with offences involving small quantities if they volunteer for de-addiction. This immunity may be withdrawn if the addict does not undergo complete treatment²³².
- Minors governed under the Juvenile Justice (Care and Protection) Act 2013²³³.

2. NDPS (Regulation of Controlled Substances) order 2013:

In pursuance of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, the Central Government made NDPS (regulation of Controlled Substances) order 2013 “NDPS order” under the powers conferred Section 9A of the Narcotic Drugs and Psychotropic Substances Act 1985 controlling the manufacture, trade and commerce, possession and consumption of controlled substances to maintain records and file quarterly returns with the Narcotic Control Bureau of India. Most importantly, private and Government educational institutions, registered scientific societies and hospitals using controlled substances for the educational, scientific and analytical purposes are exempted from maintaining records. The offenders under this NDPC Order are punishable under Section 25A of the Act with rigorous imprisonment, which may be extended to 10 years and fine which may be extended to one lakh rupees.

3. Prevention of illicit Trafficking in Narcotic Drugs and Psychotropic substances Act 1985 (PITNDPS Act)

: The PITNDPS Act provides for the effective prevention and detention of persons carrying the activities of illicit traffic in certain areas with considerable magnitude in narcotic drugs and psychotropic substances.

4. Narcotic Control Bureau (NCB): NCB is a Central Intelligence Authority constituted by the Central Government under the National policy on NDPS Act 1985 as per the provisions of Article 47 of the Constitution of India. The main function of NCB is control of illicit trafficking and abuse of narcotic substances. It mainly fights for the violation of NDPS Act and PITNDPS Act with the cooperation of Customs and Central Excise, State Police Department, Central Bureau of Investigation and other Intelligence agencies under Central and State Governments.

VIII REASONS AND CONSEQUENCES OF DRUG CONSUMPTION AMONG YOUTH

Drug abuse has social, cultural, biological, geographical, historical and economic aspects. Drug consumption indirectly effects the people who use and even those who are around them. It effects persons nutrition, sleep, education, employment, relationships, reduced capacity in making decision, violence, communicable diseases and even indulgence in criminal activities. It also pushes addicts into suicide, prostitution, child pornography, child trafficking, rape, murder, violence in society and so on. To tackle this a Public Interest Litigation was filed by Bachpan Bachao Andolan²³⁴ in Supreme Court which focused upon the alarming increased use of drugs and alcohol among children in India. It stressed the need for enforcing the fundamental rights²³⁵ of children who are suffering from Narcotic substance use and abuse. In response to the case the Hon’ble Supreme Court, in its landmark verdict, directed the

²³¹ Section 69 of the NDPS Act

²³² Section 64(A) of the NDPS Act

²³³ Section 32(B) of the NDPS Act

²³⁴ Bachpan Bachao Andolan Vs Union of India (2011) 5 SCC 1

²³⁵ Articles 14, 19, 21, 21A and 23 of the Constitution of India 1950

central government to focus on children, spread awareness on drug abuse and formulate appropriate school curriculum for spreading awareness on ill-effects of drugs.

Directions Issued by the Apex Court in Bachpan Bachao Andolan Case are:

- Missing cases of the children in India are to be registered as cognizable offences and investigated through magistrate.
- At least one Police Officer should be designated as Juvenile Welfare Officer to investigate crimes against children.
- Para Legal volunteers to be appointed by National Legal Services Authority, on the police station to keep a watch over the manner in which the complaint and offences against children are dealt with.
- To create computerized programme, to create a network between the Central Child Protection Unit as Head of Organization.
- Photographs of children who are recovered to be displayed on website and newspapers.
- Shelter Homes to be provided by the State Authorities for recovered children.

IX HOW TO TACKLE THE DRUG MENACE AMONG ADOLESCENTS

1. The prevention of drug abuse starts from the use of tobacco and alcohol at the very tender age of school going children.
2. A committee must be setup at school and college level, who must regularly monitor the activities of students and talk and counsel them on their lifestyle changes and their effect on them. Use of Smartphones must be restricted at home, schools and colleges which is becoming the main source of drug trading. A collective strategy must be setup by both parents and teachers by conducting regular meetings at school and college level apart from academic interest.
3. Even after their busy schedule, parents must try to talk to their children on their day to day activities and people they meet.
4. Regular educational programs and debates must be conducted at school and college level making children as speakers.
5. Curriculum of school must include on self-control, emotional awareness, effective communication, addressing social problems, how to maintain peer relationships, etc.
6. Movies have direct impact on minds of children and adolescents, which directly show consumption of alcohol and drugs by hero's and lead roles.
7. Early identification of high-risk individuals, starting immediate treatment and counseling of affected individuals with utmost care.
8. Those who are treated must be rehabilitated and reintegrated into their social life.
9. Corporates can also start awareness programs under CSR program thereby developing software programs which can identify the sale and trading of drugs through internet.
10. Government has to ban most dangerous drugs like Ephedrine, Ketamine and Methamphetamine.

X TREATMENT

Drug addicts are to be counseled before and after treated and sent to rehabilitation is done by several private clinics, NGO's. Family and friends an important role in the social integration and treatment of the drug addicts. Constant monitoring of drug transit route must be done. More rehabilitation centers must be sponsored by central and state government. Government must rigorously advertise on narcotic drugs and their evil effect on people. Strong monitoring and rehabilitation centers have to be setup.

Impact of Various Country Settlements on International Humanitarian Law

Abhay Singh*

ABSTRACT

International Humanitarian Law includes the, Four Geneva Convention 1949 and their Additional Protocols of 1977 it also comprises of several customary principles founded on the basis of worldwide recognition of conventions such as those mentioned in the Hague Regulations of 1907 with regard to the manner of conflict. In Israel and Palestine, human rights concern emerged as a response to the global development. The Israeli occupation of the West Bank and Gaza has become consequence of a larger Israeli-Palestinian conflict. The ongoing use of force and killing from both sides has rendered the international community in a threat of disturbance of international peace. It's not only the Israeli government which has violated the said conventions as at times the Palestinian Military forces like Hamas has caused violation of International Humanitarian Law by the act of killing of civilians. The United Nation Security Council Resolution 2334 has been thought of as a great win for the Palestinians as it declares the Israeli occupation of Palestinian land as illegal has asked Israeli government to relocate its population, which is currently present in the established Israeli settlements within the Occupied Palestinian territory. This has made Israel stand in a very difficult position as not abiding by the United Nations Resolution could result in to a major disagreement with the global community.

Keywords *International Humanitarian law, Israel, Palestine, United Nations, Killing, violation, occupied territory.*

I Introduction

International Humanitarian Law or *jus in bello* or Law in war²³⁶, consists of numerous international conventions which includes the, Four Geneva Convention 1949 and their Additional Protocols of 1977 it also comprises of several customary principles founded on the basis of worldwide recognition of conventions such as those mentioned in the Hague Regulations of 1907 with regard to the manner of conflict.²³⁷ Addition to this there are growing bodies of treaties on particular aspect of armed conflict. The development of International Criminal law has also played an effected role in implementation of International Humanitarian law.²³⁸ It has been the primary objective of international humanitarian law to try and shield the civilians from any sort of aggression that may take place around them because if the aforementioned purpose is not perused then warring states would fire indiscriminately without caution, resulting in taking lives of civilians as collateral damage. Civilians would also become strategical targets in such cases, thus their protection is one of the major concerns of international community.²³⁹

In Israel and Palestine, human rights concern emerged as a response to the global development. The human rights laws were relied upon in order to act against or to transform the prevailing tactical uses of

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²³⁶ EMILY CRAWFORD & ALISON PERT, *INTERNATIONAL HUMANITARIAN LAW*, 4-27 (2015).

²³⁷ Stanford University, *Review of The Applicability of International Humanitarian Law to The Occupied Palestinian Territory* (July, 2004) available at <https://web.stanford.edu/group/scai/images/harvardreview.pdf>.

²³⁸ Emily Crawford, *supra* note 1.

²³⁹ Pat Andriola, *Did Israel Violate International Humanitarian Law during Operation Protective Edge?* EMORY LAW (Nov. 2015) http://law.emory.edu/eilr/_documents/volumes/30/recent%20developments/andriola.pdf.

law to legitimize political dominance on one state over another.²⁴⁰ The Israeli occupation of the West Bank and Gaza has become consequence of a larger Israeli-Palestinian conflict. Since Israel is a sovereign state, it is subject to the restrictions enumerated in international human rights law²⁴¹.

After 1967 when Israeli military initiated its occupation of the West Bank and Gaza Strip, it announced through a military order that it would abide by the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949²⁴² and make it applicable within the occupied Palestinian territory. However, the said order was annulled afterwards because of the interference from Israeli politicians according to whom the occupation was an act of freedom. Thus since then Israel has refused to accept the rightful application of Fourth Geneva Convention in the Occupied Palestinian region. The Occupied Palestinian territory comprises of West Bank including East Jerusalem and the Gaza Strip. Later on a declaration has been made by Israel that it would abide by the “humanitarian provisions” as provided under the Fourth Geneva Convention but has not mentioned that which provisions would be made applicable.²⁴³ The most widespread set of principles with regard to occupation of a territory is founded in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949. These principles enforce certain specific responsibilities in relation to the treatment of civilians, material resources and territory on the parties indulged in an armed conflict.²⁴⁴

II Applicability of Geneva Convention (IV) on Occupied Palestinian Territory

Israel has denied the *de jure* application of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to the West Bank and Gaza that is the Occupied Palestinian Territory. The main argument that Israel makes and rely on is that, before 1967 West Bank was occupied by Jordan and Gaza was occupied by Egypt, who were not the High Contracting Parties but mere occupants of the territory because of the 1948 war and before that the territory was under British mandate for League of Nations, therefore, Israel did not take the control over Occupied Palestinian Territory by force and as the common Article 2 prohibits forcefully overthrow of any sovereign power which was not the case in the present situation the common Article 2 has no application. However, International Committee for Red Cross (ICRC) has been granted access to the civilians living in or from the Occupied Palestinian Territory, mainly at places of detention and has been successfully deploying protection and aid to this population for over a period of 36 years.²⁴⁵

As the rule of Israel over Gaza and West Bank has been established by military conquest, the state of Israel never claimed any right to represent Palestinians within their territories but claimed only the right to rule them.²⁴⁶ After its denial to make common Article 2 applicable the settlements were built by Israel on the Occupied Palestinian Territory. These Settlements are 131 communities comprising of approximately 385,000 Israeli Jewish settlers and 97 colonies in the West Bank, 12 settlements in East Jerusalem, and

²⁴⁰ Lisa Hajjar, *Human Rights in Israel/Palestine: The History and Politics of a Movement*, J. OF PALESTINE STUDIES (2001) <http://www.jstor.org/stable/10.1525/jps.2001.30.4.21> (last visited Jan. 20, 2017).

²⁴¹ *Id.*

²⁴² Convention (IV) Relative to the Protection of Civilian Persons in Time of War Geneva Aug. 12, 1949.

²⁴³ Shawan Jabarin, *The Occupied Palestinian Territory and International Humanitarian Law: A Response to Peter Maurer*, INTERNATIONAL REVIEW OF THE RED CROSS (2013) <https://www.icrc.org/en/download/file/13504/irrc-890-jabarin.pdf>.

²⁴⁴ Stanford University, *supra* note 2.

²⁴⁵ Stanford University, *supra* note 2.

²⁴⁶ Pat Andriola, *supra* note 4.

few settlements in the Gaza Strip²⁴⁷. Israel claims that it has not technically occupied the territory at West Bank and Gaza on the ground that, Israel has its legal presence there because of a defensive war and do not have any sovereign control over the territory, therefore it doesn't come within the ambit of common Article 2.²⁴⁸ Israel has thereby justified its violation of Article 49(6) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War that disallows an occupying nation from transferring its citizens into the occupied territory. Israel also argues that legality of these Israeli settlements had been recognized by the League of Nations 1922 Mandate for Palestine and the same has been preserved under the United Nations charter.²⁴⁹ Israel has not been allowing Palestinians who were earlier residing in Israel and thereafter had to relocate to the occupied Palestinian territory, the right to return back homes, after the end of armed conflict, which is a direct violation of international Humanitarian law and of Geneva Convention (IV) Articles 45, 46 & 49, General Assembly resolutions 194 (III) and Security Council resolutions 237. The government of Israel has enacted laws and has employed military in order to keep about a total of 750,000 Arab Palestinian civilians from homecoming after the end of armed conflict in 1948 and from the occupied territories in 1967.²⁵⁰

However, this claim of Israel has been rejected at large. The United Nations bodies and the International Committee of Red Cross and several other Non Governmental Organizations are of the view that the Geneva Convention (IV) is applicable at the Occupied Palestinian Territory²⁵¹. The International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*²⁵² stated that the Article 2 of the Fourth Geneva Convention will apply to any occupied territory in case an armed aggregation arises among two or more High Contracting Parties. The court further states that, when the conflict broke out in 1967, Israel and Jordan were parties to the Convention and therefore Convention is applicable in the Occupied Palestinian territories, and as at the time of conflict Israel was occupying the Palestinian Territory there isn't any need to look further into the exact previous status of these territories.²⁵³

United Nations Security Council passed Resolution 2334 on 23rd December 2016 which reaffirms the obligation of Israel to abide by the Fourth Geneva Convention and also reaffirms the denial of legal validity of Israel infiltration in Palestinian State as it constitutes a serious violation of International law including International Humanitarian Law, Article 49 of the Fourth Geneva Convention, other relevant resolutions and also violates the chances of ever lasting peace.²⁵⁴

²⁴⁷ *Israel and the Palestinians: Can settlement issue be solved?*, BBC NEWS, Dec. 29, 2016, <http://www.bbc.com/news/world-middle-east-38458884> .

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *List of International Law Violations by The State of Israel*, ITISAPARTHEID.ORG, http://itisapartheid.org/Documents_pdf_etc/IsraelViolationsInternationalLaw.pdf

²⁵¹ Emily Crawford, *supra* note 1.

²⁵² [2004] ICJ Rep 136, 09 July 2004.

²⁵³ *ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Request* (Jul. 9, 2004) <http://www.icj-cij.org/docket/files/131/1677.pdf>.

²⁵⁴ United Nations Security Council Resolution 2334 on Dec. 23, 2016 <https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

III Violation of Other International Humanitarian Laws

The Doctrine of Distinction is a well established humanitarian law under customary international law. According to this principle unless the people take up arms and thereby become participant in the aggression, civilian people are to be given complete protection against any attacks. This rule has been exquisitely mentioned under Article 48 of Additional Protocol I to the Geneva Conventions. Israel Supreme Court has also affirmed that the Israel government is bound by the customary international law provided under Article 48, as one of the principle responsibilities of a state is to protect its citizens from geopolitical combats.²⁵⁵

Article 1 of the United Nation Charter has been violated by Israel as it has violated the Human Rights of the Palestinian population on a large scale. Israel's illegal occupation of West Bank and Gaza is the violation of Article 2(4) and 51 of the UN Charter as military actions and occupation can only be justified under the United Nation Charter if the same is done in self defence or if the occupant territory is causing major violation of Human Rights and Israel is not defending itself but creating settlements on the occupied Palestinian territory and exploiting its natural resources²⁵⁶. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*²⁵⁷ which was a request for advisory opinion by the United Nations General Assembly via Resolution ES-10/14 of 8th December 2003, the International court of justice (ICJ) was asked to decide on the illegal construction of the wall, being conducted by Israel within the Occupied Palestine Territory. ICJ rejected the Israel government argument that the wall was just being constructed as a temporary security barrier without any political motive and can be dismantled anytime as a political settlement. ICJ stated that such construction creates "*fait accompli*"²⁵⁸ and as it becomes permanent, it would be de facto annexation. The court further stated that the wall had very little to do with security, but was being constructed to include the most number of settlers within the closed area i.e. between the wall and the Israeli border, as wall incorporated 16% of territory in West Bank and 80% of settlements were falling within this closed area. Further on October 2003 an order was issued by the Israel Defence forces which made the issuance of Identity Cards mandatory to all the Palestinian residing within this closed area and no Palestinian without an Identity Card was allowed to remain and enter the closed area while at the same time it provided a free excess to the Israelis civilians to enter or exit the area. This order of Israel Defence force made clear the intentions of Israeli government and proved that such construction was not of a temporary nature but a direct violation of Art 1 (2) of the United Nations Charter. The court further noted that Israel has violated Article 53 of the 4th Geneva Convention by destroying the civilian property for construction of the wall and Article 46 of the Hague Regulation 1907 by confiscation of Civilian property within the Occupied Palestine Territory. The court also pointed out that the wall was hindering the liberty of movement to civilians as provided under the Article 12 (1) of the ICCPR (International Covenant on Civil and Political Rights) and the right to education, social and cultural rights and right to health as provided under United Nations Convention on rights of children were also being violated. Also, Article 49 para 6 of the Fourth Geneva convention and the Security Council Resolution of 446, 452 and 465 which prohibited the deportation of civilian population into occupied territory were also being violated. Thus the court concluded that the wall in question was in violation of the International Law and Israeli government shall dismantle the wall and

²⁵⁵ Pat Andriola, *supra* note 4.

²⁵⁶ *Supra* note 15

²⁵⁷ [2004] ICJ Rep 136, Jul. 09, 2004

²⁵⁸ *fait accompli Definition*, a thing accomplished and presumably irreversible, MERRIAMWEBSTER.COM <https://www.merriam-webster.com/dictionary/fait%20accompli> (last visited Mar. 25, 2017).

repeal all the laws and regulations attached with it. The court also instructed the Israeli government to make reparations for the damages caused by the construction of the wall and asked the United Nations and the whole international community to aid in execution of its judgment.²⁵⁹

IV Establishment of Settlements and Commencement of Genocide in Israel/Palestinian Territory

Despite all the International conventions and International customary law for prevention of atrocities against civilians and for preventing the government from using their citizens like pawns in order to achieve their political ambitions, there have been a large number of violations of International Humanitarian law in the form of Genocide, Destruction of Dwellings, hospitals and schools establishment of illegal military base and civilian settlements by the occupying state. And such violation has not been seized even in the recent times.

- 1. Killings of civilians and construction of Settlements in 2014:** Israeli government and the Hamas which is a Palestinian Military organization both have conducted grave International law violations during their combat in Gaza Strip on July and August 2014. As shown by United Nations approximately 2,100 Palestinians were killed out of whom the 1500 were identified as civilians and about 11,000 civilians were injured. Thousands of Israeli attacks have caused a great majority of devastation during this combat which have rendered 22,000 homes as uninhabitable, displaced 108,000 people and has left hundreds of thousands devoid of sufficient water or electricity. Armed groups of Hamas and Palestinians commenced almost 1,700 mortar attacks and 4,800 random rocket attacks on civilian Israeli population settlements while fighting at Gaza. These armed assaults resulted into killing of 5 civilians in Israel, injured 26 and also resulted into thousands of civilians in settlements near Gaza to evacuate their homes temporarily. 66 Israeli soldiers also lost their lives in the fighting.²⁶⁰
- 2. Killings of civilians and construction of Settlements in 2015:** Israel in 2015 continued unfair constraints on Palestinian Human Rights and building of Settlements in Occupied Palestinian Territory. Israel destroyed 481 Palestinian dwellings and various other constructions in the West Bank including the East Jerusalem, forcing 601 civilians to dislocate. Israel further authorized building of 566 new Israeli settlement houses, out of which 529 were constructed during the initial months of 2015. Later on 27th November 2015 Palestinians murdered about 17 Israeli civilians and injured 87 Israeli civilians in the West Bank and Israel. Israeli security forces thereafter killed almost 120 and wounded almost 11,953 Palestinian civilians in West Bank, Gaza, and Israel as of the same date, including spectators, protesters, and believed assailants.²⁶¹
- 3. Killings of civilians and construction of Settlements in 2016:** As reported by United Nations, Israeli security forces resorted to implement lethal aggression against believed assailants in more than 150 cases, even in situations where such force was not required and the matter in question was outside Israel's jurisdiction. Between the 1st of January and 31st of October 2016, 11 Israelis

²⁵⁹ ICJ Advisory Opinion, *supra* note 18.

²⁶⁰ Human Rights Watch, *Israel/Palestine Events of 2014* (2015) <https://www.hrw.org/world-report/2015/country-chapters/israel/palestine>.

²⁶¹ Human Rights Watch, *Israel/Palestine Events of 2015* (2016) <https://www.hrw.org/world-report/2016/country-chapters/israel/palestine>.

were killed by Palestinians which includes 2 security officers, and 131 Israelis were injured which includes 46 security officers, in the West Bank and Israel. Israeli security forces in return murdered about 94 Palestinians and injured about 3,203 Palestinians in West Bank, Gaza, and Israel including believed assailants, bystanders and protesters.²⁶²

4. **ICC and Israel-Palestine conflict:** Palestine on 1st January 2015 accepted the retrospective jurisdiction of ICC under Article 12(3) of the Rome Statute of ICC for the crime committed after 13th June 2014 within the occupied Palestinian territory. ICC further in accordance with Article 12(3) of the Rome Statute referred the matter to the Office of the Prosecutor for investigation and primary examination and the same is being carried out by the Prosecutors in accordance with Rule 25(1) (c) of the Regulation of the Office of the Prosecutor the main purpose of the examination is to identify whether the Rome Statute has jurisdiction and admissibility on the matter as per Article 53(1) of the ICC statute²⁶³. Israel has contended the jurisdiction of ICC and has dined to cooperate with the Prosecutor and ICC. The incidents that have reportedly occurred within the Occupied Palestine Territory can be said to be in violation of Crime against humanity under Article 7 and War Crimes under Article 8 of the Rome Statue and can be considered as grave breaches of Geneva conventions and violation of customs of war. However the final decision is in the hands of ICC and deciding the Israel Palestine dispute will be the ultimate for the ICC as an International Criminal Tribunal²⁶⁴
5. **United Nations Security Council Resolution 2334:** Resolution 2334 was passed on 23rd December 2016 by 14-0 votes with United States abstaining from the Council. The Security Council in its resolution condemned every action taken or to be taken by Israel for modifying the “*demographic composition, character and status*” of the Occupied Palestinian territory post 1967. The resolution specifically made the Israeli Settlement established within Occupied Palestinian Territory or construction and expansion of Israeli Settlements within Occupied Palestinian Territory as illegal and in violation of Article 49 of the Fourth Geneva Convention. The Security Council slammed the actions of Israeli Authorities for transferring Israelis, confiscation of Palestinian property, destruction of homes and evacuation of Palestinian civilians from their homes in the Occupied Palestinian Territory. Freezing of all settlements activities and dismantle of already established settlements was recalled as previously mandated in Security Councils 1515 Resolution in 2003 and it was recalled and demanded that Israel shall cease all settlement activities as it is an vital for establishment of two state solution as mandated in the 242 Resolution and then again in 1515 Resolution. The Security Council also demanded that all acts of violence against civilians including the acts of terrorism from both sides be stopped as they are major violations of International Humanitarian Law.²⁶⁵

²⁶² Human Rights Watch, *Israel/Palestine Events of 2016* (2017) <https://www.hrw.org/world-report/2017/country-chapters/israel/palestine>.

²⁶³ International Criminal Court, *Preliminary Examination: Palestine* <https://www.icc-cpi.int/palestine>

²⁶⁴ Sarah Kanbar, *The ICC and Palestine: A Case of Doubtful Justice*, AL-SHABAKA Jul. 01, 2016 <https://al-shabaka.org/commentaries/icc-palestine-case-doubtful-justice/>.

²⁶⁵ UN Security Council Resolution 2334, *supra* note 19

V Impact of United Nations Security Council Resolution 2334

The deteriorating effect of Security Council resolution 2334 which was passed in the end of December 2016 has already started to be revealed, as circumstances for United Nations workforce and other NGO employees in Israel and occupied Palestinian Territory have worsen. These organizations are facing increase in hurdles for accessing and for moving in and out of Gaza Strip through the Erez crossing which is under the control of Israel. This was also shown by Israel when two Gaza based NGO workers, namely World Vision's employ Mr. Mohammad el-Halabiand and employee of United Nations Development Programme (UNDP) Mr. Waheed Borsh, was accused for supporting Hamas and for transmitting funds and supplies to the Hamas Militant division. A lot of Palestinians researchers and human rights associations have visualized these prosecutions to be triggered by these political reasons. This was boosted by Waheed Borsh conviction on 4th January 2017 in a plea bargain for crimes much less vigorous than those originally prepared for prosecution.²⁶⁶The resolution has not helped much in preventing the hostility between the Israel and Palestine as the recent news reports Riots, clashes and popular terrorism. Further possible prospect of war between Israel security forces and Palestinian armed group has also been reported in the month of November 2017 itself.²⁶⁷

VI Conclusion & Suggestions

International Humanitarian Law has been established to protect and shield the civilian populations from any harm that may arise out of an armed conflict. However there has been a large scale violation of International Humanitarian Law resulting into Genocides and illegal occupation of civilian property. Israeli Government has repeatedly violated the United Nation Charter, the Fourth Geneva Conventions and its Additional Protocols. However it's not only the Israeli government which has violated the said conventions as at times the Palestinian Military forces like Hamas has caused violation of International Humanitarian Law by the act of killing of civilians. The United Nation Security Council Resolution 2334 has been thought of as a great win for the Palestinians as it declares the Israeli occupation of Palestinian land as illegal has asked Israeli government to relocate its population which is currently present in the established Israeli settlements within the Occupied Palestinian territory. This has made Israel stand in a very difficult position as not abiding by the United Nations Resolution could result in to a major disagreement with the global community.

From the above study it is evident that the hostility is not the outcome of actions of one party both sides are to blame. The quantum of blame should not be established rather methods are required to be thought out to end the conflict. It is strongly suggested that the international community including the USA strongly should establish mediation and reach out to a solution acceptable to all. Rather than putting up sanctions and issuing fruitless Security Council resolutions mediation could provide better and effective solution for the issue in hand.

²⁶⁶ Ben White, *Israel's anti-UN steps could lead to 'isolation'*, AL JAZEERA, Jan. 10, 2017

<http://www.aljazeera.com/news/2017/01/israel-anti-steps-lead-isolation-170109131443348.html>.

²⁶⁷ *News of Terrorism and the Israeli-Palestinian Conflict (November 8-14, 2017)*,

THE MEIR AMIT INTELLIGENCE AND TERRORISM INFORMATION CENTER, Nov. 15, 2017 <http://www.terrorism-info.org.il/en/news-terrorism-israeli-palestinian-conflict-november-8-14-2017/>

Further rather than the sorted out two states solution which provide a threat of increased conflict, a better way to deal with the issue will be formulation a one state solution. It would end the conflict if keeping aside the religious and regional quarrels the Israel and Palestine would setup a single state. This kind of establishment would also lead to a revolutionary outcome and with set an example of peace for the international community.

THE NON-JUSTICIABILITY OF RIGHT TO EDUCATION IN NIGERIA – DRAWING LESSONS FROM INDIA

*Dr. K.O Amusa**

Abstract

Enforceability of right to education in Nigeria largely remains illusory due to non-justiciability clause in Fundamental Objectives and Directive Principles of State Policy. This has partly accounted for lack-lustre attitudes of Nigeria governments to education sector. It has in turn deprived lot of Nigerians, especially the youths to make governments fulfill their obligations to educate them. This paper examines contour of all the domestic and international instruments on rights to education in Nigeria as well as Nigerian courts decisions thereon. The paper notes with dissatisfaction Nigeria's judicial standpoint and recommend the adoption of judicial activism perspective in Indian jurisdiction, to enlarge the coast of enforceability of right to education.

Keywords *Directive principles of state policy, Judicial activism, International instruments, Education sector*

I Introduction

The decay in education sector in Nigeria is a product of accumulated neglect of the sector by successive administrations in Nigeria. Though, sizeable part of Nigeria's population are aged 18 years and below, no Government in Nigeria has been able to meet the UNESCO benchmark to member states to earmark at least 26% of their budgetary allocations on education. The resultant effect of this is that about 8 million children who are due for primary education are not in school and about 200,000 teachers are required to teach them. Similarly, there are 18 million Nigerian children due to attend Secondary Schools but are not in school and about 450,000 teachers are required to teach them. Some Governments at all levels are already implementing the privatization of State own schools. Gradually, the forces of privatization are being mobilized to take over the educational sector. Euphemistically, Nigerian Governments are clamoring for the industrialization and technologically driven economy. It is thus strange that a government that claims to be concerned with industrialization is systematically implementing policies that could retard industrialization.

It is against this backdrop that this paper seeks to interrogate the human rights context of education in Nigeria. The right to education has been given recognition in a number of International and Regional Human Rights Instruments, as well as National Constitutions. Having ratified those international instruments in which the right to education is protected, Nigeria assumes obligations under International Law, enjoining her to realize the right to education. Regrettably, the Nigerian Constitution in its Chapter II categorized the "right" to education under "Fundamental Objectives and Directive Principles of State Policy" which is not justiciable by virtue of Section 6(6)(c) of the Constitution of Nigeria 1999. The thrust of this paper is that even though Section 6(6)(c) of the Constitution ousts the jurisdiction of the Courts with respect to matters contained in its Chapter II, the Constitution does not prohibit justiciability of right to education and same can be litigated upon, depending on the normative basis chosen by the prospective

litigant. The paper seeks to argue that Nigerian courts have a lot to learn from India, where courts have adopted a more progressive and result-oriented interpretation of justiciability clause in India Constitution. The paper is divided into eight parts. Part I deals with the introduction, while the theoretical underpinning the topic is discussed in part II. Part III examines the legal framework on right to education in Nigeria, while Part IV discusses the challenges to the realization of right to education in Nigeria. Part V interrogates decisions of Municipal courts in Nigeria on right to education, while Part VI examines pronouncements of ECOWAS court on right to education in Nigeria. Part VII discusses the lessons Nigerian courts may learn from India on interpretation of right to education, while the paper was concluded in Part VIII.

II Theoretical Considerations

The term “justiciability” is fluid and incapable of exact definition. This is because justiciability theory develops a list of doctrines whose application do have negative or adverse effects on matters for adjudication. Thus, Novak and Rotunda note that it would be better to term these doctrines as the doctrines of non-justiciability.²⁶⁸ The argument is therefore tilt towards regarding the concept as non-justiciability rather than “justiciability theory”. In *Sehindemi V. Gov. Lagos State*²⁶⁹, the court observed as follows:

Justiciability is not a legal concept with a fixed content or susceptible of scientific verification. See *Poe V. Ullman (1961) 367 US 497, 506* and *Flast V. Cohen (1942) 392 US 83, 95* where Chief Justice of United States Warren said – ‘Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in Federal Courts have been held not to be justiciable’. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question when the parties are asking for an advisory opinion when the question sought to be adjudicated had been mooted by subsequent development and where there is no standing to maintain the action.’

But in simple term, justiciability is concerned with the province within which the law and the courts properly function, irrespective of whether or not the courts take an activist approach. Thus, for a court to hear a case, it must pass the test of a number of justiciability doctrines such as standing, mootness, ripeness, political question and directive principles. A number of theories and reasons have been advanced to justify the restraining concept of justiciability. The debates at some corners are centered on the questions – first, whether there can be an answer to every legal question; secondly, whether it is appropriate for the judicial branch to apply itself to every legal question and lastly, whether there is a meaningful distinction that can be drawn between the first and second questions.²⁷⁰

²⁶⁸ John E. Nowak & Ronald D. Rotunda *Constitutional Law* 4th Ed. (1991) 104; See also, Lawrence H. Tribe *American Constitutional Law*, 2d. ed. (1987) p. 69.

²⁶⁹ (2006) 10 NWLR (Pt. 987) p. 1

²⁷⁰ Ariel L. Bendor “Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in the Light of The Israeli and American Experience”. *Industrial, International and Comparative Law Review* Vol. 7 No. 2 (1997).

Again, the concept can be viewed on two perspectives – Substantive and Procedural²⁷¹. A close look at the justiciability doctrines suggests that they constitute features to be examined to test the justiciability of an action. They may thus be subject to enquiry in the following forms;

- whether the subject matter is appropriate for judicial action;
- whether the plaintiff has standing to claim the relief;
- whether the issue is ripe for determination; and
- whether the issue is moot, in that the dispute is resolved.

While the first in the above list is concerned with substantive justiciability, the other three relates to procedural justiciability. Normative justiciability centres on whether the subject matter for determination falls within the jurisdiction of the courts at all or whether the power of court actually extends to providing answers to the questions on the subject-matter. Institutional justiciability is focused on certain institutions or organs of the government or bodies whose sections are sensitive to the functionality and working of the government. It is concerned with the question of whether the court is the appropriate institution to provide a final binding answer to legal questions concerning, relating to, or connected with any of these bodies or on their actions and inactions. Generally, there is a presumption that the court – whose expertise and whose function, in a constitutional democracy and under the system of the separation of powers, is directed to the adjudication of disputes involving rights and obligations, is most appropriate to give final and binding answers to legal questions. The foray into jurisprudential theories as stated above is to mainstream the theories which have influenced the courts in various jurisdictions in using Directive principles of state policy to interpret the right to education. In Nigeria, there are various legal framework and international instruments upon which the right to education may be anchored, and that will be next focus of attention.

III The Legal Framework on Right To Education in Nigeria Instruments which Protect the Right to Education Have Been Adopted at the Global and Regional Levels

At the global level, instruments have generally been prepared by the UN, while at the regional level, instruments have notably been prepared within the European, American and African contexts.²⁷² At the global level, the first step in this direction was the drafting of the Universal Declaration of Human Rights by the U.N. General Assembly on 10 December 1948.²⁷³ The Declaration constitutes a significant milestone in the protection of human rights and provides a set of standards and a model for countries to follow. The Declaration provides for the right to education in Article 26 in these words.

²⁷¹ Cheryl Loots “Access to Court and Justiciability” in *The Constitutional Law of South Africa* (Revision Service 3, 1998) p. 83.

²⁷² K.D. Beiter *The Protection of the Right to Education by International Law*. Martinus Nijhoff Publishers, Leiden/Boston, p. 85.

²⁷³ Forty-eight States voted in favour, none against while eight abstained, and in the list of abstentions are Yugoslavia, Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukrainian SSR, the USSR. See UNGA Resolution 217A (III) of 10 December 1948.

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and Professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 guarantees the right to education in Articles 13 and 14.

Relevant portion of Article 13 states as follows:

1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity.....
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means.....
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

Although, the provision of education transcend age, children are vulnerable group in the society on account of their tender age. It is against this background that the United Nations made effort to work out the peculiarities of the application of human rights to children, with the adoption of Convention on Rights of the Child (CRC) in 1989; although it came into force on September 2, 1990.²⁷⁴

The Convention protects children and contains significant provisions with respect to right to education in its Articles 28 and 29. Article 28 of the Convention states as follows:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular –
 - (a) Make primary education compulsory and available free to all...

Evidently, Nigeria belong to the Continent of Africa. At the regional level in Africa, many regional instruments to which Nigeria subscribed contains provisions relating to right to education. The African Charter on Human and Peoples Rights, 1981 makes tacit reference to right to education in its Article 17(1). The Article states that every person have the right to education and such person is entitled to freely participate in the cultural life of his community. The African Charter on the Rights and Welfare of the Child (ACRWC) 1990 significantly contains provisions on the right to education. In its Article 11, the Charter allows every child to enjoy right education, set out the purpose of education, and impose duties on state parties to ensure the full realization of the child's right to education. At domestic level, Nigeria have

²⁷⁴ UN Doc. A/44/49 (1989). Nigeria signed the CRC on June 26, 1990 and ratified same on April 19, 1991.

enacted various laws on right to education. The Constitution of the Federal Republic of Nigeria (CFRN) 1999 is at the apex of the pyramid of laws, it confers legitimacy and validity on all other laws.²⁷⁵ This Constitution provides for two types of rights, viz, the fundamental human rights²⁷⁶ and Fundamental Objectives and Directive Principles of State Policy.²⁷⁷ While Fundamental Human Rights are exercisable in Courts of law, the courts may not be suited for seeking redress on violation of directive principles of state policy. Unfortunately, the right to education is consigned to directive principles of state policy. Section 18 of Constitution of Nigeria 1999 provides.

1. The Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels;
2. Government shall promote science and technology;
3. Government shall strive to eradicate illiteracy; and to this end, Government shall as and when practicable provide (a) free, compulsory and universal primary education; (b) free secondary education; (c) free university education; and (d) free adult literacy programme.

It would appear that the duty and responsibility on all organs of government is limited to the extent that the judiciary cannot ordinarily enforce any of the provisions of directive principles of state policy.²⁷⁸ The Child Rights Act (CRA) 2003 is a Municipal Law enacted to replicate the United Nations Child Rights Convention, as part of Nigeria's obligation as a State Party to the U.N. CRA 2003 is a comprehensive legislation which provides for protection and care of Nigerian child by the child's parent, legal guardians, institutions, services, agencies and organizations. The Act provide for right to education in Article 15 as follows:

- (1) Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education.
- (2) Every parent or guardian shall ensure that his child or ward attends and completes his (a) primary school education; and (b) junior secondary education.....

In 2004, the Compulsory, Free and Universal Basic Education (UBE) Act was enacted by Parliament in Nigeria.²⁷⁹ The UBE Act imposes on every government in Nigeria the duty of providing free, compulsory and universal basic education.²⁸⁰ 'Basic Education' was defined in the Act as "early childhood care and education and nine years of formal schooling."²⁸¹ The Act provides for free and compulsory basic education for every child up to the end of junior secondary education,²⁸² excluding remedial basic

²⁷⁵ Section 1(3) of the Constitution of Nigeria 1999; *Danjuma Rame V Federal Republic of Nigeria* (2013) 37 WRN, 90 at 109.

²⁷⁶ SS 33 – 46 (Chapter IV) of the Constitution of Federal Republic of Nigeria (CFRN)

²⁷⁷ SS. 13 – 24 (Chapter II) *ibid.*

²⁷⁸ S.6(6)(c) of the Constitution *ibid.*

²⁷⁹ Federal Republic of Nigeria Official Gazette, 91(66), Govt. Notice No. 142, Lagos, 2004.

²⁸⁰ S. 2(1) of the Act, *ibid.*

²⁸¹ S. 15(1) *ibid.*

²⁸² S. 2() and 3(1) *ibid.*

education for adults. It imposes duty on all parents to ensure that their children or wards attends and completes basic education, a breach of which attracts criminal sanctions.²⁸³

IV Challenges to the Realization of Right to Education in Nigeria

In spite of variant laws and international instruments applicable in Nigeria on right to education, a number of factors tends to hinder the realization of those rights. Some of the factors are considered below.

- a) **Financial Impediment.** Paucity of funds constitutes a major obstacle to the implementation of right to education in Nigeria and other developing countries. Like Nigeria, few countries in the World have constitutional mechanism to compel government to allocate substantial portion of the budget to education.²⁸⁴ Most governments use lack of sufficient resources as a pretext to justify their inability to make all forms of education available and accessible to all.²⁸⁵ In terms of funding education, two features emerge from here. First is the inability of government to meet its obligation of providing education for all. Secondly, the cut throat or exorbitant school fees are unbearable for most parents and guardians.
- b) **Poverty** Most people live in abject poverty in Nigeria today and this has impacted on the education of their children negatively. The cost of buying standard textbooks, school uniform and other needs of children in schools are soaring by the day. There is a nexus between poverty and performance of school children. All the faculties of a person who has nothing in his stomach cannot function productively and effectively
- c) **Cultural Challenges** Customs, traditions and social norms and values within societies and families have greatly militate against the realization of right to education in Nigeria. Many societies in Africa are essentially patrilineal. The belief in male child education has relegated the education of girl child to the background.²⁸⁶
- d) **Socio-Political Challenges** One issue that affects the actualization of right to education is misplaced priorities in government spending. In the past five years, government budgetary allocation to education sector in Nigeria has been oscillating between 10 to 15% per cent. This arrangement has elicited protests and strikes in the education sector, particularly at the tertiary level.
- e) **Corruption** In spite of the low budgetary allocation and utilization, the element of corruption which pervades the Nigerian landscape also crept into education sector. White-elephants projects are awarded to dubious contractors with a view to get kick backs, while some projects, especially infrastructural facilities in schools are poorly executed.

²⁸³ S.2 (2) & (4) *ibid*.

²⁸⁴ Katarina Tomaslevski *Right to Education Primers, Free and Compulsory Education For All Children: The Gap Between Promise and Performance* (Novum Grafiska AB: Gothenburg, 2001) p. 10.

²⁸⁵ Coomans "Clarifying the Elements of the Right to Education" in Coomans et al (eds) *The Right to Complain about Economic, Social and Cultural Rights* (1995) PP. 14 – 15.

²⁸⁶ Statistics from the National Personnel Audit shows that more males were enrolled in the primary schools than females in the North, while a near parity is recorded in the South. About 65% of primary school children in the North are male, while 35% are female. See Roadmap to Nigeria Education (2009) p. 19.

V Assessment of Nigeria's Municipal Courts Decisions on Rights to Education Cum Economic, Social and Cultural Rights (ESCR).

The reluctance of Courts in Nigeria to give effect to rights to education in Nigeria stems from the fact that it is categorized as fundamental objectives and directive principles of state policy. Meanwhile, the directive principles of state policy is ordinarily non-justiciable.²⁸⁷ The Nigerian Court of Appeal in the case of *Achbishop Olubunmi Okogie V. Attorney-General of Lagos*²⁸⁸ State opined that no court in Nigeria has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the fundamental objectives and directive principles of state policy. The same Court toed the same line in *Uzoukwu V. Ezeonu*²⁸⁹ when it declared

There are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the fundamental objectives and Directive Principles of State Policy under Chapter II of the Constitution.

In the case of *Badejo V. Federal Ministry of Education*²⁹⁰ the applicant claimed that as a result of discriminatory admission policy of the respondent, she was denied a chance to be admitted into one of the Federal Government Colleges in Nigeria. The Court of Appeal dismissed the action by a split decision of the justices on the ground that the respondent was justified in implementing Section 14 of the Constitution on application of Federal Character principle. It is worthy to note that Section 14 is also part of the Directive Principles of State Policy. The inaction of the courts in this area is probably borne out by judicial ideologies inherited from common law, which dictates the attitude here; that is the phonographic theory of common law tradition that judges do not make law, and are concerned with legal, not social justice.²⁹¹ However, the items on Directive Principles can be made justiciable by legislation. Therefore, if the National Assembly gives expression to any of the item on right to education as stated in Section 18 of the Constitution, a justiciable right enforceable in a Court of law has been vested. Thus, in the case of *Legal Defence and Assistance Project V. Federal Republic of Nigeria*,²⁹² the Federal High Court held that the combined effect of Section 18(3)(a) of the 1999 Constitution and Section 2 of the Compulsory, Free Universal Basic Education Act (UBE) 2004 confers enforceable right to free and compulsory primary education and free junior secondary education for all qualified Nigerian citizens.

It has been shown above that Nigerian Courts construe the Directive Principles of State Policy in the Constitution strictly. But what is the attitude of courts to International instruments which Nigeria

²⁸⁷ Section 6(6)(c) of the Constitution of Nigeria 1999.

²⁸⁸ (1981)2 NCLR 350.

²⁸⁹ (1991) 6 NWLR P 200, 708 at pp. 7561 – 762.

²⁹⁰ (1990) 4 NWLR Pt 143, 354.

²⁹¹ Kehinde Mowoe (Prof) "Economic, Social and Cultural Rights and the Dignity of Man – A Case for its realization" in *UNILAG Journal of Human Rights Law* (2007) Vol. 1. No.1 p. 84.

²⁹² Unreported decision of Federal High Court delivered on March 1, 2017 available online at <https://guardian.ng/news/court-declares-free-compulsory-education-enforceable-right/> on 15 October 2017.

subscribes and which guarantees right to education? Can the Municipal Courts allow Nigeria to abdicate its responsibilities in respect of Charter and Covenants it freely enters into? In *Ogugu V. State*²⁹³, the Supreme Court held the African Charter, after its incorporation, is applicable and enforceable in the same manner as any other domestic laws. On the status of domestic incorporated international instruments, the Supreme Court in the case of *Abacha V. Fawehinmi* declared “I would think that if there is a conflict between it (international instruments) and another statute, its provisions will prevail over those of that statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. “

And Justice Uwaifo stated in that case: “There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate rule of international law.”

In spite of these decisions, Nigerian domestic courts still prefers to decline jurisdiction on non-justiciability of Directive Principles, even when International Instruments grant such rights.²⁹⁴ Litigants now prefers to approach Regional and Sub-Regional Courts to seek remedy for alleged violation of right to education in Nigeria, and unto these we now turn.

VI Litigating the Right to Education at the ECOWAS Court

Nigeria is a member of Economic Community of West African States (hereinafter called ECOWAS). In January 2005, the jurisdiction of the Community Court of Justice of ECOWAS was expanded to include enforcement of human rights. Article 15(4) of the ECOWAS Treaty makes the judgment of the Court binding on member States, including Nigeria. Article 19(2) of the 1991 protocol provides that the decisions of ECOWAS Court shall be final and immediately enforceable. Naturally, litigants who fails to get justice in municipal courts now rush to ECOWAS Court with the hope of getting justice. In *SERAP V. Federal Republic of Nigeria & Anor*²⁹⁵, the claimants alleged a violation of their right to qualitative education as protected under the Nigerian Constitution and African Charter on Human and Peoples Rights (ACPHR). This action was met with a preliminary objection that education under Section 18 of the Nigerian Constitution is not a justiciable right. The Court dismissed the objection and declared that all Nigerians are entitled to education as a legally enforceable human right.

Similarly, in *SERAP V. Federal Republic of Nigeria*²⁹⁶, the claimants, a Non-Governmental Organization (NGO) dragged the Government of Nigeria before the ECOWAS Court alleging that diversion of public funds meant for Universal Basic Education had impeded the education of Nigeria pupils. The claimants also sought an order directing the defendants to make adequate provisions free and compulsory education for every Nigerian Child. The Nigerian government objected to the claims. The ECOWAS Court in allowing the claim held that:

²⁹³ (1994) 9 NWLR Pt 366 p. 1.

²⁹⁴ See Registered Trustees of the Socio-Economic Rights and Accountability Projects (*SERAP*) V. *Attorney General of the Federation* (unreported Suit No FHC/ABJ/CS/640/2010 delivered on November 29, 2012); *Oronto Douglas V. Shell Petroleum Development Company Limited* (1992)2 NWLR Pt 591 p.446.

²⁹⁵ ECW/CCJ/APP/08

²⁹⁶ ECW/CCJ/APP/12/07 delivered in November 2010.

We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, while steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people be denied a right to education.

VII Lessons from Indian Jurisdictions

Nigeria obviously have a lesson to learn from India where efforts are being made to ensure that the directive principles are not a dead letter. Whatever is necessary is done in India to see that they are observed as much as practicable so as to give cognizance to the general tendency of the directives.

Comparatively, while the Fundamental Rights are enshrined in Part III of Indian Constitution and Directive Principles are contained in Part IV, in the case of Nigeria, Fundamental Rights are stated in Part IV and Directive Principles are contained in Chapter II. Again, the fundamental objectives and directive principles of state policy were introduced into Nigerian constitutional jurisprudence for the first time in 1979 Constitution. They were copied from the Indian Constitution²⁹⁷, which had incorporated the Directive Principles as far back as 1951.²⁹⁸

Indian Courts have been more pragmatic in interpreting Directive Principles in the light of fundamental human rights. The courts recognize the interdependence between the two, notwithstanding the provision of the Constitution impeding their justiciability. In the case of *Keshavananda V. State of Kerala*²⁹⁹, the Supreme Court held that the jurisdiction of the court to review executive action cannot be taken away, not even by the Constitution; such as when the executive action is taken to realize Directive Principles. With respect to right to education, the Court in *Unnikrishnan J.P V. State of Andhra Pradesh*³⁰⁰ declared that 'the right to education is implicit in and flows from the right to life guaranteed in Article 2 of Indian Constitution. In other words, the right to education is concomitant to the fundamental rights enshrined in Part III of the Constitution a child (citizen) has a fundamental right to education up to the age of fourteen years.... We cannot believe any state would say it need not provide education to its people even within the limits of its economic capacity and development'. This decision led to the inclusion of an enforceable right to education in Article 21 of the Indian Constitution through the 93rd Amendment in 2002.³⁰¹

Also in *Mohini Jain V. State of Karnataka*³⁰², the Supreme Court of India declared that the Directive Principles are fundamental to governance, thus they cannot be isolated from the fundamental rights

²⁹⁷ Aguda, T. A. *The Judiciary in the Government of Nigeria* (1983) New Horn Press, Ibadan p. 129.

²⁹⁸ Kumar *Constitutional Law of India* (2000) 2nd ed. P. 14.

²⁹⁹ (1973) 4 SCC 225.

³⁰⁰ (1993) 1 SCC 645, 730 - 37

³⁰¹ See Article 2 of the Constitution (Eighty-sixth Amendment) Act 2002.

³⁰² (1992) AIR1858; (1992) 3 SCC 666.

guaranteed under Part III of the Constitution. Again in *Francis Coralie Mullin V. Administrator, Union Territory of Delhi and others*³⁰³, the Supreme Court gave an all pervasive interpretation to Article 21 of the Constitution.

According to Justice P. N. Bhagwati

We think that the right to life includes the right to live, with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and *facilities for reading, writing and expressing oneself in diverse forms*, freely moving about mixing and co-mingling with fellow human beings.

While Justice Bhagwati's audience may have Indian society, we submit that his words are well suited to the Nigerian situation.

VIII General Remarks and Conclusion

Directive Principles of State Policy is itself laudable as it is meant to provide general direction by which the government would steer the course of government. Undoubtedly, there is a link between Directive Principles and fundamental rights because of interdependence and indivisibility of all kind of rights. It is against this backdrop that we commend to Nigerian Courts, the public spiritedness and judicial activism of Indian Courts. The sacrosanctity and inviolability of right to education, like other socio-economic rights will engineer developments, actualize the goals of governance and reaffirm peoples' confidence in democratic values. It is heartening that the Supreme Court in *Attorney-General of Ondo State V. Attorney-General of the Federation*³⁰⁴ accept the view that the benefit of directive principles lies in the fact that its non observance is an indication of failure of duty and responsibility of state organs and with grave consequences.

It cannot be disputed that governments may not have the resources to implement the right to education at all levels, but even at that, the Courts must be proactive in holding them responsible for the implementation of right to education up to junior secondary school level as provided under the Universal Basic Education (UBE) Act. The municipal courts in Nigeria must not wash its hands like the biblical *Pontius Pilate* when the issue of non justiciability of right to education is raised. A veritable platform should be provided for determining the case when a claimant anchored his case on a breach of any domesticated International human rights instruments. It is crystal clear that democracy cannot survive on the ruins and rubbles of the judiciary, rather it is on the cutting edge of the judiciary that democracy thrives. The right to education is quintessential of the social justice in the society. Beyond rhetoric, governments need to invest in economic rights of the people through conscious measures which involve quantifiable and time-bound objectives, and a process of monitoring progress through indicators. The right to education should be removed from mere platitudes to the sphere of exercisable rights through constitutional amendments. Man cannot live by political rights alone, but in conjunction with other socio-economic rights.

³⁰³ (1981) 1 SCC 608.

³⁰⁴ *Supra* at pp. 144-5.

