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MASS MEDIA AND CRIMINAL JUSTICE SYSTEM: A CRITIQUE

-Archita Satsangi[1]

INTRODUCTION

"The media is the most powerful entity on the earth. They have the power to make innocent guilty and to make guilty innocent, and that's the power; because they control the minds of the masses"[2].

Media as regarded as one of the four pillars of democracy plays an indispensable role in shaping and influencing public opinions. A crucial role played by media is that of a watchdog, conscious keeper and attempting to attend the wrongs of the system by bringing them in knowledge of the public. Even the judiciary system has been started to benefit itself from the fearless journalism and is taking *suo-motu* cognizance of matters of various cases. However, as the destiny plays its role, there are always two sides of the same coin, with the increased role and importance devoted to the media, the increased is the need for the professionalism, accountability and ethics in reporting by the media. The freedom of media like all other freedoms envisaged under the Indian Constitution must be exercised within limited boundaries as the saying goes 'with great power comes the great responsibility'. The fundamental function of media is to inform people, educate them and guiding the society. Media gives voice and becomes platform for the hidden struggles of people for justice. Media has proved to be an agent of change by highlighting the murder mystery of Jessica Lal and Sheena Bohra by providing coverage of these crimes and was decided due to interference and pressure of the media.

Judiciary and media are two such independent institutions where implementation of law is a tedious process. Both the systems share a common bond and have complimenting roles to each other. While the media plays role of exploring, discovering and revealing the achievements and follies of a man, the judiciary on the other hand deals with the legal disputes created by the man. In a manner if compared both the systems are engaged in same roles as that of discovering the truth, upholding the democratic values. The pair of the

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[2] Malcom X.

systems are essential for progress of a civil society as media is called watchdog of society whilst judiciary is known as dispenser of justice. Afresh in time there have been countless occasions wherein media trial is conducted of the accused a verdict much before the court has been declared. A few widely known criminal cases would have gone unnoticed/unpublished but due to the intervention of the media the justice was served, like Jessica Lal case, Priyadarshini Mattoo case and the famous Nitish Katara murder case. While the media however drew flak in reporting the murder of Aarushi Talwar and held her parents guilty for the crime, though they had no mention in the CBI Report.

There have been times when these major two pillars of democracy have been in feud. Under the fundamental right of freedom of speech and expression, media enjoys the right to investigate, reveal, expose and highlight the criminal cases, as in a democracy the public has a right to know, on the other hand the judiciary is keenly aware of the fundamental rights of the accused and his right of fair trial. A balance needs to be striked with the people's right to know and right of fair trial of the accused.

"When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation.

ROLE OF MEDIA

The press, the radio and television play a big role in the life of the society. They inform, educate people. Also the major role by the mass media is to organize a public opinion and also influence the way people look at world and related situations. Mass media as a significant influencer (television, radio, advertisements, internet, newspapers, movies, magazines, hoardings and so forth) plays an important role in construction of opinions and views on criminality and criminal justice system. It has been observed that people usually consider everything true, what they get to know through the platform of mass media. Media, in the Indian Scenario are a primary source of political information to the citizens and also the role of media in a Democratic structure is to ensure accountability and transparency and also facilitate a motion for public discussion along with generating public awareness.

As in regard to criminal justice system, the mass media plays some major roles like those of following:

A. Agenda Setting

Power of the news media is to set a nation's agenda to focus public attention to a few major public issues. Walter Lippman has captured the essence of the media's powerful influence early in the last century with his phrase, "the world outside and the pictures in our heads," a detailed, empirical elaboration of this agenda-setting role of the mass media[3]. "Mass media by drawing attention by covering news on one issue while, ignoring others draws the attention of the public to certain aspects of politics while ignoring the others." There has been a categorisation of issues as covered by the media as said by Soroka "suggesting a typology making the difference between sensational, prominent and governmental issues".[4] Sensational issues basically are highlighted by the extensive media coverage, manifest of dramatic events. Prominent ones are those where everyone has their experiences intact and the media plays a lesser role in influencing policy decisions and opinions. Lastly, Governmental issues are the technical ones which draw limited attention of media or the public per se. it can be said that while performing this role the media sets some agendas to be of significant nature, affecting the judiciary's decisions and also guiding the people's attitude and trust towards the justice system, also the media helps in shaping public perception about crimes that media themselves set as vital.

B. Shaping of Societal Perspectives

The never-ending coverage of criminal issues play an instrumental role in moulding of public opinion and also to the climate of fear. "People's attitudes and habits can be changed, for e.g. everyone used to have mistaken notions about various diseases like Leprosy or HIV/AIDS that the disease cannot spread by the way of touch". "The representation of violent crime by the media leads to larger understanding of crime and justice that translates into public policies."[5] Confidence posed by the public in the criminal justice system is evaluative for functioning of justice; misconceptions on the same create lack of confidence and thereby public demand harsher punishment for offenders. "Proportion of media content that is filled with crime stories basically depends upon the definitions of crime used by a community". This also influences law enforcement and judicial process in both positive and negative ways, while a balance

[3] Maxwell McCombs, Setting the Agenda: The Mass Media and Public Opinion, 5 (2013).
[4] Cohen S, Folk Devils and Moral Panics, (3rd ed. 2002).
[5] Robert R, Media Made Criminality: The Representation of Crime in the Mass Media, P.307 (2002).

must be striked between attention and the interests of justice. Media acts as a powerful weapon to curb the threat of corruption in India leading to greater transparency by highlighting the ongoing corruption and pressurising and defacing the corrupt organizations and individuals.

C. Judging Police Effectiveness

There exist two conflicting views when it comes to portrayal of police officers in the media. Other roles of media such as Priming and Framing can be associated here. Priming refers to correlating people or institutions with particular issues for e.g. associating police with crime fighting. Framing refers to shaping how to think on a given issue by interpreting general trends, for e.g. In India police using excessive force in dealing with suspects is opinionated to be negative on the part of police while using of the same degree of force in dealing with hardened criminals is considered to be positive on the part of police regardless of the crime committed or any other factor. Two conflicting views are that news report highlight police personnel as insensitive and lawless thereby poising a negative refrain about the profession, on the other hand police personnel accuse media of sensationalism and exaggeration. On analysis with a section of media it is said that media persons feel there is a tendency on the part of the police to withhold information instead of sharing it with the press on the pretext of secrecy "no comment" is the unwritten policy adopted by police. Police in their defence say that not to sound unconvincing or protect from losing credibility they withhold the information till they time they themselves don't get assured of the same, which provokes media to expose and exaggerate the lapses of the police by gathering information from unreliable resources and broadcast the same. Movies like Singham, Gangajal portray police as masculine, smart, full of martial arts, fit, action-packed and always willing to shoot suspects. Various serials apart from the news portray police in positive images like Crime Patrol and Savdhaan India, which makes them aware that the behaviours of police varies considerably depending upon the socio-economic status of the victims and not like that of as portrayed by the news channels. It can be concluded that police and media usually engage in a mutually beneficial relationship wherein the media needs the police to provide them with quick, reliable sources of crime information while on the other hand police have a vested interest in maintaining a positive public image.

D. In Investigation

Media sources like newspapers, magazines and often the internet contain information about people as well as their financial and social status and their personal records are also revealed playing as a catalyst in investigation. Various interviews, oral statements that are broadcasted can be used for investigation in understanding the motive behind a crime or something of the same nature. Mass media for investigation can be of great help provided that the information used is filtered well.[6] Investigations not only in relation to crimes but also on case studies for educational purposes can be done. Various documents for e.g. legal documents, lawsuits, tax records, reports etc. can be analysed for the purpose of better understanding which is available on the media. During high-profile trials, mass media plays a significant role in collecting or highlighting maximum arguments and information.

MEDIA AS WATCH DOG OF SOCIETY

Democracy is basically defined as "government of the people, by the people and for the people" as enshrined in the Preamble of the Indian Constitution. Media regarded as the "fourth pillar of the democracy" after legislature, executive and judiciary, acting as eyes and ears of the public. Basically brings around what is happening and makes the government and legislature accountable for such acts. Citizens have a right to know and express their views on the situations happening around them and media acts as platform to voice to their views. Media owns a capacity to swing perceptions and evoke emotions, thereby gaining faith of the Indian public. Undoubtedly media has played a vital role in delivering justice to the disadvantaged sections of the society. "Without an active media, the cries of the victims of brutal khap killings of Haryana would have gone unheard. The fear of Khap and the backing of police and politicians allowed this barbaric tradition to continue for long till they came out in the front through media."[7] Numerous cases which will be further dealt in the paper like Arushi Murder Case, Panama Paper leak, Jessica Lal Murder Case, Salman Khan's hit and run case, even games in IPL row have been brought into limelight due to the commendable efforts of the media, which is till date treated as a very positive and welcome part of the media.

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[6] Aaratrika Bal, Role of Media In investigation, INDJUSTICE, (Oct. 2, 2019), https://indjustice.com/technologyandmedia/2019/6/11/role-of-mass-media-in-investigation.

[7] A Gowri Nair, Fair Trial, Judiciary and Media: Need for Balance, ACADEMIKE (Oct. 3, 2019) https://www.lawctopus.com/academike/fair-trial-judiciary-media-need-balance/

On a note of critique, media has now become a full-fledged business that whatever the work is done by them is for the salaries and the TRP's. The role and game instead of making people aware has shifted to viewership, eyeballs, advertisements, now the people are made aware in a way that whatever sells, catching, grabbing and maintaining the attention of the people. "The ethics and media now stand apart; ethics that media must embrace include virtues like accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect and autonomy. These virtues are very much part and parcel of the democratic process."[8]

As regards to judiciary and media, each time they both face a three-fold challenge. First being the question of trust and credibility on the parts of both who operate through and in the media and on those who are assumed to be guardians of law. Second being the inherent competencies, on the part of media to provide information on the conflicts affecting the society within the professional code of conduct and on part of judiciary, the right application of law. Third being the various attempts to exploit both the media and the judiciary with usage of political, economic and ideological powers. This poses as crucial challenge that hinders the processes of both and confuses media and judicial good practises in democracies.

FREEDOM OF SPEECH AND EXPRESSION AFFECTING TRAILS

"Freedom of speech and expression plays a vital role in forming public opinion on matters of importance such as social, economic, political etc". he Apex Court in Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India[9] stated that "[f]freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of s0ciety. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities."[10]. "While criticising a person in lieu of exercising his freedom of speech and expression, may indulge in libel/slander then the press is held to be

[8] *Ibid.*
[9] (1985) 1 SCC 641.
[10] Anukul Chandra Pradhan v. Union of India, (1996) 6 SCC 354.

answerable in the court of law for such an offence. Similarly this can't be used as veil by the press to intrude in one's privacy."

Media these days in the name of freedom of speech and expression has lost its focus from real life issue to sensational crimes and issues. Media these days have forgotten the hierarchy of justice and of convicting a person and based on some so called "evidence" an ordinarily accused person is made equivalent to a felony without any due procedure of intense investigation. This freedom is nowadays being blatantly misused by the media to create a Breaking News Item without considering the reputation of the accused and also his family, who suffer a long way in the society even after acquittal due to character assassination of the accused and the ruined reputation beyond repair.

On the positive side of this freedom in the garb of freedom of press it has been held by the Supreme Court of India in Printers (Mysore) Ltd. v. CTO.[11] That "though freedom of the press is not expressly guaranteed as a fundamental right, it is implicit in the freedom of speech and expression. Freedom of the press has always been a cherished right in all democratic countries and the press has rightly been described as the fourth chamber of democracy."

FREEDOM OF PRESS: AN IMPLIED RESTRICTION

"Freedom of press is not specifically mentioned in article 19(1) (a) of the Constitution and what is mentioned there is only freedom of speech and expression. In the Constituent Assembly Debates it was made clear by Dr. Ambedkar, Chairman of the Drafting Committee, that no special mention of the freedom of press was necessary at all as the press and an an individual or a citizen were the same as far as their right of expression was concerned."[12] In Romesh Thappar v. State of Madras[13] The Apex Court "took it for granted that freedom of press was an essential part of right to freedom of speech and expression". It was observed: "Freedom of Speech and Expression included propagation of ideas, and that the freedom was ensured by the freedom of circulation". It can be inferred that freedom of speech and expression comprises within it the right to publish and circulate one's ideas, opinions and other views by resorting to all available means of communication through media. "Freedom

[11] (1994) 6 SCC 632.
[12]Manmeet Singh, Freedom of Press: Article 19(1)(a), LSI, (Oct. 3, 2019), http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html
[13] (1950) A.I.R. 124.

of Press is implied from the freedom of speech and expression as enshrined under Article 19(1)(a) of the Indian Constitution", but is subject to reasonable restrictions as imposed by the Article 19(2). In Sakal Papers Pvt. Ltd. v. Union of India[14] it was held "All modern democracies have therefore, given much importance to freedom of press. A free press is the sentinel of democracy. Successful democracy requires deliberation and discussion. Amidst all in a democracy people rule themselves through their popularly elected representatives and public opinion is the sentinel against arbitrariness and authoritarianism of those rulers". *In Re* Harijai Singh and Anr. and *In Re* Vijay Kumar[15] the Supreme Court on the extent of Freedom of Press held: ""an essential prerequisite of a democratic form of government" and regarded it as "the mother of all other liberties in a democratic society". "The right under Article 19(1)(a) includes right to information and also the right to disseminate it through all types of media whether electronic, print or audiovisual means"[16]. In Hamdard Dawakhana v. Union of India[17] "the right includes right to acquire and impart ideas and information about the matter of common interest and crimes".

As against media trial, in State of Maharashtra v. R.J Gandhi[18] it was held by the Apex Court that, "a trial by press/media is very antithesis of rule of law and can easily lead to miscarriage of justice". It has been observed by the Hon'ble Apex Court that "No occasion should arise for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial"[19]. Media trial can have a damaging effect in the manner that some of the narrations, factual enumerations, data etc arising from interviews, panel discussions, debates etc would interfere in the trial by the judiciary further hindering the process.

On the other hand due to unfettered fight of family along with constant media support, many cases have caught nerves of the people, like Priyadarshini Matto murder and Rape Case, Jessica Lal Murder Case, Sanjeeb Nanda hit and run case and so forth. Thus it can be said that freedom of press has been playing a vital role in bringing into limelight high profile crimes and scams to the public.

[14] (1962) AIR. 305.
[15] (1996) 6 SCC 466.
[16] Life Insurance Corporation of India(LIC) v. Manubhai D. Shah, (1992) 3 SCC 637.
[17] (1960) 2 SCR 671.
[18] (1997) AIR 398.
[19] (1996) 6 SCC 354.

INFRINGEMENT OF RIGHT TO BE REPRESENTED

Media trial, in a way has started to create pressure on the lawyers to take or not to take up a case of accused, forcing accused to go to the trial without any defence mechanism with them. Media trial in this manner in a way is against the principles of natural justice. Keeping aside suspects and the accused even victim and the witness(es) suffer from excessive publicity thereby infringing their right to privacy. "The pressure on the police from media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect and that he has confessed, the 'Breaking News' items start and few in the media appear to know that under the law, confession to police is not admissible in a criminal trial".[20] The confession as soon as it is published, the future of the suspect gets finished and when there is retraction in front of magistrate, the public images him to be a liar. Also if the images of suspects are shared on the media, problem such as identification parade[21] which is conducted under the Code of Criminal Procedure, 1973 for identifying the accused will be *mala fide*.

For instance when an "eminent lawyer Ram Jethmalani decided to defend Manu Sharma, prime accused in the case of Jessica Lal Murder Case, he faced societal objections". Similarly, "Kamini Jaiswal, who represented SAR Geelani, A Delhi University Professor, accused in the Parliament Attack of 2001 was literally called an anti-national". On the same note, Prashant Bhushan was highly opposed and criticised on becoming the counsel of Yakub Menon.[22]

MEDIA TRIAL V. FAIR TRIAL

Right to a fair trial is an absolute right of every individual within the country, flowing from Article 21 read with Article 14 of the Indian Constitution. Media trial has created a problem as it involves a conflict between 2 crucial principles i.e. Free Press and Free Trial. "Our criminal justice system adheres to the tenet of 'presumption of innocence' person presumed to be innocent until proven guilty beyond reasonable doubt. The role of media is restricted to that of publicizing the factual part and public issue on any crime news and not to adjudicate

[20] Devesh Tripathi, Trial by Media, 2 RMLNLU J. 2-3 (2017).
[21] Indian Evidence Act, No. 1 of 1872.
[22] Poulomi Banerjee, Defending the Doomed: Lawyers Who Stand Up for Terror Accused, Maoists, H.T.,March 13, 2016.

upon the same". The Supreme Court in Zahira Habibullah Sheikh v. State of Gujarat has held "It is reflected in numerous rules and practices…. fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. A Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated"[23].

The basic tenet supposed to be dealt is not whether media does interfere, but when it interferes it does within the due course of justice as held by Supreme Court "No occasion should arise for an impression that the publicity attached to these matters has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial".[24] In a case in the Supreme Court on how the media contempt can be restricted by laying in its judgement "The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. The postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the Media."[25]. thereby in a celebrated judgement by the Apex Court which was based on streamlining the role of media in a criminal justice system was held that "It is said and to great extent correctly that through media publicity those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues. All this is done in the interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable.[26]"

INTERFERENCE OF MEDIA VIS A VIS FAIR ADMINISTRATION OF JUSTICE

Whilst it has been emphasised that penetration of media to some extent is necessary for administration of justice. On importance of media it was once said by Jeremy Bentham "in the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in

[23] (2005) 2 SCC 75.
[24] Ankul Chandra Pradhan v. Union of India, (1996) 6 SCC 354.
[25] Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India and Anr, (2012) SCC 465.
[26] Kartongen Kemi Och Forvaltning AB and Ors. v. State through CBI, (2004) 72 DRJ 693.

proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[27]" Article 19(1)(a) of the Indian Constitution guarantees freedom of speech and expression and Article 19(2) permits reasonable restrictions on it which nowhere includes 'administration of justice' but interference in administration is clearly referred in the definition of criminal contempt in Section 2 of the Contempt of Courts Act, 1971. Undoubtedly the media trial has exposed many criminals of high profile cases like that of Jessica Lal murder case and that of Nitish Kataara but also pre-decisions given by media have not been praiseworthy as can be seen in the case of Aarushi Talwar Murder case.

Media is to be appreciated in a way that it plays a good role while "divulging corruption in government exchequer and bringing into limelight the government's inaction". Though invited scorns from a multitude of agencies for some of its thoughtless coverage, media played a laudable role in exposing 2g scam, burning Vyapam Scam, Lalit Modi fled and countless other acts of corruption. Media trial and media investigation brings public closer to the democracy and helps in forming an opinion of the accused.

RESTRICTION ON MEDIA (LEGISLATIVE & REGULATIVE)

A. Constitutional Restriction

The press and the media although enjoy the freedom in expressing their views, these freedoms aren't absolute and subject to specific restrictions as discussed above. The ground includes the law of contempt. Under the Articles 129 and 215of the Indian Constitution, the Apex Court of the country and the High Courts of the states respectively are empowered to penalize people for their contempt.

B. Sanyal Committee Report

In 1961, "a special committee under the chairmanship of Late H.N. Sanyal was setup. This committee gave attention to the significance of freedom of speech and expression under the Constitution of India and the necessity of protecting and dignity

[27] Ravinder Singh Dhull, Impact and Effect of Social Media on Indian Judiciary,(Oct. 5, 2019), http://ravindersinghdhull.net/2016/09/21/impact-and-effect-of-social-media-on-indian-judiciary/.

and status of courts in the interest of administration of justice. Contempt of Courts Act, 1971 is considered to be the product of this committee report."

C. Joint Committee of Parliament

Reviewed the bill by Sanyal Committee and the reference of imminent proceedings was dropped by the decision of this committee (Bhargava Committee).

D. Contempt of Courts Act, 1971

Under the Act, "if a publication interferes or in any way tends to interfere with administration of justice, then it may result in criminal contempt and can only be prevented by imposing reasonable restriction". Under this act the punishment is imposed for protection of administration of justice and not for protecting the courts or judges. As a part of the criminal justice system is concerned there is very little or hardly restraint on the media. The act acts a shield to media from the prejudicial publications much before a trial has stated.

E. 200th Law Commission Report

The "Seventeenth Law Commission" through its report "Trial by media: Free Speech v. Fair Trial under Criminal Procedure". Law Commission took this matter *suo motu*, after considering the wide- reaching coverage by the electronic and print media of crime and the information relating to the suspects and the accused. This committee has recommended "a law to debar the media from reporting anything prejudicial to the accused rights in criminal cases from the time of arrest to investigation and trial."

In A.K. Gopalan v. Noordeen[28] the Apex Court held that "a prejudicial publication about the suspect/accused, made after a person is arrested, could be treated as arrested". After this judgement, arrest was made to be the starting point of a pending criminal proceeding, the commission report suggested that the publications and broadcast by the media will be prejudicial after arrest like that of character, confessions, previous convictions and so forth and could be labelled as criminal contempt. Even the images published may make hinder the process of identification parade.

[28] (1969) 2 SCC 734.

F. Regulatory Measures

"The Press Council of India (PCI) was basically acclaimed to preserve the freedom of press and improve the standards of news reporting". There has been suggested set of norms for journalism conduct, emphasising on the importance of accuracy and fairness[29]. The norms even suggest that any sort of criticism of the judiciary be published with utmost caution. Further the PCI has criminal contempt powers to restrict such reports.

G. Precedents

In, *In Re* Arundhati Roy[30], the Apex Court has considered the view taken by Frank Furter J. "If men, including judges and journalists, were angels, there would be no problem of contempt of court. Angelic judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to judges. The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise."[31]

In D.C. Saxena (Dr.) v. Chief Justice of India[32] the Apex Court stated that "no one has the power to accuse a judge of his misbehaviour, partiality, incapacity other than the Supreme Court." The purpose behind such judgement was to "ensure independence of judiciary so that judges decide the case without any fear or favour" as the objective behind the courts is the dispensation of justice and fair manner.

Such restrictions fulfil a two-folded purpose firstly they describe that the freedom of press is not absolute and subject to restrictions and secondly, a limitation on the part of the legislature is put restriction on this freedom of press/ media.

TRIAL BY MEDIA AFFECTING CONSCIOUS OF JUDGES

With the advent of technology the citizens are becoming more and more evolved and aware regarding the working of Government and its functionalities. "Trials are being reported in

[29] Press Council of India, Norms of Journalistic Conduct, PCI (Oct.5, 2019), http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf
[30] (2002) 3 SCC 343.
[31] Pennekamp v. Florida, 328 US 331.
[32] (1996) 5 SCC 216.

media due to which debates start, people engage themselves in the discussions and judgements made by them are made public much before the actual copies to the parties are delivered." This thereby poses a big challenge for the judges as well as the lawyers as they are answerable though not directly, but surely indirectly it becomes their duty.

The modern judge, as of date at whatever level he is, an intelligent, interested and informed one who reads the newspapers and watches television like any other member of the society and in broad sense has the knowledge of human conditions and is open to influence to the world of media. Although, what is supposed to be taken in consideration is also that the judges administer a judicial oath and receive a judicial training which makes them aware of their obligation which is to put the matters of personal opinion aside before coming to the decision of a case, what should be considered while making a judgement is the application of law to facts and the evidence before them. "Unless the Courts of Justice are able to administer the law in the absence of pressure of the popular opinion, the judiciary isn't considered to be independent."

On a deep analysis of the case Reliance Petrochemicals v. Proprietor of Indian Express[33], it can be inferred that the Apex Court in a manner has accepted that judges tend to be "subconsciously influenced" by the media publicity. It has been also inferred by another celebrated case of the Apex Court in which it was observed that "No occasion should arise for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial[34]".

The Apex Court of India has not laid down any formula or test to ascertain how the balance of convenience in a situation of conflict of media and judiciary. The media coverage though can influence law enforcement and judicial process in both negative and positive ways. These days the trend by media isn't that of 'public interest' but in 'what public is interested in'[35]. Media these days possess vast powers to subconsciously affect any case which unconsciously influences the judges conducting trial of a matter which has been tried by the public much before the Court's conclusion.

[33] (1988) 4 SCC 592.
[34] *Supra note* at 22.
[35] Zehra Khan, Trial-By-Media: Derailing the Judicial Process in India, 1 MLR, 9, (2010).

It is well accepted that "every person holding a judicial office to his fullest tries not to let his mind be affected by what he has seen, heard or read outside the court and also that he will not voluntarily be influenced by the media". It cannot be ignored that the competency of media to influence the formulations and conduct of biases and opinions can't be precluded. In *Re* P.C. Sen[36], it was held that "genuine risk of prejudicial remarks made in newspapers or by any mass media which must be guarded against is the ―impression that such comments might have on the Judge's mind or even on the minds of witnesses for a litigant."[37]

The main tool of media is reporting through which it brings various issues to the notice of public which would otherwise left unnoticed, this throwing of light by media in a way makes people aware about their rights and duties. Such a media which tries to make the citizens of a country aware is known to be an active media, which is indispensable for democracy but an interfering one can easily cause the criminal justice system to collapse. The media todays fails to accept the fact that is the sole job of judiciary to adjudicate the matter by considering the legal aspects of it, media doesn't possess the competence and the capacity which the Indian Judiciary has. Continuous harping of media on guilt of the accused is bound to influence the sub-conscious thinking of a judge. The media trial in a way sways the moods of public in favour or against the accused; judge himself may feel under tremendous pressure. Undoubtedly, the media has the right to report any proceedings which are sub-judice, with an implied condition that the media shall restrict itself to mere reporting. There arises a clear denial of the fair trial of the accused as the minds of judges are affected in 2 ways due to constant mugging upon the guilt of the accused. First being the judge already before the commencement of the trial, starts believing the accused to be guilty, thereby not appreciating the evidence before him in a fair manner, Second being that the judge in order to save his reputation may give the decision according to the mass opinion to save himself and his family from the wrath of the public.

Media trial is prevailing these days due to majorly two reasons. First and foremost being the want of public, as we all know that the Indian judiciary system unlike the judicial system of other countries is quite cumbersome, lengthy and complicated for the public to know and follow the case. This is where the media bridges the gap by giving the public access to information related to the case. Just for the sake of having knowledge of the ongoing cases, media trial is popularised among the citizens regardless of the fact that the information they

[36] (1970) AIR 1821.
[37] *Ibid.*

are getting is true of false. The other important reason being the image of media in minds of the citizens. Media being regarded as the Fourth pillar of democracy is expected to perform an important function of imparting fair, objective and true information to the public at large. Though media acquired this image over a long period of time but this is the reality of today. Hence, whatever is projected or broadcasted or published in media, the public believes it to be true, correct and in consonance of justice and thereby digested by the public.

ANALYSIS OF EFFECTS OF INTERFERENCE OF MEDIA IN PROMINENT CASES

A. *Jawahar Lal Nehru University (JNU), Sedition Case*[38]

A news channel had played videos showing students of JNU raising anti-India slogans in the "campus during an organised protest against the hanging of the Parliament attack convict Afzal Guru". Such videos were thereby used as evidence by the Delhi Police to file an FIR and arrest the President of the campus Kanhaiya Kumar and booked him for sedition.[39]

It was later been understood that speed puts pressure on the media houses to publish stories before they are adequately checked or verified as to the source of such and reliability of the same. It was said that "even after it became clear that there were no Jaish-e- Mohhamed connection, the media didn't give a disclaimer, apology or anything of that sort to get it corrected."

However, by this case the positives to be taken was that the public to doubt the ideological leanings and journalistic credentials of the 'well known' journalists.[40]

B. *Salman Khan Hit And Run Case*[41]

This case basically throws light on the agenda setting role of media as discussed above in the research paper. This case though had prospects to set an example "to deter drunk drivers across the nation, instead it could only set an example as to

[38] Kanhaiya Kumar v. State of NCT of Delhi, (2016) 227 DLT 612.
[39] Smriti Kak Ramachandran, JNU 'Sedition' Row: When Media Became the Part of the Story, HT, February 22, 2016 at 2.
[40] Viju Cherian, JNU Row: Perfect Case Study to Show How Media is Losing its Credibility, HINDUSTAN TIMES (Oct. 6, 2019), https://www.hindustantimes.com/opinion/jnu-row-perfect-case-study-to-show-how-media-is-losing-its-credibility/story-cPwk9WhMAuEZMuqQMUjTtO.html
[41] Salman Salim Khan v. State of Maharashtra, (2015) SCC Online Bom 7663.

different ways to botch an investigation only because he being a superstar since the era of 90's of the Bollywood".[42]

This case highlights the fallacy of media, even though their futile attempts to change the public opinions failed to a large extent and also the judiciary failed to consider the opinion of media and rendered a judgement which was highly criticised by the media for a long time quoting fear of fans and nepotism as major reason for the actor's acquittal.

C. Aarushi Talwar Murder Case (Noida Double Murder Case) 2008[43]

A perfect example of how media can implicate a case. "The style of writing and headlines were such that made the readers and viewers believe that Talwars were guilty of killing their own daughter on account of honour killing", although the murder had no witness and when this verdict was passed by media the case was still pending in the Allahabad High Court, the court of first instance where it was filed. The case which had no eye witness and only circumstantial evidence, "a narrative first floated by the Inspector General of Meerut, who literally 'solved' the case even before investigations took their pace". In a widely publicised press conference his theory of Rajesh committing the murder of his daughter Aarushi and servant Hemraj after finding them in "objectionable but not compromising situation" gained momentum across the media. When the case went to trial after the closure report of CBI the motive left was to turn the insinuations into evidence, where media came to be handy. The evidence that couldn't be recovered from the crime scene was materialised in the pages of the newspapers. As said by the report in Times of India, August 10, 2010 this case "is virtually a trial by a voyeuristic media presenting an incident in an extremely malicious manner"[44].

D. Sheena Bohra Murder Case[45]

The crime as put by some "was 'mother of murders' and gained huge media attention as it involved a celebrity and many sub-plots major one being the murdered young woman (Sheena Bohra) was Indrani's daughter and not sister as was portrayed to the

[42] Rahul Gaur, Will Cops Ever Learn from Mistakes, MID DAY (Oct. 6, 2019), https://www.mid-day.com/articles/mid-day-editorial-will-cops-ever-learn-from-mistakes/16769167
[43] Nupur Talwar (Dr.) v. State of U.P., (2018) 102 ACC 524.
[44] Madhabhushi Sridhar, Maligned by Police and Media?, HOOT (Oct. 2, 2019), http://asu.thehoot.org/media-watch/media-practice/implicated-by-the-media-10336
[45] Pratim@ Peter Mukherjea v. Union of India & Anr., (2018) SCC OnLine Bom 630.

society". The aim of the earliest media trial was 'justice for sheena bohra' but no consideration was given to the privacy of the main accused Indrani Mukherjee, whose every aspect of personal life and character was scrutinised by public lens. In the heat of sensational news, the media houses paid no heed to the law that identity of victim of sexual crime can't be disclosed.

No consideration was given to the fact "that the murder and other aspects of Indrani's life needed to be separated; just because of the fact that she married several times or wanted to taste social success too soon can't be held against her".[46]

E. Nitish Katara Murder Case[47]

A case where role of media was laudable in bringing the accused to the books. Nitish Katara an IIT'ian himself was battered to death on account of honour killing as he fell in love with his classmate, Bharti Yadav whose father being an influential criminal turned politician who was strongly against their love.

After the highlight of the murder Bharti under the pressure of her father and family denied any relation other than of classmate with Nitish but the media pressure however made her concede and she gave her statement, which bought into light the murderers. "Also the media highlighted that the accused that is both of her brothers had so far by then confessed to the crime which was concealed before the court as the officer (IO) was a business associate of the gir's father,"

F. Jessica Lal Murder Case[48]

The best example of how media investigation, if down with right spirit and correctly can serve justice to the victims. Case of an upcoming model who was shot in head by Manu Sharma, son of a prominent Congress Leader. The trial went for a long time span of 7 years ending in his acquittal in 2006 as till then all the witness turned hostile. Believing that acquittal owed to his father's power and position a great step by a magazine called "Tehelka" was taken by conducting a sting operation on all the witnesses who in the court had turned hostile confessing in some or other way on the camera that they were bribed by Manu's father in order to save his son. On account of

[46] Mythili Sundar, Media Trial Most Foul, THE HINDU (Oct. 5, 2019), https://www.thehindu.com/opinion/op-ed/media-trial-most-foul/article7604416.ece
[47] Vikas Yadav v. State of U.P., (2016) SCC OnLine SC 1088.
[48] Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2001) 3 AD 829.

all such evidences justice was served to Jessica Lall and her family by sentencing him life imprisonment.

G. Priyadarshini Mattoo Case[49]

Tale of a son of a soon to be Addl. Commissioner of Police, who raped and murdered a law student after harassing her on account of accepting his love proposal to which she refused all the times. The CBI after considering enough evidence arrested Santosh Kumar the son who was later acquitted on benefit of doubt. The media then took to intervene again and got its investigation mode and the dust of Jessica Lal murder case hadn't yet settled. It was then on appeal by CBI brought into light that vital evidence was overlooked and within a span of 42 days the son was convicted under Section 302 (Murder) and Section 376 (Rape) of the Indian Penal Code.

By the analysis of the above cases and many such cases it can be concluded that "relentless reporting by the media in cases have time and again brought speedier justice for the victims and its role of ensuring justice can't be overlooked". On the other hand there indeed have been several occasions as discussed in the cases as well where media has unduly interfered with the judicial process and in conducting parallel trail have infringed the rights of the accused.

CONCLUSION & SUGGESTION

Democracy cannot prevail without either media or judiciary, since both the systems are indispensible for proper functioning of the nation. It cannot be forgotten that freedom of speech and expression is not absolute, unlimited or unfettered. Judiciary performs its duties because of the people who are humans and no judge is completely distant from the hype created by the media in certain cases. To maintain this media must exercise self-regulation so that it doesn't hamper the fair investigation and with the right of fair trial of the accused. The discussion in this research paper leads to the conclusion that the media has both positive and negative effects on the criminal system in India, if in some cases it has led to harassment of innocent or in some way infringed the right of fair trial of the accused then on the other hand as well it has led to conviction of the main suspect which would not have been possible without media interference.

[49] Santosh Kumar Singh v. State thr. CBI, Criminal Appeal No. 87 of 2007, SC.

In a nutshell, it can be said that need of the hour lies in Responsive Journalism, which must be duly regulated and kept under check.

Suggestions for regulating the reporting of mass media and balancing its impact on the delivery justice system

1. Recommendation of the report of the 200th Law Commission be implemented that 'prejudicial publications 'not to be permitted after arrest of the accused.
2. More stringent powers to the statutory body which can regulate regarding improving and maintaining standards of media, Press Council of India (PCI)
3. A minimum prescribed standard to enter the profession of journalism. The syllabus to include the laws in relation to defamation and contempt of court and its penal effects.

Such changes will make the media play a pivotal role in enforcing democracy in its very true sense.

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FAMILY SEPARATION: THE AMERICAN NIGHTMARE

- Brianna Brothag[50]

INTRODUCTION

For many, America has been a sign of hope. Since the pilgrims who came to the New World for religious freedom, America has been a place that people look to in order to escape persecution. In the aftermath of the tragedy of World War II, forty-eight countries came together to sign the Universal Declaration of Human Rights (UDHR), one of which was the United States of America. Mirroring some of the language in the Declaration of Independence, the UDHR states, "[w]hereas recognition of the inherent dignity of the equal and inalienable rights of all members of the human *family* is the foundation of freedom, justice, and peace in the world . . . [a]ll human beings are born free and equal in dignity and rights."[51] This first Article sets the stage for the remainder of the Declaration and reminds everyone reading it that each article is to be read to build on equality and justice. In addition, this first article foreshadows another common theme in the UDHR: family.[52]

Despite being a major contributor in the drafting of the UDHR, the United States never ratified the Declaration.[53] Regardless of ratification, the United States has standards in domestic law which encompasses many of the rights and the spirit of the UDHR – many of which, unfortunately, are not afforded to non-citizens.[54] This creates a legal vacuum in which the United States claims that it is justified in treating asylum-seekers and migrants as

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[50] J. D. Candidate, LL.M. Candidate, Association for Immigration and Refugee Reform, Secretary, Ohio Northern University, Claude W. Pettit College of Law.

[51] Universal Declaration of Human Rights (Dec. 10, 1948,) https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf ; The Declaration of Independence (Jul. 4, 1776), http://www.ushistory.org/declaration/document/

[52] *Ibid,* UDHR, Art. 12 ("No one shall be subjected to arbitrary interference with his privacy, *family*, home or correspondence . . .") (emphasis added); *id.,* Art. 16(3) ("The *family* is the natural and fundamental group unit of society and is entitled to protection by society and the State.") (emphasis added); and *id.,* Art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care . . .").

[53] Human Rights and The United States, THE ADVOCATES FOR HUMAN RIGHTS (Nov. 16, 2018), https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states#US%20Constitution%20and%20UDHR.

[54] Gretchen Frazee, What constitutional rights do undocumented immigrants have?., PBS NEWS HOUR (Jun. 25, 2018, 5:08 PM), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have.

less then citizens, violating their human rights.[55]Today, the United States, once known as a place of refuge to the world, is littered with human rights violations at the borders due to immigration and asylum policies.[56]At the frontlines of the violations is the Trump Administration's "zero-tolerance" policy which resulted in separating children from their families and putting them into detention centers.[57] This paper will outline the human rights violations as a result of this policy and will recommend that the United States seriously look into Alternatives to Detention (ATDs) because every human, no matter their circumstance, has equal rights in dignity and each person "should act towards one another in a spirit of brotherhood."[58]

ZERO-TOLERANCE POLICY

In the summer of 2018, the world was outraged by photos released from a U.S. Border Patrol Processing Center which showed children inside of 30x30 cages in McAllen, Texas.[59] Nearly 2,000 children were separated from their guardians as a result of the Trump Administration's "zero-tolerance" policy implemented by Attorney General Jeff Sessions.[60]The zero-tolerance policy required prosecutors to criminally prosecute all aliens who enter or attempt to enter the United States without following the proper channels or misrepresents a material fact regarding entry.[61] There is no distinction between asylum seekers and immigrants seeking entry for other reasons. The result of this policy has been devastating for families. Due to the fact that children cannot be prosecuted for a crime, adults have been prosecuted and detained in criminal detention facilities while their children have been detained in family detention centers.[62]

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[55]*See generally* Amnesty International, Usa: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment Of Asylum-Seekers In The United States (2018).
[56] THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 3.
[57] Tim O'Shea & Theresa Cardinal Brown, Why are Families Being Separated at the Border? An Explainer, Bipartisan Policy Center (Jun. 13, 2018), https://bipartisanpolicy.org/blog/why-are-families-being-separated-at-the-border-an-explainer/.
[58] UDHR, *supra* note 3, at Art. 1.
[59] Trump migrant separation policy: Children 'in cages' in Texas, BBC NEWS (Jun. 18, 2018), https://www.bbc.com/news/world-us-canada-44518942.
[60]Mythili Sampath Kumar, Trump says it is the Democrats' fault children are being taken away from their families at the US border, The Independent (Jun. 16, 2018, 8:45 AM), https://www.independent.co.uk/news/world/americas/us-politics/trump-democrats-us-border-migrant-families-children-parents-mexico-separate a8401521.html?fbclid=IwAR253yLR_naDe4v2HMSSFT_zUNl_d84cY1STdzNrGAjdao9HuT6__9BFsQw.
[61] 8 U.S.C. § 1325(a).
[62]O'Shea & Brown, *supra* note 6.

Implementing the zero-tolerance policy has proven to be irresponsible.[63] It fundamentally changed the approach to immigration enforcement and because of this, the Department of Homeland Security (DHS) was not prepared to manage the results of the policy.[64] The children separated under this policy were detained for long periods of time in facilities which were meant for short-term detentions only.[65] Further, once the children were separated, DHS had a difficult time keeping track of both parents and children due an outdated information technology system.[66] Once the public outrage began, President Trump ordered a halt of the practice,[67] but by that time the damage had already been done. On June 26, 2018 – six days after President Trump's executive order – a Federal court ordered the reunification of families to be done within 30 days.[68] Thirty days later, 2,167 of 2,551 children over age five had been reunited with their families and 84 of 103 under age five had been reunited.[69] This still left 403 children separated from their families; if the numbers given are correct.[70]

a. Overview of the Policy

On April 6, 2018, Attorney General Jeff Sessions sent a memorandum for federal prosecutors along the southwest border in which he conveyed the new "Zero-Tolerance" policy for offenses under 8 U.S.C. § 1325(a).[71] After expressing his concern with the increase of illegal aliens crossing America's southern border, Attorney General Jeff Sessions directed each federal prosecutor to immediately adopt a zero-tolerance policy for all prosecution under 1325(a) and insisted that this policy shall supersede all other polices in place,[72] which included the practice of detaining families together and proceeding with civil removal rather than criminal prosecution. This policy required prosecutors to prosecute adults under criminal statutes rather than a civil immigration removal proceeding which resulted in children being taken away from parents and detained in a detention center while

[63] OFFICE OF INSPECTOR GENERAL, OIG-18-84, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY (2018) [hereinafter OBSERVATIONS REGARDING FAMILY SEPARATION] ("DHS was not fully prepared to implement the Administration's Zero Tolerance Policy or to deal with some of its after-effects.").
[64] *Supra note at 14.*
[65] *Supra note at 14.*
[66] *Supra note at 14.*
[67] *Supra note at 14.*
[68] OBSERVATIONS REGARDING FAMILY SEPARATION, *supra* note 11.
[69] *Ibid.*
[70] Catherine E. Shocichet, The US just revealed more families were separated. Here's why that matters, CNN (Oct. 26, 2018, 10:19 AM), https://www.cnn.com/2018/10/26/politics/separated-families-reunification-update/index.html.
[71] Memorandum for Federal ProsecutorsAlong the Southwest *Boarder* (Apr. 6, 2018), https://www.justice.gov/opa/pressrelease/file/1049751/download?utm_medium=email&utm_source=govdelivery&fbclid=IwAR3BfObok16v5yon8kpdA6PZxvdDIVvMJhz-YpExOHoGoAXom0xYWnOOXek; and 8 U.S.C. 1325(a) (making it a crime to enter or attempt to enter the United States without following the proper channels or misrepresenting a material fact).
[72] Memorandum for Federal Prosecutors Along the Southwest Boarder, *supra* note 19.

adults were detained in a criminal facility.[73] Where previous administrations would use family detention facilities (an issue of its own breed) or alternatives to detention, Attorney General Jeff Sessions and the Trump Administration's policy resulted in family separation across the board.[74] After public outcry, President Trump signed an executive order to end the practice of separating children from their families on June 20, 2018.[75]

The zero-tolerance policy was justified by the Trump Administration as a necessary evil because of the large numbers of aliens entering the country illegally.[76] However, the result of this policy has put a target on the backs of asylum-seekers rather than immigrants coming to work.[77] President Trump further justified this policy by claiming that the United States had a "catch-and-release" system in which "we take his name and then we release him" and give him a court date.[78] He further claims that the chance of getting an alien to court is zero.[79] However, studies show that 96 percent of asylum-seekers attend their immigration hearings after being released from detention.[80] Lastly, the Trump Administration has claimed that the zero-tolerance policy is in place to discourage submissions of fraudulent asylum reports.[81] Again, this is not true. While there has been an increase of asylum-seekers coming to the

[73] O'Shea & Brown, *supra* note 6.
[74] *Supra note at 24.*.
[75] US 'zero-tolerance' immigration policy still violating fundamental human rights laws, the Conversation (Jun. 27, 2018, 6:43 AM), http://theconversation.com/us-zero-tolerance-immigration-policy-still-violating-fundamental-human-rights-laws-98615.
[76] Adam Isacson, Maureen Meyer, & Adeline Hite, "Come Back Later": Challenges for Asylum Seekers Waiting at Ports of Entry, WOLA ADVOCACY FOR HUMAN RIGHTS IN THE AMERICAS (Aug. 2, 2018), https://www.wola.org/analysis/come-back-later-challenges-asylum-seekers-waiting-ports-entry/.
[77] *Compare* Isacson, et al., *supra* note 24, *with* David Barboza, Meatpackers'' Profits Hinge On Pool of Immigrant Labor, THE NEW YORK TIMES (Dec. 21, 2001), https://www.nytimes.com/2001/12/21/us/meatpackers-profits-hinge-on-pool-of-immigrant-labor.html?fbclid=IwAR01CL_cbSkiJ63O4e3aCBPGgxRY1KpMs78_oIdGS5LTBjH_olpStRckX80, *and* Lise Nelson, Donald Trump's wall ignores the economic logic of undocumented immigrant labor, UPI (Oct. 26, 2016, 12:34 PM), https://www.upi.com/Top_News/Opinion/2016/10/26/Donald-Trumps-wall-ignores-the-economic-logic-of undocumented immigrantlabor/2621477498203/?fbclid=IwAR3mkADDpfsMke5S433mv3pAuLE9ssW7LSUaGAacr-GOPSpqwSNeIgcmc2c.
[78] Fox News, President Trump makes surprise appearance on 'Fox & Friends', YouTube (Jun. 15, 2018), https://www.youtube.com/watch?v=KCVSx_4V0wo.
[79] *Id.*
[80] Ingrid Eagly, Steven Shafter, & Jana Whally, Detaining Families: A Study of Asylum Adjudication in Family Detention, AMERICAN IMMIGRATION COUNCIL (Aug. 16, 2018), https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention.
[81] U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration", May 7, 2018.

United States, this is a result of the increase of refugees around the world rather than an increase of fraudulent claims.[82]

Moreover, although the Trump Administration has claimed several legitimate reasons for implementing this policy (even if they are not true), there are more ominous justifications which, if true, would make the policy in clear violation of human rights. One such violation was first brought up in March of 2017 by John Kelly, then DHS secretary. Confirming considerations of separating children from their parents at the border, he explained that the department was considering this policy as a deterrent "from even beginning the journey."[83] Even more harrowing, Michelle Brané from the Women's Refugee Commission expressed concern for this blanket policy and recounted that her organization was told that consideration of the policy was seen as "the solution for how to prevent people from coming to [the U.S.] border and asking for asylum."[84]

VIOLATIONS AS A RESULT OF ZERO-TOLERANCE

Although the family separation portion of the policy was only in place for a few months, it created a humanitarian crisis at the southern American border.[85] As mentioned above, nearly 2,000 children were separated from their guardians and placed into detention centers which were never meant to house children for long periods of time.[86] Even placing the obvious violations of due process and detention of children (under American and International law alike) aside, violations stemming from the zero-tolerance policy were numerous and expansive.[87] The Trump Administration has impeded individuals' right to seek asylum, articulated in Article 14 of the UDHR.[88] Beyond international law, the zero-tolerance policy has raised serious domestic concerns and violations; first being the violations of the Flores Settlement which sets limits on the length of time and conditions that a child can

[82] UNHCR, THE UN REFUGEE AGENCY (Nov. 16, 2018), http://www.unhcr.org/uk/figures-at-a-glance.html .
[83] Daniella Diaz, Kelly: DHS is considering separating undocumented children from their parents at the border, CNN Politics (Mar. 7, 2017, 7:33 AM), https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html.
[84] Frontline: Separated: Children at the Border, PBS television broadcast (Jul. 31, 2018).
[85] Eladio Bobadilla, Opinion: Creating a humanitarian crisis – while ignoring U.S. history, THE HERALD SUN (Jun. 18, 2018, 7:03 PM), https://www.heraldsun.com/opinion/article213418724.html.
[86] OBSERVATIONS REGARDING FAMILY SEPARATION, *supra* note 11.
[87] Brothag, Family Separation: The American Nightmare, *infra* at section III (a), (b), and (c).
[88] UDHR, *supra* note 3, at Art. 14 ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

be held in immigration detention.[89] Moreover, this policy has raised questions about acceptable treatments of aliens under the United States Constitution as it grants the right of due process to all persons.[90]

b. Right to Seek Asylum

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[91] This first article is arguably the most important article of the UDHR. It sets the stage for the rest of the document and clearly sets the tone of equality, fairness, and compassion. With this article in mind, Article 14 conveys the right to seek asylum from persecution in one's home country.[92] This right is further detailed in the Convention relating to the Status of Refugees and Protocol (hereinafter Refugee Convention)[93] which establishes a definition of a refugee[94], along with requirements of the Contracting States and refugees.[95]

The United States has ratified the Refugee Convention and implemented it in Title 8 of the United States Code.[96] Despite ratifying the Refugee Convention, which grants the right to asylum, the zero-tolerance policy treats asylum seekers as criminals and prosecutes them as such as there is no exception under the policy for asylum-seekers.[97] While asylum-seekers have a universal right to seek asylum, they are not refugees simply because they claim fear of

[89]*See* The Flores Settlement: A Brief History and Next Steps, HUMAN RIGHTS FIRST (Feb. 19, 2016), https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps.
[90] U.S. Const. amends. V, XIV.
[91] UDHR, *supra* note 3, at Art. 1.
[92]*Id*. at Art. 14.
[93]Convention and Protocol Relating to the Status of Refugees (Oct. 4, 1967), https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47 [hereinafter Refugee Convention].
[94]*Id.*at 2, ; Art. 1(A) (2) and Protocol Art. 1(2) (defining a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.").
[95]*See id.* at 2, ; Art. 3 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin."); *id.* at Art. 16 (requiring that "refugees . . . have free access to the courts of law" within the Contracting State and shall enjoy "the same treatment as a national in matters pertaining to access to the Courts . . . ."); and *id.* at Art. 33(1) (prohibiting a Contracting State from returning a refugee to a place where her life would be threatened because of her race, religion, nationality, membership of a particular social group or political party).
[96]*See* 8 U.S.C. § 1158 (defining a refugee and setting conditions for granting asylum).
[97]*Supra* note 23, *See* US 'zero-tolerance' immigration policy still violating fundamental human rights laws; and WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266,; THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 1 (2018).

persecution.[98]Refugee status is determined by the Contracting States and varies from state to state.[99] In the United States, refugee status is either determined by the Secretary of Homeland Security or the Attorney General for affirmative applications or by an immigration judge in defensive proceedings.[100] Often, affirmative applications are considered the "legal" way due to the fact that asylum seekers would wait for approval before entering the country, whereas defensive applications are considered "illegal" because they occur after entry, during removal proceedings. Both, however, are legal under the laws of the United States.[101]

The zero-tolerance policy does not prohibit asylum-seekers from applying for refugee status necessarily – all it does is create a mandate for prosecutors to prosecute *every* alien who enters or attempts to enter the United States using improper channels.[102] However, the special review from the Office of the Inspector General explains how the Administration effectively limited the right to seek asylum by regulating the number of asylum-seekers entering at a port of entry, the "legal" way.[103] Customs and Border Protection (CPS) officers stand on the international line at the border of the U.S. and Mexico and stop those without proper documents, often asylum-seekers.[104] The officer then radios back to the port of entry to check for availability of space and if there is none, they advise the alien that they will be processed when there is available space.[105] This amounts to a higher volume of asylum-seekers crossing the border illegally in order to be heard.[106] Interestingly enough, U.S. law demands that once a person in physically present within the United States, she must be allowed to apply for asylum, regardless of immigration status.[107] CPS's position on the international line strategically alleviates this obligation and leaves asylum-seekers with little option for initiating an affirmative asylum application, often referred to as the "legal" way. One example of this was present in the Office of the Inspector General's report: one woman had been turned away from applying for asylum at the U.S. border three times when she finally decided to take her chances crossing illegally.[108]

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[98]*supra* note 41 at Art 1 ; *See* Refugee Convention;.
[99]Asylum & the Rights of Refugees, INTERNATIONAL JUSTICE RESOURCE CENTER, https://ijrcenter.org/refugee-law/.
[100]The Affirmative Asylum Process, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Nov. 16, 2018), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process.
[101]*See* 8 U.S Consti. § 1158.
[102]*supra* note 19, *See* Memorandum for Federal Prosecutors Along the Southwest Boarder,.
[103]*supra* note 11, *See* OBSERVATIONS REGARDING FAMILY SEPARATION,
[104]*Ibid.*
[105]*Id at 54*
[106]*Id.at 54*
[107]8 U.S.Consti. § 1158(a)(1).
[108]*supra* note 11, OBSERVATIONS REGARDING FAMILY SEPARATION,.

The one-two punch of the zero-tolerance policy and the metering at the border has effectively limited the rights of refugees to seek asylum in the United States. Those who did cross the border illegally, got their children taken away, and have a final order against them are now faced with a choice, according to the Trump administration: leave with their children or leave without them and allow them to fight their case.[109] Officials are misleading mothers to believe that if she abandons her asylum claim and promptly leaves the country, they would reunite her with her child.[110] Again, the effect of this is an extreme limit of a person's right to seek asylum.

c. Cruel and Inhumane Treatment

Severely limiting the right to seek asylum is not the only violation of the UDHR happening at the American border, however. New documents obtained by the American Civil Liberties Union (ACLU) show "the pervasive abuse and neglect of unaccompanied immigrant children detained by U.S. Customs and Border Protection."[111] The abuses listed in these documents are clear violations of UDHR, the International Covenant on Civil and Political Rights (ICCPR),[112] and United States law. From denial of medical attention to sexual misconduct, abuse in detention centers on the southern border is an on-going issue that the zero-tolerance policy exacerbated.[113]

The Flores Settlement is a settlement which limits when and how children can be held in detention.[114] In 1997, the Flores Settlement was set in place to minimize the harmful effects

[109] Jeremy Raff, ICE is Pressuring Separated Parents to Choose Deportation, THE ATLANTIC (Jul. 6, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-ice-pressures-separated-parents-to-choose-deportation/564461/.

[110] Maria Sacchetti et al., visits detention center, says no children being returned to parents there, The Washington Post (Jun. 24, 2018), https://www.washingtonpost.com/local/immigration/desperate-to-get-children-back-migrants-are-willing-to-give-up-asylum-claims-lawyers-say/2018/06/24/c7fab87c-77e2-11e8-80be-6d32e182a3bc_story.html?noredirect=on&utm_term=.a3570b221cca.

[111] ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody, ACLU (May 22, 2018), https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody?fbclid=IwAR0cf2n4M1oL3WvHTsIDRdG2iJizBdlmRvavUJ-ssArDZLVTDN3GiJazusk.

[112] International Covenant on Civil and Political Rights, [hereinafter ICCPR], (Dec. 16, 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[113] *supra* note 59 ; *See* ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody,(listing examples of abuse of children in custody such as denying medical attention to a pregnant minor which resulted in a stillbirth and threats of sexual abuse of a male child after throwing out his birth certificate); and Carl Takei, Michael Tan, & Joanne Lin, Shutting Down The Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons, ACLU (Sept. 2016), https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private (detailing one example of sexual abuse of female immigrants where the guard would rape while transporting them to the airport for deportation).

[114] The Flores Settlement, *supra* note 37.

of detaining children.[115] It requires that when detention is absolutely necessary, the children are to be kept in the least restrictive setting licensed by a child welfare agency.[116] According to the American Immigration Council (AIC) and the American Immigration Lawyer Association (AILA), there are currently three family detention centres that operate in the United States and they likely violate the Flores Settlement as they are not licensed by a welfare agency and are highly secured, like a prison rather than the "least restrictive setting" as required by the settlement.[117]

Failure to comply with the Flores settlement is most detrimental to those who are detained, according to the numerous complaints filed by the AILA, the Women's Refugee Committee, and the AIC. In one such complaint, the AILA claims that families detained at family detention centres continue to suffer from PTSD, anxiety, depression, or other emotional or cognitive disorders.[118] Even the ICE Advisory Committee recommends that family detention centres be discontinued because "detention is generally neither appropriate nor necessary for families – and . . . detention or the separation of families for purposes of immigration enforcement or management is never in the best interest of children."[119]

The United States' policy was geared towards adult illegal immigrants, but the true victims of the policy are the children. Thousands of children were separated from their parents while the policy was implemented. Yoselyn Bulux, age 15, crossed the United States border with her mother on June 1, 2018.[120] Within hours, they were separated; officials told Yoselyn they were going to take her to a shelter and that she would never see her mother again.[121] When they were reunited, Yoselyn reported that she would become angry now because she did not want to think about what she had been through.[122]Jenri from Honduras,

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[115]Statement of the American Immigration Council and the American Immigration Lawyers Association (Sept. 18, 2018),https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/hsgac_hearing_on_flores_statement.pdf [hereinafter *Statement of the AIC and the AILA*].
[116]*Id.*
[117]*Id.*
[118]CARA OCRCL Complaint: Ongoing Concerns Regarding the Detention and Fast-Track Removal of Detained Children and Mothers Experiencing Symptoms of Trauma, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (Mar. 29, 2016), https://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention.
[119]REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS (Oct. 7, 2018), https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.
[120]Frontline: Separated: Children at the Border, *supra* note 32.
[121]*Supra note at 71*
[122]*Supra note at 71*

age 6, was separated from his mother, Anita, when they crossed the border illegally.[123] Agents told Anita that Jenri would be returned to her after her trial, but instead she was sent to a detention facility to await the processing of her asylum claim.[124] Even when her asylum claim was deemed credible, she was maintained in detention to await her asylum trial, prolonging the separation from Jenri.[125] Anita, being one of the few fortunate asylum-seekers, had an attorney who pressured ICE agents to release her on bond to be reunited with her child.[126] After over a month of being separated, the effects of the separation showed; Jenri began yelling in English, "no touch," and exclaimed, "you're not my mom anymore."[127]

These specific cases of children are heartbreaking, but they are not outliers. Studies have shown that trauma of this nature can permanently affect the brains of children and can be harmful to their long-term development.[128] Policies of the detention centre require that the children are not touched and cannot be touched by one another.[129] Even siblings were not allowed to comfort each other from the stress of being separated and held in detention centers.[130] Colleen Kraft, the president of the American Academy of Pediatrics, explained:

> The brain develops rapidly before the age of 3, with some connections strengthening and some being pruned away. In healthy, normal kids, synaptic connections related to learning, playing, and social skills are being formed during the toddler years. But . . . in children who have unrelenting stress, the strongest connections in the brain are those related to fear, aggression, and anxiety.[131]

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[123] Jeremy Raff, 'The Separation Was So Long. My Son Has Changed So Much.', THE ATLANTIC (Sept. 7, 2018), https://www.theatlantic.com/politics/archive/2018/09/trump-family-separation-children-border/569584/.
[124] *Ibid.*
[125] *Id at 74.*
[126] *Id at 74.*
[127] *Id at 74.*
[128] Olga Khazen, Separating Kids From Their Families Can Permanently Damage Their Brains, THE ATLANTIC (Jun. 22, 2018), https://www.theatlantic.com/health/archive/2018/06/how-the-stress-of-separation-affects-immigrant-kids-brains/563468/.
[129] Ashley Fetters, The Exceptional Cruelty of a No-Hugging Policy, THE ATLANTIC (Jun. 20, 2018), https://www.theatlantic.com/family/archive/2018/06/family-separation-no-hugging-policy/563294/.
[130] Matthew Michaels, Migrant children who were detained say they weren't allowed to hug each other, run, cry, or use nicknames, BUSINESS INSIDER (Jul. 14, 2018, 1:52 PM), https://www.businessinsider.com/migrant-children-detention-center-rules-7.
[131] Khazen, *supra* note 76.

Further, the studies show that this trauma at such a young age can hinder the development of speech, social and emotional bonds, and gross motor functions and leads to significant developmental delays.[132]

Article 3 of the UDHR states that "everyone has the right to life, liberty and security of person."[133] Article 5 prohibits subjection to "torture or to cruel, inhumane or degrading treatment or punishment."[134] The ICCPR, ratified by the United States in 1992, reiterates these standards in Article 6 and Article 7, respectively.[135] Both international treaties emphasize the inherent dignity of a person and forbid inhumane treatment of any person, no matter their status.[136] Separating children from their guardians at the border is not only cruel and inhumane to the guardians, but is also so for the children – in most cases, even more so. Where an adult has fully developed and can cope with the stress accompanied with this trauma, a child cannot. The American Academy of Pediatrics explains this in an official statement released opposing immigration reform proposed by the Trump Administration.[137]

> We know that family separation causes irreparable harm to children. This type of highly stressful experience can disrupt the building of children's brain architecture. Prolonged exposure to serious stress – known as toxic stress – can lead to lifelong health consequences . . . . Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder. Conditions in U.S. detention facilities, which include forcing children to sleep on cement floors, open toilets, constant light exposure, insufficient food and water, no bathing facilities, and extremely cold temperatures, are traumatizing for children. These are not appropriate places for children.[138]

Physicians are in agreement that separating a child from their caregiver can cause toxic stress which hinders development and can cause physical and mental illness throughout the course

[132] *Supra note 76.*
[133] UDHR, *supra note* 3, at Art. 3.
[134] *Supra note 3.* at Art. 5.
[135] ICCPR, *supra* note 60, at Art. 6, 7.
[136] UDHR, *supra* note 3, at Art. 1, 5; and ICCPR, *supra* note 60, at Preamble, Art. 7.
[137] Colleen Kraft, AAP Statement Opposing the Border Security and Immigration Reform Act, American Academy of Pediatrics (Jun. 15, 2018), https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementOpposingBorderSecurityandImmigrationReformAct.aspx.
[138] *Supra note 87.*

of the child's life.[139] The changes in physiology "can even become epigenetically encoded, thereby passing to future generations."[140] The result of the zero-tolerance policy, intended or unintended, is causing lasting trauma in children which has a very real possibility of effecting their lives forever. Separating a child from her caregiver and detaining her in the poor conditions that have been reported amounts to cruel and inhumane treatment in clear violation of the UDHR and the ICCPR.

AFTERMATH

In the end, the zero-tolerance policy has resulted in more harm than good. The justifications the Trump Administration have offered do not excuse the blatant violations it has caused. Further, it has created a humanitarian crisis at the border which we are not equipped, nor willing, to deal with. The question remains: where does the United States go from here?

d. New Polices?

While the president has signed an executive order which prohibited separating families at the border, the administration is not finished trying to deter asylum-seekers from seeking refuge in America.[141] They are weighing options, one of which is giving the guardians a choice: stay in family detention with their child while their claims are processed or allow their children to be taken away to a government shelter for another relative to seek custody.[142] This option is being called "binary choice."[143] Similarly to the issues seen in the zero-tolerance policy, the "binary choice" option faces several legal and practical barriers.[144] The largest such barrier is the Flores Settlement. As discussed above, none of the family detention centers currently within in U.S. meet the Flores standards.[145] Thus, should guardians chose to stay in detention with their child, legally, they would only be permitted to be in detention for 20 days before getting released – in other words, the current policy, also

[139] Fiona Danaher, The Suffering of Children, 379 NEW ENG. J. MED. e:4 (2018).
[140] *Ibid.*
[141] Nick Miroff, Josh Dawsey et al., Trump administration weighs new family-separation effort at border, The Washington Post (Oct. 12, 2018), https://www.washingtonpost.com/local/immigration/trump-administration-weighs-new-family-separation-effort-at-border/2018/10/12/45895cce-cd7b-11e8-920f-dd52e1ae4570_story.html?noredirect=on&utm_term=.ddfec3edb461.
[142] *Ibid.*
[143] *Id at 92.*
[144] SARAH HERMAN PECK & BEN HARRINGTON, THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 12 (2018).
[145] Statement of the AIC and the AILA, *supra note* 63.

referred to as "catch-and-release," according to President Trump.[146] As a result, unless the Trump Administration is willing to break United States law, this policy will likely not be put in place unless the family detention facilities are updated to meet the Flores Settlement or other circumstances change.[147]

e. What are the alternatives?

In the past, President Obama's administration took advantage of alternatives to detention (ATD).[148] The most effective program was ICE's Family Case Management Program (FCMP).[149] Under that program, families are assigned case managers that ensure that they attend court hearings and comply with release conditions while the family remains free to move about the community.[150] Although this program had a compliance rate of 99 percent and cost the government $36 per day per family, ICE shut down this program in 2017.[151] ATDs are not only more humane, but they are more cost effective for U.S. taxpayers. According to the National Immigration Forum, detaining an alien costs $208 per day, totaling $3.076 billion per year.[152] However, the cost the average ATD is roughly $5 to $6 per person per day.[153] Thus, ATDs such as FCMP saves taxpayer money and results in humane treatment of immigrants and asylum-seekers. Furthermore, the fear expressed by President Trump that aliens released have a zero chance of showing up for their court hearings has continuously been proven to be unfounded as ATDs have a record of high appearance rates.[154]

CONCLUSION

"Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!"[155] This inscription has been a beacon of hope for past

[146]Dep't of Homeland Security, Press Release, Myth vs. Fact: DHS Zero-Tolerance Policy (June 18, 2018), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy.
[147] Peck & Harrington, *supra* note 92.
[148] The Real Alternatives to Detention (2018), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf.
[149]*Ibid.*
[150]*Id at 99.*
[151]*Id at 99.*
[152] Laurence Benenson, The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply, National Immigration Forum (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.
[153]*Ibid.*
[154]*See* The Real Alternatives to Detention, *supra* note 96.
[155]EMMA LAZARUS, THE STATUTE OF LIBERTY INSCRIPTION (1883).

immigrants seeking refuge. Whether their reasons be economic, political, religious, or safety, immigrants traditionally looked upon the Statute of Liberty as a symbol of freedom. The zero-tolerance policy violates not only the UDHR, the ICCPR, and United States law, but it also violates America's long tradition of being a beacon of hope for refugees. The zero-tolerance policy is a shadow on this beacon.

Although the Trump Administration has attempted to justify its policy choice, the fact remains that our southern border is continuing to be a place where human rights are not respected. America, a world leader with an important role in drafting human rights treaties, is now violating those very treaties with a policy that has resulted in the cruel and inhumane treatment of children and placing severe limitations on the right to seek asylum. Lady Liberty, still standing beside the golden door, is no longer holding her lamp. Instead, she tells the tired, the poor, the homeless, "come back later."[156] And to those who dare enter, she has two detention centres waiting: one for you and one for your children.

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[156]Isacson, et al., *supra* note 24 (referring to CPS's metering policy).

CHINA PUBLIC CHALLENGES WITH THE NEW INFORMATION TECHNOLOGIES

-Carolina Fabara[157]

INTRODUCTION

In China, business and technology are in constantly evolution. The technology and all the new innovations create opportunities that the traditional market does not bring anymore. For instance, the technologies let people to access to inexpensive tools to learn, communicate, transport, travel, and transact[158]. However, this reflects the huge value that society put in digital products and services. Moreover, it is important to mention that in many cases technology is creating sources and services that before where hard to get or even think about them.

This process is known as "Fourth Industrial Revolution", where new technologies combine the physical and digital world between different economies and industries[159]. These new technologies are facilitating tools made by people for people. For this reason, it is important to understand how the society can benefit from this revolution by establishing good public policies.

In China, the developments of the digital and artificial intelligence areas have grown so fast. Consequently, "China now boasts More than 800 Million Internet users And 98% Of them Are Mobile."[160], so it is possible to see that the number of people that use internet in this

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[158] Chris Yiu, Technology for the Many: A Public Policy Platform for a Better, Fairer Future. TONY BLAIR INSTITUTE FOR GLOBAL CHANGE (Apr 02, 2020, 04: 00 PM), https://institute.global/insight/renewing-centre/technology-many-public-policy-platform-better-fairer-future.

[159] Klaus Schwab, The Fourth Industrial Revolution, WORLD ECONOMIC FORUM (Apr 03, 2020, 04 :00 PM), https://www.weforum.org/about/the-fourth-industrial-revolution-by-klaus-schwab.

[160] Nail McCarthy, China Now Boasts More Than 800 Million Internet Users And 98% Of Them Are Mobile, FORBES (May 05,2020, 2 :32PM),

country is high. In the past years, the number of internet users have increase because the digital technologies allow them to access for different services and products such as entertainment, hotels, transportation, e-commerce, etc.

The term digital economy is known as "a broad range of economic activities that includes using digitized information and knowledge as the key factor of production, and modern information networks as the important activity space"[161]. Hence, digital economy are integrating with the technology all the economical aspects. Thus, these new business models have reduced costs and also contributes to China's economic growth.

In China, "the size of the digital economy has surged from 15 percent of GDP in 2008 to 33 percent in 2017"[162]. Furthermore, "China has the fastest-growing digital economy worldwide and related sectors already account for more than a third of the country's GDP"[163]. Hence, China has built a high industry based on the Internet platforms.

In recent years, attention has been focused primarily on the rapid expansion of China's digital economy, as symbolized by the success of major Internet- related companies like Baidu, Alibaba, and Tencent, known collectively as the "BATs"[164]. According to the "Chinese Academy of Information and Communications Technology, a think tank affiliated to the Ministry of Industry and Information Technology, China's digital economy accounted for 32.9% of GDP and 22.1% of jobs in 2017"[165] . This type of business has had a great impact on the country's economy, so it is important to analyze the main characteristics and its legal framework.

CHARACTERISTICS OF NEW BUSINESS MODELS

The main characteristics of the digital economic business models are: the reduction in transaction costs, the improvement in the performance of markets and the creation of new

https://www.forbes.com/sites/niallmccarthy/2018/08/23/china-now-boasts-more-than-800-million-internet-users-and-98-of-them-are-mobile-infographic/#6646a7d67092

[161] Longmei Zhang et al., China's Digital Economy: Opportunities and Risks, INTERNATIONAL MONETARY FUND,8, 1-24 (2019), (May05, 2020, 9 :51PM), https://www.imf.org/~/media/Files/Publications/WP/2019/wp1916.ashx

[162] *Ibid*.

[163] *Id* at 5.

[164] Yuji Miura, China's Digital Economy—Assessing its Scale, Development Stage, Competitiveness, and Risk Factors,18 PACIFIC BUSINESS AND INDUSTRIES, (May 05, 2020, 12 : 50 AM),https://www.jri.co.jp/MediaLibrary/file/english/periodical/rim/2018/70.pdf

[165] *Ibid*.

markets that will be difficult and expensive to create without technology[166]. All this makes this type of business attractive to the general public.

It is important to mention that the access to internet thorough smartphones has increase the use of most of these businesses. For instance, renting a house, buying tickets, or clothes by using apps is so easy in China and many other countries like Airbnb, Taobao. Another service is the cabs and bikes where people can share them when they need like Didi and Kuaidi. They facilitate people's lives with the use of technological tools.

In addition, it is important to mention that information is an intrinsic characteristic of these new markets. Therefore, "intellectual property subjects such as copyrights, trademarks, and patents are all paradigmatic examples of information products"[167]. Moreover, digital commerce strictly implicates the use information technology. Consequently, information technologies have progressively occupied every aspect of live.

The increased use of internet makes that most of the activities are stored by many companies and government. This has become a big issue in many countries because this entities can accumulate personal information of the users. "Although abuses of personal information are becoming ubiquitous in the digital age, not enough thought has been given to how the law should understand and address these problems"[168]. For this reason, must start to see ways to protect the personal information of the internet user. Some experts said that "the problem is caused in significant part by the law, which has allowed the construction and use of digital dossiers without adequately regulating the practices by which companies keep them secure"[169]. This is a topic that should be regulated in the future, so all the users do not feel vulnerable about the use of their information.

NEW BUSINESS MODELS DO NOT FIT OLD LEGISLATION

It is well-known that some digital platforms low cost because they do not follow established norms and business models. These platforms can be any type as it is already mention it can be

[166] Ruth Okediji et al., Development in the Information Age. Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce, UNCTAD-ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT (Apr 01, 2020, 01 :00 PM), https://unctad.org/en/PublicationsLibrary/ictsd2004ipd9_en.pdf.
[167] *Ibid.*
[168] Daniel Solove, The New Vulnerability : Data Security and Personal Information, SECURITY PRIVACY IN THE INTERNET AGE, (May 05,2020, 3 :40 PM), https://pdfs.semanticscholar.org/5df9/f1aeaa44038f8adacd8c19a08119c39e5be7.pdf
[169] *Ibid.*

for socialization, learning, traveling. The important point is that all of them are using the technology as a new form to make business. Thus, the legislators, governments, administrative offices struggle to ruled this type of business without harm traditional business. The problem is that many people prefer this type of services than the traditional ones and it can be seen as unfair competition because this type of platforms in most of the cases do not meet the same obligations. Platforms such as, Airbnb, Didi and Uber have great impact in economy and society. Therefore, they cannot be eliminated, they have to be regulated with good public policies.

LEGAL FRAMEWORK

In China, "neither the legal nor the financial system is well developed, yet it has one of the fastest growing economies.The Private Sector grows much faster than the others and provides most of the economy's growth"[170]. Chinese institutions are inadequate for these changes. It is known that economic growth is possible under weak institutions. Hence, weak institutions allow strong organizations in the Internet sector to establish their own rules that encourage private interest[171]. As it is possible to see the digital economy is growing without any clear rules of how this business should be control and regulated.

In China, "the central government has imposed only a few regulations on the Internet industry. In fact, there is no basic law in China that governs Internet transactions such as electronic money transfers"[172]. Other regulations have been put for their own local governments. For example, "Guangdong Province issued an e-commerce protocol in 2004, giving electronic documents the same legal status as written documents. Further, Zhejiang Province issued an ordinance on e-commerce in 2008, instructing the sub provincial government agents to lower the entry barriers to e-commerce"[173].

It is possible to notice that the internet industry imposes their own regulations and with this regulations they avoid most of the traditional obligations. One of the reasons why "the governments do not impose sufficient regulations is often because of the conflict of interest

[170] Franklin Allen et al., Law, finance, and economic growth in China, 77 JOURNAL OF FINANCIAL ECONOMICS, (May 15, 2020, 4 :43) http://finance.wharton.upenn.edu/~allenf/download/Vita/Finlaw_china_JFE_final_journal_form%20(2).pdf

[171] Tan-ji Chen et al., RENT SEEKING AND ENTREPRENEURSHIP: INTERNET STARTUP IN CHINA, 36 CATO JOURNAL, (May 16, 2020, 4 : 48), https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2016/9/cj-v36n3-11.pdf.

[172] *Supra Note 15*

[173] *Supra Note 15*

between different parties that wield political influence"[174]. In China and in most of the countries, the government try to regulate them with few regulations, but is possible to see that in most of the cases the digital platforms are regulated by they own rules. Basically, the platform operators try to avoid the government intervention.

In 2015 the government published its Made in China 2025 programme. It sets "out the first programme for economic modernization based on internet technology. It includes the action plans for the promotion of big data, e-commerce, and artificial intelligence, and regulatory steps such as the Cyber security Law"[175]. This gives a clue to national and foreign companies of how they should act in this area. Moreover, China 2025 strategy tries to gives China a major cyber power.

It is important to mention that "China's Cyber Security Law (CSL), passed in 2016. It is a broad legislation that dictates how companies should approach security and privacy within the country. It includes strict controls around online activities and provisions around storing data locally, having joint-venture partners, and in some cases registering network assets"[176] . Thus, this law also include some new actions that consumers can claim if they do not feel find with the digital providers. Also, includes one of the mayor concerns that is the protection of the personal information of the internet users. For instance, the law try to give a standard of how the platforms should collect and use this information.

It is important to observe that in China "a low level of cyber security maturity and rampant online fraud has affected a large number of Chinese government organisations, businesses and individuals"[177]. Consequently, the CSL is needed to control the new type of frauds that can be use by technology. They should be included in the law, in order to keep a mayor control of this abusive attitudes by technology tools.

Furthermore, for foreign business that operates in China, the compliance activity must be done with an equal treatments. Due to the fact that "CSL has an extremely wide scope of potential targets and obligations, and it is often vague on details, including definitions,

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[174] *Supra Note 15*

[175] Francois Godement, Angela Stanzel, & et al., The China Dream Goes Digital: Technology In The Age Of Xi, EUPEAN CONCIL ON FOREIGN RELATIONS ecfr.eu, (May 15, 2020,5 :33 PM). https://www.ecfr.eu/page/-/China_Analysis_China_and_Technology_pages.pdf

[176] Dan Swinhoe, What are the new China Cybersecurity Law provisions? And how CISOs should respond, CSO UNITED STATES (Apr 03, 2020, 03 :06 AM), https://www.csoonline.com/article/3359236/what-is-the-china-cybersecurity-law-how-cisos-should-respond.html

[177] Carly Ramsey et al., China's Cyber Security Law: how prepared are you?, Control Risks Group Holding Ltd., (Apr 02, 2020, 05 OO PM), https://www.controlrisks.com/campaigns/china-business/chinas-cyber-security-law.

requirements and regulators' roles"[178] . Which complete the things in order to have a clear clue of how companies should proceed. For this reason, is important to see how this new law will be enforce by the regulators.

Besides, "the business community has reacted to «China's Cyber security Law with concerns over compliance and IP protection. Moreover, the foreign companies were award that they have to share the information with Chinese authorities, which might be used for the benefit of Chinese competitors"[179]. It is important to have in mind that this requirement is eliminated in the new Foreign Investment Law that was issued in January, 2020.

Whit this in mind, China, "has embarked on a comprehensive national plan to promote the internet and ICT sector, with the current five-year economic plan until 2020 being called 'Internet Plus', that depends heavily upon the internet and technology to reinvigorate a slowing economy"[180]. The Chinese government included specific goals and measures for its promotion in the Five Year Plan. It has a number of policies, most importantly the Internet strategy[181]. The Chinese government with this regulations and policies are trying to guide this new economy that this growing and playing an important role in the society.

ADVANTAGES

The Internet helps to creates platform that are characterized for low costs entry barriers[182]. This also improves the efficiency of the market.Small businesses are easily connected to a large consumer base at low cost. Due to the fact that "big data analytics reveal consumer preferences and help target service provision"[183]. Therefore, the platforms will know what the consumers are looking for. Furthermore, the technological tools makes this services more accessible for costumers because they avoid some rules as renting a places, getting some license and permits to do that business. In this case, the digital platforms are using their own and private norm system.

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[178] *Ibid.*

[179] Global Expansion Simplified, China's Cybersecurity Law and Compliance for Foreign Businesses, INS GLOBAL EXPANSION SIMPLIFIED, (Apr 2, 2020, 04 :05 PM), https://ins-globalconsulting.com/chinas-cybersecurity-law-and-compliance-for-foreign-businesses/.

[180] Martina Ferracane et al., China's technology protectionism and its non-negotiable rationales, EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY (Apr 1, 2020, 12 :05 AM), https://ecipe.org/wp-content/uploads/2017/06/DTE_China_TWP_REVIEWED.pdf.

[181] *Ibid.*

[182] *Supra note at 15.*

[183] *Supra note at 5.*

There is no doubt, that digitalization has created more opportunities to work. For instance, " the e-commerce sector, Alibaba's platform has almost 11 million SMEs, which have created over 30 million jobs over the past decade. The Didi taxi platform is connected to 13 million drivers"[184]. Moreover, digitalization can help to create new jobs, to arrive to different places, to develop the economy and new business ideas. For example, in China "Alibaba's e-commerce platform has promoted the development of more than 1300 "Taobao villages" in China"[185].

In addition, new technologies also can give the opportunity to work to any kind of person because this type of job usually do not discriminate in different aspects as gender, age or skills. The persons that work here are named « collaborators ». This give more flexibility to the traditional jobs, because they will get paid for what they do. Also, the calification of the services as a form of references is important to develop their own business in the community. Hence, technologies give enterprises and people a chance to challenge their capacities and expand to different places by using this new tools.

DISADVANTAGES

Some disadvantages of these new technologies are the existence of an oligopoly in platform industries. In some cases only determined platforms dominate the market. For example, in China, "Alibaba and Tencent dominate the mobile payment sector"[186].

Digitalization can cause the low-cost of labour. For instance, most of the workers for Didi or Kuadi do not have access to the traditional labour rights like social security, vacations. It can be said that these workers will loose the rights that for many years workers have been fought for. In some cases, the exploitation of cheap but highly skilled labour. The majority of the services that the platforms provide are easy to develop, therefore more and more people prefer to work for this kind of platforms. Hence, the necessity of the governments to understand the new business models and forms of work.

[184] *Supra note at* 5
[185] *Supra note at* 5.
[186] *Supra note* 5.

SUGGESTIONS

The government plays a vital role in try to minimize the related risks, such as the non fair competition for the traditional business. Due to the fact that they avoid certain obligations this business are able to reduce costs. Moreover, these business create their own rules so they jump the private governance. Therefore, the governments should play much more actively. For instance, it is necessary to have a clear operating environment and incentives requirements, for these new business models.

It is important for the governments to understand what is happening, so new policies can be generate to meet local conditions and be implemented at the right time. It is fact that one of the main concerns of the governments, platforms, and citizens in general is the need of new ways to interact. So the urgent to develop public policies that do not facilitates or benefits just one of the sectors is necessary.

Taking into account that the activities of these digital platforms in many countries have not been sufficiently regulated, despite the fact that they are one of the most widely use for different matters. In China, there is no doubt that this services play an important role in the commercial and private markets, so the necessity to implement policies and generate rules that can fit with this new reality is very important for the society and the economy.

CONCLUSION

The new business models should be regulated, but they cannot be regulated with same rules that the traditional market has. In most of the cases, this platforms has elements that allow these companies to avoid the old regulations. The new changes present advantages and disadvantages due to the fact that digitalization can generate productivity and create jobs in new sectors. Also, this helps to boost the economy. On the other hand, digitalization could affect traditional sector, lead to the loss of jobs, especially for mid-skill workers.

In China, businesses and technologies are in constant evolution. Therefore, internet platforms are inspired by the opportunities that are generate in this reality. It is necessary to establish a comprehensive mechanisms built on cooperation between all the actors of these type of economy. It is possible to think that the new internet business models are strong organizations with weak institutions. For this reason, it is necessary to stable the relationship between the Internet operators and the state and create new public policies.

As a result in China it is important to establish a form of regulation that guarantees decent conditions for workers in digital economies. To protect the traditional business and not let the platforms to have unfair competition, based on violations of rules.

To sum up, governments have the responsibility to design public politics in the era of this new technologies. It is necessary to understand that the world has change and with them the public policies must change too, in order to benefit the society and the economy.

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THE JOURNEY OF INTERNATIONAL TRADE TO INVESTMENT IN THE LIGHT OF LIBERALIZATION AND PROTECTIONISM

-Dr. Pulluru Satyanarayana[187]

INTRODUCTION

International trade law deals with the trade-in products and services whereas investment law deals with investing in terms of money to do trade in foreign countries.[188] Global trade is import and export of goods, services and capital among different countries.[189]

The trade and investment liberalization is to remove the barriers for imports and exports of goods and services and allow capital in their countries to do trade with fewer restrictions and agreed terms mutually.

Trade and investment are necessary for the wellbeing of all countries. Since the earlier days' trade has been involved between different countries by the exchange of goods or exchange of goods with the gold to fill the gaps of the nonproduction of particular goods, they used to import goods. The excess goods exported to other countries.

People of all countries buy and sell things daily but it is not possible to do all the aspects of production to the sale of all things in one country. This realized by businesses, consumers and governments, therefore governments are encouraging imports and exports so that local businesses compete with foreign products.[190]

Trade takes place between two nations either the country, which is not having the capacity to manufacture the goods and get the services required or import them even though they have the capacity to manufacture them and provide the necessary services.[191] Many countries

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[188]Delany et al, 'International trade and investment law: a new framework for public health and common good', National Library of Medicine, (2018), (Sep 24, 2019), https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-018-5486-6

[189]LO. Connell**,** Trade: export volume worldwide 1950-2018, Statista, (Sep 24, 2019) https://www.statista.com/statistics/264682/worldwide-export-volume-in-the-trade-since-1950/

[190] Saylor Academy, International Trade – Theory and Policy, Saylor.org Academy, (June 7, 2019) https://www.saylor.org/books

[191] 2nd Vol, J. Sherlock et al., The Handbook of International Trade, GMB Publishing Ltd, London, p.3, 2008,

import goods because they are of good quality, design, technically advanced, cheap compared to domestic products.[192]

The countries, which have abundant capital, will have the capacity to produce more kinds of goods. They have to face the challenges of transportation expenses, tariffs and compete with other companies producing similar goods in exporting their excessive goods.[193] To prevent these developed nations such as the United States or Europe started spreading technology to developing nations where salaries are smaller, either engaging in multinational operation or licensing their technology to unrelated companies.[194]

The entering of multinational corporations in foreign markets by way of exports and investments affects energy relations, social policies, culture, women and indigenous people's rights, conditions of jobs, wage structure, labour standards, land tenure, and farming patterns.[195] Whereas the investors are worried about their foreign investments of change in government, laws, expropriation, nationalization so on.

To minimize the fears of both investors and capital receiving countries many multilateral treaties, bilateral agreements and regional agreements created between both of them. This results in an incoherent, fragmented, obscured global contradictory international legal framework.[196]

The exports and imports of one country to another is a continuous process. Even though many hurdles faced by the world, the world export of goods grew from 61.81 billion US dollars in 1950 to 17.7 trillion US dollars in 2017.[197]

This paper examines the journey of international trade since the seventeenth century to the present situation and the institutions involved which supports international trade and investment. It also examined the hurdles faced by it and concluded with recommendations.

LIBERALIZATION

Liberalization of international trade is the means of allowing the goods to enter into their countries by reducing or removing the tariffs and other trade barriers. International investment liberalization is the encouragement of cross-border investment with the help of

[192]ibid
[193]Feenstra R.C., International Trade and Investment, National Bureau of Economic Research Reporter, p.2, spring 2005,
[194] Feenstra, *Id*, at P.4.
[195] Delany, *supra note* at 1, P.30.
[196] *ibid*
[197] *Supra note* at 2.

security to the investments under global contracts including the non-state actors despite the fragmentation of the legal system.[198]

If the countries reduce the barriers, the goods will become cheaper and trade becomes more profitable which encourages imports and exports. If they completely remove the tariffs on trade, it is free trade and in preferential trade, tariffs removed on substantial products. In case of allowing foreign investments into the countries, it will help the recipient country to develop industrially and getting the benefits out of it despite some disadvantages and the investor gets profit more than investing in their own country.

After 1950s, trade liberalization has been grown which has brought other kinds of non-tariff barriers.[199] Even though the World Trade Organization (WTO) round of talks wants to liberalize the world economy by reducing more barriers but due to its stalemate leads to the controversy between free trade and protectionism, it has pushed forward the making of Regional Trade Agreements (RTAs), which has furthered the trade liberalization by way of free trade. [200] The RTAs, which are in force up to 4 January 2019, are 291 according to the WTO.[201]

The liberalization brought capital to the countries. At the same time, it has also brought investor rights including intellectual property rights, the deregulation with a strong dispute settlement mechanism. It has an impact on the democratic accountability of the governments against the citizens.[202]

PROTECTIONISM

Protectionism is an increase in tariff on imports and imposing other barriers like export subsidies, limits of imports, licensing procedure of imports, voluntary export controls, export tariffs, government acquiring of goods from external sources policies, and municipal laws to enhance the cost of products imported which affect the free flow of trade between countries.[203] It is a process of reducing the imports and encouraging exports by implementing

[198] Mark Wu, The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime, The Foundation of International Investment Law (Z. Douglas et al., eds., Oxford Univ. Press, 2014)
[199]Connell, *Supra note* 3, at P.12.
[200]Connell*, Supra note* 3, at P.7.
[201]Facts and Figures, Regional Trade Agreements, WORLD TRADE ORGANIZATION, (2019), (July 24, 2019), https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts
[202] R G. Finbow, Restructuring the State through Economic and Trade Agreements: The Case of Investment Disputes Resolution, Politics and Governance, (July 24, 2019), https://doi:10.17645/pag.v4i3.639
[203]Supra, note 3, at pp.10-14.

trade barriers to protect domestic industries, non-renewable resources, and environment and to save jobs.[204]

The protectionism measures generally are taken by the leftist governments and less developed countries[205] but in recent times adopted by developed countries like the US and developing countries like China and India.

TRADE IN THE EARLY PERIOD

Adam Smith in 1776 in his book 'the wealth of nations' wrote about the importance of international trade. He said the government abandon the barriers to imports and encourage free trade then the wealth of countries would grow most quickly. His international trade model will make everyone better without making anyone worse off.[206]

The Corn Laws were in existence since the fourteenth century, which levies import taxes on grains and other food products. In the year 1846, Britain abolished the Corn Laws of 1815. It started a new era of free international trade and it marked a historic event in the movement of economic liberalization across Western Europe and was in existence until the great depression of 1870. This was the effect of the great work of Smith and Ricardo.[207]

Colonization and gunboat diplomacy was in existence in the 1900s and in the beginning of the 2000s A.D. In 1850, with the help of the British navy, Don Pacifico, a British national, collected his dues from Greece. In 1860, French and other European soldiers were invading Mexico trying to collect unpaid debts. There is no such sort of tradition today.[208]

The Cobden-Chevalier Trade Agreement was an 1860 Anglo-French Trade Agreement providing French protection import taxes lowered to 25% and allowed entry of all French goods without taxes except wines into UK and defined as the first contemporary commercial contract.[209]

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[204] Trade Protectionism, ECONOMINCS ONLINE, (July 24, 2019), https://www.economicsonline.co.uk/Global_economics/Trade_protectionism.html

[205] Feenstra, World Trade Flows: 1962-2000, (2005) p.5, https://scholar.google.com/citations?user=gxU_g7UAAAAJ&hl=en

[206] D A. Irwin, International Trade Agreements, (2008), (July 24, 2019), https://www.econlib.org/library/Enc/InternationalTradeAgreements.html

[207] Thomson Gale, Corn Laws, ENCYCLOPEDIA.COM, (July 24, 2019) https://www.encyclopedia.com/history/modern-europe/british-and-irish-history/corn-laws#:~:text=Corn%20Laws%20Series%20of%20Acts,the%20price%20of%20bread%20high.

[208] J. Pauwelyn, Rational Design or Accidental Evolution? The Emergence of International Investment Law, Oxford Scholarship Online, (July 24, 2019), https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199685387.001.0001/acprof-9780199685387

[209] R.Robinson et al., International Trade, (July 24, 2019), https://www.britannica.com/topic/international-trade

The US economy continued to decline, and unemployment rates peaked in 1933. At that time Franklin Roosevelt was contesting for president elections talked about elevated tariffs. By 1934 the Congress of US adopted the Reciprocal Trade Agreement Act (RTAA), took hold of accepting the benefits of more liberal trade.[210] This Agreement has become an inspiration for debating and formulating General Agreement on Tariffs and Trade. This GATT paved the way for tariff reduction among many countries, whereas RTAA involved bilateral concessions and deals.[211]

International Monetary Fund (IMF) and the World Bank was established in New Hampshire by Bretton Woods Agreement. The main aim of IMF was to watch and control the international exchange rate policy and give loans to settle their debts at the global level. The World Bank, in the beginning, called as International Bank for Reconstruction and Development is helping with loans for reconstruction and development.[212]

In 1948, Havana Charter established the International Trade Organization (ITO) to monitor international trade but it has not seen the light because it was not approved by the U.S. Congress[213], but it ultimately gave birth to the GATT.

GATT TO WTO

Between 1948 and 1994, after World War II, there were discussions among increasing participants about the GATT to decrease tariffs (taxes on imports) with each other.[214]In this period, there were eight rounds of talks and each round gave the name of a prominent person or name of a place.[215]

The member states would start liberalizing agriculture and service markets in the final Uruguay Round of discussions; eliminate the quote schemes in accordance with the intellectual property laws [216] The important agreements are Agreements relating to the Textiles and clothing, Services, Intellectual property laws, Sanitary and Phyto-sanitary

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[210]'The Great Depression, Smoot-Hawley, and the Reciprocal Trade Agreements Act (RTAA), (July 27, 2019), https://saylordotorg.github.io/text_international-trade-theory-and-policy/s04-04-the-great-depression-smoot-haw.html

[211]*Ibid.*

[212]James Chen, Bretton Woods Agreement and System, Investopedia, (July 24, 2019), https://www.investopedia.com/terms/b/brettonwoodsagreement.asp

[213] Richard Toye et al., The Oxford Handbook on The World Trade Organization, OXFORD HANDBOOKS ONLINE,(2010 (5 June 2019). https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199586103.001.0001/oxfordhb-9780199586103

[214] World Trade Organization, The GATT Years: from Havana to Marrakes, (July 30, 2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

[215]GATT Rounds, Nadir org, (6 June 2019), https://www.nadir.org/nadir/initiativ/agp/free/wto/rounds.htm

[216]*Ibid.*

Measures, TRIMS, import licensing procedures, customs valuation and pre-shipment. Apart from that other multi-stakeholders agreements were made concerning agreements related to their interest of different subjects. [217]

The signatory countries of GATT have to adhere to non-discriminatory measures regarding traded goods. One is the Most Favoured Nation (MFN) in which they should not show discrimination in importing identical goods from two nations. The second one is the National Treatment in which member states should not show discrimination between domestic goods and imported goods while imposing local taxes.[218]

There are exceptions to the GATT non-discrimination principles. The one to increase import taxes on the goods of particular countries to correct unfair trade practices that are causing damage to the competing local industries with that of imported goods and the second one is the countries can form a group and make a free trade agreement to trade the goods within the group.[219]

UNCTAD

United Nations Conference on Trade and Development is the offspring of the UNO. It was set up as a permanent intergovernmental body in the year 1964. It deals with the problems of trade, investment, and development.[220] This organization is meant to uplift the countries which are being developed to do trade with other countries and to make the fruits of economy of this world distributed to all nations in an equal manner.

UNCITRAL

The United Nations Commission on International Trade Law is an ancillary part of UNO established in 1966 to facilitate international trade and investment.[221] It plays a significant role in the development of legislative and non-legislative tools to harmonize, modernize and implement trade law.[222] It formulates internationally acceptable conventions, model

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[217] Legal Texts: the WTO agreements, WORLD TRADE ORGANIZATION, (June 7, 2019) https://www.wto.org/english/docs_e/legal_e/ursum_wp.htm

[218] Principles of the trading system, WORLD TRADE ORGANIZATION, (June 8, 2019) https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

[219] *ibid*.

[220] Beyond Conventional Wisdom in Development Policy- An Intellectual History of UNCTAD 1964-2004, United Nations Conference on Trade and Development , (2004), https://unctad.org/edm20044_en.pdf

[221] UN General Assembly Resolution 2205 (XXI) 17 December 1966 Establishing – United Nation Commission on International Trade Law, Lex Mercatoria, (June 26, 2019), https://www.jus.uio.no/lm/uncitral.2205-xxi/doc.html

[222] *Ibid.*

legislation and regulations and legislative guidelines and suggestions, updated case law data and enactments of uniform commercial law, technical aid and law reform initiatives on uniform commercial law and conducting of regional and national seminars.[223] If the parties agreed to refer the dispute to Arbitration under UNCITRAL arbitration rules,[224] they have to bind by it and enforced according to the New York Convention.[225]

WORLD TRADE ORGANIZATION

The WTO is the offspring of GATT formed in 1994. The WTO has replaced and embraced the GATT as a more feasible and lasting multilateral treaty system and established the legal and institutional structure for dispute resolution, including the Appellate Body, which is unique for settling trade disputes.[226]

The members of WTO make rules regarding multinational trade but as an organization WTO is a group of States. [227]

In addition to monitoring the trade policies of each member state, it also undertakes regular trade policy reviews. The WTO group was also set up a procedure to settle the disputes. It is the significant power of WTO.[228]

Consultation

The Dispute Settlement Body (DSB) asks the disputing countries to settle the matter amicably within sixty days without external intervention.[229]

Panel Formation

If consultation was not materialized the Dispute Settlement Body forms a panel of three to five trade law experts to decide that particular dispute. The director-general chooses the panellists when the parties cannot agree.[230] Within six months, the panel has to decide and

[223]ibid.
[224]Article 1, UNCITRAL Model Law on International Commercial Arbitration 1985, UNCITRAL, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
[225]Article 35, *id at 38.*
[226] Agreement Establishing the WTO , (June 24, 2019) http://www.wto.org, available at https://www.wto.org/english/res_e/booksp_e/agrmntseries1_wto_e.pdf
[227] WTO, Understanding the WTO- World Trade Organization, (2015) (June 24, 2019) http://www.wto.org, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf
[228]*ibid*
[229]Article 4 of Annex 2 of WTO, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/legal_e/final_e.htm
[230]Article 8 of Annex 2 of WTO, *Supra note at 43.*

give its report of decision to the DSB.[231] The panel report would be rejected by the consensus of parties but not individually. Thus, all panel reports become official decisions.[232]

Appeals

The decision given in the panel report can be appealed by either of the parties if they are not satisfied and their arguments must base on the legal interpretation of points of law. It will not consider new evidence or retry the case.[233]

Resolution

When the board of Appeal agrees with the panel decision that the defendant country has violated the agreement, it has different ways to direct the defendant's country.[234]

Compliance

The defendant country has to comply with the decision and make changes in their domestic laws.[235]

Suspension of Concessions

If the defendant country either refuses to comply or delays in complying then the DSB allows the complainant country to stop a few of previous concessions earlier given to the respondent country, which should be equal to the value of the violation of the defendant.[236]

The number of trade disputes settled by DSB from 1995 is 350 and disputes presented before it above 500.[237]

DOHA DEVELOPMENT AGENDA

The DDA's main aim is to uplift the lower strata of countries to do international trade which was conducted in the year 2001 in Doha. It has discussed twenty areas of trade and concentrated on negotiating the subjects of agriculture, services. Out of which 12 of them concluded before and at Doha and several others were still under the process of negotiations.[238]The developing countries are arguing the prices of agricultural products are

[231]Article 12 of Annex 2 of WTO *Supra note at 43*
[232]Article 16 of Annex 2 of WTO, *Supra note* at 43
[233]Article 17 of Annex 2 of WTO, *Supra note at 43*
[234]Article 19 and 20 of Annex 2 of WTO, *Supra note at 43*
[235]Article 21of Annex 2of WTO, *Supra note at 43*
[236]Article 22 of Annex 2 of WTO, *Supra note at 43.*
[237] Dispute Settlement (July 25 2019), https://www.wto.org (last accessed 25 July 2019).
[238]'WTO-The Doha Round (July 5, 2019) http://www.wto.org

low due to the subsidies given by the developed countries whereas the developed countries are arguing that it will reduce the agricultural subsidies provided if developing countries reduce the import taxes.[239]

The other meetings held in Cancun, Mexico-2003, Hongkong-2005, Paris-2005, Postdam-Germany-2007, Geneva-2008, Bali-2013 and Nairobi-2015. After Geneva-2008, it took more time to conduct the next meeting because of the differences between developed nations and developing nations.[240]

In 2013, Ministerial Conference held in Bali. The major agreement made is Agreement on Trade Facilitation in which members agreed to reduce the red-tapism, hurdles in the importation and speeding up customs clearances at the ports.[241] The Nairobi conference of 2015 in which the member states made an agreement to remove export subsidies for agricultural exports and can store food for their food security. It also contains some incentives for Least Developed Countries (LDC).[242] This package will help many African countries.

Due to the slow pace of making agreements and commitments in the ministerial meetings of WTO, the Regional Trade Agreements have grown up. In these agreements, a group of countries is negotiating and making commitments, which was not possible or take more time multilaterally.[243] Even, it is allowed by Article XXIV of GATT and Article 5 of GATS forming regional trade agreements to set up customs union or free trade area for the free flow of trade by reducing the barriers substantially but they are subject to some criteria.[244]

FREE TRADE AGREEMENTS AND PREFERENTIAL TRADE AGREEMENTS

Under GATT/WTO most of the countries reduced trade barriers but not to zero. Under Regional organizations, two or more member states reduce tariffs to zero within themselves. In principle, the members of Free Trade Agreement (FTA) has to enforce it on goods traded among them but in reality rarely implemented because strong political pressure by some domestic industries exempts some products from liberalization. The Preferential Trade Agreement is applicable only to many products but not all.

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[239] *ibid*
[240] *ibid*
[241] Days 3,4 and 5: Round-the-clock consultations produce Bali Package, (July 15, 2019) http://www.wto.org
[242] WTO members secure "historic" Nairobi Package for Africa and the world, (July 15, 2019) http://www.wto.org
[243] Supra note 34, P.66.
[244] *Supra note 57.*

The first free trade agreement was made by the members of Western Europe in 1960 and it has brought the European Union into existence in 1993. This union is a Customs Union which includes free trade and movement of workers and infrastructure of production.

In the US, FTA implemented with Israel in 1986, Canada 1988 and Mexico, later on, Jordon, Bahrain, Morocco, Singapore, Chile, and Australia. Many FTAs formed around the world some of them are Latin American Free Trade Area (LAFTA) 1960 now known as LAIA (Latin American Integration Association) and superseded by *Mercado Commun del Sur* (MERCOSUR) 1995, ASEAN Free Trade Area (AFTA) 1991 and South Asian Association for Regional Cooperation (SAARC) Preferential Trading Agreement (SAPTA) 1993.

INTERNATIONAL INVESTMENT LAW

International investment law passed through different phases like diplomatic protection and treatment of aliens, treaties on friendship, commerce, and navigation (FCN treaties).In addition to that BITS, FTAs, UN resolution, International law commission reports, world bank, OECD and IBA guidelines and code of practices, rulings and awards by the PCIJ, ICJ, Iran-US, mixed claims, ICSID and UNCITRAL tribunals, studies and critiques by academics, NGOs and UNCTAD organization.[245]

The private investors have rights against state intervention at the multinational level through investor-state arbitration, investor-state contracts, domestic laws, property laws, conflict of laws and to some extent human rights law.[246]

The investors are making treaties including BITs for the protection of their investment against expropriation, nationalization, intellectual property, exchange controls and repatriation of profits unless those steps are taken for public welfare, compensation is paid immediately and equitably[247]and for protection of human and labour rights, environment and sustainable development.[248]

The investors protected against expropriation and deprivation of property without fair and equitable compensation is on par with human rights violations.[249] The WTO stated that its members have to handle cross-border investments through the provisions of TRIMS, GATS,

[245]Pauwelyn, (2014) p.30.
[246]Avena and Other Mexican Nationals (Mexico v. United States) (Judgment) [2004] ICJ Rep. 12, at Paragraphs: 40, 124.
[247] R G. Finbow, Restructuring the State through Economic and Trade Agreements: The Case of Investment Disputes Resolution, Politics and Governance, (Vol.4 No.3, 2016), p.98, available at https://doi:10.17645/pag.v4i3.639 (last accessed 5 June 2019).
[248] Julia Calvert et al., Dispute Settlement: Assessing the Social Dimensions of Investment Disputes in Latin America, New Political Economy (2018)
[249]Z. Douglas, eds, The Foundations of International Investment Law, Oxford University Press, Oxford, (2014)

and TRIPS Agreements.[250] GATT deals mostly with trade in goods only, but it remained highly restricted in its coverage to investment issues.[251] The multilateral treaties which provide investor protection are Energy Charter Treaty (ECT) and regional treaties like North American Free Trade Agreement (NAFTA), Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), Canada –EU Economic and Trade Agreement (CETA), Trans-Atlantic Trade and investment partnership (TTIP)[252] apart from Bilateral Investment Treaties, domestic law, contracts, and insurance schemes. Even the customary law applies to investment protection under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[253]

Due to the lack of these public authorities to decide the legality of sovereign acts and to compensate private investors by states made investors, file cases against states in World Bank ICSID.[254] The ICSID uses the tribunals like International Chamber of Commerce (ICC), The International Centre for dispute resolution (ICDR), The London Court of International Arbitration (LCA), the Permanent Court of Arbitration (PCA), and Institution of Stockholm Chamber of Commerce (SCC) as it operates according to the methods laid down by UN Commission on International Trade Law (UNCITRAL).[255] The arbitration rules adopted by these institutions are ICSID rules, ICSID Additional facility rules, the UNCITRAL Rules, the ICC rules, Stockholm rules.[256] These institutions use *Adhoc* arbitrators rather than permanent professional adjudication and it gives scope for criticism of favouring investors.

Unlike the WTO, there is no Multinational investment court or appellate authority to settle investor-state disputes.[257] These ICSID awards cannot be appealed but reviewed by the ICSID annulment committee. The domestic courts can defer foreign arbitration awards only if they discover jurisdictional mistakes, procedural irregularity and breach of public policy and enforce them according to the New York convention but not allowed to correct the mistakes of law.[258]There is no unique tribunal like WTO, which decides trade disputes, to settle investment disputes. There are chances of getting contradictory judgments like Lauder and CME cases in which the Czech Republic has filed two cases against two investors in two

[250] Mark Wu, (2014) P.177.
[251] *Ibid.* at P.171.
[252] U. Kriebaum, The Nature of Investment Disciplines, The Foundations of International Investment Law, (Z. Douglas,eds.,), Oxford University Press, Oxford (2014)
[253] FYRM v. Greece ICJ Rep.644 – Page 29 (2011)
[254] G. V. Harten, Investment Treaty Arbitration and Public Law, Oxford University Press, Oxford, (2007)
[255] S. Minhas et al., The Reputational Impact of Investor-State Disputes, International Interactions Empirical and Theoretical Research in International Relations (2018) P.870.
[256] Harten, (2007) P.160.
[257] Finbow, (2016) p.97.
[258] United Mexican States v Metalclad Corporation 38 CELR 284 (2001)

different tribunals regarding the same media license grant. The first tribunal decided in favour of it and the second tribunal passed an award against the Czech Republic to pay $355 million to the investor. These conflicting judgments are due to a lack of the Appellant body in investment tribunals.[259]

The scholars criticises the arbitrators in investment disputes are biased, not affordable to the poor countries because of the hefty fee of advocates huge expenses and showing favour to developed countries. These are also implying their democracy and negative impact on FDI flows. It is somewhat true that if we observe the awards passed against different countries, which is more than equalling to their GDP, the recent example in August 2019, ICSID imposed fine more than the US $ 5 billion on Pakistan in a case filed by two multinational mining companies Autofagasta and Barrick gold regarding Reko Diq mine. It is more or less the same as the US 6 $ billion bailout loan the present government is going to receive in the coming three years.[260]

MULTINATIONAL CORPORATIONS

The multinational corporations (MNEs) established in different countries to avoid customs duties, transport expenses and getting benefits of getting land, power, and workforce at cheap rates compared to their home countries thereby getting more profits for investors. The public, social, environment and human rights are receiving growing attention. [261]The number of MNEs rose from 37,000 in 1993 to 100,000 in 2012 with their assets worth US$82 trillion.[262]

CONCLUSION

This paper has dealt with the evolution of international trade and international investment. The organizations, tribunals, courts, international laws involved and pointed out the drawbacks and made necessary recommendations.

Every businessperson whether local or international will do business for profit. Every Government whether local or international will try to get more benefits in the form of taxes for running the country, development, employment and welfare of their people. In this tussle,

[259]Mark Wu, (2014) P.180.
[260]S Hassan, Multibillion dollar fine on Pakistan puts the spotlight on a secret court, (2019) TRT World (Auguest 23, 2019) https://www.trtworld.com/magazine/multi-billion-dollar-fine-on-a-secret-court-29141.
[261] S F. Puvimansinghe, Foreign Investment, Human Rights and the Environment- A perspective form South Asia in The Role of Public International Law for Development, Martinus Nijhoff Publishers, Boston (2007)
[262] EP.Mendes, Global Governance, Human Rights and International Law-Combating the Tragic Flaw (2014)

no one winner or loser but both are trying to develop a win-win situation. The growth of trade and investment shows the positive effect of it.

The international trade and investments rose to leaps and bounds despite the obstacles like recessions, the difference of opinion between developing and developed countries but still going on towards globalization and liberalization.

RECOMMENDATIONS

The paper proposes the following recommendations and the stakeholders' concern, to take necessary steps in implementing it.

- The member countries of WTO conclude trade talks answering the fears of host countries, home countries and international traders.
- The countries have to sort out the issues of trade imbalances, which are mutually beneficial.
- UNO has to establish World Investment Court in line with WTO Dispute Settlement Body to bring all types of investment tribunals under one umbrella.
- It should bring uniformity in the international legal framework to address the issues of investors and capital receiving countries.

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NEW INTERNATIONAL EONOMIC ORDER (NIEO): A BRIEF OVERVIEW

-Puligedda Sailasri[263]

INTRODUCTION

The concept of International Law has been vivid only after the World Wars, where a massive destruction was suffered not only by under-developed or developing countries, but also by the well-developed economies of the world, like UK, USA, China, and Russia etc. It has taken a great effort for all the countries to come together and bind themselves with trust, creating an organization such as the United Nations to ensure good governance and peaceful livelihood of all around the world. The emergence of United Nations post World War II has been stronger than that of the League of Nations which was established after World War I, but has failed in achieving its purposes and has led indirectly to the cause of World War II.

Thus, when United Nations Organization was formed in 1945, one of the key aims was to ensure that there is peace prevailing between nations, hence many treaties were entered into to ensure peace, also, strategically, through various treaties, countries were made inter-dependent on each other, mainly the developed economies had to depend on the Third world countries; the nation's that chose not to team up with either the First World countries like USAor the Second World countries like Russia and mainly on the now Least Developed Countries (LDC's);the nations which exhibit least socio-economic development and Human development as per United Nations standards, this was a conscious step taken to ensure that the stronger economies would not take over the weaker economies as a whole.

One such step to ensure that a balance is created among the economies world-wide in the future is the initiative of New International Economic Order (NIEO). It was evident that even after establishment of UNO, the main concentration of the organisation has continued to ensure that peace prevailed between nations and that the newly formed nations which were colonies prior to the world war under the strong colonial powers become independent and stable. Hence, there was a need felt by the third world countries; especially LDC's to create a new international economic policy and include policies of trade, foreign exchange, and other

[263] Student At Symbiosis Law School, Hyderabad

economic standards in order to create a competitive world for the development of individual economies, unlike the already existing policies which were deemed to be in favour of the stronger economies. This need of the third world countries has gained momentum in 1970's and thus after lot of discussions in the Legislative Council of UNO, has resulted in formulation of NIEO in 1974 to establish political fairness and to ensure the sovereignty of the nations with regard to their own natural resources and to protect weaker economies from being exploited by the developed nations. Since then NIEO has been struggling to ensure that the LDC's stabilize and grow their economy, and at the same time not to put beyond reasonable restrictions on the developed countries which might cut their economy, because if that happens, it would lead to utter chaos and destruction of the economic relations as a whole.

SIGNIFICANCE OF THE TOPIC

During the colonial times, the now third world nations were exploited by the colonial powers over decades and decades altogether be it in the form of natural resources or the manual labour. The oppression of the colonies and the thirst of the developed nations for power has led to destructive world wars, only after the destruction happened there was a realization that dawned upon us that the world would no longer survive if this continues, andhence a lot of peace-making treaties were signed up and till date actions are taken to ensure that the peace is not deviated from.

Though United Nations Organizations has been established, its main aim has been to ensure peace and because of the VETO power of the developed countries it has been a tough job even for the international organizations to be fair and free and it is a evident theory that there was an inclination towards the veto powers, but coming into the 7 and over decades of the UNO, and the fact that the LDC's are having a rapid growth in the economy, is when the stand of the International Organizations is turning to be more fair towards all because of growing strength of the third world countries. Through various conferences of NIEO a lot of changes are being made continuously to ensure a better sovereignty to the LDC's and to promote free and fair trade, and international trade to provide everyone a place to compete in the international market.

In today's world, no country can exist in isolation and so is important for everyone to follow the rules of international law. Many policies are formulated each year to ensure better

functioning of the world, framing of fair economic policies is very important because, it is the only way through which the developing countries can sustain in a long run protecting their identity and their people. To ensure best interest of all, amendments are made to these policies at regular intervals so that international laws are up to date.

It is the economy of the country that decides its stand in the international front. Only nations with developing economies are secured of their future, develop in the economy signifies not only growth in the living standards of the people, but also the strength of the nation and its impact worldwide. Hence, it is very important for nations to ensure that they have a growing economy also by maintaining the international standards only then they can dream of a bright sovereignty. China has realised the same only in 1990's after India in 1991, which until then were closed economies, have opened their economy to mix with the globalised standards. Hence it is very important to have an understanding of the international economic policies to improve our economy, which would be gained through this paper, by studying about the New International Economic Order and the developments thereon to understand where our economy stands and what role other economies play in the international space.

SCOPE OF THE STUDY

The area of International Law is flourishing in today's world; it is not only the first and second world countries, but also the third world countries that are dominating the international markets. Initially, it was only the nations that entered into agreements with each other and so the law was restricted in its scope as well as usage. But now, the law in itself contains not only nations, international organisations, international players, but also individuals as a whole.

The fact that it is being prioritised over the municipal laws of various nations tells us about its importance, and the importance for us to understand it before getting into the real-business world. This paper aims to analyse the economic structure of nations at the international front, so as to help the readers to understand the differences between the nations and the need why it is important to ensure that the international policies and treaties are well-known and analysed by nations.

The author intends to analyse the policies of NIEO and form an opinion as to the role of India in international markets in terms of economy, this is one of the contemporary issues that India

has to analyse; keeping its rapidly growing economy in mind. The author would restrict the paper only to Indian economy after analysing the whole concept of NIEO in detail so as to remain relative and to achieve the objectives significantly.

OBJECTIVES OF STUDY

- To understand the need for NIEO and the circumstances that led to its initiation
- To understand how the international economic policies affect developing nations like India and their stand on the policies.
- To study the policies and working of NIEO.
- To understand the classification of the world countries and their relation with the economic strata of nations today as to developed, developing and least developing countries.
- To understand the effect of NIEO on the International Economic Law.

RESEARCH QUESTIONS

- What are the circumstances that have led to the rise of NIEO?
- Why is it necessary for the third world countries to ensure that NIEO works as it was perceived to be?
- What are the Policies of NIEO and analyse its working in today's world?
- What is the effect of NIEO on International Economic Law?

RESEARCH METHODOLOGY ADOPTED

The author to achieve the objectives of this research will majorly depend on the historical and analytical type of research so as to gather information from the past and analyse the post-world war situation of economies. The research would be doctrinal to most of the extent where the author will rely on various secondary sources like articles, journals, commentaries and historical books so as to understand the international economies and the working of United Nations and implementation of principles of New International Economic Order

(NIEO). The author will also depend on recent media-prints release by United Nations so as to understand the working and effectiveness of NIEO in today's world.

REVIEW OF LITERATURE

THE NEW INTERNATIONAL ECONOMIC ORDER: A REINTRODUCTION[264]

This paper has been published by the Humanity journal, which an academic journal focussing on research related to humanitarianism and development in the contemporary world. The said article provides insights of the circumstances that have led to the initiation of the NIEO and its working and aspirations. It also talks about the stance of international law that has been amended due to NIEO and whether NIEO is a new political strategy to ultimately gain power. It analyses whether the NIEO has been a failure or a success. This article has helped the author to understand various preliminary details in the formation of NIEO. The author intends to take help of the analysis provided in the article to form an opinion and to analyse the functioning of NIEO to achieve the objectives of this paper.

NEW INTERNATIONAL ECONOMIC ORDER (NIEO)[265]

This article has been made available by the economic times consisting of a detailed survey on the NIEO and its schemes and operations world- wide. The article in detail explains many schemes of NIEO such as International Commodity Agreement, International Food Programme etc. This article has also been a subject of online debates with various academicians expressing their views on the same. It has been helpful to the author to understand the stand of Indian Jurists on the subject matter through this article.

NEW INTERNATIONAL ECONOMIC ORDER (NIEO): ORIGIN, ELEMENTS AND CRITICISMS[266]

The article throws light as to how NIEO has been formulated and throws light in a new way as though NIEO has come into action, how the developing countries have failed in strengthening their economies by making use of NIEO and how the nations have lost hteir chance by having issues between them and why could the developing nations not agree to similar policies that were of mutual benefit for all of them and how the aim of economic

[264] The New International Economic Order, (2015)
[265] Sanket Suman, New International Economic Order(NIEO), (May 27, 3:35 PM) http://www.economicsdiscussion.net/international-trade/new-international-economic-order-nieo/12969
[266] Fesseha Mulu Gebremariam, New International Economic Order(NIEO): Origin, Elements and Criticisms, IJMMU ISSN 2364-5369 (2017)

growth is side-lined, besides why the countries have failed to compete in the international market. It is a critical analysis of the criticisms of the NIEO, and has helped the author to form a neutral view on the NIEO as the article points out the flaws in NIEO and the nations therein involved.

FIRST, SECOND AND THIRD WORLD[267]

This online write up on 'nation's online' web-site provides a clear picture as to the division and classification of the nations around the world into First, Second and third world countries; it also explains the scenario during the cold war with respect to the developing Asian countries, their political and economic strata at that time. This article helps the author to differentiate and understand the circumstances that has led to the formation of NIEO.

LEAST DEVELOPED COUNTRIES (LDCs)[268]

The information and reports regarding the LDCs is provided by the United Nations Organization at their web-site; for reference purpose, which helps one to go through the criterion for classification as to the LDCs, policies that are formulated for better growth of these nations; the incentives, exclusions etc. that are applicable to them. The organization provides a massive report of all the previous years for a better study and understanding. It also talks about the aim of the organization for this classification and this would help the author in analysing the working of NIEO in the past and present and how it is expected to work for a better future and to analyse whether the same is practically achievable or is just a mere dream.

FROM NIEO TO NOW AND THE UNFINISHABLE STORY OF ECONIMC JUSTICE[269]

This scholarly article talks about the features of international law in a broad manner and explains the need for the initiation of NIEO, and tis objectives that were meant to be achieved in favour of the developing nations so as to ensure economic justice to all around the world. The article analyses how NIEO was expected to uplift the poor and how and why has it failed to deliver to the poor and how and who it has delivered to instead. This article provided a

[267] First, Second, and Third World (May 25, 2:24 PM) https://www.nationsonline.org/oneworld/third_world_countries.htm
[268] Least Developed Countries, Department of Economic and Social Affairs, (2010)
[269] Margot E Salomon, From Nieo to Now and the Unfinishable Story of Economic Justice, International and Comparative Law Quarterly, (2013)

new insight in the author as to form a view on the subject- matter in a better and a different way.

ANALYSIS

PRE- NIEO PERIOD

Post the World War II, about 56 nations have come together initially to formulate United Nations Organization in 1945. While keeping the great depressions over the world in mind, the United Nations has come up with a three-tier set up of International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) and International Trade Organisation so as to help the economies, and regulate international trade and its policies. The proposal for setting up such set up was first introduced in the conference at Havana in 1947.

This proposal is famously termed as The Havana Charter for International Trade Organization, and was majorly drafted by the United Nations, however, the charter proved to be biased towards the developed nations as it contained principles such as free trade policy, which would mean that no nation that ratify the agreement can lay down tariffs or import duties on the imports from other nations, the developing nations feared that this policy would wash out their local producers because of competition from global players who belonged to the developed nations and so the negotiations continued. The Havana Charter was then amended due to the sheer majority of the developing nations and was signed by 53 out of 56 nations that negotiated. However, the same was ratified only by one nation which is Liberia.

Looking at the failed attempts to set up the International Trade Organization, the developing nations have set up GATT, the General Agreement for Trade and Tariff, in 1947 temporarily so as to go ahead with negotiations in international front mainly regarding reduction of tariff rates. GATT also aimed at taking appropriate measures to stabilize and improve the markets of primary and essential products to attain equitable and stable prices in the global market and to reduce various trade barriers that are set up by the nations.

Further in 1962, the General Assembly under its resolution established the United Nations Conference on Trade and Development (UNCTAD) which was conducted only in 1964. The formation of UNCTAD had three main agendas; one is to strengthen the unity of the newly formed third world countries so as to compensate for the losses of past. Second is to negotiate

for establishment of a system where exporters from developing nations should be subsidized when the import is by a developed nation. Third being that the developing nations had to be provided support both financially and technically to develop their industries and to increase their contribution to global trade[270].

FORMULATION OF NIEO AND OBJECTIVES BEHIND IT[271]

Post the World War II, the revolutions in the colonies all over the world gained momentum so as to get freedom from the colonial powers; while on the other had due to recession in the economy caused as a result of World War, the colonial powers could not maintain the colonies and so had to grant freedom to the colonies. This resulted in the political independence of almost all the nations, but the economy of these colonies or the new nations was still in the hands of the colonial powers.

The colonies did not have experience or expertise to rule and stabilize their economy and so were dependent on the developed nations to establish their Multi- national Corporations (MNCs) to maintain their economy. While the developed nations took full advantage of this situation, and started establishing their MNCs in the developing nations and continued to exploit their natural resources[272]. This continued until about 1960's until Fidel Castro, the Cuban Prime Minister of those times, came up with his book on these MNCs, or now popularly known as Trans-national corporations (TNCs) which raised discussions on how the developed nations are exploiting the newly formed nations and are ruling their economy.

This realization in the minds of the developing nations left them agitated and strived to get a control over their economic freedom and have urged the United Nations to replace the then existing economic order, with a New International Economic order, so as to ensure sovereign-equality of all states, inter-dependence and cooperation among all the nations.

THREE MAIN DOCUMENTATIONS REGARDING NIEO[273]

i) DECLARATION ON ESTABLISHMENT OF NIEO

[270] United Nation Conference on Trade and Development, UNITED NATIONS, (1964) , https://unctad.org/en/Docs/econf46d141vol1_en.pdf
[271]*Supra note* at 1.
[272]Post-war reconstruction and development in the Golden Age of Capitalism, World Economic and Social Survey, (May 13, 5:44 PM) https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESS_2017_ch2.pdf
[273]Declaration on the Establishment of a New International Economic Order, UN. General Assembly (6th special sess. : 1974)

The General Assembly of the United Nations Organizations in 1974 in its 6th special session and has declared the New International Economic Order, the following are some of the principles laid down in the declaration[274][275]:

a) To ensure sovereign equality, self- determination, territorial integrity of all the nations.
b) Every nation has the right to adopt an economic and a social system of its choice as felt appropriate for its better development.
c) Permanent Sovereignty over Natural Resources (PSNR) for all the nations.
d) All the nations and their Multi- National Companies (MNCs) will have to follow the United Nations Code of Conduct for MNCs.
e) The developed nations are put under an obligation to extend assistance to the weaker economies so as to stabilize them.
f) Equitable relations should be promoted by reducing the tariff rates upon the raw materials being exported from developing nations into the developed nations.
g) The concept of reciprocity should be applied with Least Developed Nations (LDCs) as an exception.

ii) PROGRAMME OF ACTION[276]

Programme of action is the rough plan as to the implementation of NIEO and its principles. The plan was aimed to be implemented within a specific time frame so as to resolve the problems regarding raw materials and food. Some of the plans laid down are:

a) All the nations have permanent sovereignty over their natural resources, and they can take any measures so as to ensure equal development and distribution of the resources.
b) Promotion of collective self- reliance i.e., to ensure that by developing inter-dependency of nations, they develop one-self as well.

[274]Steven K. Chance, Codes of Conduct for Multinational Corporations, (May 12, 2:23 PM), https://www.jstor.org/stable/40685882

[275]Makarczyk, Principles of a New International Economic Order: A study of international law in the making, (1988)

[276]Programme of Action on the Establishment of a New International Economic Order, UNITED NATION General Assembly, (6th special sess, 1974)

Further General Trade: Code of Conduct has been laid down which enshrines the following guidelines:

a) Every nation should fulfil the commitments undertaken under UNCTAD.
b) International Commodity Agreements have to be encouraged in order to stabilize the prices of commodities in the global market.
c) The products that are exported to developed nations, from developing nations should be granted concessions by reducing the trade barriers and caps on trade.
d) Developed nations should also contribute to the society by supporting the developing nations through extension of financial and technical support for the development of weaker economies.

iii) **CHARTER OF ECONOMIC RIGHTS AND DUTIES FOR STATES**

The Charter (CERDS) deals with the economic and political rights and duties of the states and is a soft law i.e., it is not backed by the power of sanctions. The following are some of the principles laid down under the Charter:

a) Sovereignty, territorial integrity and independence of all the states is to be protected.
b) Everyone has equal rights and self- determinations i.e., the people of every nation are granted with certain civil and political rights along with certain social, cultural and economic rights.
c) Peaceful settlement of disputes with the use of arbitration, mediation, conciliation, negotiation should be promoted.
d) The nations should in good faith fulfil the obligations at the international front.
e) Social justice is to be promoted.
f)

INTERNATIONAL ECONOMIC LAW- BEFORE AND AFTER NIEO

INTERNATIONAL ECONOMIC LAW BEFORE NIEO[277]:

The International Economics started way back from the times of emperors, who invaded other geographical territories for the purposes of trade and have developed friendly relations

[277] Mathias Herdegen, Principles of International Economics Law (2nd ed. 2016),

with the states. Further, with the colonization in picture, laws have been developed by the colonial rulers so as to exploit the natural resources of the colonies.

Post World War II, the revolutions in colonies increased and given the loss and damage caused because of World Wars, it became hard for the colonial powers to control the colonies. Hence, most of the colonies were granted independence. However, the newly formed nations were debt- ridden and did not have any means to stabilize their economy. Hence wanted the developed nations to help them in the same aspect. In return, the developed nations came up with the concept of Multi-National Corporations, whereby the MNCs framed policies for utilization of the natural resources and ruled the economy of the states. Hence, until 1970s, though the colonies have gained political independence, the economy was still in the hands of developed nations, and the newly formed nations raced against each other for the setup of MNCs in their territory, thereby starting a cold-war between nations, and so , the rules of International Economic Law were tilted towards the developed nations.

The traditional Economic Law later evolved to concentrate on political independence of the states, and control over natural resources, while we will now look into the aspect of sustainable development with the incoming of NIEO.

INTERNATIONAL ECONOMIC LAW AFTER NIEO[278]:

PRINCIPLES[279]:

a) International equality and sovereignty has to be ensured by and for all the nations.
b) All the nations should imbibe the principle of reciprocity i.e., to ensure concessions to each other to promote trade and international relations; except for the LDCs, who are not in a position to offer any thing and hence concessions are to be given without expecting reciprocity.
c) Every nation has been declared economically sovereign so as to decide on the economic, political and other policies.

[278]Progressive development of the principles and norms of international law relating to the new international economic order, (May 4, 2:23 PM), https://digitallibrary.un.org/record/59123?ln=en

[279]Mohammad Belayet Hossain et al., International Economic Law and Policy: A Comprehensive and Critical Analysis of the Historical Development, Beijing Law Review (2018)

d) The developed nations are burdened with an obligation and a duty to cooperate with the developing and under- developed economies.
e) The emerging third world countries should be given preferential treatment and Most Favoured Nation (MFN) status.

INTERPRETATION

NIEO- A SUCCESS STORY OR A FAILURE

Thereby we have seen that the NIEO has been laid down with the moral aim to ensure that the widening gap between the developed and developing reduces in phases and that the economies get stabilized. But, even in the 21st century, one can observe that the gap though has reduced between some nations, some have been pushed further down on the scale of economies.

The obligations laid down under the NIEO have not been fulfilled by many developed nations at various instances, such as, in India, a decade earlier, the government announced ban of Coco- Cola and its manufacturing in India on health grounds. However, this US- based MNC; with its influence from the origin country has managed to change this decision of the central government, as the government has taken back its decision with the explanation of the economic turn over and employment that the MNC provides to India annually.

Another instance where the super power United States has breached the obligations under the NIEO was during the break of Soviet Union. When Soviet Union broke into Russia and other independent nations, the United States came into picture to help these small states to stabilize themselves and improve their economy, however, with this financial aid the newly formed states have been pressurized to adopt democracy as a way of social ruling unlike the one that prevailed during the Soviet Union.

NIEO speaks about reciprocity, though LDCs are exempted from such obligation, even for some developing nations, the reciprocity is not always practically beneficial, where the developed nations import less and export more into the developing nations, and so removal of tariff rates in such cases is a benefit for the developed world.

However keeping the failures on a hand, if we look at the other hand, NIEO has led to the unity of the developing nations, where by ensuring peace in the world became easy as the

nations are increasingly dependent on each other, further NIEO has led to stabilization of major economies, and now certain developing economies such as China and India are being argued as dependent.

The NIEO has significantly pointed out the need for sustainable development and optimum utilization of the natural resources and has provided for various guidelines as to how the extracted/ exploited natural resource should be re-developed in the nature to ensure their availability to future generations.

CONCLUSION

We have come across brief reasons for the development of NIEO and its impact on the international economy. It is a proven fact in today's time, that no nation can survive in its own bubble and in alienation, be it a developing nation or a well- developed strong economy; the international treaties have been formulated in such a way that everyone is dependent on everyone.

We have seen that the primary need for NIEO has arose due to the fact that the stronger economies have been exploiting the poorer economies, and that there is a need to stop the same from happening to prevent the destruction that has been caused by the world wars in the past, because it is an unsaid truth that if a 3rd World War comes into play; then it is not only destructive, but also an end of the world.

As seen, NIEO was a result of unification and strength of the present third world countries in a want to gain not only political independence, but also economic independence and economic sovereignty. NIEO has not only resulted in reduction of the discriminations among the world countries, but also is now taking steps towards sustainable development, thereby leading linear economies to transform into circular economies. Thereby NIEO can be concluded to have had a positive effect on the world's global economy.

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RESTORATIVE JUSTICE AN ALTERNATIVE ROUTE OF DISPUTE SETTLEMENT IN CASE OF RAPE

-Md. Saleh Akram[280]

INTRODUCTION

Bangladesh acquired its lawful framework from the British and Pakistani rule. In Bangladesh, there are many types of inequalities in the adversarial justice system, one is the segregation of aboriginal peoples and minorities and the other is gender inequality. Inequality weighs heavily on equity management in Bangladesh. Reasonableness and access to justice have made extreme deterrents to set up harmony and justice in the public arena. It is important to reform the criminal procedure of Bangladesh. Strengthening court administration and reducing delays to develop legal framework, improving board case, introducing executive data framework and automation to a court, preparing and rebuilding office readiness, providing other human resource requirements that increase legal executives and legal executive divisions, managing the functioning of the court to all degrees also renovations of its foundation is important to make arrangements for the establishment of justice. Graham Reddoch one of in his interview commented on the people in the prison said that the offenders who are in the prison are "punished as hell". Society will one day realize criminals; he believes that they will be rehabilitated without going to jail.[281] A jurist of Bangladesh said, "Law is more than standards, and it is an impression of the desire through which a country passes. With the changing need of society, its legal system change. In the event that it doesn't, it gradually turns into a dead and pointless framework. The legitimate framework we have acquired had been figured with regards to goals accessible at that point. Subsequently, our lawful framework isn't just rationale yet in addition the experience, circumstances and conditions, a large number of which don't exist any longer; thus it has gotten obsolete and overburdened by its inbuilt failure to perceive new issues. In other words our legal system does not know how to deal with modern day problems like a backlog

[280] Assistant Professor, Department of Law and Human Rights, University of Asia Pacific, Dhaka, Bangladesh.

[281] Graham Reddoch, Executive Director of the John Howard Society of Manitoba in an interview with the Winnipeg Sun , The UNITED STATES DEPARTMENT of JUSTICE, (January 28, 2004) .at<https://www.justice.gov/ovw/sexual-assault>, accessed May 17, 2016.

of cases. Though the fiery lawful frameworks of the world have by innovative trials discovered answers for their issues".[282] The way, in which the mediation can be mandatory in the civil suit, our alternative approach should be initiated on the criminal justice system which does not directly create win to win situation but creates indirectly. Think, if there were no chaos and crime in society how it would be? Restorative justice will have a role in society as an alternative arrangement. By the Restorative equity framework the casualty is allowed the chance to communicate their perspectives legitimately to the guilty party, increase certified remuneration for misfortunes, compelled to reply the offender about the offense, why he was involved with the crime and he has committed the crime against her. By acquiring answers from the offender, victims are bound to get compensation through the courts with one of the elements of recovery justice. Then again, the wrongdoer can take immediate and individual responsibility, get some answers concerning the aftereffects of his exercises, ask for forgiveness and seek laments straightforwardly to the individual being referred to which additionally offers the chance to the wrongdoer through which the embarrassment of their criminal record can be kept away from. Restorative Justice is helpful for the general public, saves money of the society and ensures peace for the society. In the whole cases victim and their family need the offender to be rebuffed or attempt to deliver retribution since they don't have legitimate thoughts regarding the restorative justice framework. It should be kept in mind that in case of rape I am not against the punishment rather I would like to say that offender must be punished but the restorative method must also be applied.

DEFINITION OF RESTORATIVE JUSTICE (RJ)

In a simple word Restorative Justice means rehabilitation. The victim will be rehabilitated in such a way that he does not think he is a victim, as the same way, the offender will never be involved in crime and since the whole society was victimized, society will also be rehabilitated in this way. Restorative justice is henceforth advancement in the fields of victimology and criminology. It means to promote a planned justice, constructing communication, and reestablish the mischief brought about by offence. Restorative justice can also be defined as a method that shows that crime is a violation of the relationship between the people and the community, offenders and communities are responsible for

[282] Hasan, K. M., A Report on Mediation in the Family courts: Bangladesh Experience, (2001), 25th Anniversary Conference of the Family Courts of Australia. Sydney.

causing harm and have a guarantee to solution. As indicated by Marshall "restorative justice is a basic intuition approach to manage bad behavior which incorporates the parties themselves and the society, in a working relationship with statutory associations".[283] In any case, Johnstone said modern rehabilitation method ought to

Require accompanying these thoughts furthermore qualities:

a. offence is, fundamentally, an infringement of an individual by someone else, and this is substantially more noteworthy than the break of legitimate principles;
b. that is reacting to offence our essential concern ought to make the offender aware of the damage they have done and to prevent them from doing it again;
c. the idea of repetition and action to re-blame should be chosen unanimously and consensually by wrongdoers, casualties and the network; and
d. Efforts should be made to improve the association between the individual being referred to what's more, to further participate the culprit into the framework.[284]

Characteristics of restorative method are: resolve a dispute outside the formal justice system, faster, reserved, economical, efficient and maintainable; to negotiate about an offense committed by the offender; a trained restorative justice facilitator will resolve the conflict; this framework has four components intervention, compromise, restitution and compensation; and, sees dispute as a conflict between individuals. Remedial intercessions may happen at numerous time thoughts may be at before making charge, after conviction, when he was sent to prison, before discharge and promptly after discharge, also at whatever point the person in question or wrongdoer wants goals outside the equity framework, regularly numerous years after the wrongdoing has happened.

LAWS RELATING TO RAPE: BANGLADESH PERSPECTIVE

[283] Tony F. Marshall, RESTORATIVE JUSTICE AN OVERVIEW, January 10, 2020, http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf

[284] Johnstone, *Restorative Justice: Ideas, Values, Debates*, Cullompton, Devon: (2012),Willan publishing

According to Bangladeshi law, rape is considered as a crime. A couple of laws define rape and its punishment. Formerly there was only the Bangladesh Penal Code, 1860 for dealing with rape but later on a special law has been passed to free women and society from the horrors of rape crime. The Bangladesh Penal Code, 1860 says that rape means having sex without a woman's consent or against her will.285 Forcing a woman to consent against her will or with her consent or without her consent or through intimidation or having sex with a girl under the age of fourteen with her consent would also be considered rape.[286] If a woman consents to sexual intercourse with a man knowing her husband and is overwhelmed by the person's false description, it will be considered rape.[287] A clarification of what qualifies as "assault" is given toward the finish of the definition, which states: "entrance is adequate to establish the sex important to the offense of assault".[288] A special case is recorded where sex happens between a spouse and his better half. When this occurs, and the wife is not under the age of 13, then the act does not constitute rape.[289] According to the Bangladesh Penal Code, 1860**,** if someone commits the crime of rape, that person will be sentenced to life imprisonment or up to ten years in prison and will be fined.[290] If the husband forcibly has intercourse with the wife and she is not less than twelve years of age, the husband will be sentenced to two years imprisonment or fine or both.[291]

Nari o Shishu Nirjatan Damon Ain, 2000, provides for harsher punishments than the Bangladesh Penal Code, 1860. According to the law, anyone who rapes will be sentenced to rigorous life imprisonment with fine.[292] But the death penalty will be given if the victim dies after the rape or if rape is committed by a gang.[293] Regarding the offense of sexual assault, the Penal Code offers a section addressing "assault or criminal force to woman with intent to outrage her modesty" with a maximum punishment of imprisonment and a fine.[294] The Nari o Shishu Nirjatan Damon Ain, 2000 addresses the offenses of sexual assault and sexual harassment through what is termed the offense of "sexual oppression", says that-

[285] The Bangladesh Penal Code of 1860, S. 375.

[286] *Ibid.*

1[287] *Id at 284.*

[288] Ib at 280.

[289] Ib at 280.

[290] The Bangladesh Penal Code of 1860, S. 376.

[291] Ibid.

[292] The Nari o Shishu Nirjatan Damon Ain, 2000, S. 9.

[293] Ibid.

[294] *Supra note at 289.*

I. *"Anyone who illegally touches a woman or a child or a sexual organ or any organ with any part of his body or any substance to satisfy his sexual desire illegally, his act will be considered sexual harassment and he will be sentenced to imprisonment which is extended to ten years. There may be imprisonment for less than two years and fine;"*[15]

II. *"Anyone who illegally sexually assaults a woman, sexually abuses a woman or makes an obscene gesture will be considered sexually harassed and will be sentenced to maximum seven years imprisonment but not less than two years of rigorous imprisonment and fine."*[16]

It is very difficult to prove marital rape. At the point when the case goes to Court, there is trouble in demonstrating that the assault occurred. The explanation is certain that sexual relations are not out of the ordinary in a marriage. The essential proof is the demonstration was not-consensual utilizing DNA tests as proof can be produced. Brutality and physical maltreatment can be found in marital rape just like any other rape. Marital rape in Bangladesh always exists de facto but not de jure. It is a common but under-reported crime because the law does recognize the offense.[295] The too old meaning of rape in Bangladeshi law is terribly lacking to give appropriate lawful help to casualties of assault.

WHEN CAN RESTORATIVE JUSTICE BE USED?

Restorative Justice works with victims and offenders. But if the question is who is good to start, then it is better to start with the victim. It is because I think the victim will be privileged for all time in this type of case. If the victim does not want to resolve her matter by the user of this method, there is no scope to use restorative justice. Suppose a girl who went to a residential hotel to celebrate her boyfriend's birthday party, where she has free consent to attend, although she knew that danger could happen against her. She was assaulted. The boy concedes that sex occurred, yet asserts that she agreed. First of all we have to find out who is a victim? Do Victims want to use a restorative method or not? I think in this kind of incident the use of restorative justice can be a good attempt because they are familiar with each other. Dr Martin Wright pointed out that restorative justice will be provided: firstly, at the point when one individual injuries another and mischief ought to be to mend; secondly, where there was a connection between the victim and the offender

[295] The Nari o Shishu Nirjatan Damon Ain, 2000, S. 10.

there ought to be a chance to fix it; thirdly, try to meet the demand of the offender; and fourthly, the community itself should assist this process.[296]

WHAT RESTORATIVE JUSTICE PROVIDES?

Bangladeshi women are not in any case mindful of their privileges and legal provisions in contradiction of sexual violence. Sometimes women wish to share these with a confident one. Most of the rape offenses are not reported, although there are many reasons behind this. Due to shame and social discourse women and family do not want to file rape cases. A raped woman always wants to know why crime has happened against her, whether the offender acknowledges his crime and understands his mistake, at the same time he takes responsibility for that harm. Not only that, the society will honor her not as a victim but as a human. In the Restorative justice method the story of the woman is heard with attention and care and she is assured that she will never be a victim. Offender will ask for forgiveness from the victim and provide necessary compensation. A detailed list is given by Teresa Reynolds, of what victims want to be said that most of the victims do not wants retribution but some wants. Victims need open affirmation that crime has been committed against her, and courts have a method for accomplishing punishment; however they permit no affirmation by the offender, which is integral to restorative method.[297]

Hate crime, not criminals. When a crime occurs, it has a background story as the cause of crime. Restorative justice method guaranteed the rights of the offender also. This method finds out the reasons for committing an offence, try to rehabilitate the offender, help him to accept the guilt and destroy his inner distractions. He must understand that the crime he committed is an accident in his life, for which he had to be punished and he should be given compensation. Accepting guilt is a matter of greatness and this will give him a mental peace. Through this method the criminal will mean that he should never commit a crime again.

When a woman is raped, she shares it with her family and friends, then her friends and family were victimized. When his friends and family share the matter with others, then the community will be victimized. There is panic in the whole society that no one is safe in

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[296] *Ibid.*

[297] Farzana Hussain, from the bedroom to the Courtroom, Dhaka Tribune, (2014), https://www.dhakatribune.com/uncategorized/2014/08/06/from-the-bedroom-to-the-courtroom

society. Restorative justice method can eliminate this panic from society. This method brings the parties direct to maintain peace and order in society.

RESTORATIVE JUSTICE PROGRAMS

New Zealand and Australia are the main wards where restorative method for rape and adolescent cases are standard. South Africa lists a wide area of restorative justice mediation that includes projects based on customary practice, social assistance and criminal justice based ventures the country over.[20] South Africa records the most raised assault rates among the every single other nation. It is found in Bangladesh that in every thirty minutes one is subjected to sexually assault. The following are the restorative justice programs:

Discussion between the parties

Discussion between the parties is one of the popular method has existed for many terms. This process is used as a process outside the criminal justice process. At the point when applied to offence, the technique includes groundwork for and helps of face to face discussion among the parties.[298] This process is similar to the meditation process. Mediation is a negotiation. Through this process the parties are tried to give equal priority in the society, there must be a nonpartisan organizer, contention which will be settled, an exchange of thoughts and there must be a result by which both the parties achieve something that will keep them happy. Rape is essentially a gendered wrongdoing that moves the supposition of equivalent assets to talk and be heard. Moreover, wrongdoings are not clashes; there is a victim and an offender. Intercession procedure isn't intended to react to acts that include parties with various degrees of intensity. Constrained interest is never adequate for casualties of rape.

1.1. Offender dealing

Offender dealing grew basically in Canada. They include an enormous gathering of people that are put resources into the goals of a wrongdoing and who meet up to decide an arrangement of criminal. This dealing idea exists in different native social orders in each

[298] Wright Martin, Paper to International Conference On Restorative Justice, Winchester, "Is mediation appropriate even for rape?,(March 23, 2020), December 31, 2019, http://restorativejustice.org/rj-library/is-mediation-appropriate-even-for-rape/10514/

landmass which has an old foundation. Participants may incorporate victims, offenders, their family, companions, judges, lawyers, and police, social workers, and society individuals.[299] For many, criminal dealings are not an effective method, because it may don't have an indisputable managing judgment about what includes absurd direct towards the women.

1.2. Conferencing

Conferencing is an extensively used kind of remedial method that has been grasped unequivocally for assault. It incorporates consensual comprehension by parties and their relatives. It is started on the offender assuming liability for the demonstrations perpetrated, despite the fact that this doesn't liken to a full comprehension of why these demonstrations are viewed as offence. The offenders were started with the responsibility of demonstrating these protests, although these demonstrations do not compare it with the full understanding of what is portrayed as a crime. Parties are given a few weeks or months to think and do the groundwork about the conference. Arrangements are made for conferencing based on the type of crime and the willingness of the parties to participate. When they meet, it will be run by a facilitator who follows a specific content so that the main focus is talked about, the speech will be harmless not only that parties also can say their own words. Facilitators are those who are experts in restorative justice, volunteers, law enforcing agencies or advocates who will have proper training to apply this type of method. Meetings have been directed in an assortment of locations, may be in police stations for security. The offender at that point recognizes and reacts to what he/she has listen about the damage that came about because of the crime. The conferencing ends with a conversation automatically and the formality of any action taken by the victim that the offender acknowledges in order to present appropriate reparations, fix damage to the person in question, family, companions, and society, and attempt individual changes to forestall re-event of comparable acts. The meeting and the subsequent review plan establish restorative justice. Instead of traditional criminal trial, the control is exercised by the person in question, personalizing the offense and re-balancing the victim and the system's commitment to the selection of justice.

[299] Wright, Martin. (1997), Victim/offender conferencing: the need for safeguards, Paper presented to International Conference, (Restorative justice for juveniles - potentialities, risks and problems for research, Leuven, Belgium, 1997).

THE PROCESS OF RESTORATIVE JUSTICE IN CASE OF RAPE

The reason for restorative justice is to set up uniting victims and offender, either face to face or by correspondence through outsiders. Restorative justice relies completely upon a procedure of: finding cases, appropriate time for using the method, consent from both the parties, arranging meetings, reaching victim-offender agreements and copy forwarded to criminal justice officials. Restorative justice can be utilized as a supplement to criminal justice processes. The method could be that as follows:

1.3. Finding cases

The work that is to be done first is, find them out those who are interested in taking advantage of restorative justice and nothing but restorative justice all the time, only then will the rehabilitation be successful. There will be two types of cases reported and unreported. The trial of the case is over and the case is currently pending, our target will be applying restorative justice in all cases.

1.4. Appropriate time for using the method

What could be the time it is said in the discussion above? In criminal justice system as the different steps are followed in case of a trial, there are several steps in case of restorative justice also. After a case has filed the accused must be arrested. Before his trial begins there should be a step in the criminal justice system for restorative justice. Final judgment cannot be made before the restorative justice method has failed. In which case the criminal is in jail, restorative justice will be done before the end of the sentence. Until a criminal is proved beyond reasonable doubly he cannot be called as offender. The advantage of restorative justice is that by the process offenders accept responsibility for their crimes.

1.5. Consent from both the parties

Offer restorative justice to victims first, without saying whether the offender is willing. Although there may be disagreement in this regard, many people think that restorative justice method depends on a longing not to trouble victim with the enthusiastic work of picking whether to talk with the offender aside from if the transgressor is glad to grant and reasonably accept risk. But my argument is that victim will not be allowed to do restorative justice it will never be possible. If the victim gives consent then it will be a great

opportunity for offender. It must be remembered that the facilitator has a special role to convince the parties. The facilitator's first responsibility is to decide at the first meeting with the victim and the offender that whether a restorative method can be used in this crime or not? If an offender refuses to accept the guilt, then restorative method can never be done. Facilitators will accept party's consent in person.

1.6. Arranging meetings

Facilitators meet with victims and offenders individually to fix the date of the meetings. We have to remember that multiple interviews can happen. The main objective of the meeting will be to place the two parties face to face as victim and offender can ask questions themselves and find out their answers. They can understand their feelings; they will be repentant and forgive each other.

1.7. Reaching victim-offender agreements

Victims usually find answers to the question:

(a) What happened?

(b) Why me?

The victim wants to hear from the offender that he will provide her all support and compensate her for the loss. The facilitator peruses the understanding, and inquires as to whether everybody is content with it. By then the offender and the facilitator consent to the arrangement. At times, a victim may sign too. The understanding at that point turns into a symbol for a guarantee to keep, an image of the offender's duty to fix the mischief. It likewise turns into an agreement for future observing of the offenders consistence with the understanding.

1.8. Decision forwarded to criminal justice officials

The issues of discussion of various meetings and the conclusions reached by the parties are sent in writing to the parties and the criminal justice officials. The copy doesn't propose to seem as though a court archive, a clinical report, or a pre-sentence report. It is, decently, as

short as a sentence may be, for example, as written in the minutes of a meeting. Persons who were not participating in the meeting will not be able to take advantage from this method.

AN INAPT SOLUTION

Here I want to tell about the case of marriage after rape. Does the solution seem inept or not? It will be a good opportunity for offender through which he legally escapes from punishment and prosecution of rape. Basically in Bangladesh women don't report rape as a result of disgrace, and the chance of being disposed of by society. The marriage between the sufferer and the guiltyparty after the assault was frequently observed as the appropriate choice of the circumstance. Both families agree on marriage and the offender escapes from punishment. The question is when a woman is assaulted how she can agree to wed the offender man who assaulted her? The possible answer is she defends her family recognition. Virginity is exceptionally valued so the woman doesn't have some other choice accessible on the grounds that no man will conceivably interest for wedding the victim woman. In India, Delhi Session's Court in State v. Raj Kumar said that "where the offender who had scooped out the victim's eye, suggested that he be permitted to wed his victim to wash off her shame and restore her in the public arena. Unusually, rather than scrutinizing the charged for such a mortifying proposition the adjudicator took up the offer and postponed the judgment giving the casualty time to consider". The woman strikingly won't, expressing, "How might I acknowledge a man who has impeded my very feeling of being, more than my physical self, similar to my significant other". "She proceeded to state that the offender's offer" is to additionally mortify, affront then malign of dignity "the judge at that point granted life sentence to the offender saying that the very late marriage offer was mala fide".[300] In another case, decided by Cuddalore Mahila Court, India sentenced to imprisonment of seven years and fine of two lack rupees to the rapist, V. Mohan. Madras High Court overruled the judgment. Justice Devadass said that-"the case is appropriate for exertion an adjustment between both the parties. Keeping the appealing party inside the prison and requesting that he take part in the intercession talks won't bring about any productive outcome". He provided the request to free the guilty party, saying he ought to be allowed to take part in the exchanges so intervention yields out better outcomes. This judgment of the Madras High Court was questionable because of the nobility, confidence,

[300] Manisha, Marital Rape: A Hidden Crime, (March 15, 2019), http://www.legalserviceindia.com/legal/article-283-marital-rape-a- hidden-crime.html.

torment and sufferings of the person in question. The Supreme Court of India set aside the decision of the Madras High Court and said in its judgment that "spectacular error to adopt any kind of liberal approach in sexual assault cases."[301] So we understand that marriage after rape and mediation can never be an answer for an offense like assault.

Then again, the image of Bangladesh is more horrific. In the event of rape, women are always tried to blame. In remote areas, the influential people took responsibility for the trial and trying to convict women. Of course, it would not be wrong to say that male dominance in society is responsible for it. High Court Division of Bangladesh said any fatwa, ("Fatwas implies legitimate assessment which implies lawful assessment of a legal individual or authority") against women by an Islamic imperfect knowledgeable mullahs will be unapproved and illicit and furthermore decided that if any unaffiliated individual has given a fatwa it must be unlawful and that it should be treated as an offence punishable by the court of law. Judges likewise said that "the lawful framework in Bangladesh enables just the courts to choose all inquiries identifying with legitimate sentiment on Muslim and different laws in force".

CRIMINAL JUSTICE V. RESTORATIVE JUSTICE: IN CASE OF RAPE

The Magna Carta, that great report on law based administration attests "*nulli vendemus, nulli negabimus aut differemus, rectum aut justitiam*" signifying "to no man will we sell, or deny, or postponement, right or equity". The broader notion of justice includes victim's right to get appropriate remedy. Universal human rights law treats the topic of a cure as autonomous human rights.[302] The right to a remedy appears in major human rights instruments. Compelling solution to human rights violations has been guaranteed by the Article 8 of the Universal Declaration of Human Rights and Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR). The right to seek justice by the affected persons is also guaranteed by the Constitution of Bangladesh. Article 27 of the Constitution of Bangladesh says, "all citizens are equivalent under the steady gaze of law and are qualifie for equivalent security of law". The International Covenant on Civil and Political Rights

[301] Akanksha Saxena, Madras High Court judgment to opt for mediation in a rape case and how was it Overruled (August 11, 2015), March 15, 2019 https://racolblegal.com/madras-high-court-judgment-to-opt-for-mediation-in-a-rape-case-and-how-was-it-overruled/..

[302] Freeman, M. Truth Commissions and Procedural Fairness, Cambridge University Press, (May 14, 2018) http:// assets.cambridge.org/97805216/15648/frontmatter/9780521615648_frontmatter.pdf

1996 (ICCPR), which Bangladesh consented in 2000, contains in its Article 14 a progression of reasonable preliminary rights including the accused's entitlement to be assumed innocent until demonstrated liable and the option to be attempted immediately. As it is seemingly an impossible task to try all the crimes, demand for a holistic approach to address the issue creates ground for restorative justice. Discussion can be initiated on establishment of truth telling mechanism to hold more suspects accountable. Democratic environment is a necessary precondition to organize truth seeking process as Ignatieff argues that "democracy is a pre-condition for that free access to historical data and free debate about its importance on which the making of open truth depends".[303] Ignatieff also observes that "in the event that foundations are excessively undemocratic, they can't permit countervailing truth to circle".[304] In various nations on the world restorative justice keeps on assuming a significant job in criminal justice framework. At each phase of the justice framework essentially in lower level of crimes and for juveniles Governments want to expand the utilization of this method. [305]Concerning job of remedial equity Tony Marshall said as: "a procedure whereby all gatherings with a stake in a specific offense meet up to determine all in all how to manage the outcome of the offense and its suggestions for what's to come".[306] As there are many authorities who work to resolve the case on the courts procedure in the same way in restoration system many have the opportunity to work. Through restorative justice, it can be properly known that a criminal offense is actually organized.[307] The roles of the parties are clearly identified: backgrounds of the crime are no identified. More importantly, opponents argue that restoration is based on the assumption that restorative practices simply capture cases from the general justice framework, in this manner dispossessing any chance of a conviction and regular discipline. Indeed, remedial justice can be used as a significant part of a sentence in a broader scope of criminal justice

[303] Ignatieff, M, Articles of Faith, "Index on Censorship, SAGE journals, (June 22, .2018) https://journals.sagepub.com/doi/pdf/ 10.1177/030642209602500522.

[304] *Ibid*

[305] Breaking the Cycle: Government Response, Ministry of JUSTICE, (June 14, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/186345/Breaking-the-cycle-government-response.pdf.

[306] 305 T. Marshall, Restorative Justice: An Overview (1999) 5.

[307] John Buttle, Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence, (August 12, 2019), https://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence.

framework, including pre-sentence and post-sentence answer.[308] Where there has been no police report, it can likewise be utilized altogether independently from the criminal justice system.[309] Further concerns may also be raised with the re-election of the offender, rather than the retrial of the offender. Be that as it may, the manner by which damage is fixed by the offender through helpful equity forms is significant and can incorporate elective types of punishment, instead of restorative justice essentially being viewed as an "option in contrast to punishment"[310] Without change from society itself, punishment and atonement only continue the cycle of revenge and allows concepts of justice to be ideologically abused.

CONCLUSION

It can be desirable that people are far away from being a vengeance. Prosecutions would every now and again be included, however diversionary results could be concurred by the police in appropriate cases. In the event that neither the victim nor offender needed the police in question, a meeting procedure could at present continue however on the premise that the victim could go to the police whenever. Despite the fact that that privilege couldn't be dealt away, the motivation would stay for offender to complete their piece of any result, which would probably include conciliatory sentiments, treatment for wrongdoers, compensation for victims, and a commitment to the society. Improving law and approach identifying with sexual viciousness has been a key concentration for women's activist battling over the past more years. Criminalization and punishment don't make more secure networks for female,[311] nor see the essentials and desires of victims. A change in the criminal justice system will be seen as a fundamental part of the guarantee of a focus on sexual violence, which will reduce crime and encourage private efforts.

However, these changes should not to be the only principal idea of progress and

[308] Shapland, et al. Situating Restorative Justice within Criminal Justice. Justicia Restaurativa en linea, (Augest 12, 2019) http://www.justiciarestaurativa.org/www.restorativejustice.org/articlesdb/articles/7895

[309] Clare McGlynn et al, I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice, (12 August 2019), https://onlinelibrary.wiley.com/doi/abs/10.1111/j. 1467-6478.2012.00579.x

[310] Clare, M., Westmarland, et al., I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice, (Journal of Law and Society, Volume 39, Number 2) P. 213- 40.

[311] Duff Antony, "Alternatives to Punishment - or alternative punishments?", W. Cragg (ed.), P. 44-68.

punishment rates should not be a single measure of success.[312] Judith Herman established that "for specific victims, their insignificant works in the justice structure were a shame just too much reminiscent of the first bad behavior and in this manner called for us to imagine what justice may look like if victims were actors, rather than periphery performers". A new definition of justice is needed to verify the needs of victims of rape.[37] The need for a restorative justice system to emphasize the needs and aspirations of women survivors of rape, to protect the words of raped women, to honor their experiences, to truly and respectfully evaluate them is immense. Our system cannot set up restorative justice method in opposition to traditional criminal justice when we want. Every method has a possibility and with it some restrictions also. Julie Stubbs properly claims that "we should move past oppositional differentiating of restorative justice and customary criminal equity and work towards 'cross breed advancements".[38] Now if we use the Restorative Justice Method in rape cases, we can understand the disadvantages of this method. But in any case, we should be committed to improving the law and creating new possibilities for rape victims. At last I would like to say that we have to build up a system for crime free society and social change as needs be. By ensuring peach and harmony between in person and society our success will come.

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[312] Clare, M., Westmarland, et al., I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice, (Journal of Law and Society, Volume 39, Number 2) P. 213- 40.

THE ANALYSIS OF NORMS OF LAW ON REGULATION OF PEACEFUL ASSEMBLIES IN KAZAKHSTAN IN COMPARISON WITH WORLDWIDE STANDARDS

-Zhuldyz Raimbekova & Balzhan Sultanova[313]

In worldwide mass media in recent times there have been many publications on detentions that took place in Kazakhstan while participating in peaceful assemblies. The organizers were un-lawfully detained, kept in inhumane conditions without any basic needs and were not provided with legal help from local authorities. Except the mass media, the United Nations issued 245 notifications to Kazakhstan regarding the issue on peaceful assembly. According to UN report, Kazakhstan have fulfilled 215 of 245 recommendations, however the population still disappointed that the law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" does not correspond international standards.[314] In addition to that Mr.Kiai, who is member of Human Rights Committee, commented on the issue of the freedom of peaceful assembly in Kazakhstan. He states that in Kazakhstan today the freedom of assembly is treated as a privilege, or a favor, rather than a right.[315] Moreover, Ryszard Komenda, the head of the UN Human Rights Office for Central Asia notified Kazakhstani authorities "To fulfil its legal its legal obligations to respect and protect the rights to freedom of peaceful assembly, expression, and ensure the right to meaningful political participation".[316]

Despite the fact that the Constitution of Kazakhstan grants its citizens to meet peacefully and without weapons, to hold meetings, rallies and demonstrations, marches and pickets4, the application of this norm in everyday life is very problematic. As practice shows, the main problem here is not in the application of the Constitution, but in the normative legal

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[314] Human Rights Council makes recommendations to Kazakhstan [Sovet po Pravam Cheloveka vynes recomendacii Kazakhstanu] The UN News (March 13, 2020) <https://news.un.org/ru/story/2020/03/1374291> accessed 18 April 2020

[315] "UN Expert Urges Kazakhstan to Boost Rights of Peaceful Assembly, Association" The UN News (January 28, 2015) <https://news.un.org/en/story/2015/01/489482-un-expert-urges-kazakhstan-boost-rights-peaceful-assembly-asso-ciation> accessed April 18 2020

[316] The Constitution of the Republic of Kazakhstan 1995

regulations that go below the Constitution. Since Kazakhstan belongs to the countries that adapted Romano-Germanic legal, lower normative legal acts are based on the highest source of law, which is Constitution. Therefore, the issue is on the formulation of lower legal normative acts. The law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" is the main source of law which regulates the organization of peaceful assemblies in Kazakhstan. In December of 2019, the president of the Republic of Kazakhstan Kassym-Zhomart Tokayev commented that the law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" should be amended. Recently, the new issue of the law was published online on the official site of the government, however it caused indignation among the population.[317] The main author of the law is Eugeniy Zhovtis, the head of Kazakhstan International Bureau for Human Rights mentioned that this law complies with international standards, including the OSCE Guidelines on Freedom of Assembly. But, after clear consideration minister offered to include several points, which include not allowing to participate in the peaceful assembly if the protester is wearing a face mask or hijab, to dismiss the peaceful assembly if the number of participants exceeds the one, the organizer included in application form, which in fact does not meet the international standards.

Since 1991, Kazakhstangave its consent only once to conduct sanctioned peaceful assembly and it happened only in previous year in 2019. Alnur Iliyashev, who is local civil activist tried 35 times to acquire the permission from local executive body, which is akimat, but the application was rejected and the agreement to conduct peaceful assembly was provided only in the summer of twenty nineteen. Iliyashev even came to police station and asked law enforcement officials to detain him, because he knew that he would be detained in any case.[318] The point is that, rather than being crammed into bus and being kept in inhumane conditions without any basic needs, it is better to go and surrender yourself, although you are not committing a crime. After this situation was published in mass media and caused a public resonance akimat finally gave its permission to conduct sanctioned PA. The actions of local executive bodies do not correspond with the supreme law of the country - Constitution, not to

[317] Venera Kasumova "What did they propose to introduce into the law on peaceful assemblies" [Chto Predlozhili Vnesti v Zakon o Mirnyh Sobraniyah] Kursiv (February 29, 2020) <https://kursiv.kz/news/obschestvo/2020-02/chto-pred-lozhili-vnesti-v-zakon-o-mirnykh-sobraniyakh> accessed April 18, 2020

[318] Daniyar Moldabekov "Activist Alnur Iliyashev Came to the Almaty Police Department to Be Detained"[Aktivist Al-nur Iliyashev Prishel v Departament Policii Almaty, Chtoby Ego Zaderzhali] Vlast (June 19, 2019) <https://vlast.kz/ novosti/33881-aktivist-alnur-ilasev-prisel-v-departament-policii-almaty-ctoby-ego-zaderzali.html> accessed April 18, 2020

mention world-widely recognized International Covenant on Civil and Political Rights (hereinafter - ICCPR).

International standards do not require prior notification of assemblies. The fact is it is not mandatory for domestic legislation to require an advance notification of the assembly.[319] Nonetheless, the lack of notification should not present the meeting as illegal and should not in itself lead to restrictions on participants or the dissolution of a peaceful assembly. In comparison, the European Court of Human Rights has never found pre-notification systems incompatible with the Venice Convention. On the other hand, the Human Rights Committee stated that it preferred the notification system, while, for example, Georgia declared this norm unconstitutional. In this context, the Principles of freedom of association and freedom, published by the African Commission on Human and Peoples' Rights in 2017, stipulate: the participation and organization of councils is not a privilege, but a right, and law enforcement that's why does not require state authorization.[320]

The Republic of Kazakhstan requires prior notification, but the domestic procedure of obtaining permission for a peaceful assembly is not that simple. Difficulties mostly arise because Kazakhstani legislation does not define terms "peaceful" and "assembly". As in ICCPR it is not directly indicated what aforementioned term means and the Committee still does not provided exact definition of the term "peaceful". Nevertheless, the explanation can be derived from the European Convention on Human Rights who has long believed that the concept of a "peaceful" gathering does not include rallies where organizers and participants have violent goals or provoke violence. In this regard the Venice Guidelines stipulate that it is especially important to emphasize that the concept of "peaceful" in the domestic legislation. The term "assembly" according to Manfred Nowak does not determined in ICCPR, on the contrary it is already assumed in the Covenant. That's why, it must be understood in accordance with the customary, widely agreed sense of national legal systems, but, also bearing in mind the object and aim of that traditional right.[321] Kazakhstan should better identify these two terms, as it causes huge confusions. The brightest example of it is a case of so-called "blank banner". The New York Times reflected on the case of Aslan Sagutdinov, who was detained for holding a

[319]Nina Belyaeva et al., Guidelines on Freedom of Peaceful Assembly (2nd ed, Sungraf, 2010)
[320] Michel Hamilton, Towards General Comment 37 on Article 21 (European Center for Not-for-Profit Law (ECNL) and University of East Anglia (UEA) 2019) 25
[321] Michel Hamilton, Towards General Comment 37 on Article 21 (European Center for Not-for-Profit Law (ECNL) and University of East Anglia (UEA) 2019) 26

blank banner.[322] Mr. Sagutdinov was detained while he stood holding the blank banner in the central square. It is not clear whether or not Mr. Sagutdinov called for rebellion, but the official statement was that law enforcement officials were acting within the boundaries of the law and Mr. Sagutdinov was detained for non-observance of the law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" because he did not notify the local authorities about the peaceful assembly. The process of application is not that long, but in practice very sophisticated. Before ten days an application should be filed to the local executive body. Then after thorough consideration, akimat informs the organizers and issues resolution no later than five days before the event.[323] As practice shows akimat, does not reply at least five days before the event and organizers always have some doubts about the legal status of the assembly. At the day of the peaceful assembly when civilians protest peacefully, police come and declares the assembly as illegal. This further leads to dissolution of the assembly, which in fact does not correspond to the Venice Guidelines. On this regard the Committee expressed concern about the timing for obtaining prior authorization and prior notice. In the light of these issues, formulated in a negative context, it would be useful for the General Comment to articulate the basic expectation of the timing of the notification (for example, the Commit-tee appreciated the six hour prior warning requirement) possibly noting that some situations in exceptional cases may justify longer periods, the needs of which need to be periodically assessed.

As it was mentioned before the law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" is going through the stage of considering new changes. The one of them is conducting peaceful assemblies online. This idea was supported by the minister of information and public development, but he did not provide any clarifications on that point regarding the notification system.[324] In Venice Guidelines National regulatory frameworks should not require notification or permission for online assemblies.[325] The Committee on the other hand stated that the requirement for prior notification of a demonstration generally occurs on grounds of national security or public order, protection of public health or morals,

[322] Daniel Victor, A Man in Kazakhstan Held Up a Blank Sign to See If He'd Be Detained. He Was, The New York Times (April 18, 2020) <https://www.nytimes.com/2019/05/09/world/asia/kazakhstan-protests-blank-sign.html>

[323] About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan [O Poryadke Organizacii I Provedeniya Mirnyh Sobraniy, Mitingov, Shestviy, Piketov I Demonstraciy v Respublike Kazakhstan] 1995

[324] Oksana Skiban, Kazakhstan Reviewed the Procedure for Peaceful Assemblies, [V Kazakhstane peresmotreli poryadok provedeniya mitingov] Zakon KZ (April 18, 2020) <https://www.zakon.kz/5015957-v-kazahstane-peresmotre-li-poryadok.html>

[325] Supra note 317

or protection of the rights and freedoms of others, therefore, warning should not be necessarily required for all meetings, as an example, for those in which only two or three participants participate, online assemblies or in enclosed spaces indoors.[326] Despite the fact that lo-cal authorities should warn protesters when at certain point legal peaceful assembly becomes illegal peaceful assembly and should require participants to dismiss the assembly and only if they will refuse, local authority should give the order to law enforcement authorities to apply certain kind of force and this force should be aimed at dismissal of peaceful assembly. Only in 2019, 4000 people were detained in peaceful assemblies.[327] Police detained all those people without explaining the grounds for their detention and was keeping them in inhumane conditions. Among those 4000 detained people were retirees, minors, nursing mothers and disabled people, which means that our government is so afraid of its citizens' any legal moves that it detains everybody no matter their age or condition, and treats them as prisoners, who committed a serious crime. Rasul Doskarev was beaten up by police officer with a rubber club on a peaceful assembly in Nur Sultan. Judge ruled to arrest Doskaraev on charges of "violating the rules for holding peaceful assemblies." According to the wife of the victim, half of the trial was held without a lawyer and her husband refused to attend the meeting, but, despite this, the administrative case was considered, the court decided to arrest him for 10 days.[328] In Venice Guidelines and the illegal, unreasonable or unconstitutional use of force by law enforcement agencies that violate fundamental freedoms and protected rights, damage ties between the police and community, and trigger general tensions and disturbances.[329] The use of force, as a result, shall be coordinated by domestic legislation. These guidelines would establish circumstances justifying the use of force (along with the demand for appropriate prior warnings), as well as a level of force necessary to battle different forms of violence and threats. International principles support comprehensive guidelines on the use of force in the context of dispersing both illegal as well as non-violent assemblies. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers state that "when dispersing assemblies that are illegal but non-violent, law

Enforcement officials should avoid using force or, if this is not possible", should limit afore-mentioned force to the least required degrees. Moreover, the UN Basic Principles specify that

12 326 *Supra note 319*

327 Four Thousand People Arrested in Kazakhstan for 2019 During Peaceful Assemblies [Chetyre Tysyachi Chelovek Byli Zaderzhany v Kazakhstane za 2019 God vo Vremya mirnyh mitingov] Tengrinews, (June 18, 2019) <https://ten-grinews.kz/kazakhstan_news/4-tysyachi-zaderjali-vremya-mitingov-kazakhstane-371609/amp/> accessed April 18, 2020

328 16 Sanat Urnaliev, After the Peaceful Assemblies. Courts, Fines and Arrests, [Posle Mitingov. Sudy, Shtafy i Aresty] Radio Azattyq, (April 18, 2020) <https://rus.azattyq.org/amp/29919771.html>

329 *Supra note 317*

"when dispersing violent assemblies, law enforcement officers may use firearms only when less dangerous means are not feasible and only to the minimum necessary degree".[330]The government needs to develop interventions that allow for a class-based and balanced use of force. These measures should include the production of weapons that are not capable of neutralizing for use in appropriate situations. In addition, law enforcement officers should wear personal protective equipment such as a shield, helmet, fire retardant clothing and a bulletproof vest to reduce the need for weapons and moreover, vehicles shall be provided to reduce the necessity for them to apply any kind of ammunition.19 This emphasizes the need for the state to provide sufficient resources for law enforcement, based on the state's positive duty to protect the freedom of assembly.

The next amendment may include not specifying the place of peaceful assembly in outskirts. Now the two sanctioned places in Almaty are the Gandhi Park and the park located near the Sary-Arka cinema. Both of these places are located not in the centre of the town, subsequently not all people are able to come and participate in the peaceful assembly, not to speak about attracting attention of the public. Sorts of limits that might be demanded from an assembly present its "time, place, and method". The term comes from the US Case law and reflects the feeling that the regulator has access to a wide range of possible restrictions that do not impede communication.[331] In other words, instead of choosing to intervene and ban, the authorities address the goals they set for them-selves (including preventing behaviours that harm property) or "moderate" restrictions that are harmful to people. These limitations may apply to changes in the time or location of an event or method. An example of "style" restrictions might be connected to use of audio or lighting devices and visual effects. In this case, an arrangement may be required depending on the location or time of the day the meeting was proposed. In this situation, adjustments may be required depending on the venue or time of day. The governing body should not apply restrictions to prevent possible riots or interference with the rights of others. The ability to apply restrictions during an event (rather than before it occurs) allows the government to avoid imposing pre-existing restrictions, which provides for a number of restrictions and reflects how the situation is evolving. This, however, does not in any way mean that the authorities may shirk their obligations regarding good governance by simply regulating freedom of assembly by administrative order. In addition, the use of negotiations and / or rejection can help resolve disputes around

[330] Supra note 319

[331] Supra note 318

assemblies by allowing law enforcement and the event organizer to agree on any necessary restrictions.

In Kazakhstani law "About the Organization and Conducting of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations in the Republic of Kazakhstan" it is not clearly indicated the grounds for restrictions of an assembly. It is only stated that the organizers and participants of the event are prohibited from: obstructing the movement of vehicles and pedestrians, interfering with the smooth functioning of infrastructure facilities of a settlement, establishing yurts, tents, other temporary structures without coordination with the local executive bodies of the city of republic can significance, the capital, district (city of regional significance), damaging green spaces, small architectural forms, carrying with them cold steel, firearms and other weapons, as well as specially prepared or adapted items that can be used against human life and health, for causing material dam-age to citizens and property of legal entities and intervening in any form in the activities of representatives of state bodies that ensure public order during events. While the Committee has frequent-ly stated that the right to peaceful freedom of assembly is subject to extreme and sometimes illegal restrictions. Restrictions shall meet strict requirements and proportions, and the State Party must demonstrate compliance with these constraints. "Proportionality was conceived based on a language of excessive breadth: " Any restriction on freedom of expression should not be too broad in nature, it should be mandatory for all measures that can provide the necessary protective function" and in proportion to the interest whose protection is sought. In Venice Guidelines it is highlighted two types of restrictions.[332] First one is content-based restriction, where speech and other forms of expression, as a rule, enjoy protection in accordance with Article 19 of the ICCPR and Article 10 of the European Convention on Human Rights. Generally, organizing public meetings should not be based on the content of the messages they want to convey. European Convention on Human Rights lately mentioned that "it is unacceptable from the point of view of Article 11 of the Convention that an interference with the right to freedom of assembly can be justified simply on the basis of the authorities' own opinion on the merits of a specific protest". This principle is clearly reflected in an extract from Dutch law at public meetings cited below. Therefore, restrictions on the visual or acoustic content of a displayed or recorded message should be carefully checked (sometimes referred to as "serious" or "alarming") and should only be applied when there is an immediate risk of violence. Moreover, judgement from the government or officials should never be sufficient to limit freedom of assembly. The European Convention on Human Rights often

[332] Supra at 317

states that "the limits of acceptable criticism are wider for the government than for private citizens".[333] The question of whether the violence is deliberately provoked is one which must inevitably be assessed in the light of the particular circumstances. Few problems appear when the relationship refers to illegal activities or when it can be interpreted as meaning to encourage other people to take non-violent but illegal actions. The extreme encouragement for illegal activities is often different from rude behaviour and should therefore not be limited to public policy. The primary criterion should still be the forth-coming threat of violence. If insignia, uniforms, emblems, music, flags, signs or posters that should be displayed or reproduced during a meeting evoke a memory of a painful historical past, this in itself should not be grounds for interference with the right to freedom of peaceful assembly to de-fend the rights of others. At the same time, if these symbols are natural and apply only to physical violence, the assembly may be restricted by law to prevent the recurrence of such violence or to protect other rights. While taking part in a peaceful assembly it is should not be forbidden to wear a mask for expressive purposes unless the mask or costume is not worn by the person whose behaviour creates a probable reason for the arrest, and until the mask poses a clear and real danger of possible illegal behaviour. Still, Kazakhstani legislation is planning to include in the new edition of the law the prohibition of wearing face masks or hijabs, which contradicts the Venice Guidelines. In addition, in Kazakhstani law it is not distinguished the impossible grounds for restricting the peaceful assembly. When in Venice Guidelines the grounds listed in article 21 of the Covenant: "no restriction of this right is permitted, unless it is provided for in accordance with the law; and (b) necessary in a democratic society". For example, the Committee is particularly concerned about legal provisions by providing broad authority for road traffic.

The last amendment does not include the behaviour of law enforcement officials, despite the fact that civilians left 23 comments in online site regarding this issue. The Committee often ex-pressed concern about the protection of assemblies and sometimes the role of local and municipal authorities. In Coleman v Australia (2003), a State party unsuccessfully challenged admissibility ratione personae because the complaint was directed at a police sergeant, city council, and federal state "that are not States parties to the Covenant". The Committee categorically rejected this, stating that “the actions and inaction of constitutional political units and their officials are charged with the state. In particular, participating States are obligated to protect the lives of demonstrators: “Member states should take measures not only to prevent and punish the deprivation of life as a result of criminal acts, but also to

[333] European Convention on Human Rights 1953

prevent arbitrary killing by their own security forces". General Provisions Comment 37 will build on - and build on - a discussion of "less deadly weapons" in the Commit-tee's General Comment 36 : States parties should give preference to more deadly weapons, which should establish that "less deadly" ammunitions are subjected to rigorous independent testing, as well as assess and monitor the impact on the right to life of weapons such as electro-muscle tissue destruction devices (tasers), rubber or foam bullets and other attenuating energy shells that are intended to be used or actually used by law enforcement officials, including soldiers who entrusted with law enforcement missions.[334] But, as it as mentioned before the victim Rassul Doskarev was beaten up with rubber by a law enforcement official. The use of such weapons by adequately armed law enforcement officers should be strictly regulated by international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In addition, such a "less deadly" can be used only when there are strict requirements of necessity and proportion, when other harmless measures are open or ineffective in eliminating the threat.

State parties should not resort to "less deadly" weapons in crowd control situations that can be re-solved by less harmful means, especially in situations involving the exercise of the right to peaceful assembly. An important element of the protection afforded by the Covenant to the right to life is the obligation of States parties where they know or should. Be aware of possible illegal deaths, investigate such incidents, including allegations of abuse of violence with fatal consequences, and prose-cute if necessary.

Kazakhstani legislation on peaceful assembly needs amendments based on worldwide standards. The law is very narrow and does not cover many terms and explanations, which then create misunderstandings among populations and subsequently, leads to detentions.

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[334] Supra at 318