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FOREWORD

IT is with great pleasure that I place before you the very first edition of RGNUL Financial and Mercantile Law Review. This law review was an endeavor on our part to better understand the financial market regimes of India and South East Asia and to promote discourse between academia in India, the West and South East Asia. We also sought to engage with the legal industry in India and wanted to lend our pages to their thoughts and opinions, so that we could better understand what the industry needs.

Needless, to say turning out the first edition has been a mammoth challenge but also, a very rewarding one. We got to engage with academicians all over the world who were encouraging and helpful to say the least and many went out of their way to help us and to contribute to our endeavor.; special thanks goes out at this point in time to our advisory board who associated with us not and lent their name to our enterprise and without whom this review would have been dead at its very inception. We would also like to thank our referees and contributors whose commitment to this review was inexorable in making this review see the light of the day.

The First edition deals with an interesting mix of issues. We have Prof. Sangroula writing about how economic and social rights are a salient and significant part of human rights and how law and development interplay. Then we have Prof. Haskell who writes a riveting note on TWAIL (Third World Approaches to International Law). Also, Bharat Budholia writes in on emerging trends in Competition law in India and we reproduce a paper Prof. Steven L Schwarcz Presented on Shadow Banking in Emerging economies. Also, Prof. Jonnalagadda presents an interesting take on the proposed Indian Financial Code, an attempt at streamlining financial laws in India.

We hope the review makes for an interesting read and we would love to hear your opinions on how we can make it better. Please feel free to write in to us.

Dr. Anand Pawar

Editor-in-chief

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ARTICLE

LAW AND DEVELOPMENT: A NEW JURISPRUDENTIAL DISCOURSE CHALLENGES, PROSPECTS AND INITIATIVES TO LINK DEVELOPMENT WITH HUMAN RIGHTS

Prof. Yubaraj Sangroula[1]

The article talks about the 'threshold ability' i.e. the ability of a person to empower himself to such an extent that he can avail of his political and civil rights. The author argues that this threshold ability cannot be attained unless and until an entity has social and economic rights which allow him to partake in development and address his basic needs. Hence, in the absence of socio-economic rights; so called 'fundamental rights' that consist of political and civil rights are ephemeral and moot. Hence, the author calls for a concerted effort to guarantee socio-economic rights and calls for them to be placed at par with political rights.

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I. POVERTY AND RIGHT TO DEVELOPMENT, AND LAW: IRRESPONSIBLE INTERNATIONAL POLITICS AND CONSEQUENCES

Shiva Devi, a pregnant woman, mother of a three year old girl child, from a Nepal's countryside committed suicide taking rat poison. She poisoned her daughter as well. Both of them died instantly. Reportedly, starvation was the cause of her suicide. Shiva was a daily wage-earner, who lost her work because of a prolonged strike by a political party, supposedly fighting for a 'revolution. Her husband was away from home for works since the past three months. He left home to avoid the being forcefully recruited into the rebellion.[2]

Laxmi Maya, a poor woman in a village of Nepal was dragged out of her home and physically assaulted by a mob until she fell unconscious. The villagers believed that she was a 'witch' causing miscarriage of pregnancies in the village. The villagers not only condemned her for their unfounded or superstitious belief but also engaged in severe physical assault. To protect her life she agreed to ingest "human excreta".

A man in the state of Andhra Pradesh, India committed suicide because he could not pay back, the debt he owed the bank. The prolonged drought stole his chance of yielding good crops, the

[2] During the conflict period (1996-2006), the Communist Party of Nepal (Maoists) coerced people to pay donation or spare a member of the family to join its armed force, the People's Liberation Army (PLA). To avoid this risk, many adult left villages to India leaving old parents and children at home. It was treacherous time in Nepal. Besides, the nation was seized by frequency of 'nation-wide violent strikes' which prevented poor people from works. Indeed, poor people were forced to starve. See, Annual Human Rights Yearbooks; INSEC, Kathmandu, Nepal.

only source for paying the debt back. His family was starved. In such an intense stress he had no option left but to end his life. He thus hanged himself from a tree.

A landslide swept away the house of a poor Chepang family, a hill tribe in Nepal. The daughter-in-law was expecting a baby shortly. The landslide also washed away a few kilograms of the rice the family was saving for the day of her delivery. The family had nothing to feed the daughter-in- law with. They were forced to live with "tarul and vhaykurs" (roots of wildly grown plants).

A child was caught in a bomb-blast in an Indian city when he was rushing home after school. The deceased child was the only child of his parents.

These are only a few representative stories about 'the cruel reality of life' associated with poverty and deprivation' in South Asia and many other parts of the world as well. Such forgotten incidents are neither remembered nor mourned for media in South Asia is emphatically interested in 'political gossip' rather than in exposing such type of incidents. Of course, these stories are reflective of many more things. The stories implicitly suggest that

a. The Governments in developing countries are less interested in human security and less accountable for the same to its masses. The death traps created by poverty are ignored and forgotten.
b. The media in developing countries is mesmerized by 'political gossip' but seems less enthralled by the death traps millions of people are strangled by.
c. The economic systems pursued by developing countries are quintessentially exploitative, and addressing basic necessities of the masses isn't an urgency for them.
d. The legal system in practice in developing countries lets–off Governments from accountability for the violation of basic human rights of people.
e. The 'modality and selection of development programs' is considered a privilege of the Governments against the rights of the people
f. Violence and impunity are emerging as a culture in developing countries. No response is found from State even in egregious cases. Terrorism and arms trade are burgeoning due to poverty and want.

The representative stories above illustrate the gruesome state of human rights violations faced by people at the bottom in the developing world. They explicitly reflect on ' the acute

state of poverty and deprivation that millions of poor from developing countries live in'. The poverty and deprivation expose common people to an utterly acute state of insecurity, the threat to the right to life being the most glaring one—every year over 18 million people die across the world pre-maturely due to poverty related causes, which is one third of all human deaths. Every day, fifty thousand people die due to poverty, of which thirty four thousand are children below five.[3] The situation has witnessed no change at all. Since the end of cold war, ordinary deaths from starvation and preventable diseases have amounted to approximately 250 million, most of them children.[4] Global poverty refuses to decline and global inequality continues to increase, more than doubling since 1960.[5] The state of poverty and deprivation represents a state of 'gross violation of human rights'. The international community has failed to bring about changes in such a 'grotesque situation' of human security. By contrast, some intellectuals love to put arguments that 'the duty of international community to help poverty-stricken societies is not absolute because they are not responsible for this poverty'.[6]

The regressive status quo[7] in developing societies is the main cause for persistence of poverty and deprivation as it blatantly refuses, or averts the development endeavors that are vital for bringing about changes in the lives of millions of deprived people. The 'state of regressive status quo' originates by persistent denial or deprivation of, or restriction on, equality in security of person, physical integrity, freedom of choice, access to basic welfare supplies, and access to right for participation in economic growth. Access to or freedom of enjoyment of

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[3] *See* Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform;* Cambridge: Polity 2002, at 2

[4] *Ibid* at 98.

[5] *Id* at 99-100.

[6] Thom Brooks, "Is Global Poverty a Crime", at 2. Available online at http://ssrn.org/abstract, last visited October 29, 2011.

[7] Regressive status quo can be epitomized in several ways. It is a state of 'traditionalism in behaviors' which dislikes changes in the prevailing paradigm of life. Politically, the phrase 'regressive status quo' represents a 'system of feudal governance' in which the accountability of rulers is fully ignored. Economically, the phrase typifies a 'system of transactions in which the power of bottom-line segment of the population for bargaining about their labor and commodity is suppressed'. Etymologically, the status-quo refers to a state of ' changelessness'. Regressive status quo denies changes in the 'prevailing conditions'. It applies rules of law and conventions to block the changes that are essentials for transformation of lives of the people towards modernity. A progressive change in the society is necessary for establish a new system where all people can have equity in development outcomes. The regressive status quo, however, averts equity for all in development outcomes. The progressive change in the society is epitomized by the following propositions: (1) every society is made up of individuals, groups and the state, and the interactions between these components determine the goals of the society; (2) the equity is the guiding principles for the State to exercise control over individuals and groups; (3) the State exercise this control through law for achieving social goals; and (4) the State applies law equally to all persons in an independent and rational manner. If these propositions function in a reverse way, the state of regressive status quo prevails.

basic needs— i.e. security of person, physical integrity, freedom of choice, subsistence supplies, education and economic participation—constitute the 'threshold ability of persons'[8] for enjoying full-fledged human rights. Poverty is therefore an outcome of deprivation of such rights.

No doubt at all, the above stories point to a state of abject denial of 'the threshold ability' to millions of people in developing countries.[9] The gruesome fact uncovered in these stories is that 'the governments in developing countries are less bothered with prioritizing the utilization of resources for 'generating threshold ability' and hence rescuing the millions living in a state of acute vulnerability. These stories also imply that no protection of human rights is possible without meticulously dealing with the state of gruesome disparity in incomes and access to opportunity of development, which is a prerequisite for acquiring 'threshold ability'. The 'threshold condition' of human rights empowers people's ability to assert their right to development, and this development, in turn, establishes a 'circumstance enabling people to enjoy full-fledged protection of civil and political participation along with freedoms of conscience and decision making on their individualistic or socialistic affairs '. Hence, human rights and development has an 'interface'. The interplay of these two is what the 'dignity of human life' is rested on.

Attaining a state of security and dignity demands a pragmatic but irreversible 'interplay between law and development'.[10] Every society is comprised of individuals, groups and the State. The interactions between these variables of society, collectively determines social goals. Societies in developing countries are, however, utterly upset by a penchant for traditionalism or

[8] *See* Thom Brooks, 2011 at 2

[9] The failure of the international community, the Governments of developed countries in particular, to generate 'threshold ability of people to enjoy rights to physical integrity, subsistence supplies, freedom of choice, education and economic participation' is the major cause of deaths of incredibly huge number of people around world today. As a matter of fact, millions of people are dying due to starvation and preventable diseases. The number is increasing as the gape of 'having and not having is widening ' indiscreetly. The inequality between individuals as well as as nations is becoming a serious challenge for 'security of the entire human civilization'. The lacking of 'threshold ability' prevents millions of people across the world to assert their inalienable and inherent rights to life, liberty and security', which constitutes a 'threshold condition for enjoyment of human rights guaranteed UDHR, ICCPR and many other similar human rights instruments. See, Thomas Pogge, 2002

[10] The theory of demanding role of law in the larger context of social, economic and political development is not new one in jurisprudence. During 1960s and 1970s, two law and development scholars, David M. Trubeck and Thomas M. Franck, described this approach as "liberal legalism". On law and development movement generally, See; Benny Simon Tabalujan, 2001. *Legal Development in Developing Countries-The Role of Legal Culture; SSRN.* The key proposition of the approach is that the State should apply law equally to all persons in an independent and rational manner. Implicit in this approach is the belief that legal development is a necessary pre-requisite of economic development and that modern laws from developed countries can be imported as "legal transplants" into developing countries to fulfill the requirements. On "legal transplants" generally see: William Ewald, *Comparative Jurisprudence II: The Logic of Legal Transplants; 43 AM.J.Comp. L. 489 (1995)*

conventionalism indiscreetly permitting ' the disparity in treatment or advantages between individuals; individual and group, and; group on the one side, and the State on the other'. The disparity is often backed by deeply rooted 'hierarchical structure of that given society'. The hierarchical structure, on the other hand, requires the 'regressive status quo' for its continuity. The change in circumstance is necessary for positive transformation of the lives of people, which is attained by 'empowering people through generating 'threshold ability' in them to assert their inherent rights concerning their security of person, physical integrity, subsistence means, acquiring knowledge and skills for development and participating in the economic enterprise. The threshold ability, to make it functional, requires soundly grounded legal culture. But how society can develop the required legal culture 'amidst rigorous tendency of preserving the status quo is an unanswered question as yet. Some western jurists have proposed an easy approach: the developing countries can import laws from the developed countries.[11] Legal transplantation, however, is not as easy as described by them.[12] Laws reflect the mood of the people. Historically, they are developed to deal with specific problems faced by the given society. The laws of a society are meticulously designed by wider interactions between individual, groups and the State to formulate the goals of their society, and such interactions provide 'contents to

[11] Alan Watson figures one of the prominent advocates of 'legal transplants. For him legal transplant has been a common phenomenon through the history and was the most fertile source of legal development. See, Alan Watson, 1993. *Legal Transplants: An Approach to Comparative Law (2nd edition)* p. 95.

[12] The legal transplant movement which gained momentum during 1960s and 1970s through flurry of law modernization programs in Latin America, Africa and, to some extent, Asia lots its vitality in 1980s. The law modernization programs did not fare well as they were expected to do. With failures of these programs, the movement got put into low-profile. According to Patrick McAuslan, the movement lost momentum partly because its main emphasis was on structural and substantive law issue and it failed to determine the nature of relationship, causal or otherwise, between law and development more generally. See: Patrick McAuslan, *Law, Governance and the Development in the Market: Practical Problems and Possible Solutions in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES* ; Julio Fundez ed. 1997, at 25 . In 1990s, the law and development movement regained its momentum once more time by emphasis of developed countries about law reforms in developing countries. This push of developed countries appeared through multilateral agencies like Asian Development Bank and individual agencies like USAID. However, the renewed momentum paid central focus on 'reforms of the governance system'. No doubt, the reforms of governance system required changes in the 'substantive framework of law', but the transplantation of the laws of developed countries could not be the central issue of the movement. The 'reforms of law movement' was found relevant more to the 'economic development' of the developing countries. Though the impact of the movement in overall economic development drive was only modest, it played reinforcing role in the process of social change in the developing countries. The movement's role was particularly crucial in identifying the relationship between legal development and the broader issues of economic, social and political development. For detail, see: Philip von Mehren and Tim Sawers, *Revitalizing the law and Development Movement: A Case Study of Title in Thailand,* 33 HARV. INTL. L. J. 67 91994)

the law'.[13] A society failing to set the goals corresponding to demands created by the change in that society naturally falls in traps of 'regressive status quo'. Socio-political movement for equity-based change backed by economic entrepreneurship is thus a prologue for development of a legal culture in a developing society. Development of the legal culture requires the following three pre-requisites to be fulfilled:

(a) Emergence of an indigenous intelligentsia of law which can underscore the importance of interactions between the social facts and emerging needs of human development;

(b) Formulation or determination of economic and socio-political goals on which the structure of the State has to be erected; and

(c) Establishment or reforms of institutions to play role in planning laws addressing emerging needs of human development and economic and socio-political goals determined by the society.

The modernization of governance systems is a key element to facilitate economic, social and political development, and to protect human rights. The legal development has to correspond to the economic, social and political development of a given society. The relationship between legal development and other broader issues of economic, social and political development is imperative for protection of human rights in any society. Emerging issues of economic, social and political development push for rationalization of laws, and the newly adopted laws do therefore ensure the 'equity of all people in benefits or advantages of the economic, social and political development'. The laws of a society thus, have to to embody human security and dignity as an issue 'of the development of legal culture' as well as human rights as a matter of concern of law as well as morality.[14]

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[13] The legal transplant theory was rejected as early 19th century by German scholar Friedrich Carl von Savigny. He believed that a nation had organic unity- over arching the individuals who constituted it and that nation's laws developed through a gradual embodiment of social norms within that community. (On Savigny's organic theory of law, see: *Of the Vocation of Our Age for Legislation and Jurisprudence,* Translated by Abhram Wayward, Littlewood & Co. 1831, at Ch II). In recent times many jurists have rejected the theory on several grounds. Robert Seidman, for instance, who coined the term "The Law of non-transferability of Law" argued that transference of rules from one culture to another would not work because a rule cannot be expected to induce same sort of role-performance as it did in the place of origin'. See, Robert B. Seidman, *Adminsitrative law and Legitimacy in Anglophonic Africa- A Problem in Reception of Foreign Laws;* 5 Law & Soc'y. Rev. 161, 200-1 (1970)

[14] Michale J. Perry, the Robert W. Woodruff Professor of Emory University School of Law, says: " Law of human rights is one thing, the morality of human rights, another. By the morality of human rights, I mean the morality that, according to the International Bill of Human Rights, is principal ground—the principal warrant for – the law of human rights." See on: "Human Rights as Law, Human Rights as Morality; Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research paper No. 08-45 at 12 (This article can be downloaded from http://ssrn.comabstract=1274728

Laws failing to embody issues of economic, social and political development of the society, in general, fail to rest on the principal ground of 'legality'. The economic, social and political development is a right of individuals and legal as well as moral obligation of the State. The State's positive law to be rational requires human rights as 'fundamental norms for 'legitimacy as well as legality'. Rationalization of State's positive law is to affirm the principal value (respect to the inherent dignity of human beings) of human rights: that is to say that the State's positive law has to imperatively affirm that 'every human being has inherent dignity and that it is inviolable under any circumstance'.[15]

Poverty and deprivation are forms of latent violence and hence pose threat to human dignity. [16] Economic, social and political development is hence an issue of human rights. The law of a society failing to embody economic, social and political development as human rights of individual fails to hold the 'sanctity of legality'. Human dignity is protected by economic, social and political development by offering adequate 'economic and social security'' to every individual. Hence, the issue of economic and social security provides content to the law and also provides 'principal ground for its legality'.

Hence, the elements of human security, which constitute the ground for non-violability of human dignity, must find explicit expression in the 'words of positive laws'. This is what we call 'rationalization or internalization of human rights'. The laws of a society without human rights firmly articulated in it, is merely a body of rules to 'impose State's decisions on human beings' but not a body of 'rules to oblige the State to work for overall security of human beings and thus protect human dignity'. The law without impregnation of human security and dignity obviously lacks a notion of justice, and hence, becomes enforceable only for the unwanted desire of the State. It means that the laws of a society have to embody human rights values and norms for their legitimacy or legality. The rules of law hence, must serve the 'interests and justified claims of human beings'. Having legal structure and legal substances is not enough for law to protect

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[15] *Ibid*

[16] To quote Dietrich Bonhoeffer is worthy at this point. In Germany during the World War II, he observed that "we have for once learned to see the greatest events of the world history from below, from perspective of outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from perspective of those who suffer" . See, Dietrich Bonhoeffer, 1995, *A Letter to Family and Conspirators in Geofferey B. Kelly and F. Burton Selson, eds. Dietrich Bonhoeffer A testament of Freedom; Harper San-Fransisco, at 482-486.* Martin Luther King Jr. declared, in the same spirit, that man's inhumanity to man is not only perpetrated by vitriolic actions of those who are bad. It is also perpetrated by vitiating inactions of those who are good. Quoted in Nicholas D. Kristof "The American Witness", New York Time, March 2, 2005

human beings from 'injustice' or 'violation of human dignity'. Friedman, an American legal sociologist, has rightly said that lawyers have a tendency of confining their analyses to the structure and substance of the legal system. According to him, structures and substances are real components of a legal system, but they are not a working machine. The trouble with … structure and substance was that they were static; they were like a still photograph of the legal system'.[17] Legal culture refers to the attitudes, values and opinions held in society with regards to law, the legal system and its various parts. [18] The development of a legal culture is an important role of the State in developing countries, especially in order to break the vicious cycle of regressive status quo.[19] Legal culture can also be taken as a theory in itself which renders the legal system concerned with the economic and social problems facing the people, and hence makes meaningful efforts to serve the people by recognizing and protecting their justified claims. Modernization mission of legal system, however, does not epitomize the 'development of legal culture in itself'. The development of legal culture is a phenomenon of rationalization of laws by accepting the 'universal values of human rights, human security and dignity in particular'. Many developing nations have grotesquely failed in development of legal culture because of attempting to affect change in their legal system by importing laws from western nations. The borrowings of privatization laws during the post 1990 era in Nepal is an example,

[17] Lawrence M. Friedman, 1975, *The Legal System: A Social Science Perspective, p. 15*

[18] *Ibid* at 76. Also, Another scholar defines legal culture as : "a specific way in which values, practices and concepts are integrated into operation of legal institutions and interpretations of legal texts: attributed to John Bell by Mark van Hoecke &Mark Warrington, 1998, "Legal Cultures, Legal Paradigms and Legal Doctrines: Towards a Model for Comparative Law; 47 Int'L&Comp.L. Q. 495 (1998). These two definitions are somehow abstract. The legal system, in a developing country, is characterized by a 'minimum role in role in the society'. The larger part of the human relations in a developing society (country) is controlled by 'traditions' both pro-human rights and anti-human rights. The legal culture in the context of developing countries is a 'specific action of expanding the role of law in dealing with human relations in the society by absorbing the positive traditions and preventing the negative traditions'. The legal culture as a dynamic phenomenon is a means to break the 'grotesque cycle of regressive status quo and violation of human dignity- that is to say poverty and deprivation', including discrimination of all forms". See, Yubaraj Sangroula, 2010, *Jurisprudence: the Philosophy of Law*; Kathmandu School of Law (first edition), at Ch. 5

[19] Significance of 'legal culture is that it is an essential intervening variable in the processes of producing legal stasis or change. See, Lawrence M. Friedman, 1997, at 33. Development of legal culture is essential to overcome the static position of law. In case of developing countries, the concept of legal culture is especially important. See, Volkmar Gessner, "Global Legal Interactions and Legal Cultures"; 7(2) RATIO JURIS 132, 134 (1994). The development of legal culture in developing countries is vital because developing countries often import from Western nations' legislation, codes or even entire legal system in their attempt to modernize their domestic legal frameworks. See, Franz von Benda-Beckmann, *Scape Goat and magic Charm: Law in development Theory and Pratice,* 28 J, OF LEGAL PLURALISM 129 (1989)

which rendered poor people to compete with elites in economic development endeavors. The consequence was that the gap between rich and poor increased sharply.[20]

Figuratively speaking, the concept of justice, representing moral aspect of human rights, legitimizes the system of law. Literally speaking, however, the concept of justice distributes benefits or advantages of development, by providing each individual with 'equity in resources to fulfill basic needs and opportunities for fair competition in participation of decision making process', to people.[21] The role of justice at this point is thus paramount because it functions to generate a 'threshold condition' of human security, physical integrity, sustenance supplies, freedom of choice, acquisition of knowledge for life skills, and participation in economic activities. Justice in this sense is an indicator of the 'embodiment of paramount values of human rights concerning development leading to human security and dignity'. Hence, the laws of a progressively transforming society need to expressly recognize these benefits and advantages, and also oblige the State to protect such benefits and advantages by establishing concrete institutions and mechanisms to ensure enforcement expeditiously, impartially and reasonably. Human rights, values and norms[22] are inherently imbibed in human capacity of acquiring knowledge and using the same for his/her transformation into a better situation; in human ability to process information and using outcomes thereof for enhanced knowledge and skills for productivity in life; and human capability of engendering mechanisms for continuity of changes without jeopardizing its collective positive impact on society at large. Human rights as

[20] For more detail on impacts of legal transplants: see Benny Simon Tabalujan, 2001

[21] These two aspects of justice are being debated with nomenclature of intrinsic or instrumental conception of justice. Instrumental justice is a notion directly related to the 'application of justice system to alleviate poverty of mass'. The debate on this taxonomy of justice is becoming more spectacular by World Bank's attempt to define indicators of justice in connection with its programs about poverty reduction. The Measuring Justice Initiative, which attempts to quantify the performance of the Justice Sector in developing countries, is a part of greater trend in the bank to empirically measure normative standards. See, Galit A. Sarfaty, 2009. "Measuring Justice: Internal Conflict over World Bank's Emperical Approach to Human Rights" in Kamari Clarke & Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold Era;* Cambridge University Press.

[22] Human rights values or norms refer to moral foundations on which human rights law has been founded on. They can be referred to as ' moral foundations human rights laws'. As pointed out by Michael J. Perry (*Human Rights as Morality – Human Rights as Law*: University of San Diego Law School, Legal Studies Research Paper series No. 08-079), the moral foundation of human rights, according to International Bill of Human Rights, consists of two connected claims: "The first of which is this: Each and every (born) human being has equal inherent dignity. To say that every human being has "inherent" dignity is to say that the fundamental dignity every human being possesses, she possesses not as a member of one or other group (racial, ethnic, national, or religious), not as a man or woman, not as someone who has done or achieved something and so on but simply as a human being. This is the second claim: The Inherent dignity of human beings has a normative force for us, in this sense: we should—everyone of us—live our lives in accord with the fact that every human being has inherent dignity; we should respect—the inherent dignity of every human being. There is another way to the second claim: Every human being is inviolable; not-to-be-violated".

moral values embody claims that every human being is inherently dignified by virtue of his/her birth as a human being and thus he/she is entitled to enjoy the dignity irrespective of differences he/she has in origin, status or circumstance. The human dignity is inviolable in any circumstances, and thus poverty and ensuing deprivation are not tolerable. Nation's laws should prevent poverty and deprivation by empowering individuals to assert the right to development.

Economic and social needs or benefits and advantages of individuals constitute the primary sources of values or norms guiding the 'meaningful operation of justice'. The outputs (equity based distribution of resources and opportunities for fair competition) generated by the operation of justice are carried out by rules of law in practice. The positive rules of law are instrumental in protecting and enforcing ' the values and norms recognized by the concept of justice'. This notion of justice as an equity based resource distribution system and as a tool of guaranteeing opportunity for fair competition along with formal positive rules of law ' provide normative ground or foundation for the principle of 'rule of law'. A political system that operates keeping these principles as cardinal norms is called democracy.[23]

This thesis underscores the role of equity-based justice, economic and social development programs and progressive legal culture as coherently interacting components of the 'concept of rule of law'. The concept of rule of law[24] is neither a 'dogmatic belief that underscores a theory that strict observance of the rules of positive law, as outlined by the procedural rules, is the true essence of 'rule of law',[25] nor is it an indicator of measuring the justice. Concept of rule of law

[23] John Rawls concept of justice that 'opportunity and priority require a political equality as a primary good is founded on a notion of the supremacy of the civil and political rights, hence not applicable in the context of developing society.

[24] Literature about the relationship between human rights and rule of law is still largely cryptic. Even the most fundamental human rights instruments such as UDHR and ICCPR have failed to point out the relationship between the concept of human rights and rule of law. Rule of law, however, is essentially important for better enforcement of human rights. Human rights' enforcement requires a sound state of political stability, economic development and good governance, and they, in turn, require meticulous observance of the concept of rule of law. Sergio Vieira de Mello suggests, rule of law will be a "fruitful principle to guide us toward agreement and results" and "a touchstone for us for spreading the culture of human rights". See, Address of de Mello at the Closing Meeting of the 59th Session of the Commission on Human Rights, April 25, 2003 at http://unhchr.ch/huricane'huricane.nsf/0/997CB7D98CAB294C1256D16002B1276?opendocument (last visited March 29th 2005)

[25] At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on State and individual members of ruling elite. The supremacy and equality of all before the law is the threshold of rule of law. Beyond this threshold requirement, concept of rule of law can be divided into general types, thin and thick. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is a part of a democratic society or non-democratic society, capitalist or socialist, liberal or theocratic (See, Joseph Raz, 1979, *Rule of Law and Its Virtue in the Authority of Law: Essays on law and Morality)*. Moreover, laws must be reasonably acceptable

is rather an instrument of 'guiding the process of development of the progressive legal culture' that embody human rights and values as cardinal principles of promoting human security and dignity'. The relationship between human rights and rule of law is therefore indispensable for better enforcement of human rights instruments. Desired enforcement of human rights instruments requires political stability, economic development and good governance. A long list of economists, legal scholars and development agencies from Max Weber to Douglas North, as well as the World Bank, have argued that rule of law is necessary for sustained economic growth and functioning of democracy.[26] Though the human rights movement has significantly increased in size, the fault lines encountered by it are not less severe or trivial. The international human rights movement is facing many crises. The fault lines emerged out of the economic gap between developed Northern countries and developing Southern countries, attempts of some countries to define human rights to suit their cultural and economic contexts, deeply rooted disparity between men and women and men's dominance in policy making institutions, poses questions about western liberalism and capitalism and also; cultural differences across the world are posing serious obstruction to a universal theory on human rights. Rule of law can however address the fault lines[27] faced in theorizing a universal theory on human rights. As a component of rule of law, human rights laws and values are the 'indicators of justice in acts of the State and instrument of people to invoke 'human rights in the law made by the State and acts performed by the Government agencies'.

II. INTERNATIONAL POLITICS ON HUMAN RIGHTS AND PLIGHT OF POWERLESS PEOPLE

The international politics, the politics of developed countries in particular, on human rights has to some extent contributed to the prolongation of the state of acute poverty in many parts of the world today. The developed countries have persistently denied recognizing the 'justiciability'

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to majority of the populace or people affected by the laws (Lone Fuller, 1977, *The Morality of Law, p. 39)*. The thick conception, beginning with thin concept elements, incorporates of political morality and legitimacy.

[26] See, Randall Peerenboom, "Human Rights and Rule of Law: What is the Relationship? University of California Los Angles School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No, 05-31

[27] Islamic States from Egypt to Malaysia have endorsed rule of law. Asian Governments, including socialist regimes in China and Vietnam, have welcomed technical assistance aimed at improving the legal systems and implementing rule of law. Developing countries that emphasize right to development see rule of law as integral to development. Concept of rule of law that way has a prospect of becoming a milestone for institutionalization of human rights universally. See, Randall Peerenboom, "Human Rights and Rule of Law: What is the Relationship? University of California Los Angles School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No, 05-31

of economic, social and cultural rights. The 'problematic nature of economic and social rights' is not a justification for placing them on the periphery. Europe would not have to encounter problem of enforcement of such rights if the resource constraint was the only raison d'être for giving same status to these rights corresponding to civil and political rights.[28] The developed countries indeed have meticulously ignored the significance of economic and social rights.[29] One of fault lines of economic and social rights lies on issue of their justiciability. Conventionally, these rights are considered by developed nations as non-litigating rights. The excuses put forward by developed countries are copied by developing countries to skip their accountability of addressing looming poverty and deprivation in their jurisdictions. Countries like UK and USA still continue to question the value of a complaint and adjudication procedure for many aspects of economic and social rights on the basis of alleged 'vagueness' of those rights and the inappropriateness of interference with governments' decision about economic and social policy.[30] While this trend is now rejected by courts of many countries[31] and regional bodies, including the African Commission on Human Rights,[32] the Inter-American Commission on Human Rights,[33] the Inter-American Court of Human Rights,[34] the European Committee of

[28] The history has witnessed a biased attitude to economic and social rights from very early time of efforts for drafting International Bill of Human Rights. The European Social Charter (ECS), for instance, was adopted by the Council of Europe in 1961, a decade after European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950. When the ECS was adopted, it was envisioned to provide the backbone and framework for the protection of fundamental economic and social rights in Europe. In the spirit of recognizing the indivisibility between civil and political rights and economic and social, the drafters of the ESC viewed it as the necessary counterpart to the rights protected under European Convention for the Protection of Human Rights and Fundamental Freedoms. In practice, however, ESC has been marginalized in the protection of economic and social rights, has failed to elevate its status equal footing with European Convention for Human Rights. See, Melissa Khemani, 2009, "Economic and Social Rights"; Georgetown Law Center ; Electronic copy available at http://ssrn.com/abstract=1606110

[29] Philip Alston has accurately described the position. He says, "ESC turned out to be the 'poor little step sister' of the ECHR". See, Philip Alston, 2005, *Assessing the Strengths and Weaknesses of the European Charter's Supervisory System,* Center for Human Rights and Global Justice, Working Paper, Economic, Social and Cultural Rights Series (NYU School of Law, No. 6 2005), 2-5.

[30] Aoife Nolan, et al. 2007, "The Justiciability of Social and Economic Rights: An Updated Appraisal", Human Rights Center, Queen's University Belfast; Electronic copy available at http://ssrn.com/abstract=1434944

[31] Jurisdictions accepting justiciability of economic and social rights include, *inter alia*, South Africa, The Philippines, India, Bangladesh, Colombia, Finland, Kenya, Hungary, Switzerland, Argentina.

[32] See, e.g. *Purohit and Moor* v. *Gambia,* Communication 241/200. Decided at 33rd ordinary Session of the African Commission, 15-29 May 2003 (dealing with the right to health of mental health patients); *SERAC and CESR* v. *Nigeria,* African Commission on Human Rights, Case No. 155/96, Decision made at 30th ordinary Session, Banjul, The Gambia, from 13th -27th October 2001 (dealing with the right to health and implied rights to food and housing).

[33] *See* e.g., *Argentina: Jehovah's Witness, Case 2137,* Inter-AM. C.H.R. 43, OEA/ser. L/V/II.47, doc 13 rev. 1 (1979) (Annual Report 1978) (dealing with the right to education; *Jorge Odir Miranda et al.* v. *El Salvador,* Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser. L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with economic, social and cultural standards enshrined in OAS Charter).

Social Rights,[35] the European Court of Human Rights,[36] the recognition and protection of economic and social rights on a equal footing to civil and political rights suffers badly. Persistent denial of some powerful nations to give equal status to economic and social rights does implicitly suggest an attitude of denying the grotesque state of poverty crushing the lives of millions of people. This non-empathetic attitude of developed nations is reflective also from the recent discussions at the United Nations about the optional protocol to establish a complaints mechanism to the International Covenant on Economic, Social and Cultural Rights. Though a Working Group established to consider the optional protocol upon hearing from a number of experts suggested that economic and social rights now must be justiciable,[37] the issue has not been resolved yet. Developed powerful countries such as USA, UK, Canada and Australia are less favorable to the idea of an optional protocol. The draft of the protocol prepared by the *Working Group* is altered by such countries to ensure 'limitations on the scope and application' of a complaint procedure.[38] Rejection of the idea about comprehensive complaints procedure implies that the powerful countries as well as politicians across the world are not yet ready to 'accept the fact that deaths occurring due to hunger, lack of medicines and

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[34] *See* e.g., *Cumindad Mayagna (Sumo) Awas Tingni* v. *Nicaragua*, Inter-American Court of Human Rights Series C, No. 79, 31 August 2001 (involving the right to property); *Delcia Yean and Violeta Bosica* v. *Dominican Republic*, Inter-American Commission on Human Rights, Report 28/01, Case 12. 189, 7 December, 2005 (involving the rights of child).

[35] *Autisme-Europe* v. *France*, Complaint No. 13/2002, 7 Nov. 2003, (dealing with the education rights of persons with autism); *FIDH* v. *France*, Complaint No. 14/2003, 8 Sept, 2004 (involving, *inter alia*, the right to medical assistance of non-nationals).

[36] For a list of decisions of regional bodies on economic and social rights: see, A. Nolan et al., 'Leading cases on Economic, Social and Cultural Rights: Summaries- Working Paper No. 2' (Geneva; COHRE, 2005), electronic copy available at www.cohre.org

[37] For additional information on progress in this regard; see, Report from the First Session of the Open Ended Working Group to consider options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2004) E/CN.4/2004/44; Report of the Second Session, 2005. E/CN.4/2005/52.

[38] *See* the Human Rights Council's Resolution 2006/3, para 2(Available at http://www.ohchr.org/english/issues/escr/docs/res2006_3.pdf). Canada for, for instance, explained after the vote that it "continued to question the merits of a communications procedure for economic, social and cultural rights, and was concerned for the potential of undue interference by international body, and the absence of a clear definition for many economic, social and cultural rights as well as for clear criteria for judging compliance (UN Press Release, 'Action on Resolution on Working group on Optional protocol to the International Covenant on Economic, Social and Cultural Rights', 29 June 2006). After new mandate to the Working Group, the first meeting the group was held on 7 July, 2007. In this meeting, the support for the comprehensive complaints procedure was seen comparatively stronger. However, a significant number of nations, through their delegations, continued to argue in favor of a provision allowing for an 'ala carte' choice by states upon ratification as to which rights or aspects of rights the complaint procedure would cover. The US delegation argued that ICESCR, unlike the ICCPR, does not require states to provide legal remedies. In contrast, NGOs and states who favored the comprehensive optional protocol stressed that all social and economic rights, and all components of these rights, are subject to a requirement of effective remedies. The stand taken powerful countries was a serious backward step in terms of effective protection of International human rights.

shelters, are the most pressing issues of human rights. The security and dignity of poor people is still at stake. The argument that the judiciary should not interfere with government's choices on socio-economic matters and resource allocation implies that there will be nowhere for them to go for a hearing in relation to violations of these rights and that no institution will hold governments accountable for violating them.[39] The denial to agree on 'justiciability' of economic social rights can have the following implications:

- the continuity of regressive status quo in a society which forces millions people to live in poverty in grotesque inhuman conditions,
- governments have no accountability for corrupt practices and wrong policies of socio-economic development,
- making decisions about development policies and allocation of resources is a privilege of governments and political elites,
- the concept of good governance is limited in scope to political rights, and
- the concept of justice has no relevance with necessity of rescuing millions people from hardship of lives caused by poverty and deprivation.

The state of 'enforceability' of economic and social rights, as seen from the preceding discussion, is made weaker. By doing so, governments have failed to underline the importance of the principle that the commitment to enforce economic and social rights along with effective remedies in case of violation is an act of maintaining integrity of the Constitution's 'promise' for all members of society. The principle is vividly described by justice Yacoob of the South African Constitutional Court in his description of the plight of Irene Grootboom[40] and her family, living under plastic in the Wallacedene Sports Field. He notes: "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream".[41] The issue of justiciability is thus not related only with remedies on violation of economic and social rights, but it is also related to the genuine claim of every individual human being of having the 'promises' made by the state and declared through the Constitution kept. It is a claim to assert the dignity and equality promised to him/her by the Constitution. If

[39] Aoife Nolan, et al. 2007, "The Justiciability of Social and Economic Rights: An Updated Appraisal", Human Rights Center, Quuen's University Belfast; Electronic copy available at http://ssrn.com/abstract=1434944

[40] *South Africa* v. *Grootboom, 2001 (1) SA 46 (CC) ('Grootboom')*

[41] *See* para 2, Yacoob J for the Court in *South Africa* v. *Grootboom*, 2001 (1) SA 46 (CC) *('Grootboom')*

the issue of dignity and equality is an agenda of the Constitution, then government under what grounds can refuse 'judicial enforceability' of economic and social rights? One should not forget at this point that 'a State is created by the social contract of people, hence people are are always sovereign. Through the contract, people have committed themselves to sacrifice their lives while defending their nations in the time of need. The State bears the reciprocal obligation to 'guarantee to fulfill basic needs of people' as and when necessary.

The 'generation theory of human rights' engendered by some jurists has produced disastrous impact in 'indivisibility theory of human rights'. The practice of dividing human rights between civil and political rights and economic and social rights with less emphasis to the later has pedantically politicized human rights to the acute disadvantage of the poor population of the world. This politics diligently deemphasizes the significance of economic and social rights and thus contributes towards dehumanization of lives of millions of poor people across the world. This unwanted politics, of keeping a significant size of the population under poverty and insecurity, negatively affects the process of legal development and sustainability of democracy. Dryness of attitude shown to economic, social and development rights by some powerful economically developed countries is indeed responsible for abject poverty confronted by millions of children, women and workers the world over today. "The adoption of rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society".[42]

The generation theory of human rights is utterly unjustified.[43] It directly contests the significance and vitality of the 'indivisibility' theory of human rights.[44] To apply generational

[42] This stamen was made by the Commission on Economic, Social and Cultural Rights (CESCR) in its General Comment (in 19th Session) No. 9 on the Domestic Application of the Covenant. See, U.N. Doc. E/C.12/1998/24 (1998) at para 10

[43] Human rights irrespective of their economic and social or civil or political contents overlap or cross cut with each other. Most importantly, the adequate enforcement of human rights is an interdependent phenomenon. The generation theory fails to understand this 'notion of human rights enforcement' paradigm. The European Human Rights court has thus adopted an approach of integrated enforcement. Case law jurisprudence on human rights established by European Human Rights holds that there is no watertight division between economic and social rights and civil and political rights. In a number of cases, the court has viewed that each treaty body significantly influence other in matter of enforcement. See, Ida Elisabeth Koch, 2006, Economic, Social and Cultural Rights as Components in Civil and Political Rights: A hermeneutic Perspective", The International Journal of Human Rights, Vol. 10, No 4, 405-430, December 2006.

theory in evolution of human rights is based on wrong analogy. It makes attempt to bring in human rights arena the generation theory of Strauss and Howe[45] that describes cycles in history divided into four phases, so-called turnings. They argue that within each turning a new generation is born, exhibiting a distinct collective persona and each generation is shaped by the mood and orientation of the turning in which it is raised and has important part to play in the whole cycle.[46] Generation is a term associated with 'pattern of succession' from one stage of history to the other by one age group to another.[47] Human rights as principal attributes of human dignity are not associated with 'such type of succession'. Human rights are universal terrestrially as well as temporally; human rights of all types were inherent to human beings in the past and so will remain in future. The so-called generation theory, which subordinately segregates economic and social rights from civil and political rights, is hence not only elusive but also detrimental to the development of an integrative approach[48] for enforcement of human rights.

Historically, the role of economic and social transformation in lives of human beings is imminent in formalization of civil and political rights. As a matter of fact, it would be sheer fallacy to attempt applying 'generation theory' to examine the evolution of human rights. Human rights collectively constitute' perfection, at least near perfection, of human personality, which is, otherwise, defined as human dignity. The generation theory was pedantically developed by some jurists to 'establish supremacy of civil and political rights and thereby justify the supremacy of liberal politics, and hence implicitly assist politicians to avoid accountability to 'omission to address grotesque inhumanity caused by poverty and deprivation'. The underlying

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[44] As pointed out by Holmes and Sunstein, all rights are positive in the sense that they have budgetary implications. See, Stephen Holmes and Cass Sustein, 1999, *The Cost of Rights: Why liberty depends on Taxes*; W.W. Norton & Company, New York at Ch. 1

[45] "Generations" (ISBN 0-688-11912-3) is a book William Strauss and Neil Howe wrote to describe a cyclic theory based on repeating generational archetypes. The book had made attempt to examine the seasonal cycles of the Anglo-American history. According to this theory, just as history molds generations, so do generations mold history. Strauss and Howe describe four turnings of Anglo-American history, and in each turning a new generation is born, exhibiting a distinct collective person. They say, "As one turning gives way to the next, a society's mood shifts because the generations age from one phase of life to the next, building their unique perspectives and tendencies into their new social roles". For more details: See, "Generations" in http://en.wikipedia.org/wiki/Strauss-Howe_generations_theory

[46] *Ibid*

[47] *Id*

[48] Integrative approach of enforcement of human rights instruments takes 'indivisibility element' as a legal content, meaning that the two sets of rights can be coordinated or integrated into concrete decision making, even though they are enumerated in respective covenants. The European Human Rights Court is increasingly using this approach. For more on explanation of integrative approach: See, Ida Elisabeth Koch, 2006, Economic, Social and Cultural Rights as Components in Civil and Political Rights: A hermeneutic Perspective", The International Journal of Human Rights, Vol. 10, No 4, 405-430, December 2006.

purpose of the civil and political rights' precedence based-generation theory is to 'morally and legally' validate the supremacy of the 'liberal majoritarian politics'.[49] Economic and social rights are considered 'second in rank' because they are vague in definition and application'. This view is provoked by a group of states, which contradicts with the ground reality. Of course, every human being has a lasting love for his/her freedoms, which are protected by civil and political rights. Nonetheless, the significance of economic and social rights is equally great because an individual must first survive to enjoy civil and political rights. Hence, the division of rights into generation is nothing but a political hoax. In social science, like natural or pure science, concepts and theories do exist and are considered valid or invalid based on their 'properties of truth and relevance', but not on the ground 'in what era or period of history they were produced'.

The unjust and biased attitude of the developed countries and some scholars of human rights jurisprudence to economic and social rights have encouraged the governments of developing countries to float out an excuse of 'resource crises' to enforce economic and social rights. The excuse of 'resource crisis' is, however, merely a hoax. The real problem indeed lies in continuing a system of governance that lets off rulers from accountability to wrong policies, mal-distribution of resources, corruption and exclusion of majority from decision-making. The law in a developing society is an instrument of 'coercion or imposing interests of political elites over general population', hence the law in such a society is devoid of 'values and norms' of justice; that is to say that the equity based distribution of resources and access to opportunities for development as well as access to remedies against unequal treatment is restricted. It is worth elaborating the 'theory of source and output rights' jurisprudence at this juncture.

Basic needs are 'primary essentials' of human lives and are recognized so by fundamental human rights instruments by most Constitutions of democratic nations. The right to adequate

[49] "One who votes in a democratic procedure is expected to abide by the result even if their cause is defeated. They are in minority but the majority has the day. They must conform to the winning policy although they voted against it. They may be forced to comply with the decision of the majority. This is not tyranny; it is just defeat. Those who are defeated should look forward to their next opportunity for decision making. They may then find themselves in a majority, and depending on the issue at stake in the voting—a representative, a government, a specific policy—they may be able to reverse the decision which went against them on the first occasion. An important assumption behind the practice of majority decision-making is that 'You win some; you lose some"—Dudely Knowles, 2001, *Political Philosophy*; Routledge, London. This essence of 'liberal majoritarianism is what the final consequence of the protection of political rights. One has to critically understand that 'the formation of majority of obtaining decision-making power' by powerless is simply unthinkable. The liberal politics is thus an instrument of political elites. The economically and socially deprived can have no influence in 'politics' and stay quite back with almost no possibility of gaining majority. The purpose behind relegating 'economic and social rights' second in generation is nothing but a design to discreetly keep politics in hands of political elites.

standard of life, which includes right to food, water supply, housing, health, education and social security, is a basic input or milestone for 'human security and dignity. Rights offered to these basic needs are characterized as 'economic and social rights'. These rights need to be guaranteed by the State as basic needs of human beings. The legal systems of democratic State acquire content as well as legality from these rights. Indeed, no legal system can be oriented to 'development or perfection in disregard of these rights'. The fundamental objective of the legal system of any democratic nation is thus to secure a ground for 'enforcement of such rights'. Since these rights are essential both for contents and legality of the 'rules of law', they can be defined as 'source or input rights. The economic and social rights, along with freedom of choice and physical integrity, place every individual in 'a threshold condition'. The 'threshold condition', as explained by Thomas Pogge, stipulates that a person suffers a violation of human rights if he/he is prevented from enjoyment of basic goods.[50] The paramount role or significance of the source or input rights lies in acquisition of the 'threshold condition' of human rights enjoyment. The satisfaction of 'basic goods, i.e. adequate access to security of person, physical integrity, sustenance supplies, freedom of choice and actions, basic education and participation in economic entrepreneurship, is what literally constitutes the 'threshold condition'. Deprivation of the access to these basic goods amounts to a human rights violation.[51] Hence, failure to underline the importance of economic and social rights or to deny justiciability of these rights amount to 'disregard of source or input rights'. The recognition of the overriding significance of economic and social rights not only secures the 'right to development' but also provides a ground for enjoyment of 'civil and political rights'. Individuals whose threshold rights are incomplete or ill-protected are placed in a less advantageous position. In such a situation, they suffer excessive exposure to violent crimes, suppressions by the State, and become unable to defend their dignity. They are unable to meet their basic socio-economic needs. These 'disadvantaged conditions' lead to negation of basic political liberties and leads to an

[50] Thomas Pogge has listed the basic goods constituting the 'Threshold Condition' of human rights enjoyment. He says: "Other, more elementary, basic goods are … physical integrity, sustenance supplies, freedom of movement and actions, as well as basic education and economic participation". *See* Thomas Pogge, 2002, at 49. What Thomas Pogge implies here that the satisfaction of the right to life, liberty and security of person under Article 3 of the UDHR collectively constitute the 'threshold condition' of human rights. Thus, when enjoyment of basic needs meets the 'threshold condition', the door gets opened for enjoyment of human rights in comprehensive form. The 'threshold condition' prepares individuals psychologically, intellectually and materialistically competent to 'assert all those rights provided by international human rights laws', the enjoyment of participating in activities of state's decision making and governance being the most important one.

[51] *Ibid* at 38.

abridgement of other civil and political liberties'. No need to hesitate in saying that 'civil and political rights are the 'yields of economic and social rights as threshold rights. The deaths and deprivation of millions of people across the world today is thus a 'violation of human rights'.[52] The input or threshold right concept holds that 'the poverty is an outcome of human rights violation'[53] caused by 'wrong political decisions and policies'. The situation cannot be averted by people having no ability to participate in the political process.

Justice as a concept embodying elements of 'physical integrity, security of person, sustenance supplies, freedoms of choice and action, access to basic education and economic participation' provides contents and measuring indicators for a system of law. These elements, in turn, embody moral and normative standards for legitimacy. A law cannot be justified being void of one or the other of these elements. Human dignity is a 'moral value or normative standard' cumulatively projected by these elements. To further enunciate, the internalization of 'basic needs' by the legal system' is justified by the need of 'protecting and promoting human dignity'. Hence, to say that economic and social rights are vague and not justiciable will imply that 'human dignity can be ignored or disregarded'. The human dignity as a value of justice renders the laws incorporating basic needs of human being grounded with full legal force as well as morally justified system. The human dignity as described by the oriental value system comprises of 'five qualities of human beings- free from want, free from diseases, free from exploitation, free from early death and free from violence'.[54] When the legal system of a society are able to adequately secure human dignity by way of 'recognizing and protecting basic needs', along with notion of justice rationalizing the same through normative values, it is supposed to correspondence with economic, social and political development of the given society. As an outcome the process, 'output rights' are activated. An individual at this stage acquires ability to

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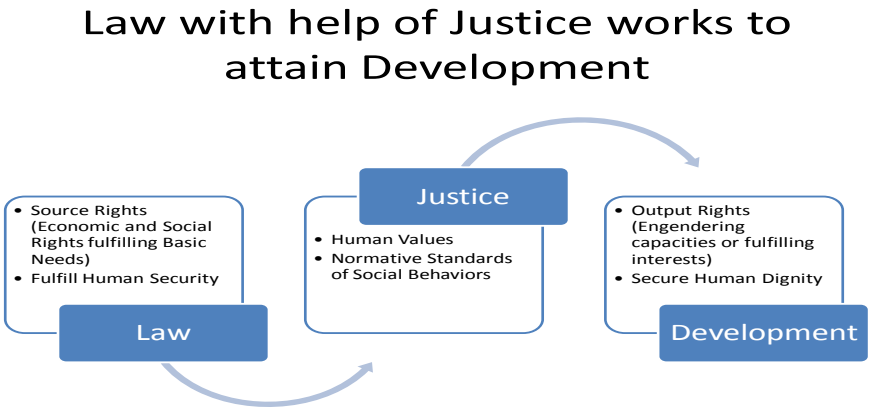
[52] Source or Input rights (can be said threshold rights) contribute to build capabilities or abilities to assert other human rights, political rights in specific. They provide individuals with 'right' to have rights. Development and input rights support each other to 'justify each other's rationality and element of justice'. Indeed, they form an interface and their interplay encourages greater participation of people in 'public affairs', thus strengthening the prospect of a participatory democracy. On role of threshold rights to build capabilities of individuals; see, Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach,* Cambridge: Cambridge University Press, 2000, pp. 96-101 and Amratya Sen, "Elements for a Theory of Human Rights", *Philosophy & Public Affairs 32 (2004) 315-56*

[53] It would be sheer fallacy to believe that 'people are poor so their human rights are violated'. Human rights violation is a state which enshrines infliction on one by others. It means that the violation of human rights is not something we do to ourselves, but others do to us. This view of the nature of human rights violation is grounded on J.S. Mills' Harm Theory. See, Thom Brooks, "Is Global Poverty a Crime", p. 5. Available online at http://ssrn.org/abstract, last visited October 29, 2011.

[54] *See* Yubaraj Sangroula 2010

exercise his/her rights to participate in the decision making process. These rights in human rights language are called 'civil and political rights'. The source rights operate to empower individuals economically and socially whereas the output rights are active to control State's tyranny or acts against rule of law. Economic and social rights are 'inherent advantages' endowed to human personality. They offer 'security' to every individual against want, diseases, violence, exploitation and untimely ending of life. The output rights on the other hands are 'capacities' of individuals to assert claims, powers, privileges and immunities that engender an independent personality of every individual. Source rights along with output rights 'secure' human dignity.



The beneficiary of the right to development is, first and foremost, the individual. But no individual can simply wait until he/she has developed; the individual also has right to opportunities to develop. That is to say that 'every individual has right to have rights'. The responsibility to make such is fully guaranteed to every individual: States have a responsibility for creation of national and international conditions favorable to the realization of the right to development.[55] On the international level, this means that 'States have the duty to take steps individually and collectively, to formulate international development policies with a view of facilitating the full realization of the right to development.[56] And on the national level, it means that 'States should undertake all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic

[55] Article 3(1) of the *Declaration of the Right to Development*, 1986
[56] Article 4(1), Article 4(2) and Article 3(3) Ibid

resources, education, health services, food, housing, employment and the fair distribution of income'.[57]

III. UN EFFORTS TO INSTITUTIONALIZE THE RIGHT TO DEVELOPMENT AND POLITICS

The economic and social wellbeing of people is a major agenda of economic, social and political development, as it is so pointed out by the UN *Declaration of the Rights on Development*. However, the right to economic and social wellbeing of people has historically become the victim of political division of the west and east and socialist and capitalist countries. The issue of economic and social progress of human beings was raised for the first time by some less powerful countries as an indispensable element of human rights at the San Francisco Conference, 1945. The discussion at the Conference had adequately reflected on the necessity of 'economic progress of the people all over the world' as a precondition for peace and democracy. Norway, for instance, had put forward the following proposal:

"*In any new world order the great powers will have to shoulder the main burden of providing the military and material means from maintaining peace, and we are prepared to grant them an international status corresponding to their responsibility and power. But at the same time, we have a strong feeling that also moral standards should be taken into account…To defend life, liberty, independence, and religious freedom to preserve human rights… It is obvious that lasting peace must be based on economic progress and social justice… It must be one of the main tasks of the new International Organizations to secure an increasingly higher standards of living and social security for all".*[58]

This proposal specifically highlighted the importance of economic development and social justice as the bed rock of peace and sustainable human rights protection. Bolivia had added a proposal demanding that the Economic and Social Council of the United Nations be mandated:

"*to achieve concerted action to promote the economic development, the industrialization, and the raising of the standard of living of less favored nations as well as the protection of the international rights of man, the perfecting of social security and the provision of the material*

[57] Article 8(1), *See* also Article 2(3)

[58] Document of the United Nations Conference on International Organization, (UNCIO) San Francisco 1945, Vol. 1, p. 554. See also vol.3, p. 355, 366 and vol. 6, p. 430-432.

opportunities for work, the solution of problems of health and population and others of a similar nature".[59]

This proposal sounded quite ambitious, but for many States it was not enough. Some countries went further to put proposal in this regard. Argentina, for instance, insisted for equal access to capital goods,[60] and France argued for fair distributions of raw materials as part of the Economic and Social Council's mandate.[61] These proposals were however rejected and in their place Article 55 of the Charter was devised. The San Francisco Conference failed to properly address the necessity of emphasizing the 'economic development and social security of people across the world'. Article 55 and 56 emerged to be the only 'instruments' in the Charter to directly deal with the role of the UN in economic and social development of the world population. The major reason behind this limited attention of the UN to the economic and social development was that the founders of the United Nations at San Francisco conference were the most influential countries and most of them had economies already developed. The matter of economic development thus could not be an issue of priority of debate for them. They were thus virtually guided by a misconception that what they were making the UN was 'an institution for collective security' but not an institution which could take responsibility for the economic development and social security of the poor people of the world.[62] Most importantly, the United States of America was very much opposed to any language about social/economic rights from the very beginning, seeing it as an opening for socialism.[63] It was this politics that stood as a stumbling block for inclusion of economic and social rights as equally important human rights. In subsequent days, the attitude of the developed countries to economic and social development agenda became further antagonistic. These rights were considered as 'offshoots' of the socialist or communist ideology, thus apt to be rejected at any cost. It was a grave injustice of the developed countries to the poor people of world.

[59] UNCIO, vol.3 at 586.
[60] UNCIO vol.10, at 84.
[61] UNCIO vol.3, at 388.
[62] Much of the world was still colonized. Western colonial States were not sincere to the people of the colonized world. They did not treat the people of the colonized parts as 'equal to that of developed countries'. The sorrow and problems faced by the people of colonized countries were not taken as violation of human rights as such people were not defined as 'civilized people'. See for detail discourse, Schirijver, van Genugten, Homan, de Waart, 2006, *The United Nations of the Future: Globalization with a Human Face.* Amsterdam: KIT Publishers, at 89.
[63] Otto Spijkers, "Human Rights and development from an international, Dutch and personal perspective". See online at Social Science Research Network URL http://papers.ssrn.com

The said mindset of the developed countries was against the spirit and letters even of Article 55 of the UN Charter, the only alternative guarantee to economic and social development enshrined into the UN Charter. Normatively, the Article, with a view to the necessity of creating stability and wellbeing on which peaceful and friendly relations of nations is rested, requires United Nations to promote (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health and related problems; (c) universal respect for, and observance of , human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. While the State parties under Article 56 of the Charter have undertaken obligation to respect the provisions set forth in Article 55, in practice subsequent they presented a sharp opposite attitude to rights of people concerning economic and social progress.

Amidst this politics was engendered a theory of 'generation of human rights' significantly devaluing the importance of economic and social rights. The impact of the theory is so wide that the significance of economic and social rights is often ignored even by the UN. This is apparent in the UN Millennium Development Goals (MDGs) as well; as it fails to underpin human rights values in those development programs. Conceivably, it can be argued that even the UN has been influenced by the contemporary political theory that 'human rights and development' are two different concepts or entities. Spectacularly, the UN paid less attention to human rights while designing, developing and implementing the MDGs.

The consequence of the politics of divisibility of human rights and generation theory was costly; the governments from developing countries never considered themselves accountable for the devastation being continuously faced by human lives due to phenomenal poverty and deprivation. The developed countries, on the other hand, overtly rejected to take responsibility to reduce the cost on defense and armaments and to divert the same to address the crisis of poverty in the developing countries. Poverty thus continued as if it was a 'usual phenomenon' having no connection to human rights at all. The politics of 'rejecting the right to development as a human right' prompted by the inhuman face of capitalism[64] is thus largely responsible for continuity of massive violation of human rights in developing countries.

[64] Does the international community today acknowledge the universal right to development? The answer is bound to be skeptical. While the *Declaration on the Right to Development*, 1986, referring to the binding law such as ICCPR and ICESCR, has stated that right to development is inalienable human rights, the ground for skepticism looms large. When the Declaration on the Right to Development was adopted, the United States of America did cast

Nonetheless, some developments have followed recently in this regard. It seems that the realization that poverty and deprivation is a grave violation of human rights is increasing. The UN *Declaration on the Right to Development* is the most visible example of this development. More recently, the *Millennium Declaration* (2000) was unanimously adopted by the UN through a largest-ever gathering of world leaders (189 member-states, most of them represented by heads of State and Government).[65] In the declaration, they pledged to effectively work to free fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected to. It included a promise to make the right to development a reality for everyone and to liberate the entire human race from want.[66]

The *Millennium Development Goals* are the concrete targets accompanying this general pledge.[67] While the language of human rights could be specifically used, [68] it can be assumed that human rights and development are closely linked and thus MDGs are not fully dry of human rights notions. However, to approach development from the perspective of legally binding human rights is not an approach accepted by it. Unfortunately enough, two years after the declaration of the MDGs, the US Government made a very controversial reservation to the declaration on food made during the World Food Summit held in Rome on 10-13 June 2002.[69] It viewed that the attainment of the right to an adequate standard of living is a goal or aspiration

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a negative vote (For a discussion on the US position on the Declaration on the Right to development See Marks, "The Human Rights to Development: Between Rhetoric and Reality in *Harvard Human Rights Journal*, Vol. 17, at 137-168). Other eight countries abstained. They were Denmark, Finland, The Federal Republic of Germany, Iceland, Israel, Japan, and the United Kingdom.

[65] United Nation Millennium Declaration, resolution adopted by the United Nations General Assembly, 18 September 2000. UN DOC. A/RES/55/2 UN Press Release, 'World Leaders adopt 'United Nations Millennium Declaration' at conclusion of Extraordinary Three-Day Summit, 8 September 2000, UN DOC. GA/9758

[66] *Millennium Declaration* , at *para* 11

[67] Although these goals are not legally binding, Alston has argued that most of the goals reflect customary international law. He states that 'at least some of the MDGs reflect norms of customary international law… it can be observed that the case would be the most easily made in relation to the first six of the Goals, and parts at least of the Seventh would be also a strong candidates. See at Alston, 'Ships Passing in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" in the *Human Rights Quarterly*, Vol. 27 (2005), no. 3

[68] For an interesting paper on a human rights perspective on the Millennium Development Goals (and a criticism of the fact that human rights did not figure prominently in these goals), see Alston, "A Human Rights Perspective on the Millennium Goals, paper written in 2004, as advice for the Millennium Projects Task Force on Poverty and Economic Development.

[69] For the Original Summit see, http://www.fao.org/wfs and for the follow-up conferences, see http://www.fao.org/Worldfoodsummit

to be realized progressively so that does not give rise to any international obligation.[70] This argument is not only deceptive to international cooperation and obligation of the developed countries to address the problem of poverty.

This is how anti-humanity international politics has played a very crucial role to perpetuate the state of hunger in the world. The grotesque state of deprivation that millions of people are subjected to live in is, to a large extent, an 'outcome of the attitude of the developed countries to neglect the responsibility of dealing with the crisis of poverty facing the poor people of the world'. While they have been interested to invest huge resources for 'armament and military' build-up, they are simultaneously arguing that 'the right to food incurs no international obligation'. As a matter of fact, in the South Asian region and in many other parts of the world as well, the frequencies of the types of stories as described at the outset are bound to occur phenomenally. The instances mentioned in there are only 'few representative incidents out of millions happening every single day'. These incidents are with no doubt an utter violation of human rights ostensibly committed by States through pursuing a 'wrong or erroneous theory of divisibility of human rights which is basically prompted by an idea of discarding the economic and social rights as human rights'.

IV. SOUTH ASIAN SCENARIO OF CONSEQUENCE OF INTERPLAY OF HUMAN RIGHTS VIOLATION, DEPRIVATION OF ACCESS TO DEVELOPMENT OPPORTUNITIES AND ILL-POLITICS AND GOVERNANCE

This part of the discourse deals with actual scenarios of the poverty, deprivation and human rights in South Asia, and their effects on institutionalization of democracy in the South Asian nations. The discourse envisions to disprove the argument that 'resource unavailability is making trouble in enforcement of economic and social rights' in South Asian countries. In fact, it is an anti-poor human rights politics of the powerful countries and unaccountable

[70] The reservation can be found in Part One of the Report of the World Food Summit: five years later, Rome 10-13 June 2002, p. 32. It reads" "The United states wishes to attach the following reservation to the Declaration of the World Food Summit… The United States believes that the issue of adequate food can only be viewed in the context of the right to a standard of living adequate for health and well-being as set forth in the Universal Declaration of Human Rights, which includes the opportunity to secure food, clothing, housing, medical care and necessary social services. Further, the United States believes that the attainment of the right to an adequate standard of living is a goal or aspiration to be realized progressively that does not give rise to any international obligation or any domestic legal entitlement, and does not diminish the responsibilities of national governments towards their citizens".

governments of the developing countries that cause grotesque violation of human rights across the world. The discussion below will exemplify the statement. This part of the discourse will implicitly plead for concentrating on 'securing good or progressive governance system' for rescuing huge population of people from state poverty and deprivation, and hence to protect human rights.

V. PERCEIVED THREAT OF NATIONAL SECURITY, INCREASED MILITARY SPENDING, RAMPANT BUREAUCRATIC AND POLITICAL CORRUPTION AND IMPACTS ON HUMAN DEVELOPMENT AND SECURITY

The main source of the mammoth poverty[71] and deprivation, violence accompanied by massive violation of human rights across the world lies on States' incessant quest for power, militarization and political supremacy. Even the era following the cold war has made no spectacular improvement in this regard. The immensely amplified globalization has resulted in increasing control of international economic order resulting in massive price hike and unbelievably extended consumerism. [72] Both of these phenomena have made the lives of poor people further deplorable.[73] The drive of mobilizing scarce resources to boost up militarization

[71] Poverty is defined as denial of opportunities and fulfillment of human potential. Poverty and inequality are closely related. The trends across the world show that inequality is rising worldwide in recent decades at both national and international level. More than 80 percent of the world population lives in countries where income differentials are widening. According to the United Nations Development Program, the poorest 40 percent of the world population account for only 5 percent of global income. On the other hand, the richest 20 percent account for 75 percent of the world income. The scenario presents a gloomy picture of the modern international economic order. The end of colonialism and imperialism fared no good for the poor population and poor countries. Failure to deeply realize the 'human dignity and security' of poor population is the major cause of poverty worldwide. According to most recent estimates of the Food and Agriculture Organization of the United Nations, 2009, the number of hungry people worldwide has reached 963 million, or roughly 15 percent of the world population. It is an increment by 142 million over the figure of 1990-92. See, Economic Survey, 2009-10; Pakistan, at Ch. 9

[72] Globalization in recent times has occurred as 'irreversible phenomenon'. It has both the challenges and prospects for developing countries. It may, as argued by Mahbub ul Haq in a brainstorming session of UNDP in 1998, help developing countries to gain if they are able to accelerate their human development, good governance and investment on infrastructure. He said, "If globalization was superimposed on a poorly-educated and poorly-trained labor force with poor system of governance and infrastructure, it would not lead to growth nor reduce poverty". See, *Human Development in South Asia: Globalization and Development*, The Mahbub ul Haq Human Development Center, Pakistan; Oxford University Press.

[73] As reported by Human Development in South Asia: Globalization and Development, (2001), the globalization has a very negative impact on lives of poor population. With intensifying globalization trend in South Asia, half a billion people have experienced a decline in their incomes. The benefits of economic growth that did take place were limited to a small minority of educated urban population. While the globalization driven investment is eventually expected to cause rise on income of all population, the transition is painful and devastating to poor population. The management of globalization in developing countries is thus a challenge in itself. The human development and economic development cannot be separated, if the advantages of the globalization have to reach

and national or regional security systems has been intensified even after the cessation of so-called cold war. Since September 11 (2001), the world has seen a dramatic change in the attitudes of the USA and its allies with regard to 'military or weapon-based security spectrum'. The massive scale of terrorist attacks and ensuing fear and insecurity in its aftermath, the emergency measures taken to prevent similar incidents in future and restrictions on freedoms allegedly to deal with the threat of terrorism and the global economic recession have collectively posed a great uncertainty about the future. These negative developments have diverted larger part of the resources to military and security build-ups, and have adversely affected the prospects of changes in the lives of the poor people of the world. Bertrand Ramcharan rightly says, "In all probability the plight of the developing countries has worsened and risk of internal conflicts has heightened".[74] Both their development and freedom have been threatened, the linkage of which is indispensable for progress of the human society.[75] The global military and security expenditure has sharply increased and the accessibility of the world poor population to basic needs has declined. The seeming development obstruction has posed increased threats to human dignity and security of the 'mammoth poor population across the world'.

The global institutional order is one of major causes for 'continuity of the deaths of millions of people by poverty'. The global institutional order allows for inequality among people from developed and developing countries. As pointed out by Thomas Pogge, there are at least three sources of the international institutional order that engender poverty and inequality among people. The first source consists of 'international economic bodies, such as the the World Trade Organization, which has enabled the exacerbation of deaths from global poverty through monetary agreements that favor affluent States at the cost of poor States.[76] The second source is protectionist exemptions insisted upon by affluent States which have 'had a huge impact on employment, incomes, economic growth, and tax revenues in the developing countries where

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the poor population. Unfortunately, the larger part of the resources in developing countries is going not to the 'human development sector', hence depriving the massive poor population from benefits of the economic growth.

[74] 2002, *Human Rights and Human Security*; International Studies in Human Rights Vol. 70: Kluwer Law Internationa, at 1

[75] In his important work, Prof. Amratya Sen has coherently presented the linkages between freedom and development. Derogation of one will automatically affect the posture of other. This theory in the present world order has been plausibly established. No democracy can thrive in absentia of development and no development can be meaningful until and unless the poverty engulfing the massive population is addressed. For further discussion see Amratya Sen, 1999, *Development as Freedom;* Oxford University Press.

[76] Thomas Pogge, 2002, at 19

many live in the brink of a starvation.[77] The third source concerns with 'international resource privilege' whereby dictator of the developing countries sell large swathes of national resources and incur foreboding debts, enhancing themselves at the great expenses of the welfare of the people.[78] Beyond these three sources, a newly identified source is 'culture of over-expenditure in luxury of managers, consultants and experts ' by projects supported by the bilateral or multi-lateral bodies. The high-cost lifestyle of expatriates is copied by the rulers, and managers of the national bodies. This culture robs huge nascent resources, which otherwise could be used for people's basic needs.[79] In these ways, the global international order contributes to the global poverty, and hence violation of human rights.

The south Asian region presents the gloomiest picture of human development situation, poverty, poverty related human miseries, and safeguard for human rights. The problem of internal conflicts, grotesque poverty and degrading state of political accountability are casting lives of millions of people in a state of chaos. The South Asian nations, by contrast to the painful scenario of human rights violation, poverty and deprivation, are increasingly engaged in building military and weaponry-based 'national security system' and are flushing increasingly huge amount of financial resource [80] to sustain their military outfits.[81] While millions of poor

[77] *Ibid* at 18

[78] *Id* at 113-14

[79] Nepal is a glaring example. After 1990, the bilateral and multi-lateral international agencies brought a culture of 'lavish life style for expatriate managers, consultants and experts'. The expensive cars, offices and high salary used by international agencies were attractive. The international aids included such luxuries too. Gradually, the luxury was transplanted by national government agencies and non-governmental agencies. This is infamously known as 'Pajero' culture in Nepal. As of now, the culture has been transformed into a 'system of legitimized avarice'. Each Prime Minister, when retired, takes the 'sophisticated car' with him. This culture has not only increased the 'Governmental expenditure' but encouraged 'corruption'.

[80] The defense spending in South Asia is painfully astounding. Even smaller members of South Asian region like Nepal and Sri-Lanka spend huge amount of revenues for sustaining their military outfits. Nepal spends 1.6% of gross domestic products (GDP) in military spending, whereas the economic growth has barely kept pace with its expanding population. With GDP per capita less than $245, Nepal is economically one of the poorest countries. In 10 years from 1996, Nepal's army increased from 46000 to 96000. A whole new institution called Armed Police Force was also created. Nepal defense budget has reached to 14 billion rupees. Whereas Nepal Needs 50,000 additional primary schools to educate its children, why Nepal has to keep this 96000 army even after the Maoist conflict has come to an end is an open question (See Kul Chandra Gautam " Arms Down ! For Shared Security" in The Rising Nepal, 2010-08-19-visited on 17-10-2010). On the other hand, Sri-Lanka, another smaller member of the region, has the largest defense budget in South Asia in percentage term. In November 2008, president Rajapaksa promised to raise defense spending by seven percentage to a record $1.6 billion in 2009 (See Darini Rajasingham Senanayake, 2009. "Win the War and Lose the Peace: Sri-Lanka's War on Terror", Institute of South Asian Studies (ISAS), National University of Singapore: Website www.isas.nus.edu.sg- visited on 17-10-2010). The defense budget of India and Pakistan is of course scary. The Indian defense budget in 2010-11 has been swollen to 31.9 billion, a 3.98% increase in budget of 2009-10. The share of the defense budget in GDP is 2.30 percent, and the share of the defense budget in the union government's expenditure is 13.88 percent (See Lexaman Behara, "Budgeting for India's Defense: An Analysis of Defense Budget 2010-11"; March 3, 2010. Institute for Defense

people in South Asia are dying due to starvation and lack of basic medicines,[82] the South Asian nations have already mastered manufacturing superb armament and military technological competence including the one to 'manufacture sophisticated long range missiles' with overwhelming capacity to hit targets at so far distance that are generally beyond the imagination

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Analysis, IDSA-visited on 17-10-2010). While Pakistan's economy is in shambles due to mounting terrorism and unprecedented flood, the defense budget is tremendously increased. In 2009-10, Pakistan's revised defense budget was Rs. 343 billion which which the Government decided to increase by 31 percent- Rs.448 billions (5.3 billion USD) in 2010-11 (See. "Pakistan to Raise defense budget by 31 percent in 2010-11: People Daily China Online, 22 May, 2010-visited 17-10-2010).

[81] The army expenditure in South Asia is huge. Arguably huge quantum of scarce financial resource is spent for defense buildup in disregard of a huge size of population is starved and forced to die in lack of food and medicine. Even a small and least developed country like Nepal has been maintaining a military outfit having approximately one hundred thousand personnel despite a clear knowledge that it is strategically no feasible for it to defend its territory by military capability in the face of mammoth forces of India and China. India and Pakistan in South Asia are two countries having largest military outfits in the world. The Indian Army consists of 1,300,000 personnel in active service, 1,200,000 reserve troops, and 200,000 territorial forces. The Pakistan Army has an active force of 620,000 and 528,000 reservists. It has 150,000 para-military troops. These weaponries possessed by these countries are extremely sophisticated and expensive. In 1996 India signed, for instance, an agreement with Russia for the purchase of 90 Su 30 Mk-1 multi-role fighter-bombers. In 2004 a multi-billion license was signed for building additional 140. 240 Su30-Mk-1s. Moreover, 51 Mirage-2000, 60 Mig-29's , 250 old Mig-21's 47 Jaguars and 70 Mig-27's for ground attack are in service, which in total cost billions of dollar. Similarly, Pakistan Air Force has 200 rebuilt Mirage- 3's and Mirage-5's. Additionally, it has 42 F-16's, 150 F-7's. Manufacture of 150 JF 17 Thunder fighters is undertaken by the Pakistan Aeronautical Complex. An order has been placed with China for the purchase of 36 JF-10.These machines are self evident as to how huge scarce resource, which otherwise could be used to save the life of rural poor people, is consumed by the so-called perceived defense threat. Do the South Asian Governments are concerned to their nations for the welfare of people for building a supremacy is a open question for debate. For additional information on South Asian defense outfit, See "Military Balance in South Asia" in South Asia Investor Review, Thursday, January 5, 2009 (URL: http://southasianinvestor.blogspot.com/2009/01/military-balance-in-south-asia.html)

[82] South Asia has 23% of the world's population and 43% of the world's poor and undernourished people with low life expectancy, low literacy rate and higher degree of gender discrimination and associated death and violence. While India and Pakistan in South Asia have attained a nuclear capacity to for war and their defense, the poor and undernourished population is implausibly huge. Though the number of people below the poverty line may have come down due to robust economic growth in India the life of millions of people is still in a peril. As studies have shown, 79% of unorganized workers, 88% of Schedule Caste and Schedule Tribes, 80% of Backward Population and 84% of Muslims belong to the poor and vulnerable group. Despite high economic growth rate, they have remained poor at a bare subsistence level without any social security, working in the most miserable unhygienic and vulnerable conditions. These poor and vulnerable categories of people are forced to survive on less than Rs. 20.30 per capita per day, which is twice the poverty line or less (See, "India-75% of Indians are poor and vulnerable" in SAAPE Bulletin: A Bulletin of South Asia Alliance for Poverty Eradication, October, 2007: Produced and published by SAAPE Secretariat, Kathmandu. Website- www.saape.org.np and Vikas Adhyayan Kendra, Mumbai. Website -www.vakindia.org : visited on 17-10.2010). As per the report of World Bank's report (Poverty Reduction in Asia), the headcount poverty rate in Nepal is 31 percent. As reported by International Development Rsearch Center (IDRC), in Bangladesh 46.8 percent people live under poverty. Even the recent economic growth in Bangladesh has not led to a major fall in poverty, least of all in rural areas. A 2008 report of Overseas Development Institute (see at www.odi.org.uk), in its 2008 project briefing, reports that around 40% people live in poverty in Bangladesh, of which 25% people are classified by the Government of Bangladesh as extreme poor and as such are rarely able to take advantage of the productive opportunities emerging from economic growth. However, Bangladesh still spends 1.1% of its GDP in defense spending (Source, World Bank, World Indicators). As per 2007 statistics, South Asia spends 31 756.7 millions for military purposes, of 81% falls with India alone.

of ordinary human beings.[83] Unfortunately, along with the mounting military capacity and spilling over modern military weapons, the South Asia continues to remain the most impoverished part of the world in terms of income as well as human development indicators, such as health and education. The largest absolute number of poor in the world, live in South Asia.[84] The missiles projects along with other military needs consume a huge amount of 'scarce revenues' which otherwise could be used for human development and basic needs of people such as sustenance, medical care and many other essential services that are necessary for a dignified life. The diversion of recourses to the 'so-called national security' and unproductive sectors such as manufacturing of weapons has seemingly affected the progress in human development by attaining the MDGs.[85] The South Asian perspective of human rights and poverty alleviation is marred by the 'unwanted nexus of instable politics, corrupt and hypocritical governance systems and military adventurism'. Human rights of people are the worst victims of this nexus.

With no doubt, South Asia holds more enterprises and investment of financial resources to produce weapons and explosive powders than pharmaceuticals.[86] Much more funds are spent in order to 'prepare armed recruits' than to 'produce doctors'. The number of women and girl children condemned to trafficking and other forms of sexual violence, and maternity related death is quite larger to those of who are fortunate to graduates from universities".[87]

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[83] India has about one hundred nuclear armed ballistic missiles (Agni-I and Agni-II), and Brahmos the new supersonic cruise missile. The ballistic missile inventory of Pakistani army is equally lethal. It comprises Ghauri III and Shaheen III and several other medium range ones. All the ballistic missiles can carry nuclear warheads. The Babur Cruise missile is the new addition to Pakistan's weapon inventory. India and Pakistan possess almost same number of ballistic missiles and warheads. These nuclear weapons and destroy the entire population of South Asia (See "Military Balance in South Asia" in South Asia Investor Review, January 15, 2009).

[84] Human Development Report: Poverty and South Asia, 2006; The Mahabub ul Haq Human Development Center; Oxford University Press, at 2

[85] Less than five mortality rate has declined from 130 deaths per 1000 live births in 1990 to 94 in 2004. The current is not going to meet the targeted goal by 2015. South Asia represents the second highest under five mortality rate in the world. While under five mortality rate declined by more than 50 percent in Nepal, Bangladesh and Sri-Lanka, Pakistan and India, nations with most sophisticated military outfits and weapons, could lower it only by 28 percent (in 2004). South Asia has the second highest maternal mortality ratio in the world and is unlikely to meet the MDG target in this regard. Despite low level of HIV prevalence, South Asia is a high risk region due to high levels of poverty, low literacy and poor awareness levels. Around one in four TB cases occur in South Asia and the growing threat of HIV/AIDS is likely to increase the number. See, *Human Development Report: Poverty and South Asia, 2006*; The Mahabub ul Haq Human Development Center; Oxford University Press, at 2

[86] The poor state of MDG on health is example. South Asia is unlikely to achieve this goal by 2015. See at *Human Development Report: Poverty and South Asia, 2006*; The Mahabub ul Haq Human Development Center; Oxford University Press.

[87] South Asia shares 22 percent of the world population, whereas it bears the burden of 43 percent of world poor population. In South Asia, 437 million people live below US $ 1 a day, while three-fourth of the population

The people of South Asia are compelled to live in a state of paradox. While South Asia, as many other parts of the world, are crawling forward with its slow economic growth rate and human development indices, the governments of South Asia are gruesomely competing for supremacy in building military strength and armament. As noted by Stockholm International Peace Research Institute (SIPRI-2009)[88], the military expenditure in South Asia has increased by 3.3 percent in 2008, in real terms to a total of $ 37.3 billion. It also notes that the Indian military spending-which increased in 2008 by 5 percent (in real terms to $ 30 billion)-dominates both the total and the trends of the region.[89] Over the 10- year period, 1999-2009, the South Asian military expenditure has increased by 45 percent; Sri-Lanka at the rate of 7.7 percent is in lead. The increment related with the mission of dealing with the problem of *Tamil Eelem* separatist movement[90], the trend has, however, not gone down even after the defeat of the 'Tigers'. None of the countries in South Asia have in fact reduced the military spending despite urgent need of diverting the available resources to human welfare and development projects. Few more examples will make it clear that 'the prevailing trends are not in favor of poverty eradication' and cut-down of defense budget in South Asia.

The defense expenses in Bangladesh, for instance, constitute the eighth largest sector of public spending. It is bigger than transport and communication, health or public order of security.[91] By contrast, South Asia spends only 4.89 to 5.85 percent of GDP in the health

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survives below US $ 2 a day. Nearly 237 million people in the region are at risk of dying before the age of 40 years. 867 million people in the region do have no access to basic sanitation. 400 million adult people are unable to read and write and 300 million people are undernourished. The challenge of poverty in South Asia is not only huge it is also highly discriminatory against women. Poverty in fact has truly a woman face. These deprivation trends are rising. The issue of so-called national security, a political agenda for perceived threat or mutually created risk, is a priority agenda for governments of South Asia than that of grotesque life conditions of millions of poor and deprived people. For further details; see, The poor state of MDG on health is example. South Asia is unlikely to achieve this goal by 2015. See at *Human Development Report: Poverty and South Asia, 2006*; The Mahabub ul Haq Human Development Center; Oxford University Press.

[88] See in Chapter on "Armament, Disarmament and International Security". Available online at www.sipri.org./yearbook/2009/files/SIPRIYBO905.pdf

[89] See in Chapter on "Armament, Disarmament and International Security". See online at www.sipri.org./yearbook/2009/files/SIPRIYBO905.pdf

[90] Ramachandran, S., "Sri-Lanka takes off the gloves', Asia Times, 5 Jan. 2008.

[91] The defense spending, in real terms, in 2008-9 is $ 935 million. It represents 6.4% of the total Government spending. The spending in sector of Transportation and Communication is 6.1 percent. It is 5.9% in health and 5.6% in public order and security. See Ishfaq Ilahi, "Bangladesh defense budget 2008-9: An Analysis", The Daily Star, 07 May, 2008.

sector.[92] As reported by World Health Organization in a study, the health spending accounts for only about 2% of the global spending while South Asia contains around 23% percent of the world population. Evidently, South Asia in terms of share in global health spending falls to the bottom. Here, the share of spending on social security is only 0.9 percent. The tax collected from the people meets only 21.8 percent source of the spending. The share of external resource in health spending is limited to 1.2 percent. The private insurance sector contributes 0.7 percent. Evidently, 73.4 percent of the total spending in health sector has to be paid by people out of their own pockets.[93] It is worth saying here that access to health service for majority of the population in South Asia is merely a dream never to come true as South Asia is a home of 43% poor people of the world.

The statistics on military spending, including investment on armaments and other means of achieving military strategic superiority, makes it plain that the Governments of South Asia are more disturbed by perceived threat of national security. The inhuman problems, miseries and plights of the one third population of the region are a matter of secondary, rather tertiary, concern. While countless of people do have nothing to eat, the South Asian Governments are spending enormous amount of money on building military strength. This mischievous intention along with erroneous policies has institutionalized poverty in South Asia. Human rights, democracy and similar other entities do hardly have any meaning for poor people in South Asia.[94]

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[92] Jean-Pierre Poullier, et al., "Patterns of Global Health Expenditures: Results of 191 Countries" , EIP/HFS/FAR Discussion Paper No. 51; World Health Organization, November 2002. Online see at www.who.int/healthinfo/paper51/pdf

[93] Jean-Pierre Poullier, et al., "Patterns of Global Health Expenditures: Results of 191 Countries" , EIP/HFS/FAR Discussion Paper No. 51; World Health Organization, November 2002. Online see at www.who.int/healthinfo/paper51/pdf

[94] The forms of governments in South Asia are, to some extent, kleptocratic. In a kleptocratic regime, the State is controlled and run for the benefit of an individual or a group-political, social or economical. The individual or group in such a regime pursues not only the wrong or disastrous development policies but also uses powers to transfer a large fraction of society's resources to their private benefits. The political elites of Nepal, for instance, are using a huge amount of money for private luxury such as expensive cars, foreign trips, allowances, gratuities and so on. Each prime minister and home minister on retirement occupies an expensive car for their personal use. Use of exchequer for retaining in power is another form of kleptocracy in Nepal. Distribution of fund from the 'prime ministerial fund' is an example. "Patronism" in politics is what the kleptocracy is rooted in South Asia. The politics is virtually controlled by a family clan or one-man leadership. On nature and approaches of Kleptocracy; see, Daron Acemoglu, et al. "Kleptocracy and Divide-and-Rule: A Model of Personal Rule"; Massachusetts Institute of Technology, Department of Economics Working Paper Series- Working Paper 03-39, July 2003. Available online at http://ssrn.com/abstract=471828

A series of study have made it clear that approximately one third of the South Asian population is chronically poor, thus being subjected to several forms of deprivation throughout their lives and are most likely to pass it on to their future generations. The figures are astounding. While the region's share in the world population is 23 percent, it contains 43% of the world's poor. Poverty does not mean merely a lack of income. It also includes other adverse conditions of life, the deprivation or denial of opportunities for living a dignified life being the most important one. In the region there are estimated 460 to 480 million people who are fully deprived of opportunities to survive with adequate food and other basic minimum facilities such as clean drinking water and so on.[95]

Poverty manifests itself in state of lacking of income and denial or deprivation of opportunities and in a number of other forms. Results such as premature deaths, poor health, illiteracy and ignorance and ensuing inability to enjoy opportunities, poor living conditions and lack of personal security can be attributed to poverty whereas poverty can be attributed to deprivation of 'basic human rights'. The state of income, poverty and deprivation of education are interlinked, and poverty together with gender inequality and social discrimination create a vicious circle of deprivation and subordination. All these attributes are interlinked in numerous ways to form a vicious circle that necessarily create a trap of constant denial of rights and extreme form of disadvantage.[96]

The impact of the trap created by the vicious circle of poverty and human rights violation is not only limited to the 'life in the post-birth condition'. The impact is more grotesquely devastating in the pre-birth state. The cruel impact of income poverty and deprivation starts as early as in pre-natal stage. The recent discoveries of the medical science researchers have abundantly confirmed that the 'effect of poverty and deprivation of mother' is devastating to the health of the fetus. The kind and quantity of nutrition the child in pre-natal stage has received in

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[95] For detail information, see Human Development in South Asia: A ten Ten-Year Review, The Mahabub ul Haq Human Development Center; Oxford University Press.

[96] Persistent poverty, which is deeply rooted in denial or violation of human rights, is a source of violence or conflict in society. Conflicts on the other hand weaken already depleted resources and further cripple the fragile economy. Decline in GDP is another impact. These factors in turn intensify the conflicts. The results of conflicts are disastrous for poor. Examples in this regard are abounding. In Congo, two full-scale wars erupted in the mid-1990s, ultimately resulting in the deaths of an estimated 4 million people. Nepal itself is an example- estimated 14000 people died in a decade long Maoist insurgency. On cycle of poverty, conflict and kleptocracy; See, Daron Acemoglu, et al. "Kleptocracy and Divide-and-Rule: A Model of Personal Rule"; Massachusetts Institute of Technology, Department of Economics Working Papwer Series- Working Paper 03-39, July 2003. Available online at http://ssrn.com/abstract=471828

the womb; the pollutants, drugs and infections the fetus is exposed to during the gestation; the mothers' health, stress level and state of mind which she was pregnant with the fetus—all these factors do shape the future of a fetus as a baby and a child and continue to affect him/her all throughout life.[97]

The pioneers[98] of the gestation research have recently with abundance of evidence asserted that the nine months of pre-born state constitutes the most consequential period of human lives, permanently influencing the wiring of the brain and the functioning of organs such as the heart, liver and pancreas. The conditions the fetus encounters in uterus shape his/her susceptibility to diseases, his/her appetite and metabolism, his/her intelligence and temperament in the entire forthcoming life.[99] The health researchers of pre-natal conditions have uncovered a series of facts that suggest that the origin of cancer, cardiovascular disease, allergies, asthma, hypertension, diabetes, obesity, mental illness are consequences of adverse conditions the mother of fetus is exposed to.[100] Poverty and deprivation pose the most negative impacts on the life of the mother. The impact created by the poverty and deprivation is enduring. The state of poverty and deprivation of mother forces a person to be born with diseases or physical and mental deficiencies. The issue of human rights is thus a matter of concern in human life before he/she is born. This fact is however ignored by the human right jurisprudence.

It is a given state of affairs that 'one in every three people' in Asia is forced to survive in a condition of abject poverty and deprivation, the Asian nations are obviously responsible for violation of human rights as they have failed to ensure a 'safe and healthy birth of a child'. It is plain form this fact that the Governments of South Asia, by their wrong attitude, policies and actions, which lead them to spend more money on military installations and strategic superiority missions than food and health of their citizens, are forcing millions of children to come out in this world with poverty inherited defects and diseases causing serious violation of human rights.

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[97] *See* Paul, Annie Murphy. "Cancer. Heart disease. Obesity. Depression. Scientists can now trace health to the nine months before birth" in TIME, October 4, 2010.

[98] David Barker, a British Physician, two decades ago, noticed an odd correlation between poorest regions of the England and Wales and the highest rates of heart diseases. His investigation after comparing the adult health of some 15,000 individuals with their birth weight, he discovered an unexpected link between small birth size—often an indication of poor pre-natal nutrition, and heart disease in middle age. Professor John Karl, at SUNY Downstate Medical Center in Newy York, found that the metabolism system of a child was made by his/her pre-natal experience. The mother's condition of health was determining factor for this. Poor mother transferred her poverty to her child in womb. Daniel Benysshek, a medical anthropologist at University of Nevada at Las Vegas, found that some simple changes made during the pregnancy could reduce the offspring's risk for diabetes. See Ibid.

[99] *See* Paul, Annie Murphy, 2010.

[100] *Ibid*

It implies that the violation of human rights is not only associated with the proper treatment in post-natal stage, it is also equally associated with adequate facilities and good care of mothers during their pregnancy. The right of a child to grow as a healthy person is thus related with right of mother to good food, shelter, health and other rights.[101]

The perceived threat of security and ensuing military spending is a major cause behind persistence of the chronic poverty in South Asia. The security threat in fact is a hoax used by the Governments[102] to 'legitimize the spending', which is of course a rich source for corruption—the bigger the military spending, the greater the opportunity for accumulation of wealth by 'commission' or 'other forms of transactions'. Poverty thus can be attributed to the 'kleptocratic nature of the Governments in South Asia".[103]

VI. RECENT ECONOMIC GROWTH IN SOUTH ASIA AND ITS IMPACTS ON LIVES OF POOR PEOPLE

Abundance of reports from national governments and world organizations like Asian Development Bank and World Bank have described that South Asia is well established on a high economic growth path, with strong and improving macroeconomic fundamentals. In statistics, the description may be true. The life of people in reality is, however, implausibly different. As Human Development Report in South Asia, 2006, has rightly noted, "South Asia remains the most impoverished region in the world in terms of income as well as human

[101] In a village, the writer encountered a poverty stricken family with three children all with acute sickness. The mother had given birth a number of child many of who died before age of five. This is a scenario of many Asian poor villages. Children are born with mental and physical defects. After birth, they will not be able obtain nutritious food and proper treatment. Feeding their mothers will have no meaning as the mothers have no nutritious food to impart them nutrition. If they survive somehow, they will not have opportunity to go to school. If they are girls, they will be the victims of 'patriarchal customs' and will be forced to get married and become pregnant prematurely, and, many of them, ultimately will die pregnant or at childbirth. In Nepal, as reports have stated, about 250 mother in one hundred thousand die during pregnancy and childbirth. Source, Ministry of Health, Nepal Government, September, 2010.

[102] Most South Asian Governments are carbon copies of British colonial bureaucracy in their formal trappings, the elite values of the past govern the behind-the-scenes machinations over the graft, patronage, and power. The governments with this nature consume huge amount of resources by corruption of public funds. This form of government is living reality of the South Asian Nations. To loot resources for their private needs and luxury as well as power, political leaders are always prepared to commit any amount of violation of ethics or law. The political instability is attributed to this factor. The source of corruption lies on 'elite values, patronage and power'. For more on this; see, Anjum Siddiqui (ed), 2007, "India and South Asia: Economic Development in the Age of Globalization".

[103] On magnitude of corruption and its linkage with development; see Transparency International, 2002. "Corruption in South Asia: Insights and Benchmarks from Citizens Feedback Survey in Five Countries", December, 2002.

development indicators, such as health and education". While economic growth rate is supposedly increasing, the region is known to have the largest absolute number of poor in the world'. South Asia is home to 43 percent of the world's poor—an estimated 437 million people live below one US dollar a day, whereas three-fourths of the total population survives below two US dollar a day. It is disheartening to say that 237 million people in South Asia live at risk of dying before the age of 40 years. Furthermore, it is a fact that 867 million people in the region do not have access to basic sanitation and more than 300 million people are living undernourished. The significance of the recent economic growth is thus widely suspected looking from human rights perspective.[104]

With India in the lead, the improvement in performance in South Asian economy is reportedly broad based. In 2007, the state of the GDP growth rate was as follows: Afghanistan 3.4%; Bangladesh 4.9%; Bhutan 21.4%; India 7.4%; the Maldives 5.7%; Nepal 4.7%; Pakistan 2.7%; and Sri-Lanka 7.7%. India with over 60% of the total South Asian population has not only crucial but decisive role in economic development of the region.[105] While economic growth rate varies in different SAARC members all are not doing equally good, the spectacular increase in economic growth rate of India is playing a crucial role viewing from the fact that 60% population of South Asia belongs to India alone. Due to macro-economic growth rate, the proportion of the income poverty is supposedly declining in most members of South Asia. Adult literacy rates have gone up from 49 to 58 percent; the net primary enrolment situation sharply increased from 61 to 87 percent;[106] drop-out rate at the primary level has come down from 43 to 14 percent; and the number of out-of-school children has been reduced from 50 million to 13 million. Infant and under-five mortality rates have also gone down significantly. [107] Each individual member of South Asian region has gone a long away in progress.

Intellectuals, policy makers and planners in South Asia and beyond believe that the recent macroeconomic growth rate in some South Asian countries has positively impacted the human

[104] *See* Human Development Report in South Asia, 2006

[105] See, World Bank, South Asian Economic Report (SAER), 2007

[106] The net enrollment ratio (NER) in Nepal is promising. As reported by the Ministry of Education, Nepal, the number of net enrolled children has reached at 89.3 percent. NER in the case of girls has reached at 85.5 percent, still 4 percent less to boys. However, the NER for girls shows an upward trend. The literacy rate is improving remarkably as well. As per the Ministry of Education, literacy rate in 2009 of the age group between 15 and 24 has reached 75 percent and age group 6 year plus is 69 percent. The literacy rate at the age group 15 year plus is 56 percent. For detail see 'Nepal's State Party Periodic Report to CRC Committee'.

[107] Human Development In South Asia 2007: A Ten-year Review, The Mahabub ul Haq Human Development Center; Oxford University Press, at Ch. Overviw.

development paradigm of the region. In turn, the human development paradigm has influenced economic and social development policies and plans in the region.[108] 'The Human Development in South Asia 2007- A Ten-year Review', for instance, claims that 'the human centered policies and actions as well as the ongoing economic reform programs in the region in the recent decade has witnessed progress in many areas'. The report has identified the following areas as making spectacular progress:[109]

a. Economic growth rate of the major economies of South Asia has increased.
b. Poverty has declined in most countries, although rural poverty is still a major issue in some countries.
c. Literacy rate has significantly gone up.
d. Infant and under-five mortality rate has reduced significantly.
e. Women's economic and political empowerment, as captured by GDI and GEM indices, has recorded higher values over the period, and both access to and enrolment of girls in primary and middles schools has increased rapidly.

These indicators of progress are supported by organizations such as UNDP, the World Bank and the Asian Development Bank.[110] In particular, Nepal's position for meeting many of MGD goals is appreciated internationally. The Nepal Demographic and Health Survey, 2006, presents that the infant mortality rate has come down to 48 per thousand live births and neonatal mortality (less than 4 weeks) has come down 33 per thousand live births. The under-five mortality rate has been reduced down to 61 per thousand live births. The immunization (BCG,DPT+HEP-B, Polio and Measles) rate of all six antigens in infants is more than 85 percent. Nepal is said to have successfully eliminated the neonatal tetanus and more than 9.5 million children have been given second dose of measles vaccination and this has reduced the post measles deaths significantly. Moreover, Nepal has been declared a polio free country in South Asia. However, in matter of the overall nutritional status of the children Nepal is facing a serious challenge. A large number of children in rural part of the country have no adequate food available. The poverty is thus a serious affliction on prospect of many children growing as 'healthy adults'. The fruits of these developments are largely confined to cities—the urban educated population is mainly benefited by these progresses. The gap between city and

[108] *Ibid*
[109] *Id*
[110] *See* Human Development Report, 2009; UNDP.

countryside is a serious problem in all South Asian countries. The governments, with their kleptocratic nature, are less attentive to this gap which is putting increasingly bigger number of people in crisis of life. The macro-economic growth has thus emerged with conceivably larger risk of human rights violation.

VII. SOME MACRO-PROBLEMS AND EFFECTIVE STRATEGIES NEEDED TO PROMOTE HUMAN RIGHTS

Some positive stories of the macro-economic successes in South Asia and other parts of the world do not represent total reality. The thesis that average incomes of the poor of society rise proportionately with average incomes is no longer a plausible theory of development and human rights. The present successes of the South Asian economic growth represent only a scenario of the regional averages. The rise in macro-economic growth rate alone is not enough to reduce poverty and address other forms of deprivation. The looming South Asian scenario invalidates the theory that the liberal economic policies such as monetary and financial stability and open markets alone raise incomes of the poor and everyone else in society proportionality.[111] There are several other determinants of the rise in incomes of the poor and change in the vector of their lives. Specifically, progressive rule of law, openness to international trade and developed financial markets, less consumption of financial resources by the government, control on inflation and strict financial disciplines are essentially important factors of income rise of the poor. These factors along with attainment of primary education increased spending on public health and education, labor productivity in agriculture relative to the rest of the economy, and enhancement of formal democratic institutions engender a positive atmosphere for income growth of the poor.[112] The state of these factors in South Asia is poor.

The objective of growth in incomes of the poor is to 'achieve transformation in the lives of people'. The change in life enables individuals to accommodate new demands by acquiring new

[111] There are two schools of thought in debate regarding impacts of macro-economic growth rate in society. Some economists and development experts argue that the potential benefits of economic growth for the poor is undermined or even offset entirely by sharp increases in inequality that accompanies the growth. According to this thesis, the economic growth is extorted by educated urban population leaving rural poor untouched by benefits of economic growth rate. The eventual outcome is that 'the gap between poor and rich is enlarged. At the other end of the spectrum is the argument that liberal economic policies such as monetary and fiscal stability and open markets raise incomes of the poor and everyone else in society proportionately. This paper and more about debates is available at http://www.worldbank.org/research/growth last visited on 22 October 2011

[112] David Dollar & Arat Kraay, "Growth is Good for Poor"; Development Resource Group, The World Bank. This paper is available online at http://www.worldbank.org/research/growth last visited on 22 September 2011.

skills of life and hence increase productivity. The scope of 'skills' acquired by the poor is limited. A professor, for example, can easily learn skills of driving a car and thus can easily change his/her profession. This potential is attributed to his/her education and capacity to change life. A poor farmer, however, cannot easily change his/her life due to lack of education. Education is, thus, significant for rise in income. It implies that income growth is not *all* for human development. The income alone does not improve all aspects of the life of individual.[113] The factors described above are indispensable for overall human development. The scenario of these factors or determinants of development in South Asian countries is elaborately discussed below.

The role of law at this juncture becomes inevitable. All these determining factors of human development should be the primary concerns of the 'system of law'. Income growth as well as human development, in oblivion of a 'legal system' impregnated with pro-poor policies, formal democratic institutions and mechanisms to offer remedy in a state of denial of benefits from these policies and institutions, is nothing but a 'myth'. The legal systems of South Asian nations are great detriments in this regard. The legal systems are hardly coherent with need of income growth and human development enhancing policies and institutions. A reform of the legal systems is a prerequisite for extending the benefits of the economic growth to the poor. The reform must address the following sectors as a primary agenda:

- Quality in many spectrums, ranging from gender, socio-economic, geographical and ethnic disparities, is a detriment of income growth as well as overall human development.
- Psychology of law that it is an instrument of the State to regulate citizens' behavior is equally important detriment for progressive change in the vector of lives of the poorest section of the population. The South Asian governments invariably consider that the 'poor population is a problem of their nations' development'. They use law to 'protect State's privilege of making decisions' in disregard of the interests or choices of this segment of the population. The duty of the State to work for change in the vector of the

[113] The income growth of the poor does not automatically respond systematically to a number of supposedly 'pro-poor policies including formal democratic institutions and public expenditure on health, education and social security. The income growth also does not necessarily automatically respond to the development of human rights protection mechanisms. Rule of law, well-defined financial disciplines and fairly and impartially protected access to market competitions and most importantly guarantee of rights by legal system to development (a determinant to change in vector of life—from regressive status quo to progressive transformation of life conditions) are systematic instruments for 'human development'. For further detail discussion; *See* David Dollar & Arat Kraay, *Ibid*

lives of people is refused, and the law is used as an instrument protecting the 'older values, power-centric governance system and machinations to protect State's discretions in development activities'.

- The poverty impact of growth has not declined even in recent years. The growth spurred by open trade or other macro-policies benefits merely the upper-strata population. As pointed out above, the average growth of income does not appear to have an effect on the crises of lives the poor population is living in. The growth in fact has created added hardship on the poor. The growth has increased the government's consumption of resources, and has intensified the corruption. The spending on so-called military and other perceived needs has increased manifolds. The legal systems of the region have utterly failed to 'protect the rights of the poor to socio-economic security'. In short, the legal systems of the region have failed to systematically respond to the Governments' responsibility to increase public spending on health, education and empowerment of the poor, introduce stringent financial disciplines, follow rule of law in decision making and impose sanctions on corrupt officials, and make the system of law an instrument of protecting rights of people.
- The legal transplant from developed countries is phenomenal in the region. The investment on justice, research, development and planning of laws, and reforms and development of law enforcement institutions is considered unproductive. State's lack of inclination to enhance rule of law based-legal regime as an essential development strategy has caused international organization to jump in and promote the notion of 'legal transplant'. The legal systems of the region in lack of indigenous and development warranted insights, have become in themselves, instruments of violation of rights of the poor.

These pitfalls in the legal systems have negatively affected the elements of justice in the present paradigm of economic growth in South Asia. Due to the absence of progressive law as an 'instrument of linking development efforts with notion of justice', 'the rise of average incomes has excluded the poor. The current growth pattern denies a fact that 'equitable distribution of the income is a precondition for reduction of poverty'. This is a consequence of the failure of the legal system. Financial and monetary stability and open market policies alone cannot guarantee access to the poor to benefits of economic growth. According to "Kuznets

hypothesis'', inequality tends to increase during the early stage of development and then decreases later on'. Theoretically, the hypothesis bears no objection. However, the theory cannot justify a notion of 'taking income growth of the poor for granted on the basis of the growth of average economic growth of a society'. Role of an independent intervening factor or element is necessary as a prerequisite for 'setting up of the relationship between income growth of the poor and average economic growth of the society'. The independent intervening element is 'a well defined system of equitable distribution of benefits of the development'. And, for this society needs a well defined framework of law. The benefits of the average or macro-economic growth in a society are thus made available to the poor by the system of law. The system of law, on the other hand, works through instrumentality of 'the system of governance'. This thesis asserts that 'the macro-economic development of a society is achievable only through an interplay of economic principles of average income growth and a progressive system of law promoting equitable distribution of advantages and good governance'. The relationship between average economic growth of a society and the income growth of the poor is an overlapping issue of economy and law—no economic affairs such as financial and monetary stability and open market alone can ensure 'equitable growth of individuals' income without having a well planned system of law'.

The state of unremitting poverty and deprivation in South Asia is a result of persistent denial by the Governments of South Asia of a thesis that ' the interplay of a macro-economic growth and the system of law promoting equitable distribution of advantages' is a prerequisite. As noted before, the legal systems of the South Asian countries are the worse factors for blocking the poor from taking advantage of the ever inclining macro-economic growth in the region. With no doubt at all, the prevailing legal systems in the region are colonial in prodigy, formalist in operation and patronizing in distribution of advantages.[114] Consequently, the current macro-economic growth in the region is contributing to worsening the 'lives of poor'. The legal systems have grotesquely failed to address the problems of corruption, government frauds, illegal political party financing, embezzlement, bribery, favoritism, extortion, abuse of

[114] Constitutions of most countries of South Asia meticulously deny recognizing the 'economic and social development rights' as fundamental rights. The economic and social development planning is considered as a 'prerogative of the Government'. The people have neither say 'in decision making nor participation in development activities'. The public resources are considered as 'the property of the government', hence the governments consider no need of popular participation in decision making in matters of development projects. For debate on this issue; see Yubaraj Sangroula, 2010 at Ch. 5

discretion, and so on, and they are stealing the fruits of economic growth from of the poor people *en masse*. The problems are in fact making the poor 'the poorest'.

The level of economic and social transformation achieved by individual countries, especially by regions and groups within each country, differs significantly. The exclusion of the poor and marginalized communities is a serious problem in the region. The benefit of the economic growth is exclusively exploited by the upper, middle and elite classes. Consequently, despite the remarkable indicators of economic growth rates referred to above and ensuing decline in statistics of poverty, there is hardly any change in the quality of lives of the millions of people living in poverty. The actual number of people living in poverty has not gone down, and health and education indicators are still matters of concerns for realistic scrutiny.[115] The efficacy of the system of law and justice is, thus, obviously questionable.

In fact, poverty in the region continues to remain huge and, therefore, constitutes one of the major causes of violence and human rights violation both structurally and systematically. Even today, the region fails to address poverty as a daunting cause of structural violence. The Governments of South Asia, hence, deserve no thanks, being in powers for so many years after the end of colonial rules. The seriousness and required interventions to address the problems of poverty is less visible in the systems of law and attitudes of the Governments in the region. Specifically, the following scenarios will present a scary picture of poverty and human rights violation in the region:[116]

A. India

Aggregate economic statistics on evolution of poverty in India point fairly unambiguously towards steady, albeit slow, progress in the reduction of poverty. According to these statistics, the poverty headcount has drastically declined. Yet, the impact in rural part of the society has made no strong mark.[117] Over a period after 1990, India has achieved remarkable growth in GDP, accompanied by macroeconomic stability.[118] The cruelest part, however, is that the problem of social exclusion based upon income, caste, gender, and geographical location

[115] Human Development In South Asia 2007 at Ch. Overview.

[116] For drawing attention of readers to some specific representative problems related with poverty, India, Bangladesh, Pakistan, and Nepal selected as examples here. Hence, the reference of these four countries should not be taken to mean that the other countries in the region are free of problems relating to poverty.

[117] India: Country Economic Memorandum Report No. 14402-In, The World Bank, 1995.

[118] Human Development in South Asia 2005: Human Security in South Asia; The Mahbub ul Haq Human Development Centre, Pakistan.

continues to exist treacherously.[119] The benefits of economic growth have not been translated into reduction of poverty and human deprivation. In the wake of massive macroeconomic progress made over the last two decades, the gap in inequality of income has sharply increased.[120] Impact of the growth is mainly confined to the urban areas and has mostly benefited the urban middle class that is well equipped with education and skills.[121]

A recent study by Asian Development Bank has confirmed that the fruits of rapid economic growth are not reaching the poor.[122] The study has pointed to a grim situation of inequality. The widening gap between urban rich and rural poor people implies that the better-off sections of society have experienced a significant increase in their standard of living, whereas the poor population is exposed to added hardships of life. The least- well-off section has been pushed to a state of added sufferings due to ostensible increase in the price of basic substances in the wake of economic growth.[123]

The Times of India[124] gives a further grim situation of the poor people in India. Referring to a report of the National Commission for Enterprises in the Unorganized Sectors (NCEUS), 75% of Indians are poor and vulnerable. 79 percent unorganized sector workers, 88 percent Scheduled Caste and Scheduled Tribes, 80 percent backward class people and 84 percent Muslims belong to the poor and vulnerable groups. These groups continue to remain poor at a bare subsistence level without any social security and are forced to work in miserable, unhygienic and unlivable conditions.[125] The categories of 'poor and vulnerable' groups are forced to survive on less than Rs. 20.30 per capita per day, which is twice the poverty line, or further less. As the Times of India states, 77% of India's population falls within this bracket. Furthermore, 6.4% people of this group are forced to live on less than Rs. 9 per day. Another 15.4% lives in between this layer and the poverty line.[126]

Studies have revealed that about 800 million Indians are living in a state of extreme poverty and are not technically included in the category of below poverty line for they earn Rs. 20 per

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[119] Human Development In South Asia 2007 at 2

[120] Human Development in South Asia 2005

[121] For detail facts and figures; see, Human Development in South Asia 2005

[122] *See* in "Rising income inequality in Asia", A Bulletin of South Asia Alliance for Poverty Eradication, Kathmandu, Nepal; October 2007, at 20

[123] *Ibid*

[124] 11 August 2007

[125] The Times of India, 11 August, 2007.

[126] "75% of Indians are poor and vulnerable", *Ibid*

day, which is more than cut-off line of Rs. 12. Seemingly, the amount is hardly enough to live a dignified life.[127] Though they are technically above the poverty line, they continue to be dismally poor. Nearly 85% of them belong to scheduled caste, scheduled tribes, backward class and Muslims.[128] The impact of social exclusion is self-evident here. The extremity of human rights violation is obvious by these figures.

This section of the population is discriminated against and forced to live in a disadvantaged and downtrodden condition. The so-called mammoth economic growth rate, thus, has no meaning in the lives of the poor. Economic growth without adequate distribution of development opportunities makes no sense for human rights. Macroeconomic development, thus, cannot be taken as an indicator of positive human rights trend. Development, which implies a state of 'human security' against regressive status quo, is missing in India despite its mammoth economic growth rate. The given condition of looming poverty indicates an extreme form of human rights violations in India.

The pattern of employment in the agriculture sector is also a fertile ground for perpetuating the poverty, especially for small and marginal farmers. In India, 84% of small and marginal farmers are placed in a condition where they are forced to spend more than they earn, thus, falling into a trap of debt. Nearly 84% of all farmer households are forced to spend Rs. 2770 per month against their earning of Rs. 2115.[129] The rise of per capita income to $1000, thus, has nothing to offer to the vast majority of population which lives in extreme poverty in the rural parts of the country.

The rise in GDP is mainly achieved due to sharp increase in income of the middle and higher income groups.[130] This has, in turn, sharply winded the gap between rich and poor people. The development paradigm is not only faulty but visibly antagonistic to masses of the poor people. The so-called development paradigm is, in addition, worsening the prevailing state of regressive status quo. The system of law is an important instrument of breaking this 'regressive status quo'. Poverty contributes to continuation of the status quo, hence, constitutes a factor of human rights violation. International human rights mechanisms put States under

[127] "83.6 crore Indians live on Rs. 20 per day", Hindustan Times, 10 August 2007.
[128] "83.6 crore Indians live on Rs. 20 per day", *Ibid*
[129] "83.6 crore Indians live on Rs. 20 per day", *Id*
[130] For theoretical discourse on GDP growth and income of the poor; see, David Dollar & Arat Kraay, "Growth is Good for Poor"; Development Resource Group, The World Bank. This paper is available online at http://www.worldbank.org/research/growth last visited on 22 September 2011.

obligation to ensure human security and dignity by adequately enforcing international human rights instruments. Since international human rights mechanism are not enough for adequate enforcement of international human rights norms, the mechanisms set up by domestic laws could play a decisive role in the enforcement of international human rights norms.[131] Removal of a state of regressive status quo, reduction of poverty and income growth, and guarantee and enforcement of human rights are three constituent elements of human development, all of which come into operation through system of law. Like other members of the region, India has significantly failed to engineer a 'pro-active, pro-poor, pro-development legal system' that could play an important role in reducing the gap of income disparity.

B. Bangladesh

Economic growth rate in Bangladesh in the last two decades has no doubt improved significantly. Analysis of the poverty trends has shown a consistent decline in poverty incidence, especially in the rural areas. Bangladesh, over the past few years, has enjoyed credible record of sustained growth within a stable macroeconomic framework. However, it continues to suffer from acute interface of poverty dynamics and unfavorable agro-ecological and climatic environment. Other factors contributing to this interface include low human capital accumulation, unregulated and highly informal labor market, health hazards and illness, social risks like weak rule of law resulting in crime, violence and insecurity, political unrest and corruption.[132] The benefits of economic growth are, thus, exacted by a smaller urban middle and higher income groups. There are plenty of indicators to show that a large number of households hover around the poverty line implying that the high ratio of households could potentially fall back into poverty line.[133]

A significantly large population of Bangladesh remains in margin between $1-a-day poverty to $2-a-day poverty line. The decline in $1-a-day poverty line has contributed to overall decline in figure of the poor population. The ground reality, however, is different; there are staggeringly large numbers of poor people at the 'margin' who can potentially fall back below

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[131] *See* Oona Hathaway,*The New Empericism in Human Rights: Insights and Implications*, 98 AM.SOC'Y INT"L L. PROC. 208 (2004). Also see, Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 A.J.S 1373(2005).

[132] Azam, Shaiful Md. And Imai, Katashuhi S., "Vulnerability and Poverty in Bangladesh", ASARC Working Paper 2009/02. See at Online htpp://rspas.anu.edu.au/papers/asarc/WP2009_02.pdf

[133] For detail analysis, See, Ibid

poverty line.[134] Reportedly 68 million individuals remain in this range.[135] Hence, the contribution of recent economic growth in the lives of large masses is extremely limited. The so-called development, thus, has very little role in 'change of the penetrating regressive status quo', which is a major factor of deprivation.

The poverty decline trends present an impressive development in efforts of poverty eradication. The official figure for the estimated level of poverty during the period of independence stood as high as 82.9 percent, whereas in 2005 it has declined to around 40 percent.[136] However, the impressive statistical poverty reduction record in reality is different. First, poverty in Bangladesh continues to deprive around 60 million people of a dignified life as it continues to remain at very high level. Out of 60 million, 36 million people are still deprived of adequate diet.[137] This category of population is chronically underfed and consequently highly vulnerable. The people falling in this category have no assets to protect themselves from adversities of life. This segment of population has neither resource to health service, nor can it afford sending children to school.[138]

The economic growth in the last two decades has been accompanied by the rising inequality between rich and poor. The level of inequality of consumption, in a period of ten years that is from 1990 to 2000 has increased from 31.9 to 37.9 percent in urban areas and from 25.5 to 29.7 percent in rural areas. The rising income inequality is, thus, creating an adverse condition to the pace of economic growth itself.[139]

The people falling in the poverty group are, for worse, affected by periodic shocks such as natural disasters, illness and insecurity. A household survey conducted by Bangladesh Bureau of Statistics presents that 23.55 percent of people in Bangladesh are surviving in chronic poverty. 15.01 percent population lives in transient poverty, with great vulnerability of reversal

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[134] Ajaya, T. and Rana Hasan, 2005,"Conceptualizing and Measuring Poverty as Vulnerability: Does it Make a Difference?' ERD Policy Brief Series No. 41. Manila: Asian Development Bank

[135] *See* Azam, Shaiful Md. 2009/02

[136] *See* Ahmed, A.U., 2000, "Trends in consumption, nutrition and poverty". In R. Ahmed, S. Haggblade, and T.E. Choudhary (eds) *Out of the Shadow of Famine: evolving food markets and food policy in Bangladesh.* Baltimore: John Hopkins University Press for the International Food Policy Research Institute.

[137] Bangladesh Bureau of Statistics (BBS), 2006, *Preliminary Report on Household Income & Expenditure Survey 2000*. Dhaka: Ministry of Planning

[138] *See* Quisumbing, A., 2007, "Poverty transition, shocks, and consumption in rural Bangladesh: Preliminary results from a longitudinal household survey'. CPRC Working Paper-105. Manchester: Chronic Poverty Research Center, University of Manchester

[139] *See* Sen, B., 2003, "Drivers of Escape and Decent": Changing Household Fortunes in Rural Bangladesh. Bangladesh Institute Development Studies, Dhaka

to the chronic poverty trap. The population of high vulnerable non-poor is 9.25 percent. Hence, 47.81 percent people in Bangladesh live in higher level of vulnerability to poverty.[140] These poverty figures present that despite increasing efforts for poverty reduction over the years, poverty remains a pervasive factor in Bangladesh.[141]

The poverty and life-style has an interface. Poor people with minimal income cannot afford needed sanitation, safe drinking water, electricity and entertainment. In a given state of poverty in Bangladesh, a huge population is naturally deprived of such amenities. Some studies have noted that 62 percent rural people in Bangladesh have no sanitary latrine or they have a culture of using open space for defecation. The access to electricity is an issue of deprivation. In some places, 94 percent people are having no access to electricity.[142] Most importantly, the food poverty is associated, as shown by a survey, with independent variables. They are: geographic location, gender, age, household size, occupation, and land ownership'. The poverty is, even more painful to people from backward geographic areas, women, menial workers, old and those having more members in family.[143]

C. Pakistan

Economic growth rate in Pakistan reached at 6.8 percent in 2006-07. But it experienced a disheartening turbulence in 2007-08 and 2008-09 (declining to 3.7% and 1.2% respectively). The economic survey[144] of the Government of Pakistan presents an increase to 4.1% in 2009 - 10. On the other hand, the inflation rate has gone up to 20.77% in 2008-09 and showing a further upward trend. The food inflation which has immediate impact on poverty increased to

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[140] Azam, Shaiful Md. 2009/02

[141] Bangladesh in terms of GDP per capita is placed in a category of one of the poorest countries in the world. The Human Development Index (UNDP, 2002) has ranked Bangladesh as 145 the country out of 173 countries in 2002. Based on $1-a-day income criterion for demarcating poverty line, 29% of Bangladesh lives under poverty line, whereas the percentage increases to 78, if the $2-a-day income criterion is applied. Based on poverty line measured by direct calorie intake (DCI) method as less than 2,122 kcal per person a day, 44.3 percent (55.9 million) people fall in category of "absolute poor". Similarly, according to the cost of basic needs (CBN) methods, which constructs "upper poverty line" (a generous allowance for non-food items), and "lower poverty line" (a minimal allowance for non-food goods of those who could just afford the food requirement), the "upper poverty line is constructed at Taka (Bangladesh currency) 690 in 2000 for rural areas, whereas the "lower poverty line is estimated as Tk. 586. Applying these income standards, 49.8 percent and 53.1 percent people are regarded as income poor respectively. In any case, almost half of the Bangladeshi people are victimized by poverty. See, A.I. Mahbub Uddin Ahmed, "Socio-demographic correlates of rural poverty in Bangladesh: A Case Study of Gaibandha Sadar anf Tanore Upazilas"; online www.nscb.gov.ph/poverty/conference/papers/11_kam.pdf

[142] *Ibid*

[143] *Id*

[144] Economic Survey 2009-10 in online www.finance.gov.pk/survey/chapter_10_0.pdf

23.7 % in 2008-09 but decreased to 12% in 2009-10. However, it has again shown a trend of escalation.

With rapid economic growth and considerably stable macroeconomic development in the past, Pakistan achieved tremendous decline in poverty; it experienced a decline in the headcount index from 73 percent to 23 percent.[145] Despite declining rate of poverty, many other indicators of human development are still nascent. As pointed out by the Human Development Report, 2009, Pakistan holds the position of 141st country in the global human development index.[146] Its position concerning improvement in the life expectancy at birth is 117th;[147] current life expectancy at birth is 66.2 years. Adult (age 15 and above) literacy rate is 54.2% and combined gross enrolment ratio of children in school is 39.3%.[148]

As per the HDR, 2009, the human poverty index (HPI-1) remains at 33.4 percent. The Human Poverty Index (HPI-1) focuses on the proportion of people below certain threshold levels in each of the dimensions of the human development index-living a long and healthy life, having access to education, and a decent standard of living. By looking beyond income deprivation, the HPI-1 represents a multi-dimensional alternative to the $1.25 a day (PPP US$) poverty measures. Hence, HPI-1 value of 33.4% for Pakistan, ranks 101st among 135 countries for which the index has been calculated.

According to the said report, 12.6% people are still at risk of not surviving to the age of 40 years; 10% people still do not have access to improved water source; and 38% children age below 5 do survive in underweight situation.[149] The development in Pakistan has thus no meaning to a huge population, who is still at death row due to lack of nutritious food and clean water.

Global economic recession and deteriorating security situation negatively affected the economic growth rate of Pakistan. In 2009 it went down to 2.9% compared to 4.7% in 2008. The hardship of poverty in certain sections of the population is extreme. About two million scheduled caste people are among those suffering from worst poverty. Being poorest and

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[145] *Ibid*
[146] See Pakistan in Human Development Report, 2009; At online http://hdr.undp.org/en/humandev
[147] *Ibid*
[148] *Id*
[149] *Id*

belonging to the scheduled caste, they are vulnerable to worse form of discrimination and ill-treatment.[150]

As reported in a conference,[151] the illiteracy level among Dalit communities stands at 73% against national literacy level of 54 percent. The nexus of discrimination, illiteracy and poverty is well visible; approximately 56% of Dalit families live in a single room shanty houses and children dying in these communities below age of five years was reported by 35% families.[152]

Pakistan has the worst record concerning protection of social rights of women in South Asia. Freedom of movement of women is gravely obstructed. Similarly, women's inheritance rights are hardly respected. The problem of polygamy is most chronic.[153]

D. Nepal

According to the Human Development Report, the HDI of Nepal, between 1980 and 2007, rose annually by a rate of 2.16 percent, i.e. it increased from 0.309 to 0.553. This position gives Nepal a rank of 144th out 182 countries. With this rank, Nepal is two positions ahead of Bangladesh and two positions behind Pakistan. In terms of life expectancy at birth, with 66.3 years on average of men and women, Nepal's position is 115th ; in adult literacy rate, for ages 15 and above, stands at 130th rank, with 66.5 percent; in combined gross enrolment ratio the rank is 136th with 60.8%; and in GDP per capita occupies the 165th rank with $1,049.[154] The state of poverty and vulnerability is, thus, quite visible.

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[150] See "Pakistan", in Bulletin of South Asia Alliance for Poverty Eradication, Kathmandu, Nepal; October 2007, p. 27

[151] National Worshop on "Caste-based discrimination in Pakistan, held on June 3, 2007 in Karachi. This Conference was organized by the Pakistan Institute of Labor Education and Research (Piler) and the Thardeep Rural Development Programme ITRADP). A study report was presented by Zulfiqar Shah in the Conference. The reported gave a grim situation of poverty and discrimination the scheduled caste people Pakistan were living in. According the report, the scheduled caste communities included Kolhi, Megwhar, Bheel, Balmaiki, Oad, Jogi, Bagri, and several other communities. These communities were treated as untouchable communities both by Hindu and Muslims. See "Information on the Caste System in Pakistan", a Report prepared by Refugee Documentation Center (Ireland), Legal Aid Board; at online www.unhcr.org/refworld/pdifd

[152] "Information on the Caste System in Pakistan", a Report prepared by Refugee Docunentation Center (Ireland), Legal Aid Board; at online www.unhcr.org/refworld/pdifd

[153] *See* Figure 3.15 in Human Development in South Asia, 2006: Poverty in South Asia: Challenges and Responses; The Mahbub ul Haq Human Development Center, p. 54

[154] *See* Nepal in Human Development Report, 2009; at online http://hdr.undp.org/en/humandev/

Nepal stands at 32.1% HPI-1 which places it at 99th rank among 135 countries for which the index has been calculated.[155] The HPI-1 measures severe deprivation in health by proportion of people who are not expected to survive to age 40. Education is measured by the adult literacy rate. And a decent standard living is measured by the unestimated average of people not using an improved water source and the proportion of children under age 5 who are underweight for their age. These values keep Nepal in the following position: For human poverty index with 32.1, Nepal has been placed 99th rank; with 11% people not surviving to the age of 40, Nepal has stood with 90th position; with adult literacy rate for ages 15 and above, it occupies a place of 135th country; with 11% people not using improved source of water, it obtains a rank of 73rd country; and with 39% children below age 5 having underweight, it occupies a place 127th country. In HPI-1 index, Nepal is two numbers ahead of Pakistan and trails only by two numbers behind Pakistan with regard to children underweight for their age.[156]

Despite a decade long devastating civil strife, Nepal's progress in achieving MGD goals by 2015 is positive. As per the press note issues by UNDP on September 07, 2010, Nepal is close to achieving several of the eight globally agreed Millennium Development Goals by 2015 related to poverty, education, health and environment sustainability. Nonetheless, the problem of poverty and deprivation possess a serious challenge to protection of human rights. The press note of UNDP says: "While there is striking progress in reducing poverty, in getting children into school and in saving the lives of children and mothers the national averages continue to mask significant disparities between ethnic, social and economic groups, amongst rural and urban populations and people living in the mountains, in remote areas and in the Terai (low-land plains)".[157]

The gender, ethnic and regional exclusion from socio-economic and political life of nation has been a serious problem encountered by development and modernization of Nepal. While the poverty line has declined to 25.4% in 2009 from 42% in 1996, the figures have hardly made any difference in lives of poor people. By contrast, the problem of gap between rich and poor and incidences of inequality in many respects is rapidly going up. The proportion of working poor—

[155] According to the National Planning Commission (Nepal), the national poverty level has gone down to 24.8 percent. See Asian Tribune, Tuesday, 14 April, 2009.

[156] *See* Nepal in Human Development Report, 2009; at online http://hdr.undp.org/en/humandev/

[157] "Nepal makes notable progress on the MGDs, eradicating inequality and social exclusion remain major challenges": Latest Updates, UNDP, Nepal. September 07, 2010. See at online http://www.undp.org.np/successstory/successstory/php

people who are working but earn less than a dollar a day is more than one in five. On hunger, the picture is grim with close to 40 percent of children below age of five underweight.[158]

The food insecurity is a major problem for many people. High dependence on traditional agriculture, low productivity, small landholdings, limited off-farm and wage earning opportunities, low-wages/incomes, and various deep-rooted structural discriminations and exclusions are major factors causing food insecurity at household level. The food insecurity is also a cause of intensive migration and destruction of public assets such as forest.

The deep rooted power-centric political culture, political instability, and phenomenal impunity for violation of human rights accompanied by deepening problem of corruption are aggravating factors and they form an interface with the problem of poverty, exclusion and threats to democracy. The power centric-political culture and anti-people bureaucracy are seen as equally major obstacle for achieving progressive changes even after the historic success of conflict resolution in 2006. While there is a very strong support of poor and excluded groups and communities for peace and progressive changes in Nepal, regardless of their painful experiences during the conflict, the senile minded political leaders and bureaucrats are seen as stumbling blocks in the hopes of people for their socio-economic transformation. The leaders and bureaucrats have failed to see significance of democratic culture, effective state efforts and trust on good governance to efficiently combat poverty.[159]

The descriptions given above on the interface of poverty and deprivation distinctly reveal that 'the systematic continuity of the regressive status quo' is a stumbling block to the human security and dignity in South Asia. No human rights can be protected without adequate opportunities for development that addresses the regressive status quo. Development in this perspective is 'a change in the static paradigm of life'. Development is an instrument of 'equality'. Equality ensures 'equity' which is a prelude for protection of human rights. This underlying notion of the interface between human rights and development is overlooked by the contemporary jurisprudence. The change in the above mentioned 'situation' can be brought about only by recognizing the indispensability of 'development' as a means of 'building

[158] "Nepal makes notable progress on the MGDs, eradicating inequality and social exclusion remain major challenges": Latest Updates, UNDP, Nepal. September 07, 2010. See at online http://www.undp.org.np/successstory/successstory/php

[159] *See* "Governance and Poverty in Nepal": Oversees Development Institute; September 01, 2010. At oneline, www.odi.org.uk/resource/download/3289/pdf

capacity' of individuals to address the problem of poverty and deprivation. The state of poverty and deprivation are consequences of 'human rights' violation and the protection of the same cannot be achieved without development, i.e. the progressive shift in the paradigm of life marred by regressive status quo.

The system of law can play instrumental role in promoting human development by promoting equity-based progressive changes in society. In South Asia, the role of law is, however, confined to behavior regulatory mechanism. The prime object of law is to 'ensure equal opportunities' for development of everyone'.

VIII. SOME COMMON ISSUES AND PROBLEMS RELATING TO POVERTY AND LAW

Nations in the south Asian region faces many similar problems or challenges concerning human rights protection and poverty alleviation. The country specific instances mentioned above abundantly shed light on the types of human rights violations posed by poverty and ill-governance in South Asia. The following pressing representative problems will provide additional insights about and spatial intensity or extremity of poverty and ill-governance in South Asia.

Gender and poverty: In South Asia, the poverty is more prevalent and acute among women. Women tend to be food poor, asset poor and consumption poor. The poverty is seemingly feminized in South Asia and, as such, constitutes one of the 'major sources of violence against women'. Poverty is a cause of subordinating women at home, market and public life. It ostensibly disables women to assert their human dignity and, thus, renders them vulnerable to all forms of subordination and exploitation. A poor woman is exposed to danger of being sexually exploited, sold in market, used in pornography and prostitution, and used as a commodity. A poor woman is easy prey of crimes; the sexual harassment, domestic violence, rape and trafficking. The looming poverty sustains the cultural violence and degradation of women's personality; women's personality is defined either in terms of marital status or sex.[160]

The problem of violence against and subordination of women is equally intensive and severe in all South Asian countries. Unfortunately, the recent economic growth and reforms in development policies have made no substantial changes on lives of women. The reduction of

[160] In Nepal, for example, a woman is 'recognized only by her marital status, for instance a married woman, a single woman, unmarried woman, married wife, unmarried wife (kept), etc. The term woman 'does not represent all women without an adjective signifying their marital status. The *Muluki Ain* (National Code) is framed accordingly.

poverty level in South Asia has rare impact on lives of women. The regressive status quo on relationship between men and women is still at large. The role of law to address this problem is insignificant.

Rural poor and poverty: Over the past one decade, the total number of poor, despite some reduction in poverty rate, has increased significantly. The state of rural poverty has gone from bad to worse. The rising income inequality, fueled by rapid growth of income in urban service sector and resultant benefits to urban middle and higher classes, has tremendously contributed to the increase of poverty level as well as its severity in rural areas. The problem of feminization of rural population is likely to negatively affect education, employment and other services in rural areas. The intensification of rural poverty has, thus, posed interface with increasing problem of violence and insurgency.[161]

Characteristically, the economic growth in South Asia, India in particular, is mainly confined to limited service sector in urban areas and its benefits are limited mostly to the middle and higher classes which are equipped with education and skills for long period of time. The contribution of elitist service sector in 'generating employment for rural labor force' is extremely limited. Hence, the ongoing economic growth in South Asia is rather contributing to rise of unemployment rate.[162] The so-called economic growth is, thus, not development as it has obviously failed to address the 'regressive status quo' to which the vast majority of the rural population is subjected to. The so-called economic growth has nothing to contribute to the 'protection of human rights of vast majority of the population in the rural South Asia'.

As commonly understood, the growth of economy is meant as a state of added foreign investment. As it is plain from face itself, one of the reasons in rapid growth of economy in South Asia today is the surge of Multinational companies alone or their partnership with

[161]A classic example is the 'intensification of Naxalite insurgency in India'. Nepal is another example, which underwent a devastating conflict since 1996 to 2006. The rapid rise of inequality in India between urban and rural sectors with concentration of economic benefits in cities like Mumbai, Bangalore, Chennai, Delhi and so on, India has now distinctly divided between 'traditional poor rural India and modern rich urban India'. The rural poverty is intensified, which is poviding a justification as well as breeding ground for organized violence. The ideological base of Naxalites is founded on liberation of workers and poor peasants. The Naxalites have formed a 'red corridor' that comprises of eastern and central provinces of India plaguing by poverty and other associated problems like illiteracy, poor health facilities, unemployment and several other hardships of life. In these provinces, the Naxalites have been consistently claiming that they are fighting on behalf of the landless poor, unemployed youths and those suppressed by the State (See Willaima Magioncalda, "A Modern Insurgency: India's Evolving Naxalite Problem" in South Asia Monitor, 08 April, 2010: Center for Strategic and International Studies (CSIS). At on line: http://csis.org/files/publication/SAM_140_0.pdf

[162] Human Development In South Asia 2007 at Ch. Overview

national companies. The Indian economic growth is particularly marked by this character, which has of course contributed to achieve two digits' growth rate. Unprecedented surge of MNCs has generated a tension between the Government and the rural population. The surge of MNCs and government's liberal polices regards them has already seen an increased intensification in violent conflict in the society. A decade long Maoist insurgency in Nepal and the rising Naxalite movement in several provinces in India can be taken as best examples of this new development. Such movements have found a leverage and justification in widening gap created by the income inequalities between rich and poor sections; rural and urban areas.

In the past two decades, the governments in South Asia, particularly in India, the biggest economy in the region, in a rush of pumping their ailing, lethargic and traditional economy did favorably open the doors for MNCs that are allegedly involved in notoriously robbing the resources and labor of the poor citizens. While their engagement could be welcomed if they had been rendered ethical in their business, the failure of the government to place them within the bound of precisely defined regulatory system has serious consequences. In absence of precise policies to control such enterprises in view of broader 'public interests' and urgency to look into basic needs of the vast rural majority of the population, the MNCs are found robbing the labor and resources with no price. MNCs are responsible for displacement of people by utterly violating the sovereignty of people over natural resources. The MNCs' unlimited extraction of natural resources and ensuing problems of displacement is increasingly becoming a source conflict between 'local people and the government'. The wider culture of corruption and valueless politics in South Asia has made governments fall in the trap of MNCs. The natural resources are being sold by governments in no price to MNCs for the private gains of the political leaders and bureaucrats.

Suitable example is the problem of Indian state of Orissa. In this State, the provincial government, against the background of underdevelopment, endemic poverty and hardships of life faced by millions of rural people, jumped up to embrace neo-liberal policies of development with open arms and hearts. As a result, from early 1990s, MNCs and big national companies (BNCs) are engaged in a race of installing extractive industries such as mining. The government signed 46 memorandum of understanding with MNCs and BNCs to let them extract mines and similar resources with no consent of local people. These companies, in disregards of the interest of local communities and their sovereignty over natural resources, grabbed 75-80 percent of the

lands where tribal people had been living in. The government gave such lands to MNCs and BNCs that were customarily occupied by tribal people for generations. In this wake, the so-called development drive not only legitimated the exploitation of labor in cheap wage but also violated the sovereignty of people over natural resources and ensued displacement of almost 100 percent of tribal population. Obviously, these people have now become landless.[163] It is now obvious that Orissa is, today, one of states worse hit by the emerging Naxalite movement.[164]

India was able to dampen the Naxalite movement significantly in 1971. With inception of the new millennium, it is increasingly escalating. The escalation corresponds with India's huge macroeconomic economic growth and this is not merely coincidental. In the past two decades, the economic boom has given almost 100% rise of per capita income in India. MNCs have sustained this growth by pumping billions of dollar to invest in it. But the rain of this growth has not trickled down in rural areas and less developed Northeast states. The new economic phenomenon has engendered a wider gap between rich and poor people and this emerging inequality of income between rich and poor has given a new political leverage to the Naxalite movement which is increasingly gaining momentum in the Red-corridor area.[165] The rising movement has been a serious political issue in India and neighboring nations like Nepal, Bhutan and Bangladesh. While India looks on Nepal's Maoist insurgency as a catalytic factor for the 'reemergence of the Naxalite movement' and takes Nepalese Maoist movement as a threat to the India security, it is largely a 'misconception of the India policy makers'. The emerging high-profile of Naxalite movement in India is an outcome of 'ill-governance' plaguing Indian

[163] Ruchi Yadav "Impact of Mining in Orissa: Development induced displacement" in Development and Human Rights- Asian Human Rights Defender, Third Quarterly, 2006. Forum Asia: URL, www.forum-asia.org

[164] Naxalite movement is a 'radical communist movement' which avows for establishment of a proletariat regime by violent conflict. The movement emerged in 1960s in a small village called Naxalbari in North Bengal had gone to low profile during 1990s. It has now taken a high profile shape in the "Red Corridor" area. The movement has now grown to an extent that it is able to cause serious concerns of the central Government of India.

[165] 'Red corridor' includes states in the coast of Bay of Bengal (Bengal, Orissa, Andhrapradesh) and adjacent states like Bihar, Jharkhand, and Chattistgrah. Poverty is extreme in these states. They have remarkably low per-capita income, compared to other states but abundance of raw materials (minerals) in their hills and forests. Fred Burton and Ben West in Blog "Rofasix" with a title "India's Eastern Naxalite Insurgency" (09 July, 2010) have rightly remarked: "… state of India has been hard-pressed to get at those resources because it cannot effectively control them. Eager to stimulate growth in the region, the central government promised foreign investors land without communicating, much less negotiating, with locals inhabiting the lands, which naturally led to disputes between the locals, the foreign companies and the government. A famous example of an ongoing dispute involves the South Korean Steel conglomerate POSCO, which is in the process of acquiring 4,000 acres in Orissa state on which to build a $12 billion steel mill". See at online: http://rofasix.blogspot.com/2010/indias-naxalite-insurgency.html

politics. Candidly speaking, the existing Indian governance system mixes 'traditional elitisms,[166] neo-elitism, criminalization of politics[167] and emerging control of economy by MNCs and BNCs backed by penetrating state of corruption in the state machinery'.

Education and poverty: Despite significant improvements in overall literacy rate, the South Asian nations continue to be one of the most uneducated and illiterate regions in the world containing around 379 million illiterate adults[168]—the highest absolute number in the world. India and Pakistan two largest economies with remarkable increase in per-capita represent countries in South Asia having the largest number of out-of-school of children in the region and the world. The rise of per-capita income at national level, thus, has very less significance to those huge masses in rural areas and shanty towns who are unable afford education for their children. The existence of huge uneducated mass implies a state of 'unproductiveness' of the population as well as mammoth state of deprivation. No protection of humans in such a state is possible as 'ignorance and deprivation' are the components of sustainability of regressive status quo.

Malnutrition, health, deaths and poverty: Looking at South Asia from perspectives of health indicators, the situation is scary. Women and children are the most vulnerable groups. It is

[166] Indian politics has not yet been able to get rid of 'dynasty and patronage' syndrome. Most political parties, except some left and socialist backgrounds having no decisive role in Indian politics, have maintained a dynastical succession system. This dynamic of Indian politics helps in continuity of the 'traditional elitism' in politics, which exists in politics mainly for the power. It has been a source of 'continuity for regressive status quo'. In this type of political bastion, the wealth becomes the source of political power. For more detail see at "criminalization of politics" : www.legalserviceindia.com/articles/editorials/htm

[167] A remark presented by the research report of the National Law Institute University at Bhopal is worth mentioning: "Criminalization of politics has become a headache for the Indian democracy. It is shameful to admit that in the world's largest democracy the cult of the gun prevails. *Goondas* and criminals are hired to capture booths and political rivals. In this way the entire democratic process is negated". See at "Criminalization of Politics in India: A Study of Politicians in the 15th Lok Shava with criminal records"; National law Institute University, Bhopal. There are several studies conducted in this regard. A part of another study reads: "The elections to Parliament and State Legislatures are very expensive and it is a widely accepted fact that huge election expenditure is the root cause for corruption in India. A candidate has to spend *lakhs* of rupees to get elected and even if he gets elected, the total salary he gets during his tenure as an MP/MLA will be meager compared to his election expenses. How can he bridge the gap between the income and expenses? It is plain, through donations in eyes of public but secretly through illegal means. The expenditure estimation for an election estimated as Rs 5 per voter as election expenditure, for 600 million voters, and calculation of all the expenses in a general election estimated around Rs 2,000 crore. Then there is the period between elections. This requires around Rs 250 *crore*. Then there are state elections and local elections. All told, the system has to generate around Rs 5,000 *crore* in a five year cycle or Rs 1,000 *crore* on average each year. Where is this money to come from? Only criminal activity can generate such large sums of untaxed funds. That is why you have criminals in politics. They have money and muscle, so they win and help others in their party win as well. See at www.legalserviceindia.com/articles/editorials/htm

[168] Human Development In South Asia 2007 at 2

painful to accept that the 'indicators' have failed to show improvement in the sector of health in South Asia. South Asia even today is the most malnourished region in the world and it continues to remain so even after its massive economic growth over the last two decades. India and Pakistan possess the largest population in this sector too. Most shockingly, the number of malnourished people is further increasing. In the past decade (from 1995-2005), the total number of malnourished people in the region increased from 290 million to 299 million; it implies that despite impressive rise in the per-capita income 9 million people are added in the category of having no adequate nutritious food.[169]

Unemployment and poverty: Like other sectors of low performance, the sector of employment and actual poverty reduction sectors record no progress. No positive trends in rise of employment rate are seen in India despite its approximately 9 percent rise in GDP. The growth rate of employment rather declined from 2.7 percent in the past one decade to 1.07 percent per year till 2000, thus, indicating that the economic growth has failed to benefit the large section of the population. It means that the ratio of unemployment has dramatically increased; it is approximately 8 percent for male working force. It remains around 9-12 percent for female. The gender gap in wages is a problem too. Most importantly, the youth unemployment continues to be the largest one.[170] The situation of Pakistan, Bangladesh, Nepal, and Sri-Lanka is further worse. In Pakistan, there has been gradual erosion of the consumption share of the lowest 20 percent of the population,[171] and in Nepal it is shameful as the lowest 20 percent receives only 5 percent of the total GDP.[172] The instances of Pakistan and Nepal provide a glaringly shameful paradigm of increasing inequality between so-called higher classes and bottom/lower classes population groups. Land constitutes the primary mean of support and employment in South Asia. In Pakistan, for example, two thirds of the rural households are landless.[173] The situation in India, Nepal and Bangladesh is hardly better than Pakistan. The lands are grabbed by a small elite population.

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[169] Human Development In South Asia 2007 at 3

[170] *Ibid* at 4

[171] *Id* at 3

[172] Martinussen, John, 1995, *Democracy, Competition and Choice: Emerging local self-governance in Nepal*, Sage Publication, New Delhi, p. 35

[173] Human Development In South Asia 2007 at 2

Income distribution and poverty: Uneven income distribution is a serious problem in all South Asian countries. The 'magnitude of unevenness' in distribution has increased in recent years. The unevenness is reflected in size of the land holding, gender, income level and social position. In Nepal, for instance, the lowest 20 has access to merely 5 percent of the GDP. Being a women from Dalit community, especially from the western remote districts, accounts for most serious deprivation. The income distribution is painfully abject in the case of Dalit women.

The recent economic growth in all South Asian countries is concentrated in urban areas, and hence has mostly benefited the urban middle class that is already well equipped with education and skills.[174] The income distribution led disparity in the wake of macroeconomic growth rate in recent years has 'made the traditional structural violence more acute' and it consequently has sharply divided the South Asian societies. The rise in the number of violent conflicts in the recent past can be attributed to this factor. As pointed out by the South Asian Human Development Report, 2007, 'the ratio of income, on average, of the richest 20 percent to poorest 20 percent has gone up from 4.3 percent in 1990-96 to 5.5 percent in 2000-05. This ratio in the recent past has gone up further. In fact, this paradigm of increasingly widening gap has:

- dulled the impact of economic growth on poverty reduction,
- intensified the conflict by widening the traditionally existing 'structural violence',
- has added to the state of marginalization of excluded groups,
- many more people have fallen in the poverty trap, and
- caused implausibly bigger number of youth to migrate across the border in search of job.

All these consequences are indicators of a fact that 'the recent economic growth has been less humane' in result. It has in fact intensified the risk of human rights violation. The widening income gap between poor and rich and city and village is likely to intensify the risk of violence, which constitutes a major factor for defilement of democratic governance. The income disparity is a curse for democracy itself.

Moreover, the economic growth has occurred mostly in the service sector. The contribution of the service sector in the GDP has gone up from 45 to plus 54 percent in the past 15 years. The contribution of agriculture sector has declined from 28 to plus 19 percent in the same

[174] Human Development South Asia 2006

period. The contribution of industry has remained stagnated at around 27 percent.[175] Given the fact that industry is considered to be the backbone of any economy, it seems that the growth of economy, with deterioration of agriculture sector and stagnation of industrial sector, mainly confined to service sector is pro-elitist, thus posing a serious threat to marginalization of extremely large part of the population. It is now plainly visible that in South Asia, with most rural poor dependent upon agriculture as the main source of livelihood, the stagnation in agriculture growth and productivity could precisely be one the reasons why poverty has gone up in rural areas of almost all South Asian countries. This fact itself shows an immensely big risk of human rights violation and failure of so-called formal democracy in South Asia. This fact also shows another fact that the South Asian governments are miserably failing to understand the 'meaning of development'. The discourse amply suggests that 'human security' is not what development means for the South Asian governments.

Crisis of governance: Governance is an issue of constant discourse in all forms of Diasporas in South Asia. Is there governance at all? People are skeptical to answer this question as "yes". Corruption, nepotism, plunder of public assets and violation of rule of law are serious problems faced by South Asian societies. Constantly swelling problem of criminalization of politics and politicization of crimes has further worsened the confidence of people over governance.

The structure and functionality of governance in any society are matters closely associated with the system of politics adopted by the society. Governance in any society is an instrument necessary to facilitate development process and the ultimate goal of it is to build human capabilities along with enlarged human choices in order to create a safe and secure environment conducive for dignity and equality in citizens' lives. In a democratic setting, a system of governance is an instrument of 'development' to break the vicious circle of 'regressive status quo and structural violence'. However, in South Asia the governments in the region are rejecting or declining to practice the progressive notion of governance that promotes people's freedoms and participation in policy or decision making process. For South Asian governments, democracy is hardly more than a majoritarian system of representation and adult franchise-based election. Anti-democratic and human rights legacy, partly inherited from past feudal status-based structure of governance and partly inherited from colonial divide and rule policy,

[175] *Ibid*

is responsible to create this 'psyche of democracy' that negates or cripples the notion of progressive 'governance system', thus, helping the continuity of the vicious circle of 'regressive status quo and structural violence'.

Continuation of 'regressive *status quo'* to prevent change and progress is a characteristic notion of the South Asian governance system. With no doubt, development is a 'phenomenon' of change. As a matter of fact, to resist change would simply imply nothing but a 'deceptive design to protect and preserve the state of regressive status quo'. In such a state, the prospect of development as an instrument of socio-economic transformation into lives of people is fully discarded. In South Asia, the governments are, thus, instruments of 'regression' rather than 'progression'. The 'regressive status quo is characterized in South Asia by:

- practice of 'legal system' which is essentially congenital to colonial system. It was introduced by the colonial rulers to 'maintain their interests', but not for the benefits of indigenous people. After more than five decades of colonial rule, the legal system, however, is in place. The legal system is found on the notion of 'utter formalism', which implies that rules are sacrosanct. The legal system practiced in South Asia is structurally unfriendly to 'equity-based change and protection of human rights'. The formalist conclusion drawn by formalist interpretation of the century-old rule is commonly known as 'justice'. The recognition of the inviolability of the physical integrity of individual, security of person, supply of sustenance needs, respect to freedom of choice and action and guarantee of economic participation' do not figure important while carrying out the interpretation of the rules of law
- the legal system is lacking a framework congenial for 'engendering the human rights threshold condition'. Individuals have no justiciable right to 'food, cloths, health, housing and sanitation'. These rights of people are considered as 'development privileges of the State'. Human rights are, thus, separated from spheres of development affairs
- the tax system is largely informal. Only a very smaller section of society is taxed. The informal tax system, basically in the form of fee, royalties, service cost, etc. constitute major source of revenue in South Asia, which, in fact, puts the poor people into tax traps. The South Asian economy is, thus, basically based on what is paid by the poor

- forms of inequality in service and social security is discriminatory. The education system is a glaring example. The government schooling system is not only inadequate; the quality provided by the schools is incredibly poor. The privatization of the schooling is a policy priority of the South Asian governments. The affluent families benefiting from the recent growth of economy can afford the costly privatized schooling, and the poor are forced to lag behind due to non-quality education. The type of disparity in policies is pervasive
- criminalization of politics is a rampant character in South Asia. Democracy is, thus, a myth.

Plainly enough, these characters of governance system in South Asian are obviously promoting and protecting a state of 'regressive status quo' that defies 'equity-based transformation' of the society. It is now increasingly accepted that the main causes of the South Asia's colossal human deprivation are not related with economy but politics, i.e. the system of governance. The structure of ill-governance is pervasive and phenomenal. It has deeply institutionalized poverty by persistently denying 'equity-based distribution' of resources and opportunities.

The positive opposite of 'the state of regressive status quo' is 'an endeavor for progressive change or transformation into traditional paradigm of people's lives'. The concept of 'progressive change for transformation' embraces a right-based approach for development, and the development, in turn, necessitates an active interplay of 'economic growth and good governance'. It means that 'system of pro-people governance and development' form an interface. Unfortunately, South Asia has in the past heavily suffered from bad or regressive governance system and anti-people policies of the governments. It continues to suffer from the problem even today. While South Asia structurally is a fully democratic region at present, [176] the performance of the governance system continues to remain poor, traditional and

[176] Nepal and Bhutan were the two monarchies that transformed into democracies lately. Nepal, however, suffered heavily from Maoist insurgency over a period of one decade. In 2006, the conflict ended with a great hope of people to progressive transformation of the society. Nepal was seen by South Asian people with great hope. However, the poor performance of political parties, including Communist Party of Nepal (CPN) Maoist, that waged a revolution for change, failed to give effect to the aspirations of people. They rather acted to 'continue the state of '*regressive status quo*'. Political leaders of Nepal are now regarded as obstacles for change. In a country with per-capita of 275 USD, the luxury they are living with is a best example of the anti-development poor governance. Today, the political parties are busy with criminalizing politics and politicizing crimes. Impunity is a rule in Nepal. Criminals are holding post of members in the Constituent Assembly. Political parties have raised 'semi-armed' organizations to terrorize people. The state exchequer is plundered by political parties. Violence is legitimated.

regressive.[177] It is rightly described by someone that 'South Asia remains a region divided—divided between the hopes of the rich and despairs of the poor; a region where the richest one fifth enjoys almost 40 percent of the income, and the poorest one-fifth makes survival with less than 5 percent of the income. This is a region where 559 million people struggle for survival every day. Nearly one in three is poor, and two third of these poor are women.[178] The poverty constitutes a major cause for early death, diseases, exploitation and violence in Asia. As early in 1940s, Mathma Gandhi, the main architect of the Indian independence or British Quit movement', reflecting on poverty said: "Poverty is the worst form of violence".

Poverty, as a source of violence, is both the cause and consequence of human rights violation in Asia. This is the main point which demands critical assessment of the governance systems of South Asia as it has widely been felt that the governance systems of South Asia are facing a chronic crisis with not much hope for change in the future. The signs of the crisis can be found:

a. in continuity of race for 'nuclear capacity building' between India and Pakistan which apparently threatens peace and tranquility of the region and contributes to rise of spiraling tensions and conflicts among the members of the region, including unsustainable military cost;[179]
b. in criminalization of politics and corrupt practices of politics that have largely defused the trust of people over the state's institutions, including judiciary;[180]

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[178] *See* Anselmo Lee, et al, (ed.) "Poverty and Human Rights" in "Linking Development and Human Rights"; The Newsletter of the Asian Forum for Human Rights and Development, Vol. 2 No. 3, Third Quarter 2006. Forum Asia, Bangkok.

[179] As discussed in the introduction part, India and Pakistan are two nuclear powers in South Asia with legal missiles with capabilities to destroy the over 5000 year long South Asian civilization. A huge part these countries' scare revenue goes to maintain and buttress their nuclear strategies and schemes.

[180] Governments of all South Asian nations have blatantly failed to rescue the politics from the grip of criminals. It seems that, the political parties of South Asia are gradually transforming into the parties of criminals, smugglers, mafias and gangsters.

c. in constant institutionalization of violence in politics and 'feudalization' of political parties, which promotes patronage and hereditary succession in political parties;[181]
d. in incessant political demonstrations and strikes which regularly affect the economic, educational and productive activities;[182]
e. in terrorism and inhuman blasts, detonation, ambush and firings which takes lives of hundreds of innocent children, pregnant women, workers and tourists;[183]
f. in corruption and political maneuverings for search of powers;[184] and

These signs of crises indicate adequately that in many South Asian states democracy has turned into an empty ritual;[185] elections are taken often as means or bridge for political leaders to legitimize their access the State's powers. Over the years, the South Asian people are left helpless; excluded from the larger political process which directly affects their livelihoods and way of life.[186]

The South Asian governments are expensive. They are large but inefficient. The cost of government overrides much essential expenditure. As late as 1995, some studies reported that per-capita government expenditure in South Asia was $56 even as the number of people living in poverty swelled to 559 million. The governments in South Asia consume some 10 percent of the GDP[187] whereas the 20 percent poorest people have only a share of 5 percent in the GDP.[188] It is a dire paradox.

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[181] Nepal, India, Bangladesh and Pakistan are obvious examples. It is a patronage and 'factionalism' is two characteristic features of the political parties in these countries. The political ideology, conviction, and contribution in democratic performance of political parties are seen as 'disqualifications'. No person can hold the highest office of the country without having connection to a certain clan or having patronage of this or that clan. Lately, the criminalization of politics has seen as a serious problem of politics in South Asia. Nepal is its blatant example. Despite being identified as criminals or engaged in criminal activities, the political parties of Nepal have given space in politics for such persons. Indian politics is criticized for the same for long time.

[182] Bangladesh and Nepal are examples for strikes for continuously for a longer period of time.

[183] Problems in India and Pakistan are now serious enough.

[184] Corruption is plaguing democracy and governance of South Asia seriously.

[185] Nepal is the worst example. Mr. Madhav Kumar Nepal, a person who lost election from two constituencies, was elected Prime Minister. Majority of ministers in his cabinet, especially from his party, were persons rejected by people in election. Mrs. Sujata Koirala, who have never been elected as a member of the parliament nor has she been elected in important post of the part, got appointed as deputy Prime Minister simply because she was a daughter of Girija Prasad Koirala, one of the former Prime Minister of Nepal. In Nepal, a care-taker government continued for several months simply because the 'Constituent Assembly' could not elect the Prime Minister. Enough to be a farce, the CA held elections more than a dozen times. However, the candidate of Nepali Congress did not withdraw from the contest even there was no chance for him to be elected. In Sri-Lanka, the president moved a proposal in the Parliament to amend the constitution with an effect to allow him to contest the election again in future. Similar stories are found in abundance in India, Pakistan and Bangladesh.

[186] Human Development in South Asia 1999: The Crisis of Governance; Oxford University Press.

[187] Human Development in South Asia 1999: The Crisis of Governance; Oxford University Press

The corruption is phenomenal. One of the reasons for phenomenal corruption is overwhelming domination of the Government in all functions of the State. The South Asian Governments are directly engaged in activities of development expenditures. As rightly pointed out by 1999 Human Development Report, the over indulgence of the Governments has limited their ability of focusing on the essential takes of service delivery and productivity enhancement. The overindulgence in expenditure activities is also major cause of notoriously high levels of corruption. This skewed governance stood on inefficiency and corruption is a cause of many severe consequences. The tax collection, for instance, is an example; it is so meager, hardly one percent of the population pays income tax.[189] South Asia collects around 10 percent of GDP in taxes, compared to the average tax revenue collections 15-20 percent of GDP in developing countries.[190] Yet, a bigger irony is that most of these taxes fall far more heavily on the poor and lower middle class than on the rich. Nearly seven percent of the tax in the region is collected through levying indirect taxes.[191] Most pathetically, even the low levels of revenue that governments collect largely fail to materialize into pro-poor expenditure.[192] Finally, the ability of South Asian governments to deliver the most basic goods is further weakened by endemic corruption.

Poverty and human security: Human security is a 'guarantee of life and liberty against violence of any kind and disruption by societal injustice or natural calamities, and adequate provision for food, health, education, employment and good environment'. In short, human security is a condition of the fulfillment of economic and social needs of people. Territorial security, which is mainly concerned with protecting national borders, is meaningless for people if they are

[188] John Martinussen, 1995 at 35

[189] Human Development in South Asia 1999: The Crisis of Governance; Oxford University Press, p.4

[190] *Ibid* at 5

[191] A few instances of Nepal, for example, will make it clearer. In Nepal, the Government of CPN (Maoist) imposed 5% tax for educational institutions privately run. The educational institutions to meet the tax raised the tuition fees by 10 percent. Indirectly, it was fee imposed on education; a student paid tax to the government to obtain education. Similarly, the Government is levying tax on 'lands'. Even the smaller farmers who barely produce enough to support their livelihood are thus taxed. It can be said that 'poor farmers are taxed to survive'. By contrary, the government has fixed a slab of Rs. 150,000 for exemption of income tax. It is thus argued that 'rich are taxed on luxury' and poor are taxed for survival.

[192] In South Asia, the bulk of public spending is directed away from social and development opportunities towards providing non-merit subsidies, making up for losses of public corporations, maintaining a large force of civil servants and providing for external defense. With notable exception of Maldives, social sector expenditures (like school education) in South Asia remain low at less than 5 percent of GDP. Large proportion of expenditures is spent on low human development priority areas. For instance, for every dollar spent on social sector, Pakistan and India spend 4.32 and 1.70 dollars on defense and debt servicing, respectively. See Human Development in South Asia 1999: The Crisis of Governance; Oxford University Press, p.5

hungry, sick, jobless, or are violated or killed by oppressive systems, practices, and corrupt state institutions.

South Asia faces serious problems in this regard. Countless people are deprived of food, health, education, and jobs. For these countless people huge standing army and nuclear weapons mean nothing. Unfortunately, most South Asian states are persistently resisting the idea of recognizing human security as 'a fundamental right' of people by their constitutions.[193] The overall situation of human security in South Asia is in a very pernicious position. South Asia is a region where people die in all seasons, by all diseases and fall in trap of all kinds of adverse conditions. The wrong economic policies of the Governments are major factors throwing people into a state of added vulnerability. As discussed abundantly hereinbefore 'the South Asia's economic growth has created some oasis of affluence and security for a small group of people. But the deprivation of a huge absolute number of people in all walks is creating social turmoil across the region'. The so-called growth itself has become a source of threat to human security. Ongoing conflicts and many more factors that escalate conflicts between states and different groups within a state are other forms of threat to 'human security'. The widespread structural violence is a major source of conflict between different groups within a state. Increasing poverty and income inequality between the ethnic, social and religious groups set the stage for outbreak of violent conflicts. To put concisely, poverty and widening income inequality, food insecurity, the changing nature of employment and unemployment, against the backdrop of greater global economic integration, underline the human security vulnerability of South Asia.[194]

IX. IMPLICATIONS OF POVERTY ON HUMAN RIGHTS: ANALYSIS OF POVERTY AND HUMAN RIGHTS VIOLATION TRENDS

It is plain from the foregone discussion that the South Asian nations manifestly hold similarities in types, consequences or impacts and dynamics of poverty, at least at macro levels. In micro-levels, however, there is divergence in situations. In this article, no serious attempt is made to explore individual nation's micro-realities of poverty and its nexus with human rights

[193] None of South Asian Constitutions has incorporated 'right to food, health, education and job' as an enforceable fundamental right. In 2007, Nepal's Interim Constitution included these rights as fundamental rights, but unfortunately subjected their enforcement to legislation.

[194] Human Security in South Asia; Oxford University Press for The Mahabub ul Haq Human Development Center, 2005; p 6

violation. It has rather given a regional perspective of causes and impacts of poverty and deprivation. An attempt has been made to

a. explore inherent dimensions of poverty as a cause of human rights violation ;
b. investigate the nature of interface of poverty and other issues such as illiteracy, discrimination, disenfranchisement and exclusion, and its impacts on human development as well as the realization of human rights ;
c. examine the impacts of poverty on enjoyment of liberal democratic rights by people ; and
d. scrutinize the impacts of poverty on sustainability and institutionalization of democracy.

The overall impacts of poverty and deprivation at macro-level is similar in all countries. The ill-governance is a major factor for continuity of the mammoth poverty in the region. Wrong economic policies, huge governmental expenditure, huge expending on military out-fits, poor tax regime, corruption, increasing state of criminalization of politics, and power-centric attitude of politicians are macro-level factors prolonging the state of poverty, deprivation and ensuing inequality among population in the region. These factors obviously engender a 'state of lawlessness'. The legal systems in the regions are rudimentary and hardly play a role in elevation of human development. In developing societies, the role of legal system in uplifting individuals' position at 'threshold condition of human rights' is crucial. However, the same is obscure in the region as the prevailing legal systems are congenitally colonial and functionally formalist. They embody feudal characters and are prone to preserve the 'conventional hierarchical structure' of the society, and, hence, promote 'regressive status quo' against progressive transformative change. The legal systems are enforced largely to protect the interests of economical, political and bureaucratic elitism in the society. As a matter of fact, the development role of law is insignificant. The poor state of the legal system in the region is thus buttressing the 'ill-governance and other vices' obviously thwarting the prospect of equitable human development. The enforcement of international human rights in such a perspective is very challenging mission.

X. DIMENSIONS OF POVERTY AND THEIR IMPLICATIONS ON HUMAN RIGHT: SOME THEORETICAL SETTINGS

To provide a basis for ‘critical analysis of the problems relating to human security and development in South Asia’, the following guiding principles can be set forth:

a. It is assumed that 'human rights' normatively constitute a composite system of 'human security' by which every individual's 'human dignity' is shielded against any form of violence or disruption, and wants or adverse conditions that pose threats to survival and dignified existence. Human rights thus, as core values, underlie all activities, policies and programs of states, non-state entities and individuals.[195]
b. Human rights constituting a 'composite system' of human security provide the source of legitimacy or legality for all other systems that operate for benefits of human beings. State's policies and programs failing to respect human rights should therefore be viewed as 'threats to human security'. State's activities that place human security, directly or indirectly, into a crisis or threat must be condemned as human rights violation. The excess of powers or authority hence must be strictly prevented.[196]
c. Consequently, the duty of every human individual and institution to ensure the realization of human rights is unlimited, unconditional, and immovable in any circumstance. No argument of any one, including state, can be acceptable which makes the 'realization' of human rights contingent upon 'some perceived or real claims' of national security or interest. Hence, no excuses for human rights violation in forms or pretexts of threat to national security can be acceptable to a society that is marching to a new civilization. No arguments justifying inefficiency or deficiency causing failure to protect and preserve human rights can be tolerated either.

As the foregone discourse amply sheds light, poverty amounts to the degrading form of human rights violation. Poverty is a deprivation of basic needs of human beings and it flouts the prospect of a dignified life by effectively blocking the process of progress in prevailing human conditions. The deprivation caused by poverty engenders deplorable state of vulnerability to the physical integrity, security of person and liberties. The State's duty to protect human rights is absolute, thus, to have a dignified life with access to all basic needs is a fundamental right of every individual.

The importance of human rights largely rests on their ability to enable the enjoyment of minimally satisfactory life or what J.S. Mill calls "the ordinary chances of desirable

[195] (All ancient traditions asserted these values –to be elaborated from HRSs power point presentation).
[196] Elaborate the doctrine of 'public interest, people's sovereignty and state's authority'- the new concept of law that it it prevents states to violate people's freedoms

existence".[197]To meet the threshold condition of human rights is, thus, a mandatory obligation of each state. States can have no excuse under any circumstance for meeting the threshold condition. The right to life, dignity and basic liberties, such as freedom of choice, action and movement, generally constitute 'the minimum threshold condition', to which States have an absolute obligation to protect and enforce. At this point, States have an obligation to remove all those laws and other impediments that hinder satisfaction of the 'minimum threshold condition'. Failure of States to meet the 'threshold condition' means a denial to protect human rights, and the denial amounts to 'violation of human rights'. The violation of human rights amounts to be crime by State 'if it is paradigmatic' in nature.[198] A paradigmatic violation is that which do not merely deprive victims of the objects of their rights but systematically attack these very rights themselves; it does not merely subvert what is right, but the very idea of 'right' and justice.[199] To say concisely, failure to meet the 'threshold condition' entails a violation of human rights with no doubt. Poverty and deprivation thus epitomize ' a paradigmatic' violation of human rights as the state of poverty and deprivation represents 'a state below the threshold condition'. States' attempt to flout obligation to address poverty and deprivation is tantamount of legitimization of the 'crime of human rights violation'.

Individuals' rights to development prevent States to commit paradigmatic violation of human rights and ensuing crime. To say other way round, individuals' rights to development is an instrument of compelling States to 'meet the minimum threshold condition' of human rights protection. The right to development rescues individuals from a state of 'regressive status quo' epitomizing poverty and deprivation. Eradication of poverty and deprivation is thus an 'inalienable obligation of States as well as international community'. The following justifications help to establish this principle:

a. Poverty is an outcome of ‘the state of income inequality, hence violation of human rights by States and international community’. The income inequality, on the other hand, is a result of the ill-governance, or an outcome of the failure of public system, the political apparatus in particular, and its wrong policies and decisions. International suppressive polices on trade, protectionist exemptions insisted upon by developed countries, international resource privilege and culture of luxury in internationally funded projects fuel ill-governance and

[197] John Stuart Mill, *On Liberty* , ed. Elizabeth Rapport, Indianapolis; Hackett (1858) 1978
[198] Thomas Pogge, 2002 at 29
[199] *Ibid* at 59

corruption poverty stricken societies. Poverty and deprivation destroy a normative value that 'human lives are equal and every human life has its equity on advantages secured or provided by the State he/she is a citizen of'.

b. Human rights collectively constitute an 'entity' that guides each and all functions of public institutions, without sparing the State and international community. Both the system of democracy and governance derive legitimacy by success in protection and preservation of 'human security, liberty and dignity'. Protection or preservation of human dignity is an 'advantage obtained or acquired by individual that ensures his or her security' against all forms of wants, violence or disruptions. Human rights in this form constitute a set of mandatory obligations of States and international community to 'ensure human security'.

c. No State or international body has thus power or privilege to set a priority for 'development project' that negates human security and liberty. No national defense or security system has meaning for hungry people. State's priority to build military outfits or defense system against its 'perceived threat' of security lacks legitimacy in view of its citizens forced to die in want of food. Poverty caused death of citizens is a 'paradigmatic' violation of human rights, and as such a crime committed by the State and international community.[200] The South Asian defense spending can thus be defined as 'sheer violation of human rights' by States because such spending forfeits people of their 'minimum threshold condition' of human security and dignity. This spending steals foods of people to feed 'guns'. States have no authority or power to claim that 'they are the 'users of the people's wisdom. It can assume the role of people's attorney neither. A State is merely a mechanism of people to ensure their 'security, freedom and dignity' through constant change and development endeavors'. State has neither its independent will nor capacity to 'function' independently of the will and capacity of its constituents-the people.

d. State cannot 'set goals for a society' different to that of its members. Poverty is engendered when State comes forward to set goals of human society in disregard of the actual needs of its members. No interest of State can be defined as 'public interest'. Public interest is a

[200] Thomas Pogge 2002. "States by corruption and extortion of national revenues and international community through practice of monopolized international trade disadvantageous to developing countries, protectionist exemptions insisted upon developing countries, international resource privilege and funding for luxury of expatriate experts, managers and consultants de not merely allow for poverty and deprivation but engender and secure poverty and inequality. For further information" Also see, Thomas Brooks, 2011.

'collective aspiration or wisdom of the people'. State's interest does not necessarily represent the 'collective aspiration or wisdom' of people. Poverty is a state of life which is abhorred by the public interest. Hence, State cannot justify poverty in any pretext. The first and foremost obligation of the State, as an organized mechanism of the people to ensure 'security, freedom and dignity' against want, violence, diseases, immature death and exploitation, and any other forms of disruption, is to promote 'progressive transformation of the lives of people'.

XI. POLITICAL IMPLICATION OF POVERTY AND DEPRIVATION

Why does poverty need to be addressed by State as its first agenda? The answer is plain. Poverty as a cause of deprivation disables people from enjoying their freedoms creatively. Poverty underlies a deficiency and as such forms a formidable factor destroying human potential to transform society into 'an equitable institution'. By contrast, poverty of masses empowers non-poor to monopolize the authority of State. Poverty is thus a stumbling block in achieving institutionalization and sustainability of democracy. Precisely speaking, poverty is a symptom of dysfunctionality of State. Eradication of poverty, thus, implies an attempt to 'ensure dynamism and productivity of the State'.

Failure to recognize and enforce 'economic, social and development' rights amounts to reinforcement of the 'state of poverty', and ultimately the cause of 'defiling' democracy. Economic, social and development rights are instruments of justice for securing positive transformation in lives, which is generally called 'development'. Development is thus an anti-thesis of the state of poverty and deprivation. 'Democracy is a synthesis'. Democracy achieves stability by enhanced 'minimum threshold condition' of human rights. Indeed, the significance of economic and social rights' 'achieve minimum threshold condition' is decisive. To look at significance of economic and social rights from Marxist point of view, the enhancement of the collective egalitarian solidarity is the most desired one. Democracy falls in a state of chaos in absence of an 'egalitarian solidarity' of the people.[201] Marxist critiques point out that 'liberal

[201] Marxist human rights intellectuals assert that the rights and freedoms of bourgeois democracies are purely formal –at most procedural- and thus are illusions. To Marxists, the working class (who today live in the third world due to outsourcing) lack the economic means and intellectual formation to enforce its rights. Thus, for Marxists, workers are victims of 'the shell of game". For detail; see, Eric Engle, "Human Rights According to Marxism", Available online at http://ssrn.org/abstract

states fail to respect the basic rights and dignity of the poor.[202] This is where the pitfalls of liberal democracy lie. According to socialism, the distributive justice promotes collectivization and socialization of human potentials, which in fact, is a base-stone for a democratic system. The liberal democracy has indiscreetly ignored this fact by consistently denying to give same gravity to economic and social rights. Attaining solidarity of and equality among people constitutes a pre-requisite for functionality of democracy, and economic and social rights are touchstones of attaining such solidarity and equality.[203] Hence, recognition and enforcement of economic and social rights results in development of individuals ensuring constructive engagement in 'exercise of civil and political' rights, which make democracy a functional system in societies. Poverty is 'an obstruction' to democracy needing the liberal states and international community to recognize and sincerely enforce.

Why South Asia has failed to materialize this ‘core principle’? There are many hidden factors needing intensive research, which is not possible without long-term engaged efforts. Nevertheless, some assumptions can be put forward at this juncture.

a. South Asia has inherited a wrong ‘notion’ of state. Most countries in South Asia have inherited so-called modern structure of ‘state’ from colonial power, the foundation of which is rested on Hobbesian theory. It believes that a state is a ‘representative institution of people’. For Hobbes, people have unconditionally transferred their powers to the State so that it has power to rule them. The colonial powers in Asia ruled over it for centuries under this doctrine. The so-called modern States in South Asia are indiscreetly influenced by the same doctrine. As matter of fact, the Governments here implicitly take people as ‘subordinate entities'. The consequence is that people’s wills or choices, or rights are meticulously disregarded in the process of nation building. For them ‘development’ is a matter of state’s privilege. Hence, governments in South Asia are engaged in building huge defense and other projects at the cost of lives of millions of hungry people. The poverty is thus an outcome of the ‘wrong notion of political, social and economic elites about State’. State for them is an entity above the 'people'. It is, therefore, hard to expect such a regime to

[202] Eric Engle, "Human Rights According to Marxism", Available online at http://ssrn.org/abstract

[203] For general discourse on Marxism and human rights; see, Evgney Pashukanis, *Law and Marxism: A General Theory*, trans. Barbara Einhorn; Ink Links, 1978.

'uplift people's position to the threshold condition' of development without addressing the said notion of elites about State.

b. The people's sovereignty is another form of deception used by States in the region. The people's sovereignty is an attribute of people's power to 'determine legitimacy of the State's authority. By contrast, the States in the region have stepped up to define 'people' sovereignty as 'state's authority' to rule people independent of their aspirations or expectations. The exercise of 'sovereignty' is carried out by people by 'forming collective interests- popularly known as 'public interest'. However, Hobbesian model of States have deceptively converged the 'idea of public interest' into national interest connoting the 'independent will of the state'. This deception implicitly legitimizes the 'authority of the State to declare priority in development endeavors irrespective of people's consent'. The poverty in this perspective is an outcome of 'State's endeavors to set its own goals as an independent institution'.

c. Most States in South Asia are, thus, promoting that modality of development which empowers the state in the cost of people's sovereignty. The widening gap between rich and poor and urban and rural population can be attributed to the deceptive doctrine of 'state as an independent entity'. Poverty is an outcome of the State's deception to assume the shape of an independent entity. No guarantee of human security is possible until and unless this deceptive Hobbesian doctrine is stopped from being practiced in the name of 'democracy'.

State is a machinery of expressing collective will of people for their 'collective security'. It is not only a truism but a 'goal set forth for the unconditional security' of people. Human rights are fundamental values as well as rules to 'prevent states from articulating their independent wills against the people's choice for welfare and security'. 'Development' targeted to meet the 'minimum threshold condition for security and dignity of people' is a measure to correct the setbacks resulted by deceptive exercise of powers by States.

XII. SOCIO-ECONOMIC AND POLITICAL PROBLEMS SURROUNDING OF HUMAN RIGHTS VIOLATIONS

As elaborately argued above, 'development for progressive change in the existing conditions of life' is an 'innate right of people'—not a privilege of Government. A State has no authority to

deny taking endeavors for the sake of progressive transformation of the lives of its citizens. No individual can build one's own independent empire. The society is 'a collective form of lives' that necessitates a system of sharing 'intelligence, wisdom and endeavors for development of every individual. State is a machinery devised by human wisdom to facilitate erection of this essentially 'sharing system'. This simple philosophy connotes that (a) monopoly over resources by an individual or a group is forbidden; (b) resources are common heritage of all and their utilization should necessarily benefit the entire people equitably; (c) the common resource can be best utilized by 'harnessing the fullest potential of each human individual, hence, development of productivity of each human individual is a precondition as well as their human right; (d) equity is a minimum norm for distribution of advantages and resources, hence, poverty is a state of denial of equity to the poor and as such a violation of human rights; (e) the state of poverty is, thus, not a 'fate' of individual but failure of the State to be a meaningful machinery to facilitate the process of development; and (f) no legitimacy to Governments which fail to 'transform the state of the poor into 'threshold condition' of development.

This philosophy underscores a fundamental doctrine that 'every individual in a society has a right to "have a right to development". The facts described above present a stark and compelling situation of human tragedy created by deceptive endeavors of the governments in South Asia. The situation points out to a glaring fact that, today in South Asia, poverty is the most potent violation of all human rights and, as such, constitutes a major threat not only to the survival of the greatest numbers of the human population, but also to the dynamics that make democracy and rule of law a functional system of the society'.

The looming political instability, the fundamentalism grotesquely infesting democratic institutions, deeply rooted problem of corruption, the widening gap between the rich and poor and phenomenal violence in South Asia maintain inseparable nexus with poverty, which has occurred as a consequence massive human rights violation by States. The States' failure to protect human rights is 'paradigmatic' by all implications. The State's failure to protect human rights is aggravated by several attributive factors. Such as:

a. *Fundamentalist nationalism or patriotism*: The governance systems of the South Asian nations are in control of elite population that have intentionally chosen the fundamentalist notion of nationalism or patriotism as a defense for its existence. Nationalism in its fundamentalist or ultra-notion is used as' opium' to exploit common people's sentiment of

belongingness to a ‘nation’. The entire edifice of ‘national security doctrine’ and military outfits-spending is justified by this perspective. The poor mass is deluded. Individuals are divided. The spending of the national resources in military purposes against human welfare is justified on the ground of threats to national security.

b. *Myth of democracy*: Exclusion of masses in democratic practice is a serious problem in all South Asian nations. Politics is used an as 'instrument' of fundamentalism religiously, politically and socially. The elite class, by championing the radical nationalism or patriotism, seeks to 'legitimize its wrong policies and programs ' that divide the society and subject masses to extremity of poverty. The pride taken by South Asian nations in organizing big events such as Common Wealth Game, Cricket World Cup etc. are few examples of misutilization of resources in the cost of lives of poor people. While States have no adequate money for 'safe drinking water, schools, hospitals, and other basic amenities, they are often ready to spend billions of rupees of on such events. This notion shows lacking of the 'Government's primary responsibility to the poor communities'.

c. *Confused role of UN and other development organizations*: Despite the fact that the principles contained in the Universal Declaration of Human Rights clearly establish poverty as a human rights violation, it was only during 1980s that the UN began to look at the issue of poverty explicitly as a human rights issue. In 1992, the General Assembly asserted that extreme poverty and exclusion constituted the violation of human dignity. The Millennium Declaration of 2000 was noteworthy in the regard that it was the first time that the heads of States had recognized explicitly the link between the realization of the right to development and poverty reduction. Even though the UN has been less active to 'enforce' the poverty eradication as a matter of human rights of people, it has engendered a good excuse for States to flout obligations to implement effective programs for poverty reduction as a 'matter of right of people'. The development efforts of States in South Asia are still considered as a matter of privileges of the governmental decisions. The inclusion of the beneficiaries in priority fixation process is still not a matter of concern for the Governments. For instance, in Nepal, reportedly, 9000 women die due to lack of basic health care supports during pregnancy and childbirth. In contrary, the huge budget has been allocated by the Government for a special hospital for 'civil servants'. Who should fix the 'priority' of State's

expenditure? This is what UN is not clear about its 'policy determination'. The large chunk of financial resources is, thus, being channeled by the UN to the development efforts of poor Asian countries' suffering from this shortcoming.

d. *Problem in definition of poverty, or conservative attitude to define poverty:* The definition of concept of poverty is a vexing issue. Skeptics have argued that the concept is too vague and broad, as well as subjective in the sense that it is prone to encompassing any level of deprivation. The World Bank's definition relates poverty to the material ability to purchase minimum goods and services, i.e. poverty is defined as living on one US dollar or less a day. This definition lacks consideration about the 'issue of dignity'- the human dignity to survive as a human being equal to others. Indeed, the poverty relates to the lack of capability of individuals living in poverty to enjoy certain basic rights which are necessary to achieve and retain human dignity. Again, the issue of 'State's policy becomes related with this point'. Nepal, for instance, spent almost 10 hundred million rupees for Constituent Assembly elections and constitution making process. The similar amount was also expended by 'donor agencies'. However, all these costs were made for visits, meetings of politicians, deliberation of members and so on. How the constitution making process could be made 'realistic' to rescue the '31 percent below poverty line people' could not become an issue of debate. These people were not given a platform for discussion either. The issue of 'dignity' as a matter of right is, thus, effectively discarded. The conceptualization of poverty eradication strategies thus requires 'standing at right-based approach', which tells us that the people living in poverty have inalienable entitlements to human rights, and are not passive recipients of commodities only. The Constitution making process in Nepal, for instance, should be a platform for 'people living in poverty to address their basic rights to food, education, health and environment conducive to development'. One important element at this point is that the prohibition of 'discrimination' is a central or key issue of the right-based approach. Individuals and groups find themselves in a situation of poverty as a result of government policy which discriminates against them.

e. *The gap between rhetoric of the right based approach and reality of development planning*: There is a dangerous and critical gap between rhetoric of the right-based approach and reality of the development planning and poverty eradication interventions. The planning of

development programs excludes the 'poor beneficiaries' and this is, at least in case of Nepal, true with both the Government of Nepal and donor agencies. Two specific examples can be cited. In 1993, the World Bank, Asian Development Bank and many other donor agencies in Nepal urged the newly formed democratic government to pursue 'privatization and open market economy'.[204] Consequently, the Government privatized a 'leather factory and a paper factory', the two biggest government undertakings directly benefiting the people as they supplied cheaper commodities to the poor people. The over exaggerated and mismanaged privatization drive thus stole the right of poor people to obtain 'affordable commodities that were primarily used by the poor people'. Development in this sense is a curse for common people. Education became fully privatized and the private schools became unaffordable to the poor people. Good education in Nepal, thus, became a 'privilege of the rich people'. The government schools failed to compete with private schools and universities. The access to service sector with government schools graduates then became a 'dream' only. The exclusion of the poor in decision making is, thus, a 'deprivation of human rights' and hence constitutes a factor of prolongation of the poverty.

f. *The transnational corporations* are becoming a serious cause of violation of human rights in South Asia. In the context of globalization and privatization drives, the Governments of South Asia are happy enough to have partnership with transnational companies across the world. Such companies have obtained absolute power or privileges for 'utilization of resources'. Some of these resources constituted traditionally the 'source of sole income and livelihood' for the poor local people. For instance, India has signed 46 Memorandums of Understanding with transnational companies that allow them to extract minerals and develop industries in Orissa. Consequently, the poor people in that province are becoming landless. These lands are being given to the transnational companies at throw-away prices. Tribal people's customary rights on land are discarded. The government has been involved in forceful acquisition of such lands to give to transnational companies.[205] Obviously,

[204] In 1994, The World Bank insisted for rise in price of electricity. It was thought that the price hike for consumers would attract investors. The people resisted the decision of the government, though the price rise kept going on. While privatization was fully brought in the policies of government, the per-capita income of people did not rise. The democracy in 1990 thus did not bring good days for people, and this is possibly a cause of rise of Maoist insurgency that forced the entire nation plunged into a crisis for a decade taking lives of 14000 people causing serious destruction of the infrastructures.

[205] Ruchee Yadav 2006

corporate social responsibility and accountability for human rights violations are issues of serious consideration in Asia.[206] While these transnational companies have made serious intrusion into human rights of people, traditionally, the focus lies only on the western transnational groups. However, similar companies of India, China, Korea and Japan have replaced the western companies, and they are more immune from their responsibilities. These companies command stronger support from their governments.

All these problems are related with less stable democracy and phenomenal corruption in all levels of government in South Asia. Together, these problems constitute the 'focus of human rights problems' in connection with the development in Asia. The issues, thus, needing serious attentions are:

a. *Inclusive democracy*: How to give access to people to meaningful participation on control over their resources is a major issue for 'protection and promotion of human rights' of poor people. The development is a choice and right of people, so no government can exercise the power of 'imposing development projects'. The development projects should not be 'luxury of decision making by the government'. The people should not be treated like silent or passive recipients of the 'development projects'. Development is a part of the process of 'progressive transformation' of the lives of citizens and hence, it should be institutionalized as a democratic process of governance. The politics is a matter of direct and immediate concern of the people and hence State as well as non-state actors should internalize the values in process of governance. Especially, the ILO Convention 169 that recognizes the 'autonomy of indigenous people in local resources should be a matter of key concern in any matters of development projects'.

b. *Paramount concerns on economic, social and cultural rights*: While Article 2 of ESCR refers to 'progressive realization of such rights, depending on availability of resources, the same should not be viewed as 'immunity to the government not to act or to blur the rights conferred upon by the covenant as unenforceable abstract values'. Most Asian countries have conventionally argued that 'the dearth of resources' is a major challenge to prompt and

[206] Of the world's 100 largest economies, 51 are now global corporations rather than countries. There are currently some 70,000 transnational firms, together with roughly 700,000 subsidiaries and millions of suppliers spanning every corner of the world. The global expansion of the market economy has resulted in an overwhelming intrusion of transnational corporate activity into the Asian region.

effective recognition of the 'ESCR'. However, the same seems to be a 'sheer lie' if considered from the pattern of 'expenditure distribution system'. The South Asians nations have been overwhelmingly influenced by the notion of perceived threat of security, and consequently, large part of the revenue is consumed by military affairs. Nepal, for instance, has no use of maintaining a 'huge military in view of its strategic situation between China and India'. It is conceivably illogical to argue that Nepal can protect its national security by building strength of 'military maneuverings and weapons'. It had a military force of 54000 persons until 1998. The Maoist insurgency hit the nation subsequently, and with a view to control the insurgency, the force was raised to 90,000. The military strategy, however, failed to address the conflict. The crisis was politically addressed in 2006. The government is, however, adamant to maintain the force with all '90,000'. The revenue of billions of rupees is, thus, spent on military for no reason at all. The revenue being used in building military strength and weapons, if diverted to social justice sector, could be largely adequate to address number of problems associated with basic needs of people. The major constraint in this regard is the 'conventional notion of state' which emphasizes the military character or security of the state as its prime function'.

c. *Control on increasing cost of statecraft*: In Nepal, for instance, the monthly cost of a minister is 1.6 million rupees (approximately 30,000 USD). The large part of this cost goes for ceremonial activities. A minster has a troop of over 20 police personal; the escort cars, personal security guards etc. These people are ceremonial rather than necessity. They are associated with 'feudal status' or dignity of being a 'big-person'. Nepal has a practice of using sophisticated imported cars (like Pajero and Prado from Japan) by political leaders, high-position government officials, police and military personnel and consultants. This is what they have learned from chief of international development agencies. Every year millions of rupees are spent for importing cars. The illegal benefit behind such transaction is a vested interest. Over one thousand Nepalese government officials have such cars, which thus steals the money that could otherwise go to women who are forced to die for absence of medical care or children who have no privilege to go to school or this revenue could go towards construction of school buildings or hospitals. The expenditure on ceremonial activities of the statecraft is a means of 'legitimizing corruption'.

d. *Diffusion of the centralization of administration*: The system of centralizing the administration is serious hurdle for empowerment of general to enjoyment of their rights. The local government in most South Asian countries is effectively controlled by the central government. The centralization of the tax and development planning system is the most serious constraint in 'empowering the people and eradication of poverty'. The centralization tendency is antagonistic to a 'democratic governance system'. It is equally responsible for failure of the government projects. The international and bilateral donor agencies are not out of this deficiency. Most projects of the World Bank in Nepal, for instance, follow the traditional centralized bureaucratic system. The promotion or enhancement of local autonomous governance system is an effective check against corruption as well as deficiency of the development projects.

e. *Increased expenditure on education and productivity enhancement*: Emphasis on education and human productivity enhancement should be taken as policy priority by Government as well as international and bilateral development agencies. The majority population of Asia, especially South Asia, is young. The average age of the South Asian population 20 years from now will be 29 years as compared to Chinese and Japanese population in same period as 34 and 43 respectively. The population would be a boon to the development of South Asia if the quality of education and human productivity are enhanced.

f. *Protection of natural resources from abusive utilization:* The lacking of policy and planning has largely resulted in destruction of natural resources. On the one hand, the transnational companies have been exploiting such resources excessively and at a marginal cost and on the other hand they are causing irreparable environmental destruction. *Dabar of India*, for instance, is using herbs of Nepal almost freely. The '*Yarshmabagumba'*, an organism, for instance, is harvested in the high hills is extorted from local people for few hundred rupees and refined and used in herbal products for medications to be sold at many times the price. Nepal's water resources are facing the same situation. The rivers have been captured by national or international companies for hydro-electricity projects and the local people are forced to incur loss of irrigation facilities and suffer from other environmental degradations.

XIII. CONCLUSION

The culture of elitism founded on notion of feudalism is abundant in developing South Asian nations. The lacking of the culture of popular accountability in the bureaucracy as well as in the political segment of the government is a serious challenge for meaningfully linking the development activities with human rights. The policies and style of running the governments in South Asia seems to be a vital cause of the prolongation of poverty in the South Asian societies. The feudal culture coupled by phenomenal problem of corruption should be attributed for continuation of the state of extreme poverty in the South Asian nations.

The notion of development projects as means of 'material luxury and comfort' given by government to people is phenomenal in the South Asian nations. The 'development projects' are in fact rights of people; they are not 'gifts' of government. The international aid agencies must put priority on eradicating this 'understanding' of development. The international agencies by avoiding being 'accomplices' to anti-human rights notion of development can widen the scope of human rights enforcement in South Asian countries.

Human rights is necessary not for 'luxury' of people; it is, indeed, a matter of 'human dignity'. No development project that underestimates or ignores human dignity can be accepted as a development activity. The core value of human rights is to 'promote freedoms of people against violence, want, exploitation, diseases and unnatural death. These ancient values nurtured by South Asia provide a 'solid' ground for enforcement of economic and social, and development rights that 'link development as an essential element of human rights observance'. This philosophically positive attribute of South Asia should be fully exploited by the international agencies. Their contribution would be significantly important, provided it goes towards helping people and to subject the bureaucracy and political segment of government in South Asia to democratic accountability. The primary concern of human rights in South Asia is to eradicate the poverty and relieve the vast majority of the population from going to bed without food, help children go to schools and protect women from death while giving birth to children. This is what can be called 'true face of human right'. No democracy, otherwise, will have meaning in a society where people have no means to survive. Democracy has meaning only for 'people' who are alive.

ESSAYS

AN ESSAY ON BELLAMY FOSTER'S IDEA OF FINANCIALIZATION: ASSESSING THE CREDIBILITY AND PROSPECTS IN FINANCIAL REGULATORY SYSTEM

Gazi Sangita Farzana[*]

Economic liberalization and technological advancement have brought the world closer than ever before. The lasting global imbalances, the recent subprime mortgage fallout, and the subsequent credit crunch in the United States (US) have rendered the global economic outlook more uncertain and precarious. The excessive domination of finance over the production has led the world economy to a volatile stage when it is thought of having a new financial structure. This essay discusses, in turn, Bellamy Foster's idea of financialization and different perspectives thereof. It also analyses the associated implications of financialization on financial regulation. In fine, it discusses the necessity to bring about a financial reform and change in the regulatory system to prevent the recurrence of 'boom and bust'.

I. INTRODUCTION

In the so-called 'Golden Age of Modern Capitalism' which lasted from about 1950 through the early 1970s, the appropriate role for the financial sector was thought to be as the 'servant' of the real sector rather than its pre-1930s role as its 'master'.[1] The positive role played by the financial system with a strong regulation was thought to have made a strong contribution to the best economic performance in US history in this era.[2] However, with the span of the time, an incessant demand for regulatory relief by increasingly political influential financial interests, and an erosion of belief in the efficacy of regulation by those charged with enforcing the rules, eventually led to its dismantling.[3] The new approach to regulation was based on the belief that free financial markets with only the lightest touch of regulatory restraint will produce optimal outcomes.[4] The credit market grew, the GDP was dominated by finance, the financial engineering with innovation of financial instruments "reached such heights that the regulators

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[1] Orhangazi O. (1977), *Financialization and the US Economy*, New Direction in Modern Economics, Edward Elgar Publishing Limited, p. xi.

[2] *Ibid.*

[3] *Ibid*, p. xii.

[4] *Ibid*, p. xii.

could no longer assess the risks"[5] and released from their regulatory chains, financial markets did what they always seem to do when left to themselves: they exploded in size and become more volatile.[6] This leads to the very fundamental question- what is the shift that has caused the major transformation in the world economy? The changing landscape has been characterized by the rise of 'neoliberalism', 'globalization' and 'financialization'.[7] The main objective of this essay is to analyze Bellamy Foster's ("Bellamy") idea of 'Financialization' and evaluate the credibility of this theory with reference to other scholastic view in this regard. In turn, it discusses the various aspects and nuances affiliated with 'financialization'. It further seeks to delve into the necessary implications of 'financialization' on the global financial system. One of the major ideas behind the 'financialization' is that it has an impact on de-stabilizing the production based economy and stimulating high-leverage financial capitalism. It encourages the financial corporations to invest more in speculative business rather than promoting small-scale business creating employment opportunities in the society. As a result of it, if any of the speculation goes wrong, the whole system falls apart which evidently demonstrates a flawed and shaky financial system based on false assumption. Regulatory relief, i.e. de-regulation further favours the financial and non-financial corporations to conduct their business in a reckless manner without assessing the risk. All this suggests that we are now facing the 'crisis of financialization'.

II. 'CRISIS OF FINANCIALIZATION': BELLAMY FOSTER

The phrase 'crisis of financialization' has been first used by Bellamy in his *The Financialization of Capital and the Crisis*.[8] According to Bellamy, the financial crisis 2007 is the phenomenon of a new phase in the development of "monopoly-finance capitalism".[9] He argued that "financialization of capital" is "the new financial alchemy of high-risk debt management" and is based on "huge speculative profits",[10] which has a major contribution in creating "bigger and bigger bubbles that burst more frequently and with more devastating effect threatening each

[5] Soros (2009: 318); quoted in McNicholas, P. and C. Windsor (2011), *Can the Financialised Atmosphere be Effectively Regulated and Accounted for?* Accounting, Auditing & Accountability Journal, Vol. 24 No. 8, p. 1081.

[6] *Supra* note 2.

[7] Epstein, G. (2005), *Financialization and the World Economy*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 1.

[8] Foster B. J. (April 2008), *The Financialization of Capital and the Crisis*, Monthly Review, Volume 59, Issue 11, p. 1; also available at http://monthlyreview.org/2008/04/01/the-financialization-of-capital-and-the-crisis, accessed 2 January 2014.

[9] *Ibid*, p. 1.

[10] *Ibid*, p. 1.

time a deepening a stagnation-i.e., the condition, endemic to mature capitalism, of slow growth, and rising excess capacity and unemployment/underemployment- is thus a development of major significance."[11]

Citing Sweezy, he further stated that "The financialization of the capital accumulation process" in US economy has been the main force lifting economic growth since the 1970s.[12] However, this financial unravelling coupled with weak regulatory system led to "two major financial bubbles"[13] in seven years in the citadel of capitalism which points to a "crisis of financialization or the progressive shift in gravity from production to finance that has characterized the economy over the last four decades."[14]

In an attempt to reinforce his argument, Bellamy delved into the five phases of the financial crisis 2007 and showed that the crisis is nothing but an event of a "more general crisis of financialization, beyond which lurks the specter of stagnation".[15] He saw another implication of financialization, which is debt-based financial system lifting the economy in one hand and leading to grow instability on the other.[16] Foster described that "US addiction to high consumption, high borrowing, and vanishing personal savings" have been "made possible by the infusion of capital from abroad, itself encouraged by the hegemony of dollar."[17] He further described that the process of financialization lessens the production growth which means that finance now dominates production.[18] The main three arguments of Foster in relation to "the crisis of financialization" are:

(i) Financialization has been evolved as a response to the stagnation of the underlying economy which helped to "offset the surplus productive capacity of modern industry".[19] It is argued that at the root of the financialization tendency was the underlying stagnation of the real economy.[20]

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[11] *Ibid*, p. 2.
[12] Sweezy P. (September 1997), *More (or Less) Globalization*, Monthly Review, Volume 49, Issue 4, p. 3.
[13] The dot-com bubble in 1999, the Stock bubble in 2000.
[14] *Supra* note 8.
[15] *Ibid*, p. 6.
[16] *Ibid*, p. 9.
[17] *Ibid*, p. 9.
[18] *Ibid*, p. 9.
[19] Magdoff H. and Sweezy P. (May 1983), *Production and Finance*, Monthly Review, Volume 35, Issue 1, pp. 11-12; cited in *Supra* note 3, at 9.
[20] *Ibid*, p. 10.

(ii) Another crisis of financialization as seen by Foster is that the economic growth is based on debt. It is in the nature of today's monopoly-finance capital that it "tends to become addicted to debt" more and more is needed just to keep the engine going."[21] Capitalism in its monopoly-finance capital has become increasingly reliant on the ballooning of the credit debt system in order to escape the worst aspect of stagnation.[22]

(iii) The shifting from production based growth to finance based growth is the major cause of the recurrence of financial crises.[23]

In order to escape from the 'boom and bust' economy and to attain stable financial markets, he has suggested of a 'new financial architecture that will stabilize the economy and protect wage labor.'[24] However, this new financial architecture is yet to be achieved in the sense that the 'financialization' of economy has created a spiral web where the major investing and other financial institutions are largely dependent on leveraged capital in running their business operation. Aside the advantage of the high-leverage in providing quick and timely investment, this is actually creating a never-ending debt circle in which case, if any of the components of the circle collapses, panic starts waving all around the web crashing the whole system altogether. The notion that the financialization gives rise to a leverage-based financial system and hence, is a reason behind the volatility of the financial system can be analyzed with a specific example of sub-prime mortgage crisis 2008 where the major investment and mortgage corporations like Lehman Brothers, Fannie Mae, AIG and as such were excessively leveraged and contributed significantly to create a financial bubble. However, Bellamy's idea on financialization calls for a comparative discussion from the other authors in order to find out the necessary features linked to this theory which will be discussed hereinafter.

III. FINANCIALIZATION AND THE ASSOCIATED NUANCES THEREOF

While many books have been written about neoliberalism and globalization, research on the phenomenon of financialization, is relatively new.[25] The concept has been used to designate

[21] *Supra* note 23, at 16.
[22] *Supra* note 23, at 14.
[23] *Supra* note 23, at 14.
[24] *Supra* note. 23, at 16.
[25] *Ibid.*

diverse phenomena, including the globalization of financial markets, the rise of financial investments and incomes derived from these investments, the rise of the 'shareholder value' movement and related changes in corporate governance theories and practices.[26] Even though there is no common agreement about the definition of the term and its significance, various writers have viewed financialization as a structural change in the post-1980 era which is characterized by 'the growth of financial enterprises, the rising involvement of nonfinancial enterprise in financial operations, the holding of large portfolios of shares and other securities by households, and so on'.[27] It also refers to the 'growing dominance of the financial economy over the real economy'[28] and indicates "a pattern of accumulation in which profits accrue primarily through financial channels rather than trade and commodity production."[29] It also means the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies.[30] It not only denotes a complete transformation of economic relations but also highlights a reorganization of financial markets themselves.[31]

The process of financialization and its phenomenon have been discussed by various authors in different times. Financialization has been seen as an expression of both neo-liberalism and globalization.[32] However, the financialization phenomenon can be analysed from three different perspectives.

- Financialization is the result of over-accumulation of capital which consists of two segments: an increase in material production followed by a crisis due to over-accumulation and a financial expansion.[33]

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[26] *Supra* note 2, at 3.

[27] Duménil G. and D. Lévy (2007), *Periodizing Capitalism. Technology, Institutions, and Relations of Production*, accessed 9 September 2007 at www.jourdan,ens.fr/levy.

[28] Wade, H. Robert (2005), *The March of Neoliberalism and What to Do about It*, draft paper for plenary talk at conference Beyond 'Deregulation': Finance in the 21st Century, University of Sussex, 26-28 May 2005; referred in *Supra* note 2, at 5.

[29] Krippner, G. (2005), *The Financialization of the American Economy*, Socio-Economic Review, Volume 3, Issue 2, p. 174.

[30] *Supra* note. 8, at 1; see also *Supra* note 2, at 6.

[31] Kessler O. and B. Wilhelm (2013), *Financialization and Three Utopias of Shadow Banking*, Competition and Change, Volume 17, No. 3, p. 249.

[32] *Supra* note 8, at 5.

[33] Arighiri, G. (1994), *The Long Twentieth Century: Money, Power, and the Origins of Our Time*, London: Verson; see also, Arighiri, G. (2005), *Hegemony Unravelling-2*, New Left Review, pp. 83-116.

- Financialization can also be seen as an integral part of the neoliberal economic structures,[34] which has been spread all over the world following the economic instability of the 1970s. The policies aimed to reduce the government intervention and regulation and all sorts of economic activities and leave an increasing portion of the economic activities to the 'free market'.[35]
- The financial globalization process, which intensified in the 1980s, has contributed to the financialization of the economy and created a necessary condition for an unprecedented development of institutional investors.[36] This idea of financialization shows the increasing engagement of NFCs in financial business.

IV. CRITICAL ANALYSIS OF BELLAMY'S THEORY: IMPLICATIONS OF FINANCIALIZATION

Upon a number of literature reviews regarding financialization and the empirical evidence of its influence in global economy, it seems the concept of 'financialization' is "associated with a rise in the share of national income accruing to the holders of financial assets and a concomitant decline in the share of labor, an increase in financial instability, slower growth and dimmer prospects for economic prosperity."[37] The idea that the "prolonged stagnation" is an outgrowth of financialization is also reinforced by Palley who sees three principal implications of financialization: it (i) elevates the significance of the financial sector relative to the real sector; (2) transfers income from the real sector to the financial sector; and (3) increases income inequality and contribute to wage stagnation."[38] He further adds that 'financialization may render the economy prone to risk of debt-deflation and prolonged recession'.[39] Following is a brief analysis as to the implications of 'financialization' in the global economy:

A. Stimulation of a Debt Based Economy: from large corporation to private individuals

[34] *Supra* note 2, at 49.
[35] *Ibid.*
[36] *Supra* note 1, at 42-44.
[37] *Supra* note 23, at 6.
[38] Palley, T. (2007), *Financialization: What it is and Why it Matters*, Working Paper Series No. 153, Political Economic Research Institute, University of Massachusetts Amherst.
[39] *Ibid.*

It is in the nature of today's monopoly-finance capital that it "tends to become addicted to debt: more and more is needed just to keep the engine going."[40] From large corporations to private individuals everyone is being encouraged to adopt a cult of debt finance.[41] The reason behind is that debt is used as a tactic to drain free cash flow out of firms, thereby putting pressure on workers and leaving less for other claimants on the firms' income stream; that debt financing increases leverage, thereby potentially raising the rate of return on equity capital.[42] This implication of financialization was evident from collapse of credit market in USA in 2008 which can be largely attributed to the tendency of taking high leverage by the companies without assessing the risk. Leverage can be called a 'double-edged sword' that is a powerful ally during boom times, but can quickly become the worst enemy during the bust. The collapse or bail out of some of the most highly regarded financial institutions was squarely due to leverage.[43] The most significant example in this regard is the collapse of Lehman Brothers. Lehman Brothers was the fourth largest investment bank in USA holding about $600 billion dollar asset around the world. Nonetheless, when it had filed the Bankruptcy petition in 2008, the bank was under some $619 billion debts which can be attributed to its reckless involvement in the speculative investment and excessive leverage with no protection for the company to absorb losses when the house-market began to decline.

B. Impact on wage earners: creating huge inequality in income

Another implication of financialization is that it has changed the framework dramatically, to the detriment of wage earners, first, and of the whole economic system eventually. Labor market deregulation has negative consequences on the purchasing power of wage earners, particularly so when this is associated with restrictive fiscal policies.[44]. On the one hand, workers accept lower wages, because they fear unemployment and the related lower compensation by social security. On the other hand, their productivity increases, as they fear of being dismissed, considering their reduced bargaining powers.[45] These structural changes moved wage earners from a creditor to a

[40] Magdoff H. and P. M. Sweezy (1988), *The Irreversible Crisis* , Monthly Review Press, New York, p. 49.
[41] *Supra* n. 38, p. 14
[42] *Ibid.*
[43] Mooji, R., M. Keen and M. Orihara (2013), *Taxation, Bank Leverage, and Financial Crises*, International Monetary Fund Working Paper No. WP/13/48, Fiscal Affairs Department, International Monetary Fund, p. 4.
[44] Rossi, S. (2011), *Can it Happen Again?,* International Journal of Political Economy, vol. 40, no. 2, p. 68
[45] *Ibid.*

debtor position with respect to banks and reciprocally for nonfinancial businesses.[46] The result was a rapidly inflating asset bubble in the early 2000s on real estate properties and financial (structured) products, which in the end burst and ravaged the global economy.[47] The distribution of ownership of financial wealth among households is now so concentrated, the average returns to financial wealth have been so high, and compensation for top executives has reached gargantuan levels, income and wealth inequality has skyrocketed everywhere.[48] Investors making money from money became the "masters of the universe" while ordinary people directly contributing to the benefit of society were squeezed by declining working conditions and increased living costs exacerbated by labour market deregulation and the dissipation of publicly provided services.[49]

C. Stagnation: Impacts on economic growth

In finance dominated regimes, corporations find it more profitable to lend their profits is financial markets rather than investing them in the production process.[50] The tendency to drive the monetary circuits by financial markets and motives, rather than by labour markets and productive investment lead to the stage of economic stagnation. 'Stagnation'[51] and 'Financialization' represented co-evolutionary phenomena caught in a "symbiotic embrace."[52] The dependence on financialization might benefit the owners of financial firms (and bonus recipients), but to the extent that it only transfers wealth, it does not benefit the broad economy."[53] One of the major aspects of financialization is that it in one hand, increases inequality in society and on the other hand, more and more surplus capital tended to accumulate actually and potentially within the giant firms and in the hands of wealthy investors, who were unable to find profitable investment outlets sufficient to absorb all investment-seeking

[46] *Ibid*, p. 69.
[47] *Ibid*.
[48] *Supra* note 1.
[49] McNicholas, P. and C. (2011), Windsor, *Can the financialised atmosphere be effectively regulated and accounted for?* Accounting, Auditing & Accountability Journal, Vol. 24 No. 8, pp. 1081.
[50] *Supra* note 44, at 70.
[51] The very notion of 'stagnation' does not refer to that the economy was not productive enough; rather it was too productive to absorb the entire investment-seeking surplus generated within production.
[52] Bellamy F. J. and R. C. McChesney, *How Monopoly-Finance Leads to Economic Stagnation*, October 2012, e-excerpt, available at http://www.utne.com/politics/monopoly-finance-capital-ze0z1210zgar.aspx#axzz2orRL75oa accessed 5 January 2014.
[53] Turbeville, W. *Financialization and a New Paradigm for Financial Markets*, Financial Pipeline Series, Demos, p.8.

surpluses.[54] The banks are more interested in investing in the house market or auto-mobile market rather than giving loan to an entrepreneur or a limited liability company. Therefore, there is no real economic growth and the economy became increasingly dependent on external stimuli such as higher government spending (particularly on the military), a rising sales effort, and financial expansion to maintain growth.[55]

D. Recurrence of financial bubble: boom and bust

Financialization is also integrally related to instability of the financial system because in its extreme case, the bubble created out of the process of financialization bursts rendering the whole economy volatile.[56] The dangerous feedback loop between stagnation and financial bubbles has been suggested by Foster and McChesney which reflects the fact that the stagnation and financialization are increasingly interdependent phenomena. It is reasonably evident from the fact that the U.S. in the last 100-plus years face four major 'boom and bust' of financial bubbles- the 1907 Panic, the Great Depression of 1930 and the Stock Bubble of 2000 and the Great Recession of 2008. However, the major implications of 'boom and bust' lies that the many think that there should be another 'bubble cycle' as the only way out to avert catastrophe and quickly restore growth to the economy. This seems to be a recurrent process where ultimate financial stability still remains a far cry.

E. Change in corporation's behavior: engagement in speculative business

One of the major impacts of financialization in the area of corporate governance is that it elicits the corporations to use debt to finance their activities owing to its tax advantages and the higher rates of return on equity that leverage allows.[57] This major shift in the change of corporate behavior has been illustrated by the 'agency theory' which denotes that "the firm exists for the benefit of shareholders who own the firm and who should exercise control so that the interests of management are beneficially aligned with those of the owner shareholders around the pursuit of profit."[58] Another aspect in the change in corporate behavior is its tendency to re-purchase stock,

[54] *Supra* note 52.
[55] *Ibid*.
[56] *Supra* note 53.
[57] *Supra* note 38, at 15.
[58] Froud, J., S. Johal and K. William (2002), *New Agendas for Auto Research: Financialization, Motoring, and Present Day Capitalism*, Competition and Change, Volume 6, Issue 1, p. 11.

which drives up the stock price and generates lower-taxed capital gains, rather than paying dividends that are highly taxed. [59]

F. Politics of financialization: Change in the economic policy

Financialization has greater implications in formulating the economic policy and shaping the trends of financial regulations. During the finance based capitalism, financial sector interests, supported by other business interests, have promoted a policy framework favoring their agenda.[60] By the removal of the checks and controls on most financial activities, finance became so powerful, not only in terms of the expansion of financial activities and markets, but also in terms of political influence, which in turn helped them to further liberalize and deregulate financial markets.[61] Another implication of financialization in changing the economy policy can be perceived during the financial crisis when no CEO has ever been prosecuted for their unregulated behavior.

Figure 1 below shows the interconnectedness of the impacts of financialization in the global economy stimulating a debt-based financial growth which in the long run creates economic stagnation, meaning the economy is no longer based on production. This stagnation paves the way of creating financial bubble through financial innovation and engagement in speculative business. The impact of this is the recurrence of financial crisis and long-term financial instability in the global system.

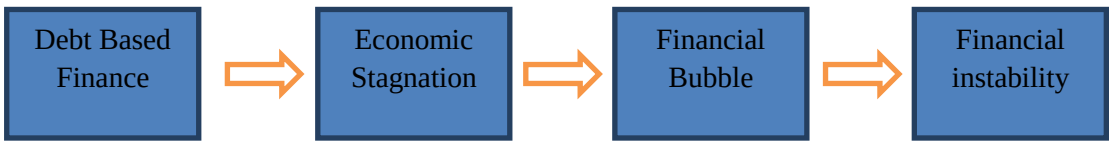

Figure 1: Interconnectedness of the implications of Financialization

V. COUNTERING FINANCIALIZATION: WHAT CAN BE DONE TO ACHIEVE A LONG-TERM FINANCIAL STABILITY?

Countering financialization calls for a multi-faceted agenda that (1) restores policy control over financial markets, (2) challenges the neo-liberal economic policy paradigm encouraged by

[59] *Supra* note 38, at 15.
[60] *Supra* note 38, at 17.
[61] *Supra* note 38, at 56.

financialization, (3) makes corporations responsive to interests of stakeholders other than just financial markets, and (4) reforms the political process so as to diminish the influence of corporations and wealthy elites.[62] The major question is that what can be done in order to achieve a long-term financial stability?

In 2010, the Steering Committee following the Crisis of 2008 presented a report concerning the financial reforms which contains, inter alia, imposition of restriction on high leverage; redefining the scope and boundaries of the prudent regulations; reforming the prudent structure of the regulations, including the role of the central bank and the implications of the "lender of last resort," as well as the "safety networks" and the need for greater coordination; improving the government's authority, risk management, regulatory policies, and accounting practices, as well as the standards; improving the transparency of the financial infrastructure agreements.[63] It is further proposed that we require a new 'international architecture', i.e. an international authority governed by the principles of "consolidated and integrated supervision, Management by Exception, and a hierarchical structure."[64] Another approach is to adopt macro and micro prudential system of regulations within the financial institution. Micro prudential regulation concerns itself with the stability of each individual institution.[65] In contrast, a macro-prudential approach to regulation considers the systemic implications of the collective behaviour of financial firms.[66]

In order to counter the impacts of financialization the behavioural factors of the corporations also have to be taken into account. A number of behavioral factors such as fraud and greed, predatory lending, and regulatory capture exacerbated has been called into question during the crisis of 2008. However, the disappointing part is that none of CEOs of Wall Street who were alleged to be involved in creating such a massive bubble was prosecuted for the negligence mismanagement and fraudulent behavior. Therefore, in order to avert the same scenario, it is

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[62] *Supra* note 38.

[63] Girón, A., *Crisis, Dollar and Shadow Financial System*, Journal Of Economic, Vol. XLVI, Issue No. 2, p. 516.

[64] Garicano L. and R. M. Lastra (2010), *Towards a New Architecture for Financial Stability: Seven Principles*, Journal of International Economic Law, Volume 13, Issue 3, pp. 597-621 (p. 614).

[65] Goodhart et al. (2009), *The Fundamental Principles of Financial Regulation*, Geneva Reports on the World Economy, International Centre for Monetary and Banking Studies, p. 7; available at http://www.princeton.edu/~markus/research/papers/Geneva11.pdf accessed 3 January 2014;

[66] *Ibid*; see also The Warwick Commission (2012), *Macro and Micro Prudential Financial Regulation*, The University of Warwick, p. 13; available at http://www2.warwick.ac.uk/research/warwickcommission/financialreform/report/chapter_2.pdf accessed 2 January 2014.

imperative that there should some regulatory measure to check the uncontrollable speculation and greed of the corporate managers.

VI. CONCLUSION

The discussion above illustrates that Bellamy's idea of 'crisis of financialization' creating the recurrence of volatility in the economic system due to financial liberalization and integration has been substantiated by other authors in this field and also with specific examples from the financial crisis of 2008. This new financial alchemy has formed a new business cycle with major implications like, economic growth has been tepid, median wages have stagnated, and income inequality and economic insecurity have both risen.[67] Moreover, there are concerns that the business cycle generated by financialization may be unstable and end in prolonged stagnation.[68] However, the reality is, it is not possible to restructure the whole economic system overnight which is based on a system of financialization so long. It is not even the system which carries with it the necessary evil. This requires that new financial structure is needed injecting more responsibilities and accountability to avoid the next 'boom and bust.' In this regard, the role of the international financial institutions has always been called into question. Financialization under the auspices of the International Monetary Fund has forced many countries to liberalize and open their financial sector to foreign capital, striving for a liberalized, market-based financial system.[69] However, the failure of the private or public institutions due to reckless borrowing in countries like Iceland, Greece and Mexico led not only to ruin the whole economy but also created a big vacuum which needed to be refinanced by debt (bail-out) mostly from the international institutions. This bailing out always comes along with the austerity measures where the indebted countries are asked to cut their public expenditure mostly in welfare sector, shut-down business or raise tax-payment. Thus, the rescue measures not only accumulates the level of debt in the whole financial system, but also decreases the standard of peoples' lives and restricts their right to access to welfare services. This is a big concern in today's global financial system as the impacts of financialization are threatening the stability of the global economy.

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[67] *Supra* note 38, at 22.

[68] *Ibid.*

[69] Ling, Y. (2010) *Interdependency, Decoupling and dependency: Asian Economic Development in the Age of Global Financialization*, International Journal of Political Economy, vol. 39, no. 1, p. 44-45

EMERGING TRENDS IN THE INDIAN COMPETITION LAW

Bharat Budholia[1]

The author via his scholarship seeks to enunciate upon the competition law regime in India and the roles and powers inherent within the Competition Commission of India. He explains how the CCI from its inception in 2002 has made massive strides and has now become a competent and efficient body. He lists out the powers of the CCI with a special emphasis on its powers regarding regulating mergers and its power to place huge penalties on violators. He also lists the latest occurrences in the competition law regime in India; especially the Competition Bill, 2012.

I. INTRODUCTION

Indian Competition law is governed by the Competition Act of 2002 ("Competition Act") and various regulations formed thereunder and is regulated by the Competition Commission of India **(**CCI**)** which is the nodal agency established under the Competition Act. Whilst the Competition Act was enacted in the year 2002, the substantive provisions of the Competition Act were notified much later. The provisions relating to anti-competitive agreements and abuse of dominance became effective from 20 May 2009 and the provisions relating to merger control came into force on 1 June 2011 after a long wait of almost 9 years.

II. IMPORTANT ASPECTS OF THE COMPETITION ACT

The Competition Act deals with three major areas:

(a) *Anti-competitive agreements*: The Competition Act prohibits agreements which are anti-competitive in nature. An agreement is considered to be anti-competitive if it has the potential to result in an appreciable adverse effect on competition ("AAEC") in India. For example, price-fixing, market sharing, output restriction, cartels;

(b) *Abuse of dominant position*: Secondly, the Competition Act prohibits a dominant enterprise from abusing its dominant position in the market. For example, predatory pricing, excessive pricing, unfair conditions in sale, tying, leveraging, denial of market access, limiting

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production; and

(c) *Combinations*: Thirdly, Sections 5 and 6 of the Competition Act are the operative provisions that deal with merger control or the regulation of combinations in India. Section 5 prescribes worldwide and Indian turnover and assets thresholds for transactions involving the acquisition of an "enterprise" or mergers and amalgamations of an enterprise that will be subject to merger control (i.e., require prior approval of the CCI) ("Combinations[2]"). Section 6 prohibits combinations which causes or are likely to cause an AAEC within the relevant market in India and treats such combinations as void. In addition to the provisions under Section 5 and 5 of the Competition Act, the CCI has notified the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011* ("Combination Regulations") which provide the procedure for filing the merger notification.

A. Penalties

The Competition Act provides for the highest economic penalties in India. Under Section 27 of the Competition Act, the CCI has the power to order the following in case of breach of Sections 3 or Section 4: to impose a penalty up to 10% of the average of the turnover for the last 3 preceding financial years, upon each contravening party.

Further, in case of cartels, the CCI is empowered to impose a penalty of up to 3 times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding 3 financial years, whichever is higher.

In addition to the penalties, the Competition Act empowers the CCI to pass *cease and desist* orders. In case of abuse of dominance, the CCI has the power to order the division of an enterprise enjoying a dominant position, in a manner that ensures that the enterprise is no longer able to abuse its dominant position.[3]

In case of a contravention by a company, every person in charge and responsible for the company at the time of contravention as well as the company will be liable to be proceeded

[2] Any acquisition of shares, voting rights, assets, or control of one enterprise over another or the merger or amalgamation of two or more enterprises, exceeding the jurisdictional thresholds prescribed under Section 5 of the Competition Act.
Act, is referred to as a "Combination."

[3] So far, the CCI has only imposed fines and cease and desist orders against enterprises found to be abusing their dominance.

against and punished. Further, the directors, managers, secretaries or other officers of the company, with whose consent or connivance or due to whose negligence the contravention was caused, would also be liable to be proceeded against and punished under Section 48 of the Competition Act.

It should be noted that the Competition Act provides for the filing of claims for compensation to the Competition Appellate Tribunal ("COMPAT"), the appellate authority established under the Competition Act. Further, in the case of abuse of dominance, officers of a company are precluded from filing compensation claims in relation to any loss or damage arising from the CCI's orders in relation to the division of a dominant enterprise. It is relevant to note that the COMPAT has not passed any order in relation to claims for compensation thus far.

The CCI hasn't shied away from levying huge penalties on errant parties and has in numerous cases levied penalties that were generous to say the least. In *Builders Association of India* v. *Cement Manufacturers' Association & Ors.*[4] (Cement Cartel case), the CCI imposed a penalty of INR 6317.32 crores. In the recently passed *Coal India case*, the CCI has imposed a penalty of INR 1773. 05 crores on Coal India for abuse of its dominant position. In *Belaire Owners' Association* v. *DLF Limited, HUDA & Ors.*[5]*, the CCI imposed a penalty of INR 630 crores on DLF for abuse of its dominant position.* As such, the CCI has imposed penalty in more than a dozen cases to date.

B. Extra-territorial application of the Competition Act:

Under Section 32, the CCI has the power to inquire into any agreements executed outside India or agreements executed amongst foreign parties that may have an AAEC in the relevant market in India.

III. TRENDS IN INDIAN COMPETITION LAW

Despite being a new regulator on the block, the CCI has proved itself in a short span of five years to be a proactive, forceful and a sincere regulator conducting *suo motu* investigations across varied sectors, including gas supply, aviation, banking, power and essential commodities etc. The CCI have also passed several orders relating to various important issues such as burden

[4] Case no. 29/2010.
[5] Case no. 19/2010.

of proof, standard of proof[6], single economic enterprise[7], establishment of an agreement in the case of cartels[8] and bid-rigging[9] as well as the delineation of the relevant market in abuse of dominance cases.[10] However, there are several open ended issues where there is no jurisprudence or guidelines provided by the CCI.

In relation to merger control, the CCI has passed more than 140 orders (including both Form I and Form II merger notifications) to date, having examined a wide variety of sectors, including aviation, automobile, steel, manufacturing, loyalty programs, information technology, media and communication, real estate, retail, pharmaceuticals, etc. Given that the Competition Act provides a maximum time period of 210 days to the CCI, the notification of the merger control provisions met with a stiff resistance from the industry which treated this as another impediment to the M&A process. Nevertheless, the CCI has thus far cleared all the Combinations within Phase I[11]. However, the CCI's timely review of the merger filings have quelled the apprehensions of the business community that notification of transactions with the CCI could lead to tremendous delay in completing transactions.

A. Establishing existence of an agreement: Direct v. Circumstantial Evidence

In the alleged *Cement Cartel Case*, the CCI found that in absence of direct evidence, circumstantial evidence alone can be relied upon. The CCI found a trend of increases in cement prices, especially increases after two meetings of the Cement Manufacturers' Association (CMA) and steady reduction in production capacity, which did not match with the capacity utilization patterns for previous years. This was sufficient evidence to indicate a violation of Section 3(3) of the Competition Act[12]. Further, the opportunity to discuss and determine prices through the

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[6] *Builders Association of India* v. *Cement Manufacturers' Association and Others*, Case no. 29/2010 and *All India Tyre Dealers Federation* v. *Tyre Manufacturers*, MRTP Case RTPE No.20/200

[7] *Exclusive Motors Private Limited* v. *Automobili Lamborghini S.P.A.*, Case no 52/2010.

[8] *In Re: Sugar Mills*, Case no. 1/2010, *Builders Association of India* v. *Cement Manufacturers' Association and Others*, Case no. 29/2010 and *All India Tyre Dealers Federation* v. *Tyre Manufacturers*, MRTP Case RTPE No.20/2008.

[9] *In Re: Aluminium Phosphide Tablets Manufacturers*, Case no. 2/2011 and *In Re: LPG Cylinder Manufacturers*, Case no. 3/2011.

[10] *MCX Stock Exchange Limited* v. *National Stock Exchange of India Limited*, Case no. 13/2009 and *Belaire Owners Association* v. *DLF Limited*, Case no. 19/2010.

[11] Under the Combination Regulations, the CCI is required to provide its prima facie order within 30 days of filing of the merger notification.

[12] 3. Anti- competitive agreements.-

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of

platform of the CMA, which was already engaged in collecting retail and wholesale prices for benchmarking purposes, along with the above facts, was held to be sufficient evidence. Parallel behaviour in prices, supply, dispatches, and production can be considered as an indication of the co-ordinated behaviour among the companies, relying on evidence from other jurisdictions to substantiate its arguments. As such the CCI observed that the anti-competitive conspiracies (especially cartels) are often hatched in secrecy and the companies engaged in such anti-competitive activities are not likely to leave any direct evidence of the same. The CCI held that in absence of any direct evidence of agreement among the conspirators, circumstantial evidence can be taken into consideration.

B. Competition Bill, 2012

Given that the Competition Act have certain ambiguities, the Ministry of Corporate Affairs introduced certain legislative amendments in 2013 by way of the Competition Amendment Bill, 2012 ("Bill"). However, the bill was not passed by both the houses of the Parliament and the Bill is still pending before the Parliament of India. While some of the proposed amendments are merely clarificatory, the Bill, if passed, could result in the CCI having stronger investigation powers and wider jurisdiction.

1. Proposed amendment to "Search and Seizure" norms

The CCI's extensive powers of investigation include the power to conduct "dawn raids" i.e. carry out unannounced inspections to search for relevant evidence. However, the CCI has not used the tool of dawn raids partly because it currently lacks the authority to order the Director

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enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub- section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of se vices. Explanation.- For the purposes of this sub- section," bid rigging" means any agreement, between enterprises or persons referred to in sub- section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

General ("DG") to investigate without a warrant from the Chief Metropolitan Magistrate, New Delhi ("CMM").

By way of an amendment to Section 41, the Bill proposes to permit search and seizure powers (including dawn raids) to the DG, after obtaining proper authorization from the Chairperson of the CCI instead of the CMM, thereby making it easier for the DG to conduct dawn raids as well as improving the quality of investigations. The amendment also empowers the DG to record statements of persons having knowledge of such information or documents, that it thinks are being withheld or are likely to be destroyed.

This move will help the CCI to use dawn raids as an important instrument to strengthen its investigation process across a variety of sectors and industries. This will also enable the CCI to collect vital direct or indirect evidence regarding alleged anti-competitive activities.

2. Collective Dominance

At present, the Competition Act prohibits abuse of dominance by an enterprise or a group[13]. However the abuse of dominance provisions does not apply to a situation where two or more groups which are not part of the same group abuse their "collective" dominance. Given the loophole, the Government has decided to introduce the concept of "collective dominance" in Section 4 of the Competition Act. This will allow the CCI to investigate cases where two unrelated enterprises which are not part of the same group (as defined under the Competition Act) are alleged to have abused their joint market power.

3. Different thresholds for merger control relating to different sectors

Currently, the asset and turnover thresholds prescribed in the Competition Act apply uniformly to all enterprises across all sectors. However, the Bill seeks to insert an enabling provision under the Competition Act allowing the Central Government to provide sector specific thresholds. While the intention of the legislature seems to be to provide variable and possibly lower asset and turnover thresholds for certain sectors (given that present asset and turnover levels are arguably high), any such variation may result in complicating the merger control rules

[13] The term "group" has been defined under the Competition Act to means *two or more enterprises which, directly or indirectly, are in a position to —*
(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise.

and create confusion in cases where the parties to the combination are engaged in several businesses in varied sectors.

C. Leniency Regulations

The CCI has issued the *Competition Commission of India (Lesser Penalty) Regulations, 2009* (the "Lesser Penalty Regulations") prescribing the method and extent to which the CCI may grant leniency (lesser penalties) to applicants that make any "vital disclosure" relating to a cartel. The reduction in penalties that may be awarded by the CCI depends on when the disclosure is made.

First applicant – up to 100% reduction of penalty;

Second applicant – up to 50% reduction of penalty, if they make a disclosure of evidence that provides significant added value to the evidence already in possession of the CCI or the DG;

Third applicant - up to 30% of the full penalty leviable, only if the information is a vital disclosure, which enables the CCI to form a *prima facie* opinion in relation to the existence of a cartel, and the CCI did not have sufficient evidence to form such opinion, at the time of making the application.

Whilst the leniency program has been in place since 2009, it has not been utilized. However, there has been several news report which indicate that at least one leniency applications have been filed before the CCI and the matter is currently pending before the CCI.[14]

D. Definition of "control" - from merger control perspective

The term "control" has been defined under the Competition Act to include controlling the affairs or management of one or more enterprises or group, either jointly or singly. Given that this definition of control is a circular definition it leaves scope for confusion and ambiguity. However in *MSM India/SPE Holdings/SPE Mauritius*[15], the CCI has effectively concluded that the right to block special resolutions (by way of a more than 26% equity stake) amounts to 'negative control', which is 'control' for the purposes of the Competition Act. Thus, at least for the purposes of the merger control provisions under the Competition Act, negative control would amount to control. However, the CCI may take a different view on what amount to control

[14] http://articles.economictimes.indiatimes.com/2014-02-27/news/47739680_1_alleged-cartel-competition-commission-regulator

[15] C-2012/06/63

depending on the facts of the case.

IV. CONCLUSION

The Competition Act is an important piece of legislation which regulates and governs many aspects of the day-to-day working of any business. Non-Compliance of the Competition Act may lead to serious damage to reputation and expose the company to stringent penalties and claim for damages. The CCI has proved to be an effective regulator in a short span of time. By imposing heavy penalties on various enterprises, the CCI has given a clear signal to the industry that it will not take the violation of the Competition Act lightly. In relation to merger control, it is expected that the CCI is likely to bring greater clarity and certainty in the law by making appropriate changes in the merger control provisions under the Competition Act as well as the Combination Regulations.

NOTES

TWAIL PARADOX

John Dixon Haskel[*]

The author via his scholarship tries to firstly, map Third World Approaches to International Law (TWAIL), elaborating on it genesis and the causes for its development, post which he tries to show the dichotomy existent within the system, i.e. its Eurocentricism; the very paradox it set out to escape.

I. INTRODUCTION: A PARADOX

A curious paradox animates Third World Approaches to International Law scholarship (TWAIL). On the one hand, the literature demonstrates that international law developed out of and perpetuates the colonial experience. International law, writes Makau Mutua, "is a predatory system that legitimizes, reproduces, and sustains the plunder and subordination of the Third World by the West."[1] On the other hand, however, its authors claim international law to be a source of future emancipation. "Rather than replacement," explain Eslava and Pahuja, "TWAIL scholarship is more interested in overcoming international law's problems, while still remaining committed to the idea of an international normative regime largely based in existing institutional structures."[2] In this brief essay, I wish to first map out TWAIL's predominant critiques against international law, and second, to highlight some blind spots within TWAIL literature. My

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[1] Makau Mutua, *What is TWAIL?*, 94 American Society of International Law Proceedings *31* (2000).

[2] Luis Eslava and Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45(2) Journal of Law and Politics in Africa, Asia and Latin America 206 (2012).

argument is that while TWAIL offers important corrections to mainstream international legal theory, it ultimately reinforces the Eurocentric liberal tradition it sets out to escape.

II. MAPPING TWAIL

At the most general level, TWAIL literature follows two interrelated critiques concerning the formal distinctions established by liberal theories of international law: the first concerning law and politics, the second related to economics and politics. In regards to the law/politics distinction, TWAIL scholars argue that formal sovereign equality alienates subaltern populations from participation in domestic or global governance. Likewise, scholars claim that the economics/politics distinction also disenfranchises former colonized populations from meaningful control over the distributional effects of exchange and production. Through historic and contemporary analysis of these two modes of alienation, TWAIL scholarship constructs methodological and normative alternatives meant to transcend the colonial inequalities structured within the discipline. In this section, I briefly map out the predominant critiques and reforms advanced through TWAIL scholarship.

The mainstream narration of international law claims that the discipline grew out of the question concerning how to maintain stability between formally equal sovereign states.[3] Though acknowledging that the international legal system only pertained to the 'family of nations' in Europe, its expansion in terms of geographical reach (e.g., decolonization) and range of actors (e.g., corporations, individuals, non-governmental organizations), as well as its prioritization of humanitarian and other 'non-political' objectives (e.g., environment), is posited to be indication that international law has transitioned from being the handmaiden of empire to serve the progressive interests of the international community at large.[4] Distinct from powerful political agendas and pluralistic in orientation, the international rule of law thereby offers an egalitarian, universal structure of governance for all people and countries alike.

TWAIL scholars contest the formal distinction between politics and law that undergirds this liberal cosmopolitan description of international law. First, drawing upon the 20th century jurisprudence of Critical Legal Studies and New Approaches to International Law, the literature

[3] *See* Antony Anghie, *The Evolution of International Law: colonial and postcolonial realities*, 27(5) Third World Quarterly 740 (2006).

[4] For a provocative description of how this argumentative logic operates in mainstream international law, *see* Nathaniel Berman, *In the Wake of Empire*, 14 *American University International Law Review 1515 (1999).*

argues that legal norms are fundamentally indeterminate, and thereby inescapably bound to political biases. From any "relatively specific statements of social goals can be elaborated an infinite series of normative propositions", which in turn requires subjective, interpretative choices to be selected concerning what specific regime of law to apply to a given set of dynamics (e.g., international economic law versus national security interests, international trade law versus human rights law) and what specific doctrine or remedy to privilege in balancing various interests (e.g., domestic labor sectors versus foreign direct investment).[5] To claim international law is somehow 'outside' arbitrary, distributional choices only suppresses its deeply political character.[6] This de-politicization of international law is especially troubling in light of the unequal political and economic relationships that currently exist between 'first' and 'third' world states, because in the 'free competition' of legal interpretation, the more powerful party tends to prevail – as Marx once explained, 'between equal rights, force decides'.[7]

Second, on a more subtle level, TWAIL scholarship argues that the actual conceptual vocabulary and background sensibilities that structure progressive international law are embedded in European prejudices concerning the legitimate organization of culture and politics. On the one hand, scholars emphasize the colonial legacy attached to the fact that the administrative centralized state is held out to be the sole political mechanism to full international legal personality.[8] This mode of governance arose specifically in the context of Western Europe, but was often foreign to former colonialized populations who historically and sometimes continue to favor alternative political forms of organization (e.g., clan, intergenerational, kinship, tribal). The insistence that newly formed postcolonial states adopt the territorial boundaries drawn up by colonial administrations (e.g., *uti possidetis juris*) therein frustrates the possibility of authentic, legitimate foundations for these states because the national populations often lack a

[5] *See* Harold Dwight Lasswell, LEGAL EDUCATION AND PUBLIC POLICY 31 (2012).

[6] This theme has been rigorously developed by scholars in the Critical Legal Studies tradition. *See e.g.*, David Kennedy, *New Stream of International Legal Argument*, 7(1) Wisconsin International Law Journal 1 (1988); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Studies Forum 327 (1991); Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

[7] For the perhaps most thorough Marxist analysis of international law, *see* China Mi*é*ville, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW (2004); *see also* Bill Bowring, LAW, RIGHTS AND IDEOLOGY IN RUSSIA: LANDMARKS IN THE DESTINY OF A GREAT POWER (2013); Akbar Rasulov, *The Nameless Rapture of the Struggle*, 19 Finnish Yearbook of International Law 243 (2008). For a useful explanation of Mi*é*ville's argument, *see* Rob Knox, *Marxism, International Law and Political Strategy*, 22(3) Leiden Journal of International Law 412 (2009).

[8] *See* Vasuki Nesiah, *Placing International Law: White Spaces on a Map*, 16 Leiden Journal of International Law 18 (2003).

common heritage and in fact maintain pre-colonial alliances and tensions, which manifest themselves in violent outbreaks and require non-democratic suppression because they continue to be unrecognized in the statist model of international law.[9] Moreover, the preoccupation with the state model (and to a lesser extent, international institutions) privileges financial and political elites (e.g., transnational corporations, local co-opted leadership) that have easy access and technical knowledge to navigate official bureaucratic channels, all at the expense of mass social movements and traditionally marginalized identities (e.g., environmentalist coalitions, gender struggles, peasant movements).[10] On the other hand, the growing proliferation of humanitarian aid, human rights law, and focus on 'third world' poverty indirectly reproduces the imaginative and real inequality of European and non-European populations. Since international law denies its historic and ongoing complicity, responsibility for the problems that haunt former colonized states is attributed solely to the 'backwardness' and 'corruption' of local populations and their political leaders.[11] As such, the category of 'third world' becomes the repository for a set of images – "of poverty, squalor, corruption, violent calamities and disasters, irrational local fundamentalisms, bad smell, garbage, filth, technological backwardness or simply lack of modernity" – that demands Western international institutions to step in as their managers or saviors to lift foreign people from their economic, moral and political depravity.[12] When these efforts are disappointed, their failure is again located with the 'third world', which leads to competing feelings of cynical exhaustion and renewed paternalism by traditional power centers that are in turn reflected in new waves of international legal debate and policies that exclude those most affected.

In a related set of critiques, TWAIL scholars cast suspicion on the formal splitting of economic and political regimes within global governance. First, by founding 'economic' principles (e.g., non-preferential trading, qualitative easing, private property rights, investment arbitration dispute resolution) on the conceptual basis of a non-political market of free state

[9] *See* Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Michigan Journal of International Law 1118, 1135, 1144 (1994-1995).

[10] *See* B.S. Chimni, *Third World Approaches to International Law: A Manifesto,* 8 International Community Law Review 18 (2006); *see also* Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 Columbia Journal of Transnational Law 401-405 (2003).

[11] *See* Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42(1) Harvard International Law Journal 201-209 (2001).

[12] *See* Keith Aoki, *Space Invaders: Critical Geography, the 'Third World' in International Law and Critical Race Theory*, 45 Villanova Law Review 925 (2000).

personalities following their individual interests on a 'level-playing field', international law distorts the fact that most 'developed' countries implemented rigorous protectionist measures for domestic industry, and perhaps more importantly, hides the reality that former colonized states do not interact on equal terms in commodity exchange and production with a range of foreign actors, such as developed countries, financial investors and transnational corporations.[13] "The distinction between public and private as a way of conceptualizing resolving the problems associated with economic reform is unsatisfactory," Gathii writes, since it "tells us nothing about the substantive questions, which are the scope, type and structure of private interests and power which should be configured … [and the] redistribution of power among different social groups that the state is prepared to back."[14] Second, the de-politicization of the market not only masks the new face of colonial inequality, but results in the 'naturalization' of the architecture and principles of the international economic system whereby any attempt by subaltern states to alter the terms and conditions of the market are seen as unduly 'political' interventions, or at best, political appeals to the charity of Western-based institutions. Just as the narrowing of political possibilities to the statist model castrates former colonized populations to adopt their own traditional or innovative modes of political governance, the naturalization of the economy results in a unitary model of development that imposes constraints on subaltern states to experiment with alternative principles of distribution and production or to contest European consumer society as the objective place-mark of economic progress.[15] The postcolonial order "may in principle no longer have been serving political colonization," explains Bedjaoui, but "it did not cease for all that to be a means of economic domination and an excuse for it. In actual fact, it modified only the form, not the substance of domination."[16] In other words, rather than the liberal view that held the grant of statehood to 'third world' populations and full entrance into market relations to demonstrate the move within the discipline towards a more tolerant and universal global order, TWAIL scholars emphasize that the requirement of independence be

[13] *See* Chimni, *supra* note 11, at 14.

[14] James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 Michigan Law Review 2025 (1999-2000) (quoting Kerry Rittich).

[15] *Id.* at 2012-2013; *see also* Sundhya Pahuja, DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERALITY 86, 96, 134 (2011).

[16] Mohammed Bediaoui, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 59-60 (1979). For a discussion of arguments by 'third world' scholars and policy makers in the decolonization era, *see* Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16(2) Wisconsin International Law Journal 353 (1998).

modeled on social and territorial configurations set during the colonial era coupled with the subjection of these states to market conventions that depicted newly independent and industrialized Western countries to possess 'equal bargaining positions' was merely the transition within the international legal order from a 'formal' to 'informal' mode of imperialism.[17]

The central critique in TWAIL literature is that contrary to liberal claims about the inclusive, progressive nature of the discipline in the wake of decolonization and the end of the Cold War, international law in fact developed and perpetuates European oriented imperialism across economic, political and social terrains. Beneath the philosophical debates and formal doctrines of law is the silent hegemonic struggle of cultures.[18] The paradox in this argumentative logic, however, is that TWAIL scholars also hold that international law contains a fundamentally emancipatory potential whereby its colonial predispositions may be reformed on behalf of subaltern interests. "The point is not to condemn the ideals of [international law] as being inherently imperial constructs," explains Antony Anghie, "but rather to question how it is that these ideals have become used as a means of furthering imperialism and why it is that international law and institutions seem so often to fail to make these ideals a reality … and in doing so, power us to make, rather than simply replicate, history."[19] The critical impulse, in other words, is not to do away with the institutions and vocabulary of the liberal cosmopolitan project that is claimed to animate international law, but rather to make good on its democratic, universal promise.

To do so, the literature calls for a reprioritization of the method and subject-matter of international law. On the one hand, the discipline must internalize that all truths are "local… contextual, cultural, historical and time bound", and can never be in a practical sense truly universal in scope.[20] Since truth is always located in a cultural context and has tended to be captured by elite interest groups, international legal analysis must therefore transition away from the traditional doctrinal preoccupation with states and international institutions to embrace a more "legal-ethnographic method" that incorporates "social movements" and "engage[s] with the

[17] *See* James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54(4) Buffalo Law Review 1019 (2007).

[18] *See* Anghie, *supra* note 4, at 740-741.

[19] *See* Antony Anghie, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 320 (2007).

[20] *See* Makau Mutua, *The Complexity of Universalism in Human Rights*, in Andras Saja (ed.), HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51 (2004).

everyday complexities of law facing ordinary people".[21] On the other hand, this 'cultural turn' does not mean that international law should reject its universal aspirations because this would simply re-instigate hegemonic struggles. Balancing the local and universal claims to truth, TWAIL scholars advocate a "quasi-transcendental" normative commitment whereby international law simultaneously seeks shared meaning (e.g., universalism) and maintains a critical awareness of the inherently particular foundations to any universalizing claim.[22] As such, international legal reform would be required to more fully seek to open its doctrines and practices to previously marginalized subaltern forms of economic, legal and political governance – whether recognizing new socio-political organizations (e.g., clans, tribes), or incorporating alternative economic conceptions regarding the use and distribution of property (e.g., communal), or acknowledging innovative legal techniques that address the unequal bargaining position between 'first' and 'third' world states (e.g., non-reciprocal terms of trade). The liberal international rule of law can only be achieved, in other words, through the embrace of a cultural 'particularism' and a robust 'universalism'.

III. CRITIQUING TWAIL

It is difficult not to be sympathetic to the historical and theoretical insights within TWAIL literature: the emphasis on the colonial encounter as an important dynamic in the development of contemporary international law, the resurrection of subaltern scholars in the wake of post-colonialism (e.g., dependency theory), as well as the transmission of insights from Critical Legal Studies (CLS) and New Approaches to International Law (NAIL) concerning the indeterminacy of law and the postmodernist prioritization of marginalized identities and peripheral social movements over traditional locations of power (e.g., states, international institutions). Moreover, the regulative challenge to the liberal cosmopolitan pretensions of international law whereby TWAIL scholars attempt to reclaim the promises and techniques of the system itself to hold it accountable seem both pragmatic and progressive in their orientation. My argument here, therefore, is not that TWAIL does not offer valuable proposals, or at least intellectual space to make interventions into international legal scholarship, but rather that its argumentative logic and

[21] *See* Luis Eslava and Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) Trade, Law and Development 126 (2011).
[22] *Id.* at 120-122.

theoretical concerns ultimately betray its foundational critique about the imperialist character of international law, and thereby restore the very conditions the literature set out to transcend.[23]

My first concern is that whatever its commitment to advocating on behalf of subaltern interests, TWAIL perspectives look strikingly Eurocentric. Perhaps a banal point, but the intellectual community in the European tradition (of which, in many respects, TWAIL literature participates in) has expressed a long-standing fascination with the image of non-European ideas and populations as a source for institutional renewal.[24] A significant motif in Orientalist thought is to identify whatever is 'non-Western' as somehow more authentic, closer to nature, more communal and holistic. These sentiments often find their way uncritically into TWAIL scholarship, either in calls for international law to reinstate "pre-colonial identities" or in characterizing 'third world' ways of life in ways that look remarkably similar to romanticized memories of ancestral European communities before the advent of capitalism (e.g., communal over individual values, respect for intergeneration familial ties, authentic relations to the land).[25]

Moreover, the majority of reforms to human rights and international economic law proposed by TWAIL scholars do not look all that different from their liberal European peers. On the one hand, economic inequalities are met with calls to a more 'gradualist' approach to the 'timing' and 'extent' of trade liberalization, international economic law is recommended to become more open to democratically led developmental experimentation and a more nuanced accounting of the social costs involved in production and commodity exchange, and international institutions are called upon to shore up regulation on excesses of financial speculation to promote abstract liberal principles such as 'accountability' and 'transparency'.[26] On the other hand, in relation to human

[23] For a brief discussion of how the argument collapses upon itself as 'restoration anxiety', *see* John D. Haskell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible*, 13(5) German Law Journal 472-481 (2012).

[24] *See* Michel Foucault, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976 194 (English ed., 2003). For a discussion about how the 'masses' were formulated as the source of inspiration to renew and legitimacy to regulate for the discipline in the context of the post-World War 1 era, *see* Nathaniel Berman, *But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 Harvard Law Review 1792 (1993). The focus on European populations in the development of international legal institutions and doctrines to structure inequalities, though not addressed by Berman, seems to suggest that the colonial encounter emphasized within historical studies of TWAIL was itself part of a broader system of distribution and production.

[25] *See e.g.*, Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 Oregon Review of International Law 131 (2012).

[26] *See e.g.*, B.S. Chimni, *Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations*, in Chantal Thomas and Joel Trachtman (eds.), DEVELOPING COUNTRIES IN THE WTO SYSTEM 24-43 (2009). For a discussion of the false distinction between post-Keynesian economic 'gradualists', such as Joseph Stiglitz, and neo-liberal 'shock therapists', such as Jeffrey Sachs,

rights law, TWAIL scholars challenge the international legal order to liberalize its notions of the 'human' to account for alternative conceptions of legitimate social relations and personal meaning, yet do not provide anything that might smack of being unconventional to yoru average upper-West side New York progressive intellectual. For instance, addressing the phenomena of female genital mutilation, Mutua proposes a more culturally integrated approach that moves past condemnation at first blush to seek to understand the cultural nuances that lead to the practice and, through cultural exchange, to develop a minimum standard of agreement that can begin to mitigate its occurrence.[27] Whether in terms of economic or human rights reform, the core logic of the international legal order is never questioned as part of the problem: Chimni assumes capitalist-oriented development and economic integration is a good thing, Mutua does not contemplate why certain occurrences are the focal point of human rights or if there are more fundamental problems with ideas like 'human' and 'rights' in the first place.

In fact, though the dual advocacy of an anthropological or cultural turn in international law and more egalitarian terms to guide economic integration is not without merit, TWAIL scholars tend to overestimate its innovative or emancipatory effect on global governance. Since the fall of the Soviet Union, the capitalist system has reorganized to subdivide traditional political units along "local, ethnic, religious, and other identities" and, at the same time, increasingly pushed for a more fully integrated global economy where "no state or local society can reproduce itself and develop materially without becoming increasingly implicated in the market economy".[28] In other words, the transnational capitalist class relies on a mixture of more closely tailored political management according to accurate localized data and a flexible economic approach that facilitates market entry regardless of social particularities. The scholarly documentation of subaltern aspirations and political solidification of 'third world' communities with the intent to integrate them into the global economy will ultimately lead to readily available information and convenient institutional structures to exploit for vested capitalist interests, most often linked to Eurocentric centers of power. The language of eclecticism and innovation, with its grassroots sensibility, is itself the new imperialist tactics of cooption and management.

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in the post-Soviet regimes, *see* John D. Haskell and Boris Mamlyuk, *Capitalism, Communism… and Colonialism? A Critical Colonial Reading of 'Transitology' in the Former Soviet Union*, 9(1) Global Jurist (2009).

[27] What is especially curious is how similar his argument looks to American liberal theorists, such as Rawls and Rorty. *See* Mutua, *supra* note 21, at 62.

[28] *See* Maurice Godelier, IN AND OUT OF THE WEST: RECONSTRUCTING ANTHROPOLOGY 9 (2009).

My second concern is that TWAIL scholarship under-theorize the actual dynamics of imperialism due to the (general postmodern) aversion to Marxist theory. TWAIL scholars tend to discount the Marxist tradition by only focusing on early Marxist theorists[29] or critiquing the theory on grounds that it is overly nihilistic in its condemnation of law as purely a technique of ruling class interests,[30] that it is too Eurocentric in its preoccupation with the party/state model of governance and a linear notion of development,[31] and that it thereby reduces the complexity of lived experience and meaning to the rubric of 'class' interests.[32] "In short," writes Rajagopal, summing up this general sentiment, "Marxism [is] simply unable to supply the theoretical tools to comprehend and respond to … globalization [and] the new forms of economic arrangements and new forms of struggles that accompanied them, not only in advanced industrial societies, but also in the Third World."[33] The lost opportunity cost of dismissing Marxist theoretical insights becomes especially clear when analyzing the TWAIL literature's theory of the interaction between subaltern subjects and imperialism in relation to international law.

To recall their central claim, imperialism is a central dynamic in the historic and ongoing development of international law, though it has mutated over the course of the 20th century in relation to changing external and internal dynamics from 'formal empire' (e.g., explicitly coercive forms of political control over territory) to 'informal empire' (e.g., formal political sovereignty coupled with economic domination), which thereby reinforces the uneven development and distribution of resources. Beneath the mainstream narratives of international law, therefore, is the silent hegemonic struggle between different societies (e.g., culture), and which is driven ultimately by the human desire for expansion and control (e.g., imperialism). What is interesting here is that both 'culture' and 'imperialism' operate within TWAIL literature on a pre-political, or naturalist framework: on the one hand, cultures not only shape and direct colonialism, but are said to pre-exist the colonial encounter as the actors that 'make' the history of international law; and on the other hand, imperialism is not tied to a particular political-

[29] Gathii addresses the Marxist theory of imperialism in less than two pages, and draws solely upon Lenin and Luxemberg to make his claims. *See* Gathii, *supra* note 18, at 1018. The lack of academic rigor here is apparent if we were to imagine a scholar adopting a similar approach to critiquing liberal claims about the 'individual' – to limit analysis to a single turn of the century author over the course of a page or two would seem perfunctorily unsatisfying. In particular, this sentiment misses the rich and often conflicting theories within the tradition that might offer useful analytic tools. *See e.g.*, Giovanni Arrighi, GEOMETRY OF IMPERIALISM (1978).

[30] *See* Chimni, *supra* note 11, at 19-21.

[31] *See* Rajagopal, *supra* note 11, at 413-417.

[32] *Id.*

[33] *Id.* at 413.

economic system, but is itself something intrinsic to humanity, a deep innate drive that exists not above but within the depths of human desire and that expresses itself across space and time (an almost inverted Hegelian Geist).[34]

The problem with this analysis, from a Marxist perspective, is that it projects the failure of international law in overly 'naturalistic' terms and does not incorporate any evaluation of its historically specific form. For the Marxist scholar, there is no 'subject' that can pre-exist their historically situated context: there is no 'real human nature' to be discovered, but rather the organization of individuals are always born and made into the subjects of specific constellations of meaning and organization. Since this locally or globally structured environment is itself always organized around a specific set of historical conditions, we must construct and employ a sociology of how these conditions of knowledge are produced rather than take the knowledge itself at face value. However, to do so is no easy task, because these conditions of production are themselves comprised of diverse institutional apparatuses that structure the means and relations that a society organizes its sustenance and reproduction, but are also further composed of secondary effects, or ideological institutional apparatuses (e.g., art movements, church denominations, education degrees and schools) that can facilitate 'material' varieties of production (e.g., habitus) but equally can operate in relatively autonomous environments that even conflict with the dominant forms of production or other ideological institutions.[35] A change in the structure of production (e.g., from feudalism to capitalism), for instance, does not necessarily mean a corresponding change in the doctrines or rituals of the Church (though it will undoubtedly have some effect). In this sense, there cannot be a 'subject' that 'makes' history, but rather history is a process that conditions the subject.[36] The difficulty here is that to account for this process of particularity and totality, a theoretical framework must be developed to 'decipher the effects' of these differentiated and relatively autonomous structures on each other

[34] "Imperialism … constitute[s] in part the primordial and essential identity of international law … a constant … most simply associated with power [which] seeks to further itself in every way …. far from peculiar to Western societies." Anghie, *supra* note 20, at 315-319. This same logic leads scholars, such as Gathii, to argue that "imperialism's constant drive to expand … was one of the very conditions of the existence of capitalism". *See* Gathii, *supra* note 18, at 1020.

[35] *See* Louis Althusser, *Contradiction and Overdetermination*, in FOR MARX 87-128 (English ed., 2006); *see also* Althusser, *Ideology and Ideological State Apparatuses*, LENIN AND PHILOSOPHY AND OTHER ESSAYS 127-188 (English ed., 1971).

[36] *See* Louis Althusser, *Remark on the Category: Process without a Subject or Goals*, in RESPONSE TO JOHN LEWIS 95-99 (1973).

'through the various processes of social practice and place them in a hierarchy of causes' that allow for that 'specific totality' that reproduces the necessary conditions of production.[37]

This analytic of seeking to explicate the specific historical composition (in all its institutional diversity and contradiction) that structures the conditions of production in relation to the development of the conceptual vocabulary and professional techniques within international law as the privileged form of regulation reframes the conceptual vocabulary and questions related to the development of international law. To address 'imperialism' in the context of international law, therefore, would be to not only uproot it from natural drives to the specific drives of 'capitalism' as the hierarchical 'cause' that ties together the highly differentiated institutional apparatuses that made up the colonial and postcolonial eras, but to unpack its key elements and explain their overlapping functions, such as the narrowing of economic value to commodity exchange, the political imperative of market entrance, and the central drive of imperialism rooted in the accumulation of capital.[38] And such a historic analysis of these conditions would equally contribute to explain why the specific character of regulation took on its given legal form – without elaborating here, the recourse to formally equal rights that are essential to a liberal rule of law can only occur within the social relationships based on the circulation of commodity exchange.[39] Likewise, the Marxist perspective would necessitate a different set of questions and conceptual tools to address the dynamic of 'culture': for example, how and why did the formal legal description of culture develop as the privileged technique to create solidarity among various people? An answer would thereby need to engage a sociological analysis concerning the prioritization of 'culture' in the globalization of the centralized administrative state and expanding market imperatives. In this sense, the scholar invoking 'culture' would need to distinguish between 'race' as a 'genetic' description rooted in the axial divisions of labor between 'core' and 'periphery' geographies, the 'nation' as a socio-political category related to the legitimization of state bureaucracies that arose with the invention and expansion of European governance, and 'ethnic groups' as a 'cultural' category that refers specifically to the ideological institutional apparatuses that sustain the maintenance of the

[37] *See* Maurice Godelier, PERSPECTIVES IN MARXIST ANTHROPOLOGY 2-4 (1977).
[38] *See* Ellen Meiksins Wood, THE ORIGINS OF CAPITALISM: A LONGER VIEW 110-115 (2002)
[39] *See* Miéville, *supra* note 8, at 23.

conditions of production, as well as the maintenance of non-waged labor.[40] The neglect of Marxist theory in TWAIL scholarship, in short, results in a type of closeted transcendentalism that remains incapable to explain the historic reasons for the how or why of the dynamics and subjects of international law.

IV. CONCLUSION: BEYOND LEFT-WING LIBERALISM

The TWAIL literature arose as a subgenre with international legal scholarship as part of the more general trend towards postcolonial theory within the academy in the 80s and 90s, and the specifically legal intellectual arguments advanced by the Critical Legal Studies and New Approaches to International Law movements. The critique by TWAIL that the colonial legacy permeates the history and contemporary development of the architecture and doctrines of international law across economic, political and social regimes continues to exert an important rupture within the everyday scholarship and conferences for a range of heterodox authors to advance their careers, build new intellectual communities and friendships, and recalibrate the academic literature to account for the dark sides of cosmopolitan virtue.[41] I think this is not only valuable, but an essential space that should not be lost. And yet, at the same time, for all its merits, the TWAIL movement suffers from the paradox that its argumentative logic ultimately relies on the same underlying assumptions of the system it sought to transcend. In mapping out the arguments and blind spots of international law, my hope is that we as scholars deploy the opportunities that TWAIL (and other left-of-liberal perspectives) provides to revisit the analytical richness of theoretical Marxism. For myself, I do not think this means embracing its traditional political implications, nor do I think they are actually available for us today – but perhaps it might lead us somewhere that if not emancipatory, is at least different.

[40] *See* Immanuel Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, in Etienne Balibar and Immanuel Wallerstein, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 71-80 (1991).

[41] For a discussion of TWAIL as an academic community built around a shared sensibility towards personal engagement and scholarly concerns, *see* Michael Fakhri, *Questioning TWAIL's Agenda*, 14(1) Oregon Review of International Law 1 (2012).

SHADOW BANKING, FINANCIAL RISK, AND REGULATION IN CHINA AND OTHER DEVELOPING COUNTRIES[*]

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Shadow banking is growing rapidly in a number of developing countries, including China where it recently was estimated at around 20 trillion yuan (which is approximately a third the size of China's bank-lending market).[1] *The shadow banking sector in these countries is typically weakly regulated, yet the growth of the sector is thought to pose risks to financial stability. Additional regulation therefore may be needed. Any such regulation, however, should attempt to strike a balance between reducing that risk and preserving shadow banking as an important channel of alternative funding to developing economies, particularly in the face of significant retrenchment by large banks that had dominated the credit supply.*

 This paper is based in part on portions of my article, *Regulating Shadow Banking*, 31 BOSTON UNIVERSITY REVIEW OF BANKING & FINANCIAL LAW 619 (2012) (also available at http://ssrn.com/abstract=1993185).

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[1] *See In China, Hidden Risk of "Shadow Finance"*, WALL ST. J., Nov. 26, 2012, also available at http://online.wsj.com/article/SB10001424127887324712504578133053914208788.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fxml%2Frss%2F3_7013+(WSJ.com%3A+What's+News+Asia) (reporting an estimate by Sanford C. Bernstein & Co.). More recent estimates suggest that the number may be as high as 30 trillion yuan (*see* Yi Xianrong, *Shadow Banking Rampant in China*, CHINA.ORG.CN (Jan. 27, 2013), available at http://www.china.org.cn/opinion/2013-01/27/content_27775060.htm) or even 36.8 trillion yuan (*see* David Barboza, *Loans Practices of China's Banks Raising Concern*, N.Y. TIMES, July 1, 2013)—the latter figure being "69 percent of China's gross domestic product" (*id.*, referencing a report released in May 2013 by JPMorgan Chase).

I. WHAT IS SHADOW BANKING?

Shadow banking is a loose term that refers to the provision of financing outside of traditional banking channels.[2] Estimated at $67 trillion worldwide,[3] shadow bank financing appears to dwarf traditional bank financing.[4]

There are many ways to provide financing outside of traditional banking channels. Structured finance and securitization, for examples, raise financing indirectly through the capital markets using special purpose entities ("SPEs") such as asset-backed commercial paper (ABCP) conduits and structured investment vehicles (commonly known as SIVs).[5] The term shadow banking also includes the provision of financing by finance companies, hedge funds, money market mutual funds, non-bank government-sponsored enterprises, securities lenders, and investment banks. The term even includes the provision of financing by banks using non-traditional means. For example, banks sometimes create and derive fee income from SPEs, ABCP conduits, and SIVs. Banks also are important players in repo markets.

II. SHADOW BANKING IN CHINA

Shadow banking is increasingly important in China, especially as a source of funding to small and medium-sized enterprises ("SME"s), including entrepreneurial start-up companies. The superficial reason is that Chinese banks are not extending as much credit to SMEs, focusing instead on lending to large Chinese companies and also investing abroad. SMEs therefore must seek other financing sources.

At least in part, this trend may reflect the unintended consequence of Chinese regulatory policy. Chinese banking law limits bank-loan profits to percentages of the loan,[6] which makes small and

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[2] Chinese regulators appear to follow this same definition. *See, e.g.*, Xiao Gang, *Regulating Shadow Banking*, CHINA DAILY (Oct. 12, 2012) (writing that "[s]hadow banking can broadly be described as the system of credit intermediation involving entities and activities outside the regular banking system"). Xiao Gang is the chairman of the Board of Directors of Bank of China.

[3] Financial Stability Board, Global Shadow Banking Monitoring Report (Nov. 18, 2012) (estimating shadow banking's worldwide assets in 2011).

[4] Zoltan Pozsar et al., Federal Reserve Bank of New York Staff Reports, No. 458: Shadow Banking Abstract, 4-5 (2010).

[5] For an introduction to structured finance and securitization in the context of China, *see* Steven L. Schwarcz, *Securitization, Structured Finance, and Covered Bonds* (2012), available at http://ssrn.com/abstract=2182597.

[6] *Cf.* Michael F. Martin, *China's Banking System: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 10 & n. 24 (Feb. 12, 2012), *available at* http://www.fas.org/sgp/crs/row/R42380.pdf

medium-sized loans much less attractive than large loans.[7] The trend might also reflect the higher risks of SME lending, which sometimes exceed current banking lending standards.[8]

The resulting alternative financing arrangements are deemed part of China's shadow banking sector. Although much less diversified and complex than in the United States, participants in these arrangements include corporate-style entities such as property-development trusts[9] as well as individuals involved in more interpersonal lending through credit associations, rural cooperative foundations, and even pawnshops.[10] Peer-to-peer business lending is also becoming common, in which companies lend to other companies, sometimes arranged through banks.[11] Equipment-lease financing is increasing, sometimes arranged through the leasing subsidiaries of state-owned banks.[12] Accounts receivable factoring is also increasing in importance, to provide liquidity to

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("Historically, the [People's Bank of China] has maintained a roughly 3% range between comparable deposit and loan benchmark rates, thereby insuring banks approximately a 3% gross profit margin.").

[7] The People's Bank of China may now have removed the limitation on bank lending rates, except regarding certain loans (such as residential mortgage loans). E-mail from Liu Xiaoli, Associate at the Zhong Lun Law Firm in Beijing and Duke Law School LL.M. Class of 2013, to the author, May 6, 2013.

[8] *Cf.* E-mail from Liu Xiaoli, Associate at the Zhong Lun Law Firm in Beijing and Duke Law School LL.M. Class of 2013, to the author, Nov. 11, 2012 (observing that China's banking industry has strict loan underwriting standards, and SMEs often cannot provide sufficient collateral to satisfy these standards). Ms. Liu nonetheless also observes that, in recent years, the State Council and financial regulators have been actively encouraging SME financing; as a result, some banks have been expanding their SME loan business. *Id.*

[9] *See Shadow Banking Looms Over China*, REUTERS, Sept. 28, 2012, *available at* http://www.reuters.com/article/2012/09/28/china-trusts-banking-idUSL4E8KS50J20120928 (reporting the rise of trusts in China, and particularly their exposure to the "property, infrastructure, and financial sectors"); *see also*, DELOITTE TOUCHE TOHMATSU LIMITED, CHINA REAL ESTATE INVESTMENT HANDBOOK, 51 & 81 (2012), *available at* http://www.deloitte.com/assets/Dcom-China/Local%20Assets/Documents/Industries/Real%20estate/cn_RE_REIH2012_130312.pdf. (quoting the OECD definition of a REIT as a "widely held company, trust or contractual or fiduciary arrangement that derives its income primarily from long-term investment in immovable property (real estate), distributes most of that income annually and does not pay income tax on income related to immovable property that is so distributed.").

[10] Kellee S. Tsai, Back-Alley Banking: Private Entrepreneurs in China 39 (2002).

[11] *See China Slowdown Stymies Plan to Curb Shadow-Banking Risks*, BLOOMBERG NEWS, July 17, 2012, http://www.businessweek.com/news/2012-07-16/slowdown-threatens-curbs-on-shadow-banking#p2 ("Shadow banking, including loans changing hands between friends, families and companies seeking capital as well as the off-balance-sheet business of lenders and trust companies, totals as much as 15 trillion yuan ($2.4 trillion), about one-third the size of China's official loan market"). Many peer-to-peer sites exist that allow small businesses to access loans from individuals and other businesses. *China Shadow Bankers Go Online as Peer-to-Peer Sites Boom*, BLOOMBERG NEWS, July 24, 2012, http://www.bloomberg.com/news/2012-07-23/china-shadow-bankers-go-online-as-peer-to-peer-sites-boom.html. Incongruously, peer-to-peer lending among enterprises is technically illegal (and thus risky for lenders) under Chinese financial regulatory law. E-mail from Liu Xiaoli, *supra* note 7. Nonetheless, courts often enforce lenders' repayment claims for principal and, to the extent not exceeding comparable bank deposit interest rates, interest. *Id.*

[12] *Cf.* Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 38 (1996) (describing financial lease terms in China).

vendors of goods.[13] As with securitization, factoring additionally enables those vendors to allocate risk on the receivables to third parties (in the case of factoring, those third parties are the "factors" who provide the financing), enabling vendors to quantify their repayment risk. Risk allocation is increasingly critical because receivables are becoming increasingly delinquent in payment.[14]

China's shadow banking sector also includes the provision of financing by banks, using non-traditional means.[15] Commercial banks, for example, provide wealth management plans to their customers, as investors. Customers entrust funds with their bank and join the plan; the bank uses the entrusted funds to invest in a pool of securities—functionally no different than an investment in a mutual fund. Wealth management plans have grown rapidly, estimated at 12 trillion yuan in the third quarter of 2012 compared to just 8.5 trillion yuan the year prior.[16] From an investor standpoint, the reason for this growth appears to be risk aversion: investors believe, rightly or wrongly, that wealth management plans provided by banks are safe because of banks' implicit guarantees.[17] From a bank standpoint, the reason for this growth appears to be regulatory arbitrage: it enables banks to avoid regulation that limits, among other things, their loan-to-deposit ratios.[18]

The changing details of China's shadow banking sector are less important, however, than the fact that it—like the shadow banking sector outside of China—reflects non-bank, or at least non-traditional-bank, intermediated financing.[19]

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[13] Factors Chain International, *Total Factoring Volume by Country in the Last 7 Years* (last visited Nov. 8, 2012), http://www.fci.nl/about-fci/statistics/total-factoring-volume-by-country-last-7-years (showing the rapid growth of Chinese factoring volume to become one of the largest factoring markets in the world).

[14] Hu Xuwei & Lin Xiaozhuan, The Causes and Risk Management of SME's Accounts Receivable *Based on Information Asymmetry*, 212 (2009), http://www.seiofbluemountain.com/upload/product/200911/2009zxqyhy03a24.pdf (observing the high total volume, as well as the high default rates, of Chinese accounts receivable).

[15] *Cf. supra* notes 5-6 and accompanying text (observing that the term shadow banking even includes the provision of financing by banks using non-traditional means).

[16] Wang Xiaotian, *Banks' Wealth Management Products Have Growing Risks: Fitch*, CHINA DAILY, Dec. 05, 2012, available at http://www.chinadaily.com.cn/china/2012-12/05/content_15989924.htm.

[17] E-mail from Liu Xiaoli, Associate at the Zhong Lun Law Firm in Beijing and Duke Law School LL.M. Class of 2013, to the author (Apr. 16, 2013). *See also* Edward Chancellor, *China Crunch Shows Financial Fragility*, FINANCIAL TIMES, July 1, 2013, at 20 (observing that "Many [Chinese wealth management products] are kept off the balance sheets of the banks although it is widely understood that banks will make good any losses to investors.").

[18] E-mail from Liu Xiaoli, *supra* note 17. *See also* Cai Zhen, *The Features, Manifestations and Causes of the Chinese Shadow Banking System*, 11 CHINESE BANKER (2012), available at http://ifb.cass.cn/show_news.asp?id=51623.

[19] *Cf.* Paul Tucker, Deputy Governor, Financial Stability, Bank of England, Remarks at a BGC Partners Seminar: Shadow Banking, Financing Markets and Financial Stability (Jan. 21, 2010), *available at*

III. SHADOW BANKING IN OTHER DEVELOPING COUNTRIES

I investigated shadow banking in China in connection with a series of lectures I gave there in December 2012.[20] My understanding of shadow banking in developing countries outside of China ("other developing countries") is much more limited. Nonetheless, some general observations can be made.

Although banks still dominate the financial sector in most other developing countries, shadow banking is on the rise.[21] In those countries, however, shadow banking is "less about long, complex, opaque chains of intermediation and more about being weakly regulated or falling outside the regulatory sphere altogether."[22]

For example, the main shadow banking players in other developing countries tend to be "finance, leasing, and factoring companies; investment and equity funds; insurance companies; pawn shops; and underground entities."[23] These players overlap significantly with Chinese shadow banking market participants.[24]

IV. SHOULD SHADOW BANKING BE REGULATED?

Shadow banking tends to be much less regulated than traditional banking.[25] This inevitably means that shadow banking is, to some extent, driven by regulatory arbitrage.[26] But that does not necessarily mean that shadow banking should be subjected to more regulation. It sometimes might mean, for example, that traditional banking should be subject to less regulation. This alternative approach would have particular salience when traditional banking is subject to ill-inspired regulation that drives regulatory arbitrage, such as China's banking law limits on bank-loan

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http://www.bankofengland.co.uk/publications/speeches/2010/speech420.pdf (observing that we may "confront new variants of shadow banking in the future").

[20] Even in that context, however, my investigation was limited to conversations with Chinese financial regulatory experts as well as research of the relevant literature.

[21] Swati Ghosh, Ines Gonzalez del Mazo, & İnci Ötker-Robe, *Chasing the Shadows: How Significant Is Shadow Banking in Emerging Markets?*, The World Bank (Sep. 2012), at 2-3, *available at* http://siteresources.worldbank.org/EXTPREMNET/Resources/EP88.pdf.

[22] *Id*. at 3-4.

[23] *Id*. at 2.

[24] *See supra* notes 9-13 and accompanying text (indicating an overlap for pawnshops, investment funds, leasing companies, and factoring companies).

[25] Since 2010, however, the China Banking Regulatory Commission (CBRC) has begun to address regulatory arbitrage concerns, such as by imposing net capital regulations on trust companies (requiring them to maintain sufficient net capital to cover their potential business risks). E-mail from Liu Xiaoli, *supra* note 8.

[26] *Cf*. Ghosh et al., *supra* note 21, at 3 (observing that regulatory arbitrage "played a role in the growth of (unregulated) shadow banking [in] China, Bulgaria, Croatia, and Romania").

profits.[27] The determinative issue is thus the consequences of the regulation. In deciding how to regulate shadow banking, it additionally is important to acknowledge that shadow banking has the potential to increase economic efficiency but also to increase risk.[28] Consider each in turn.

Increasing Economic Efficiency. Shadow banking can increase efficiency through disintermediation and decentralization. Disintermediation refers to the distinguishing feature of shadow banking: providing financing outside of traditional banking channels.[29] This helps companies avoid having to pay the profit markup that intermediary banks would otherwise charge on traditional products, such as loans. That reduction in cost can increase economic efficiency.

Shadow banking can additionally increase efficiency by diversifying, and thus decentralizing, the provision of financial products and services. This can increase consumer welfare, for example, by allowing investors to tailor financial portfolios to their own preferences. Consumer welfare can also be increased by serving underserved constituents, such as shadow banking's providing financing to underserved SMEs in China.[30] A decentralized financial system may also be more robust in the face of negative shocks. To the extent decentralization helps to reduce the size of firms, it also can mitigate the "too big to fail" problem.

Increasing Risk. But decentralization can also increase risk. For example, it may be relatively harder to control market failures, or there could be more such failures. Decentralization might also make it more difficult for market participants to effectively process information, allowing risks to accumulate unnoticed and unchecked. When hidden risks suddenly become apparent, market participants can panic[31]; and panics can trigger systemic risk.[32]

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[27] *See supra* notes 6-7 and accompanying text. *Cf.* Chancellor, *supra* note 17 (observing that a "collapse in the supply of credit . . . can also arise as a result of regulatory actions").

[28] *Cf.* Ghosh et al., *supra* note 21, at 2 (observing that it "is generally agreed that financial intermediation through nonbank channels [i.e., shadow banking] provides some benefits, and hence can constitute a useful part of the financial system").

[29] *See supra* note 2 and accompanying text.

[30] *See supra* note 6 and accompanying text.

[31] Daniel Awrey, Complexity, Innovation and the Regulation of Modern Financial Markets, 2 HARVARD BUSINESS LAW REVIEW 235 (2012).

[32] Panics often serve as a trigger that can commence a chain of systemic failures. Steven L. Schwarcz, *Systemic Risk*, 97 GEORGETOWN LAW JOURNAL 193, 214 (2008).

Another risk closely associated with, although not at all unique to, shadow banking[33] is the short-term funding of long-term capital needs, such as occurs when SPEs issue short-term securities (like commercial paper) to fund long-term projects.[34] This can increase risk by creating liquidity discontinuities (what economists sometimes call maturity transformation), which can have potentially systemic consequences. In traditional banking, this is labeled the risk of a "bank run." Economists argue that equivalent types of liquidity discontinuities in shadow banking "played a central role in transforming concerns about the credit quality of mortgage-related assets into a global financial crisis."[35]

Additionally, because non-bank shadow banking participants are unregulated or lightly regulated compared to banks, they might be more likely to fail than banks. Their failures could impact traditional banking to the extent shadow banks and traditional banks have contractual (or other) interrelationships.[36]

Shadow banking thus can operate as a double-edged sword, increasing both efficiencies and risks. The challenge for regulation is to minimize those risks while maximizing (or at least not significantly impairing) those efficiencies.

A. Regulation Focused on Maximizing Economic Efficiency

Regulation can maximize economic efficiency by correcting "market" failures. At least four types of partly interrelated market failures can occur within the shadow banking sector: information failure, rationality failure, principal-agent failure, and incentive failure.[37] None of these failures is unique to shadow banking, but all can be exacerbated by shadow banking's complexity.

1. *Information Failure*

[33] Traditional banks, for example, typically fund themselves through short-term deposits and use the proceeds to make long-term loans.

[34] *See supra* note 5 and accompanying text (discussing ABCP conduits and SIVs, which do this). *See also* Ghosh et al., *supra* note 21, at 3 (observing that "many, if not most, [shadow banks] fund themselves through short-term or callable deposit-like liabilities").

[35] *See, e.g.*, Daniel Covitz, Nellie Liang & Gustavo Suarez, *The Evolution of a Financial Crisis: Panic in the Asset-Backed Commercial Paper Market*, Fed. Reserve Bd. Finance and Discussion Series, #2009-36 (2009), at 16, *available at* http://www.federalreserve.gov/pubs/feds/2009/200936/200936pap.pdf (examining the inability of many ABCP conduits to roll over their short-term commercial paper in the last five months of 2007).

[36] Even given such interrelationships, however, it is unclear whether the decentralization of shadow banking actually reduces systemic risk on a net basis; a shadow bank may well be more likely to fail than a traditional bank, but the failure of a shadow bank is less likely to systemically impact traditional banking.

[37] *Regulating Shadow Banking*, *supra* note **Error! Bookmark not defined.**.

Shadow banking can be complex and arguably is becoming more complex as economies develop.[38] Although disclosure always will remain important and necessary,[39] complexity limits disclosure's ability to achieve meaningful investor transparency.[40] A question, therefore, is whether regulators should try to simplify or standardize shadow banking to minimize its complexity. Currently, this question may be more critical in the United States and other developed countries where shadow banking is especially complex.[41]

2. *Rationality Failure*

Humans have bounded rationality. And the more complex something is, the more we tend to focus on the simpler and more straightforward elements with which we're familiar. We also tend to believe what we want to believe.

Shadow banking increases complexity. As a result, market participants sometimes act even more irrationally. For example, investors were prepared to believe, based on mathematical models they did not fully understand, that the investment-grade rated securities issued in highly complex second-generation securitization transactions,[42] offering much higher returns than other similarly rated securities, represented good investments even though they were at least partly backed by subprime mortgage loans.

3. *Principal-Agent Failure*

Conflicts of interest between managers and owners of firms are widely studied. At least in the shadow banking sector, I believe the more serious conflict is *intra-firm*: secondary managers, such as analysts, are almost always paid under short-term compensation schemes, misaligning their interests with the long-term interests of the firm.[43] This intra-firm principal-agent failure is not

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[38] *Cf. supra* notes 21-22 and accompanying text (observing a correlation between the complexity of shadow banking and developed economies).

[39] *Cf.* Global Shadow Banking Monitoring Report, *supra* note 3 (arguing for more transparency).

[40] Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 2008 UTAH LAW REVIEW 1109, also available at http://ssrn.com/abstract_id=1113034; Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 UNIVERSITY OF ILLINOIS LAW REVIEW 1 (2004), also available at http://ssrn.com/abstract=336685.

[41] *Cf.* Ghosh et al., *supra* note 21, at 3 (observing that in emerging market and developing economies, "the shadow banking sector is relatively simple, given the [lower] level of sophistication of financial markets and instruments").

[42] These transactions included securitizations of collateralized-debt-obligation securities, or "ABS CDO" transactions.

[43] Steven L. Schwarcz, *Conflicts and Financial Collapse: The Problem of Secondary-Management Agency Costs*, 26 YALE JOURNAL ON REGULATION 457 (2009); also available at http://ssrn.com/abstract_id=1322536.

unique to shadow banking; but the complexity of shadow banking, combined with the technology that enables it, can exacerbate the failure. For example, the complexity of shadow banking motivated senior manager reliance on the imperfect value-at-risk, or VaR, model for measuring investment-portfolio risk, thereby enabling conflicted secondary managers to propose dangerous investment products, like credit default swaps, which had low VaR risk profiles.[44]

4. *Incentive Failure*

Technology has enabled the shadow banking sector to finely disperse investment risk. In theory, that could be beneficial. But risk can sometimes be marginalized by becoming so widely dispersed that rational market participants individually lack the incentive to monitor it.[45]

Summary: Shadow banking regulation should focus on maximizing shadow banking's potential to increase efficiency and minimizing its potential to increase risk. I have so far discussed regulation focused on maximizing economic efficiency by correcting market failures. Regulation can help to control, but it cannot completely eliminate, those failures. I next examine shadow banking regulation focused on minimizing systemic risk.

B. Regulation Focused on Minimizing Systemic Risk

Regulation should also focus on minimizing shadow banking's potential to trigger systemic risk.[46] One way to minimize that potential is to make panics less likely.[47] It is impossible, however, to identify and forestall all the causes of panics. To some extent, even the market failures I've already discussed could trigger panics or other systemic shocks. For example, information failure, principal-agent failure, and incentive failure could, individually or in combination, cause one or more large firms to overinvest, leading to bankruptcy; and rationality failure could cause prices of securities in a large financial market to collapse.

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[44] *See id*. at 460.

[45] Steven L. Schwarcz, *Marginalizing Risk*, 89 WASHINGTON UNIVERSITY LAW REVIEW 487 (2012); also available at http://ssrn.com/abstract=1721606.

[46] *Cf*. Xiao Gang, *supra* note 2 (observing that "China's shadow banking sector has become a potential source of systemic financial risk").

[47] *Cf. supra* note 32 (observing that panics often serve as a trigger that can commence a chain of systemic failures).

Regulation could indirectly help by limiting the factors that give rise to shadow banking. Because the most important factor is regulatory arbitrage,[48] there is a circularity: greater regulation of shadow banks could reduce the risks of (by reducing) shadow banking, but at the possible cost of reducing efficiency. China appears to be trying to limit regulatory arbitrage by regulating at least some shadow banks.[49] It can be difficult to know ex ante, however, whether enhanced regulation of non-banks optimally maximizes efficiency while minimizing risk.

Regulation might also be considered to reduce the interrelationships between shadow banks and traditional banks.[50] That would make it less likely that the failure of a shadow bank could impact traditional banks. To the extent the interrelationships are created by contract, however, such regulation would necessarily reduce freedom of contracting. It is not clear that would be beneficial, even assuming it could be adequately monitored and enforced.

Shadow banking regulation therefore might be able to mitigate, but cannot prevent, the occurrence of systemic shocks. I therefore would argue for more regulatory *ex post* approaches, such as trying to protect against systemic consequences that could result from these shocks.[51] This regulatory approach is inspired by chaos theory, which holds that in complex engineering systems—and, I have argued, also in complex financial systems[52]—failures are almost inevitable. Therefore regulatory remedies should focus on breaking the transmission and limiting the consequences of these failures.[53] In other contexts, I have shown how regulation could accomplish this, such as by ensuring liquidity to systemically important firms and markets and by privatizing sources of liquidity in order to help internalize externalities and motivate private-sector monitoring.[54]

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[48] Another factor giving rise to shadow banking may well be technology, which facilitates ever more sophisticated financial mechanisms. However, it would almost certainly be futile, if not counter-productive, to try to regulate the use of technology.

[49] *See supra* note 25 (observing that the CBRC has begun imposing net capital regulations on trust companies).

[50] *See supra* note 36 and accompanying text.

[51] *Cf.* Iman Anabtawi & Steven L. Schwarcz, *Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure*, forthcoming 92 TEXAS LAW REVIEW (2013) (arguing that ex post regulation is necessary).

[52] Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASHINGTON UNIVERSITY LAW REVIEW 211 (2009); also available at http://ssrn.com/abstract_id=1240863.

[53] *Id*.

[54] *Id*. *See also* Steven L. Schwarcz, *Controlling Financial Chaos: The Power and Limits of Law*, 2012 WISCONSIN LAW REVIEW 815, 829-33 (also available at http://ssrn.com/abstract=2016434).

Another question for further inquiry might be the extent to which regulation of shadow banking should tie more closely to particular factual patterns.[55] For example, more regulatory attention could be given to managing the short-term funding of long-term assets which, as mentioned, can create a risk of liquidity discontinuities with potentially systemic consequences.[56] Chinese regulators appear to be very concerned about this risk.[57]

The market failure underlying this risk is partly an information failure: that investors in short-term debt may not individually have enough at stake to make it worthwhile to fully evaluate the transaction. Those investors therefore will not accurately price the repayment risk.[58] One possible remedy might be to encourage the development of a liquidity-support industry. Such an industry could achieve an economy of scale in which professional liquidity providers have enough at stake to make that evaluation economically worthwhile.[59]

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[55] *Cf.* e-mail from Dan Awrey, University Lecturer in Law & Finance, University of Oxford, to the author (Jan. 24, 2012; emphasis in original) (saying that he is "increasingly of the view that the prevailing notion of 'shadow banking'—which throws a number of divergent institutions, instruments and markets into the same bucket—has become a meaningful obstacle to regulatory reform in a number of key areas (esp. wholesale funding markets). There are many different *objects* of (potential) regulation wrapped up in this definition, each manifesting different *issues* and requiring different regulatory *responses*.").

[56] *See, e.g.*, Steven L. Schwarcz, *Regulating Shadows: Financial Regulation and Responsibility Failure*, forthcoming 70 WASHINGTON AND LEE LAW REVIEW issue no. 3 (2013); also available at http://ssrn.com/abstract=2159455. *Cf.* Kyle Glazier, *Bernanke: Financial Crisis Was a Structural Failure*, BOND BUYER, Apr. 16, 2012, at 2 (quoting Federal Reserve Board Chairman Ben Bernanke as saying that "a key vulnerability of the [disintermediated or "shadow," financial] system was the heavy reliance . . . on various forms of short-term wholesale funding"); Viral V. Acharya & S. Viswanathan, *Leverage, Moral Hazard, and Liquidity*, 66 JOURNAL OF FINANCE 99, 103 (2011) (observing that short-term funding of long-term projects "played an important role in the financial crisis of 2007 to 2009 and the period preceding it").

[57] Xiao Gang, *supra* note 2. Xiao Gang observes that "China's shadow banking is contributing to a growing liquidity risk in the financial markets. . . . [In] some cases short-term financing has been invested in long-term projects, and in such situations there is a possibility of a liquidity crisis being triggered if the markets were to be abruptly squeezed." *Id*.

[58] *Marginalizing Risk*, *supra* note 45. *Cf.* Tobias Adrian & Adam B. Ashcraft, "Shadow Banking Regulation," Federal Reserve Bank of New York Staff Report No. 559 (Apr. 2012), available at http://www.newyorkfed.org/research/staff_reports/sr559.pdf (arguing that part of the problem of shadow banking is inaccurate pricing of risk).

[59] *Cf. id.* (arguing, among other things, that regulatory reform should focus on enabling more appropriate pricing of shadow bank liquidity arrangements). Other ways to mitigate the risk might include better standards on match-funding coverage, better internal controls on collateral valuation and margining policies, and internalizing externalities (such as mandating privately funded systemic risk funds). The international Basel III capital accord takes a match-funding coverage approach, for example, introducing a liquidity coverage requirement that banks hold sufficient high-quality liquid assets to cover their total net cash outflows over 30 days and another requirement that banks maintain minimum yearly available amounts of stable funding. Jerome Walker, Rosali Pretorius, Michael Zolandz, & Gary Goldburg, *Reconciling the Dodd-Frank and Basel Committee Capital Requirements*, 129 BANKING LAW JOURNAL 627, 631 (July/August 2012).

INDIAN FINANCIAL CODE VIS A VIS INDIAN FINANCIAL LAW: THE WAY FORWARD

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The author elaborates upon the Indian Financial Code as promulgated by the Financial Sector Legislative Reforms Commission (FSLRC) set up in 2011. The author describes the complex and confusing state of Indian financial regulation and then states the salient features of the Indian Financial Code (IFC) and how this code can help achieve uniformity and clarity, features which are essential to the legal regime of any nation specially in an area like financial markets which is prone to market sentiments and affects everyday lives of millions of consumers and investors who avail of these services.

I. INTRODUCTION

In the era of technological advancement, Global Trade, development of Global Village connected with technology provides means and ways to inflow and outflow a nation's currency. The investment pool creates the development of state and needs to be regulated, protected and to be prevented and punished for unfair and prohibited trade practices. The Consumers, Investors and Economy should be protected in good sprit for the growth and development of nation. In this backdrop, it is highlighted here that the proposed draft submitted by the Financial Sector Legislative Reforms Commission on Indian Financial Code needs urgent attention of all the consumers and investors, in particular, as it proposes a sea of changes in the present regulatory system of our economy and law.

The present paper aims to analyze the salient and broad features of IFC Code and the way forward for future in Indian Financial Law.

II. NEED AND OBJECT OF FSLRC

The Government[1] in its budget 2010-11 had, inter alia announced the setting up of Financial Sector Legislative Reforms Commission (FSLRC) with a view to rewriting and cleaning up the financial sector laws to bring them in tune with current requirements.[2]

The Financial Sector Legislative Reforms Commission was constituted by the Government of India, Ministry of Finance, in March, 2011. The setting up of the Commission was the result of a felt need that the legal and institutional structures of the financial sector in India need to be reviewed and recast in tune with the contemporary requirements of the sector.

The institutional framework governing the financial sector has been built up over a century. There are over 60 Acts[3] and multiple rules and regulations that govern the financial sector. Many of the financial sector laws date back several decades, when the financial landscape was very different

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[1] *See* Resolution No:18/1/2011-RE dt.24th March, 2011, Govt of India, Ministry of Finance, Dept of Economic Affairs.

[2] Examining the architecture of the legislative and regulatory system governing the financial sector in India, including:

a. Review of existing legislation including the RBI Act, the SEBI Act, the IRDA Act, the PFRDA Act, FCRA, SCRA and FEMA, which govern financial sector;

b. Review of administration of such legislation, including internal structures and external structures (Departments & Ministries of Government), if required. Etc.; See further terms of reference.etc

[3] *See* Approach Paper on Financial Sector Legislative Reforms Commission (FSLRC), Ministry of Finance Government of India, October 2012.

from that seen today. For example, the Reserve Bank of India (RBI) Act and the Insurance Act are of 1934 and 1938 vintage respectively. Financial economic governance has been modified in a piecemeal fashion from time to time, without substantial changes to the underlying foundations. Over the years, as the economy and the financial system have grown in size and sophistication, an increasing gap has come about between the requirements of the country and the present legal and regulatory arrangements.

Unintended consequences include regulatory gaps, overlaps, inconsistencies and regulatory arbitrage. The fragmented regulatory architecture has led to a loss of scale and scope that could be available from a seamless financial market with all its attendant benefits of minimizing the intermediation cost. A number of expert committees have pointed out these discrepancies, and recommended the need for revisiting the financial sector legislations to rectify them. These reports help us understand the economic and financial policy transformation that is required. They have defined the policy framework within which reform of financial law can commence.

The remit of the Commission is to comprehensively review and redraw the legislations governing India's financial system, in order to evolve a common set of principles for governance of financial sector regulatory institutions. This is similar to the tradition of Law Commissions in India, which review legislation and propose modifications. The main outcome of the Commission's work is a draft 'Indian Financial Code' which is non-sectoral in of the report and replaces the bulk of the existing financial law.

The IFC code drafted with the object to consolidate and the law regulating the Indian Financial Sector and to set out principles for financial regulation, and to provide the establishment, objectives, powers of, and framework for interaction among, financial regulatory agencies, and for matters connected therewith or incidental thereto, with a view to bring coherence and efficacy in the financial regulatory framework. The act lays down the mechanism of independence and accountability, and provides for judicial review and oversight over financial sector regulation.

The act is intended to be a principle based law[4], enabling its application to any segment of the financial section, intending to focus on ownership-neutrality, and seeking to foster competition. The IFC is aimed at strengthening and formalizing the governance of financial regulatory agencies, and to proved for a comprehensive framework for consumer protection, prudential regulation, regulation of certain types of financial contracts, market abuse, resolution of financial

[4] *See* para no. 2.2, FSLRC Report, vol. 1, p. 13.

service providers, systemic risk oversight, effective and affordable access to financial service, market development, capital controls, and public debt management in India.

The proposed IFC code is divided into 87 chapters, XVI parts and 450 sections with a view to achieve the object of the act.

III. The Tasks of Indian Financial law

The first set of questions that the Commission dealt with was about the purpose of the financial legal framework. From this point of view, nine components were envisioned[5], these points are as follows[6]:

A. Consumer Protection[7]

The Commission found that a mere 'buyer beware' approach is not adequate in finance; regulators must place the burden upon financial firms of doing more in the pursuit of consumer protection. This perspective shapes interventions aimed at prevention (of inducing financial firms towards fair play) and cure (redress of grievances).

The work of the Commission in the field of consumer protection marks a watershed compared with traditional approaches in Indian financial law. It marks a break with the tradition of caveat emptor, and moves towards a position where a significant burden of consumer protection is placed upon financial firms.

The draft Code first establishes certain basic rights for all financial consumers. In addition, the Code defines what an 'unsophisticated consumer' is, and an additional set of protections are defined for these consumers. The basic protections are[8]:

- Financial service providers must act with professional diligence;
- Protection against unfair contract terms;
- Protection against unfair conduct;
- Protection of personal information;
- Requirement of fair disclosure;
- Redress of complaints by financial service providers.

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[5] *Ibid*
[6] *Id*
[7] *See* para no. 5.1, FSLRC Report, vol. 1, p. 43.
[8] *Ibid*

In addition, unsophisticated consumers have three additional protections:

- The right to receive suitable advice;
- Protection from conflicts of interest of advisors;
- Access to the redress agency for redress of grievances.

The regulator has been given an enumerated set of powers through which it must implement these protections. Alongside these objectives and powers, the regulator has been given a set of principles that guide in use of the powers. The Commission recognizes that competition is a powerful tool for the protection of consumers. The Competition Act enshrines a non-sectoral approach to competition policy. The Commission has envisaged a detailed mechanism for better co-operation between financial regulators and the Competition Commission through which there is greater harmony in the quest for greater competition.

B. Micro-Prudential Regulation[9]

When financial firms make promises to consumers (e.g. repayment of a bank deposit) the regulators are required to monitor the failure probability of the financial firm, and undertake interventions that reduce this failure probability. The pursuit of consumer protection logically requires micro-prudential regulation: the task of constraining the behavior of financial firms so as to reduce the probability of failure. When a financial firm makes a promise to a consumer, it should be regulated so as to achieve a certain high probability that this promise is upheld.

The first component of the draft Code is a definition of the class of situations where micro-prudential regulation is required. This is done in a principles-based way, focusing on the ability of consumers to understand firm failure, to co-ordinate between themselves, and the consequences of firm failure for consumers.

Regulators have five powers through which they can pursue the micro-prudential goal: regulation of entry, regulation of risk-taking, regulation of loss absorption, regulation of governance and management, and monitoring/supervision. Alongside this, it specifies a set of principles that guide the use of these powers. Eleven principles have been identified that must be complied with. For example, principles require proportionality (greater restrictions for greater risk), equal treatment (equal treatment of equal risk), and so on. It is envisaged that regulators will pursue the micro-prudential objective by writing regulations that utilise the five powers.

[9] *See* para no. 6.1, FSLRC Report, vol. 1, p. 55.

A regulation engages in micro-prudential regulation of an activity where micro-prudential regulation is not required. A regulation utilises powers which are not prescribed in the l aw.

The Indian financial system has traditionally been dominated by public sector firms. When consumers deal with a Public Sector Undertaking (PSU) bank or insurance company, for all practical purposes, they are dealing with the Government, and there is no perceived possibility of failure. Over the last 20 years, however, India has increasingly opened up entry into finance, and a new breed of private financial firms has arisen. These firms can fail, and when this happens, it can be highly disruptive for households who were customers of the failing firm, and for the economy as a whole.

Sound micro-prudential regulation will reduce the probability of firm failure. However, eliminating all failure is neither feasible nor desirable. Failure of financial firms is an integral part of the regenerative processes of the market economies: weak firms should fail and thus free up labour and capital that would then be utilised by better firms. However, it is important to ensure smooth functioning of the economy, and avoid disruptive firm failure.

This requires a specialised 'resolution mechanism'. A 'Resolution Corporation' would watch all financial firms which have made intense promises to households, and intervene when the net worth of the firm is near zero (but not yet negative). It would force the closure or sale of the financial firm, and protect small consumers either by transferring them to a solvent firm or by paying them.

At present, for all practical purposes, an unceremonious failure by a large private financial firm in India is not politically feasible. Lacking a formal resolution corporation, in India, the problems of failing private financial firms are placed upon customers, tax-payers, and the shareholders of public sector financial firms. This is an unfair arrangement.

Establishing a sophisticated resolution corporation is thus essential. Drawing on the best international practice, the draft Code envisages a unified resolution corporation that will deal with an array of financial firms such as banks and insurance companies. It will concern itself with all financial firms which make highly intense promises to consumers, such as banks, insurance companies, defined benefit pension funds, and payment systems.

C. Resolution[10]

[10] *See* para no. 7.1, FSLRC Report, vol. 1, p. 69.

Micro-prudential regulation will diminish, but not eliminate, the failure of financial firms. A specialized resolution capability is required, which swirly and efficiently winds down stressed financial firms, and protects the interests of small customers. A key feature of the resolution corporation will be speed of action. It must stop a financial firm while the firm is not yet bankrupt. The international experience has shown that delays in resolution almost always lead to a situation where the net worth is negative, which would generally impose costs upon the tax-payer. The resolution corporation will charge fees to all covered entities, which benefit from greater trust of unsophisticated consumers. This fee will vary based on the probability of failure and on the financial consequences for the resolution corporation of the event of failure. This risk-based premium would help improve the pricing of risk in the economy, and generate incentives for financial firms to be more mindful of risk-taking.

The first three pillars of the work of Commission – consumer protection, micro-prudential regulation and resolution – are tightly interconnected. All three are motivated by the goal of consumer protection. Micro-prudential regulation aims to reduce, but not eliminate, the probability of the failure of financial firms. Resolution comes into the picture when, despite these efforts, financial firms do fail.

D. Capital Controls[11]

These are restrictions on cross-border activity on the capital account. The Commission has no view on the sequencing and timing of capital account liberalization. The work of the Commission in this field was focused on placing the formulation and implementation of capital controls on a sound footing in terms of public administration and law. Capital controls

India has a fully open current account, but many restrictions on the capital account are in place. A major debate in the field of economic policy concerns the sequencing and timing towards capital account convertibility. The Commission has no view on this question.

The focus of the Commission has been on establishing sound principles of public administration and law for capital account restrictions. A large array of the difficulties with the present arrangements would be addressed by emphasising the rule of law and by establishing sound principles of public administration.

[11] *See* para no. 8.2.2, FSLRC Report, vol. 1, p. 82.

In terms of creation of rules, it is envisaged that the Ministry of Finance would make 'rules' that control inbound capital flows (and their repatriation) and that Reserve Bank of India (RBI) would make 'regulations' about outbound capital flows (and their repatriation). With RBI, the regulation making process would be exactly the same as that used in all regulation-making in the Commission framework. With Ministry of Finance, the rule-making process would be substantially similar.

The implementation of all capital controls would vest with the RBI. The draft Code envisages the full operation of the rule of law in this implementation.

E. Systemic Risk[12]

Micro-prudential regulation thinks about the collapse of one financial firm at a time. A very different point of view is required when thinking of the collapse of the entire financial system. Micro-prudential regulation is about the trees, and systemic risk regulation is about the forest. It calls for measurement of systemic risk, and undertaking interventions at the scale of the entire financial system (and not just one sector) that diminish systemic risk. The field of financial regulation was traditionally primarily focused on consumer protection, micro-prudential regulation and resolution. In recent years, a fresh focus on the third field of systemic risk has arisen. Systemic risk is about a collapse in functioning of the financial system, through which the real economy gets adversely affected. In the aftermath of the 2008 crisis, governments and lawmakers worldwide desire regulatory strategies that would avoid systemic crises and reduce the costs to society and to the exchequer of resolving systemic crises. The problem of systemic risk requires a bird's eye perspective of the financial system: it requires seeing the woods and not the trees. To some extent, systemic crises are the manifestation of failures on the core tasks of financial regulation, i.e. consumer protection, micro-prudential regulation and resolution.

If the three pillars of financial regulation would work well, many of the crises of the past, and hypothetical crisis scenarios of the future, would be defused. Systemic risk in India will go down if institutional capacity is built for the problems of consumer protection, micro-prudential regulation and resolution. However, it will not be eliminated.

First, despite the best intentions, errors of constructing the institutional frame work, and human errors, will take place. Second, even if all three pillars work perfectly, some systemic crises

[12] *See* para no. 9.1, FSLRC Report, vol. 1, p. 89.

would not be forestalled. This calls for work in the field of systemic risk, a s a fourth pillar of financial regulation.

While there is a clear case for establishing institutional capacity in these areas, it is also important to be specific in the drafting of law. Unless systemic risk regulation is envisioned as a precise set of steps that would be performed by Government agencies, there is the danger that systemic risk law degenerates into vaguely specified sweeping powers with lack of clarity of objectives.

The Commission deeply analyzed the problem of reducing the probability of a breakdown of the financial system. This requires understanding the financial system as a whole, as opposed to individual sectors or firms, and undertaking actions which reduce the possibility of a collapse of the financial system. Each financial regulator tends to focus on regulating and supervising some components of the financial system. With sectoral regulation, financial regulators sometimes share the world view of their regulated entities.

What is of essence in the field of systemic risk is avoiding the worldview of any one sector, and understanding the overall financial system. In order to achieve this, Commission envisages a five-part process.

F. Development and Redistribution[13]

Financial economic governance in India is charged with the development of market infrastructure and processes, and with redistribution. The development agenda in Indian financial economic policy comprises two elements:

(i) The development of market infrastructure and processes, and

(ii) Redistribution and financial inclusion initiatives, where certain sectors, income or occupational categories are the beneficiaries.

The framework proposed by the Commission involves placing the first objective with regulators and the second with the Government. The draft Code envisages regulators undertaking initiatives in the first area. For the second area, the Government would issue notifications in the Gazette, instructing regulators to impose certain requirements upon stated financial firms. The Government would be obliged to make payments to firm reflect the costs borne by them.

[13] *See* para no. 10.1, FSLRC Report, vol. 1, p. 99.

The Commission felt that all initiatives of this nature – in the pursuit of inclusion or of development – should be subject to systematic evaluation after a period of three years. Decision making would be improved by a process of articulation of specific goals, followed by an evaluation of the extent to which these goals were met. These objectives have to be achieved through sound principles of public administration and law.

G. Monetary Policy[14]

Objectives, powers and accountability mechanisms have to beset up for monetary policy. The framework envisaged by the Commission features a strong combination of independence and accountability for RBI in its conduct of monetary policy.

The first stage lies in defining the objective of monetary policy. The Ministry of Finance would put out a Statement defining a quantitative monitor able 'predominant' target. Additional, subsidiary targets could also be specified, which would be pursued when there are no difficulties in meeting the predominant target.

The draft Code places an array of powers with RBI in the pursuit of this objective. Decisions on the use of these powers would be taken at an executive Monetary Policy Committee (MPC). The MPC would meet regularly, and vote on the exercise of these powers, based on forecasts about the economy and the extent to which the objectives are likely to be met. The MPC would operate under conditions of high transparency, thus ensuring that the economy at large has a good sense about how the central bank responds to future events. Alongside this core monetary policy function, RBI would operate a real time gross settlement system, that would be used by banks and clearing houses. It would also operate mechanisms for liquidity assistance through which certain financial firms would be able to obtain credit against collateral.

H. Public debt management[15]

A specialized framework on public debt management has to be setup that takes a comprehensive view of the liabilities of Government, and establishes the strategy for low-cost financing in the long run. The management of public debt requires a specialized investment banking capability for two reasons:

[14] *See* Chapter 11, FSLRC Report, vol. 1, p. 104.
[15] *See* Chapter 12, FSLRC Report, vol. 1, p. 111.

- Debt management requires an integrated picture of all onshore and off shore liabilities of the Government. At present, this information is fragmented across RBI and the Ministry of Finance. Unifying this information, and the related debt management functions, will yield better decisions and thus improved debt management.
- A central bank that sells government bonds faces conflicting objectives. When RBI is given the objective of obtaining low cost financing for the Government, this may give RBI a bias in favour of low interest rates which could interfere with the goal of price stability.

In its entirety, the problem of debt management for the Government includes the tasks of cash management and an overall picture of the contingent liabilities of the Government. These functions are integrated into a single agency through the draft Code.

I. Contracts, Trading and Market Abuse[16]

Certain adaptations to the foundations of commercial law, surrounding contracts and property, are required to enable the financial system. Alongside this, the legal foundations for the securities markets are established.

The overall task of constructing financial law comprises the above nine elements, and of establishing sound foundations of regulatory governance. The last component of financial law is the set of adaptations of conventional commercial law on questions of contracting and property rights that is required in fields such as securities and insurance. Statutes as well as case laws have shaped the rules regarding creation of financial contracts, transfer of rights, title or interest in such contracts and enforcement of such rights. These developments have largely been sector specific.

The framework of the securities markets requires legal foundations for the issuance and trading of securities. Issuance of securities requires three kinds of restrictions. At the time of the issue, adequate information must be available for an investor to make an informed decision about valuation. Once the trading commences a continuous flow of information must be available through which the investor can make informed decisions. Finally, a set of rules must be in place through which all holders of a given class of securities obtain the identical payoffs. These three objectives would be achieved through regulations.

[16] *See* Chapter 13, FSLRC Report, vol. 1, p. 119.

Financial markets feature an important role for Infrastructure Institution. The rules made by these organizations shape the design of financial markets to a substantial extent.

The draft Code constrains the behavior of Infrastructure Institutions in three respects:

i) Infrastructure Institutions are required to issue bye-laws and abide by them;

ii) The objectives that these bye-laws must pursue are defined in the law;

iii) They are required to obtain approval from the regulator for bye-laws.

The draft Code has provisions that require dissemination of this information. In addition, the falsification of this information is termed 'market abuse'[17]. The draft Code defines market abuse and establishes the framework for enforcement against it.

This problem statement differs considerably from approach taken by existing laws in India, which are sector-specific. The existing laws deal with sectors such as banking, securities and payments. The Commission analyzed this issue at length, and concluded that non-sectoral laws constitute a superior strategy.

As an example, a non-sectoral consumer protection law would lead to harmonization of the consumer protection across multiple sectors. If this approach were not taken, there is the possibility of a certain sector having more lax standards of consumer protection than another. Profit-seeking financial firms would rush to exploit the profit opportunities, and distort the structure of the financial system.

The Commission believes that the draft Code will, with no more than minor modifications, represent the essence of financial law for many decades to come. In this respect, the work of the Commission has taken Indian financial law closer to its roots in the common law tradition.

At present, financial law in India is fairly complex. The drafting style used in most current laws is relatively complex and thus unreadable to non-specialists. The Commission has tried to achieve a simple writing style for the draft Code. The unification of many laws into a single draft Code has greatly assisted simplification.

The first task of financial law is to establish a clear strategy for the nine areas listed above. The second task of financial law is to establish financial regulators. In a liberal democracy, the 'separation of powers' doctrine encourages a separation between the legislative, executive and judicial functions. Financial regulators are unique in the extent to which all three functions are

[17] *Ibid*

placed in a single agency. This concentration of power needs to go along with strong accountability mechanisms.

There is a strong case for independence of regulators. Independent regulators would yield greater legal certainty. The quest for independence of the regulator requires two planks of work. On one hand, independence needs to be enshrined in the law, by setting out many processes in great detail in the law. On the other hand, alongside independence there is a requirement of accountability mechanisms.

The Commission has adopted five pathways to accountability. First, the processes the regulator must adhere to, have been written down in considerable detail in the draft Code. Second, the regulation-making process (where Parliament has delegated lawmaking power to regulators) has been established in the draft Code with great care, with elaborate checks and balances. Third, systems of supervision have been established in the draft Code with a great emphasis on the rule of law. Fourth, strong reporting mechanisms have been established in the draft Code so as to achieve accountability. Finally, a mechanism for judicial review has been established for all actions of regulators through a specialized Tribunal.

At present, laws and regulations in India often differentiate between different ownership or corporate structures of financial firms. The Commission has pursued a strategy of ownership-neutrality: the regulatory and supervisory treatment of a financial firm would be the same, regardless of whether it is private India, foreign, public sector and co-operative. This would yield a level playing field.

At present, many public sector financial firms, e.g. Life Insurance Corporation of India (LIC), State Bank of India (SBI), are rooted in a specific law. The Commission recommends that they be converted into companies under the Companies Act, 1956. This would help enable ownership-neutrality in regulation and supervision. This recommendation is not embedded in the draft Code. A related concern arises with co-operatives which fall within the purview of state Governments. The Commission recommends that State Governments should accept the authority of Parliament (under Article 252 of the Constitution) to legislate on matters relating to the regulation[18] and supervision of co-operative societies carrying on financial services.

[18] Art.252. Power of parliament to legislate for two or more states by consent and adoption of such legislation by any other state:- (1) if it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which parliament has no power to make laws for the states except as provided in articles 249 and 250 should be regulated in such states by Parliament by law, and if resolutions to that effect are passed by all the Houses

The Commission proposes that regulators may impose restrictions on the carrying on of specified financial services by co-operative societies belonging to States which have not accepted the authority of Parliament to legislate on the regulation of co-operative societies carrying on financial services.

IV. FUNCTIONS AND POWERS OF THE REGULATOR

The actual functioning of the regulator lies in three areas: regulation-making, executive functions and administrative law functions. In each area, the draft Code defines the functioning of regulators with considerable specificity.

At present, in India, there is a confusing situation with regulators utilizing many instruments such as *regulations, guidelines, circulars, letters, notices* and *press releases*. The draft Code requires all regulators to operate through a small number of well defined instruments only.

The first task of a regulator is that of issuing regulations. If laws are poorly drafted, there is a possibility of excessive delegation by Parliament, where a regulatory agency is given sweeping powers to draft regulations. The Commission has consistently sought to define specific objectives, define specific powers and articulate principles that guide the use of powers. Through this, regulation-making at the regulator would not take place in a vacuum.

A structured process has been defined in the draft Code, through which regulation making would take place. The regulator would be required to articulate the objective of the regulation, a statement of the problem or market failure that the regulation seeks to address, and analyze the costs and benefits associated with the proposed regulation. A systematic public consultation process is written into the draft Code. This structured regulation-making process would reduce arbitrariness and help improve the quality of regulations.

A. This Structured Regulation-making

This process requires a considerable expenditure of time and effort at the regulator. This is commensurate with the remarkable fact that Parliament has delegated law-making power to a

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of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

regulator. In an emergency, the regulator can issue regulations without going through the full regulation-making process. However, these regulations would lapse within six months. Alongside regulations, the draft Code envisages a process through which regulator scan issue 'guidelines'. Guidelines clarify the interpretation of regulations but do not, themselves, constitute regulations. Specifically, violation of guidelines alone would not constitute violation of the law.

At present, regulations are not subject to judicial review. The Commission envisages an important process of judicial review of regulations. It would be possible to challenge regulations either on process issues (i.e. the full regulation-making process was not followed) or substantive content (i.e. the regulation does not pursue the objectives, or exceeds the powers, or violates the principles, in the Act). The Commission believes that these checks and balances will yield considerable improvements in the quality of regulation-making in India.

B. Turning to Executive Functions

The draft Code has specifics about each element of the executive powers. The first stage is the processing of permissions. A systematic process has been laid down through which permissions would be given.

The second element is information gathering. Regulators require a substantial scale of regular information flow from financial firms. The Commission envisages a single 'Financial Data Management Centre'. All financial firms will submit regular information filings electronically to this single facility. This would reduce the cost of compliance, and help improve data management within regulators.

C. Turning to Penalties

The draft Code has a systematic approach where certain standard categories are defined, and principles guide the application of penalties. This would help induce greater consistency, and help produce greater deterrence. A critical component of the framework for penalties is the mechanisms for compounding, which are laid on a sound foundation, and consistently applied across the entire financial system.

Once an investigation has taken place, and the supervisory team within a regulator believes there have been violations, the principles of public administration suggest that the actual order should be written by disinterested party. At the level of the board, an 'administrative law member'

would have oversight of 'administrative law officers' who would not have any responsibilities within the organisation other than performing quasi-judicial functions. A systematic process would operate within the regulator, where administrative

Law officers and the administrative law member would be presented with evidence and write orders. The working of the regulator ultimately results in regulations and orders. These orders would face judicial review at the Tribunal. The Commission envisages a unified Financial Sector Appellate Tribunal (FSAT) that would hear all appeals in finance. A considerable focus has been placed, in the draft Code, on the functioning of the registry of FSAT, so as to achieve high

V. FINANCIAL REGULATORY ARCHITECTURE

We now turn to the 'financial regulatory architecture'[19] or the division of the overall work of financial regulation across a set of regulatory agencies. Many alternative structures can be envisioned for the financial regulatory architecture. Parliament must evaluate alternative block diagrams through which a suitable group of statutory agencies is handed out the work associated with the laws. These decisions could conceivably change over the years.

At present, Indian law features tight connections between a particular agency (e.g. Securities and Exchange Board of India (SEBI)) and the functions that it performs (e.g. securities regulation). The draft Code does not have such integration. Changes in the work allocation should not require changes to the underlying laws themselves. From the outset, and over coming decades, decisions about the legal framework governing finance would proceed separately from decisions about the financial regulatory architecture. This would yield greater legal certainty, while facilitating rational choices about financial regulatory architecture motivated by considerations in public administration and public economics.

At present, India has a legacy financial regulatory architecture. The present work allocation, between RBI, SEBI, Insurance Regulatory and Development Authority (IRDA), Pension Fund Regulatory and Development Authority (PFRDA) and Forward Markets Commission (FMC), was not designed. It evolved over the years, with a sequence of piecemeal decisions responding to immediate pressures from time to time.

The present arrangement has gaps where no regulator is in charge – such as the diverse kinds of 'ponzi' schemes which periodically surface in India, which are regulated by none of the

[19] *See* Chapter 14, FSLRC Report, vol. 1, pp. 131-135.

existing agencies. It also contains overlaps where conflicting laws have consumed the energy of top economic policy makers. Over the years, these problems will be exacerbated through technological and financial innovation. Financial firms will harness innovation to place their activities into the gaps, so as to avoid regulation. When there are overlaps, financial firms will undertake *forum-shopping*[20], where the most lenient regulator is chosen, and portray their activities as belonging to that favored jurisdiction.

An approach consisting of multiple regulators for specific sector that constructs 'silos' induces economic inefficiency. At present, many activities that naturally sit together in one financial firm are forcibly spread across multiple financial firms, in order to suit the contours of the Indian financial regulatory architecture. Financial regulatory architecture should be conducive to greater economies of scale and scope in the financial system. In addition, when the true activities are defined the financial firm is split up across many entities, each of which has over sight of a different supervisor; no one supervisor has a full picture of the risks that are present. When a regulator focuses on one sector, there are certain unique problems of public administration which tend to arise. In order to analyse alternative proposals in financial regulatory architecture, Commission established the following principles: Accountability is best achieved when an agency has a clear purpose. The traditional Indian notion, that a regulator has powers over a sector but lacks specific objectives and accountability mechanisms, is an unsatisfactory one. Conflicts of interest, in particular direct conflicts, of interest are harmful for accountability and must be avoided.

A financial regulatory architecture that enables a comprehensive view of complex multi-product firms, and thus a full understanding of the risks that they take, is desirable. Avoiding sector wise regulation when a single regulator works there is a possibility of an alignment coming about between the goals of the sector (growth and profitability) and the goals of the regulator. The regulator then tends to advocate policy directions which are conducive for the growth of its sector. Such problems are less likely to arise when a regulatory agency works towards an economic purpose such as consumer protection across all or at least many sectors.

[20] *See Vodafone International Holdings B.V.* v. *Union of India (UOI) and Anr.* MANU/SC/0051/2012 (Para 195)

Economies of scale in Government agencies In India, there is a paucity of talent and domain expertise in Government and constructing a large number of agencies is relatively difficult from a stating perspective. It is efficient to place functions that require correlated skills into a single agency.

Transition issues – It is useful to envision a full transition into a set of small and implementable measures. The Commission proposes a financial regulatory architecture featuring seven agencies.

VI. UNIFIED FINANCIAL REGULATOR

This proposal features seven agencies and is hence not a 'unified financial regulator[21]' proposal. It features a modest set of changes, which renders it implementable:

a. The existing RBI will continue to exist, though with modified functions.
b. The existing SEBI, FMC, IRDA and PFRDA will be merged into a new unified agency.
c. The existing Securities Appellate Tribunal (SAT) will be subsumed into the FSAT.
d. The existing Deposit Insurance and Credit Guarantee Corporation of India (DICGC) will be subsumed into the Resolution Corporation.
e. A new Financial Redressal Agency (FRA) will be created.
f. A new Debt Management Office will be created.
g. The existing FSDC will continue to exist, though with modified functions and a statutory framework.

The functions of each of these seven proposed agencies are as follows:

Reserve Bank of India – It is proposed that RBI will perform three functions: monetary policy, regulation and supervision of banking in enforcing the proposed consumer protection law and the proposed micro-prudential law, and regulation and supervision of payment systems in enforcing these two laws. Unified Financial Agency The unified financial regulatory agency would implement the consumer protection law and micro-prudential law for all financial firms other than banking and payments. This would yield benefits in terms of economies of scope and scale in the financial system; it would reduce the identification of the regulatory agency with one sector; it would help address the difficulties of finding the appropriate talent in Government agencies.

[21] *See* Part-II Establishment of Financial Regulatory Agencies Chapter 3 Establishment of The Unified Financial Authority, FSLRC Report, vol. 2, p. 15.

This proposed unified financial regulatory agency would also take over the work on organized financial trading from RBI in the areas connected with the Bond-Currency-Derivatives Nexus, and from FMC for commodity futures, thus giving a unification of all organized financial trading including equities, government bonds, currencies, commodity futures and corporate bonds.

The unification of regulation and supervision of financial firms such as mutual funds, insurance companies, and a diverse array of firms which are not banks or payment providers, would yield consistent treatment in consumer protection and micro-prudential regulation across all of them.

Financial Sector Appellate Tribunal – The present SAT will be subsumed in FSAT, which will hear appeals against RBI for its regulatory functions, the unified financial agency, decisions of the FRA and some elements of the work of the resolution corporation. Resolution Corporation The present DICGC will be subsumed into the Resolution Corporation which will work across the financial system.

The FRA is a new agency which will have to be created in implementing this financial regulatory architecture. It will setup a nationwide machinery to become a one stop shop where consumers can carry complaints against all financial firms. Public Debt Management Agency An independent debt management office is envisioned. Financial Stability and Development Council Finally, the existing FSDC will become a statutory agency, and have modified functions in the fields of systemic risk and development. The Commission believes that this proposed financial regulatory architecture is a modest step away from present practice, embeds important improvements, and will serve India well in coming years.

Over a horizon of five to ten years after the proposed laws come into effect, it would advocate a fresh look at these questions, with two possible solutions. One possibility is the construction of a single unified financial regulatory agency, which would combine all the activities of the proposed Unified Financial Authority and also the work on payments and banking. Another possibility is to shift to a two-agency structure, with one Consumer Protection Agency which enforces the proposed consumer protection law across the entire financial system and a second Prudential Regulation Agency which enforces the micro-prudential regulation law across the entire financial system. In either of these paths, RBI would then concentrate on monetary policy.

These changes in the financial regulatory architecture would be relatively conveniently achieved, given the strategy of emphasizing separability between laws which define functions, and

the agencies that would enforce the laws. Over the years, based on a pragmatic assessment of what works and what does not work, the Government and Parliament can evolve the financial regulatory architecture so as to achieve the best possible enforcement of a stable set of laws.

VII. CONCLUSION

On the basis of aforesaid analysis it is submitted the steps taken by the Government of India for protection of consumers is highly appreciable. However, it is noted that the proposed draft recommends for repealing various laws[22], as this submission makes to think the existing the financial law in India in not serving common good. Therefore, it can be deduced the IFC code may provide the new way for neo- globalization era without updating the existing the economic reforms in India. Economic Reforms which are fundamental for development of People and State is integral part of democracy. As we see today is that India is progressing and becoming strong economic country in South Asia Region with existing system of Law. However, we can achieve more results by adopting the proposed the IFC Code, with certain modifications which are necessary to adapt with business formulas of other legal systems in world. As a Positive note that the proposed draft is well identified existing lacuna in the present legal system and projecting the new ways to look forward for success in the Indian economy and Indian financial Law.

[22] See the FSLRC Report no.1 page no: 139. From existing legislations affecting India's financial system that are not to be repealed, most will require amendments. Some will have to be substantially amended, and others will require only minor amendments. Following is a list of legislations to be repealed: 1. The Securities Contracts (Regulation) Act, 1956 2. The Securities and Exchange Board of India Act, 1992 3. The Depositories Act, 1996 4. The Public Debt Act, 1944 5. The Government Securities Act, 2006 6. The Reserve Bank of India Act, 1934 7. The Insurance Act, 1938 8. The Banking Regulation Act, 1949 9. The Forward Contracts (Regulation) Act, 1952 10. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 11. The Deposit Insurance and Credit Guarantee Corporation Act, 1961 12. The Foreign Exchange Management Act, 1999 13. The Insurance Regulatory and Development Authority Act, 1999 14. The Payment and Settlement Systems Act, 2007 15. The Acts establishing bodies corporate involved in the financial sector (e.g. The State Bank of India Act, 1955 and The Life Insurance Corporation Act, 1956)

BOOK REVIEW

INTERNATIONAL ENVIRONMENTAL ISSUES AND THE INDIA'S STAND *1st Edition, Editor: Dr. Arup Kumar Poddar. ePub Bud, Santa Monica, California, USA, 2013. Pages 132. Price: USD 9 and INR 600.*

Dr. Sreenivasulu N.S[*]

I take the pleasure of writing a review of a book titled "International environmental issues and the India's stand. The book published by an international publisher ePub Bud, based in Santa Monica, California, USA. The book has total 132 pages.[1] There are 13 chapters in the book written by the select Students of NUJS working in the field of environmental law and compiled and put together in a systematic manner by Dr. Arup Kumar Poddar who teaches and researches in environmental law at the WB National University of Juridical Sciences (NUJS), Kolkata. To take you through the contents of the book in the process of review I find following insights and inferences. I believe that these inferences would present a blue print of the book and the overall cause of review of the book, its contents and the coverage. Let me go one by one for chapter wise review in the following way.

The First Chapter is on Corporate Environment Responsibility (CER) in India and is written by Aishwarya Ayushmaan. The chapter presents the concept of CER with its implications and opportunities. The author states that the idea of Corporate Environmental Responsibility ('CER') is fairly recent and stems from the concept of Corporate Social Responsibility.[2] Corporate Social Responsibility ('CSR') refers to the idea that not only public policy but companies and corporations should also take responsibility for social issues.[3] It is argued that; more recently, CSR is seen as a concept in which companies voluntarily integrate social and environmental concerns into their business operations and into the interaction with their stakeholders.[4] It is believed that; a socially responsible company exhibits not just mere compliance with the law when investing in

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[1] It has ISBN 978-1-62840-113-4 (Paperback) & 978-1-62840-208-7 (E-Book).

[2] PayalGwalani,Corporates swear by eco responsibility, The Times of India (Nagpur), Mar 29, 2012 available at http://articles. timesofindia. indiatimes. com/2012-03-29 / nagpur /3254175 _ 1 _ corporate – environmental – responsibility - environmental- laws- water- harvesting (Last visited on March 30, 2013).

[3] Chahoud, Emmerling, Kolb, Kubina, Repinski & Schläger, Corporate Social and Environmental Responsibility in India – Assessing the UN Global Compact's Role (2007).

[4] *Id.*

human resources and the environment but a continuous and actively attempts to ensure sustainable development.[5] Thus, corporate social responsibility motivates companies to assume responsibility for problems and challenges that are traditionally addressed by the State. It is discussed that; the importance of sustainable development has been recognized on the national and international level. The Constitution of India lays adequate focus on the environment by the virtue of Article 48A and 51(A) (g). However, it is clear now that this can be achieved, not in isolation, but through joint efforts by the industries. It is viewed that; the importance of Corporate Environmental Responsibility emerges in this context. Being a voluntary concept, this idea rests mainly on the shoulders of the companies. A growing environmental consciousness is visible amongst various companies.[6] It is recommended that; the State can encourage this trend further by incentivizing it in the form of tax exemptions, environmental permits etc. It has to be acknowledged, that environmental protection involves multiple stakeholders and if sustainable development has to be achieved, corporate bodies have to play a proactive role.

The Second Chapter is on Wetland Conservation: Examining the Initiatives written by Asha Rachel Joy. Perhaps, wetlands are fragile ecosystems that represent the interface between land and water.[7] They are defined as 'lands transitional between terrestrial and aquatic eco-systems where the water table is usually at or near the surface or the land is covered by shallow water.[8] It is submitted that; today, in an era of imminent water scarcity where wetlands are increasingly relevant, they are also fast depleting. In light of this, the chapter seeks to analyze global and national initiatives undertaken to protect and conserve wetlands. A brief discussion on the need to conserve wetlands in the light of the various functions they perform and the threats to their existence has been made. The primary global initiative undertaken to protect wetlands, namely, the Ramsar Convention is examined and in this context, there discussed the obligations of member nations, implementation technique etc. Further, wetland conservation measures which have been adopted in India are examined.

The Third Chapter is on Construction of Dam and Protection to Environment and Wildlife - A Study of the fact from *Mullaperiyar Environmental Protection Forum's* case written by Dr. Arup

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[5] *Id.*

[6] *See Supra* note 22.

[7] Jyoti Parikh, INTRODUCTION IN SUSTAINABLE MANAGEMENT OF WETLANDS: BIODIVERSITY AND BEYOND 21 (Jyoti Parikh, Hemant Datye eds., 2002).

[8] W.I. Mitsch & I.G. Gosselink, WETLANDS (1986).

Kumar Poddar. It is mentioned that; the construction of Mullaperiyar dam dates back to 29th October, 1886 because of entering into an agreement between Secretary of State for India and Maharaja of Travancore Nearly 8000 acres (approx.) of land property was subjected to an irrigation work project called "Mullaperiyar Project". In order to fulfill the requirement of the agreement a reservoir was to be constructed and after the construction of the dam became famous as Mullaperiyar Dam located at the vicinity of the Periyar River. It was agreed that the maximum level of the reservoir would be 152 ft. However, this agreement was modified in 1970. As per this agreement, the fishing right was given to Kerala and Electricity generation to Tamil Nadu. Moreover, it was agreed that the State of Tamil Nadu would pay a certain sum of money annually to State of Kerala. The Kerala was given additional right to fish over land, water, tank and ponds whereas without affecting the main ideology of the agreement. However, this additional grant did not affect the rights of Tamil Nadu over irrigation and power generation.

The write up comes out in the background of dispute between the state of Tamilnadu and Kerala regarding on the dam, its water levels, height and its strengthening. The Central Water Commission suggested for strengthening of the dam which was constructed decades back and as there is a minor fracture noticed during its examination by the commission. The author argues that the state of Kerala has got some objections with the intentions of state of Tamilnadu to further strengthen the dam and increase the water levels. He submits that the Tamilnadu government is trying to implement the suggestions made by Central Water Commission regarding the strengthening of the old dam and for possible improving its capacity. After the completion of strengthening and capacity increasing work again Central Water Commission can examine and inspect the dam and its conditions after taking into consideration views of both the states before taking any decision with regard to actually allowing for more storage of water in the dam. The author in a very detailed manner presents the factual situation of water and dam dispute between both the states and offers his point of views on the current state of affairs regarding the stands of both the governments and the Central Water Commission

The Fourth Chapter is on Greater Cost for Greater Emission: A Brief Overview on the Idea of Carbon Trading written by Mani Aishwarya K.V.S. It is observed that; during the Kyoto Protocol many developed nations including members of the European Union agreed to legally bind themselves with regards to reducing the emissions of green house gases especially that of Carbon-dioxide. The Kyoto Protocol came up with many propositions however the most significant of

them was that of Carbon Credit and 'Carbon Trading.[9]It is submitted that; the alarming rise in temperatures along with the increase in carbon-dioxide and other green house gases, and the thinning of the Ozone layer resulted in the United Nations holding a convention called as the United Nations Framework Convention on Climate Change and was held in the beautiful Japanese city of Kyoto in 1997. The author presents how the Kyoto Protocol came into being with what objectives. The success and failure of the protocol have been mentioned by the author. The author opines that; yet despite its numerous defects, the Kyoto Protocol played no insignificant role in generating awareness and appealing to the global consciousness. Creating awareness in its essence means winning half the battle. The Kyoto Protocol has a wonderful vision and if it focused on better implementation, there is nothing preventing it from saving our planet.

The Fifth Chapter is on Right to Life in a Healthy Environment: Article 21 of The Indian Constitution written by Deskit Angmo. The author states that; with the advent of technology and industries as a part of a developing nation, there is an upsurge of radical change in the relationship between man and his environment. According to the author, this is where a very crucial question comes in to picture, that is whether all of this development with a strong confidence of aiding man, is actually doing so. It has been argued widely that the consequence of development is an evil which is depriving man of his prime right to be in a healthy environment. Therefore, this leads to the need for statutes which will ensure that such is not done. The chapter is primarily an attempt to look at the fundamental rights that our constitution provides with regards to the environment that we live in. The Indian constitution has various statutory provisions which ensure protection and improvement of the environment.[10] With the recognition of this right, various case laws in India have passed on judgments observing various international principles of sustainable development like 'polluters pay' and other 'precautionary principles'.[11]

The author argues that; with the passing time and advent of modern technology and the country going through the process of development all at the cost of the environment we live in. It has been considered important that the need to protect the environment becomes important in order to give to a person his basic right to live a healthy life. It is opined that; the legislature apart from going beyond its jurisdiction to include international principles adopt the need to protect the

[9] Raina Wagner, 'Adapting Environmental Justice: In The Age Of Climate Change, Environmental Justice Demands A Combined Adaptation-Mitigation Response', 2 Ariz. J. Envtl. L. & Pol'y 153 (2012).

[10] Article21, Article 41, Article 48A Constitution of India.

[11] *Vellore Citezens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647

environment in the important articles of the constitution and also bring about amendments wherever it has been seen necessary, now addresses pleas and matters related to the degradation of the environment in the form of petitions filed in public interest.[12] The Supreme Court for such issues entertains writ petitions under Article 32, it has under this article ordered for closure of certain quarries on the ground that it has been affecting the ecological balance.

The Sixth Chapter is on Sustainable Development in India written by Dhvani Shah, according to whom 'Environment' and 'Economic Progress' have always been seen as an antithetic to each other. It has become very evident in the last few decades that economic development can no longer be viewed in isolation from environmental protection and social progress. The nature of issues along with an increasing interdependence among nations has necessitated that countries act collectively, in the spirit of multilateralism to chart a sustainable course of development.[13] In this chapter, the author discusses the concept of sustainable development while, elucidating on the interplay between sustainable development and the Indian legal system. Additionally, the role of citizens in sustainable development been discussed and practical solutions offered to ensure sustainable development. It is argued that; sustainable development should not be a modification of the existing policies but rather an alternative to them.[14]

The Seventh Chapter is on Genetic Engineering Laws: A Comparative Analysis written by D Divyanshu who discusses genetic modification of organisms and crops and give an account of the history of the GMOs and the development of the regulatory measures for these products. The chapter will look into the debate concerning the benefits and adverse impacts associated with these Genetically Modified Products. A comparative analysis of genetic engineering laws of different jurisdictions, highlighting the environmental concerns addressed in these laws has been given. It is submitted that; Indian jurisdiction has always been careful with regards to the preservation of biodiversity, and the Indian cultivators have been skeptical about the use of modern biotechnology, but with globalization it is an inevitable consequence that GMOs have become a part of our daily life. It is opined that; the only way to avoid the harmful impacts of such

[12]Article 32 (1) provides: "The Supreme Court by appropriate proceedings for the enforcement of right conferred by this Part (Part III) is guaranteed."

[13] Ministry of Environment and Forests, Government of India, Sustainable Development in India: Stocktaking in the run up to Rio + 20, 2 (2011).

[14] Ramon Lopen and Michael Toman, Economic Development And Environmental Sustainability: New Policy Options 28 (2006).

substances would be a stricter implementation of genetic engineering laws and adherence to the internationally recognized principles.

The Eighth Chapter is on The Clean Development Mechanism under the Kyoto Protocol written by Varsha Shivanagowda who dwells on the origins of the protocol. The commitment goals set by the Protocol according to the author could not be feasibly achieved only by conventional means of emission reduction and the Protocol in recognition of this also provided for special 'flexibility mechanisms' to supplement the process. The focus of this chapter is on the Clean Development Mechanism under the Protocol and its implementation so far, particularly from a developing country perspective. The chapter also looks at the role played by it in achieving the objectives of emission control and sustainable development in context of the history of the Kyoto framework. The author mentions that; we have seen how the original notion of the Clean Development Mechanism was based on an idea of mutual benefits accruing to all parties involved. This would be possible in an ideal situation and would rely greatly on the existence of a transparent regulatory mechanism. However, it is opined that; this original idea has been sullied by the ground-realities of corruption and profit-seeking which have overshadowed the original objectives of the Kyoto Protocol. It is submitted that; it is easy to forget the potential far-reaching impacts of climate change and that a little timely action can go a long way in mitigating the damage that has already been done. Once can only hope for better planning in the post-2012 commitment periods. This could possibly be ensured by introduction of a less subjective mode of determining benefits with more targeted and specific goals focusing on sustainable development.

The Ninth Chapter is on The Environment Impact Assessment-The Process and Fallback written by Yashaswi Kant. This chapter is an attempt to introduce to the reader the concept of Environmental Impact Assessment (hereinafter EIA), its process and the fall-backs witnessed in the Jaitapur Nuclear Power Plant EIA Report. As an essential precursor to the appreciation of the same, the chapter shall initially meander through the concept of environmental impact assessment, its origin and requirement. The essence of the discussion is the process of EIA in India and a critical analysis of the EIA report on the Jaitapur Nuclear Power Plant. It is viewed that; as can be seen from the abovementioned scenario, the Jaitapur EIA lacks credibility on various grounds, starting from the very institute conducting the impact assessment to the flagrant overlooking of

provisions mandated by law. Author argues that; it is nothing but a lacuna in the environmental law jurisprudence within India. The Ministry of Environment should come out with stricter checks to plug such loopholes as shown by the Jaitapur EIA. The other aspect which should be paid attention to is the enforcement of the law in their true spirit. Having an environment friendly law on paper won't save the environment. It should be seen by the government that such laws are diligently followed in their letter and spirit.

The Tenth Chapter is on Wildlife Conservation and Protection in India written by *A*rnav Mohanty. The author discusses wildlife conservation, significance of the same in India, while highlighting statistics with regard to various wild lives in India. This chapter seeks to discuss the history of various wildlife conservation practices in India, the existing mechanism in the form of laws and rules etc. as well as the existing measures that are in place for the protection and conservation of wildlife and lastly the manifold factors which threaten the existence of wildlife. It is presented that; albeit there are adequate mechanisms in the form of laws, rules, regulations etc. in place for the conservation and protection of wildlife in India, the effective implementation and enforcement of the same is wanting. It is viewed that; the mere presence of laws, rules etc. to preserve wildlife and combat extinction of wildlife is not enough. There should be strict observance and adequate implementation of the said laws, rules etc. in order to successfully conserve and preserve our rich and diverse wildlife. It should be noted that government alone will not sufficiently be able to conserve wildlife. The author opines that; there should be participation of the society and other organizations like NGOs in the conservation process and masses should be educated about the importance and value of wildlife and the pivotal role that it plays in maintaining the balance in the ecosystem will go a long way in facilitating the ongoing conservation process.

The Eleventh Chapter is on Environmental Justice through Constitutional Writ Jurisprudence written by Samkit Sethia. The author discusses how public interest litigations in India have come out with outstanding outcomes providing environmental justice though public interest litigations. Information has been provided how public interest litigations gained importance in the development of Indian legal jurisprudence. How law courts responded to such litigation, how the same have been streamlined to ensure that justice is delivered with proper motives and means. For the prevention of abuse of public interest litigation also courts have formulated mechanism to

check and balance while discussing case of *State Of Uttaranchal* v. *Balwant Singh Chaufal & Ors.* [15]

The Twelfth Chapter is on the Importance of Role of Indian Judiciary in Encouraging Sustainable Development written by Akshat Gupta. It is viewed that; in the trade-off between development and environment, it is generally the latter that has suffered, especially in the context of developing nations. The implications of this choice have finally caught up with the human race. Recognizing this, the international fraternity began to convene to address the present environmental problems. Consequentially, the notion of sustainable development was devised. It was first defined in the Stockholm Declaration of 1972 and was further developed by the World Commission on Environment and Development in its report called "*Our Common Future*". The chapter begins with a brief understanding of the definition and principles of sustainable development by studying the following documents: Stockholm Declaration (1972), Rio Declaration and Agenda 21 (1992), and Rio+20 (2012). The author will then proceed to trace the evolution of sustainable development in India with the help of relevant case law, the foremost instance being *Vellore Citizens Welfare Forum* v. *Union of India*[16]. In the conclusion, the chapter ascertains whether the Indian judiciary has truly acknowledged and embraced the importance of sustainable development.

It is perceived that; the role played by the Indian Judiciary in encouraging the principle of sustainable development cannot be overstated. However, due to want of a proper monitoring mechanism and financial constraints, profound judgments are not always implemented. The researcher would also like to point out that the courts can only respond to the cases that are presented before them. Consequently, the other branches of the government also have an important role to play in enhancing the goal of sustainable development. Therefore, it is opined that; the other two wings of the Government, namely the executive and the Legislature along with the civil society must contribute by carrying out their duties effectively to help the judiciary in making sustainable development a reality.

The Thirteenth Chapter is on Doctrine of Public Trust in India written by Akshay Sewilkar. The doctrine of public trust is an ancient doctrine that developed during Roman times. It is mentioned

[15] Civil Appeal Nos.1134-1135 of 2002
[16] (1996) 5 SCC 647.

that; this doctrine then migrated to the English law from where it was adopted by other civil and common law jurisdictions. The doctrine was introduced in India by the *M.C. Mehta* v. *Kamal Nath*[17] case and has been applied in a number of subsequent cases. This chapter aims to deal with doctrine of public trust in India. To achieve this purpose, the Chapter shall first discuss the historical development of the doctrine and then move on to discuss its development in India. The author then discusses the subsequent application of the doctrine by various courts in the country. Further, the scope and extent of the application of the doctrine as determined by the decisions of various courts in India has been presented. The chapter concludes with an overview of the doctrine of public trust in India. According to the author, the doctrine of public trust is a recent introduction to Indian jurisprudence on environmental law. Applied for the first time in 1996, the scope of the doctrine has greatly widened since then. The judiciary has applied this doctrine in a large number of cases and has also developed it to suit Indian requirements. The application of this doctrine gives power to the court to strike down actions that are against the interest of the public and therefore allow a strict check over the actions of the executive. Furthermore, the application of the doctrine has been broadened to include man-made resources in addition to natural resources. Even the allocation and distribution of resources has to be governed by the public trust doctrine. To ensure that the interests of the public and environmental concerns are protected at all instances, the doctrine also provides that the government would have a duty to protect and promote the environment. The government would not be merely enjoined from taking actions that are detrimental to the interest of the public at large. Thus, the doctrine as evolved and applied by Indian courts has widespread application. Its application would allow courts to prevent and overturn actions of the government that could have negative ramifications for the environment and its resources. Thus, the introduction of the doctrine of public trust to Indian jurisprudence was according to the opinion of the author is a positive development that has and will benefit the cause of environmental protection in India.

After having reviewed the book through its thirteen chapters let me put in place my feedback and opinion on the entire content, coverage and structurization of the book. Dr. Poddar has done immense and in-depth study for realizing scope for the current book. He rightly identified the issues at stake on number of international environment related issues for projecting India's stand

[17] (1997)1 SCC 388

in its logical and legal senses. Number of issues that the book covers are having significant relevance for international environmental studies and. The author promptly puts efforts in this regard to give us a blue print of contemporary international environment issues while highlighting India's stand in this regard. Under his supervision different authors have contributed their research on standing environmental issues which have been purposefully edited and put together by Dr. Poddar. I shall appreciate the efforts of the writer and the co-writers in this regard and strongly believe that this book shall be very useful as reference copy to students and shall provide useful information to officers, judges, academicians, professional, etc.