

ISSN 2231-0355



Journal of
PARLIAMENTARY STUDIES
INSTITUTE OF PARLIAMENTARY AFFAIRS, GOVERNMENT OF KERALA

VOL. 11 • ISSUES (1&2) • JANUARY-DECEMBER 2019
(Printed in February 2022)





INSTITUTE OF
PARLIAMENTARY AFFAIRS
GOVERNMENT OF KERALA

Published by Dr. Raju Narayana Swamy, Director General (i/c), INPA
Printed and Owned by Registrar, INPA
Design : Graphic Designing Section, Government Central Press
Printed by the Superintendent of Government Presses
at Government Central Press, Thiruvananthapuram-695 001

Published from Institute of Parliamentary Affairs
Govt. of Kerala, Thiruvananthapuram
Tel: 0471 - 2339266/2331080
Website: www.ipaffairs.org,
E-mail: mail.inpa@gmail.com



Journal of
PARLIAMENTARY STUDIES

VOLUME 11 • ISSUES (1&2) • JANUARY- DECEMBER 2019

PEER REVIEWED BI-ANNUAL JOURNAL OF
INSTITUTE OF PARLIAMENTARY AFFAIRS, GOVERNMENT OF KERALA

INSTITUTE OF PARLIAMENTARY AFFAIRS
GOVERNMENT OF KERALA

JOURNAL OF PARLIAMENTARY STUDIES
(Peer Reviewed Biannual: Published since 2010)

Editor:

Dr. Raju Narayana Swamy IAS
Principal Secretary to Government of Kerala,
(Parliamentary Affairs Department)
& Director General (i/c) INPA.

Annual Subscription:

Individuals	:	Inland` 200.00	Abroad \$20
Single Copy	:	Inland` 200.00	Abroad \$20
Institution/Library	:	Inland `200.00	Abroad \$20
Life Members of INPA	:	Inland `300.00	Abroad \$15

Bank drafts /Postal orders should be drawn only in favour of
"The Registrar, Institute of Parliamentary Affairs, Government of Kerala"

For subscription to be sent to:

The Editor

Journal of Parliamentary Studies, Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051, Shanthi Nagar
Near Government Press, Thiruvananthapuram - 695001
Email: mail.inpa@gmail.com

Published by Dr. Raju Narayana Swamy, Director General (i/c), INPA	Published from Institute of Parliamentary Affairs
Printed and Owned by Registrar, INPA	Govt. of Kerala, Thiruvananthapuram
Design : Graphic Designing Section, Government Central Press	Tel: 0471 - 2339266/2331080
Printed by the Superintendent of Government Presses	Website: www.ipaffairs.org,
at Government Central Press, Thiruvananthapuram-695 001	E-mail: mail.inpa@gmail.com

Contents

Page

Parliamentary Democracy : The bridge to our Ecological Civilisation of Vasudhaiva Kutumbakam and our Constitution based on Diversity and Pluralism Vandana Shiva	1
On the Significance of Plant Intelligence for Sound Cultivation Savyasaachi	5
Ramifications of The Divya Pharmacy Judgement The Need for A Two Step Ad-Valorem Royalty Model Raju Narayana Swamy IAS	15
Jammu and Kashmir in a Melting Pot Constitutional Democracy under Siege K. M. Seethi	29
'New' Developmental State and Enduring Ethnic Anxieties in Northeast India V. Bijukumar	41
Asia Floor Wage, International Labour Standards and 21st Century Issues Krishnakumar S	53
The State and the Individual: Mahatma Gandhi on Dissent Teresa Joseph	63
National Education Policy 2020, Higher Education Reforms and Public Universities in India: Promises, Practices, and Problems Saranya Antony. A	76

Our Contributors

Dr. Bijukumar V.

Associate Professor at the Centre for Political Studies,
School of Social Sciences, Jawaharlal Nehru University, New Delhi

Dr. Krishnakumar S.

Teaches at the Department of Economics,
Sri. Venkateswara College, University of Delhi

Dr. Raju Narayana Swamy IAS

Principal Secretary to Government of Kerala,
(Parliamentary Affairs Department)
& Director General (i/c) INPA.

Saranya Antony A.

is a doctoral candidate in the School of International Studies,
Jawaharlal Nehru University, New Delhi

Savyasaachi

Teaches at Department of Sociology,
Jamia Millia Islamia, Delhi, India

Prof. K. M. Seethi

Dean of Social Sciences and Professor,
School of International Relations and Politics,
Mahatma Gandhi University, Kottayam, Kerala

Dr. Teresa Joseph

Associate Professor in the Department of Political Science and
Director of the Centre for Gandhian Studies,
Alphonsa College, Pala, Kerala

Dr. Vandana Shiva

A physicist, ecologist, activist, editor and author of numerous books
and above all a tireless defender of the environment



From the Editor's Desk

As I put pen to paper, the world continues to battle the corona virus and its variants including Delta and Omicron. Covid -19 has brought multiple unprecedented critical challenges to the modern international community. It has severely shaken politics, the economy, environment and most importantly health care. While the world readjusts to the new reality under continuing statistics, lock downs and social distancing, the buzzword is resilience - the ability to recover from setbacks, adapt well to changes and keep going in the phase of adversity, nay to peer through the fog of the pandemic caused uncertainty.

Covid has exposed our pervasive dependence on private pharmaceutical companies. Despite tall claims being made by them that it is not business as usual anymore, the reality is different and the operation of the industry has not been fundamentally altered. Add to these the vaccine and treatment nationalism which has had a significant negative impact on public health and the picture is complete. The data on vaccine procurement and vaccination shows that most rich nations embarked on a part different from that of justice. This underlines the crying need for equity and collaboration - the moral constellation that helps us find the way whenever darkness engulfs us. It needs special mention here that these are the cornerstones of democracy which is an ideal that mankind should strive for, though not an ideology to be prescribed - an institution for the strengthening of which INPA is wedded to.

Needless to say, the time has come to think beyond the pandemic, make sure that all key sectors fall back in track and take proactive steps to launch a frontal assault on the citadels of the deeper crises that loom large over mankind - problems that range from poverty to pollution. It is in this backdrop that this journal is being brought out. We at INPA do earnestly hope and trust that this volume will be a reader's delight - interesting as well as informative.

Thiruvananthapuram,
02/02/22.

Dr. Raju Narayana Swamy IAS,
Principal Secretary to Government of Kerala,
(Parliamentary Affairs Department)
& Director General (i/c) INPA.

Parliamentary Democracy : The bridge to our Ecological Civilisation of Vasudhaiva Kutumbakam and our Constitution based on Diversity and Pluralism

Dr Vandana Shiva

A robust, vibrant parliamentary democracy is vital for Earth Democracy, which enfolds both the principles and values of our ecological civilization based on Vasudhaiva Kutumbakam, the Earth as one family, as well as the decentralized, participatory democracy in the idea of Swaraj as self rule and self governance - from the local, to the regional, to the national.

India is a pluralistic and decentralized civilization. We have avoided the centralizing urge of a Hobbesian state which assumes ecological and societal chaos as the state of nature and society in the absence of a centralized centre of external control. That is why our laws are built on rights of the people and communities, and a federal structure which is a union of states based on the principles of self organization, cooperation and mutuality. Diversity and decentralization weave the fabric of democracy and freedom - they create political, economic and ecological resilience.

As a civilization, we have avoided the anthropocentric errors of the West of seeing humans as superior to other species and nature as separate from humans. Through parliamentary democracy we have avoided the hubris of claiming that other species are our inventions, our intellectual property, which can be owned through patents on animals, plants and seeds.

I have dedicated my life to upholding the deeper values of Vasudhaiva Kutumbakam through my work in Navdanya, the biodiversity movement. We worked with an all party parliamentary committee to ensure that our civilizational values of the Earth as one family were not undermined by the greed of a handful of global chemical corporations who are the agrichemical and seed industry as well as the pharmaceutical industry who want to patent lifeforms, seeds and our indigenous knowledge embodied in our biodiversity.

Patents on life violate the "Ordre Public" or moral order embodied in the philosophy of Vasudhaiva Kutumbakam, all beings on earth as a family. IP laws need to be subjected to ethical criteria, criteria of justice, and on a clear definition of *invention*.

Our Parliamentarians wrote an Section 3(j) in the Patent Act that clearly prohibits patents on life.

Article 3(j) excludes from patentability “plants and animals in whole or in any part thereof other than microorganisms; but including seeds, varieties, and species, and essentially biological processes for production or propagation of plants and animals”.

Life forms, plants and seeds are all evolving, self-organized, sovereign beings. They have intrinsic worth, value and standing. Owning life by claiming it to be a corporate invention is ethically and legally wrong. Patents on seeds are legally wrong because seeds are not an invention. They are ethically wrong because seeds are life forms, they are our kin, members of our earth family.

In 2004, both India and the US introduced new seed laws that criminalised the saving of traditional/heirloom varieties of all seeds. By outlawing the availability of renewable, open-pollinated seeds, corporations selling non-renewable patented seeds would be able to force everyone, from a large scale farmer to a balcony gardener, to buy only the seeds they sold, ensuring an absolute monopoly.

In India, hundreds of thousands of citizens petitioned the government and worked with the Parliament to roll back the Seed Law of 2004.

We recognise that the diversity of our crops has been evolved and bred by our farmers. As Dr Richaria taught us , Indian farmers evolved 200,000 rice varieties from one wild grass ,*oryza sativa*

India’s law titled Protection of Plant Varieties and Farmers Rights Act, 2001 has a clause on Farmers Rights.

“a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act”

There is no such protection for citizens and farmers of the US. Not only are citizens in the US being denied their right to know what they are eating, they are now being denied their right and duty to save and exchange seed. The Seed Laws of 2004 have been used in Pennsylvania, Maryland, and now Minnesota to shut down seed libraries.

Seed saving is the foundation of Bija Swaraj in our times. It is vital to our ability to address hunger and malnutrition. Seed Saving is vital to bring back taste, nutrition and quality in our food. And without conservation and evolution of the biodiversity of our seeds ,we will not be able to adapt to climate change.

Our National Biodiversity Act is another law that upholds our ecological civilisation as well the democratic principles of Swaraj , the rights of local communities to their biodiversity and the knowledge associated with it .¹

The Indian Biodiversity Act was the implementation of the International

Convention on Biodiversity in the context of the growing recognition that biodiversity is at the heart of sustainability and conservation of biodiversity is an ecological imperative . The International law and National Act were also written to regulate emerging biotechnology industries , the global chemical, seed, and pharmaceutical industries which are one and the same.

The Preamble clearly states the Biodiversity Act is

An Act to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge

The Biodiversity Act has prevented biopiracy , the false claim of “inventing” the properties of seeds and medicinal plants evolved by nature and local communities .

We are a civilization of Vasudhaiva Kutumbakam, the Earth as one family . In our culture and indigenous sciences , all beings have intrinsic worth. Biodiversity is the contemporary word for diversity of living beings with their self organisation, their self meaning and self worth . For the Western Colonial powers, other life forms and species are mere raw material resources to be commercially exploited .

There is an attempt to amend the Biodiversity Act under global corporate influence.ⁱⁱ

Over the last 3 decades, the chemical industry of the rich North including the big Pharmaceutical companies and the big Seed Companies have been trying to get access to our rich biodiversity and its associated indigenous knowledge .They have neither the biodiversity nor the knowledge associated with it .The countries of the South are rich in biodiversity and biodiversity based knowledge systems and production systems . The colonizing countries of the North became rich through extraction of our resources and rents through Lagaan . The British extracted \$45 trillion from India during their rule.ⁱⁱⁱ

For a century , the production systems of the rich countries have been based on fossil fuels and petrochemicals. The petrochemical industry is now turning to biodiversity to develop their biotechnology with Intellectual Property Rights and Patents. In the context of biodiversity , patents are a new form of Lagaan , of extraction through rent collection which I have called Bija Lagaan , extraction of royalties on biodiversity and indigenous knowledge stolen from us .

Substituting the word “resources” for “diversity” in the title Chapter II of the principal act is a violation of our indigenous world view, the world view of our tribals and farmers and also a violation of ecological science that recognizes that biodiversity weaves the web of life and is not merely a resource for extraction .

In the proposed amendment, there is an attempt to centralize the powers in one Authority , eroding the powers of states and communities to protect our biodiversity , and our democracy that flows from biodiversity .

Today, just as in Tagore’s time, we need to turn to nature and the forest for lessons in freedom and democracy .

In “The Religion of the Forest,” Tagore wrote about the influence that the forest dwellers of ancient India had on Indian Civilisation

Our parliamentary democracy has enshrined this in law through PESA , the Panchayats (Extension to the Scheduled Areas) Act^{iv} and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Dwellers (Recognition of Forest Rights Act 2006)).^v

These laws need to be upheld and strengthened, not diluted and undermined to protect the rights of people guaranteed in the Indian Constitution , and the rights of communities who are the true custodians of India’s Ecological Civilisation based on diversity , both biological and cultural . Diversity is the organising principle of our civilisation .

In his essay “Tapovan” (Forest of Purity), Tagore writes: “Indian civilization has been distinctive in locating its source of regeneration, material and intellectual, in the forest, not the city. India’s best ideas have come where man was in communion with trees and rivers and lakes, away from the crowds. The peace of the forest has helped the intellectual evolution of man. The culture of the forest has fuelled the culture of Indian society. The culture that has arisen from the forest has been influenced by the diverse processes of renewal of life, which are always at play in the forest, varying from species to species, from season to season, in sight and sound and smell. The unifying principle of life in diversity, of democratic pluralism, thus became the principle of Indian civilization.”

It is this unity in diversity that is the basis of both ecological sustainability and democracy. Diversity without unity becomes the source of conflict and contest. Unity without diversity becomes the ground for external ,centralised, authoritarian control. This is true of both nature and culture. The forest is a unity in its diversity, and we are united with nature through our relationship with the forest and biodiversity .Diversity is the way of our land, our cultures, our civilisation, our democratic pluralism .

In “The Religion of the Forest,” the poet says that our frame of mind “guides our attempts to establish relations with the universe either by conquest or by union, either through the cultivation of power or through that of sympathy.”

The forests are sources of water and the storehouses of biodiversity that can teach us the lessons of democracy—of leaving space for others while drawing sustenance from the common web of life. Tagore saw unity with nature as the highest stage of human evolution. This is the evolutionary path our parliamentary democracy protects and nourishes.

ihttps://www.indiacode.nic.in/bitstream/123456789/2046/1/200318.pdf

iihttp://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/158_2021_LS_Eng.pdf

iiihttps://economictimes.indiatimes.com/news/politics-and-nation/british-looted-45-trillion-from-india-in-todays-value-jai-shankar/articleshow/71426353.cms?from=mdr

ivhttps://legislative.gov.in/sites/default/files/A1996-40.pdf

vhttps://www.indiacode.nic.in/bitstream/123456789/8311/1/a2007-02.pdf

On the Significance of Plant Intelligence for Sound Cultivation

Savyasaachi

Correspondence: savyasaachi@gmail.com

The contemporary agrarian crisis has three significant aspects. First, mainstream agrarian knowledge systems are created by manipulating plant living materials, depriving them of their resilience and immunity. Second, it increases the distance between the consumers and the producers of agricultural goods. Third, it gives low priority to the large population of marginal cultivators, who have to depend on government programmes and capital-rich farmers, especially when they run into crisis on account of crop failure and indebtedness.

I would like to argue that to overcome this crisis will require a shift to a radically different system of knowledge and its concomitant practices that understand the significance of plant intelligence. These practices will be averse to manipulating plant living materials, will give priority to marginal cultivators, and contribute to reducing the distance between the consumer and the producer. These attributes make a cultivation system sound.

Marginal farmers need to be given priority because they are the backbone of the agrarian system: they are a large workforce and several of them are sensitive to plant intelligence on account of a working day-to-day relationship with plants on cultivated land, and in landscapes.

The Agrarian Crisis and Marginal Cultivators

Mainstream modes of addressing the contemporary agrarian crisis use modern and traditional knowledge to enhance food crop production. The former uses pesticides, genetically modified seeds, and mega hydro-electric dam-based canal irrigation. The latter uses organic manures, indigenous seeds, lift-irrigation, etc. The intention of using traditional knowledge is to undo the damage caused by modern agricultural knowledge, such as loss of crop and seed biodiversity, loss of nutritional substance, loss of crop resilience, loss of ground water etc.

These two knowledge systems are the basis of agricultural practices as well as of their respective social structures that can be sustained by rich and some middle class farmers who have capital reserves and large farms.

Limits of mainstream Knowledge

The contemporary agrarian crisis is a consequence of the alienation of landscapes of non-human nature from the cultivation of food crops. An aspect of this alienation is the indifference to the autonomy of landscapes of a non-human nature (both living and non-living) and disrespect for the way members of such landscapes – plants, birds, animals, trees, mountains, rivers, insects, etc. – communicate with and relate to each other and to human beings, contributing to shaping an inclusive collective social life.

It can be argued that this alienation over time created conditions for the innovation, use and dependence on pesticides, genetically manipulated seeds, and dependence on international market price fluctuations. This alienation has also exposed non-human landscapes to rising pollution and its cumulative resultant phenomenon – climate change. This severely damaged communication networks between members of human and non-human nature.

The motivation to do away with such dependence with organic farming, biodynamic farming and natural farming etc., have caught the imagination of several entrepreneurs. This is a welcome development. However, it is not sufficient to heal the damage to non-human nature caused by exposure to pollutants and their cumulative phenomenon, climate change.

Working with forest dwellers, I witnessed a tradition of communication between plants and human beings. There is a resonance of this in the discussions on plant intelligence. Here, non-anthropocentric intelligence is coming to light. This could become the basis for sound cultivation of food crops, contributing to building and enriching communication between humans and non-human nature, thereby overcoming their alienation for an inclusive collective social life.

Plant Intelligence and Landscape Cultivation

Koitors are forest dwellers who describe their habitat as *ShringarBhum*. Geographically, they are located in North Bastar, Chhattisgarh. They are marginal cultivators who practice landscape cultivation.

They understand plant intelligence as the basis of systems of communication and inter-connections between human beings and all aspects of living landscapes. They recognise that a living landscape is the habitat of communication between communities, plants, animals, waterways, hills, mountains, and stones. On the one hand they understand that this social life of living landscapes is autonomous, and interdependent with human beings existing alongside. On the other hand, they also understand that human beings with a different autonomous system of communication have an equally interdependent relation with plants. They acknowledge that this

interdependence is relative to the presence of each in the neighbourhood of the other. That is to say, their co-presence assures their respective autonomy.

Their landscape cultivation practice ensures a healthy and happy landscape which is described by them as *ShringarBhum*. This practice has the following four aspects:

First, it is based on the knowledge of the life cycle of water, plants and animals in order to harvest them in tune with their rhythms. For instance, not to eat fruits before they are mature.

Second, it requires the skill of making small clearings marked for this purpose alone, selected on the basis of vegetation type and topsoil quality. For instance, non-fruit bearing trees predominate and vegetation on the ground is low.

Third, at the foundation of this practice are sacred groves, from where nothing can be taken or removed, not even a dry leaf fallen on the ground. Such sites are distinguished by sacred trees that are propitiated.

Fourth, to be cognizant that the intention of such practice is to enrich the topsoil, do nothing that will destroy it, and do everything to enrich it.

The underlying principle is: “that which is not the product of human labor cannot be possessed and has to therefore be looked after, taken care of.” This principle informs the relationship between human beings and the landscape, its mode of use and a sense of responsibility towards it.

Koitors ensure that in their yearly cultivation cycle the relation between the small clearing and the landscape is mediated by fallow cultivation. That is to say, fallow cultivation orients small clearing cultivation. Fallow cultivation refers to no interference, with the intention to show respect to plural time of life cycles that shape a living landscape. During this time the clearing is not cultivated. This is the time when human and non-human nature come together as a community, in communication nurtured by each other’s quiet presence. Fallow is inclusive of all living beings, human and non-human. It ensures the welfare of all.

Koitors indicate that crops cultivated in small clearings, plants in the landscape, water ways, hills, mountains and stones communicate with each other, and have a social life. They share their sorrows, their joys, their life experiences, in the process enhancing each other’s potential. On account of this social life, a living landscape makes everyone feel happy. This shows in the uprightness, the texture, the luminous colours and the abundant diversity of life forms.

Some Koitor elders described to me an important aspect of this communication system – a robust system of exchange between the clearing and its surrounding

landscape. This, they argued, follows from the principle underlying landscape cultivation, namely, that which is not a product of one's labor cannot be owned and has to be cared for. The boundaries between them are defined by reciprocal welfare. For instance, the cultivated crop in the clearing is not the exclusive property of human beings and equally, the edible plants are not exclusive to the landscape. For instance, living beings in the landscape can eat cultivated plants and the human beings gather food from landscapes.

If this principle is respected in the cultivation practices, then both (human beings and non-human living beings in the landscape) will take only so much that it will not deprive the others. According to the Koitors, the practice of fencing (guarding) cultivated clearings from living beings inhabiting the landscape (such as animals), begins when human beings begin to deprive them of their share.

Conceptually, fallow time in landscape cultivation fosters conjoint behaviour, discussed by John Dewey in his article on "Social as a Category" (Dewey, 1928). Conjoint behaviour enhances the potential of togetherness.

Denial of the opposition between the social and the natural is, however, an important element of the *meaning* of "social" (p165)...Social *phenomena* are not of themselves, of course, equivalent to social as a *category* (p168). ...When we return to the social, we find that communication as the existential occurrence involved in all distinctly communal life, and we find that communication effects meaning and understanding as conditions of unity or agreement in conjoint behaviour (p172)...The view of those is superficial who fail to see that in the social the physical is taken up into a wider and more complex and delicate system of interactions so that take on new properties by release of potentialities previously confined because of the absence of interaction (p 169).

A testimony to the efficacy of this principle is that between the village settlement and the forest there are no fences, land is contiguous. During the day Koitors visit the forest and at night the forest beings come to visit the settlement.

This demonstrates that intersubjectivity with non-living beings ensures conjoint behaviour. Respect for plant intelligence presupposes reverence for life, which is absent in current agricultural practices. It is equally possible that the experience of intersubjectivity with plants can induce reverence for life.

Fallow Time, Marginal Cultivators and Plant Intelligence

Not all marginal cultivators have their small productive clearings nested in forested landscapes. A large majority are far from the forest, with their unproductive clearings in the midst of barren landscapes. They have to work with knowledge systems

(both modern and traditional) that do not harness the potential of fallow time. Fallow time is seen as a liability on the monetary cycles of capital reproduction. To be polite, there is no respect whatsoever for living forms, who are manipulated slaves. These are of mere instrumental value for achieving economic and political objectives. Here plants are deprived of their social life by destroying their conjoint behaviour. Human and non-human beings are alienated from each other.

Koitors have worked with marginal cultivators to restore the landscape and generate productive clearing. In their experience, the process begins with including fallow time as an integral component of marginal farmers. The making of a sacred grove inaugurates fallow time. Here, species native to the geography of the place are given a sanctuary to mature at their own rhythm, free from any pressure from the markets and time-bound performance. During this time, plant intelligence has the opportunity to work. Plants, in this sanctuary, open up communication channels with the rest of the landscape – above the earth and under it – and other living beings begin to come to this sanctuary. It prepares the ground for cross pollination and inaugurates a food chain.

This is the beginning of the restoration process.

Understanding Plant Intelligence

In the observer-centred view, thinking and intelligence are used interchangeably, as aspects of the mind located in the brain.

Intelligence of beings with a brain is reflected in thinking, which may or may not translate into communication. Intelligence of beings without brains, such as plants, is reflected in the way they communicate, undeterred by the ‘absence of thinking’.

The distinction comes from the difference in their modes of memory.

Heidegger in his first lecture on “What is Called Thinking (Heidegger, 1954, p. 3-4)” says:

Memory is the gathering of thought. Thought of what? Thought of what holds us, in that we give it thought precisely because It remains what must be thought about. Thought has the gift of thinking back, a gift given because we incline towards it. Only when we are so inclined towards what in itself is to be thought about, only then are we capable of thinking.

Here memory, inclusive of recollection and remembering, is the gift of thinking “back” in order to hold on to it. We also know that this gift of thinking guided by concepts, words and images is grounded in labour teleology (as discussed by Lukacs (1978)).

Indigenous voices across the world have indicated that this mainstream knowledge system is based on and promotes anthropocentric intelligence. What this means is that it is observer-centric in so far as it privileges the observer over the observed. It has been pointed out that the gaze of the mainstream knowledge system has ‘fixed’ not only people but the entire realm of non-human as ‘observed’ under the microscope or under surveillance. This gaze denies subjectivity to the observed.

It is suggested in the example of landscape cultivation that indigenous people put forward a different point of view: all non-human nature – animals and plants along with other aspects of the landscape – constitute a living system and therefore have intelligence. To know of this, Koitors point out that the realm of non-human nature is observing the observer. This is as if, when walking in a particular landscape, say the forest, a person is aware that the trees, the birds, the insects, the hills ... are saying to each other, “we know who this person is”. They remember.

Memory plays a very significant role here. But here memory is not the gift of thinking back.

In this regard, Rupert Sheldrake (1988) tells us about animals:

In 1980’s neuroscientists discovered that when animals watched other animals doing something, for example a monkey peeling a banana, changes in the motor part of their brains mirrored those in the brain of animals they were watching. These responses were described in terms of ‘mirror neurons’. But this term is misleading if it suggests a special kind of nerve. This is better thought of as a kind of a resonance. In fact, Vittorio Gallese, one of the discoverers of the mirror neuron refers to the imitation of movements or actions by another individual as ‘resonance behaviour’

Here, memory that mirrors resonance is an aspect of ‘mind’ (that is not a gift of thinking). This could be described as an aspect of the ‘Inclusive of Mind’. Stefano Mancuso (2017) argues:

It isn’t too difficult to imagine that intelligence is not the product of one single organ but that it is inherent in life, whether there is brain or not...

With regard to plants, Stefano Mancuso, in a discussion on “Memories without a brain” argues:

“All plants are capable of learning from experience and therefore have memorization mechanisms. If you submit a plant, for example an olive tree, to a stress such as drought or salinity, it will respond by implementing the necessary modifications to its anatomy and metabolism to ensure its survival. Nothing unusual in that, right? If, after a certain amount of time, we

submit the same plant to the exact stimulus, perhaps with an even stronger intensity, we notice something that is surprising only on the surface: this time, the plant responds more effectively to the stress than it did the first time, It has learnt its lesson”.

Memory here is not determined by the ‘gift of looking back’ and is not an expression of teleology of labour, its agency and practice. It is not the ability to not forget, or the capability to memorise facts and figures. This memory, with or without a brain, records resonances of experiences that give rise to morphic structures. It retains the imprint of the event mirrored.

Plants are intelligent: they communicate with each other and memorise the resonances of human beings. They do not require a brain.

In this communication, the observer is observed by animals and plants. With the awareness of being observed by animals and plants, the observer begins observing ‘its-self,’ and this makes it possible to ‘see,’ the difference and relationship between one’s (observers) own self and the entire realm of non-human nature wherein the act of observation is happening.

In this recursive reciprocal communicative relationship-‘the observer is the observed’-clears the ground to explore the intelligence of plants. The intersubjectivity generated from the reciprocity of the observer and the observed makes it possible to see that ‘thinking’ is only one aspect of intelligence. Thinking communicates conceptual intelligence only as an aspect of the ‘inclusive mind ’ which is located not only in the physical brain material, but in other physical materials of trees and plants. Its resonances continue to exist independently after the physical matter decomposes and dissolves, in the course of its life cycle. This recursive reciprocal communication triggers a semiosis.

Eduardo Kohn (2013) argues that we can understand how forests think by observing semiosis:

Semiosis is the name for this living sign process through which one thought gives rise to another, which in turn gives rise to another, which in turn gives rise to another, and so on, into the potential future (Kohn, 2013, p. 33).

This understanding of semiosis is observer-centric. By describing it as a chain reaction of thoughts, it excludes the intersubjectivity of the observed (plants and animals). It does not account for several ethnographic passages, in the book, that suggest that the amazon people are aware of being observed by animals. This oversight is because the definition of semiosis focuses on a chain reaction of thoughts which are expressions of thinking associated with a particular kind of memory described earlier as ‘thinking back’.

Animal and plant memorization, as we have noted, are mirror resonances (and are not memorizations thinking back).

The observer-observed intersubjectivity between human and non-human beings defines the

non-anthropocentric semiosis of the inclusive mind. Plant semiosis can be observed in the subtle behavioural changes acknowledging co-presence.

Richard Grant (2018) in his article “Do trees talk to each other?”, shares his conversation with German Forester Peter Wohlleben, a tree whisperer.

Wohlleben takes me to two massive beech trees growing next to each other. He points up at their skeletal winter crowns, which appear careful not to encroach into each other’s space. “These two are old friends,” he says. “They are very considerate in sharing the sunlight, and their root systems are closely connected. In cases like this, when one dies, the other usually dies soon afterward, because they are dependent on each other.

Co-presence is seen in conjoint behaviour (discussed above). Whispering is a mode of communicating presence, it is free of signs, symbols, signals all of which constitute non-verbal visual concepts. Whispers are soft sounds to be uttered and received in most intimate relations. It is quiet communication between quiet beings.

Eduardo Kohn misses out on the whispers. In a discussion on “knowing without knowing,” he wonders:

How could Ameriga, Delia, and Luisa presume to guess at what their dogs were thinking?...Granted, that Ameriga, Luisa and, Delia will never know with certainty what their dogs were thinking...but they could make some good guesses (Kohn, 2013, p.86).

Eduardo does take this wonderment to Ameriga, Delia, and Luisa! The reader is left wondering what these three ladies would have said!!!

We take Eduardo’s question to Peter Wohlleben: ‘How did he know the intimacy between the two massive beech trees growing next to each other?’

I cannot speak for Peter Wohlleben. However, I can venture to share my understanding. Peter Wohlleben heard the whispers between the two big birch trees.

Good guesses are necessary when there is lack of attunement.

Peter Wohlleben and the trees are perhaps attuned to each other!! His entire work in “Secret Networks of Nature (Wohlleben, 2017)” is testimony to his attunement.

Social Structure for Sound Cultivation

A social structure for sound cultivation is not in agreement with the current agricultural practices based on modern and traditional knowledge, because both evolved to kill plant subjectivity and are scornful of any attempt to explore human-plant

intersubjectivity. In both systems of knowledge the observer's gaze fixes a frame to manipulate their being, as it were.

Rich and middle level farmers will remain far away from social structures of whispering, as long as they are wedded to these two systems. For this reason they will not get the benefit of plant wisdom necessary for sound cultivation.

Some marginal cultivators are plant whisperers. They are likely to be open to work with foresters, ecologists, botanists and anthropologists who are sensitive to plant intelligence and know the value of man-plant intersubjectivity.

For Discussion

There are three significant aspects of the knowledge on which sound cultivation is based:

1. The gift of thinking located in the brain is only one instance of intelligence. It is observer-centric and anthropocentric.
2. Communication with the semiosis of 'feeling co-presence' amongst beings that do not think with brains, reflects intelligence of an 'Inclusive Mind'.
3. This semiosis is integral to the human-plant intersubjectivity.

In order to grasp this with an open mind and engage with it, observer-centric ideas of subjectivity and intelligence reflected in thinking will have to be bracketed.

CONFLICT OF INTEREST

There are no competing interests.

REFERENCES

- Dewey J (1928). Social as a Category. *The Monist*, 38 (2), 161–177.
<https://doi.org/10.5840/monist192838218>
- Heidegger, M. (1954). *What is Called Thinking?* Translated by Gray, J. G. (pp. 3-4). New York: Harper & Row.
- Lukacs, G. (1978). *The Ontology of Social Being-3. Labour*. Translated by David Fernback. London: Merlin Press.
- Sheldrake, R. (1988). *The Presence of the Past-Morphic Resonance and the Habits of Nature*. (pp.269-270). New York: Vintage.

Mancuso, S. (2017). *The Revolutionary genius of Plants-A New Understanding of Plant Intelligence and Behaviour*. (pp. 5). New York: Atria Books

Kohn, E. (2013). *How Forests Think-Toward an Anthropology beyond the Human*. Berkeley: University of California Press.

Grant, R. (March, 2018). "Do Trees talk to each other?" *Smithsonian Magazine*, <https://www.smithsonianmag.com/science-nature/the-whispering-trees-180968084/>

Wohlleben, P. (2017). *The Secret Network of Nature-The delicate Balance of All living Things*. Translated from German by Jane Bilinghurst, J. London: The Bodley Head, An imprint of Vintage.

This article has been reprinted from Vantage: Journal of Thematic Analysis, 2(2) with their permission and with the consent of the author

© The Author(s) 2021.

This work is licensed under a Creative Commons Attribution 4.0 International License which permits its use, distribution and reproduction in any medium, provided the original work is cited.

Ramifications of The Divya Pharmacy Judgement: The Need for A Two Step Ad-valorem Royalty Model

Dr. Raju Narayana Swamy IAS

Abstract

The access to biological resources located within India is governed by the Biological Diversity Act, its Rules and Regulations, that were enacted in furtherance of the Convention on Biological Diversity (CBD) and the Nagoya Protocol. One important aspect under them is fair and equitable 'benefit-sharing'. Under this, certain users of biological resources are required to share certain parts of the benefits accruing to them from such use with the local communities that preserve those resources and impart their traditional knowledge relating to those resources. This article argues that the current benefit-sharing regime in India is problematic on various fronts. A recent judicial pronouncement has further aggravated those concerns. Luckily, the CBD/Nagoya Protocol do not envision a singular model for benefit-sharing leave that for the member countries to decide. Therefore, this article proposes an alternative two-step ad-valorem royalty model that should be explored which addresses various problems prevalent in the current regime. The specifics of the same can be worked out, but the focus of this article is to present the problems prevalent in the system and initiate a discussion towards rebranding India's benefit-sharing regime towards more certainty, transparency, and fairness, towards which the proposed model can be a concrete step.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. INTERNATIONAL FRAMEWORK ON 'ACCESS AND BENEFIT SHARING'
- III. LEGAL FRAMEWORK OF BENEFIT-SHARING IN INDIA
 - A. THE REGULATIONS AND THE EMPOWERMENT OF SBBS QUABENEFIT-SHARING
- IV. PROBLEMS IN THE CURRENT ABS REGIME –
BUREAUCRATIZATION, DELAYS, ETC.
 - A. FIRSTLY, THERE IS NO SAY OF THE USERS IN DETERMINATION OF ABS TERMS
 - B. SECONDLY, LONG DELAYS IN THE ABS PROCEDURE
 - C. THIRDLY, THE MANNER OF CALCULATION OF ABS AMOUNT IS PROBLEMATIC
- V. DIVYA PHARMACY Vs UNION OF INDIA - JUDICIAL MISINTERPRETATION
AND ITS RAMIFICATIONS
- A. JUDICIAL MISINTERPRETATION

- B. RAMIFICATIONS
- VI. AN ALTERNATIVE MODEL FOR BENEFIT-SHARING PAYMENTS
- A. A TWO-STEP PROCESS FOR DISCHARGING ABS OBLIGATION
- 1. ADDRESSING THE CONCERNS OF THE PRESENT REGIME
- B. ABS AS AN AD VALOREM ROYALTY/TAXATION
- VII. CONCLUSION

I. INTRODUCTION

If conservation of natural resources goes wrong, nothing else will go right.
- M. S. Swaminathan

Both, internationally as well as domestically, the above statement is acknowledged in various forms. Furthermore, on both the levels, specific legal frameworks are in place to ensure the conservation of natural resources and their sustainable use. One of the ways in which the law seeks to achieve the same is by levying the obligations upon certain users of the genetic/biological resources to share fair and equitable benefits they reap by utilising those resources with the local communities that preserve those resources. This benefit-sharing framework, internationally formulated for the first time around 1992-93, has undergone changes/additions/improvements from time to time, both internationally and domestically. In fact, recently, the United Nations Convention on Biological Diversity ('CBD') Secretariat has released its first official draft on a new Global Biodiversity Framework to align actions across the globe through 2030 for the preservation and protection of the nature and its essential services to people. One (out of four) goal of the draft framework is to ensure that the *benefits from the utilisation of genetic resources are shared fairly and equitably, with a substantial increase in both monetary and non-monetary benefits shared, including for the conservation and sustainable use of biodiversity*.¹

In India, the benefit-sharing framework is well-defined. However, there are various problems that exist in the present regime. Furthermore, certain recent legal development has further added to the existing concerns. Therefore, this article seeks to explore the benefit-sharing framework in India, highlight the existing problems, and then propose an alternative model that can be considered in place of the current model. For that, this article has been divided into six parts subsequent to the 'Introduction'.

In Part II, this article lays down the international backdrop against which India's benefit-sharing regime was introduced. Thereafter, in Part III, it discusses the broad legal framework and the peculiar provisions in the Indian law regarding benefit-sharing. Part III ends on the argument that certain aspects of benefit-sharing in India, as introduced by a sub-ordinate legislation, do not have a legal validity under the parent statute. Then in Part IV, the article discusses how a recent judicial pronouncement has in fact, endorsed the said erroneous practice vis-à-vis benefit-sharing. Thereafter, in

¹ EurekAlert! American Association for the Advancement of Sciences, *UN's new global framework for managing nature: 1st detailed draft agreement launched, July 12, 2021*, available https://www.eurekalert.org/pub_releases/2021-07/tca-ung071121.php (Last visited on July 23, 2021).

Part V, it highlights some other problems that exist in the current benefit-sharing regime that have been aggravated by the said judicial pronouncement. Part V ends on a note regarding the need to introduce an alternative model in the benefit-sharing regime in India. Then, in Part VI, it proposes two prongs of the alternative model and discusses how they respectively address the issues that exist in the current benefit-sharing regime. In the concluding Part VII, it ties the discussion together on the future course of action that can be taken vis-à-vis the proposed model.

II. INTERNATIONAL FRAMEWORK ON ‘BENEFIT-SHARING’

The CBD, signed at Rio de Janeiro in 1992-93, with 196 party countries today, is so far the most accepted international arrangement for conservation and sustainable utilization of biological resources (‘bio-resources’) and sharing of the benefits arising out of such use.² India became a party to the CBD on 19 May 1994.³ It then enacted the Biological Diversity Act 2002 (‘Act’) and the Biological Diversity Rules 2004 (‘Rules’). The Act has adopted the three objectives of the CBD verbatim, i.e., *conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the use of bio-resources, knowledge.*⁴

The third objective of the CBD, i.e., fair and equitable sharing of benefits (‘benefit-sharing’) got further attention both, internationally and domestically. At the 10th Conference of Parties of CBD, a supplementary agreement to the CBD, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the ‘Nagoya Protocol’) was signed (with effect from 12 October 2014).⁵ The Nagoya Protocol calls for the state parties to, *inter alia*, make provisions to ensure that the users of the genetic resources, share the benefits that they reap from such use, with the local communities who conserve such resources. Such benefits can be monetary or non-monetary, but they have to be on mutually agreed terms with the local communities.⁶ India ratified the Nagoya Protocol in 2012. Consequently, the Government of India, through the National Biodiversity Authority (created under the Act) came up with the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations 2014 (‘Regulations’).⁷

Thus, the Act, the Rules and the Regulations together constitute the benefit-sharing regime in India. The next part shall explain the legal framework of benefit-sharing as envisaged by the Act and later by the Regulations. A correct understanding of the Act is important, *inter alia*, to appreciate an argument made later in this article on how the Regulations deviate from the content of its parent Act, and a judicial misinterpretation in that regard.⁸

² M.S. Suneetha, B. Pisupati, & S. Kumar, *Framework for Benefit Sharing Guidelines for India* 11 Asian Biotechnology and Development Review 2 (2009), ¶55-58.

³ Convention on Biological Diversity, *List of Parties*, available <https://www.cbd.int/information/parties.shtml> (Last visited on June 28, 2021).

⁴ *Statement of Object & Reasons of the Biological Diversity Act, 2002.*

⁵ Convention on Biological Diversity, *About the Nagoya Protocol*, available at <https://www.cbd.int/abs/about/default.shtml/> (Last visited on June 28, 2021).

⁶ *Id.*

⁷ Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014.

⁸ See discussion *infra* Part III.B, IV.

III. LEGAL FRAMEWORK OF BENEFIT-SHARING IN INDIA

The Biological Diversity Act 2002 prescribes the procedures to be followed by the users to access the bio-resources located within the Indian territory. However, the law categorically prescribes different procedures for such access for non-Indian and Indian users. The non-Indian users⁹ are required to get an approval from the National Biodiversity Authority ('NBA'), a central regulatory body created under the Act, before accessing the bio-resources for any purpose.¹⁰ However, the Indian users¹¹ do not require such approval. They just need to give a 'prior intimation' to their respective State Biodiversity Boards ('SBBs'), state level statutory authorities created under the Act, that too, only when the purpose of access is commercial utilisation, bio-utilisation or bio-survey.¹²

The Act then provides a separate process of approval from the NBA for the non-Indian users. They are required to apply to the NBA before accessing the bio-resources and the NBA then processes and approves those application.¹³ In approving the applications, the NBA is required to put certain terms and conditions on the use of the bio-resources that would ensure that the user equitably shares the benefits arising out of such use. These terms have to be as per mutual agreement between the users, the local bodies, and benefit claimers.¹⁴

Pertinently, this provision, under which the NBA is required to put benefit sharing as a condition on the users' access, is there only for non-Indian users and not for Indian users. Since Indian users are not required to get an approval from the NBA/SBB, such absence is well-warranted. However, despite such clear-cut differentiation in the law, various SBBs (on the footsteps of the NBA) have been, over the years, putting benefit-sharing obligations upon the Indian users.¹⁵ They argue that they are legally empowered to demand benefit-sharing from the Indian users.¹⁶ In fact, a 2018 judgment by the Uttarakhand High Court (as this article shall discuss later) has accepted their stand.¹⁷

⁹ See also Biological Diversity Act, 2002, §3 (Section 3(2) defines non-Indian users to mean and include: (a) a person who is not a citizen of India; (b) a citizen of India, who is a non-resident as defined in clause (30) of Section 2 of the Income-tax Act, 1961 (43 of 1961); (c) a body corporate, association or organization— (i) not incorporated or registered in India; or (ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management).

¹⁰ Biological Diversity Act, 2002, §3.

¹¹ See also Biological Diversity Act, 2002, §7 (Section 7 defines a non-Indian user to mean and include, citizen of India; body corporate, association or organization registered in India; but excludes local people and communities of the area, including growers and cultivators of biodiversity, and vaidas and hakims who have been practising indigenous medicine).

¹² *Id.*, §7.

¹³ *Id.*, §19.

¹⁴ *Id.*, §21.

¹⁵ See generally K. Kohli & S. Bhutani, 'Litigating India's Biological Diversity Act: A Study of Legal Cases' (2016) *Foundation for Ecological Security and Kalpavriksh Environmental Action Group* available at <https://docplayer.net/54604536-Litigating-india-s-biological-diversity-act-a-study-of-legal-cases-by-shalini-bhutani-kanchi-kohli.html> (Last visited on 28 June 2021) ('Kohli and Bhutani (2016)') (discussing about various litigations that Indian users of bio-resources have fought various SBBs (like Madhya Pradesh SBB, Maharashtra SBB, etc.) for demanding benefit sharing from Indian users).
See also *Divya Pharmacy v. Union of India* 2018 SCC OnLine Utt 1035 (where the moot issue was whether the Uttarakhand SBB was empowered to demand benefit sharing from Divya Pharmacy (Indian user) or not).

But before the judiciary, the executive has endorsed this erroneous position of law by empowering the SBBs to demand benefit-sharing through the Regulations, as discussed in the next sub-part.

A. THE REGULATIONS AND THE EMPOWERMENT OF SBBS QUA BENEFIT-SHARING

Between 2012 and 2013, the Madhya Pradesh SBB ('MP SBB') (that has the largest share of cases on benefit-sharing issue) issued notices to various Indian companies using bio-resources to share with the MP SBB 2% of their gross revenue annually. Around thirteen of these companies moved the National Green Tribunal Central Zone Bench ('NGT (CZ)') arguing that the SBB was not empowered to demand benefit-sharing from Indians.¹⁸ After a series of similar litigations (mostly resulting in favour of the MP SBB), the NGT (CZ) directed the Government of India to come up with standardized guidelines for ABS from Indian users. In response to this and in furtherance of the Nagoya Protocol (as discussed earlier), the NBA came up with the 2014 Regulations.¹⁹

Under the Regulations, both, non-Indian as well as Indian users are required to apply to the NBA and SBBs respectively for accessing bio-resources for commercial utilisation, bio-utilisation/bio-survey for commercial utilization.²⁰ On being satisfied with the applications, the NBA/SBB (as the case may be) would enter into Access and Benefit Sharing Agreements ('ABS Agreements') with the users, and thereby approve the applications.²¹ Under the ABS agreements, the users are liable to pay to the NBA/SBB (as the case may be), a certain percentage (0.1% to 0.5%) of their annual gross ex-factory sale minus government taxes as benefit-sharing amount.²²

So, in essence, the above provisions in the Regulations have empowered the SBBs with twin powers regarding the access and usage of bio-resources by Indians. The first is the grant of 'approvals' to the Indian users to access the resources (through ABS agreements), and the second is the power to demand benefit-sharing money from them (as part of the ABS agreements).²³ The Act does not provide either of these powers to the SBBs, as discussed.²⁴ Nevertheless, in practice, the SBBs vehemently exercise these powers by virtue of the Regulations. Furthermore, in 2018, the Uttarakhand High Court, in a landmark ruling, held upheld the power of the SBBs to put benefit-sharing obligations upon Indian users, and has raised further concerns, as the next part discusses.

¹⁶ S. Bhutani and K. Kolhi, *Despite Landmark Judgment, Issues of Regulation Remain in India's Biodiversity Regime*, March 05, 2021, available at <https://thewire.in/law/divya-pharmacy-india-biodiversity-act> (Last visited on June 28, 2021).

¹⁷ See discussion *infra* Part IV.

¹⁸ Kohli and Bhutani (2016), *supra* note 3, 13.

¹⁹ *Id.*, 14.

²⁰ Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, Reg. 2(1).

²¹ *Id.*, Reg. 2(2).

²² *Id.*, Reg. 4.

²³ *Id.*, Reg. 2, 4.

²⁴ See *supra* Part III.

IV. DIVYA PHARMACY V UNION OF INDIA - JUDICIAL MISINTERPRETATION AND ITS RAMIFICATIONS

The authority of NBA in demanding benefit-sharing from non-Indian users has not been questioned so far. However, similar authority of the SBBs has been questioned on various occasions, more so, since the notification of the Regulations. Finally, in 2018, the Uttarakhand High Court ('Court') settled the jurisprudence on this issue in *Divya Pharmacy v Union of India*²⁵ ('Divya Pharmacy').

In 2016, the Uttarakhand SBB had issued a notice to Divya Pharmacy (a manufacturer of Ayurvedic medicines and nutraceutical products in Haridwar) to share 2% of its revenue, annually to the SBB as fair and equitable benefit-sharing amount. Divya Pharmacy moved the Court against such notice. It relied upon the definition of 'fair and equitable benefit sharing' under Section 2(g) of the Act that defines it as sharing of benefits as determined by the National Biodiversity Authority, and not by State Biodiversity Boards. Further, under Section 21, the NBA, while granting approval to the non-Indian users, shall ensure that the terms on which such approval is granted, secures equitable benefit sharing from use of the bio-resources. Based on these, Divya Pharmacy argued that under the Act, only the NBA, and not the SBBs, is empowered to levy benefit sharing obligations, and since NBA approval is required only for non-Indian users, Indian users are free from benefit sharing obligations.²⁶ All they need to do is give prior intimation to the SBB.²⁷

The Union of India argued that the Indian, non-Indian user differentiation in the Act is only to determine the authority they need to approach, and not regarding benefit-sharing obligations. It further argued that if such a differentiation is maintained, it would defeat the objective of the Act and the international conventions that India is a signatory to. Further, it relied upon Section 7 r/w Section 23(b) that suggest that the SBB is not a mere bystander that is only required to accept prior intimations by the Indian users. It also has the power to 'regulate by granting of approvals or otherwise' requests for commercial utilization/bio-survey/bio-utilization. Further, the SBB can restrict any activity if it opines that such activity is detrimental to equitable benefit-sharing from that activity.²⁹

The Court observed that even though a literal interpretation of the Act does not put a benefit-sharing obligation upon non-Indian users, the law has to be interpreted in light of its purpose.³⁰ And since the Act was enacted in furtherance of the CBD/Nagoya Protocol, it has to be interpreted in that light. Since, CBD/Nagoya Protocol do not differentiate between domestic and foreign entities in putting benefit sharing obligations, the legislature would not have intended to make such differentiation in the Act.³¹ Therefore, it agreed with the Union to hold that SBBs also have the power to levy benefit-sharing obligations on non-Indians and the NBA is empowered to frame guidelines in that regard.

²⁵ *Divya Pharmacy v. Union of India*, 2018 SCC OnLineUtt. 1035 ('Divya Pharmacy').

²⁶ *Id.*, ¶9-16.

²⁷ *Id.*, ¶14.

²⁸ *Id.*, ¶17.

²⁹ *Id.*, ¶18-21.

³⁰ *Id.*, ¶34.

³¹ *Divya Pharmacy*, supra note 25, ¶72.

This judgment had received mixed response from different sections. While some saw it as a landmark judgment that has clarified the law on ABS by SBBs, and as a concrete step that would further the objectives of CBD and Nagoya Protocol, others feared that it would give impetus to a new order of bureaucrats to secure their own turfs³² as the benefits anyway do not actually reach the local communities. The author argues that the court's decision is a judicial misinterpretation of the Act and that a purposive interpretation was not warranted in this case. The next sub-section clarifies this argument.

A. JUDICIAL MISINTERPRETATION

The Court had acknowledged that a literal interpretation of the Act does not put benefit-sharing obligations upon Indian users (even though the Union argued that even the provisions put benefit-sharing obligations upon Indians³³). However, it went past the literal interpretation to a purposive interpretation in light of India's international obligations.

The author argues that the Court was incorrect in taking a purposive interpretation here when the statute clearly differentiates between Indian and non-Indian users vis-à-vis benefit-sharing obligation, as discussed.³⁴ In India, the courts are not supposed to necessarily read a law in light of India's international obligations. As discussed in *NALSA v Union of India*, if the legislature makes a law that is in conflict with international law, Indian courts are bound to give effect to the domestic law, rather than the international law. But, if there is a void in the domestic legislation and a contrary legislation is absent, the courts can give effect to international laws.³⁵ Pertinently, in *Vishaka v State of Rajasthan*³⁶, when there was a void in the Indian law on prevention of sexual harassment and there was no contrary law present, the court read the provisions of the CEDAW Convention into the domestic law. Furthermore, in *Novartis v Union of India*³⁷, the court denied to test whether Section 3(d) of the Patents Act 1970 was in compliance with the TRIPS Agreement or not.

Therefore, when the Act is loud and clear in not putting benefit-sharing obligations upon Indian users, the Court should have interpreted it literally and not purposively. The Act envisages different procedures and rules for Indian and non-Indian users regarding benefit-sharing, and wherever required, they are put on equal footing.³⁸ So, if the legislature intended to put benefit sharing obligation upon Indian users as well, it could have very well done that in the relevant provisions.³⁹

³² L. Jishnu, *Pressed for sharing*, January 08, 2019, available at <https://www.downtoearth.org.in/news/economy/pressed-for-sharing-62743> (Last accessed on June 29, 2021) ('Jishnu').

³³ See *infra* Part IV.

³⁴ See *discussion infra* Part III.

³⁵ National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶53.

³⁶ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

³⁷ *Novartis AG v. Union of India*, (2007) 4 MLJ 1153.

³⁸ See Biological Diversity Act, 2002, §6 (as per which both Indian and non-Indian users are placed on same footing if they make an application for intellectual property rights over the bio-resources).

³⁹ Apoorv K. Chaudhary, *Access and Benefit Sharing for domestic entities: Case comment on Divya Pharmacy v. Union of India & others*, April 25, 2019, available <http://scholarship.ciipec.org/2019/04/25/access-and-benefit-sharing-for-domestic-entities-case-comment-on-divya-pharmacy-v-union-of-india-others/> (Last visited on March 5, 2021).

B. RAMIFICATIONS

This judgment gave judicial acceptance to the Regulations that empowered the SBBs to levy benefit-sharing obligations upon Indian users. This judgment had been eyed by various Indian entities that had not registered themselves with the SBBs. Post this judgment, all those entities would be required to register with the respective SBBs. Furthermore, the SBBs in all states that were not very proactive in demanding ABS would feel emboldened with this judgment.⁴⁰ A large number of businesses, small businesses in particular, face unjustified legal threats from the SBBs. In one case, forest officers from the biodiversity board apparently raided the premises of a company, despite the fact that the Act does not warrant such even if there is a non-compliance with the law.⁴¹

Divya Pharmacy judgment is not up for an appellate decision. Therefore, the bottom line is that the system of levying benefit-sharing upon Indian users continues, in fact, with much more authority. Nevertheless, for the reasons discussed above, this position of law taken in Divya Pharmacy is questionable and this issue may reopen for further discussion in some future case where the court may/may not agree with Divya Pharmacy. There may even be a legislative clarification as well. Whatever course of action the legal issue of benefit-sharing obligation takes, there are further reasons to argue that the current benefit-sharing regime in India (for both, Indian and non-Indian users) is problematic on various fronts. And now that even the SBBs are formally empowered to levy benefit-sharing, it would further multiply the problems already existing. Therefore, the author proposes a different model of benefit-sharing altogether, which is more transparent, certain, and fairer, and also complies with the objectives of benefit-sharing obligations. But before that, it is important to understand some of the major problems that exist in the current benefit-sharing regime, that solicit for an alternative approach/model.

V. PROBLEMS IN THE CURRENT ABS REGIME – BUREAUCRATIZATION, DELAYS, ETC.

The benefit-sharing responsibility casted on the users of bio-resources (particularly, commercial users) is a result of a global push by conservationists, rights activists, governments, etc. to ensure that parts of the benefits yielding to the users from bio-resources go back to the communities who play a significant role in housing/developing/conserving those resources for a long time.⁴² This responsibility is further to acknowledge that the users, in utilizing the bio-resources greatly rely upon

⁴⁰ *Down To Earth*, Patanjali judgement can have ramifications beyond Uttarakhand *Down To Earth*, December 28, 2018, available <https://www.downtoearth.org.in/news/economy/patanjali-judgement-can-have-ramifications-beyond-uttarakhand-62629> (Last visited on July 23, 2021).

⁴¹ Prashant Reddy, *India's Biodiversity Law Has Turned Out to Be a Nightmare for Scientists and Businesses – Parliament Should Repeal It*, November 28, 2018, available <https://spicyip.com/2018/11/indias-biodiversity-law-has-turned-out-to-be-a-nightmare-for-scientists-and-businesses-parliament-should-repeal-it.html> (Last visited July 15, 2020) ('Reddy').

⁴² Kanchi Kohli & Shalini Bhutani, *Can Benefits Be Shared? Three Tangles for Access and Benefit Sharing in BIODIVERSITY FOR SUSTAINABLE DEVELOPMENT: ENVIRONMENTAL CHALLENGES AND SOLUTIONS* 121-134, 124 (K. Laladhas, P. Nilayangode and O.V. Oommen, Springer International Publishing, 2017) ('Kohli and Bhutani (2017)').

and benefit from the ‘traditional knowledge’ of the local communities regarding those bio-resources.⁴³

However, the Regulations, enacted supposedly to further the objectives of CBD and Nagoya Protocol, some scholars argue, reflect that the government of India sees ABS as a ‘large-scale financing mechanism’ that would generate funds to be used for conservation and poverty reduction.⁴⁴ As per the Regulations, 95% of the money received under ABS has to be given directly to the local communities (if identifiable) or to support the conservation of bio-resources and the livelihood of people in that region.⁴⁵ But, scholars argue that there is no information on how the ABS money is ultimately shared with the local communities. This raises suspicion that the SBB bureaucrats are using the ABS system to extract money from the users just to secure their own turfs.⁴⁶ Similarly, little documentary evidence prove that the ABS money goes towards conservation of bio-resources and livelihood of the communities. These raise questions about the actual performance of the government on its promises under the Act/CBD/Nagoya Protocol. However, further exploration on the ‘actual performance’ of the government is not the primary focus of this article. Nevertheless, under the current framework, the bio-resources and the traditional knowledge of the communities are now being controlled by government bureaucrats.⁴⁷ More so, the NBA (again, a government body) has been made the relevant authority to determine what shall be ‘equitable’ for benefit sharing in each case, adding another level of bureaucratic interface.⁴⁸ This excessive control/involvement of the government authorities in the entire process is a major problem that needs to be fixed. Some of the aspects of the current benefit-sharing regime in which this control is reflected are discussed hereinafter.

A. FIRSTLY, DETERMINATION OF ABS TERMS IS TOTALLY CONTROLLED BY THE GOVERNMENT AUTHORITIES

The Act provides that the amount to be paid, and other terms under ABS have to be determined on Mutually Agreed Terms (‘MAT’) between the user, the concerned local bodies and the local communities (benefit claimers).⁴⁹ However, in practice, the users (under both, NBA and SBBs) hardly get any say in the determination of the MAT. The application process of the NBA as well as of major SBBs starts with the filling of a

⁴³ See generally, NLSABS, *Biodiversity and Access and Benefit Sharing in India*, available at https://nlsabs.com/?page_id=219 (Last visited on June 28, 2021) (that discusses about Kani tribe inhabiting the Agasthyamalai forest in Kerala, who use a medicinal plant called ‘Arogyapaacha’ as their traditional medicine recognizing its restorative, immune-enhancing, anti-fatigue properties. The knowledge about these properties of the plant was revealed by some tribe members to some scientists from the Tropical Botanical Garden and Research Institute who then, using this ‘traditional knowledge’ developed a drug called ‘Jeevani’. The license to manufacture this drug commercially was then granted to a pharmaceutical company. Thereafter, in recognition of the contribution of the Kani tribe in developing the drug (through their ‘traditional knowledge’), a Trust Fund was created to continuously share the benefits coming from the commercialization of the drug with the Kani tribe. This story remains an important motivation behind strengthening the ABS regime in India).

⁴⁴ Kohli and Bhutani (2017), *supra* note 42, 126.

⁴⁵ Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations 2014, Reg. 15.

⁴⁶ Jishnu *supra* note 32.

⁴⁷ Kohli and Bhutani (2017), *supra* note 42.

⁴⁸ The Biological Diversity Act, 2002, § 21., The Biological Diversity Rules, 2004, Rule 20.

⁴⁹ The Biological Diversity Act, 2002, § 21(1).

standard application form by the user. The NBA/SBB then, after completing the internal processes (that involves consultation with the local bodies) with the applications, comes up with the terms of access and the ABS amount to be paid by the user. The user is then required to sign an ABS agreement drafted to that effect (usually, a standard agreement) and pay the ABS money.⁵⁰ Importantly, in this entire process, there seem to be no scope for any consultation/discussion with the users in determining the MAT. At most, the users can appeal before the National Green Tribunal against the calculation of the ABS amount.⁵¹ Therefore, MAT is just a misnomer and in reality, the users do not have any say in it. Further, even the benefit claimers hardly have any say in the MAT determination. This is because the local bodies, that are ultimately required to deliberate with the local communities and take steps for their benefits and conservation of the resources, are not adequately developed, and in many areas, not even existent!⁵² Therefore, only the government authorities take the first and the final calls.

B. SECONDLY, LONG DELAYS IN THE ABS PROCEDURE

For non-Indian users, NBA approval is required at almost every stage (from approval for access for research, commercial utilization, bio-utilization or bio-survey and for transfer of research results, to approval for transfer of biological resource or knowledge associated thereto).⁵³ This causes the diversion of resources of those non-Indian users in legal advices, other transaction costs, etc. Long delays in approvals further complicates the quagmire.⁵⁴ Now, with the Regulations, since the SBBs also enjoy the right to demand benefit-sharing as a condition precedent to granting the approval to access the bio-resources (and other terms as per the ABS agreements), similar delays have become a reality for Indians as well. For example, in Uttarakhand SBB (that belongs to one of the most biologically diverse Indian states), as of May 17, 2018, the status of around 120 out of 139 ABS agreements have been pending at the application stage for the applications filed in the year 2014-15.⁵⁵ The website does not reflect any newer data. Since the bureaucrats have been given the power to determine the ABS and other terms, this gives them a leverage in demanding more and more money from the users. Consequently, bigger companies/entities get free from this bureaucratic red tape by providing hefty upfront ABS amounts and easily secure their access to the bio-resources.⁵⁶ It is the smaller players in the market that suffer from the system.

⁵⁰ See generally, National Biodiversity Authority, *Schematic Presentation of Processing of Applications under Biological Diversity Act, 2002 and Rules 2004*, available at <http://nbaindia.org/content/684/62/1/applicationprocess.html> (Last visited June 29, 2021) (depicting the process-flow of getting NBA approval by non-Indians and consequent ABS process); See also, Uttarakhand State Biodiversity Board, *Workflow chart (SoP) for commercial users of "Biological Resource" Annual compliance of ABS- Indian Entity*, available at <https://sbb.uk.gov.in/files/Documents/ABS/Workflow.pdf> (Last visited June 29, 2021) (depicting the process-flow for ABS process at Uttarakhand SBB for Indian users).

⁵¹ The Biological Diversity Act, 2002, § 52A, *inserted vide* The National Green Tribunal Act, 2010 (w.e.f. October 10, 2010).

⁵² Kohli and Bhutani (2017), *supra* note 42, 125.

⁵³ The Biological Diversity Act, 2002, § 19-21., The Biological Diversity Rules, 2004, Rule 14-20. See generally, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations 2014.

⁵⁴ Prashant Reddy & M. Lakshmikumaran, *Protecting Traditional Knowledge Related to Biological Resources: Is Scientific Research Going to Become More Bureaucratized?* 5 Cold Spring Harb Perspectives in Medicine 10 (2015).

⁵⁵ Uttarakhand State Biodiversity Board, *Status of compliance of ABS in Uttarakhand*, available at https://sbb.uk.gov.in/files/ABS/Status_of_compliance.pdf (Last visited on June 29, 2021).

⁵⁶ Kohli and Bhutani (2017), *supra* note 42, 125.

C. THIRDLY, THE MANNER OF CALCULATION OF ABS AMOUNT IS PROBLEMATIC

Thirdly, the Regulations simply provides flat rates of 0.1-0.5%⁵⁷ on the ex-factory sales of the products without explaining the logic behind these figures. Such arbitrary calculation squarely ignores the differences in the relative value of different bio-resources in different end-products, something that should be an important consideration in benefit-sharing amount calculation. This article deals with this point in a while.⁵⁸

Having described the problematic aspects of the current benefit-sharing regime, the author hereby proposes an alternative model that can be put up for discussions as a concrete step towards reforming the present system.

VI. AN ALTERNATIVE MODEL FOR BENEFIT-SHARING PAYMENTS

The objective of the Nagoya Protocol is fair and equitable sharing of benefits arising from the utilisation of genetic resources.⁵⁹ However, it does not subscribe to a particular type of benefit sharing or a model thereof. It provides a non-exhaustive list of monetary or non-monetary benefits that the members may adopt in their domestic jurisdictions.⁶⁰ Therefore, India's international obligations do not stop it from adopting a different model for benefit-sharing as long as it ensures fair and equitable benefit sharing with the local communities. The author argues that the proposed model does allocate fair and equitable benefit-sharing amounts for the local communities, thereby, is compliant with the objectives of the Act/CBD/Nagoya Protocol. Furthermore, it has the potential to address various problems existing in the current regime, and is more certain, transparent, and fairer.

A. A TWO-STEP PROCESS FOR DISCHARGING BENEFIT-SHARING OBLIGATION

The author proposes that benefit-sharing obligation should be discharged by the users in two steps. At the time of filing of application before the SBB (and on every subsequent year), a user can pay a reasonable upfront amount and be allowed to access the resources immediately on payment of such amount. A simpler version of the ABS Agreement can be signed at this point. Then, at the end of the financial year, the final ABS amount calculated can be adjusted with the upfront amount. If the calculated ABS exceeds the upfront amount, the balance can be paid to the SBB by the user, and if it falls short, the balance can be refunded to the user or be carried forward to the next financial year. This process shall repeat for every financial year. Possibility of making this process automated/partly automated can also be explored. This way, the obligation to pay certain upfront amount would ensure that the users do not use the bio-resources

⁵⁷ Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, Reg. 4 (the rates are: 0.1% for gross ex-factory sales up to Rs. 1,00,00,000, 0.2% for Rs. 1,00,00,001 - 3,00,00,000, 0.5% for Rs. 3,00,00,000 and above).

⁵⁸ See discussion *infra* Part VI.B.

⁵⁹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, October 12, 2014 ('Nagoya Protocol'), Art. 1.

⁶⁰ *Id.*, Annexure.

free from any immediate obligation, while at the same time are not burdened a lot.⁶¹ The exact value of this upfront amount can be fixed by considering the necessary variables.

The scenario would be a bit different for non-Indian users. After filing the applications and before the access, they would be required to wait for NBA's approval.⁶² However, the payment obligation can be made simpler under the proposed model even for non-Indian users.

Having proposed the model, the author now argues that this model adequately addresses the concerns raised in this article vis-à-vis the present regime.

1. ADDRESSING THE CONCERNS IN THE PRESENT REGIME

As discussed, the present regime is saddled with huge administrative discretion/control that makes the process opaque, uncertain and puts the users at the mercy of the authorities.⁶³ The proposed model reduces the administrative discretion/control significantly. The authorities would not be free to charge any amount as upfront payment from the users. If they do so, they would be liable to refund the excess amount at the end of the financial year. The proposed model comes with greater certainty and transparency. Further, by ensuring that the users end up paying fair and equitable benefit-sharing amount, it furthers the objectives of the Nagoya Protocol, and at the same time does not unnecessarily burden the users of the bio-resources. Further, since the proposed model would be rather simpler in terms of working, it would cut the unnecessary delays that happen in the current benefit-sharing regime.⁶⁴

Now, having discussed the framework of the proposed model, the author also proposes a different model for the calculation of the ABS amount. This proposed model would be fairer and compliant with the international conventions (and the Act), and would also address the third concern raised in this article.⁶⁵

B. BENEFIT-SHARING IN FORM OF AD-VALOREM ROYALTY

Under the present mode, benefit-sharing amount is levied as a certain percentage on the ex-factory sales value of the goods produced that uses bio-resources.⁶⁶ The author proposes that ABS should instead be levied as a certain percentage on the value of the bio-resources used in the final product, like an ad valorem royalty, and not on the sales value of the final product. Such an ad valorem royalty model is not new in the benefit-sharing regime. It has been previously proposed in certain other kinds of benefit-sharing frameworks. For example, under the 1982 United Nations Convention

61 See generally, United Nations Environment Programme [UNEP], Convention on Biological Diversity, Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, at 29, UNEP/CBD/WG-ABS/4/INF/7 (Dec 22, 2005) (discussion about Australian legislations (like Queensland's Mineral Resources Act, 1989, and the Petroleum and Gas Act, 2004) under which benefit-sharing arrangements follow a two-step process. First, certain amount is paid as fees before access, and then royalties are paid on discovery of the resources).

62 Biological Diversity Act, 2002, §19.

63 See *supra* Part V, V.A.

64 See *supra* Part V.B.

65 See *supra* Part V.C.

66 *Id.*

on the Law of the Seas, there are benefit-sharing provisions qua the benefits arising out of the exploration of resources in the seabed, that are to be shared equitably for the mankind as a whole. In furtherance of this, later, various models of benefit sharing have been proposed. One proposal was to impose an 'ad valorem royalty' on the value of sales of the seabed resources to be paid towards benefit-sharing.⁶⁷

Evidently, the benefit sharing obligation was proposed only on the value of the seabed resources and not the final product made out of it. The author argues that the possibility to introduce such a model should be explored in the Indian benefit-sharing regime as well where benefit-sharing obligation is put on the total value of the bio-resources used and not the ex-factory sales value of the final product (as happens in the present regime).

A final product (be it a pharmaceutical product, cosmetic product, etc.) is not formed just by the use of the bio-resources. Various other inputs are also involved. Therefore, it is unfair to tax the users on the total value of the products (that includes many more inputs other than the bio-resources) in name of benefit-sharing. Pertinently, if the objective of the Act/CBD/Nagoya Protocol is to ensure that the benefits accruing to the users due to the use of bio-resources comes to them ⁶⁸, it only seems fair if such an obligation is put on the users only to the extent the bio-resources are valued/used in the products and not beyond. The manner of calculation of such value can be explored.

This model also addresses the third concern raised in this article.⁶⁹ Since ad valorem royalty would be levied on the value of the bio-resources in a particular product, it would take into account the differences in the use of bio-resources (in terms of amount as well as value) in different end-products, which is not taken care of in the present regime. For example, bio-resources may form the most important component in a pharmaceutical product, but it may not be so in a cosmetic product that might just use the essence of a biological resource. Under the present system, since benefit-sharing amount is levied on the ex-factory sales value, it does not account for the relative difference in the value of the bio-resources in the two products. However, the present model would take care of the same.

Both prongs of the proposed model can be implemented in either of the circumstances, whether the Divya Pharmacy's interpretation occupies the field of law, or it is later overturned by the apex judiciary or the legislature. In the former case, the proposed model can be applied in levying benefit-sharing upon both, Indian and non-Indian users, while in the latter, it can be applied only qua the non-Indian users.

⁶⁷ Dr. James Harrison, Who benefits from the exploitation of non-living resources on the seabed? Operationalizing the benefit-sharing provisions in the UN Convention on the Law of the Sea, July 1, 2015, available <https://benelexblog.wordpress.com/2015/07/01/who-benefits-from-the-exploitation-of-non-living-resources-on-the-seabed-operationalizing-the-benefit-sharing-provisions-in-the-un-convention-on-the-law-of-the-sea/> (Last visited on July 23, 2021).

⁶⁸ Nagoya Protocol, *supra* note 59.

⁶⁹ See *supra* Part V.C.

VII. CONCLUSION

Benefit-sharing obligation is levied so that the benefits actually reach to the local communities. But as things stand, the performance of the government on this front is highly questionable. Therefore, some scholars argue a legislation like the Act, that has failed in its purpose and is just benefitting the government authorities, must be repealed. However, the author argues that, since the current model is not serving its purpose adequately, it is only fair if it is at least made less burdensome for the users, while remaining compliant with the applicable international conventions. The proposed model proposes a way towards the same. The specifics of this model can be worked out, but the focus of this article has been to present the problems prevalent in the system and initiate a discussion towards rebranding the benefit-sharing regime in India towards a more certain, transparent, and fairer regime. But even this model would be inadequate to ensure that the benefits actually reach the local communities. However, that would be a discussion for another day.

⁷⁰Reddy, *supra* note 41.

Jammu and Kashmir in a Melting Pot Constitutional Democracy under Siege

K.M. Seethi

Abstract

The State of Jammu and Kashmir (J&K) witnessed unprecedented political developments since 2015 which eventually led to the dismantling of its statehood and the 'special status' enjoyed by the state under Article 370 of the Indian Constitution. The implications of extinguishing its statehood elicited several constitutional issues, besides bringing into focus the challenges to parliamentary practices and the federal principles. Experts have already pointed out the impact of short circuiting the parliamentary practices in respect of the issues concerning the states. J&K, being a sensitive state with a history of problems having internal and international dimensions, is pushed into the vortex of multiple chaos and the 'reorganisation' of the state is nothing but the culmination of BJP's strategy to realise its long-term goals. The article seeks to bring out the developments leading to the annulment of J&K statehood and its implications for India's constitutional democracy.

Key Words: Reorganisation, Constitutional democracy, Federalism, Article-370

Introduction

The reorganisation of the State of Jammu and Kashmir (J&K) in 2019 was one of the most decisive steps taken by the Union Government since India's independence. The manner in which the 'special status' of J&K was rescinded raised several constitutional, political and ethical questions. Even as the issues related to its implications for India's neighbourhood policy remain complicated, the Union Government's action amounts to challenging India's parliamentary practices, federal principles and, most importantly, India's traditions of constitutional democracy in dealing with the affairs of the states. This article tries to address some of these questions in their broader socio-historical contexts.

Division of Jammu and Kashmir

The passing of the Jammu and Kashmir Reorganization Act, 2019 was generally seen as a hasty step, and it was carried out without any serious discussions and engagement with the parties concerned, particularly the political forces in J&K. With

the enunciation of the Act, J&K has been divided into two Union Territories of Ladakh and Jammu & Kashmir by abrogating the State of J&K. The move was criticised from different angles insofar as it has virtually extinguished India's constitutional democracy which is founded on federal precepts. Experts pointed out that the Union Government has wilfully resorted to manipulating Article 3 of the Indian Constitution, by wrongfully interpreting it, to terminate the status of a sensitive state within the political system. Furthermore, critics say, the J&K State Legislative Assembly has been made redundant by undermining its role in the very process of altering the status of J&K (Sindhu and Narayan 2019; Tharoor 2019).

According to Article 3 of Constitution, "Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State: Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired." The same Article is being explained as (i) "in clauses (a) to (e), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory; (ii) the power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory" (India, Ministry of Law and Justice 2019a).

Given this provision granted by the Constitution, Parliament does not have unfettered power to take away the status of a State altogether. Plausibly, any step by the Union Government to take control of a State, by changing it into a Union Territory, would imply undermining the very principle of federalism that recognises the autonomy and privileges of States within the Union of India. The action in J&K shows that it was for the first time since the State Reorganization Act, 1956 that a State has been extinguished by making it into one or more Union Territories for the Union Government to exercise complete control.

The fact that the J&K State Legislative Assembly has been totally sidelined in the process of the reorganisation of the State is clearly evident insofar as Article 3 of the Constitution stood grossly misinterpreted. This was discussed in the Constituent Assembly itself when B.R Ambedkar noted: "I have not the least doubt about it that the method of consulting, which the President will adopt, will be to ask either the Prime Minister or the Governor to table a resolution which may be discussed in the particular State legislature which may be affected, so that ultimately the initiation will be the local legislature and not by the Parliament at all." He was very firm that Parliament should be

restrained from arbitrarily misusing its power under Article 3 and, naturally, any move to alter the status of a State would have to come from the State legislature (Ambedkar 1948).

The Union Government, however, appropriated the prevailing political climate in the State for such an arbitrary exercise of power. J&K was placed under President's rule a year ago, following the declaration of a breakdown of constitutional machinery by the Governor under Article 356, thereby facilitating the control of the State by the Union Government. This was followed by the dissolution of the State Legislative Assembly. It is in this context of the prevailing political uncertainty that the question is being raised if the Governor or President or Parliament can be a substitute for the State Legislature for the purposes of Article 3 (Sindhu and Narayan 2019). Here the hurry shown by the Union Government has got to do with the political agenda of BJP which leads the National Democratic Alliance (NDA).

There were already rumours in the last week of July 2019 that the Union Government was planning to annul Article 370 and Article 35A of the Constitution. The speculations were generated by reports of the Union Government putting additional paramilitary forces to deal with the possible consequences of the removal of the 'special status' enjoyed by J&K. But the Modi Government went on justifying these precautionary measures in view of "terrorist threats." It was also at this time that various political leaders, including former chief ministers Omar Abdullah and Mehbooba Mufti, were placed under house arrest. Mobile internet services were also restricted, if not barred. When Home Minister Amit Shah had made a statement in Parliament that Article 370 was "temporary in nature" and "not permanent" (blaming it for the growth of separatism in J&K), rumours of a major central intervention were afloat (Times of India, 29 June 2019). In fact, Shah made this statement in the context of the discussion on bills seeking extension of President's rule in J&K for another six months beginning on July 3. Everyone knew that BJP has long been campaigning for revoking Article 370 as well as Article 35A, which put J&K on a 'special status.' Its promise to remove these provisions was also found a major place in its manifesto for the 2019 Lok Sabha elections.

Article 370 and J&K

Under the Indian Constitution, Article 370 was envisaged as a provisional measure with which J&K was assured of autonomy. According to this, the President can, with the Constitution (Application to Jammu and Kashmir) Order 1954, decide provisions of the Indian Constitution which could be binding on J&K with or without change. However, this can only be done in consultation with authorities in J&K. The expressions 'consultation' and 'concurrence' that were referred to under Article 370 underlined the importance of ensuring J&K autonomy. But, over years, this has been amended, from time to time, to make more and more provisions of the Indian Constitution applicable to J&K (Sathe 1990; Seethi 2005; and 1999: 2682-84).

The Article 370 provides: (a) The Union Parliament can legislate on such matters in List I and List III of the Seventh Schedule of the Constitution in accordance with those stated in the Instrument of Accession signed by the Maharaja of J&K. The President of India may identify subjects under Lists I and III which concur with subjects stated in the Instrument of Accession but the order of the president indicating such subjects must be made in 'consultation' with the State government; (b) The President can extend the legislative power of Parliament in respect of subjects in the Union and Concurrent Lists of the Seventh Schedule not included in the Instrument of Accession by an order, which could be made only with the 'concurrence' of the State government; (c) Article I of the Constitution of India, which defines the territories of India, and Article 370 itself apply to J&K accordingly. All other provisions of the Constitution could be extended to J&K, by an order of the President under Article 370, only in 'consultation' with the State government of J&K if it relates to matters concerning legislative power of Parliament, and with the 'concurrence' of the state government if it concerns subjects other than those pertaining to the legislative powers of Parliament (EPW Engage 2019).

So, it is fairly clear that Article 370 can only be abrogated through a Presidential order after obtaining the approval of the Constituent Assembly of J&K to terminate the operation of the article. It may be noted that the Constituent Assembly of J&K enacted the Constitution of J&K, which places [through Article 147(c)] a restriction on the legislative assembly from affecting the constitutional relationship with India. In effect, there was an acceptance of Article 370 as the enduring instrument of constitutional relationship between the Union and the State. Hence the consent of the people of J&K through a representative agency is a stipulation in place to interfere with its 'special status' under Article 370. Furthermore, Section 3 of Article 370 is ample evidence that the Union Government cannot alter the status of the State without the recommendation of the Constituent Assembly of J&K.

But the Union Government resorted to a backdoor method by amending Article 367 first, before amending Article 370 in order to ensure that the Constituent Assembly would imply the State Legislative Assembly. The Presidential notification issued through an extraordinary Gazette on 5 August 2019 states:

All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows: —

To article 367, there shall be added the following clause, namely: —

“(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as

applied in relation to the said State; (b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the *Sadar-i-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir; (c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and (d) in proviso to clause (3) of article 370 of this Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” shall read “Legislative Assembly of the State” (India, Ministry of Law and Justice 2019b).

The intent behind this amendment is clear. With the Article 367 being amended, the Union Government could then argue that with the President’s rule in operation in J&K, the role of the State Legislative Assembly has been passed on to Parliament, which could give the recommendation rather than the State Legislative Assembly insofar as the Assembly stood dissolved. This indirect method of amending Article 370, without the consent of the State Assembly, amounted to challenging the established norms and traditions in law.

The Union Government made a claim that the ‘concurrence’ of the government of J&K was obtained. But when the State of J&K remained under President’s rule, the ‘consent’ of the State amounted to the consent of the Governor, who, for all intents and purposes, the agent of the Union Government. As Sashi Tharoor, a Member of Parliament and former minister of state for external affairs, commented, “the Centre has taken its own consent to carry out its agenda. The consent of Kashmiris is irrelevant to the government” (Tharoor 2019). He further said that this “blithe disregard for Article 370(3) and Article 3 is a breathtaking betrayal of our democracy and nothing short of legislative authoritarianism.” Tharoor argued that “President’s rule is a temporary mechanism, meant for situations in which there is a breakdown of constitutional machinery and meant to cover exigencies that may arise during the period before fresh elections are held and a new assembly constituted. Yet, permanent measures are now being taken under the cover of President’s rule – in the absence of a state government and a legislative assembly...” (Ibid).

On 5 August 2019, Home Minister Amit Shah introduced a bill for the reorganisation of J&K in the Rajya Sabha and it was passed on the same day. There were widespread criticisms that the Bill itself was introduced without circulation. Lawyer Maansi Verma commented that this was done “amid flagrant violations of rules and procedures” and that the “lawmakers voted on and eventually passed a bill that they did not get a fair chance to read, analyse or discuss” (Verma 2019). The bill was subsequently passed by the Lok Sabha on the following day which received the President's assent on 9 August 2019.

The Jammu and Kashmir Reorganisation Act, 2019 contains provisions to reconstitute the State of J&K into Union Territories called Jammu and Kashmir, and Ladakh, and becoming effective on 31 October 2019. The Act has 103 clauses, extends 106 central laws to the two Union Territories, revokes 153 state laws, and abolishes the Jammu and Kashmir Legislative Council, among other things (India, Ministry of Law and Justice 2019c). As stated before, the introduction of the bill came immediately after the promulgation of a Presidential Order which indirectly amended Article 370 and annulled J&K's 'special status.' The new Act has given extensive powers to the Union Government to pass a number of executive orders in relation to both the Union Territories. These orders resulted in the modification or repeal of over 400 State and Union laws with respect to the Union Territories.

Several petitions challenging the validity of the J&K Reorganisation Act 2019 were filed before the Supreme Court. These included petitions filed by advocate ML Sharma, advocate Shakir Shabir, Mohammad Akbar Lone, former Justice Hasnain Masoodi, Shah Faesal and Shehla Rashid. There was also a public interest litigation filed by former interlocutor for J&K Radha Kumar, Air Vice Marshal (Retd) Kapil Kak, Major General (Retd) Ashok Mehta, and former IAS officers Hindal Haidar Tyabji, Amitabha Pande and Gopal Pillai who appealed to the Supreme Court to declare the August 5 Presidential Orders "unconstitutional, void and inoperative." On 28 August, the Supreme Court referred these petitions challenging the Presidential Order to a five-judge Constitution Bench.

Political Objectives of J&K Reorganisation

Depriving J&K of its statehood has multiple dimensions and they have got much to do with the political objectives of the BJP-led NDA Government. BJP has always raised national security reasons for its J&K policy and it has been legitimised with an argument that the entire move is to stem the tide of terrorism in Kashmir. Ironically, everything happened at a time when the entire Valley has been heavily militarised. However, the BJP resorted to such drastic action in J&K in continuation of its own frustration in sharing power with the political forces in Srinagar during 2015-18.

BJP's decision in 2018 to pull out of the coalition with the People's Democratic Party (PDP), formed in 2015, had led to the resignation of J&K Chief Minister Mehbooba Mufti. In fact, Mrs. Mufti's decision to join hands with the BJP had kicked up controversies at that stage. The reason advanced by the BJP for its withdrawal was tactically significant for the Modi government—that the alliance with PDP had become unmanageable in the context of growing violence. Evidently, the BJP tried to play a different sort of game in J&K when only months were left for the 2019 Lok Sabha elections. It knew very well that the party, over the last two years, had its popular base in Jammu just as that the PDP too lost the people's confidence and support in the Valley with the whole series of issues—from violence to mounting social crises such as high unemployment and economic stagnation (Seethi 2018). BJP's sudden withdrawal

came barely a day after the suspension of ceasefire in the Kashmir Valley ordered by the Modi Government, which began with the onset of Ramzan. Mrs. Mufti had asked for continuance of ceasefire in the Valley. But the Centre turned down this request ostensibly in the context of BJP's change of mind on its alliance with the PDP.

A few days before the political drama in Srinagar, a prominent journalist, Shujaat Bukhari, was murdered outside his office. It had raised a very serious credibility crisis for the Mufti government because Bukhari's brother was a member of her cabinet. It was on the same day that the Office of the United Nations High Commissioner for Human Rights released its Report on the Human Rights in J&K and Azad Kashmir which catalogued the human rights abuses and violations over the last two years (UN, Office of the United Nations High Commissioner for Human Rights 2018). The Report, which called for independent inquiry into human rights violations in both J&K and Azad Kashmir, was turned down by India—characterizing it as an intrusion into the country's national sovereignty and security. India called it “fallacious, tendentious and motivated” (India, Ministry of External Affairs 2018). This was not the first time that the Union Government despised such reports and statements of international human rights agencies. Every crisis within J&K would have a ‘foreign hand’ and hence all successive governments played the ‘politics of procrastination’ by not addressing the basic problems of the State (Seethi 1999; Seethi 2005; Seethi 2018).

While Bukhari's murder was one of the latest series of reasons for the BJP's decision to pull out, many believed that the BJP-PDP coalition had a troubled time from the very beginning due to their entirely differing views on the status of J&K. While BJP had a well-established position on Article 370 and the ‘special status’ accompanied by it, the PDP could not ignore the ground situation in the State, and hence it sought dialogues and negotiations with militants. It was therefore natural that the coalition formed in the wake of an uncertain (hung) assembly called for a ‘painful understanding’ with BJP which many in the PDP and outside called it a sellout. As violence continued to increase over months and years, differences between the two coalition partners also got intensified. In fact, while BJP tried to go ahead with an aggressive strategy in dealing with the situation, Mrs. Mufti's ‘soft’ approach only aggravated differences within (Seethi 2018).

The PDP-BJP coalition dispensation also witnessed one of the deteriorating social conditions in J&K. While the 2014 flood caused considerable damage across J&K, Modi government's demonetization drive further aggravated the economic conditions. Modi's assertion of demonetization was that it would destroy the base of terrorists in places like Kashmir with illegal money being flowed in. But the last three years witnessed a different experience with violence getting out of proportion in the Valley. Modi's ‘surgical strikes’ also did not achieve any desired result. The introduction of Goods and Services Tax (GST) regime only added to the distress. Tourism and agriculture, which constitute the backbone of the economy, were the worst-hit sectors in the State. Nobody paid attention to these basic problems of J&K (Ibid).

When the BJP referred to the deteriorating law and order situation in J&K—alongside the state of stagnation and underdevelopment in other parts of the state as reasons of its withdrawal—the party handily drew a veil over its own share of responsibility, including the Modi government’s role. In a press meet Mrs. Mufti said that her party had always believed in ‘reconciliation’ while its coalition partner—BJP—was so preoccupied with “muscular policies” which would in no way help the peace process in J&K. She pointed out that the PDP had “worked for months to form an understanding with the BJP. We wanted the BJP to start the process of reconciliation in Kashmir and ease tensions with Pakistan” (The Times of India (web edition) 19 June 2018). The BJP general secretary Ram Madhav told the press that “Terrorism, violence and radicalisation have risen and fundamental rights of the citizens are under danger in the Valley.” He said that the decision was taken “keeping in mind larger interest of India’s security and integrity.” Ram Madhav also announced that “in order to bring control over the situation prevailing in the state, we have decided that the reigns of power in the state be handed over to the governor” (Organiser (web edition) 19 June 2018). Obviously, the Modi government was all set to appropriate the ‘security situation’ in the Valley for larger political aims as it did in the past (Joshy and Seethi 2015).

The Kathua incident was yet another blow to BJP. The brutal rape and murder of an eight-year-old girl in Kathua was a turning point in the BJP-PDP coalition. The PDP publicly criticized BJP for protecting the supporters of the accused in the Kathua incident. While BJP sought to have a CBI inquiry into Kathua murder, Mrs Mufti wanted nothing beyond J&K Police, obviously due to the apprehension that the culprits would escape with the Union Government-controlled agency investigating the matter. In the post-Kathua period, BJP evidently lost its face, particularly in the Jammu region (Seethi 2018).

There were already too many issues emerging from different parts of the State, over years and months. The military’s indiscriminate use of pellet guns on the protesting people had generated widespread denunciation. The number of civilians who suffered injuries, including loss of vision, was very high. The Jammu and Kashmir State Human Rights Commission (SHRC) gathered information from 10 districts of the Kashmir Valley and recorded that 1,726 people were injured by metal pellets in 2016. Chief Minister Mrs. Mufti told the State Assembly in January 2018 that “6,221 people had been injured by pellet guns in Kashmir between 8 July 2016 and 27 February 2017; among the victims, 728 had eye injuries” (UN, Office of the United Nations High Commissioner for Human Rights 2018). Likewise, the killing of Burhan Wani, a young militant leader, in July 2016 generated widespread protests in the Kashmir Valley and in some districts of Jammu also. Indian army’s response was again aggravating the situation which led to more and more casualties and increasing incidents of human rights violations throughout the summer of 2016 and into 2018 (Ibid).

According to the UN Human Rights Report, while J&K saw “waves of protests in the past—in the late 1980s to early 1990s, 2008 and 2010—this current round of protests appears to involve more people than the past, and the profile of protesters has also shifted to include more young, middle-class Kashmiris, including females who do not appear to have been participating in the past (Ibid). The Report also noted that “Special laws in force in the state, such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA)²⁶ and the Jammu and Kashmir Public Safety Act, 1978 (PSA)²⁷, have created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.” AFSPA 1990 “grants broad powers to the security forces operating in Jammu and Kashmir and effectively bestows immunity from prosecution in civilian courts for their conduct by requiring the central government to sanction all prospective prosecutions against such personnel prior to being launched.” The Report pointed out that a committee appointed by the Supreme Court in 2005 had commented that the law had become “a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness” (Ibid; also Seethi 2018).

In April 2017, the Indian army had also faced widespread criticism for its ‘human shield’ strategy in Kashmir. A 26-year-old Kashmiri youth Farooq Ahmad Dar was tied to the bonnet of a military vehicle by a senior officer when the by-elections for the Srinagar parliamentary constituency were held. Dar was also paraded through the streets with a view to preventing stone pelters. This inhuman action was widely denounced by several human rights activists and political parties. But it was admired by the Indian security forces as a ‘preventative measure against stone pelters.’ Later, J&K State Human Rights Commission called this as ‘illegal’ and ordered to pay the victim a compensation of Rs. 10 lakh.

In the preceding years, J&K experienced recurrent communications interruptions with the State government suspending mobile and internet services that continued for several months. There were other instances of violation of freedom of expression even targeting media and journalists. Even as the internal situation continued to worsen, the militants in the Valley went ahead with their operations. There were a large number of attacks on schools reported during this period. The Union Government told Parliament that as many as 32 schools were damaged in such attacks by militants. India accused Pakistan of actively supporting such armed groups based in territories controlled by Pakistan. It was reported that from the late 1980s, a number of militant groups have been actively operating in J&K, and they were responsible for unleashing human rights abuses, including kidnappings, killings of civilians and sexual violence (Seethi 2018).

The UN Report pointed out that the location of intervention by militant groups operating in J&K shifted over the years. “In the 1990s, around a dozen significant armed groups were operating in the region; currently, less than half that number remain active. The main groups include Lashkar-e-Tayyiba, Jaish-e-Mohammed, Hizbul

Mujahideen and Harakat Ul-Mujahidin; they are believed to be based in Pakistan-Administered Kashmir. Hizbul Mujahideen is also part of the United Jihad Council, which began as a coalition of 14 armed groups in 1994, claiming to be fighting Indian rule..." Though Pakistan denied of any support to these groups, the UN Report recorded experts' opinion that "Pakistan's military continues to support their operations across the Line of Control." Three of them—Lashkar-e-Tayyiba, Jaish-e-Mohammed and Harakat Ul-Mujahidin—are listed on the Security Council "ISIL (Da'esh) & Al-Qaida Sanctions List"³⁰³ for their activities in J&K (UN, Office of the United Nations High Commissioner for Human Rights 2018).

With the state of J&K being placed under the Governor's rule—the eighth episode in its political history—the Modi government exercised enormous freedom to manoeuvre the State politics by appropriating the security situation in the Valley. With the Modi Government having a direct hand in J&K, the BJP was apparently drawing a different scheme for the State This was crucial for the Modi regime even as the combined opposition was brazing themselves against the NDA dispensation in General Elections in 2019. Evidently, all political forces in the State—from the Indian National Congress, National Conference to BJP and PDP—have their share of responsibility in subverting the political atmosphere in J&K. They never addressed the problems of the State from the perspective of the people (Seethi 1999; 2005; 2018). The events leading to the abrogation of Article 370 should thus be viewed in the background of the deteriorating socio-political conditions in J&K over decades.

Conclusion

The decision to dismantle the State of J&K marks a major shift in the government's basic approach towards the states that were caught up in conflicts and turmoil in the Indian Union. With this belligerent policy, as it has been shown in J&K, the BJP has evidently sent a message: it will be impudent in respect of any state which does not conform to the Centre's whims and facies. As such, the political dispensation in New Delhi has least respect for the constitutional propriety and parliamentary practices. The experience of Kashmir also shows that the root causes of the conflict in J&K could easily be located in the excessive interference by the Centre which eventually undercut the democratic process and the acceptability of the regional political forces. The latest action in J&K has only vitiated the situation.

References

- B.R. Ambedkar (1948): *Complete Works*, edited by Dr. Anand Teltumbde, https://archive.org/stream/Ambedkar_CompleteWorks/63B1.CA%20Debates%2015.1.1948%20to%208.1.1949%20Part%20I_djvu.txt
- EPW Engage (2019): “Article 370: A Short History of Kashmir’s Accession to India,” *Economic and Political Weekly*, 6 August, <https://www.epw.in/engage/article/article-370-short-history-kashmirs-accession-india>
- India, Ministry of External Affairs (2018): “Official Spokesperson’s response to a question on the Report by the Office of the High Commissioner for Human Rights on “The human rights situation in Kashmir,” 14 June, http://www.mea.gov.in/media-briefings.htm?dtl/29978/Official_Spokespersons_response_to_a_question_on_the_Report_by_the_Office_of_the_High_Commissioner_for_Human_Rights_on_The_human_rights_situation_in_K
- India, Ministry of Law and Justice (2019a): *The Constitution of India*, New Delhi: Government of India.
- India, Ministry of Law and Justice (2019b): “The Constitution (Application to Jammu and Kashmir) Order, 2019 C.O. 272, Notification Order, 5 August 2019,” *The Gazette of India Extraordinary*, <https://egazette.nic.in/WriteReadData/2019/210049.pdf>
- India, Ministry of Law and Justice (2019c): “The Jammu and Kashmir Reorganisation Act, 2019, No. 34 of 2019, 9 August, *The Gazette of India*, <https://egazette.nic.in/WriteReadData/2019/210407.pdf>
- Joshy, P.M. and K.M. Seethi (2015): *State and Civil Society under Siege: Hindutva, Security and Militarism in India*, New Delhi: Sage India.
- Sathe, S.P.(1990): “Article 370 Constitutional Obligations and Compulsions, *Economic and Political Weekly*, Vol.25, No.17, 28 April.
- Seethi, K.M. (1999): “A Tragedy of Betrayals: Questions beyond the LoC in Kashmir,” *Economic and Political Weekly*, 11 September: 2682-84.
- Seethi, K.M. (2005): “Kashmir: Rethinking Security beyond the Line of Control,” in Rajen Harshe and K.M. Seethi (eds.), *Engaging with the World: Critical Reflections on India’s Foreign Policy*, New Delhi: Orient Longman.
- Seethi, K.M. (2018): “Kashmir in a Dense Cauldron of Uncertainty,” *Countercurrents*, 20 June, <https://countercurrents.org/2018/06/kashmir-in-a-dense-cauldron-of-uncertainty/>
- Seethi, K.M. (2019): “Kashmir: Back to Square One?” *Global South Colloquy*, 16 February, <https://globalsouthcolloquy.com/kashmir-back-to-square-one-2/>
- Seethi, K.M. (2019): “Balakot Air Strikes: Diplomatic and Strategic Fallouts,” *Global South Colloquy*, 27 February, <https://globalsouthcolloquy.com/balakot-air-strikes-diplomatic-and-strategic-fallouts/>

Sindhu, Jahnavi and Vikram Aditya Narayan (2019): "Parliament Doesn't Have the Power to Downgrade J&K's Status To UT," *The Quint*, 8 August, available at <https://www.thequint.com/voices/opinion/kashmir-bifurcation-union-territory-unconstitutional-violation-federal-structure#read-more>

Tharoor, Shashi (2019): "Legislative authoritarianism – that's how Modi govt bulldozed Article 370," *The Print*, 9 August, <https://theprint.in/opinion/legislative-authoritarianism-thats-how-modi-govt-bulldozed-article-370-shashi-tharoor/274753/>
UN, Office of the United Nations High Commissioner for Human Rights (2018): Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit–Baltista, <https://www.ohchr.org/Documents/Countries/PK/DevelopmentsInKashmirJune2016ToApril2018.pdf>.

Verma, Maansi (2019): "Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Reorganisation Bill," *EPW Engage*, 1 November, <https://www.epw.in/engage/article/diminishing-role-parliament-case-jammu-and-kashmir>

‘New’ Developmental State and Enduring Ethnic Anxieties in Northeast India

V. Bijukumar

Abstract

While the earlier ethnic anxieties of various communities in the Northeast India were more related to the nature and intervention of the Old Developmental State, the recent ethnic anxieties seem to be associated with New Developmental State where market (corporate) is an allied partner to development. When there is an emerging developmental consensus on market and private capital in development of the Northeast India, there is also greater pessimism towards the migration of labour. In other words, the region is witnessing a phenomenon that while capital is welcomed, labour is unwelcomed. Perhaps, the virulent protests against the Citizenship Amendment Act not only stem from the ethnic anxiety of losing out the distinct cultural identity and dwindling demographic profile of the ethnic communities of the region, but also from the material realization of losing their skewed resource and scanty share in the national development cake.

Keywords: Citizenship Amendment Act; Inner Line Permit; Brus; Bodo Agreement; Tribal Development.

The role of state in economic development continues to be a lively debate in the development literature. Plethora of studies have been conducted on its nature and role in development in advanced capitalist countries, postcolonial societies and in the East Asian regimes. While some states assumed the sole authority in the process of development, others worked with market forces to catalyst development. In the postcolonial societies, state assumed active role in development to combat the underdevelopment caused by the long colonial regime and to lift people from socio-economic vulnerabilities. Adopting state dominated development strategies, it was able to influence the everyday life of people by way of delivering public goods and emerged as the monopoly public provider in infrastructure and social development. In many postcolonial societies, the state as a modern institution, through its development strategies, tried to modernize the traditional values and norms that retarded the social and economic development. The instrumentalities like centralized planning not only aimed at economic development but also to achieve high levels of social development

guaranteeing health and education. While some states in its recourse to social and economic modernization, wedded liberal democracy, others sought to realise these goals under authoritarian or semi-authoritarian framework.

Idea of Developmental State

Though the state assumed vital role in development, the idea of developmental state (DS) was emerged in the 1960s in the context of East Asian Development. The idea is principally associated with Chalmers Johnson who used it to explain the rapid economic development of Japan in the post second world war era. The DS was one that determined to influence the direction and pace of economic development by directly intervening in development process, rather than relying on the uncoordinated influence of market forces to allocate economic resources (Johnson, 1982). According to Bagchi, “developmental state puts economic development as the top priority of governmental policy and is able to design effective instrument to promote such a goal. The instruments would include a forging of new formal networks of collaboration among the citizens and officials and the utilization of new opportunities for trade and profitable production” (Bagchi, 2000). Michael Man argues that DS state has infrastructural power, means the ‘capacity of the state to actively penetrate civil society, and to implement logistically political decisions throughout the realm’ (Man, 1993). DS enjoys certain ‘embedded autonomy’. As Evans argues that DS is autonomous in so far as it has a nationalized bureaucracy characterized by meritocracy and long-term career prospects (Evans, 1995:45).

The DSs differ in methods to achieve development as some like India see liberal democracy can catalyst development as it firms up the accountability between the people and the policy makers. The developmental priorities of the government come under public scrutiny and social auditing when democracy come into play a vital role. Advocating the liberal democracy as a catalyst for development, Amartya Sen, for instance, firms up the relationship between development and democracy arguing that if people are not enjoying substantial freedom, there is no meaning for development. As Sen asserts that “development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as a systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states” (Sen, 2005: 3). In contrast to this, the East Asian development experiment argued that non liberal democratic regimes are favourable to boost economic growth of the countries and to nudge the popular pressure and competitive party bargaining in economic policies. The political stability established by the authoritarian regimes essential for framing long term public policy and monitor high economic growth.

The Northeast India Case

The postcolonial India inaugurated a DS within the framework of liberal democracy to catalyst development and to uplift people's life. Rather than achieving high economic growth by any non-democratic means, the greater emphasis was on ameliorating the wellbeing of the people with the protection of their civil and political rights. It is argued that "state-making also informed the very fabric of development structures on the frontier, which increasingly centred around Community Projects and National Extension Schemes i.e., development 'block' that involved selecting a specific tribal area for all-round development: agriculture, healthcare, education, sanitation, and cottage industries" (Guyot-Richard, 2013: 25). Though democratic ideals and values were wedded in the modernization project of postcolonial India, it has generated certain anxieties among certain social categories like the ethnic communities of the Northeast. However, many constitutional and policy protections were guaranteed for these communities to ally their anxieties and apprehensions about the modernization project initiated by the Indian democratic DS. However, the state capitalist development under the aegis of the DS generated greater anxieties. It brought extraction of resources and unequal regional development. It is argued that the tribal life-world suffered heavily owing to the introduction of the state sponsored agencies to govern development (Biswas and Suklabaidya, 2008: 124).

In the initial phase of independence, the nationalist leaders and policy makers were well aware of the possibility of generating ethnic anxiety among the ethnic communities of the region. Even the Constitution Assembly debated such possibility in anticipation and recommended certain measures in the form of institutional and policy accommodation in the new Constitution. In the 1950s when India initiated a new centralized planning and industrialization, it also thought of allaying the fears of these communities due to its impact on the region. The newly emerged DS tried to integrate ethnic communities into nationalist imagination through physically and emotionally. Perhaps, the integration was through the instrumentalities of the DS by invoking the idea of developmental nationalism. Such developmental nationalism synthesized the elements of both primordial and modern elements in national development. In fact, the genealogy of DS can be found in nationalist movements influenced by the divergent ideological currents. It is argued that "state involvement was taken to be central to this developmental nationalism, for only the state had the capacity and reach to create a national political economy and to forge a united society" (Guyot-Richard, 2013: 23).

After independence, the Indian nation inaugurated a development model which generated greater amount of anxieties among various ethnic communities of the region. Nehru-Elwin Plan (Panchasheel) five principles of tribal development. Elwin believed that development should not cause a breakdown of the values of tribal society (Elwin, 1959: 116). As Biswas argues that "Nehru's apprehensions about the role of the state in enforcing and imposing a homogenizing process of development took into accommodate the historical precedents of annihilation of tribal culture by civilizations

to suggest a discourse of sympathy and care for the cultural distinctiveness of the tribals” (Biswas and Suklabaidya, 2008: 116). It is argued that “the Nehruvian era saw the genesis of the deployment of the India state’s administrative and developmental apparatus and of a tribal-specific policy” (Guyot-Richard, 2013: 24). In fact, the “welfare schemes and activities enabled the entrenchment of the Indian state on the frontier in a way that had hitherto eluded it” (Guyot-Richard, 2013: 23).

The areas come under the Sixth Schedule of the Constitution, were provided specific ethnic protectionism in the form of Inner Line Permit (ILP). The ILP is an official travel document issued to a person who is visiting to the states come under Sixth Schedule. It is considered as a mechanism to restrict the flow of outsiders to the states and thereby protect the rights of the indigenous people. The genesis of this protectionist law has a colonial legacy of the British formulated the Bengal Eastern Frontier Regulations, 1873 to protect the crown’s interest in the tea, oil and element trade in the region. It was intended to restricting and regulating the stay of outsiders in designated areas and preventing “British subjects” (Indians) from trading within these regions. Under section 2 of the Regulation of 1873, the ILP was only applicable to three states such as Mizoram, Arunachal Pradesh and Nagaland. The ILP is considered to be the first law passed by the British in Assam to separate tribal people and their territory distinct from the plain. It is often argued that “the Inner Line Regulation was a product of the colonial frontierizing of the hills” during the British time (Barua, 2017: 108). The intention behind such regulation was to protect the commercial interest of the British in the region but it was projected as the mechanism to ethnic protectionism. The Government of India Act, 1935, called “excluded area”, which covered most backward tribal areas under the direct rule of the Government having no representation in provincial legislation. In 1950s, the Indian government replaced “British Subjects” with “Citizens of India” for protecting the indigenous population of these states. The ILP was originally granted to areas come under the Sixth Schedule of the Constitution like Arunachal Pradesh, Mizoram and Nagaland. Dimapur, the trade and commercial centre of Nagaland, came under the purview of ILP in 2019.

In many occasions, as an ethnic protective shield from the onslaught of the migration of people from outside to the region, many ethnic organisations like indigenous peoples organisations and students and youths demanded ILP across the northeast. The Federation of Khasi Jaintia and Garo People (FKJGP) in Meghalaya, North East Students Organisation (NESO), All Assam Students Union (AASU), Young Mizo Association (YMA) and Khasi Students Union (KSU) in Meghalaya were in forefront of demanding such ethnic protectionism for their states. When Assam witnessed migration from East Pakistan before and after 1971 the demand for ILP emerged as a perplexed political issue. In fact, the Clause 6 of the Assam Accord for making a recommendation to the Union Government to introduce the ILP. It says that providing constitutional, legislative and administrative safeguards to protect, preserve and promote the cultural, social and linguistic identity and heritage of the Assamese people. It has to be noted that the migration of non tribals into the region is a contentious

issue and demand for ethnic protection of the people. In most the Northeastern states, there is a sizeable number of people from other states such as Marwadis, Gujarati, Biharis, etc. who engaged in trade and business in the region is mostly done by the people from other states.

In spite of many constitutional guarantees ensured by the DS, ethnic communities in the region suspiciously watched many developmental projects and often halted its implementation arguing that it would endanger their distinct cultural identity. The introduction of rail project in Meghalaya was stopped by some ethnic communities as it leads to the inflow of people from other parts of the country that endanger their resources and identity. Perhaps the most crucial problem emerged in relation to the ODS was the migration of labour which spawned greater ethnic anxiety among the people. Often the ethnic anxieties were channelised by the vested interests of the ethnic communities to flare up intercommunity conflicts and extremist activities. It is argued that “the pervasiveness of violent conflict in Northeast India is routinely ascribed to the region’s backwardness and the ‘natural’ propensity for violence of its indigenous populations” (Kolas, 2017: 22). Thus, it can be argued that the DS pushing its developmental governmentality was the cause of many ethnic anxieties and also emerges as the resolver of such anxieties through its constitutional and extra constitutional protectionism. While moving from one trajectory to another, the DS was pregnant with such dichotomy leading the ethnic tensions and political turmoil in the region.

New Developmental State and its Developmental Stratagems

Since 1990s, the NEI is witnessing the emergence of a new developmental state (NDS) which was quite different from the old developmental state (ODS) especially in the policy and implementation. Though, unlike the rest of India, the pace of market reforms was slow in the region, it has impacted on the developmental priorities and the course of development. The DS still remains as the prime engine of development and occupy high place in the developmental imagination of people, even though market forces entered into the region with high developmental goals to achieve. For the past one decade, NEI India is witnessing dramatic advances in development. While recognizing the consensus on market and corporate business play vital role in the development activities, especially in the economic development, the state still remains as the prime mover of development and occupy high place in the developmental imagination of people. The region is attracting many investment, connectivity- road, rail, air and internet- and other infrastructure development. The wider perception that India’s Act East Policy, the growing regional connectivity with South East Asia and greater amount regional cooperation would bring more developmental avenues for the region. Since the region shares border with many countries and over 2000 km of the border with China, Bhutan, Myanmar and Bangladesh and having border trade with these countries, it has emerged as the new destination for border trade and wider road connectivity.

The Northeast 'Vision 2020' document emerged as the roadmap for development. There is a growing public investment through different agencies such as Development of North Eastern Region (DONER) which was established in September 2001 under a separate Ministry of Government of India to oversee the matters relating to the planning, execution and monitoring of development schemes and projects and thereby catalyst development in the region. The budgetary allocation to Ministry of DONER witnessed an increase of 51% allocation in BE 2018-19 compared against actual of 2015-16.

Due to the concerted effort of various agencies new skills and entrepreneurship is emerging. In 2007, the North East Industrial and Investment Promotion Policy (NEIIPP) was announced to give incentives in the form of subsidies like capital, transport and interest. It gave huge tax exemptions and subsidies to all new and existing industrial units. The announcement of the Northeast Industrial Development Scheme (NEIDS) by the Government of India in April 2018 for the period of 2017-22. On 21 March, 2018, the Union cabinet approved the NEIDS with a project outlay of Rs. 3000 crore up to March 2020. Along with the active role of the state in development, the union government is showing much interest in the flow of private invest in the region. The NITI Aayog document states that the Government of India and NER should work together to create an environment to attract more private investment into the region (Government of India, 2018: 177). Though the region has rich reservoir of natural resources, biodiversity, oil and gas, coal, herbs and aromatic plants for potential development, the major constraints of economic growth are inadequate infrastructure in terms of limited air, rail, and road connectivity, underutilization of available nature resources, safety and security related to development project, etc.

Enduring Ethnic Anxieties

Though the NDS engages in new developmental initiatives and implement new developmental projects, it is confronting with new ethnic anxieties of the various communities in the region. Perhaps, some of the ethnic anxieties are the prolongation of the earlier ones confronted by the ODS. For instance, there is demand for more ethnic protectionism, in the form of ILP to address this anxiety was confronted by the ODS. The growing demand for protecting the distinct identity and culture of the communities in the region. While the earlier ethnic anxieties of various communities in the Northeast India were more related to the nature and intervention of the Old Developmental State, the recent ethnic anxieties seem to be associated with New Developmental State where market (corporate) is an allied partner to development. The ODS emerged in the context of the command economy and protectionism and imagined in a broader developmental nationalism, NDS emerging in the context of liberalization and new forms of politically gratifying nationalism. Under the NDS, there is an emerging developmental consensus on market and private capital, but greater pessimism towards the migration of labour. In other words, the region is witnessing a phenomenon that while capital is welcomed, labour is unwelcomed. The growing ethnic anxieties perhaps not emerged out of the penetration of capital but migration of the labour and the

growing demands for the restriction of the mobility of labour to the region. Though militancy and extremism are receding considerably and peace is prevalent in the region, new ethnic assertions are taking place. Part of the reasons for the ethnic anxieties is the realization that market is the manifestation of exclusion as the opportunities created by it was extracted by certain social groups. Moreover, the growing unemployment due to lack of training and skill development among the youths in the region added to these concerns and which often lead to the ethnic youths and students for championing this anxiety. The growing ethnic anxiety further accelerated ethnic mobilization by the ethnic organisations like the students, youths and women. For instance, the All Assam Chutia Students' Union (AACSO) threatened to commit mass suicide by jumping from the under construction of Bogibeel bridge unless the upcoming bridge were named after 'Sati Sadhani', a cultural/mythological icon from the community. Here development project is welcomed but demanded for an ethnic naming. Further, the KSU's opposition to the extension of railway linkages to the state, being proposed as part of the Vision 2020 can be seen as the fear of labour migration in Meghalaya. The NEFR's initiative to connect the capital cities of the northeast was viewed as a threat to their indigenous identity.

Like the ethnic anxieties confronted by the ODS, the present ethnic anxieties are too related to class nature. In fact, these ethnic anxieties created by the elites among the communities to extract maximum resources and positions misleading the vulnerable segments of the community that all the vulnerability they face was due to the ethnically dissuaded development. The NDS is reaching out to the middle class and political elites through their development programmes. As Srikanth asserts that "a section of the elites closely associated with the liberalization process no doubt gets some benefits. But majority of the indigenous people will be exposed to the problems of land alienation, displacement, proletarianisation and unemployment" (Srikanth, 1998: 164). The policy makers pointed out that the simmering discontent of the ethnic communities is due to the growing unemployment and limited private investment which forced the youth to adopt the path of extremism and violence. They emphasis on the growing faith in potentialities of the market and the private and public initiative in projects as the solution. However, the new ethnic anxieties emerge out of migration, inflow of outsiders which not only leading to losing identity but also depletion of its scarce resources. Moreover, the private investment added new worries as there is a growing spatial disparity in development and social inequality among various communities in the region.

In Meghalaya, the extraction of Uranium by private companies induced the youths to protest against the Uranium mining in the West Khasi Hills District. In 2009, the KSU spearheaded an agitation when the state government decided to lease land to Uranium Corporation of India Limited (UCIL) for uranium mining in Meghalaya. It is to be reminded that the West Khasi Hills District in Meghalaya, which comes under the Sixth Schedule area, is known for rich reserve of uranium, estimated to be 9.22 million tons of uranium ore deposits. The Government of India in connivance with the state

government and the UCIL had made many attempts to mine the radioactive mineral from the regions of the West and South West Khasis Hill Districts since 1993. In September 2009, the KSU was in the forefront of the agitation, called for blockades and bandhs and started hurling stones on vehicles, as it claimed that the mining would affect the health and livelihood of the tribal communities. Moreover, it was claimed that the mining would lead to the displacement of tribal communities from their land.

Citizenship Amendment Act and New Anxieties

When the NDS was confronting with the ways and means to tackle the mounting ethnic anxieties of the communities of the region in the context of the penetration of private business, the introduction of Citizenship Amendment Bill (CAB) 2016 further aggravated the situation. According to the provisions of the CAB which was tabled in Parliament on 11 August 2016 citizenship rights should be granted to Hindus and other non-Muslims who migrated to India, Bangladesh other neighbouring countries such as Pakistan, Afghanistan due to religious persecution. It was argued that the Bill makes illegal migrants eligible for citizenship on the basis of religion, violating Article 14 of the Constitution which guarantees right to equality. Many ethnic organisations who ventured into violent protests and agitations against the CAB alleged that it would legalise the process of migration that is going on the region for more than six decades. According to them, it would further lead to developmental deprivation for the vast majority of the ethnic communities who are critically depend on the scarce resources and meagre developmental benefits. The CAB was passed by the Lok Sabha on 8 January 2019, but could not go through the Rajya Sabha where the Bharatiya Janata Party (BJP)-led National Democratic Alliance (NDA) government lacked majority. Later a Joint Parliamentary Committee (JPC) under Rajendra Agarwal was constituted to ascertain the view of stakeholders in Assam. In many places, which it visited faced protests from the various ethnic organisations such as students, youth and women. The government, through CAB, wants to enlarge the provisions of Citizenship Act of 1955 to provide asylum to 'persecuted minorities' in India's neighbouring states adding a religious identity in the discourse of citizenship.

The CAB provoked the ethnic communities of the NEI as they believe that it would facilitate migration from neighbouring countries. In wake of this the NESO demanded ILP for all states of the North East Region asserting that 'like everyone else, refugees will also have to come with ILP. Our states cannot be made dumping grounds for all those refugees.' NESO opposed the CAB as it affects the cultural values of the region. It further feared that the indigenous people in the region would decline 30 per cent due to the illegal migration from neighbouring countries. Further, it alleged that legalising migration of non-Muslims would also affect the resource crunchy states in the region, as resources would be plundered by the migrants. The NESO believes that the CAB is a threat to the identity of the local people. Instead of passing the CAB, constitutional safeguard should be granted to the people of NE states, along with adequate delegation in the vast federal authority, including the rights over land and its

natural resources. NESO, which submitted a memorandum to the chairman of JPC, alleged that illegal migrants have infiltrated into and polluted every aspect of the social culture of the northeast people. It also asserted that northeast should not be converted into dumping ground for illegal migrants. The Democratic Students Alliance of Manipur (DESAM) even threatened to start a movement to demand separate 'political autonomy' for the entire northeastern states, if the Rajya Sabha passes the CAB. Perhaps the most effective demand came from the NESO, in the context of CAB and subsequent CAA, was the introduction of ILP system for the entire region. The ILP, made by British under the Bengal Frontier Provision Act, 1873, exists in Nagaland, Mizoram and Arunachal Pradesh, which constituted the parts of the 'excluded' areas of erstwhile Assam. It is often argued that 'the Inner Line Registration was a product of the colonial frontierizing of the hills' (Barua, 2017: 107). The proponent of ILP often cite Tripura's skewed demography in favour of the migrants against the indigenous population. It needs mention that the indigenous population of Tripura have reduced to minority due to the large-scale influx from Bangladesh. It is also cited that Dimapur in Nagaland, the only district in the state the ILP is exempted, witnessed enormous influx of migrants and indigenous people lost the land and other resources. However, sensing its collateral damage to the electoral prospect of the NDA in the 2019 general election, the government was slowing down the process after passing it in the Lok Sabha.

After the NDA came into power for the second consecutive term, it brought back CAB in its new avatar and could muster support in both houses of the Parliament. Though the ethnic organisations fervently protested against the Citizen Amendment Act (CAA), the ruling BJP at the Centre was able to play a balancing act in addressing the ethnic anxieties emerging out of the guaranteeing citizenship to the religious minorities in the neighbouring states. The new CAB was passed in the Lok Sabha and the Rajya Sabha on 9 and 11 December 2019, respectively. President Ram Nath Kovind signed the Bill into an Act on 12 December. Unlike the previous Bill, the new one provided provisions for safeguarding the people of the region, as the government was categorical that CAA won't apply to areas under the sixth schedule of the Constitution, which deals with autonomous tribal-dominated regions in Assam, Meghalaya, Tripura and Mizoram. In other words, the CAA exempts certain areas in the North-East from this provision. It would not apply to tribal areas of Assam, Meghalaya, Mizoram and Tripura. This effectively means that Arunachal Pradesh, Nagaland and Mizoram along with almost whole of Meghalaya and parts of Assam and Tripura would stay out of the Act. Moreover, Manipur was placed under ILP to satisfy the demands of the dominant Meiteis community. Along with the counterstrategy of ethnic protectionism in the form of ILP, the BJP also ventured into the process of manufacturing elusive peace in the north-east India. The central government was instrumental in signing the Bru Accord and Bodo Accords to bring peace in the region. The quadripartite agreement signed between the Government of India, the state governments of Mizoram and Tripura and the representative of the Bru communities on 16 January 2020, was described as the historical initiative to end the 23-old Bru refugee crisis in Tripura and Mizoram. In a meeting presided over by Amit Shah, the Union Minister for Home Affairs, with the

presence of chief ministers of Mizoram and Tripura and Himanta Biswa Sarma, chairman, North East Democratic Alliance (NEDA), the agreement among other things allowed the Brus to stay back in Tripura. The agreement came after almost eight repatriation attempts over the last one decade to send back the Brus to their home land in Mizoram. Although the repatriation process was initiated during the United Progressive Alliance (UPA) regimes at the Centre, it got accelerated during National Democratic Alliance (NDA) regimes since 2014.

The tripartite Bodo Peace Accord 2020 (January 27) signed by the Government of India, Government of Assam and Bodo groups such as All Bodo Students Union (ABSU) and the National Democratic Front of Bodoland (NDFB). The agreement has been signed by Assam Chief Minister Sarbananda Sonowal, the leadership of four factions of NDFB, Satyendra Garg, Joint Secretary of ABSU, representative of the Ministry of Home Affairs and Kumar Sanjay Krishna, Chief Secretary of Assam. The Bodo Accord provides political and economic benefits to the tribal areas without seeking a separate Bodoland state or union territory. It assures providing some political rights and economic packages to the community. According to the provisions of the Accord, the number of seats in the Bodo Territorial Areas District (BTAD) will be increased from 40 to 60. Apart from these, the Accord provides setting up a central university at Barama in the name of Upendra Nath Brahma, special industrial policy for BTAD, railway coach factory in BTAD area, Sports Authority of India (SAI) centres at Udalguri, Baksa and Chirang, Deputy Commissioner (DC) and Superintendent of Police (SP) to be appointed in consultation with Bodoland Territorial Council (BTC) authority, a national sports university, Autonomous Welfare Council (AWC) for the Bodo people living outside BTAD areas, a cancer hospital and medical college in Tamulpur. Further, the Government of India has to expedite the process of granting hills tribe status to Bodos living in hills areas, establish a veterinary college at Kumarikata, a central university and Regional Institute of Medical Sciences in Udalguri. The Government of Assam “will notify Bodo language in Devanagiri script as the associate official language in the state.” The Accord also enlarges the scope of representation by increasing the strength of BTC from 40 to a maximum of 60 members.

Conclusion

The ODS initiated enormous developmental activities but it was not able to integrate North East with India’s trajectory of growth as ethnic assertions grip the region. Though, the ODS set certain mechanisms to address the ethnic anxieties, it could not achieve its goal fully as there were competitive demands on the ODS by various communities. The NDS wedded with new forms of political nationalism, of course different from the developmental nationalism of the Nehruvian era, sought to address the growing ethnic anxieties in the context of market. While earlier ethnic anxieties emerged out of the developmental experiment of ODS was addressed by the protective mechanisms guaranteed by the Constitution, the new ethnic anxieties

emerged out of the NDS was addressed through politically motivated strategies to harvest more electoral dividends for the ruling dispensation at the Centre. When the ethnic anxieties are gathering momentum under the NDS, political calculations take a push which divide the ethnic communities by offering certain perks to different communities and thereby dislodge the ethnic solidarity among various communities. To conclude, rather than finding an amicable solution to address the ethnic anxieties which developed under the ODS, the NDS prolonged it for reaping political benefits of the ruling dispensation and thereby putting the NEI under durable turmoil.

Endnotes

- 1 1. "NESO Resents Citizenship (Amendment) Bill," *The Arunachal Times*, 2 October 2016.
- 2 2. "NESO May Agitate Against Amendment to Citizenship Act," *The Shillong Times*, 2 October 2016.
- 3 3. "DESAM Warns of Movement for Separate 'Political Autonomy' for Northeast if RS Passes Citizenship Bill," *The Indian Express*, 17 July 2019.

References

- Bagchi, A.K. (2000), "The Post and Future of the Developmental State", *The Journal of World-System Research*, Vol.5, pp. 398-442.
- Barua, Taz (2017), "Return of the Frontier: Understanding the Demands for Inner Line in Northeast India", *Alternatives: Global, Local, Political*, Vol. 4, No.3, pp. 107-120.
- Biswas, Prasenjit and Chandan Suklabaidya (2008), *Ethnic Life-Words in North-East India*, New Delhi: Sage Publications.
- Elwin, Verrier (1959), *A Philosophy for NEFA*, North-East Frontiers Agency, Shillong: North East Frontiers Agency, Research Department.
- Evans, P. (1995), *Embedded Autonomy: States and Industrial Transformation*, Princeton: NJ: Princeton University Press.
- Government of India (2018), *Strategy for New India @75*, New Delhi: NITI Aayog.
- Guyot-Richard, Berenice (2013), "Nation-building or State-making?: India's North-East Frontier and the Ambiguities of Nehruvian Developmentalism, 195-1959", *Contemporary South Asia*, Vol. 21, No.1, pp. 22-37.
- Johnson, C. (1982), *MITI and the Japanese Miracle: The Growth of Industrial Policy*, Stanford, CA: Stanford University Press.

Kolas, Ashild (2017), "Framing the Tribal: Ethnic Violence in Northeast India", *Asian Ethnicity*, Vol. 18, No.1, pp. 22-37.

Mann, M. (1993), *The Sources of Social Power*, Vol. II, Cambridge: Oxford University Press.

Sen, Amartya (2005), *Development as Freedom*, New Delhi: Oxford University Press.

Srikanth, H. (1998), "Liberalization and Development of India's Northeast: Learning from Experience", in Gurudas Das and P.K. Purkayastha (eds.), *Liberalization and India's Northeast*, Shillong: Common Wealth Publishers, pp. 157-165.

Asia Floor Wage, International Labour Standards and 21st Century Issues

Krishnakumar S

Abstract

The maintenance of labour standards in the global value chain of production has been an important matter of policy concern worldwide. In the contemporary global economy with increasing fragmentation of production and organisation of production through the global value chains, this is of utmost importance. Not infrequently the protection of labour rights is used as a pretext for protectionist trade policies which discriminate against developing countries. Even when there is an agreement about the importance of the maintenance of labour standards through organisations like ILO, it has been found that the labour disciplines are dragged into various bilateral and megaregional trade agreements. Linking every other issue including labour standards with trade has been a method pursued by the advanced economies in the WTO towards upstaging the system based on rules of game. There have also been efforts from the part of private civil society initiatives in this regard. The “Asia Floor Wage”, a civil society response in the aftermath of the Rana Plaza Tragedy in Bangladesh, is a case for instance. This paper undertakes a critical evaluation of the same and brings out the possible limitations. The growing concern about the divergence between productivity and wages has been true across the world, and, it is not something specific to the developing world.

Keywords: Labour standards, Global Economy, Value chains, Trade Introduction

The contemporary era is witness to the emergence of different mega-regional trade agreements, some of which have been initiated at the direction of United States. Undermining the contours of the Doha Development Round, United States has been making concerted efforts towards pushing, what is characterized as the “21st century issues”, through these agreements. As part of the same, issues relating to international labour standards, environmental standards and intellectual property rights have been written into the draft of various agreements like Trans Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP).

Paradoxically, even as arguments linking trade to labour are being made towards improving the lot of the labour in the developing world, the neoliberal discourse has always been supportive of the doctrines based on labour market flexibility, and a laissez-faire approach of non-intervention in the matter (Bhattacharjea, 2006). Worst, it is even argued that such policies would alone be able to attract capital to one's own territory. The indicators developed in the last decade like *The Ease of Doing Business* are essentially built upon this rationale.

In fact, the organisation of production through global value chains and global production networks has been on the rise in the course of the last two decades. However, empirical evidence indubitably reveals the fact that the share of the total gross value added which accrues to the developing countries continues to be trivial. For the period from 1995 to 2010, empirical studies reveal that the share of the domestic value added in the gross exports of the developing countries have been on the decline, indicating a rising share of foreign value added in gross exports (Banga, 2013).

Even as the harmonization of labour standards would not be desirable, the slow pace of growth of wages and the working conditions in different Asian economies has been a growing matter of concern, both from the angle of demand as well as from the angle of the minimum conditions of work. The widening distributive disparities and the abysmally poor rate of growth of wages have been attributed as an important factor behind the lack of aggregate demand in the global economy. Increasingly when production in the world economy is increasingly as part of the global value chain, the multinationals headquartered in developed world which rely on the developing economies for outsourcing cannot shirk from their responsibility of rights violations in the developing world to which they outsource the manufacture of their products.

This paper is divided into three sections. The first section tries to shed light on the debate relating to core international labour standards and their enforcement in the context of the rising participation of countries in the global value chain. It attempts a critical appraisal of the different initiatives with respect to labour standards. The second section gives a brief summary of the argument of the initiative of Asia Floor Wage. The third section attempts a critical overview of the same. The last section has some concluding observations

I

From Singapore Ministerial to Megaregionals in the World Trading System

Despite the futile attempts from the part of the developed world towards linking core international labour standards with trade ever since the Singapore Ministerial, the importance of the same was recognized. The ILO was considered to be the appropriate institution towards monitoring the implementation of the same. ILO gives primacy of importance to state as the regulator of the implementation of the rules in this regard,

this has been viewed critically by various corners including Dhan, Lerner and Milman Sivan, who feel that in the course of the large scale disintegrated production happening in varied geographies under the auspices of the global value chains, mediated by the multinational enterprises, responsibility should be fixed on such organizations too, with respect to the assurance of decent working conditions (Marx, Wouters, Rayp, & Beke, La, 2015). Inasmuch as a very large share of the gross value added accrues to the developed countries, particularly, due to the high margins on account of brand values, it would only be appropriate to hold them also responsible with respect to the betterment of labour conditions in the developing world. Though the argument that the ILO should not continue to have a statist approach towards the issue of the regulation of the working conditions of labour might have some merit, it would not be appropriate to let the corporations decide on issues with respect to social labeling on the basis of what one can characterize as private labour standards, determined largely by norms of corporate social responsibility. In case, agents other than state, which is assumed to be a *neutral arbiter* is brought into the picture, not just multinational firms, but trade unions at the national and international level also ought to be incorporated. Later, taking cognizance of the inability of the private civil society groups alone to deliver on the front of labour standards, the International Labour Conference held in June 2016 has decided to go for multipronged approach: public, private, social as well as multilateral to deliver on this front (ILO, 2016).

Though in various rounds of WTO Ministerials, persistent efforts were made towards incorporating core labour standards, it could not get through. Inasmuch as wages across countries were not found to be moving in tandem with productivity improvements, the '*pauper labour argument*' made by the developed countries alleging unfair trade was not found to be coherent either. In fact, the '*pauper labour argument*' is just a protectionist rhetorical device towards containing even the minimal gains which developing countries have made in the field of trade and growth. Indeed, in the Doha Development Agenda, arguments were put forward towards sharing the fruits of development amidst countries which were excluded, through special safeguard measures and enhanced market access (Khor, 2010). But even when the *pauper labour argument* (i.e., the argument that low wage in poor countries give them an advantage) and the efforts to linking trade with labour standards did not make much sense, the declining share of wages in the national incomes, and the wages not keeping pace with productivity improvements were a growing matter of concern universally. For empirical evidences in this regard, studies by L. Mishel and H. Shierholz is insightful (Stiglitz, 2015). In this context, the declining share of wage in the developed world is as much a concern as in the developing world.

The level of global supply chain (GSC) participation of countries increased between 1995 and 2008 in many OECD and emerging market economies. In fact, the GSC participation index of India and China in this period has increased by almost by 93 % and 85%. The level has increased to such an extent that there are group of transnational contract suppliers like Li & Fung (apparel), Yue Yuen (footwear), and

Foxconn and Flextronics (electronics), which cater to multiple global brands simultaneously (Appelbaum, 2008). The number of jobs generated in the GSCs, as per ILO estimates, has increased from 296 to 453 million between 1995 and 2013 for the advanced and emerging economies, this amounts to 21% of the employment in 2013 as against 16% of the employment in 1995. (ILO 2015)

This process of outsourcing has been undertaken by the multinational firms with an intent of making good use of the opportunities of the reduction in per unit costs of production, and garnering competitiveness. The same has not resulted in any substantial increase in the share of these countries in the gross value added of exports in the global value chain. For example, the value captured by Foxconn, a prominent first-tier contract manufacturer for Apple, is extremely small, compared to the gains by Apple and other high-end component suppliers (Dedrick et al., 2011). Nevertheless, it has had a perceptible impact on the level of employment generated in the course of the last two decades. Though the wages have witnessed an increase, much of the same has often occurred by virtue of the decrees issued by the governments, than as a logical fallout of the productivity improvements in the economy. Moreover, given the low elasticity of employment to output due to labour augmenting nature of technological changes, the labour reserves would never be exhausted. (Patnaik, 2011). But the developing countries themselves are constrained from continuing the process of hiking up wages, fearing that this could result in capital migrating to low cost locations. On the other hand, in the developed world too, the stagnant share of wages in the national output has been an important matter of worry. The median wages (adjusted for inflation) in United States increased by only 5 percent from 1979 to 2012, even though at the same time productivity grew by 74.5 percent (Stiglitz, 2015). Indeed the debate on decent working conditions and the labour standards needs to be revisited in the context of the stagnation in real wages in the developed world as well as slowly rising wages in east Asia. The declining share of wages have also been instrumental in keeping the level of aggregate demand in the world economy at a lower level, that co-ordinated wage policies should be drawn out under the auspices of international organisations like ILO.

There have also been efforts underway at consumer conscientisation campaigns in different developed countries, in particular, European Union, where, there were efforts towards having GSP+, i.e., much more favourable provisions for developing economies which agreed to be signatories of the implementation of core international labour standards. And also, given that the brands based in US and Europe, particularly in the apparel sector, were subcontracting the various processes of the production to the low cost production centres in different parts of the world through the global value chain, ILO initiated the Ruggie Principles, which underlines the responsibility of businesses enterprises in resisting human rights violations during the course of their business activities throughout the supply chain. The same was further ratified by the UNHCR too. Indeed, this also gives some background for the initiative in the form of the Asia Floor Wage Alliance.

In the meantime, the Rana Plaza incident at Bangladesh in 2013, which resulted in the death of 1129 labourers, with over 2000 injured, following the collapse of the building under highly unsafe conditions drew the seriousness of the issues involved at the lower end of the global value chain. The intervention mediated through the ILO along with international trade unions with the major brands in clothing on owing up responsibility in this context is noteworthy. Not only is The Accord For Fire And Building Safety in Bangladesh legally binding on the brands committing them to make payments towards upscaling the inspection regime, but also assured maintaining purchasing volumes from Bangladesh. Further, it assured payment of 500000\$ over a period of five years. This is one of the cases which gave validity to the assertion that private standards and its maintenance have serious limitations and institutional efforts from the part of international agencies are warranted.

The rise to dominance of global value chains as method of organizing production has been witness to the process of large scale of informalisation of employment. Indeed the dispatched agency workers have literally doubled in China to 60 million between 2008 and 2012. In India, the NCEUS(2005) have drawn attention to the large scale informalisation of labour. This has been true with respect to other countries like Mexico and Thailand, among others, which have also been large beneficiaries of the production under global value chain. In fact, Chan et al (2010) draws attention to the state-in and state-out policies in China, where the state interested in attracting FDI would be ready to step in to offer concessions to them, and step out by withdrawing worker benefits for the labour.

Indeed unable to push their initiatives on 21st century issues at the WTO relating to labour and environmental standards and the protection of intellectual property rights, the developed countries, particularly United States, have taken resort to the establishment of megaregionals in the world trading system, which have WTO plus and WTO extra rules, like chapters on labour. In this regard, it should be noted that US is not a signatory to many of the core international labour standards including that relating to unionization of labour and discrimination of pay based on gender at workplace. In the course of the last few years, the talks and deliberations with respect to TTIP as well as TPP have however been in a state of flux. Though there has been a disagreement on various contentious issues and the agreements are yet to be finally clinched, the countries which constitute these blocks account for a very large proportion of the total world output, and account further for a larger share of the total world trade. The TPP, TTIP and number of Bilateral Investment Treaties(BITs) and FTAs, which have been ratified, or are under various stages, have inbuilt within it chapters relating to labour, and clauses relating to the enforceability of the provisions incorporated in them.

Indeed, if one goes by the supportive arguments of Baldwin and others, it seems that inasmuch as multilateralism is not suiting their interests with respect to 21st century issues, countries like US are resorting to such RTAs, FTAs or BITs. (Baldwin,

2016) This is even as the same countries use to their best the benefit of Dispute Settlement Mechanism within WTO in an unprecedented manner. Indeed even as most of these treaties have specific clauses relating to labour, the agreements like RCEP, BIMSTEC and so on among Asian economies do not have explicit incorporation of labour clauses within them. Indeed, the best way out would be to give teeth to the Singapore Ministerial Declaration, and bring ILO back into action as per the June 2016 decisions of the International Labour Conference, rather than directly link labour standards to trade. The next section explores one of the initiatives from the civil society in the form of Asia Floor Wage, which has as its premises an advocacy for decent wages for workers in the textiles and apparel sector in Asia, through a transfer mechanism from multinational brands.

II

The Asia Floor Wage- A Civil Society Initiative

The objective of the civil society initiative of Asia Floor Wage has been to assure decent living wages to labour in the textiles and clothing sector (Bhattacharjee, Roy, Bhardwaj, & Ghosh, 2015). The focus of the Asia Floor Wage Strategy has been to draw international attention towards the low levels of wages prevalent in the region, and emphasise upon the importance of a decent living wage for the labour in the apparel industry. Through social campaign like *Cleanclothes Campaign*, the large brands are forced to address the issue of decent wages down the global supply chain. The struggles of the labour in the region as well as the severe conditions under which they work have made the organisers to raise the issue of living wage, rather than minimum wage. This effort has often been seen as an attempt from the part of the Northern activists, rather than as a collective endeavour of the labour in Asia. The negotiations, too, of the Asian Floor Wage, has been with the corporates, and, not with the states concerned. Though the strategy has been built upon the premises that there are enormous labour reserves in Asia and capital is less likely to move out of the region, the brands to whom this issue have been raised have maintained that this would result in the shift of the location of production from one location to the other.

Without having to work overtime, that is beyond 48 hours in a week, the labour should be able to have a decent consumption for his or her family under the assumption that only one of them in the family is working, argues the Asia Floor Wage. Contrary to the usual calculations based on a poverty line approach, given the contribution of the labour to a sector which caters to the consumers of higher income countries, the calculations are made on the basis of basket of consumption in which food and non-food items are consumed in the ratio of 1:1. The calculation of food expenditure is made under the presumption of 3000 calories per person, rather than the lower limit numbers used for the assessment of the poverty line. Towards arriving to this AFW wage, the AFW Alliance has conducted detailed surveys in different parts of Asia. This Alliance would conduct periodic surveys on the needs requirement of labour

from time to time and revise the same. The Alliance has recommended a local wage equivalent of 475PPP\$ (2009) ,540 PPP\$ (2011) and 725 PPP \$(2013). It should be cautioned here that the calculations made on PPP basis, once converted into current dollars makes the problem very serious for the developing countries. This, though, this beyond the scope of this paper.

The Asia Floor Wage puts the onus on the brands that possess the economic power in the global supply chain to deliver on the front of a decent living wage. This is done by invoking the logic that they are the principal employers in the global chain , and ought to behave with a sense of responsibility. The AFW argues that given that it would fix the labour cost as per the living wage requirement, the attention should shift of the producers to deliver on the front of efficiency, productivity , and improving sourcing . Given that much of the value added is cornered by the brand owners and the global buyers, the AFW Alliance argues that towards assuring the Floor Wage, the f.o.b price granted to the supplier be increased accordingly. Indeed, it is counting on the fact that in case the brands and retailers are ready to give up on a negligible amount of the profit, it could work favourable for millions of workers in the sector

Indeed the wage costs in the apparel sector amounts to a trivial 2 to 3% across Asian economies, but vis-à-vis the price at which they supply, it is considerable at around 10 to 12%. Therefore too, the AFW Alliance argues that given the minimum level of profits accruing on the suppliers side, the onus should be on the global brands to specifically make the difference of living wage from the minimum wage, which is generally being paid in factories, as the living wage supplement, which should be transferred to the labour, by an increase in the f.o.b price to such an extent. This would occur only at the cost of the profits of the big brands, is according to the AFW, the only way it becomes workable.

III

Asia Floor Wage-A Critical Appraisal

At the outset, to raise an argument against fair decent living wages would be unwarranted. The premises of the argument of the AFW that under no circumstances would textiles migrate out of the region does not stand the scrutiny of history. It was not the case that the Asian region had any less of labour reserves then than now when cotton textiles was centered around Britain. Per se, it would be too presumptuous to build up an argument under the premise that capital in textiles would not migrate from one region, and it would stay put in Asia, that too, in a globalised world of finance and capital. On the other hand, it could get relocated to yet another low-cost region, or it would even get relocated at least partly to certain countries in Europe, provided the wages there are kept at lower levels compared to the productivity of labour .

This brings us to the next point, with respect to the conceptualization of decent wage per se in the Asian Floor Wage Alliance. It assumes that the wages should be twice

as much as is required to maintain the intake of 3000 calories. The PPP equivalent in local currencies of the same, the proponents consider to be important for all the apparel workers across Asia. Are we here presuming the productivity of labour employed across Asia is the same? As per the data available on UNCOMTRADE for 2015, it is understood that at least 42.99% of the textiles and apparel under the category of Clothing and Accessories export is done from China. The next best Asian performance is from India, that too at 4.47%. Far further are the shares of the other Asian economies. There are a number of European economies also in the list of leading exporters, as can be seen in the table. Would it be appropriate or even logical to keep the decent wages of the labour in the sector across economies at the same level, even when these economies are characterized with huge productivity differentials? This is possibly because the proponents have confusion of categories between the exaction of absolute surplus value and relative surplus value, continuing to nurture the belief that the profits accruing are purely due to the labour being kept at the subsistence level. In case decent wages is to be demanded in principle, it should be synchronized with the productivity of the sector in different economies. Lest, the anomalies as it shows up in different calculations done by the team would arise.

If calculations are made purely from the assumption that the workers are being paid the minimum wage, indeed the proposed Asia Floor Wage does not have any inbuilt incentive to support higher wages from the part of the domestic employer which occurs endogenously, for it is assumed that the gap would be or should be filled by the big buyer brands. In fact wages can be low in developing countries, as much as in the advanced economies, if they do not move in tandem with productivity improvements.

Assume that this works out, won't it be rational for the brand retailers/MNEs to shift their location to one of the other Asian countries to which the supplementary living wage transfer requirement is less. This is argued so because the AFW believes that given the labour surplus available in the Asian economies, and the labour intensive nature of the jobs entailed, the businesses would not leave the region. What should stop them from shifting their locations to non-Asian regions like Mexico, Tunisia, or for that matter some other new location, where such conventions do not prevail?

This brings us to the next important, which is pertinent from the part of the textiles and clothing industry. Amidst the important exporters of textiles to the world economy are countries like China, EU, India, United States, Turkey, Korea, Chinese Taipei, Hong Kong, Pakistan, Japan, Vietnam, Indonesia, Thailand, UAE and Mexico. Of the approximately 772 bn\$ billion dollar worth of exports, China has a share of 35%, and India is second with a share of 5%, followed by Germany and Italy. Prominent amidst the non-Asian economies in the list are Turkey(4%) and Mexico(1%).

The share of the major exporters under the various categories of Textiles & Clothing: Clothing and Accessories (84), Textile, Yarns and Fabric(65) and Textile

Fibre and Waste(26) based on the data provided by UNCOMTRADE reveals that just behind India(are countries like Germany and Italy. In case, this transfer mechanism is implemented, would it not end up increasing the relative profitability of operating from those economies? Would it not result in some of these Asian economies being pushed to a “middle income” trap of sorts? What explanation would the AFW offer for the same? It is also to be seen as to how effectively the chapters on labour would be pursued in the new regional trade agreements, FTAs and BITS? Or would they be mere strategies of trade diversion with an intent of reducing the share of some economies in the world trade? Have the earlier experiments in the form of NAFTA given any evidences with respect to harmonization of labour standards.

Table 1: Export Share of Major Exporters in the Textiles & Clothing Sector 2015

Export Share Of Major Exporters In The Textiles & Clothing Sector 2015					
	84		65		26
	Clothing and accessories		Textile yarns, fabric etc.		Textile fibre and waste
China	42.99%	China	38.78%	USA	18.43%
Italy	5.22%	India	6.14%	China	9.43%
Hong Kong	4.53%	USA	4.95%	Australia	9.13%
India	4.47%	Germany	4.48%	India	8.43%
Germany	4.22%	Italy	4.16%	Japan	4.69%
Turkey	3.72%	Turkey	3.90%	Rep. of Korea	4.55%
Spain	3.03%	Rep. of Korea	3.79%	Brazil	4.28%
France	2.73%	Other Asia, nes	3.44%	Belgium	3.60%
United Kingdom	2.17%	China, Hong Kong SAR	3.24%	Germany	3.18%
Belgium	2.05%	Pakistan	2.93%	Other Asia, nes	2.65%
Netherlands	1.92%	Japan	2.19%	United Kingdom	2.33%
USA	1.50%	Belgium	2.00%	Thailand	2.21%
Cambodia	1.46%	Netherlands	1.73%	France	1.94%
Pakistan	1.24%	France	1.69%	New Zealand	1.74%
Malaysia	1.18%	Spain	1.39%	Italy	1.53%
Sri Lanka	1.17%	United Kingdom	1.34%	Turkey	1.03%
Source : UNCOMTRADE (own calculations)					

In fact, Germany has been witness to a decline in collective bargaining and the increase in in-work poverty over the decades. Collective bargaining coverage reduced from 80% in 1980s to 66% in 2000 to 57% in 2010, compelling the government to announce a statutory minimum wage of 8.5 EUR per hour in 2015. From the data provided by the German Socioeconomic Panel, it has been estimated that at least 11.3%

of the labour are below this minimum wage. There are estimates which even say that it is as high as 14 to 19% (OECD, 2016). The OECD Employment Outlook 2016 particularly highlighted this fact, which is relevant from the angle of the argument of AFW, in the sense that if for comparatively higher productivity, even when there is wage stagnation in developed countries like Germany, this partial, region-specific effort could spell doom for the export prospects of the region and might end up being self-defeating.

Indeed, due to the high levels of deflation as well as depreciation, several developed countries have been witness to real exchange rate depreciation, which could translate in the form of improved competitiveness. In certain economies like Germany, notwithstanding productivity improvements, there has been no translation of the same into improvements in the level of wages, that it has been able to transform itself into a big exporter. Further the real exchange rate appreciation of the Bangladeshi takka having an adverse effect on the exports of the country has also been a concern in 2016 (Shafiullah & Rasul, 2016).

The initiative in the form of the Asia Floor Wage has been with an intent of addressing the issue of low wages which has been plaguing the textiles and apparel sector for long, despite the significant earnings accruing to different Asian economies by virtue of the same. This, it is argued, would also go a long way towards the creation of large domestic markets. The net ought to be spread wider, why should the idea of Asia Floor Wage be confined to the Asian countries focusing on textiles and clothing alone? Should not the other industries also be brought under its purview? Should not other regions also be brought under such norms? Should not the reluctance of certain developed countries to pass on the benefits of productivity improvements on to their labour be equally held responsible, for this gives undue advantage in the form of their real exchange rate depreciation? This argument for decent wages should be pursued at the global level through the guidance of international institutions like ILO, which has the mandate for the same.

IV

Some Concluding Observations

The last decade has witnessed tremendous increase in the global value chain participation rate of different countries. The disintegration of production and integration of trade has also resulted in the rights of labour becoming matter of concern. The declining share of labour incomes across countries in the world has become an important matter of concern, further contributing to the problem of demand shortages in the global economy. Many efforts have been underway towards addressing this issue. With the rise of civil society activism there have been many private standards initiatives. Even when they are no less important, there is a necessity of bringing ILO in a big way towards addressing the pressing concerns of labour. Even when the efforts

towards linking labour standards with trade are being pursued through various mega-regional trading agreements, the multi-tiered level of addressing these concerns, under the direction of ILO would be best. This paper has made an attempt towards critically evaluating the Asia Floor Wage argument in the light of the debate on core international labour standards. In fact, it would be appropriate to end with a quote from Joan Robinson (1946) when she remarked “the wages of a valet in US are higher than that of a bearer in India, not because the American is more efficient (the reverse may very well be the case), but because of the superior productivity of the industrial and agricultural labour has set the wages there at a higher level than in India” (Robinson, 1946). When efforts are being made to integrate international labour standards through the pauper labour argument, rather than falling prey to the same, we ought to bring out the widening disjuncture between productivity improvements and wages across economies in the world.

This is a substantially revised version of the paper presented at the 58th Annual Conference of Indian Society of Labour Economics, Guwahati, 24-26 November 2016. The author wishes to thank the participants in session, in particular, to Keshab Das for his observations. Also thanks to Benny Kuruvilla and Rajib Sutradhar, with the usual disclaimer.

Bibliography

- Appelbaum, R. P. (2008). Giant transnational contractors in East Asia: Emergent trends in global supply chains. *Competition and Change*, Vol. 12, No. 1, 69–87.
- Baldwin, R. (2016). The World Trade Organisation and the Future of Multilateralism. *Journal of Economic Perspectives*, Vol 30, No 1, Winter, 95-116.
- Banga, R. (2013). *Measuring Value in Global Value Chains Background Paper* No. RVC-8. Geneva: UNCTAD.
- Bhattacharjea, A. (2006). Labour Market Regulation and Industrial Performance in India: A Critical Review of the Empirical Evidence. . *The Indian Journal of Labour Economics*, Vol 49, No. 2, Apr-June, 211-232.
- Bhattacharjee, Roy, Bhardwaj, & Ghosh. (2015). *Towards An Asian Floor Wage. A Global South Labour Initiative for Garment workers in Asia .South-South Dispatch* 03. Bangalore: Books for Change.
- ILO. (2016). *Decent work in global supply chains. Report IV. International Labour Conference. 105th Session. 2016.* Geneva: ILO.
- Khor, M. (2010). *Analysis of Doha Negotiations and the Functioning of the WTO. Research Paper* 30. May 2010. Geneva: South Centre .

Marx , A., Wouters, J., Rayp , G., & Beke, La. (2015). (2015) *Global Governance of Labour Rights: Assessing Effectiveness of Transnational Public and Private Policy Initiatives*. *Leuven Global Governance Series*. . Edwar Elgar.

OECD. (2016). *OECD Employment Outlook 2015*. *OECD Publishing*. Paris. Paris: OECD Publishing.

Patnaik, P. (2011). Crisis and employment in the World Economy. *Indian Journal of Labour Economics*. *Volume 54, Number 1, Jan-March*.

Robinson, J. (1946). The Pure theory of International Trade . *Review of Economic Studies*. *Vol 14*, No. 36., 1946-47.

Shafiullah, & Rasul. (2016, March 28). Bangladesh's-real-exchange-rate-appreciation:- A-source-of-competitiveness-erosion. *Financail Express* .

Stiglitz ,J. (2015). *The Great Divide*. Random House. Penguin.

The State and the Individual: Mahatma Gandhi on Dissent

Teresa Joseph

Abstract

Dissent is inevitable in any society and the manner in which it is articulated and responded to, reflects the nature of that society. This calls into question the nature and role of the state, and the inter-relation between the state and the citizen. Mahatma Gandhi has inter alia dwelt in depth with these questions and the idea of dissent, as well as the nature of response to it. An attempt is made here to bring these strands of thought together to provide a cohesive understanding of Gandhi's approach to dissent in its larger context.

Keywords: Gandhi, dissent, sedition, civil disobedience, swaraj, State

Introduction

Dissent is an integral part of any democratic society, often contributing to socio-economic, cultural and political transformation. Dissent, as reflecting a difference of opinion or the withdrawal of consent, together with the failure to engage with dissenting voices, often finds its expression in protest and resistance. Various forms of dissent, protest and resistance are visible all over the world. However, although this is perceived to be part of democratic processes in many societies, in the less democratic ones efforts are taken to suppress such voices, through various methods.

Mahatma Gandhi was one person who has written and spoken about, as well as practised dissent at various points of time. Gandhi's views on the state and the individual, and questions of dissent and sedition gains significance in the contemporary global situation where spaces for dissent are decreasing. Although Gandhi did not provide a systematic account of these questions, his thoughts lie interspersed in his numerous speeches and writings.

Gandhi on Power and the State

The question of dissent is rooted in the power dynamics of any society. Political power for Gandhi was not an end but one of the means to improve the lives of the people in every aspect. It meant the capacity to regulate national life through representatives (CW 47: 91). He was of the opinion that true power rests with the people and not in parliaments or legislative assemblies. In fact, “parliaments have no power or even existence independently of the people” (CW 75: 148). He argued that the “government exists to serve the people, not the people the government” (CW 22: 28). In other words, representatives were the servants of the people as they were sent to Assemblies to loyally carry out the people’s wishes. He did not make any distinction between the then existing Assemblies or future ones under Swaraj (CW 84: 35).

Gandhi’s notion of the state needs to be viewed in the larger context of his core ideas of truth and nonviolence. He was critical of all institutions that use force and viewed the ‘modern state’, as he referred to it, as one such institution. Compared to the ancient and medieval states, he felt that the modern state, a product of modern civilisation, represented “violence in a concentrated and organized form” (CW 59: 318). Through the use of the police, the military, courts, laws, prisons, etc. it sustained itself and tended to impose its will on the people. Furthermore, in contrast to the individual who has a soul, he considered the state to be a soulless machine. It lacked human sensitivity and focused on rules and regulations. As such, he felt that it could not be drawn away from the violence to which it owed its very existence (CW 59: 318).

Gandhi felt that as the existing forms of government took the modern state for granted and only represented different ways of organizing it, they were inherently incapable of tackling its structural defects. Even liberal democracy, which was the least objectionable, did not contribute to integrate state and society, decentralize political power, involve citizens in the conduct of public affairs, or reduce violence (Parekh 1997: 99). For him self-government meant being “independent of government control, whether it is foreign government or whether it is national” (CW 28: 33). Swaraj for him meant “freedom for the meanest of our countrymen.... I am not interested in freeing India merely from the English yoke. I am bent upon freeing India from any yoke whatsoever” (CW 24: 227). For him political independence meant “sovereignty of the people based on pure moral authority” (CW 64: 192).

Gandhi argued that if national life became so perfect as to be self-regulated, representation would not be necessary, as there would then be a state of ‘enlightened anarchy’, where each one would be his own ruler. He would rule himself in such a manner that he would never be a hindrance to his neighbour. In the ideal society therefore, there would be no political power as there was no State. However, Gandhi admitted that this ideal would not be fully realized in reality and therefore subscribed to Thoreau’s view that “that Government is best which governs the least” (CW 47: 91). He often reiterated that “that state will be the best governed, which is governed the least”

(see for instance CW 72: 388-89). For Gandhi “a nation that runs its affairs smoothly and effectively without much State interference is truly democratic. Where such a condition is absent, the form of government is democratic in name” (CW 62: 92). Thus, according to Iyer (2000: 254) Gandhi, in essence supported the anarchist view of the state as an ideal, but in practice supported minimum state intervention.

The two major functions that Gandhi envisaged for the state were the protection of the rights of citizens and guarding their security from external aggression. He felt that the state should be centralized enough to provide for internal order and external security and coercive enough to meet its constitutional requirements. He defended the limited liberal state, which was limited by the very fundamental rights that it was required to protect. However, he felt that even a liberal state could abuse its power. Hence, citizens had to be prepared to resist such abuses (Parel 207: 53-5).

He argued that the state depended on the cooperation – whether active or passive – of its citizens. This meant the rendering of specific services such as carrying out orders, paying taxes, fighting wars and obeying laws. Thus, the state did not exist independently of its citizens, but was ultimately only a system of institutionalized co-operation between them (Parekh 1997: 105). Thus, the power of the state over the individual cannot be total even where the state is based on consent (Parel 2011: 159). As long as the state is essentially a coercive agency, it could not “claim inalienable, unchallengeable authority for itself, even if it secures the tacit assent of its citizens or the active consent of a majority of their chosen or nominated representatives” (Iyer 2000: 253). But Gandhi revealed that his greatest fear was the possible increase in the power of the State as “it does the greatest harm to mankind by destroying individuality, which lies at the root of all progress” (CW 59: 319).

On ‘The Duty of Disloyalty’

According to Gandhi, while a just and democratic state deserves loyalty, the citizen has the right to disobey unjust and repressive laws. He elaborated in *Young India*:

Most people do not understand the complicated machinery of the Government. They do not realize that every citizen silently but nonetheless certainly sustains the Government of the day, in ways of which he has no knowledge. Every citizen therefore renders himself responsible for every act of his Government. And it is quite proper to support it so long as the actions of the Government are bearable. But when they hurt him and his nation, it becomes his duty to withdraw his support (CW 18: 93).

Iyer (2000: 256, 55) argues that this was the most extreme statement ever given of the doctrine of the collective responsibility of all citizens for the acts of the government and the very nature of the state. Gandhi believed that if individuals recognized this power in their hands and used it constructively to secure the social good

or to engage in non-violent resistance against unjust laws and the repressive measures of the State, State power would be reduced and its coercive authority would be undermined. The draft of the Declaration of Independence that Gandhi prepared for the 1930 Karachi session of the Indian National Congress, clearly stated that

it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth. We believe also that if any government deprives a people of these rights and oppresses them, the people have a further right to alter it or to abolish it (CW 42: 384).

Thus, Gandhi felt that citizens, as moral beings, had a duty to decide to whom they should give their loyalty and support and under what conditions. Their self-respect and dignity required that their loyalty should not be unconditional or taken for granted. He did not elaborate his criteria for evaluating the law, but he considered a law to be regressive if it degraded its citizens and made them behave against human dignity; if it was openly partisan in its objectives or outcome and discriminated against specific religious, racial and other groups; if it was disliked by a vast majority of citizens and if opposition to it was universal (Parekh 1997: 106-8). He pointed out that:

it is a great error to believe that nothing but justice prevails in a country in which everything is decided by a majority vote. Much injustice continues to be perpetrated because this error is not recognized. It is a mere superstition to believe that what is done by a multitude is bound to be right. Can there not be a government in which majorities do not decide right and wrong, but conscience? Must the citizen always resign his conscience to the legislators? I would say that we are men first and subjects afterwards. It is not necessary to cultivate a respect for the law so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right. Law never made man a whit more just (CW 7: 218).

At the same time, Gandhi warns that laws should be judged in consonance with the general character of the state. If it was generally good, with occasional wrongs it should not be judged too harshly. He wrote in *Hind Swaraj* (1939: 70) that the notion that we should obey laws whether good or bad is a new-fangled one, man-made laws are not necessarily binding. "If man will only realise that it is unmanly to obey laws that are unjust, no man's tyranny will enslave him. This is the key to self-rule or home-rule." In an article in *Young India* of 27 March 1930, Gandhi further emphasised "The Duty of Disloyalty." He argued that it was "the duty of those who have realised the awful evil of the system of Indian Government to be disloyal to it and actively and openly to preach disloyalty. Indeed, loyalty to a State so corrupt is a sin, disloyalty a virtue..... Disobedience of the law of an evil State is therefore a duty" (CW 43: 132-3). He explained that Civil Disobedience should however be confined only to those laws which do not bear any moral sanction. Laws may be either criminal or civil.

But a Civil Resister will not hesitate to commit a civil breach of artificial crime (law?), e.g., Section 124 A of the Indian Penal Code, under which anything according to the vagaries or predilections of a judge may be termed sedition.... The law of sedition could never mean [that] tyranny or high-handedness, even though they may be enshrined in a Statute-book, should be submitted to, for fear of the tyrant being held in contempt (CW 15: 482).

The right to civil disobedience according to Gandhi was therefore duty based rather than rights based. He believed in the right to civil disobedience which he derived from the duty of civil disobedience (Haksar 2008: 80).

Dissent: Gandhi's Way

Real swaraj according to Gandhi would not come through a few people acquiring authority "but by the acquisition of the capacity by all to resist authority when it is abused. In other words, *Swaraj is to be attained by educating the masses into a sense of their capacity to regulate and control authority*" (italics added, CW 26: 52). Yet, any kind of resistance to the state would be possible only if citizens generally appreciate the laws of the State and obey them voluntarily without fear of punishment. He felt that the reasoned and willing obedience to the laws of the state was the first lesson in non-cooperation. "We must tolerate many laws of the State, even when they are inconvenient.... It is only when a people have proved their active loyalty by obeying the many laws of the state that they acquire the art of civil disobedience" (CW 25: 560). He stressed the point that while unjust laws were to be broken, this should be a last resort, to be undertaken only after petitions, requests, etc. failed. He also felt that one need not necessarily wait until the opponent was converted. According to him:

We must refuse to wait for the wrong to be righted till the wrong-doer has been roused to a sense of his iniquity. We must not, for fear of ourselves or others having to suffer, remain participators in it. But we must combat the wrong by ceasing to assist the wrong-doer directly or indirectly. If a father does injustice, it is the duty of his children to leave the parental roof. If the headmaster of a school conducts his institution on an immoral basis, the pupils must leave the school. If the chairman of a corporation is corrupt, the members thereof must wash their hands clean of his corruption by withdrawing from it; even so if a government does a grave injustice the subject must withdraw co-operation wholly or partially, sufficiently to wean the ruler from wickedness (Tendulkar 1951: 357).

He was also clear about how laws were to be disobeyed. He wrote in *Young India* in 1920 (CW 17: 114) that disobedience to be civil "must be sincere, respectful, restrained, never defiant, must be based on some well understood principle, must not be capricious and above all must have no ill will or hatred behind it." Two years later, he further clarified that more value should be given to the adjective "civil" rather than to

"disobedience". "Disobedience without civility, discipline, discrimination, nonviolence is certain destruction" CW 22: 137).

Gandhi differentiated between individuals and their deeds, as well as between individuals and institutions, warning that irrespective of the nature of the deed, the doer of the deed "always deserves respect or pity as the case may be. 'Hate the sin and not the sinner'" (Gandhi 1927: 254). While he opposed the British Empire, he did not view the British people in similar light. On the contrary many of them became his closest friends. During all the protest and resistance movements that he participated in, he sought to focus on principles rather than persons. The underlying principles of Gandhi's engagement with an opponent in any conflict were to keep open the channels of communication, avoid intimidation, and remove all obstacles to dialogue (see Gonsalves 2010: 15). He wrote in *Young India*:

In these days of democracy there is no such thing as active loyalty to a person. You are therefore loyal or disloyal to institutions. When therefore you are disloyal you seek not to destroy persons but institutions.... Violent disobedience deals with men who can be replaced. It leaves the evil itself untouched and often accentuates it. Non-violent, i.e., civil, disobedience is the only and the most successful remedy and is obligatory upon him who would dissociate himself from evil (CW 43: 132–3).

Gandhi clearly felt that the administrators of an unjust system were only creatures of circumstance, and even the purest men entering the system would be affected by it. Gandhi's words in *Young India* of 23 September 1926 certainly needs reiteration:

The golden rule of conduct, therefore is mutual toleration, seeing that we will never all think alike and that we shall always see *Truth* in fragment and from different angles of vision. Conscience is not the same thing for all. Whilst, therefore, it is a good guide for individual conduct, imposition of that conduct upon all will be an insufferable interference with everybody else's freedom of conscience (CW 31: 440).

Gandhi felt that Civil Disobedience, becomes a sacred duty when the state becomes lawless, or corrupt. "And a citizen that barter with such a state shares its corruption or lawlessness" (CW 22: 143). He wrote in *Young India* in 1922 that "the All-India Congress Committee holds civil disobedience to be the right and duty of the people to be exercised and performed whenever the State opposes the declared will of the people" (CW 22: 468).

Gandhi drew on Thoreau's notion of civil disobedience. Henry David Thoreau, the American philosopher who wrote 'On the Duty of Civil Disobedience' in 1849, argued that it is one's duty to register one's protest against any injustice by the

government. Thoreau had faced imprisonment for refusing to pay taxes to the state which continued to practise slave trade. Gandhi was first introduced to Thoreau's writings in 1907 when a friend sent him a copy of 'On the Duty of Civil Disobedience' (see CW 41: 553). He paraphrased it and published it in two parts in *Indian Opinion*, the newspaper he established in South Africa (CW 7: 217). In 1942 Gandhi wrote that through his essay 'On the Duty of Civil Disobedience', Thoreau provided 'scientific confirmation' of what he had been doing in South Africa (CW 76: 358)

What interested Gandhi in Thoreau was his reference to the role of moral conscience in resistance against injustice. For Gandhi "the voice of conscience transcended that of the state" (Jahanbegloo 2018: 103). As early as 1917, when Gandhi was summoned before the Magistrate of Champaran for refusing to obey his orders to leave the area immediately, he, pleaded guilty of defying the law. He stated that he had disregarded the order served on him "not for want of respect for lawful authority, but in obedience to the higher law of our being, the voice of conscience" (Gandhi 1927: 384). He later wrote in *Young India* that "there is a higher court than courts of justice, and that is the court of conscience. It supersedes all other courts" (CW 22: 29).

Parel (2016: 191-5) points out that Gandhi agreed with Thoreau that there would never be a truly free and enlightened state until it recognized the individual as the higher and independent power from which its own power and authority are derived and treated him accordingly. As the citizen possessed higher and independent power, he had the right and the duty to resist the state when it acts unjustly. Gandhi was impressed with Thoreau's idea of the moral foundation of government and the state – i.e. to be strictly just, the government must have the sanction of the governed. Similarly, he was impressed with the notion of the relationship of the individual to the state – i.e. in some respects, the individual is subject to the power of the state, but in others, he or she is independent of it. Other ideas that attracted Gandhi were the need to limit the government's power over the citizen; and that the duty to disobey an unjust law requires prompt and concrete action. Gandhi endorsed the theory that the state's authority over the life, liberty, and property of its citizens is not absolute. It is contingent on the state being just. However, that state is never just that imprisons a just citizen who justly disobeys specific laws. Gandhi agreed with Thoreau that in a tyrannical state or under a government which imprisons anyone unjustly, the right place for a just man or those who do not wish to submit to its tyranny is in prison (see CW 7: 230; CW 9: 183). He also agreed that the "loss of liberty, wealth and intense suffering were the only course of honorable conduct under an unjust government." (CW 18: 169).

For Gandhi the objective of civil disobedience was to change the policy of the government. So it was to be used only against foreign rulers, tyrannical governments or unjust governments that did not respond to people's rights and needs. Thus, when citizens disobeyed a law, they should satisfy two conditions. The first being that disobedience should be civil – i.e. it should be public and nonviolent. Those undertaking it should reveal why they found the law unacceptable and they should be

ready to face the consequences. Gandhi argued that while violent disobedience may remove or replace men, it leaves the evil itself untouched. The second condition was that they should have earned the moral right to disobey the law. Only those who had usually obeyed its laws and shown their loyalty to the state and proved their moral maturity had the right to civil disobedience or non-cooperation (Parekh 1997: 107). Gandhi thus provides ample safeguards against anarchy – by making this disobedience civil and non-violent (Dhawan 2006: 294). Civil disobedience was to him the purest form of constitutional agitation. While a civil resister is a philanthropist and a friend of the State, an anarchist is an enemy of the State (CW 22: 19). In similar vein, referring to the question of satyagraha or ‘soul force’, Gandhi explained that it was aimed at an improved constitutional order rather than the replacement of the state by statelessness.

He wrote in *Hind Swaraj* (1939: 69) “passive resistance is a method of securing rights by personal suffering; it is the reverse of resistance by arms. When I refuse to do a thing that is repugnant to my conscience, I use soul-force.” As Parel (2007: 57) points out, the voluntary acceptance of the penalty for civil disobedience proved both the legitimacy and validity of the state, and the constitutionality of civil disobedience. The constitution and satyagraha played complementary roles in Gandhi's philosophy. He spoke of the difference between what he called the “constitutional swaraj” and “organic swaraj.” The first created a liberal, coercive state; the second developed the satyagraha technique of resisting it, should it deviate from its liberal path. The first required the involvement of the elite - “the learned and politically astute leaders” - and the second required the involvement of “the ordinary, illiterate masses” (also see CW 37: 249). To run smoothly, the Gandhian state needed the active involvement of both the elite and the masses. Action on the part of the state and the corrective, non-violent, resistance on the part of citizens would restrain the state's tendency to expand its power.

Gandhi's statement at the ‘Great Trial’ (as it came to be known) of 18 March 1922 is noteworthy. He was arrested on charges of sedition under Section 124A of the Indian Penal Code for exciting or attempting to excite disaffection towards the government by writing three articles in *Young India* – ‘Tampering with Loyalty’, ‘The Puzzle and Its Solution’ and ‘Shaking the Manes’. Pleading guilty to all the charges, Gandhi explained how from a “staunch loyalist and co-operator” he had become “an uncompromising disaffectionist and non-cooperator.” Referring to the Englishmen and their Indian associates in the administration of the country, Gandhi further stated:

.... a subtle but effective system of terrorism and an organized display of force on the one hand, and the deprivation of the powers of retaliation or self-defence on the other, has emasculated the people and induced in them the habit of simulation. This awful habit has added to the ignorance and the self-deception of the administrators. Section 124A, under which I am happily charged, is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or

system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence.... I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system.... Holding such a belief, I consider it to be a sin to have affection for the system” (CW 23: 118).

Gandhi argued that while the state would be justified if it uses the minimum of violence, “the fear is always that the state may use too much violence against those who differ from it” (CW 59: 318). He further argued that it was the state’s power to punish that was “an instrument of fear. When the subjects have abandoned fear, this instrument loses its effectiveness. This fearlessness can be cultivated only through irreproachable conduct and such purity of conduct is impossible without truth. Thus, practice of truth is the only gateway to our freedom” (CW 16: 298-99).

Moreover, he felt that when normally law-abiding citizens disobeyed the law, they deserved a good response and the government should not ruthlessly suppress them (Parekh 1997: 107). To put down civil disobedience was “to attempt to imprison conscience” (CW 2: 143).

Conclusion

Romila Thapar (2020: 4, 109) points out that dissent is not a modern concept, having existed over centuries. While earlier only the powerful had the right to question, today – at least in theory the right to question is public, open and can be exercised by any citizen. The most widespread articulation of public dissent in India were the Non-Cooperation and Civil Disobedience Movements under the leadership of Gandhi. Dissent helped to establish a free and democratic India. As Jahanbegloo (2018: 105) points out “perhaps one of Gandhi’s greatest accomplishments was to replace fear of authority with the courage to resist and overcome it.”

However, there is an increasing intolerance to dissent the world over, and the possibilities of dissent are becoming problematic, with the question of sedition gaining salience – India being a case in point. As Gopal Guru (2021: 7) points out, “the provision of sedition law has experienced a seamless transition from a colonial to a postcolonial state.” Section 124A has been used by different governments to stifle dissent. “The chilling effect of these laws threatens to undermine, and gradually destroy, the legitimate and constitutionally protected right to protest, dissent or criticise the government” (Narain 2011: 37). Anushka Singh (2021: 8) succinctly points out that “sedition as a political act was as appropriate to explain the anti-colonial movement as is to elucidate the exercise of popular sovereignty post independence.... What is needed is not the judicial erasure of the offence of sedition alone but the restoration of the language of dissent that the meaning of sedition imports.” The virtue of any democratic polity is the right of every citizen “to think, express and organize ‘disaffection against the government’” (Editorial 2011: 7).

But in the first instance, as Gandhi wrote in *Young India* in 1922, “we must first make good the right of free speech and free association.... We must defend these elementary rights with our lives” (CW 22: 142). For Gandhi dissent or resistance was an ethical duty, so were the questions of what to resist, why to resist and how to resist. The need of the hour is to draw lessons from Gandhi’s views on the right as well as the duty to dissent, freedom of speech and expression, and sedition, as well as his tradition of dialogue and openness. Therein lies the future of a truly democratic society.

References

- Dhawan, Gopinath (2006) *The Political Philosophy of Mahatma Gandhi*, New Delhi: Read Books.
- Editorial (2011) “Contempt of Justice” *Economic and Political Weekly*, 1 January, 46 (1): 7-8.
- Gandhi, M.K. (1927) *An Autobiography or the Story of My Experiments with Truth*, Ahmedabad: Navajivan Trust.
- Gandhi, M.K. (1939) *Hind Swaraj*, Ahmedabad: Navajivan Trust.
- Gonsalves, Peter (2010) *Clothing for Liberation: A Communication Analysis of Gandhi’s Swadeshi Revolution*, New Delhi: Sage.
- Guru, Gopal (2021) “Understanding the Concept of ‘Sedition’” *Economic and Political Weekly*, 7 August, 41 (32): 8-9.
- Haksar, Vinit (2008) “Satyagraha and the Right to Civil Disobedience” in Douglas Allen (ed.), *The Philosophy of Mahatma Gandhi for the Twenty First Century*, New Delhi: Oxford University Press.
- Iyer, Raghavan (2000) *The Moral and Political Thought of Mahatma Gandhi*, New Delhi: Oxford University Press.
- Jahanbegloo, Ramin (2018) *The Disobedient Indian: Towards a Gandhian Philosophy of Dissent*, New Delhi: Speaking Tiger.
- Narrain, Siddarth (2011) “Disaffection and the Law: The Chilling Effect of Sedition Laws in India” *Economic and Political Weekly*, 19 February, 46 (8): 33-37
- Parekh, Bikhu (1997) *Gandhi: A Very Short Introduction*, New Delhi: Oxford University Press.
- Paré, Anthony J. (2007) *Gandhi’s Philosophy and the Quest for Harmony*, New Delhi: Cambridge University Press.

Parel, Anthony (2011) “Gandhi and the State” in Judith M. Brown and Anthony Parel (eds.) *The Cambridge Companion to Gandhi*, New Delhi: Cambridge University Press.

Parel, Anthony (2016) *Pax Gandhiana: The Political Philosophy of Mahatma Gandhi*, New Delhi: Oxford University Press.

Singh, Anushka (2021) “Towards a Political Etymology of Sedition” *Economic and Political Weekly*, 7 August, 41(32): 8.

Tendulkar, D.G. (1951) *Mahatma, Life of Mohandas Karamchand Gandhi*, Bombay: Vithalbhai K. Jhaveri & D. G. Tendulkar.

Thapar, Romila (2020) *Voices of Dissent: An Essay*, New Delhi: Seagull Books.

The Collected Works of Mahatma Gandhi (CW) Vol.1-98, (1969-94), New Delhi: Publications Division, Government of India.

National Education Policy 2020, Higher Education Reforms and Public Universities in India: Promises, Practices, and Problems

Saranya Antony. A

Abstract

National Education Policy (NEP) 2020 is a new step that aims to reform the education system in India. The Ministry of Human Resource Development (MHRD) approved the NEP on 30 July 2020 as a comprehensive reform measure covering all education sectors from primary schools to higher educational institutions. The NEP has emphasised the structure, governance, and content of the education system in India. This paper focuses on the NEP reform in higher education and its consequences for public universities. Moreover, the article outlines the promises highlighted in the NEP, practices employed by NEP, and the rise of problems with the NEP reform in public universities. NEP's major higher education reforms are discontinuation of the M.Phil. programme, multidisciplinary, and internationalisation. In addition, the NEP reform has proposed changes in private participation in the higher education system. This can lead to the quest for implementing neoliberal principles firmly in public universities. The new changes led to public universities' democratic values-liberal space, federal structure, and various nature distortion. Thus, these reforms promulgated at the verge of several disruptions such as economic shock, migrant crisis, authoritarian regime, social tensions, students' unrest, and alarming public health crisis due to the pandemic in India.

Keywords: NEP 2020, Higher education, Public universities in India, Neoliberalism

Introduction

National Education Policy (NEP) 2020 is a new step that aims to reform the education system in India. The Ministry of Human Resource Development (MHRD) released the NEP on 30 July 2020 as a comprehensive reform measure covering all education sectors from primary schools to higher educational institutions. The NEP has emphasised the structure, governance, and content of the education system in India.

This paper focuses on the NEP reform in higher education and its consequences for public universities. Moreover, the paper outlines the promises highlighted in the NEP, practices employed after NEP, and the rise of problems with the NEP reform in public universities. NEP's major higher education reforms are discontinuation of the M.Phil. programme, multidisciplinarity, and internationalisation.

In addition, the NEP reform has proposed changes in private participation in the higher education system. This can lead to the quest for implementing neoliberal principles firmly in public universities. The new changes challenged public universities' democratic values-liberal space, federal structure, and diverse nature. Thus, these reforms promulgated at the verge of several disruptions such as economic shock, migrant crisis, authoritarian regime, social tensions, students' unrest, and alarming public health crisis due to Covid-19 pandemic in India.

The NEP 2020 distinguishes from the three significant historical policies, primarily the National Policy on Education in 1968, second in 1986 under the Rajiv Gandhi era, and later in 1992 under the Narasimha Rao Government. Thus, the 1992 Programme on Action had addressed the severe economic crisis and advocated to create a structural adjustment programme in India. Hence it proposed a mixed economy with the decrease of state social role and liberalised public service sector into market logic. It has increasingly impacted the higher education system in India. However, the NEP 2020 plans to fulfil the earnest hope of building India's national philosophy on education.

Framework of Analysis

The NEP 2020 has proposed extensive transformative measures in the educational system of India. It had widely reversed the higher education institutions in terms of structure, content, governance, and philosophy. The NEP 2020 has been extensively acknowledged and discussed as a controversial policy; the critics describe NEP as tailored to favour a neo-colonial economic order. It will favour those from affluent backgrounds and discriminate against the poor and the oppressed (Singh 2020). With the present mindset, NEP 2020 may be providing hope but only on paper (Sibal 2020). Niveditha Menon explains NEP 2020 as elitist and corporatised education under Hindu Rashtra (Menon 2020); Prabhat Patnaik says NEP will severely damage the nation (Patnaik 2020). Niraja Jayal was pointing that NEP 2020 addressed Nathaniel Curzon's (11th Viceroy of India) aspirations directly or indirectly: entrenching state control in the governance of education; fixing the problem of affiliating colleges; and restricting the political activism of students (Jayal 2020:1). Vasavi says that the NEP claims the purpose of education is to achieve full human potential, develop an equitable and just society, it fails to cater to the needs of rural India's marginalised majority, who in so many ways are rendered into being subjects rather than citizens (Vasavi 2020).

Higher education is an essential social institution that plays a significant role in transforming society. Luhmann Niklas viewed the university as an organised institution (1992: 90). Though, it has been connected with the organised social practice inculcation of norms, values, beliefs of the society. Higher education institutions maintain the social life and manage human conduct. Higher education institutions' social role unveiled social capital and cultural capital formation of higher classes and reproduced the legitimate inequalities through the higher education system (Bourdieu 1986). Higher education is considered a service provider in India.

Indian public universities have mainly been publicly funded, a socio-political and cultural institution. The purpose of the university can be defined as to create, disseminate and transform knowledge from one generation to another. Henry Newman brought the idea of a university by stating that a university teaches universal knowledge (Newman 1852). Avijit Pathak described that a university should be an ideal place to encourage students and teachers to engage with this plurality of visions and even live with philosophic ambivalence (Pathak 2021). Jawaharlal Nehru's vision was that "a university stands for humanism for tolerance, for a reason, for the adventure of ideas and the search for truth. It stands for the onward march of the human race towards ever-higher objectives. If the universities discharge their duties adequately, then it is well with the nation and the people" (Nehru 1947). Gopal Guru (2020:) points out:

the universities' functions are to create space for dialogue and dissent and make that dissent universal. Dissenting voices and dialogical spirits on university campuses are considered universal in their promise for epistemic egalitarianism and social democracy and the universal articulation of such promises. Thus, universities as institutions do not travel on their own; they begin to travel across regions and countries when they transform themselves into an attractive idea for many.

Until 1991 India followed the trend of a planned economy with nationalised public institutions. Then, India's socio-economic and political circumstances became vulnerable due to unstable government, the balance of payment crisis, poverty, unemployment, illiteracy, diseases, malnutrition, and rising inflation (Kapila 1990). Moreover, the changes in the world system in 1991, the disintegration of the Soviet Union- East European Socialism and the Gulf War severely impacted the Indian political economy. Consequently, Indian Prime Minister P.V Narasimha Rao and Finance Minister Manmohan Singh initiated New Economic Policy. It brought the structural adjustment programme in India (The Times of India 1994). This phase had recognised as the beginning of the neoliberal era in India.

The state's public service sector role started to limit and promote market interest in public services. Neoliberalism has infiltrated higher educational institutions in India. As a result, the number of private universities has increased in India. The government spending on public universities began to reduce. Rapid fund cuts, seat cuts, poor

infrastructures, and increased privatisation of public universities became critical challenges in India.

Development of Indian Higher Education System

Higher education in India has a long history of ancient Indian education, medieval Indian education, and education in the colonial, independent, and neoliberal eras. The ancient higher learning institutions were *gurukul*, *pathshalas*, *tols*, *Brahminical mathas*, *Jaina pallis*, and *Buddhist viharas*. During the middle age, the Islamic rulers influenced the learning institutions. Most of the vital learning institutions were *Makhtabs* (primary learning schools) *Madrasas* during the medieval period. It was an institution that taught religious and moral training besides other ancient learning institutions in India (Sharma and Sharma 1996).

The colonial-era brought western trends in the Indian education system. The British raj and education policies have contributed to forming a national consciousness and social reformation movements in India. Subsequently, it led to the intensive struggle for India's independence. It ended up in the declaration of India's Independence on 15 August 1947. India's post-independent era education system aimed to transform India's scientific, technical, and socio-economic challenges (Chakrabarty 2008).

Independent India encountered the multiple social challenges of colonial legacy, feudalism, caste, class, and gender-based discrimination. The government of India provided constitutional safeguards against social challenges in the education sector. During 1950-51 India had thirty-two central universities and 695 colleges for higher learning (Duraismy 2008). University Grants Commission was formed in 1953 as an institution that aims to regulate, maintain and allocate public funds for the universities in India (UGC Act 1956).

The Indian government has appointed the Radhakrishnan Commission (1948) to study the funding pattern of universities. Then, Kothari Commission (1964-66) was appointed to explore the possibility of faculty development and to strengthen the qualitative development in higher educational institutions. The introduction of a national education policy for the first time appeared in 1964. Accordingly, the D. S. Kothari Commission was constituted to prepare a National Policy on Education (Report of the Education Commission 1966). Moreover, the Parliament passed it as the first education policy in 1968. Later, Parliament adopted the National Policy on Education (NPE) in May 1986 as it developed a gamut of national consensus on the conditions of India's education sector.

Moreover, the number of university-level institutions increased compared to 1980-81 to 1990-91, from 133 to 190 universities, and the colleges from 4,722 to 7,346 (Duraismy 2008:28). However, the NPE was revised later and gave a new thrust by

releasing it in 1992 as a Programme of Action. In 2021, the number of central universities is fifty-four, state universities 442, deemed to be Universities are 126, and private universities are 397 (UGC 2021).

Formation of NEP 2020

The policy reform of NEP was released on 30 July 2020; yet, many agitations and protests of students, teachers, and other staff across India have arisen against NEP reforms in the higher education sector. The government of India had introduced the NEP 2020 as nation-centred education reform. In June 2017, the MHRD formed a committee headed by Dr. K. Kasturirangan to draft the new education policy. Accordingly, on 31 May 2019, a draft was submitted to the MHRD. The Draft of National Education Policy (DNEP) has initiated as an enthusiastic and aspirational transformative document that triggered a nationwide discussion in the educational setup of India. Moreover, the DNEP is based on access, affordability, equity, quality, and education accountability. Besides that, the draft forecasts that by 2030 education development falls into sustainable development, a vibrant knowledge society, and thereby developing India into a global knowledge superpower (Kasturirangan 2018).

Higher education is commonly considered a service sector circumscribed with polity, society, and the economy. However, the recent trend emphasises the economic benefits from the higher education sector. The financial gain from the education sector has deeply connected to industries and other competitive enterprises. Education has been part of economic development, and it has been deeply interconnecting with human development. Therefore, these tie-ups create a phase of economic progress through the education industry. The transformative reforms are shifting in the hybrid learning model, categorised as non-skilling-reskilling, upskilling the education sector.

The NEP 2020 identified a set of problems faced by the higher education system in India, and those are as follows:

- Severely fragmented higher education ecosystem India.
- Less emphasis on the development of cognitive skills and learning outcomes;
- A rigid separation of disciplines, with early specialisation and streaming of students into narrow areas of study;
- Limited access, particularly in socio-economically disadvantaged areas, with few higher educational institutions that teach in local languages
- Limited teacher and institutional autonomy
- Inadequate mechanisms for merit-based career management and progression of faculty and institutional leaders;
- Lesser emphasis on research at most universities and colleges, and lack of competitive peer-reviewed research funding across disciplines
- Suboptimal governance and leadership of higher educational institutions;

- An ineffective regulatory system; and
- Large affiliating universities, resulting in low standards of undergraduate education (NEP 2020: 2).

The Promises of NEP 2020

The National Education Policy 2020 was a decisive education policy framed to sermon the growth of India, mainly focusing on youth in the development of the higher education sector. This policy proposes changes and reconfigures all aspects of India's higher education system. It includes institutional restructuring and consolidation, high-quality liberal education, optimum learning environments and student support, energised and engaged faculties, empowered governance and autonomy of higher education, regulations, integrating professional education into higher education (NEP 2020).

Major principles of NEP 2020 are:

- Flexibility
- Multidisciplinary and holistic education
- Creative and critical thinking
- Promotion of multilingualism
- Extensive use of technology
- Light but the tight regulatory framework
- Integrity, transparency and resources efficiency
- Outstanding research
- Autonomy, good governance and empowerment
- Education is a public service
- Encouragement and facilitation of philanthropic private and community participation
- Full equity and inclusion (NEP 2020)

The NEP 2020 assumes a gap between the current learning outcome and the required outcome. Thus, NEP attempts to fill the gap between the current learning outcomes and the required outcome expected by the state from the youth. The principles of NEP emphasised enhancing quality, equity, and integrity in the higher education system.

The NEP has the vision to enhance the Gross Enrolment Ratio (GER) in higher education by 50 percent by 2035; during 2019-20 ratio was 27.1 percent against 2018-19 of 26.3 percent. GER would profess to increase the rate of GER in higher education. In addition to that, NEP focused on extending the possibilities of open universities, distance education programmes, and online education programmes. Moreover, the

increasing GER in higher education subsequently assumes that it improves the employment market of India. As per the All-India Survey of Higher Education Report (2019-20), the total enrolment in higher education has been 38.5 million, with 18.9 million females and 19.6 million males. The GER estimation on higher education in India under 18-23 is 27.1 percent (AISHE 2020).

Multidisciplinary Education

One of the core changes emphasised by the NEP 2020 is the increase in Multidisciplinary Education and Research Universities (MERU) as replicas of the IITs and IIMs to develop the highest standard in the higher education institutions. This expects to form many multidisciplinary institutions across India, primarily focussed on creating multidisciplinary institutions near every district in India. Besides that, multidisciplinary academic initiation concentrates on broadening the curriculum, pedagogy, assessment of any programme in the various public universities (NEP 2020).

To escalate the multidisciplinary approach by driving more holistic education and dismantling rigid split of disciplines, including professional, technical, and vocational disciplines. Similarly, IITs were designed to be an institute of engineering and technology, advancing with integrating arts and humanities areas of studies through the multidisciplinary approach of a new learning process. It has been assumed as a distinct approach to independent subjects like engineering and technology relegated to the human context. The NEP 2020 reforms suggest establishing and developing higher educational institutions in underserved regions to ensure full access, equity, and inclusion. There shall, by 2030, be at least one large multidisciplinary higher educational institution in or near every district. To develop high-quality higher education institutions, both public and private, with the medium of instruction in local/Indian languages or bilingually. The NEP aimed to increase the GER in higher education to reach at least 50% by 2035, including vocational education from 26.3% in 2018 data (NEP 2020:35).

Restructuring Governing Institutions

The Government of India decided in July 2020 to change the erstwhile Ministry of Human Resources and Development into the Ministry of Education, which was one of the proposals made by the DNEP draft 2019. The most important structural change proposed by the NEP 2020 was establishing a single body of Higher Education Commission (HECI) for regulating the overall higher education sector except medical and legal institutions. According to the DNEP proposal, HECI will become the single umbrella body for higher education composed of independent verticals to fulfil the role of HECI. The primary vertical of HECI is the National Higher Education Regulatory Council (NHERC), which deals with the regulatory framework, including teaching education. The second vertical is National Accreditation Council (NAC) deals with accreditation; the third vertical is Higher Education Grants Council (HEGC) maintains

the funding; the fourth vertical is General Education Council (GEC) manages the standard settings. However, as those new regulatory verticals of HECI replace the University Grants Commission (UGC), All India Council for Technical Education (AICTE), and National Council for Teacher Education (NCTE) functions in the higher educational bodies in India (NEP 2020).

The establishment of a National Research Foundation (NRF) is considered an essential recommendation by the DNEP to stimulate the quality of academic research in all fields. The role of broadening the research ecosystem and developing a research culture infiltrate through central university, IITs, IIMs, TIFR, and IISERs. The Prime Minister of India states that National Research Foundation is being built for the first time in the country, and an allocation of fifty thousand crore rupees fund for this. This will strengthen the governance structure of the research-related institutions and improve linkages between R&D, academia, and industry, embracing the significance of the establishment of NRF (Modi 2021).

According to the NEP 2020, the major exercise of the NRF is:

(a) to fund competitive, peer-reviewed grant proposals of all types and across all disciplines; (b) seed, grow, and facilitate research at academic institutions, particularly at universities and colleges where research is currently in a nascent stage, through mentoring of such institutions; (c) act as a liaison between researchers and relevant branches of government as well as industry, so that research scholars are constantly made aware of the most urgent national research issues, and so that policymakers are constantly made aware of the latest research breakthroughs; to allow breakthroughs to be optimally brought into policy and implementation, and (d) recognises outstanding research and progress (NEP 2020: 7).

Private Philanthropic and Social Categories

All higher educational institutions-public and private shall be ruled under the same regulatory mechanism. Thus, regulatory bodies shall encourage private philanthropic efforts in education. Therefore, it will be common national guidelines for all Legislative Acts to form higher educational institutions. These common guidelines or the regulations are categories in light but tight in nature. These common guidelines will cover good governance, financial stability and security, educational outcomes, and transparency of disclosures (NEP 2020: 48-49).

Moreover, according to NEP 2020, private higher educational institutions are accountable for offering free ships and scholarships to meritorious students. They belong to Scheduled Caste (SC), Scheduled Tribes (ST), Other Backward Community (OBC), and other Socio-Economically Disadvantaged Groups (SEDGs). Curbing the commercialisation of education is another significant reform propounded by NEP

2020. However, the NEP document has loud enough to support the public-spirited private institutions in education. It states that multiple mechanisms with checks and balances and combat stop the commercialisation of higher education through the regulatory system (NEP 2020: 48).

The Academic Bank of Credit (ABC) system has been introduced to facilitate campus integration and storing credit systems by creating student mobility within inter and intra- university systems. Moreover, this is a digital place or body managed by the Ministry of Education. Academic credit bank is like a commercial bank to students; it does credit verification and degree authentication, like a digital storeroom of academic credits and student data. It works in a way that a student who earned credits from the recognised higher educational institutions is permitted to redeem their credit for any academic programme by awarding a degree, diploma, or certificate (NEP 2020).

The Promise of Autonomy in Higher Educational Institutions

The NEP 2020 recommended for the autonomy of higher educational institutions refers to the state-wise mechanism for awarding graded autonomy and a transparent system of graded accreditation of colleges. It has moved towards developing autonomous degree-granting colleges. They were forming colleges as integral parts of a university. Similarly, this has escalated the universities' competitiveness compared to other institutions that receive rewards better than others. As per the NEP 2020, higher educational institutions shall convert into multidisciplinary. Eventually, the higher educational institutions are categorised into a spectrum of institutions such as Research-Intensive Universities, Teaching Universities, and Autonomous Degree-granting colleges, focusing on research and teaching, teaching, and undergraduate education. Eventually, those institutions receive academic, administrative, and financial autonomy. Similarly, in every rural area, at least have one multidisciplinary higher education by 2030. This transformative measure has been called one of the rationalised institutional architectures proposed by the NEP (NEP 2020).

Internationalisation of Higher Education

The roadmap of NEP 2020 looks upon the internationalisation of higher education to build India as a global destination for studies by 2030. Moreover, the NEP 2020 recommended that foreign universities have campuses in India to solve the brain drain challenges. Similarly, diverse academic collaborations encourage growth in India's higher education system. NEP 2020 elevated as the global study destination by guaranteeing affordable education by resuming the Viswa Guru and increasing the collaboration among the foreign universities subjected to be mobility programme installed by the universities in India. The NEP 2020 is crating the universities into world-class. It is the one which the Prime Minister of India pointed to as Atmanirbhar Bharat to create world-class universities in India. The world-class university offered

good infrastructure, vibrant faculty, employment opportunities, internationalisation, funds, and popularity. The Union Minister of Education, Ramesh Pokhriyal, underlines the inextricable link of the government's aspirations to build a strong foundation for an Atmanirbhar Bharat and help India claim its status as a Vishwaguru (Pokhriyal 2021).

Flexibility in Programme

The NEP 2020 brought the process of flexibility in the programme at the higher education level. The NEP suggests the flexible design of master's programmes. The crucial recommendations are as follows:

- a) There may be a two-year programme with the second year devoted entirely to research for those who have completed the three-year bachelor's programme.
- (b) For students completing a four-year bachelor's programme with research, there could be a one-year master's programme.
- (c) There may be an integrated five-year bachelor's/master's programme (NEP 2020: 38).

A master's degree or a four-year bachelor's degree with research is required for enrolment in a PhD programme. The NEP 2020 recommended that the M.Phil programme be discarded from India's higher education system (NEP 2020: 38).

The Problems of NEP 2020

The promulgation of NEP was born during the crisis of economic downfall, political decay, and social fragmentation, the rise of cultural nationalism. It also includes massive students' resistance movements, Shaheen Bagh protest, farmers' agitation against the repressive policies, which has affected the escalating rate of unemployment and poverty. Moreover, the unprecedented public health emergency caused by the spread of the Covid-19 pandemic had hit India at its worse, also severely impacted the higher education sector. However, NEP launched during this crisis period. Thus, the NEP policy document was not presented and debated in parliamentary sessions. This has received severe criticism from various quarters of states and political parties (*The Hindu* 2020). One of the severe criticisms against the NEP 2020 was India's failure to protect the federal nature of the policy formulation process. The policy formulation process failed to do systematic consultation with the states. However, education is added to the Concurrent List, and it shares the powers between both the Central and State Government of India. Most of the higher education policies are formed through step-by-step expertise consultations. It used to take a year or more to consult and codify opinions across the nation. It describes the lack of state role in conducting and discussing NEP. Fast policy implementation procedures as a significant drawback of NEP 2020 after a year pass (Prasad 2020).

Neoliberal Agenda

The new architecture of higher education had implied the government's inclination towards the neoliberal transition in the higher education sector through the rapid transformative reform launched by NEP. The impulse of NEP 2020 had encouraged the privatisation and internationalisation of India's higher education sector. Prasad has illustrated that NEP 2020 dramatically increases private participation in education, ignores the country's pluralistic traditions, and furthers the neoliberal agenda of designing a profit-orientated system that serves corporate interests (Prasad 2020).

The Ambani-Birla report is identical to the NEP 2020 on market principles and neoliberal solutions to the socio-political challenges of higher education. The National Democratic Alliance (NDA) government organised to prepare the policy Framework for Reforms in Education (PFRE) or Ambani-Birla report in 2000 under the political leadership of Atal Bihari Vajpayee. Mukesh Ambani and Kumarmangalam Birla in 2000 (Ambani-Birla report) (NDA) made recommendations for higher educational institutions. The significant recommendations: to change in fee structure, limited state spending and increase of private engagement in public universities, depoliticisation, internationalisation, increase in the private universities, and entry of Foreign Direct Investment (FDI) in the higher education sector (Bhattacharya 2021).

The NEP promoted the global standard, digital education and promises world-class higher education institutions; it has deep connections to corporate interests. Neither NEP had contextualised the social role of higher education nor promoted India's constitutional values. For instance, grading or ranking higher educational institutions seems like a market logic format.

World Bank and IMF are agents of neoliberal ideas such as privatisation of public services. The World Bank aspires to work for capital making, developing the international financial system, supervision, and protection of market interest. Furthermore, the World Bank often discussed and propagated for privatisation of the higher education sector. Therefore, decoding the NEP is a deadly cocktail of the Hindutva agenda and the World Bank model of knowledge prepared to suit the needs of corporate job markets (Sadgopal 2020: 9).

NEP 2020 policy emphasised the Public Philanthropic Partnership (PPP) involvement and establishments in the higher education sector. It causes the rise of private engagement in higher education, which enhances neoliberal principles of the profit-making system of corporate interests intrudes in all levels of education as a positive signal for private entrepreneurs. However, the NEP document reinstated education as a public service; the irony lies in the NEP 2020 policy was curbing the commercialisation of education on the one side and supporting the Public-spirited Philanthropic Partnership and foreign investments on the other side. Menon stated that

curbing the commercialisation of education written in the NEP document is meaningless and hypocritical (Menon 2020). The higher educational institutions are mainly the state controlling, governing, and safeguarding institutions. Furthermore, the state used to be the sole provider of funds and the supporter of the development of higher educational institutions. With the rise of the Public Philanthropic Partnership, self-financing institutions and foreign investors are the choices of the state to facilitate and favour the market entry into the higher education sector and regulate the state's role in the higher education sector.

Regarding the corporate and ruling party nexus behind NEP reforms, Prabhat Patnaik argues:

...the NEP involves a paradigm shift in India's education system that is highly retrograde and deleterious. This shift is from a conception of education as a means of 'nation-building' (for want of a better term) to one that prepares students to become mere fodder for neoliberal capitalism, even while giving them a dash of Hindutva chauvinism. The NEP thus visualises an education that is in perfect sync with the politics of the corporate-Hindutva alliance that currently rules India. (Patnaik 2020).

Similarly, Menon (2020) observes that the term "philanthropic" is a simile for "private", and the latter term never appears without "philanthropic" or "public-spirited" before it.

Nevertheless, the Private University Bill 1995 (establishment and regulation) had been declared unconstitutional after it was presented in Parliament and subsequent committees to examine the bill. Therefore, each state had the provisions to permit the establishment of private universities (Nilajan 2015). However, the NEP proposes to have standard national guidelines for all Legislative Acts that confuses the distinct role of the state in managing private higher educational institutions. Is this shifted the state power over private universities to the standard national guidelines for all Legislative Acts by a single regulatory body? However, this has exhibited higher educational institutions subjected to centralisation. Thus, the rise of private universities was recommended by NEP by adding a phrase that 'public spirited' before encouraging private educational enterprise (NEP 2020). Neoliberal capital is riding piggyback on the Hindu Rashtra forces to loot India's natural and human resources! India needs Ambedkar, Gandhi, and Shaheed Bhagat Singh today more than ever before (Sadgopal 2020:13).

Structural Challenges and Hindutva Agenda

Jayal describes that the NEP 2020 does not address the structural problems in the higher education sector today. Instead, it merely rejigs the existing edifice, creates new institutions, and re-imagines the system, anticipating that a new, creative one will

emerge (Jayal 2020:1). Krishna Kumar describes that the NEP shows its preference for the United States model's self-tailored academic trajectory. Elements of this shift from the old British model frozen degree programmes to a US model have been gathering recognition over the recent years (Kumar 2020: 20).

Anil Sadgopal argues that NEP fails to recognise the hegemonic role caste and patriarchy continue to play in circumscribing access to participation in education, acquisition, and production of knowledge, and opportunities for socio-economic mobility through higher education (Sadgopal 2020:10). Rajalakshmi expresses that the NEP makes tall promises, but there is no clear vision regarding translating the equity goals into reality (Rajalakshmi 2020:14). Kumkum Roy discussed that the NEP 2020 requires closer scrutiny regarding its implications for the marginalised, disciplinary spaces, autonomy, and constitutional values, among other things (Roy 2020).

Further, the ideological frame of the NEP was deciphering the Brahmanical; and Hindutva predominance by reiterating the ancient and eternal Indian knowledge and thought, what Menon calls the saffronisation agenda (2020). Sadgopal (2020) says it is historical prejudice (2020). The emphasis on the Brahmanical tradition and origin of knowledge was recited in the NEP 2020. It had excluded the other social categories contributions such as Charvaka or Lokayata; Buddha and Mahavira; Tamil literature, Islamic and Christian contributions have been an integral part of the development of education in India.

Moreover, the Medieval era's contributions by the Islamic tradition are silenced. The NEP 2020 reveals the root of Indian tradition from the Hindu Brahmans, and the great Indian tradition lies only in ancient Vedic times. Thus, it has failed to address the exploitative and discriminatory nature of the old learning system (*The New Indian Express* 2020) but, in effect, reproduces the old inequalities.

The NEP discussed the institutional restructuring and consolidation intended to produce large multidisciplinary universities, colleges, and higher educational institutions/knowledge hubs, each of which will aim to have 3,000 or more students. The multidisciplinary universities and higher educational institutions clusters taking the references of the ancient Indian universities *Takshashila*, *Nalanda*, *Vallabhi*, and *Vikramshila*, were India's vibrant multidisciplinary learning institutions (Shukla 2020). Therefore, India urgently needs to bring back this great Indian tradition to create a well-rounded and innovative India. It is likely an attempt to idealise the ancient period learning system.

Moreover, after the independent era, the higher education sector had received political, economic, and social progress, which became irrelevant and insignificant by stating that restoration of 'great Indian tradition'. Moreover, according to the great Indian tradition, the search for knowledge in the ancient era was only the privileged of Brahmins or upper caste; therefore, the deprived, untouchable caste and women were

restrained from seeking education. Or does it seem that knowledge production other than Brahmins was not considered as knowledge? Menon expressed that NEP is evident with its two agendas – privatisation and Hindu supremacism. The NEP 2020 as a policy promotes and propagates the cultural preservation of India and seeks an attraction from the international community to the great Indian tradition. Menon had raises questions about how the international student gets attracted to the non-progressive, sectorial, and Hindu Brahmanical tradition? Who would be interested in learning the outdated learning schemes that put forward the cultural nationalist agenda in the NEP? (Menon 2020).

The NEP 2020 is unsuccessful in perceiving the root problem of the higher education institutions as social service institutions. It is linked with the issues of caste hegemony and patriarchy to get equitable, accessible, free higher education in India (Sadgopal 2020). The NEP reforms have not reflected the social context of higher education and the year's old struggles of social reformers to seek social justice. The NEP 2020 policy document did not mention reservations for SCs, STs, OBCs, and other Minority communities disadvantaged and under-represented in the higher education sector. Although the NEP had defined what it calls "socio-economically disadvantaged groups into the ambit of education" but completely neglected the reservation implies the unwillingness to continue with them (Patnaik 2020).

The state was responsible for the financial and social protection belonging to SC, ST and OBC communities. Whereas the NEP shows the state support towards deprived communities becomes minimal. The strict entry of disadvantaged communities in private philanthropic universities has deepened neoliberal principles, and the reservation schemes remain the responsibility of private corporations. Simultaneously, it encourages fee hikes in private universities. Regarding the aspect of inclusiveness in NEP, Patnaik says that its first removal is the element of inclusiveness. The NEP, contrary to its claims, will make education confined, more so than before, only to socially and economically privileged elites (Patnaik 2020).

The NEP embedded the multidisciplinary, holistic, and non-rigid university clustering, which has avoided the socio-economic context in higher education. Patnaik sees the imposing bourgeois notions of excellence upon educational institutions (Patnaik 2019). There were distinct new subjects developed in the academic disciplines like Gender, Dalit, and social discrimination-social exclusion and labour studies were not mentioned in the NEP. The multidisciplinary universities and higher education institution cluster is a huge step to benefit from the market demands. The vision of holistic education means the curricula of higher educational institutions proposed to assimilate the distinct disciplines such as humanities and arts integration to the science, technology, engineering, and mathematics. This cluster of subjects in the universities is mainly motivated to seek funds from the private entrepreneurs and make the university education as the industry produces education (Patnaik 2020).

Moreover, the multidisciplinary will reduce the birds' views on the subject matter. The NEP policy suggests the consolidation of discipline, and it causes the student to deviate from the competency over a particular subject. In a sense, the merging process of subjects endangers the students at various levels, including undergraduate and postgraduate. Moreover, the case of the Liberal Arts/Liberal Education bachelor program (BLA/BLE) of four years will reduce the value of already prevailing bachelor degree programmes of B. A and B.Sc. The lack of possibilities in a four-year degree programme in the field of Liberal Arts is a significant drawback of NEP. However, unlimited entry and exit options for students' enrolment in higher educational institutions cause the increase of phase-wise dropout. The student seeks employment at a particular phase, and students will reduce the entry of the highest learning phase. Students will grant a certificate of each phase that had been part of the top-down feature of the NEP, and the government changed from free education into affordable education, which intends to increase the private interest in the educational sector; therefore, it increases the number of dropouts (NEP 2020).

The state's autonomy, credit bank, academic autonomy, the bureaucratisation of higher educational institutions, regulation, accreditations, and funding led to a top-down approach that restrains academic autonomy. NEP emphasis the light but tight regulations, although the regulations and accreditation and academic standards of the public and private higher educational institutions have been made the same. The institutional restructuring and consolidation under the higher education commission of India (HECI). NEP proposed the National Testing Agency (NTA) for conducting common aptitude tests on particular subjects, including science, humanities, language, arts and vocational subjects (NEP 2020). It has only changed from the Board of examination into NTA, bringing up the intensive centralisation. It can spoil the distinct curriculum, subjects, and themes within higher educational institutions.

Moreover, the teachers' autonomy was under threat, introducing the Board of Governors (BOGs) was a new shift. It proposes that institutional leaders have become the bosses in the institutions. Therefore, the democratic space enjoyed by the teachers and the academic community gets vanished, and it causes nullifying the democratic representation among the teaching community (Kidwai and Nivedita (2018); Arunima 2020).

The NEP strongly recommended the internationalisation of higher education, including the foreign universities that operate in India, Vishwa Guru, teacher-student mobility programmes on research and teaching exchange programmes, which emphasises the homogeneous entity, as it assumes a replica of the US model of the education system. The purpose of education in India, viewed from the point of Antonio Gramsci, is to create "organic intellectuals" of the people of an independent India (Patnaik 2020). Internationalisation put forward by the NEP can be viable in the scenario of a homogenous system, which ruins creativity, hybrid knowledge production

and ignores the deprived sections in the landscape of the Indian higher education sector. Higher education has become part of neoliberal globalisation, which can exchange and purchasable by anyone by price.

Conclusion

The government of India launched NEP 2020 as a transformative measure on the education sector. The NEP 2020 is a complicated and multi-dimensional policy reform. It had opened up several opportunities and obstacles to the higher education sector. It is a policy with an extended vision for the progress of the higher education sector from student-oriented learning programmes into skills-oriented ones to enhance the education sector's employability and competitiveness. NEP is based on western trends. The criticism on NEP begins from its formulation implementation and impacts. The cultural propaganda endures from the NEP 2020 by doing the sectorial and Brahminical Hindutva shades of the vision, reinforcing the great Indian tradition of ancient India. Commercialisation and promotion of private investment in the higher education sector are explicit in NEP 2020 by pointing the space for publicly spirited private universities. How can be private enterprises in going to be public-spirited? This is fundamentally the neoliberal franchise of the government reforms. Multidisciplinary, new regulatory framework, institutional consolidations, privatisation through philanthropic investments, foreign investments and internationalisation, the boycott of reservation and minimal state role in higher education were major drawbacks of NEP 2020. To conclude, policy formulation and its implementation require collective participation. We should not ignore the voice of the voiceless. Therefore, every reform should talk for the voiceless.

*The author thankfully acknowledges the valuable comments, suggestions, and encouragement by K. B. Usha while writing this paper.

References

- Arunima, G. (2020). *Light But Tight: Whose National Education Policy is it Anyway?*, www.outlookindia.com, Accessed on 20 September
- AISHE (2020), Government of India, Ministry of Education, www.aishe.gov.in.
- Bhattacharya, Debaditya (2021). *Reading the contemporary fortunes of Indian higher education*, www.radicalphilosophy.com, Accessed on 20 September
- Bourdieu, P. (1986) (ed). *The Forms of Capital*, Westport CT: Greenwood.
- Chakrabarty, Bidyut (2008). *Indian Politics and Society since Independence Events, processes and ideology*, USA and Canada, Routledge
- Divya, Trivedi (2020). *It offers more of the same remedy' Interview with Professor Krishna Kumar, former director, National Council of Educational Research and Training*, www.frontline.thehindu.com.

Duraisamy P.(2008). *Higher Education in India Issues Related to Expansion, Inclusiveness, Quality and Finance*, University Grants Commission, New Delhi.

Guru Gopal (2020), *University as an Idea*, www.epw.in

Highlights of New Education Policy (NEP) -2020 (2020). Ministry of Education. pib.gov.in

National Education Policy (NEP) 2020. Government of India, New Delhi, www.education.gov.in.

Indian Express (2020). *New education policy refers to ancient Indian knowledge, seeks to instil pride in the country*, 30 July (for news items)

Jayal, Gopal Niraja (2020). *NEP 2020 on Higher Education, Wishing Away Structural Problems, wishing a Magical Solution*, The Indian Forum, Accessed on 17 August.

Kasturirangan, K (2018). *Draft National Education Policy 2019, Ministry of Human Resources Development*, Government of India.

Kidwai, Ayesha and Menon, Nivedita (2018). *Does the MCQ format work for social science and humanities entrance examinations?* www.epw.com, 53(40).

Kapila, Uma (1990). *Indian Economy Since Independence*, India, Academic Foundation.

Luhmann, Niklas (1992)(ed). *Universitatals Millieu*, Bielefeld: Haux.

Menon, Niveditha (2020). *Bad Ideas, Debates, Education, Right Watch, NEP 2020-Elitist and Corporatized Education under Hindu Rashtra, Kafila. Online*, Accessed on 20 August.

Ministry of Education (2020). *Union HRD Minister Shri Ramesh Pokhriyal 'Nishank' highlights India's efforts to build resilience into the education system in face of COVID before G20 Members*.

Nehru, Jawaharlal (1947). *Allahabad University Convocation on 26/December 19477*, (speech).

Newman, Henry (1852). *The Idea of a University*, N.p., Ignatius Press.

Nilanjan (2015). *Policy Brief Regulatory Structure of Higher Education in India*, Centre for Civil Society, International Growth Centre.

Pathak, Avijit (2021). *Choice before JNU is not between Nehru and Vivekananda, but between a plurality of thought and the psychology of revenge*, www.indianexpress.com, Accessed on 19 December

Patnaik, Prabhat (2020). *A retrograde paradigm shift in education*, *The Telegraph Online*, Accessed on 16 September.

Prabhat, Patnaik (2019). *Kerala begins deliberations on draft education policy*, www.thehindu.com.

Patnaik, Prabhat (2019). *On the Draft National Policy on Education*, *Social Scientist*, 47(9/10):61–68.

Patnaik, Prabhat (2020). *National Education Policy 2020 and Kerala (Draft Report of the Six Member Committee)*, The Kerala State Higher Education Council Thiruvananthapuram, www.kshec.kerala.gov.in

Pokhriyal, Ramesh (2021). *Union Education Minister's reply to the discussion on demand for Grants of Ministry of Education for Year 2021-22*, Ministry of Education, www.pib.gov.in

Prasad, Madhu (2020). *Cover Story at The Mercy of The Market*, www.frontline.thehindu.com

Modi, Narendra (2020). *PM addresses webinar on effective implementation of Budget provisions regarding education sector*, Prime Minister's Office.

Modi, Narendra (2021). *National Research Foundation 2020*, www.psa.gov.in/nrf

Rajalakshmi T.K (2020). *High on rhetoric*, www.frontline.thehindu.com, Accessed on 3 August.

Report of the Education Commission, 1964-66, (1966). Vol I: General Problems Education and National Development, National Council of Educational Research and Training 1970, Ministry of Education.

Roy, Kumkum (2020). *National Education Policy needs close scrutiny for what it says, what it doesn't*, indianexpress.com.

Roy, Kumkum (2020). *Timeline Worries*, www.frontline.thehindu.com, Accessed on 3 August.

Sadgopal, Anil (2020). *Decoding the agenda of the National Education Policy*, frontline.thehindu.com, Accessed on 3 August.

Sibal, Kapil (2020). *With present mindset, NEP 2020 may be providing hope but only on paper*, www.indianexpress.com, Accessed on 20 August.

Ministry of Education (2020). *Silent features of NEP 2020: Higher Education*.

Singh, Prem (2020). *National Education Policy for the elites*, www.indianexpress.com, Accessed on 22 October.

Sharma, R. N., Sharma, R. K. (1996). *History of Education in India*. India: Atlantic Publishers and distributors.

Shukla, Amandeep (2020). *New Education Policy 2020 Highlights: Key takeaways of NEP to make India global knowledge superpower*; www.hindustantimes.com, Accessed on 20 October.

Shukla, Amandeep (2020). *Takshashila, Nalanda: New Education Policy seeks to draw from ancient Indian knowledge*, www.hindustantimes.com.

The Hindu (2020). *NEP not passed in Parliament, States not taken into confidence*: W.B. Minister, 1 August 2020.

The Times of India (1994). *Rao's visit to US 'will boost economic ties'*, 14 May 1994.

The Report of The University Education Commission (December 1948 – August 1949) (1962). Volume I, Ministry of Education, Government of India.

UGC Act (1956). (As modified up to the 20th December, 1985) And Rules & Regulations Under the Act, University Grants Commission, New Delhi.

Vasavi, A. R. (2020). *NEP 2020 ignores crisis in education among the marginalised majority in rural India*, www.indianexpress.com, Accessed on 15 September.

**Statement about ownership and other particulars about
JOURNAL OF PARLIAMENTARY STUDIES**

FORM-VI (See Rule 8)

1. Place of publication
and Address of place of publication : Thiruvananthapuram
Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051
Shanthi Nagar, Near Government Press
Thiruvananthapuram - 695001
2. Periodicity of Publication : Bi-annual
3. Printer's Name
Address : The Registrar
Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051
Shanthi Nagar, Near Government Press
Thiruvananthapuram - 695001
4. Publisher's Name
Nationality : Dr. Raju Narayana Swamy IAS
Indian
Address : Director General(I/C)
Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051
Shanthi Nagar, Near Government Press
Thiruvananthapuram - 695001
5. Editor's Name
Nationality : Dr. Raju Narayana Swamy IAS
Indian
Address : Director General (I/C)
Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051
Shanthi Nagar. Near Government Press
Thiruvananthapuram - 695001
6. Name and Addresses of individuals
who own the news paper and partners
or share holders holding more than
one per cent of the total capital : The Registrar
Institute of Parliamentary Affairs
Building No. 32, TC - 81/1051
Shanthi Nagar. Near Government Press
Thiruvananthapuram - 695001
7. Printing Press Address : Superintendent of Government Presses
Government Central Press,
Thiruvananthapuram-695 001

On behalf of Institute of Parliamentary Affairs, Thiruvananthapuram I, Dr. Raju Narayana Swamy IAS, here
by declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Dr. Raju Narayana Swamy
Publisher

