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FOUNDER'S MESSAGE

It gives me immense pleasure to bring out our July, 2017 issue of 'CPJ Law Journal' which is published annually. CPJ Law Journal has successfully completed its 7th Anniversary serving the legal fraternity. Our Journal continues to serve as a store –house of information for the researchers and scholars around the nation. This journal aims to accomplish lots of milestone in terms of defining and redefining paradigms to achieve excellence in the area of legal research. We make our best efforts to rely on honesty, integrity, intellect and ability of our contributors to place 'CPJ Law Journal' among the very best. The Editorial Board is dynamic and offers a platform to the contributors to research upon the emerging issues and evolving concepts in their interest areas relating to law. We endeavor to accept and publish high quality papers which are aimed essentially and substantially at addressing the recent developments in the field of law and also to motivate the researchers to bring out suggestions and recommendations for improving the existing legal framework of. I take pride in congratulating all contributors of this issue & give my heartiest thanks to the whole editorial board of this Journal.

"Research is to see what everybody else has seen, and to think what nobody else has thought."

- Albert Szent Gyorgyi

We would like to hear from you about your views, suggestions and feedbacks for our journal so that we can improve and understand our readers mind. Please feel free to drop us mail at lawjournal.cpj@gmail.com

With Regards,

Shri Subhash Chand Jain
Founder, CPJ Group of Institutions

FROM THE DESK OF PATRON

"In much of society, research means to investigate something you do not know or understand."

- Neil Armstrong

The initiative of the Chanderprabhu Jain College of Higher Studies and School of Law in regularly publishing the CPJ Law Journal containing insightful research work is praise worthy attempt by the editorial team in contributing to the legal field. The editorial team works dedicatedly to put forward the research work of various contributors so as to be useful for the readers.

Change is the law of nature. Nothing remains static and therefore, we should always strive for the best and adapt ourselves to the changing times, technology and the needs of the changing society. In order to keep oneself updated about such events, it is necessary to have access to the sources of knowledge. We aim to provide such informative and resourceful content to the readers by motivating the researchers, scholars, academicians, students and other members of the legal fraternity to contribute towards the Journal.

It gives us great pleasure to bring forward the new volume of the CPJ Law Journal Vol. VII July, 2017. Although the Journal content is limited in the amount of in-depth information it can provide, we will make every effort to bring out the same for our readers every year with more information and knowledge. I firmly believe that the readers will find the present issue of the CPJ Law Journal interesting, insightful and thought provoking. CPJCHS & SOL solicits valuable suggestions from all our learned leaders for making the Journal more resourceful, relevant and dynamic.

Love & Best Wishes!

Mr. Abhishek Jain
General Secretary
CPJ–CHS & SOL

EDITORIAL NOTE

Dear Readers,

We are presenting to you with July, 2017 Issue of CPJ Law Journal. Our basic aim behind introducing this journal is to create a new forum for exchange of information on all aspects of legal studies and we ensure to keep you updated with recent developments in the legal field. Future scope of journal is open to your suggestions. You are invited to contribute for the Journal, your submissions should include original research articles and commentaries on legal aspects.

The CPJ Law Journal is a peer reviewed journal which is published annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights of the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in depth study in specific areas of the law and enhances their skills in legal research writings and analysis.

Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity .It is not only confined to being a paper collection activity, rather it aims at providing services for all round development of law students , professionals and all others in this field .

Also being from law background we feel it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance.

I hope you find this issue of journal informative and interesting. The success of this Initiative depends upon your response. We would appreciate your feedback.

Happy Reading!

Dr. Neeta Beri
Editor

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TRIPLE TALAQ UNDER MUSLIM PERSONAL LAW: A CONTENTIOUS ISSUE AND HISTORIC DEMAND FOR CHANGE

Prof. (Dr.) Subhash Chandra Singh*

ABSTRACT

One of the subtle but most pervasive areas of discrimination against women in the Muslim world today is the 'triple talaq' that occurs within the context of the marriage and family relations. The institution of marriage holds great status and honour for all people in all communities. To safeguard such a blessed institution as marriage, every possible means should be sought to prevent the collapse of the relationship. Undoubtedly, in certain circumstances, when every avenue has been exhausted and there is no solution to the problem, and living together as husband and wife has become a nightmare rather than bliss, divorce may be the only solution. But this should be done in a humanistic and universally accepted manner. This Article outlines key issues relating to triple talaq under Islamic law and the efforts being made by progressive members of the Muslim community for comprehensive reform of Muslim family laws. This effort also includes the reinterpretation of Islamic texts in changing scenarios.

INTRODUCTION

The question of triple *talaq* under Muslim personal law has been highlighted once again and has become a matter of national debate in the context of women's rights. This time the issue has been raised by Muslim women and is also being discussed in the Supreme Court. In 2016, Shayara Bano and Afreen Rahman, unilaterally divorced by their husbands, approached the Supreme Court of India, demanding an end to triple *talaq,* seeking justice from the Court to nullify a practice which is not only unconstitutional, but also "un-Quranic".This is a positive step because the demand for reform of Muslim marriage and divorce law has come from inside the Muslim community itself. The present debate represents a major change around marriage and divorce procedures for Muslim women under Muslim personal law.

The triple *talaq* debate has been triggered due to some developments in the past few months.

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In December 2015, a lawyer filed a Public Interest Litigation (PIL) in the Supreme Court seeking direction to Parliament to enact a Uniform Civil Code (UCC) to put an end to alleged discrimination being faced by Muslim women. The Supreme Court Bench headed by Chief Justice T.S. Thakur declined to entertain the PIL, saying that the Court's position had already been cleared that the framing of an UCC was a matter for the legislature. The Court also questioned the petitioner's position for the rights of Muslim women. The Court asked why none of those who are being allegedly discriminated against have come forward for redressal. The Chief Justice adding, "If a victim of triple *talaq* comes to the Court and questions the validity of the … procedure, we can surely examine the legality of triple *talaq* and find out whether it violated her fundamental rights."

In another development, the Supreme Court had recently admitted a petition by the 35-year-old Shayara Bano of Uttarakhand, seeking for the striking down of triple *talaq*, *halala* and polygamy under Muslim personal law as violative of the fundamental rights guaranteed in the Constitution. After 13 years in an abusive marriage, the petitioner had received a triple *talaq* by speed post in her matrimonial home. Halala is a tortuous method by which a divorced wife can remarry her husband if she first marries another man, consummates her marriage and then gets divorced by him. Again, in another petition, a 28-year-old Jaipur resident Afreen Rahman, who, like Shayara Bano, had received *talaq* by speed post while at her mother's home after a 17-month marriage marked by physical abuse, approached the Supreme Court, with the help of the Bharatiya Muslim Mahila Andolan (BMMA). Her petition was tagged along with Shayara Bano's. In the context of all these developments the Muslim marriage and divorce law has become a topic of debate for reform of Muslim personal law. All these developments paved the way for a new discussion on the uniform civil code (UCC), and now the question of whether it is the right time to abolish the practice in India, is being debated by all quarters of the media and civil society.

Law reform in the area of Muslim personal law can be a challenging and frustrating process regardless of the issue, and many advocates believe that it is often easier to stop a law from being adopted than to make changes to laws once they are in place. Within the context of Muslim family law, efforts at reform pose particular challenges because the push for a legal regime that recognizes equality between men and women is often regarded as un-Islamic. The conflict between constitutional guarantees of equality and nondiscrimination and constitutional provisions that recognize religious and customary laws poses a special challenge in India where

such laws continue to discriminate against women in the name of religion and recognition of cultural diversity.[1]

A number of developments in the past twenty to thirty years have provided support for women's groups that are pushing for reform of Muslim laws. These developments include new progressive scholarship that supports the concept of equality and justice within Islam, studies on the construction of gender and family relationships in Islamic legal theory, and successful efforts at reform of Muslim laws in various countries. Themes in the new scholarship include the recognition of equality between men and women in Islam, the imperative of *'ijtihad'* (independent reasoning to arrive at a legal principle) in modem times, the dynamics between what is universal for all times and what is particular to seventh century Arabia, the socio historical context of revelation, and the need to differentiate between what is revelation and what is human understanding of the word of God.

WAYS OF EFFECTING *TALAQ* UNDER ISLAMIC LAW

No particular form of words is prescribed for affecting a *talaq*. If the words are express or well understood as implying a divorce no proof of intention is required. If the words are ambiguous the intention must be proved. It is not necessary that the *talaq* should be pronounced in the presence of the wife or even addressed to her. Some courts in their earlier decisions have strictly adhered to the rule of Muslim law that a *talaq* pronounced by the husband in the absence of a wife is valid, even if it is not communicated to her.[2] In *Mohd. Shamsuddin* v. *Noor Jehan*,[3] the Court said that there was no authority for the proposition that *talaq* took effect from the date on which the wife came to know of it. On the other hand, in *Abdul Khader* v. *Azeera Bee*,[4] the Madras High Court, following Ameer Ali's view, held that a talaq given in the absence of the wife would be effective only when it became known to her. The Bombay High Court was of the same view.[5]

In *Farzund Hussein* v. *Janu Bibee*,[6] the husband merely pronounced the word *talaq* before a family council and this was held to be invalid as the wife was not named. In *Asha Bibi* v. *Kadir Ibrahim,*[7] the Madras High

1 Leila Ahmed, Women and Gender in Islam: Historical Roots of a Modern Debate, 79-101 (1992) (discussing the historical context in which classical fiqh doctrine on marriage and family relationships was developed).
2 *Fulchandv. Nawab Ali* (1909) 93 I.L.R. Cal. 184; *Manoli* v. *Moideen* (1968) M.L.J. (Cr.) 660.
3 AIR 1955 Hyd. 144.
4 AIR 1944 Mad 227.
5 *Chandi* v. *Bandesha,* AIR 1961 Bom 121.
6 (1878) 4 Cal 588.
7 (1909) 33 Mad 22.

Court held that the words should refer to the wife. In Shia Law a divorce must be pronounced orally in the presence of at least two competent witnesses.

In the light of Quran here it is made clear that divorce can be given twice, not any number of times. This divorce, it should be noted, is a revocable type of divorce. In the waiting period after pronouncing divorce reconciliation can be effected. Here the question arises as to why "divorce may be pronounced twice". It has to be understood against the background of the pre-Islamic period durin which the Arabs used to divorce their wives and take them back something that might be repeated a thousand times. Thus they always had this threat hanging over them. Islam did not approve of such a practice, which was essentially designed to keep women under men's control. The *Qur'an,* therefore, clearly lays down that divorce could be pronounced only twice and that a third pronouncement would result in irrevocable divorce after which marriage with a woman would not be possible unless she married someone else and happened to be divorced by him. Only then could she marry her former husband again. This was done to prevent the abuse of divorce.[8]

Divorcing a woman thrice is considered as the last and final divorce. However, there is controversy whether three divorces could be pronounced in one sitting or such pronouncements could occur on three different occasions. According to the established practice among Muslims it could be pronounced thrice in one sitting or such pronouncements could occur on three different occasions. Undoubtedly, it could be pronounced thrice in one sitting after which a woman could not be taken back unless she married someone else who divorced her after the conjugal relationship. In that case she could remarry her former husband after observing the period of '*iddat*'.[9]

Sudden termination of long married life under the so-called 'triple *talaq* in a single formula' (pronounced in the words "I divorce you thrice", or by a triple repetition of "I divorce you")—even if resorted to unconsciously or under the effect of a momentary provocation, intoxication or duress—leaving no room for remarriage under marital relation actually consummated between the woman and a third person is interposed.[10] In the matter of effectiveness of three *talaqs*, what becomes quite clear from

8 ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM, 123 (1992).

9 *Ibid*.

10 This requirement was made, in fact in the nature of a punishment inflicted on a husband who divorced his wife on three successive occasions and yet wished to take her back. See: Tahir Mahmood, *Dissuasive Precepts in Muslim* Family Law, 2 ALJ 122- 127 (1965).

the foregoing detailed discussion is that there is no clear order either in the Quran or in Hadith to show that three *talaqs* given at a time become effective. Nor is there consensus of knowledgeable persons over this issue.

Rather, this problem is under dispute ever since the time of the Prophet's companions till today and both the parties, in favour and against it have their arguments.

Since the common misconception about triple *talaq* has been brought to light and the fallacy about its practice exploded, it is time that steps be taken to abolish the practice of arbitrary and unilateral divorce as prevalent in India. Way back in 1971 Justice V. R. Krishna Iyer in A. *Yusuf* v. *Sowramma*[11], pointed out that:

A. *"It is a popular fallacy that a Muslim male enjoys under the Qur'anic law, unbridled authority to liquidate the marriage… The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce that not accord with Islamic injunctions. However, Muslim law, as applied in India, has taken recourse contrary to the spirit of what the Prophet or the Holy Qur'an laid down and the same misconception vitiates the law dealing with the wife's right to divorce".*[12]

A *talaq* should not be given effect to it if it is pronounced under compulsion, or in a state of voluntary intoxication, jest or anger. Fyzee denounces such *talaq* as "absurd and unjust", and suggest that the proper remedy should be to do away with them by a statute.[13] Here, it is to be noted that far-reaching reforms relating to unilateral repudiation of marriage have been introduced, during the recent years in a large number of Muslim countries, which may be a model for us.

MUSLIM PERSONAL LAW AND THE CONSTITUTION

The conflict between constitutional guarantees of equality and non-discrimination and constitutional provisions that recognize religious and customary laws poses a special challenge in many countries where such laws continue to discriminate against women in the name of religion and recognition of cultural diversity.[14] For minorities in general and Muslims in particular their personal law has also become a matter of their religious identity. They do not want any interference from government of the country

11 AIR 1971 Ker. 261.

12 *Id*. at 264.

13 A.A.A. FYZEE, OUTLINES OF MUHAMMEDAN LAW, 149 (1968).

14 Zainah Anwar and Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities and Law Reform,* Vol. 64 WLLR (4) 1529 (2007) at 1540.

or by legislature in their personal law as it is deemed undue interference in their religious matters. They argue that freedom of religion has been guaranteed by Art. 25 of the Constitution and effecting any changes amount to curtailing this freedom. Even the Supreme Court judges are not unanimous on the question whether enforcing Uniform Civil Code as per Article 44 of the Constitution would violate the right under Article 25 or not. In *Sarla Mudgal* v. *Union of India*,[15] Kuldip Singh J. delivering one of the two concurring decisions of the Supreme Court commented on the need for the central government to enact a Uniform Civil Code:

> *"Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divert religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27.The personal law of the Hindus, such as relating to marriage, succession and the like all a sacramental origin [sic], in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a 'common civil code' for the whole of India."*

For Many Muslims marriage and divorce matters are a part of their religious issue which is constitutionally protected. They feel that Articles 25 and 44 contradict each other and there is no question of enforcing Article 44 which is any way only recommendatory and not obligatory. Thus minorities in general and Muslims in particular refuse to allow any change in their personal laws. On account of this it is women who suffer. Here, the question is, does the reform of Muslim personal law violate religious and cultural rights of the Muslims? Article 25 (1) guarantees besides freedom of conscience, the right to profess, practice and propagate religion, subject to the limitations specified in that article. A Muslim, who wants to divorce his wife unilaterally in arbitrary manner by uttering *talaq* three times without assigning any reason, is engaged neither in professing and practising nor in promoting or propagating his religion. He cannot, therefore, complain of denial of the right to profess, practice or propagate religion, if the state takes away his unilateral right to divorce his wife.

15 AIR 1995 SC 1531.

In S.R. *Bommaiv. Union of India,*[16] as per Justice Jeevan Reddy, it was held that religion is the matter of individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the State by enacting a law. In the light of all these it may be concluded that neither reform nor replacement of the Muslim family law in India violates the religious or cultural rights of Muslims in anyway. Here it may be noted that gender equality is a secular value which cannot be compromised in any way in the name of religion or culture.

Way back in 1952 the Madras[17] and Bombay[18] High Courts held that the practice of religion was subject to state regulation. Relying on a passage in *Reynolds* v. *U.S.*,[19] the Madras High Court distinguished religious belief from practice and held that practice of religion is subject to state regulation. The Court held that the state could regulate or restrict a practice if it "thinks that in the interest of social welfare and reform it is necessary to do so". The Bombay High Court also rejected similar arguments and upheld the Bombay Prevention of Bigamous Marriages Act, 1947. Relying on *Davis* v. *Beason*[20], the Court read the belief practice dichotomy into Article 25 and held that the impugned law did not violate any religious practice of the appellants. The Court also held that abolition of polygamy was a measure of social welfare and reform. Marriage and divorce determine the personal status and as such are secular activities surrounding religion. The state can validly enact measures of social welfare and reform in respect of the matters governed by Muslim law.[21] Further, whether amendment or abrogation of the Muslim personal law infringes Article 29(1) depends on whether the cultural identity of the Muslims rests only or mainly on their personal law. Mohammad Ghouse has rightly observed that neither polygamy and unilateral right to divorce nor non-maintenance of divorced women and disinheritance of orphaned grandchildren can be identified with Muslim culture. As most of the Muslims in India are monogamists and have not exercised their right to divorce, they would be uncultured if polygamy and arbitrary divorce are regarded as the warp and woof of Muslim culture in modern India.[22] In India, the Muslim law acquired binding force not from the divine origin but from the Constitution of the country.[23]

16 (1994) 3 SCC 1.
17 *SrinivasaAiyar* v. *SaraswathiAmmal,* AIR 1952 Mad 193.
18 *The State of Bombay* v. *NarasuAppa Mali*, AIR 1952 Bom 85.
19 (1879) 98 U.S. 145.
20 (1899) 133 U.S. 333.
21 MOHAMMAD GHOUSE, PERSONAL LAWS AND THE CONSTITUTION IN INDIA, p. 54. (TahirMahmood ed. Islamic Law in Modern India) (1972).
22 *Ibid.*
23 *Id.* at 55.

It is a fundamental norm of constitutional jurisprudence that the State shall not make any law which is violative of fundamental rights enshrined in Part III of the Constitution. However challenges of personal law as being inconsistent with the right to equality under Article 14 had not always received a favourable response from the courts in India. It is argued that both Article 14 and 15 are addressed to the state; and the disability and discrimination that a Muslim wife is subject to does not come from the state. While deciding on the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, the Bombay High Court in *Narasu Appa Mali's* case was of the conclusion that the framers of the Constitution did not wish that the provisions of the personal laws should be challenged by reason of the Fundamental Rights. This view continued to be reiterated by the various High Courts as well as the Supreme Court of India.

It may be noted that, under the Preamble to the Constitution of India the people of India have solemnly resolved to secure all its citizens, besides, social, economic and political justice; equality of status and opportunity, assuring the dignity of the individual and the unity and integrity of the nation. Article 14 (as a fundamental right) guarantees equality before the laws and equal protection of laws. Under Article 15 it is guaranteed that the State shall not discriminate against any citizen on grounds of religion, caste, sex etc. Article 13 provides that all laws in force in the territory of India before the commencement of the Constitution, so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency be void. And Article 44 of the Directive Principles of State Policy provides that the State shall endeavour or secure for the citizens a Uniform Civil Code throughout the territory of the country.

In view of the above provisions the question arises as to whether a Muslim woman married or divorced who is a citizen of India gets equality of status and dignity, treated equally before the laws and not discriminated only on the ground of sex, under the Muslim personal law and whether the same is not inconsistent with the fundamental rights guaranteed under the Constitution and not void under Article 13 of the Constitution. If so, how long should the country wait to reform the Muslim personal law to secure and protect all? All these questions have been raised from time to time at different forums, but without positive result.

JUDICIAL INTERPRETATION OF TRIPLE *TALAQ* IN INDIA

When the issues of triple *talaq* have come up for judicial adjudication, the courts have always adopted the view that Islam does not sanction divorce without reason or any attempt at reconciliation, and that *talaq*

would not be valid unless some conditions are fulfilled. In *Marium* v. *Md. Shamsi Alam,*[24] the husband had pronounced triple *talaq* on his wife and when he repented his action, she filed a suit for a declaration that she had been divorced by Alam. The Allahabad High Court held that "[a] divorce pronounced thrice in one breath by a Muslim husband would have no effect in law, if it was given without deliberation and without any intention of affecting an irrevocable divorce; such divorce is a form of *talaq-e-ahsan,* and thus is revocable by the husband before the *iddat* expires." The Court ruled that *talaq* pronounced by Alam was revoked by him within the *iddat* period. Therefore, the marriage between the couple was subsisting and the wife was denied the relief she had asked for.

In *Rahmatullah* v. *State of U.P.*,[25] the Lucknow Bench of the Allahabad High Court declared the triple talaq invalid. In this case, a notice was issued to Rahmatullah, a landowner, under the U.P. Imposition of Ceiling on Land Holding (Amendment) Act, 1972. He pleaded that since he had divorced his wife KhatoonNissa, the land belonging to her was mistakenly added to his assets. Both Khatoon Nissa and Rahmatullah produced a document to prove the divorce. Under the Act, a married woman cannot hold separate property; but a judicially separated wife or a divorcee can. The High Court had to decide whether the plea of divorce was genuine or resorted to for defrauding the state, and whether a woman who is divorced according to the rules of her personal law is entitled to the same benefits as a woman who is separated or divorced through a court decree.

The Court held that the said lands were still the property of the 'couple' and there was no divorce. Divorce through irrevocable *talaq* was not lawful because it was against the provisions of Quran. Referring the relevant provisions of Quran the Court (Tilhari, J.) observed that *talaq-e-biddat* i.e., irrevocable *talaq* is not valid under Shia and Maliki law and even though Hanafi and Maliki law recognize it, but an irrevocable talaq given in one sitting would be sinful and against the mandate of the Holy Quran. Referring the relevant provisions of the Constitution of India the Court observed further that irrevocable *talaq* is also against the provisions of the Constitution of India because it gives opportunity to the husband to dissolve the marriage by a single pronouncement without any reason or fault of the wife. It is a mode of divorce which amounts to a "practice derogatory to the dignity of the woman." The Court said, that an irrevocable talaq *(talaq-e-biddat)* appears to be violative of the Fundamental Duties as provided in Article 51-A(a), (e), (f), (h) of the Constitution. Further

24 AIR 1979 All 257.
25 II (1994) DMC 64.

the Court pointed out that in this case since the parties could not produce sufficient evidence of their legal divorce and there was lack of iddat and it could also not be established that *talaq* was according to the provisions of Quran, therefore, divorce between the parties is not acceptable to the court.

The Court ruled that the mode of triple divorce, giving unbridled power to the husband to divorce his wife at will, cannot be deemed operative as it has the effect of perpetuating discrimination on the grounds of gender, i.e., male authoritarianism. The Court further opined that since the practice of triple *talaq* denigrates women, it is in violation of the Indian Constitution. But, against this decision, the separated Muslim couple preferred appeal in the Supreme Court. The Supreme Court disagreed with the decision of the Allahabad High Court and held that 'triple *talaq'* in one sitting was not unconstitutional. The Five-Judge Constitution Bench held that the High Court's finding could not operate as the law of the land "until and unless the same arises in an appropriate case and is decided accordingly". According to the Supreme Court, the present case was unconnected with the issue of constitutionality of 'triple *talaq*' as a mode of irrevocable divorce under Muslim law; and the Supreme Court declined to go further into this question.[26]

In *Masroor Ahmed* v. *State (NCT of Delhi),*[27] the Delhi High Court held triple talaq to be one revocable talaq meaning that the divorce can be revoked at any time before the completion of a waiting period of 90 days (called *iddat*) after which the marriage is dissolved. *Talaq* must be for a reasonable cause. Talaq given in anger is not valid. In this case, the husband claimed restitution of conjugal rights against the wife who in turn filed proceedings for dowry harassment. While these cases were pending in the court, the couple decided to be reunited. However, since the estranged husband had, reportedly, triply divorced his wife, the local '*ulama*' (religious scholars) opined that the reunion was illegal and sexual relations resumed by the two amounted to *zina*. To circumvent this, the husband entered into a new contract of marriage with the wife. But, the '*ulama* insisted that renewal of marriage, without an intervening marriage (*halala*) with a third person, was of no avail and their *zina* verdict remained in force. Meanwhile, relations between the husband and the wife worsened and the wife filed a First Information Report against the husband accusing him of marital rape. They subsequently reconciled and the husband applied to the court for quashment of the FIR. BadarDurrez

26 *Khatoon Nissa* v. *State of U.P.,* 2002 (6) SCALE 165; JT 2002 (7) SC 631.
27 (2008) 103 DRJ 137 Del.

Ahmad, J., of Delhi High Court observed that harsh abruptness of triple *talaq* has brought about extreme misery to divorced women and even men who are left with no choice to undo the wrong or any scope to bring about reconciliation. He ruled that a triple *talaq* should be regarded as one revocable *talaq*.

The Delhi High Court in *Masroor Ahmed's case*, after considering different forms of talak, so also the provisions of Sections 311 and 312 in Mulla's *Mohamedan Law*, in paragraphs 26 and 27 of the judgment held thus:

> *"26. ...There are views even amongst the Sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.*
>
> *27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for Sunni Muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc."*

In *Riaz Fatima v. Mohd. Sharif,*[28] the Delhi High Court observed that evidence must be given by the husband of the reasons that has compelled him to seek divorce. A proof that a *talaq* was proclaimed thrice in the presence of witnesses or in a letter must be proved and an attempt of reconciliation has been made. There has to be proof of payment of *mahr* (dowry) amount and observance of *iddat* (the period of waiting by a woman after divorce or the spouse's death before she can marry again). In *Sabah Adnan Sami Khanv. Adnan Sami Khan*,[29] the Bombay High Court has explained the concept underlying 'triple *talaq*' as prevalent under Muslim law and its legal implications. The decision of the High Court was based

28 (2007) DMC 26.
29 AIR 2010 Bom 109..

upon an extensive survey of the Muslim law and upon an examination of the various concepts embedded therein.

In *Shamim Ara* v. *State of U.P.*,[30] the Supreme Court has observed that the correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's and if the attempts fail, the *talaq* may be effected. Therefore, the pronouncement of *talaq* should be effective by establishing the above materials. Five years later, the Supreme Court reaffirmed the *ShamimAra* decision in *IqbalBano* v. *State of U.P.*[31]

In *M. ShahulHameed v. A. Salima,*[32] the Madras High Court held that the evidence must be adduced by the husband either to prove that there was reconciliation attempt or to prove that the *talaq* pronouncement was attested by the persons from both the family or from both the Jamaths or to show three *talaqs* were pronounced through the said letter (if the pronouncement is by letter).

In *Smt. Riaz Fatima* v. *Mohd. Sharif,* the Delhi High Court observed in para 6 that mere statement of the husband taken in the written statement that he had divorced his wife on a particular day would not suffice. If this is accepted, it would be prone to misuse. Law on divorce by Muslim husband to his wife is well settled. There are certain prerequisites, which are to be fulfilled, before a Muslim husband is able to divorce his wife. Divorce cannot be said to have taken place unless following prerequisites are proved:

1. Divorce must be for a reasonable cause that is mandatory of Holy¬ Quran. Therefore, when a dispute arises, the husband has to give evidence showing as what was the cause which compelled him to divorce his wife.

2. He has to prove that there was proclamation of *talaq* thrice in presence of witnesses or in a letter (as pleaded in the instant case). Till it is proved, *talaq* is not valid.

3. There has to be proof of payment of *mahr* (dower) amount or observance of period of *iddat*.

30 (2002) 7 SCC 5132.
31 AIR 2007 SC 2215.
32 AIR 2003 Mad 162.

4. The husband has also to prove that there was attempt for settlement/ conciliation prior to the divorce.

The aforesaid judgment lays down the four ingredients in the absence of which there cannot be a valid divorce. Another novel Indian concept regarding triple *talaq* is that *talaq* must be "for a reasonable cause." This was first held in *Jiauddin Ahmed* v. *Anwara Begum*[33] by the Gauhati High Court. Two other grounds were also added by the Court. These were that *talaq* must be preceded by "attempts at reconciliation" by the nominees of the spouses, and it "may be affected" if the said attempts fail.[34] In this case, the wife was thrown out of her matrimonial home by her husband and she applied for maintenance. The husband argued that he had divorced her. The first question that the court had to answer was whether there had been a valid *talaq* by the husband. The court held that the *talaq* allegedly given by the husband was invalid under Islamic law and the wife was entitled to maintenance. Jiauddin was a single bench decision but was subsequently endorsed by many Indian High Courts, as well as the Supreme Court in *ShamimAra* v. *State of U.P.*[35]

The prevailing case law in India, therefore, is that *talaq* given without a valid cause, which is not preceded by an attempt at reconciliation between the nominees of the spouses, is invalid. However, such reforms should be brought by legislators and not through judicial law-making or judicial activism. The Indian courts have attempted a rewriting of Islamic law unknown to the overwhelming majority of Muslim jurists.

It is possible for courts to apply the principles of Muslim law in a liberal manner without claiming the rights of a re-interpreter of the texts. Such a progressive judicial approach and a liberal interpretation of, the texts of Muslim law was strongly advocated by Tahir Mahmood in 1965.[36] And voicing a similar opinion as early as 1946, M. C. Chagla had observed:

> *"Now there is no doubt that these ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time Muslim jurisprudence is not a static jurisprudence. It is a jurisprudence which has grown and developed with the times and the quotations from Muslim texts should be so applied as to suit modern circumstances and conditions. It is also dangerous to pick*

33 (1981) 1 GLR 358.

34 Attempt at reconciliation before talaq is undoubtedly Islamic but is not a pre-condition for talaq to be effective.

35 (2002) 7 SCC 518.

36 Tahir Mahmood, Dissuasive Precepts in Muslim Family Law, 2 ALJ 122- 127 (1965).

out illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the Court should try and do is to deduce the principle which underlines the illustrations".[37]

FAMILY LAW REFORM IN MUSLIM COUNTRIES

As the law now stands in India, a formula of divorce uttered by a *Hanafi* husband under compulsion, intoxication, or the influence of such rage as deprives him of self-control, is regarded as valid and binding—although legislation, based on authorities in the other schools of law which are of unquestionable repute, has been introduced in one after another of the Muslim countries to ensure that this "dominant *Hanafi* opinion" should no longer be followed by the courts.[38] Reforms to ensure that the "triple" divorce when pronounced on one and same occasion should be regarded as only a single (and therefore revocable) divorce have also been widely accepted by Muslim countries.[39]

Many Muslim states have carried out reforms in their personal laws. As many as twenty two Muslim countries, including Pakistan and Bangladesh have abolished triple *talaq* either explicitly or implicitly. Some countries like Turkey and Cyprus have adopted secular family laws. Tunisia and Algeria and the Malaysian state of Sarawak do not recognise a divorce pronounced outside a court of law. In Iran, triple *talaq* does not have validity under its Shia law.

Egypt was the first country which in 1929, removed the principle of the effect of triple *talaq* and enacted a law stating that several talaqs will be considered only one talaq and that will be a revocable one except when three *talaqs* are given, one in each *tuhr*.[40] "A divorce accompanied by a number expressly or impliedly, shall count only a single divorce and such a divorce shall be revocable".[41] A similar law was enacted by Sudan in 1935, by Jorden in 1951, by Syria in 1953, Morocco in 1958, Iraq in 1959 and Pakistan in 1961.[42] Kuwait introduced the law restricting the effect of triple talaq in one sitting to one *talaq* in 1984.

Family law reform in Tunisia abolished the man's unilateral right of repudiation by establishing the principle of equal divorce rights for men and

37 *AshrafalliCassamalli* v. *Mahomedalli*, (1945) 48 Bom L.R. 642, 652.
38 J. N. D. ANDERSON, MUSLIM PERSONAL LAW IN INDIA, p. 39 (Tahir Mahmood ed., Islamic Law in Modern India)(1972).
39 *Ibid*.
40 *Tuhr* in Arabic means the period of "purity" between menstruations.
41 Egyptian Family Laws of 1929, Art. 3 (as amended by Law No. 100 of 1985).
42 See, TAHIRMAHMOOD, FAMILY LAW REFORM IN THE MUSLIM WORLD (1972).

women under the Code of Personal Status, 1956. The law also introduced the necessity of judicial intervention in all cases: "No divorce shall take place save before the court"[43]. In Tunisian, divorce pronounced outside a court of law will not have any validity whatsoever, and no divorce shall be decreed except after the court has made an overall inquiry into the causes of the rift and failed to bring about a reconciliation. In Algerian law "divorce may only be established by a [court] judgment preceded by an attempt at reconciliation by the judge which shall not exceed a period of three months."[44] The 1961 Muslim Family Law Ordinance is the most significant but also controversial reform law in Pakistan. Under the family law of the Malaysian state of Sarawak, a husband who desires to divorce his wife has to request a court to look into the causes of proposed divorce and advise the husband not to proceed with it. However, if the differences are irreconcilable, then the husband may pronounce one divorce before the court.[45] The procedure laid down in the laws of Algeria, Sri Lanka, and the Malaysian state of Sarawak, seem to be in harmony with the procedure of *talaq* in Islamic law.

In 2004, the Government of Morocco introduced a new family code, known as the *Moudawana*. The family law reforms in Morocco considerably enhanced the rights of women in terms of equality within the family, allowing women access to no-fault divorce.[46] The Government of Jordan also modified its family code, the *Personal Status Code* (PSC), in 2010. The amendments did close some of the gaps in terms of gender equality, though not as much as the *Moudawana*. Women's rights involving access to marriage and divorces were enhanced, but not equalized with men.

Similarly, Sri Lanka's Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006,[47] provides that a husband intending to divorce his wife "shall give notice of his intention to the *Qauzi* (sic. *Qadi*)" who shall attempt reconciliation between the spouses "with the help of the relatives of the parties and of the elders and other influential Muslims of the area." However, if after thirty days of giving notice to the *Qadi*, attempts at reconciling the spouses remain fruitless, "the husband, if he desires to proceed with the divorce, shall pronounce the *talaq* (sic. *talaq*) in the presence of the *Qadi* and two witnesses." In this regard, Sri Lanka's

43 Tunisian Code of Personal Status, 1956, Article 30.

44 See, Article 49 of Law No. 84-II of1984 (Comprising the Family Law of Algeria).

45 See, ZALEHAKARUDDIN, DIVORCE LAWS IN MALAYSIA (CIVIL & SHRIAH) 167-168 (Kuala Lumpur: International Islamic University, 1998).

46 Paul Scott Prettiton, *Family Law Reform, Gender Equality, and Underage fMarriage: A view from Morocco and Jordan,* Vol. 13 RFIA (3) (2015).

47 The Muslim Marriage and Divorce Act No. 13 of 1951 as amended by Act No. 1 of 1965, Act No. 5 of 1965, Act No 32 of 1969, Act No. 41 of 1975 and Act No. 40 of 2006.

Marriage and Divorce (*Muslim*) Act, 1951, as amended up to 2006, seems to be the most ideal legislation on triple *talaq*.[48]

Referring to the Arab world, L. Labidi remarks that "the Tunisian Code of Personal Status has been a beacon and a source of hope for other women's movements and governments in the region."[49] The Tunisian Code of Personal Status has expanded women's rights and transformed family law, when compared to the situation ante and to developments in other parts of the Arab-Islamic world.[50] Besides reform in Muslim-majority countries, Muslims who live in U.S.A., Australia, U.K. and other parts of Europe readily accepted the civil laws applicable to all citizens in the respective countries.

MOVEMENT FOR LAW REFORM IN INDIA

It is interesting to observe that progressive men and women belonging to the Muslim community have already started demanding a change. Further the changes taking place in other countries which are predominantly Muslims cannot but make an impact on Muslim opinion in this country. Since Shah Bano, a group of Muslim women has come up forward in asserting their identity, both under religious texts or challenging their religious leaders. Today, Muslim women are interacting among themselves, forming organizations, and proclaiming their opinions through the media, state and the judiciary.

Today, some progressive Muslims felt an urgent need for reform. But these had to be internal reforms, without the intervention of a hostile state. A drive for education was coupled with the drawing up of standard *nikahnamas* (marriage contracts) to do away with the two biggest evils facing Muslim women, namely, triple *talaq* and polygamy. These *nikahnamas* prescribed the *Qur'anic* method of talaq that is preceded by arbitration and punishments for husbands who violated this. They also made polygamy difficult in some way. One such *nikahnama*, drawn up by Muslims in Mumbai in 1994, was approved by Aligarh's Fiqh Academy (comprising Islamic jurists). But the All India Muslim Personal Law Board (AIMPLB) refused to endorse it. In 2005, it came up with its own nikahnama. But this merely advised men to follow the *Qur'anic*

48 Muhammad Munir, *Reforms in Triple Talaq in the Personal Laws of Muslim States and the Pakistani Legal System:* Continuity Versus Change, International Review of Law, 2013:2 (2011).

49 L. Labidi, *The Nature of Transnational Alliances in Women's Associations in the Maghreb: The Case of AFTURD* and *ATFD*, Vol 3 (1) JMEWS 7 (2007).

50 M.M. Charrad, *Gender in the Middle East: Islam, States, Agency,* Vol 37 Annual Review of Sociology p. 417-37 (2011).

method of *talaq*, without prescribing any punishments for those who did not. The board did not even bother to publicize this *nikahnama* in the community.[51] Several people tried dialogue with the AIMPLB. The late Asghar Ali Engineer, for instance, invited them more than once to discuss codification of Muslim Personal Law. But instead of a discussion, each time there was only a thundering assertion: "We will not allow any change in our *Shariah*."[52]

Recently, the Chairman of the Andhra Pradesh (AP) Minorities Commission, Abid Rasool Khan, announced to the press that he had written to the All India Muslim Personal Law Board (AIMPLB) to stop supporting triple *talaq*, a common form of divorce among Indian Sunni Muslims, by which a wife is instantly divorced if the husband says/writes "*talaq*" three times, even in her absence. If this was not done, said Khan, the board would be responsible for the eventual de-recognition of Muslim Personal Law, paving the way for a uniform civil code (UCC).[53] Many legal scholars believe that change can come only when Muslim women collectively ask for it. The demand for change must come from within the Muslim community itself.

CONCLUSION

It is evident from the above discussion that the courts in India have sometimes interpreted the principles of Muslim divorce law in a conservative spirit and sometimes in a progressive manner. The need for progressive interpretation is greater today than ever before, in view of the changing socio-economic conditions. In regard to marriage and divorce, there is larger scope for liberalisation of Muslim law than in respect of other areas. There is a diversity of opinion among the Muslim jurists themselves on the way of effecting talaq. Undoubtedly, during the colonial era the Privy Council has endeavoured its best to apply and administer the Muslim law in a liberal way, but it seems to have hesitated on many occasions with the result that it often failed to appreciate the true spirit of Islamic law. Its approach was so cautious as to limit its vision. Here it may be pointed out that the courts in some Islamic countries have assumed the power of to interpret the original texts of Muslim law, independently of the opinion expressed by the ancient doctors. As a result, polygamy and triple talaq have been controlled to a greater extent in some Muslim countries.

51 Jyoti Punwani, *India: Muslim Women: Historic Demand for Change,* Vol. 51 (42) *Economic and Political Weekly*, Oct. 15, 2016.

52 *Ibid.*

53 *Ibid.*

As we know, religion-oriented personal laws were a concept of medieval times. That concept is alien to modern societies which are secular, cosmopolitan as well as globalised in many ways. Under our Constitution we have decided to build a secular society. We have decided to separate religion from our secular activities. The judiciary can, thus, play an important role in liberalizing and modernizing the rules of Muslim law relating to marriage and divorce. But this should be cautiously done. The process of judicial reform is likely to attract lesser hostility than an attempt to reform the Muslim law made by the legislature.

What is needed in the present situation in India is a progressive codification of the marriage and divorce laws. But this task can be undertaken only in stages depending on secular consciousness of various communities. The educative process must precede the legislative process. The whole society must be transformed from the era of traditionalism to secularism and universalism. Crucial to this is a genuine effort to establish consensus on the issue of reform. Intervention through legislation will widen the gap detrimental for communal harmony and gender equality.

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AWE- INSPIRING FLAWS OF SECURITY COUNCIL

Dr. C.P. Gupta* Dr.R.K.Patni**

ABSTRACT

Security Council in Itself is a unique build in order to fulfill the pious objective of the United Nation Organization. It is composed of 15 member States of the UN. There are five permanent members of the Council. If one takes a general look at the proposals, the question of reform of the Security Council is first of all a North-South issue. The industrialized states of the Northern Hemisphere, which make up four of the five permanent members and to which, according to the 1963 allocation, are assigned three of the ten nonpermanent seats leaving aside the two Latin American seats, acknowledge that the increase in the general membership from fifty one in 1945 to 113 in 1963 to 191 in 2002 suggests that the number of Council seats should again be increased. The contrasting of North and South holds good only in very genera1 terms, because there are numerous differences of opinion within the two camps and overlapping of views that give developed and developing nations some common ground.

"Trusting his images, he assumes their relevance mistrusting my images"

Robert graves

INTRODUCTION

Security Council in Itself is a unique build in order to fulfill the pious objective of the United Nation Organization. Although the whole framework is developed as a by product of various treaties/agreement/ conventions of the universal countries but being poor obligations having no sanction behind, it has not been able to achieve so much success as desired by the innovation formula accepted by the developed and developing Countries the world at large.

The Security Council is composed of 15 member States of the UN. There are five permanent members of the Council (USA, Russia, UK, France,

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and China and 10 which are elected by the Assembly for two-year terms (Article23). Its competence is mainly though not exclusively limited to issues concerning the maintenance of international peace and security, for which it bears primary responsibility within the UN system (Article 24). Although each member has one vote, decisions on non-procedural matters must be adopted by the affirmative vote of nine members and include the concurring vote of the permanent members who therefore possess a veto with respect to substantive decisions. Abstentions however are not deemed to be vetos.[1] The powers of the Security Council in the areas of peace and security dispute settlement are explored in Chapter 19 and 21. It suffices here to note that the Council has the power to adopt decisions which are binding on members of the UN[2]

The debate about the limits of the Security Council Enforcement power dates back to the Dumbarton Oaks proposals and the travaux préparatoires of the UN Charter. The Security Council was meant to be a political organ with broad police-like functions, endowed with the primary responsibility to maintain international peace and security, which is the main purpose of the United Nations. The UN itself was likewise structured at the outset to be 'a universal instrument of geopolitics.[3] The post-Co1d War' revival of the debate was not only due to the impressive quantitative[4] and qualitative[5] reactivation of the Security Council, but it was also seen as an essential component of the increasing endeavors to foster the rule of law in international relations. Although the question of legal limits on the Council's powers is more properly discussed in conjunction with the question of judicial review, these are two separate issues.[6] Indeed, an ultra vires act of the Council can arguably have distinct legal consequences,[7] notwithstanding its judicial review.

1 *Legal Consequences for the Continued Presences of South Africa in Namibia (South West Africa) (notwithstanding Security Council Resolution 276,* 1970), Advisory Opinion, ICJ Reports [1971] ,p 16, Paras 20-22.

2 2 Articles 24 & 25 of UN Charter.

3 Falk, The United Nations and the Rule of Law, 4 TLCP, 625, (1994).

4 Since 1990 the Security Council has adopted more than 900 resolutions as compared to the 646 resolutions it had adopted in the first forty-five years of its function.

5 Acting under Chapter VII of the Charter, the Security Council has gone as far as, inter alia, to establish a Compensation Commission for Iraq.

6 Skubiszewski, The International Court of Justice and the Security Council, in (V. Lowe and M. Fitzmaurice Eds.), Fifty Years of the International Court of Justice.

7 For instance, this can be the case of the controversial 'right of last resort' of Member States to refuse, wider certain conditions, to abide by an ultra vires decision of the Council. Earlier proponents of this right include Virally. L ONU, *devant le droit,* 99 JDI , 531 (1972); D. Ciobanu, Preliminary *Objections Related to the Jurisdiction of the United Nations Political Organs*,174 (1975); Contra Wright, *The Strengthening of International Law,* 98 RCADI 125 (1959); Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations,* 77 AJIL 255 (1983).

To sum up, the main points of the debate and then focus on the Council's controversial involvement in post-conflict Iraq. Part One will trace the legal basis for such restraints in the UN purposes and *jus cogens* norms. As a case-study, Part Two will then consider whether Security Council resolutions on Iraq which had any legalizing effect upon the US-led war of March 2003; secondly they were impermissibly at variance with the interactional law of occupation; or and thirdly impinged upon the right of the Iraqi people to self-determination.

SECURITY COUNCIL ENFORCEMENT ACTION AND THE LEGAL BASIS OF SUCH RESTRAINTS

The initial question is whether the Security Council is bound by the law or whether it is omnipotent. The answer to this question is that the Council is not sovereign; itis not above the law.[8] Despite it's predominantly and par excellence political character and functions, it is still an organ of international organizations deriving its very broad powers from a treaty concluded by States. It is very unlikely that an organization based on the principle of sovereign equality of its Member States would confer unlimited powers to any of its organs.[9] This has been reaffirmed in the early jurisprudence of the International Court of Justice[10] and more recently by the International Criminal Tribunal of Yugoslavia Appeals Chamber in the Tadic case.[11]

It is also maintained that article 25 of the UN Charter serves as a specific legal basis for the Council's obligation to respect the Charter. Under such interpretation of article 25, States should accept and carry out only those decisions of the Council which are intra vires and consistent with the Charter.[12] In the Namibia Advisory Opinion, the International Court of Justice found that the relevant Security Council decisions were adopted in conformity with the purposes and principles of the Charter arid in accordance with Articles 24 and 25; the decisions were 'consequently binding on all States Members of the UN, which were thus under obligation

8 Aristotle Constantinides, *An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq,* http://www.esil-sedi.eu/sites/default/files/Constantinides_0.PDF

9 Simma, *From Bilateralism to Community Interest in International Law*, 250-270 RCADI (1994).

10 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the UN Charter)*, ICJ Reports, 64 (1948).

11 *Prosecutor Vs. Tadic*, No.IT-94-1-AR72, Para. 28 'the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for"that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be'.

12 *supra* note 8

to accept and carry them Ouc.[13]

THE SUBSTANTIVE LIMITS

Indeed, it is article 24 of the Charter and the very purposes and principles of the UN to which it is referring that can serve as workable limits on the SC power.[14] Even if the UN purpose are ambiguous, conflicting and indeterminate,[15] the Council has to act in accordance with them and, thus, strike in all cases the concrete and proper balance between the primary goal of maintaining peace and security and the other UN purposes[16] This implies respect for core provisions of human rights[17] and humanitarian law[18] as well as the right to self-determination[19] and territorial integrity of States;[20] indeed, any violation of these would in all probability amount to a violation of a jus cogens norm.[21]

THE POWER OF THE SECURITY COUNCIL AND NORMS OF INTERNATIONAL LAW

"Law makes long spokes of the short stakes of men"[22]

International law as such is not the primary consideration when the UN is faced with issues of peace and security and adopts enforcement measures under its Chapter VII powers. In fact, international law is mentioned in Article I (1) of the Charter among the UN purposes but only with

13 *supra* note 1.

14 J. Verhoeven, *Droit International Public*, 826 (2000); Angelet, *International Law limits to the Security Council*, in Gowlland-Debbas (ed.) at 74-75.

15 Kciskennierni, *The Police in the Temple — Order, Justice and the UN: A Dialectical View,* 6EJIL, 327 (1995); Martenczuk, The Security Council, *The International Court of Justice and Judicial Review: What Lessons from Lockerbie*?, 10 EJIL , 537 , (1999).

16 *With respect to human rights, Paust peace Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions,* 19 Southern Illinois 141-142 ULJ (1994).

17 Cohen-Jonathan, *Le Conceal de Security et les droids de l'homme, in J.-F.Flauss andP. Wachsmann ,(1997) 40; De Wet, 'Human Rights Limitations to Economic EnforcementMeasures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime,* 14 LJIL (2001) 279.

18 Gardam, *Legal Restraints Of Security Council Military Enforcement Action, 17Michigan* JIL, 302(1996); Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions'* 95 AJIL (2001).

19 See *infra* 37—38 and accompanying text.

20 Bowett, *The Impact of Security Council Decisions On Dispute Settlement Procedures,* 5EJIL 96 (1994); Herdegen, *The Constitutionality of the UN Security System's* 27 Vanderbilt HL 156 (1994).

21 Gill*, Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 NYIL, III (1995).*

22 *William Empson.*

respect to the peaceful settlement of disputes. Indeed, fundamental rules of international law, such as the prohibition of the use of force, respect for State sovereignty or nonintervention do not apply in case of Chapter VII action. Yet, by virtue of Article 103 of the Charter binding Security Council decisions prevail only over treaty law, but not over customary law. Nevertheless, the Council is empowered to derogate temporarily from rules of both treaty and customary law, as long as it is acting under Chapter VII to maintain and restore international peace and security; this authority is inherent in the very nature of enforcement action and implicit in Chapter VII itself.[23] Under no circumstances, however, may the Council act in a way which would defeat the other purposes and principle of the UN, or override any other rules of jus cogens.

Until today, positions on concrete proposals could not be reconciled. Many states, among them the members of the African Group, seek an increase in both permanent and nonpermanent membership; they constitute a majority some delegations in particular Argentina. Canada. Italy, Libya. Mexico, Pakistan. and Turkey have supported an increase in nonpermanent membership only, and others like South Korea and Sweden propose a reform process in stages, the first stage being an enlargement limited to nonpermanent members. However, criteria and modalities for the election of nonpermanent members remain to be agreed upon. Proposals aiming at an introduction of new categories or types of Council membership, which had some importance in the early discussions of the Open-Ended Working Group, remain on the agenda but appear to enjoy very limited support Views are divided on how, if there is to be an expansion in permanent membership, such members should he elected, and whether formal criteria such as those contained in Article 23(1) should guide such an election. In the event that there is agreement on an increase in the permanent membership, an increase only by industrialized countries is widely regarded as unacceptable.

If one takes a general look at the proposals, the question of reform of the Security Council is first of all a North-South issue. The industrialized states of the Northern Hemisphere, which make up four of the five permanent members and to which, according to the 1963 allocation, are assigned three of the ten nonpermanent seats leaving aside the two Latin American seats, acknowledge that the increase in the general membership from fifty one in 1945 to 113 in 1963 to 191 in 2002 suggests that the

23 Gowiland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 ICLQ 78 (1994); Arangio-Ruiz.On the *Security Council's Law-Making,*133 , 627 (2000); Gill, *supra* note 19 at 62. Cf. Cohen-Jonathan, *supra* note 15 at 40.

number of Council seats should again be increased. However, they want to limit an increase in the overall membership of the Council, since any such expansion necessarily amounts to a certain restraint on their influence and, according to the official reasoning, might impede the Council's ability to fulfill its mission speedily and effectively the "efficiency and effectiveness" argument. The developing nations of the Southern Hemisphere, by contrast, tend to promote a stronger increase in the Council's membership in order to improve their representation on the body.

CONCLUSION

The contrasting of North and South holds good only in very genera1 terms, because there are numerous differences of opinion within the two camps and overlapping of views that give developed and developing nations some common ground. There is in particular, general agreement about the fact that the number of nonpermanent members should be increased and that the criteria contained in Article 23, (1) of the Charter should by and large remain valid. Different opinions exist as to whether additional criteria and, if so which should be applied and whether the chances of smaller states being selected for non-permanent membership by their regional groups should be enhanced. Some delegations pointed to the lack of uniformity in the way regional groups select candidates and suggested that the selection procedures could be unified to ensure quality of treatment across regions. Proposals for a new distribution of sears among regional groups, and for a new definition of these groups, usually favor the developing countries and seek to reduce the number of European and Western seats. Other proposals intend to regularize the practice of selecting certain states more often for non-permanent member ship. Views have also been expressed in support of, and against, Lifting the ban on immediate reflection of non-permanent members.

As regards the overall size of the Council after its reform, there was a certain convergence of positions. The figures most commonly quoted in the discussions of the Open-Ended Working Group seem to be between twenty and twenty-five, the lowest and highest figures being twenty and thirty. The African Group favours a Council of twenty-six members.

Already the George H. W. Bush administration had favoured permanent membership for Japan and Germany, and President Clinton adopted this policy. Pointing to the two states' "record of constructive global influence and their capacity to sustain heavy global responsibilities." the U.S. representative even said in 1995 that the United States "enthusiastically endorses the candidacies of Japan and Germany" and that it "could not

agree to a Council enlargement that did not result in their permanent membership." The United States regards both countries as economically potent Western democracies that expect substantially to share the burden the United States has to carry in the post-cold War world. Very cautiously, the United States intimated that it could also agree to a permanent membership of other states if they were to enjoy universal support. The United States has, however, strictly opposed the idea of granting any developing country the right of veto.

For their part, Great Britain and France initially were reluctant to accept the idea of additional permanent seats. It was clear from the begin-fling that any such addition would give testimony to a relative loss of global power of the United Kingdom and France and might also increase Germany's regional influence in Europe thus adding to the perceived, imbalance that was brought about by Germany's reunification in 1990.However, in the 1990s both states became strong supporters of Germany and Japan's candidacies. France later also decided to support India's aspiration to become a permanent member. In this regard the welcome stapes taken by Prime Minister Mr. Narendra Modi are to be given an applauded and it will be befitting to hope for a golden morning in recent future.

"Not enjoyment, and not sorrow,

Is our destined end or way

But to act, that each tomorrow

Find us further than today" - (H.W. Long fellow)

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CONCEPT OF JUDICIAL REVIEW AND ITS EXTENT IN GOVERNMENT CONTRACTS IN THE LAST SIX PLUS DECADES: AN APPRAISAL

J. Ravindran*

ABSTRACT

Although our constitutional courts, the Supreme Court and various high courts enjoy inter alia original and appellate jurisdiction conferred upon them by the Constitution of India, a great deal of their time is spent on innumerable matters which call in question the action of the other two principal organs of the State. Unlike the Supreme Court whose writ jurisdiction is available only in case of violation of fundamental rights, the jurisdiction of the high courts is wider, in that, it could be approached even for violation of legal rights and in this sense, the high courts are the courts of the first instance in this regard. Any appeal from their judgements is entertained by the Supreme Court only at its discretion unless the jurisdiction invoked is by way of certificate in which case the Supreme Courts sits as a Court of Appeal to adjudicate the disputes. It is in this manner that the principle of judicial review operates in our system. This paper, after introducing the topic, deals firstly, with a brief essay on 'Judicial Review'; secondly, identifying cases where 'Judicial Review' has been recognized as a Basic Feature of our Constitution; thirdly, points out three distinct phases with regard to applying 'Judicial Review' by the Supreme Court in the area of contracts by/with the government by leading/latest case laws before recording the conclusion while recalling the definition of the Constitution of India from the earliest time to the time we are in by the Chief Justice of India.

INTRODUCTION

Within two years of our Constitution coming into force, Chief Justice M. Patanjali Sastri heading the Constitution Bench in State of Madras v. V G Row,[1] went on to point out that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely

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1 State of Madras v. V G Row, AIR 1952 SC 196.

interpreted 'due process' clause in the Fifth and Fourteenth Amendment. The Chief Justice made it simple and plain that while our Supreme Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute, while justifying that he had ventured on to these obvious remarks because it appeared to have been suggested in some quarters that the courts in the new set up were out to seek clashes with the legislatures in the country.[2] The position articulated with extreme brilliance by one who would not have been the Chief Justice, as equally as his successor who also would have retired as a puisne judge, had it not been for the passing away of the founder Chief Justice Harilal J. Kania in harness,[3] has never been doubted nor could it ever be, so much so, that it is now well settled that judicial review is among the basic structures of our Constitution. This paper begins with a short write up on judicial review, identifying few landmark cases wherein judicial review has been elevated to the status of a non-amendable feature of our Constitution before discussing its application to government contracts in three clearly distinct phases prior to summing up the conclusion.

JUDICIAL REVIEW

The basis, charter, source, object, meaning, necessity and advantages of judicial review were extensively brought out by Justice K. Ramaswamy heading a full bench in *S S Bola* v. *B D Sardana*,[4] though he found himself in a minority in a matter relating to service jurisprudence. Briefly, as he records, in order to achieve fruition of the goals listed in the Preamble to our Constitution, as its bastion, the power of judicial review has expressly been conferred on Supreme Courts and the high courts.[5] Though article 13 of the Constitution is the charter for judicial review, article 32 and articles 226/227 are the express source under which the Supreme Court and the high courts concerned exercise the power of judicial review. The object of judicial review is to maintain constitutionalism and to uphold constitutionality of the legislative acts, administrative actions and quasi-legislative orders within the confines of the Constitution.[6] The process of judicial scrutiny of the legislative Acts on the touchstone of the

2 *supra* note 2 at 199.

3 Chief Justice Kania was set to retire on November 2, 1955 but he died on November 6, 1951. Chief Justice Sastri demitted office on January 3, 1954 where after he was succeeded by Mehr Chand Mahajan as the Chief Justice who retired on December 22, 1954. On this, see George H Gadbois, Jr, JUDGES OF THE SUPREME COURT OF INDIA 1950-1989 (Oxford University Press, New Delhi, 1st edn., 2011).

4 S S Bola v. B D Sardana, JT 1997(6) SC 637.

5 *Id*. at 697.

6 *Id*. at 701.

Constitution is technically called 'Judicial Review'.[7]

JUDICIAL REVIEW AS A BASIC FEATURE OF THE CONSTITUTION

In *Special Reference No. 1/1964,*[8] Chief Justice P.B. Gajendragadkar, speaking for the majority of Seven-judge bench, upheld judicial review on the anvil of the distribution of the sovereign power among the three organs of the state and express absence of power of judicial review in the legislature; conversely, its conferment on the judiciary as a ground, to exercise judicial review of legislative acts and executive actions. In the *Fundamental Rights Case,*[9] a Thirteen-judge bench held that separation of powers between legislature, the executive and the judiciary is also a basic feature of the Constitution. In *Minerva Mills v. Union of India,*[10] also judicial review was declared, by a Constitution Bench, as one of the basic features of the Constitution. In *Kihoto Hollohon v. Zachillu,*[11] a Constitution Bench, per majority, had undertaken judicial review of Tenth Schedule to the Constitution of its constitutionality and parameters of power of judicial review, though judicial review was expressly excluded vide paragraph 7 thereof. In *S R Bommai v. Union of India*,[12] a Nine-judge bench while considering the constitutionality of the proclamation of emergency issued by the President of India exercising the power under article 356 of the Constitution held that judicial review is a basic feature of the Constitution. In *L Chandra Kumar v. Union of India,*[13] a Seven-judge Bench speaking through Chief Justice A.M. Ahmadi held that the conferment of the power of judicial review and assurance of security of tenure and the nature of judicial functions, are the formidable grounds for distribution of sovereign power of the people and its location in each of the three organs of the state i.e. legislature, executive and judiciary as only demarcating lines. It was also held that judicial review is a basic feature of the Constitution and is the function of the constitutional courts.

POSITION PRE-AIRPORT CASE

Formerly, the tendency of the courts by and large was to concede to the government an extremely broad discretion to choose the party with whom it would wish to enter into contractual relationship on the ground that the

7 *Id*. at 702.
8 Special Reference No. 1/1964, (1965) 1 SCR 413.
9 Kesavananda Bharati Sripadagalavaru v. State of Kerala, (1973) Supp. SCC 1.
10 Minerva Mills v. Union of India, (1980) 3 SCC 625.
11 Kihoto Hollohon v. Zachillu, JT 1992 (1) SC 600.
12 S R Bommai v. Union of India, JT 1994 (2) SC 215.
13 L Chandra Kumar v. Union of India, JT 1997 (3) SC 589.

government enjoyed the same freedom in the matters of contract as was enjoyed by any private party. The courts followed the general principle that just as a private party is free to enter into a contract with anyone it liked, so is the government. The courts displayed great reluctance to interfere with government discretion to award contracts.[14] In *C K Achuthan v. State of Kerala,*[15] upon a petition filed under article 32, by a contractor for supply of milk, whose contract was stated to have been cancelled by the district medical officer, on the ground that he was entitled to equal treatment in the eye of law and that there had been discrimination against him, Justice M. Hidayatullah (as he then was) writing for a Constitution Bench observed that there was no discrimination, because it was perfectly open to the government like a private party, to choose a person to their liking, to fulfill contracts which they wish to be performed. When one party is chosen rather than another, the aggrieved party cannot claim the protection of article 14, because the choice of the person to fulfill a particular contract must be left to the government. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been deprivation of the right to practice any profession or to carry on any occupation, trade, or business, such as is contemplated by article 19(1)(g) of the Constitution.[16]

Petitioners resorted to article 32 for a declaration that certain sections of the Orissa Kendu Leaves (Control of Trade) Act, 1961 and rules framed thereunder were violative of their fundamental rights guaranteed under articles 14, 15 and 19 (1) of the Constitution as also for a declaration that the 'revised policy' as enjoined by the said act, as amended and rules framed there under were arbitrary, discriminatory and *mala fide* etc. in *Trilochan Mishra v. State of Orissa*.[17] The Constitution Bench speaking through Justice G. K. Mitter, while dismissing the petitions, went on to observe that they were not satisfied that there can be any legitimate grievance against the amending act and new rules framed there under for they all appeared to be necessary to enable the government to control the business in kendu leaves effectively.[18] The government did not accept the highest bid for the sale of kendu leaves. Instead, the persons making lower bids were asked to raise their bids to the level of the highest bids and were given contracts. There was thus no loss to the state revenue. The court held that the refusal to accept the highest bids could not be the cause of any complaint as the government could have preferred one tenderer

14 M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 1644 (7th ed., 2013).
15 AIR 1959 SC 490.
16 *Id*. at 492.
17 AIR 1971 SC 733.
18 *Id*. at 738.

over another.[19]

THE AIRPORT CASE

Much of what has been stated above in relation to government contracts has undergone a sea change as a result of the principles laid down in the *Airport case*. The importance of this case lies in the fact that it seeks to regulate government discretion in a newly developed area, viz., the award of contracts, conferment of government largess and benefits, and disposal of public property. Answering the questions formulated by a full bench presided by Justice P.N. Bhagwati (as he then was), who also wrote for the bench, notwithstanding that the appeal at the instance of an intending tenderer failed in *Ramana Dayaram Shetty v. International Airport Authority of India,*[20] it was observed that it is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.[21] It must, therefore, be taken to be the law that where the government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.[22]

Having held that the respondent/corporation is an instrumentality or agency of government, it was further observed that it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as government. This rule also flows directly from the doctrine of equality embodied in article 14. Referring to the judgements authored by him in *E P Royappa v. State of Tamil Nadu*[23] and *Maneka Gandhi v. Union of India,*[24] Justice Bhagwati observed that article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. It requires that state action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory;[25] it must not be guided by any extraneous or irrelevant

19 *supra* note 15 at 1646.
20 AIR 1979 SC 1628.
21 *Id*. at 1635.
22 *Id*. at 1637.
23 AIR 1974 SC 555.
24 AIR 1978 SC 597.
25 *supra* note 15 at 1652.

consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by article 14 and it must characterize every state action, whether it be under authority of law or in exercise of executive power without making of law. The state cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. It must, therefore, follow as a necessary corollary from the principle of equality enshrined in article 14 that though the state is entitled to refuse to enter into relationship with any one, yet if does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.[26]

DEVELOPMENTS POST AIRPORT CASE

The question of structuring government discretion in the matter of awarding contract to, or conferring benefit on, someone came up again before a full bench presided over by Justice P.N. Bhagwati (as he then was) in *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir.*[27] The economic reforms of nineties encouraging opening up of key sectors to private enterprises has seen mushrooming of writ litigation and the apex court has laid down broad parameters to test the validity of state action qua the fundamental law. Commenting on the scope of judicial review, Justice S. Mohan for a full bench in *Tata Cellular* v. *Union of India*[28] observed that it cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism though there are inherent limitations in exercise of that power. There can be no question of infringement of article 14 if the government tries to get the best person or the best quotation. Of course, if the said power is exercised for any collateral purpose the exercise of that the power will be struck down.[29]

It was further observed that judicial quest in administrative matters has been to find the right balance between the administrative discretion to

26 *Id*. at 1653.
27 AIR 1980 SC 1992.
28 AIR 1996 SC 11..
29 *Id*. at 25.

decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need is to remedy any unfairness. Such unfairness is set right by judicial review.[30] Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.[31] After examining various authorities and commentaries on the point, the court deduced certain principles which are *(a)* the modern trend points to judicial restraint in administrative action *(b)* the court does not sit as a court of appeal but merely reviews the manner in which the decision was made *(c)* the court does not have the expertise to correct the administrative action *(d)* the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract *(e)* the government must have freedom of contract. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by *mala fides (f)* quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.[32]

Making *inter alia* a reference to *Tata Cellular*[33], Justice S. Saghir Ahmad leading a full bench in *Common Cause* v. *Union of India*[34] observed that judicial review would lie against persons and bodies carrying out public functions[35] while allowing the review application and recalling the earlier order in the matter.[36] Applying the principles laid down in *Tata Cellular,* [37]Justice N. Santosh Hegde for a full bench in Centre for *Public Interest Litigation* v. *Union of India*[38] held that it was difficult to come to the conclusion that the decision of the Government of India in accepting the bid of two respondents on the advice of the Committee of Secretaries is so unreasonable as to accept the prayer of the appellants to grant the reliefs sought for in the instant appeal.[39] Justice Syed Shah Mohammed Quadri heading the bench in *West Bengal Electricity Board* v. P*atel Engineering Co. Ltd.*[40] held that the direction of the high court of Calcutta to the appellant to permit correction of errors by respondents in their bid

30 *Ibid*.
31 *Id*. at 26.
32 *Id*. at 32.
33 *supra* note 29.
34 AIR 1999 SC 2979.
35 *Id*. at 2999.
36 *Id*. at 3026.
37 *supra* note 29.
38 AIR 2001 SC 80.
39 *Id*. at 91.
40 AIR 2001 SC 682.

documents and consider their bid along with other bid went far beyond the scope of judicial review as elucidated in *Tata Cellular*[41] and accordingly allowed the appeal in part.[42]

Justice Ashok Bhan in *Directorate of Education* v. *Educomp Datamatics Ltd.*[43] while allowing the appeal of the state observed that the courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.[44] Justice Arijit Pasayat writing for a full bench in *Delhi Development Authority* v. *UEE Electricals Engg. (P) Ltd.*[45] held that if the authority felt that in view of the background facts, it would be undesirable to accept the tender, the same is not open to judicial review in the absence of any proved mala fide or irrationality.[46] Applying the test laid down in *Tata Cellular,*[47] Justice S.H. Kapadia (as he then was) in *Anil Kumar Srivastava* v. *State of Uttar Pradesh*[48] found that the tender invitation was given wide publicity; that although nine bidders bought the tender documents, only one offered its bid; that the financial committee had recommended its acceptance keeping in mind the prior experience and the terms and conditions of the resolution passed by the board in the matter of fixation of sector price and reserve price and accordingly, found no merit in the contentions advanced by the petitioner.[49]

Noticing the principles laid down both in *Tata Cellular*[50] and *Sterling Computers Ltd*.,[51] Justice G.P. Mathur allowed the appeal in *Master Marine Services Pvt. Ltd.* v. *Metcalfe & Hodgkinson Pvt. Ltd.*[52] holding that the high court of Delhi erred in setting aside the order of the Container Corporation of India in awarding the contract to the appellant for there was no public interest involved which warranted interference by the high court in exercise of its extraordinary jurisdiction under article 226 of the Constitution while undertaking judicial review of an administrative action relating to award of a contract.[53] Placing reliance on *Tata Cellular,*[54]

41 *supra* note 29.
42 *supra* note 41 at 695.
43 AIR 2004 SC 1962.
44 *Id*. at 1965.
45 AIR 2004 SC 2100.
46 *Id*. at 2103.
47 *supra* note 29.
48 AIR 2004 SC 4299.
49 *Id*. at 4306.
50 *supra* note 29.
51 Sterling Computers Ltd. v. M & N Publications Ltd., AIR 1996 SC 51.
52 2005(4) SCALE 216.
53 *Id*. at 224.
54 *supra* note 29.

Air India Ltd. v. *Cochin International Airport Ltd.*[55] and *Directorate of Education,*[56] Justice G.P. Mathur again observed in *Global Energy Ltd.* v. *Adani Exports Ltd.*[57] that the terms of the invitation to tender are not open to judicial scrutiny as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.[58]

Challenge to a decision taken by a group of Ministers in a matter of joint venture partnership as a part of the privatization policy of the Government of India was first dismissed by the high court of Delhi and in appeal, by the Supreme Court in *Reliance Airport Developers* v. *Airports Authority of India.*[59] Heading the bench and writing his leading opinion, Justice Arijit Pasayat dealing with the scope for judicial interference in matters of administrative decisions observed that administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. Further, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality', the second 'irrationality' and the third 'procedural impropriety'.[60] Whether actions falls within any of the categories has to be established[61] and that to characterize a decision of the administrator as 'irrational' the court has to hold, on material, that it is a decision 'so outrageous' as to be in total defiance of logic or moral standards.[62] In the ultimate, the question would be whether the process of selection the government had adopted transparent and fair process.[63]

Allowing the appeals in *Jagdish Mandal* v. *State of Orissa*,[64] Justice R.V. Raveendran after making reference to certain earlier decisions of the court observed that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides.*Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: *(i)* whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone or whether the

55 2000(2) SCC 617.
56 *supra* note 44.
57 AIR 2005 SC 2653.
58 *Id*. at 2657.
59 2006(11) SCALE 208.
60 *Id*. at 244.
61 *Id*. at 245.
62 *Id*. at 246.
63 *Id*. at 250.
64 2006(14) SCALE 224.

process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached', *(ii)* whether public interest is affected. If the answers are in the negative, there should be no interference under article 226. Whether a writ petition is maintainable in contractual matter was the core question before Justice S.B. Sinha led bench in *Noble Resources Ltd*. v. *State of Orissa*.[65] It was observed that it is trite that if an action on the part of the state is violative the equality clause contained in article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of article 14 of the Constitution. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.[66] Contractual matters are, thus not beyond the realm of judicial review. Its application may, however, be limited.[67] Public interest may be one of the factors to exercise power of judicial review. Another field where judicial review is permissible would be when mala fide or ulterior motives are attributed.[68] Justice Sinha again, led the bench in *B.S.N. Joshi* v. *Nair Coal Services Ltd*[69]. in summarizing the principles relating to judicial review in contractual matters. They are *(a)* if there are essential conditions, the same must be adhered to: *(b)* if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully; *(c)* if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing; *(d)* the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction; *(e)* when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is

65 AIR 2007 SC 119.
66 *Id*. at 123.
67 *Id*. at 124.
68 *Id*. at 125.
69 AIR 2007 SC 437.

ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with; *(f)* the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority; *(g)* where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.[70]

A bench led by Justice T.S. Thakur (as he then was) dismissed the appeals in *Tejas Constructions & Infrastructure Pvt. Ltd.* v. *Municipal Council, Sendhwa*[71] in the light of the settled legal position and in the absence of mala fide or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders.[72] The questions which a court, before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself, as observed by Justice P. Sathasivam (as he then was) in *Michigan Rubber (India) Ltd.* v. *State of Karnataka*[73] are *(i)* whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and *(ii)* whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under article 226.[74]

Justice T.S. Thakur (as he then was) leading the bench in *Maa Binda Express Carrier* v. *Northeast Frontier Railway*[75] observed that the scope of judicial review in matters relating to award of contract by the state and its instrumentalities, as settled by a long line of decisions, clearly recognize that power exercised by the government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party.[76] Suffice it to say that in the matter of award of contracts the government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in for the court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public

70 *Id*. at 450.
71 2012(5) SCALE 113.
72 *Id*. at 123.
73 2012(7) SCALE 414.
74 *Id*. at 423.
75 2013(4) SCALE 226.
76 *Id*. at 230.

interest.[77] In as much as the competent authority decided to cancel the tender process, it did not violate the fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference by the court.[78] Justice Ranjan Gogoi, while allowing the appeal against the judgement of high court of Judicature at Patna, in *Sanjay Kumar Shukla* v. *Bharat Petroleum Corporation Ltd.*[79] felt it necessary to extract the principles laid down *inter alia* in *Air India Ltd.*,[80] *Master Marine Services Pvt. Ltd.*[81] and T*ejas Constructions & Infrastructure Pvt. Ltd.*[82] in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Deprivation of the benefit of a service or a facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur.[83]

The appeals in *Siemens Aktiengeselischaft & S. Ltd. v. DMRC Ltd.*[84] failed and were dismissed with costs by a bench led by Justice T.S. Thakur (as he then was). It was fairly conceded that the appellant had not alleged any *mala fides,* bias or bad faith in the matter of evaluation of bids by the respondent or any process connected therewith nor even in the award of contract in favour of the successful bidder.[85] After referring to case laws on the scopeof judicial review, it was observed that in any challenge to the award of contract before the high court and so also before the Supreme Court what is to be examined is the legality and regularity of the process leading to award of contract. In cases involving award of contracts, the court ought to exercise judicial restraint where the decision is *bona fide* with no perceptible injury to public interest.[86] Justice R. Banumathi observed in *State of Jharkhand* v. *CWE-Soma Consortium*[87] that when the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh tenders, it cannot be said that there is any *mala fide* or want of *bona fide* in such a decision and that while exercising judicial review in the matter of government contracts, the primary concern of the court is

77 *Ibid*.
78 *Id*. at 231
79 2014(2) SCALE 127.
80 *supra* note 56.
81 *supra* note 53.
82 *supra* note 72.
83 *supra* note 80 at 135.
84 2014(2) SCALE 315.
85 *Id*. at 322..
86 *Id*. at 327
87 2016(6) SCALE 743.

to see whether there is any infirmity in the decision-making process or whether it is vitiated by *mala fide,* unreasonableness or arbitrariness.[88] In the instant case, the respondent had neither pleaded nor established *mala fide* exercise of the power by the appellant.[89] The principles laid down in *Jagdish Mandal*[90] were noticed by Justice R.F. Nariman in *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd*.[91] while setting aside the decision of the high court of Gujarat and allowing the government to proceed further in finalizing the tender in favour of the appellant.

Notice Inviting Application 2015 for allocation of spectrums in various areas was subject matter of appeal in *Reliance Telecom Ltd.* v. *Union of India.*[92] Rejecting the challenge so mounted, Dipak Misra, J led the bench in quoting various authorities on the point beginning from *Tata Cellular*[93] and ruled that the observations in *Asia Foundation & Construction Ltd.*[94] were apt. It was observed that in the instant case, they were unable to perceive any arbitrariness or favouritism of exercise of power for any collateral purpose in the NIA and that in the absence of the same, to exercise the power of judicial review was not warranted.[95] Following *Tata Cellular*[96] and *Jagdish Mandal,*[97] Justice Deepak Gupta in *JSW Infrastructure Ltd.* v. *Kakinada Seaports Ltd.*[98] while allowing the appeal against the judgement of the high court of Orissa concluded that the decision taken by Paradip Port Trust in issuing the Letter of Award in favour of the appellant of the first consortium could not be termed to be arbitrary, perverse or mala fide. [99]It was found that in the present case there were no allegations of mala fides and that the appellant consortium had offered better revenue sharing to the employer.[100]

Nagpur Metro Rail Corporation Ltd., issued a Notice Inviting Tender for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of

88 *Id*. at 750..
89 *Id*. at 751.
90 *supra* note 65..
91 2016(7) SCALE 425..
92 JT 2017(1) SC 603..
93 *supra* note 29..
94 Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd., JT 1997(1) SC 309.
95 *supra* note 93 at 644..
96 *supra* note 29..
97 *supra* note 65.
98 2017(3) SCALE 216.
99 *Id*. at 221.
100 *Id*. at 220.

personnel at Nagpur Metro Rail Project. The said project is being funded by KfW Development Bank, Germany. As per the terms and conditions, at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfD Development Bank. Upon the recommendation of appropriate authority and before work order was to be issued, one of the bidder unsuccessfully moved the high court. The appeal also failed in Supreme Court in *Consortium of Titagarh Firema Adler SPA* v. *Nagpur Metro Rail Corporation*[101] with Justice Dipak Misra agreeing with the respondent 1 that in the absence of any kind of perversity, bias or mala fide, no interference ought to be made in the exercise of power of judicial review and that further, the decision taken by respondent 1 as was perceptible was keeping in view the commercial wisdom and the expertise and it was in no way against the public interest.[102]

Allowing the appeal in *Chhattisgarh State Industrial Development Corporation* v. *Amar Infrastructure,*[103] a bench of Justices Arun Mishra and Amitava Roy placing reliance on *Tejas Construction and Infrastructure Pvt Ltd.*[104] observed that court should be slow to interfere as retendering would delay the project and that in the absence of mala fide or arbitrariness which was not made in the instant case as 50 per cent of the work had been completed when the order was passed by the high court, no interference was warranted in the present case.[105]

CONCLUSION

Among the three principal organs established by our Constitution, judiciary remains the most trusted for more reasons than one. Firstly, they alone, be it the high courts or the Supreme Court, are constitutionally mandated to keep an eye on the executive and legislative functioning and check their excesses, if any. Secondly, to use the words of Justice P K Goswami in *State of Rajasthan* v. *Union of India*[106] 'the Supreme Court is the last recourse for the oppressed and bewildered'. Thirdly, for both the citizens and persons, in our constitutional scheme the last word on law is by the Supreme Court; it is also so provided by the Constitution. And the tool which they employ for the purpose is 'Judicial Review' which so long as the various judgements that have identified judicial review is neither overruled nor shaken, shall continue to hold the field in times to come, hopefully.

101 2017(6) SCLAE 177.
102 *Id*. at 196.
103 2017(4) SCALE 171.
104 *supra* note 72.
105 *supra* note 104 at 185.
106 (1977) 3 SCC 592.

From being a passive observer in the area of judicial review of government contracts in the first three decades of our Constitution to an active participant in the three decades and more which have followed, the approach of our Supreme Court has indeed been remarkable, to say the least. As citizens continue to engage with the government in contractual matters, there could still be room for taking this debate further if the apex court could continue to keep a watchful and vigilant eye on the other two organs of the state, point out their infirmities and remove them, clarify their understanding of the fundamental law, innovate new methods as to application of judicial review as time and events demand.

After all, Justice Vivian Bose who is acknowledged both by the bar and bench for writing judgements in beautiful English, had this to say of the Constitution of India in *State of West Bengal* v. *Anwar Ali Sarkar*:[107]

> *"They constitute a framework of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. They are not just dull life less words static and hide bound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present. The law of the Constitution is not only for those who govern or for the theorist, but also for the bulk of the people for the common man for whose benefit and pride and safeguard the Constitution has also been written."*

Again, he further said thus in *Bidi Supply Co.* v. *Union of India*:[108]

> *"I am clear that the Constitution is not for the exclusive benefit of Governments and States, it is not only for lawyers and politicians and official and those highly placed. It also exists for the common man, for the poor and the humble, for those who have business at stake, for the "butcher, the baker and the candlestick maker."*

For Chief Justice Jagdish Singh Khehar who is in office since January 2017, who headed the Constitution *Bench in Supreme Court Advocates-on- Record Association* v. *Union of India,*[109] the Constitution is a

107 AIR 1952 SC 75.
108 AIR 1956 SC 479.
109 (2016) 5 SCC1.

sacred document and not a Rubik's cube that can be manipulated and maneuvered by the political executive any which way only to suit its immediate needs. It is this 'manipulation' and 'maneuvers' by the other organs which is sought to be guarded against by the constitutional courts by using the mechanism of 'judicial review' in every sphere including government contracts.

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BOOK REVIEW: RANJEEV C. DUBEY, LEGAL CONFIDENTIAL: ADVENTURES OF AN INDIAN LAWYER (PUBLISHER: PENGUIN BOOKS)

Subhradipta Sarkar*

A ROLLER COASTER RIDE

Legal profession has undergone a revolutionary change in last couple of decades. Newer vistas have opened up with jobs at law firms, companies, etc. Such diversity is destined to put the young legal minds in great dilemma at the start of their career. They often do not get the appropriate advice in making the correct choice[1] and exactly here Ranjeev Dubey makes the right noise through his semi-autobiographical account, *Legal Confidential*.

The book consists of three parts. In the first part, he slogs as a rookie litigation lawyer in the Tees Hazari Court.[2] In the following part,[3] he sails us through a fascinating tale of becoming managing partner at the law firm, City Law capturing his legal exploits to his tumultuous with the partners.[4] The final part is about his last days at City Law before drawing curtains and embarking on his journey in pursuit of professional freedom.[5]

WHAT'S IN THE NAME?

Catchy titles of the books often attract readers. Dubey's love for such titles is nothing new. His previous book, *Bullshit Quotient* is also an exciting read where he eloquently explains some of the most difficult concepts of law and corporate governance.[6] However, if one approaches this book with an expectation that Dubey has made startling revelations, he would be crestfallen. In fact, Dubey has maintained gentlemanliness throughout,

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1 RANJEEV C. DUBEY, LEGAL CONFIDENTIAL: ADVENTURES OF AN INDIAN LAWYER chap. 4. *Hard Choices* (2015).

2 *Id., Part I. The Doghouse Years.*

3 *Id., Part II. Dancing With Wolves.*

4 Later on, he continuously refers to them as "Dragons".

5 DUBEY, supra note 1, *Part III. Rocking Steady*

6 RANJEEV C. DUBEY, BULLSHIT QUOTIENT: DECODING INDIA'S CORPORATE, SOCIAL AND LEGAL FINEPRINT (2012)

showering fulsome praises on those whom he admires but refrains from naming those about whom his opinion has been less than satisfactory. He has appreciated upright and efficient characters likeJustice V.D. Tulzapukar, District Judge P.S. Sharma.[7] Conversely, he went in length about a "retired High Court judge" who made the arbitration proceeding an ordeal in the lust for money.[8]

Seemingly, the book intends to debunk the misconceptions and myths about the profession and reveal the real essence of so-called justice delivery system in India. However, at times, his novel-like chapter titles tend to be confusing. E.g. the chapter titled *"Gangsters, Vultures and Angels"* is actually about arbitration and private equity financing;[9] or *"Gypsies, Tramps and Thieves"* is nothing but a tale of his professional challenges at City Law.[10] Regardless of hyper sensational titles, this book is truly an adventure.

A STORY OF HOPE

Although being a Brahmin hailing from Jammu educated in a "snooty top-class boarding school"[11] and being a student of Delhi University during the Emergency days, he hasn't generally diverted much of our attention with peripheral stories about life, people and society.He is candid about his misadventures and failures – whether it is about a judge who "dressed him down mercilessly"[12] or the "Dragons [who] got together and royally screwed him into ground".[13] Yet he has not let the frustration to get better of the readers, as every time he keeps reassuring them with the hope of better times, whether moving out of his senior's office as a young penniless lawyer "singing 'Hum Honge Kamyab'" [14] or declaring "better times were going to be advancing upon me shortly" while starting off his lengthy career at City Law.[15]

LITIGATION HOLDS THE KEY

Dubey's obsession with litigation lingers throughout. In quite a few places, he has gone into details in discussing defence strategies of various

7 DUBEY, *supra* note 1, at 19, 23, 211.
8 DUBEY, *supra* note 1, at 212 – 14 .
9 DUBEY, *supra* note 1, chap. 15.
10 DUBEY, *supra* note 1, chap. 7.
11 DUBEY, *supra* note 1, at 50.
12 DUBEY, *supra* note 1, at 33.
13 DUBEY, *supra* note 1, at 290.
14 DUBEY, *supra* note 1, at 27.
15 DUBEY, *supra* note 1, at 100.

clients from individuals[16] to corporate giants.[17] He is unconvinced with the growing trend among young law graduates' inclination of joining the higher courts or law firms straight away. He firmly believes that you do not become a "lawyer till you understand litigation".[18] At the same time, he admits that trial court is a brutal arena with blood spluttering gladiators where you fight to kill and live to fight.[19] If one survives, the invaluable experience pays off in a long run whether as a hot-shot corporate or higher court counsel.

LAW IS AN ASS

Carrying on from where he left in *Bullshit Quotient,*[20] analysing "Buffalo Jurisprudence"[21] symbolizing the pain-sticking litigation process in India, he frankly declares that "the whole system was designed to promote litigation. And litigation, once started, could go on forever".[22] No eulogizing of judicial activism, no glorification of symbolic justice, no belief in legal morality; he depicts the actual picture of the legal system from a litigator's (common man) perspective. He holds no qualms to assert that the *chakravyuha* of adjournments – dismissal – appeal serves everybody except the litigators, who is the proposed "customer" of the entire justice delivery system.[23] Eventually, he disrobes the system with scathing criticism in the chapter "*The Naked Truth about the Law*".[24]

FIRST AMONG EQUALS

Fali Nariman to Ram Jethmalani – legal luminaries have penned autobiographies. Notwithstanding *Legal Confidential* has more to offer to the real world and not just credo statements which autobiographies tend to be. Nariman travels through his personal life, adores the justice delivery system, explains his commitment to social justice, and justifies

16 DUBEY, *supra* note 1, at 8 – 10.
17 DUBEY, *supra* note 1, chap. 17 & 18.
18 DUBEY, *supra* note 1, at39
19 DUBEY, *supra* note 1, at39
20 DUBEY, *supra* note 6
21 He submits that it is a "sin to be a plaintiff" aspiring to enforce a legal contract through the court. He draws a hilarious analogy of a villager whose buffalo calf was taken away by his neighbour. He starts taking rounds of the court in the hope of regaining the possession. Meanwhile years went by. The calf went on to become a full grown buffalo and the neighbour derived milk and all other benefits from it. By the time, the court declared that the calf originally belonged to the villager, the buffalo had died. See DUBEY, Supra note 6, at 118 – 125
22 DUBEY, *supra* note 1, at4
23 DUBEY, *supra* note 1, at16, 36
24 DUBEY, *supra* note 1, at chap. 16

his defence in the Bhopal Gas Tragedy.[25] However, inspirational lawyering tips have remained an illusion. Jethmalani's memoir is more political than legal.[26] Being close to upper echelon of power over the years, his book is undoubtedly a revelation for masses. From Pakistan to North-East, from Emergency to Black Money trail – he has spared nothing. Yet the maverick in the court has remained out of bounds for the future generation of lawyers. Consciously, Ranjeev has tried to fill up this void in the legal literature through this rare and insightful guide presenting the real story about the "noble" profession.

THE JUDGMENT DAY

Ranjeev Dubey has a natural flair of a top notch novelist and *Legal Confidential* endorses it. It is insightful yet hilarious, explanatory yet entertaining. Though the young legal professionals will enjoy it the most, he is careful of the general readers. He has occasionally taken time off to explain some of the critical concepts in a lucid manner.[27] Readers may find couple of chapters in third part a bit boring[28], but the flow has largelybeen delightful. Ranjeev, himself, seems to have matured as a story teller when compared to his earlier writings. The author truly deserves a four out of five rating for this refreshing work.

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25 FALI S. NARIMAN, BEFORE MEMORY FADES: AN AUTOBIOGRAPHY (2010)

26 RAM JETHMALANI, RAM JETHMALANI: MAVERICK UNCHANGED, UNREPENTANT (2013)

27 E.g. He explains "*Private Equity Financing*" before narrating a case on this matter. *See generally* DUBEY, *supra* note 1, at 215 – 16.

28 DUBEY, *supra* note 1, chap. 17. *War Games in the Himalayas*; chap. 18. *Korea Rope* Tricks.

EVOLUTION OF PATENT LAW IN INDIA AND ITS AMENDMENTS TO BOOST THE INDIAN ECONOMY

Tejaswini B J* & T N Praveen Kumar**

ABSTRACT

India recognizing the potential of Intellectual Property Rights (IPR) in the economic progress and development of the country has evolved a strong patenting statute which has undergone changes to meet with the global changes in the economy. This paper focusses on the evolution of the patent laws in India during the colonization period and changes made after India patent Act, 1970 by three amendments i.e. Patent Amendment Act, 1999, 2002 and 2005.With an objective of making India a nation of job creators and boost innovation culture,Government of India launched independence to encourage innovations in technology. During the era of globalization, India being a signatory to Trade Related Intellectual Property Rights (TRIPS) system, Paris Convention and the Patent Cooperation Treaty has made significant changes in the the Start Up India Initiativein January2016 and accordingly enacted Patent Amendment Rules 2016 which provides for faster patent registrations, lesser fees and quicker exits. These amended rules can gear up business and create revenues to the Start -ups.

INTELLECTUAL PROPERTY

Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce[1] As these creations have commercial value, a set of rights are associated with it which is termed as Intellectual Property Rights (IPR). It is a monopoly right to use the intellectual property. The Law, which helps in protecting such properties, is called Intellectual Property Law (IP Law).[2]

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1 *What is Intellectual property,* WIPO, http://www.wipo.int/about-ip/en/

2 *What is Intellectual Property* (IP/IPR), IUS MENTIS, http://www.iusmentis.com/ip

IP is a creation of human mind and intellect, idea and thought which turns out to development of products, processes, works, trademarks or designs. The types of IP[3] are:

1. Industrial Property (Patents, Trademarks, Geographical Indicators, Industrial Designs, Trade secrets) and

2. Copyright & Neighboring Rights (Writings, Musical work, Dramatic work, Paintings, Drawings and AV material)

The distinction between intellectual and industrial property is, intellectual property covers copyright and related rights, whereas industrial property means patents, trademarks, trade secrets, plant breeder's rights etc. Traditionally this distinction was made because Industrial Property Rights were mostly used by industry, whereas Intellectual Property Rights are used by artists, writers and other creative people. Today the distinction between these two has disappeared and use of the term "Intellectual Property includes patents and other items that are traditionally considered under industrial property.

Among the intellectual properties mentioned above Patent plays a very important role in the industrial growth of the country. Patent is "an exclusive right granted for an invention, may be product or process which gives new way of preparing and providing solution to a problem".[4] It protects novel inventions and manufacturing processes for a specific period of time. It is a territorial protection and can be sold or licensed. Patent protection implies that inventions cannot be commercially made, used, distributed or sold without the patent owner's consent. It is a monopoly right which prevent others from making, using or selling the creator's invention for the specified period. A patent owner has rights to decide who may or may not use the protected invention for the period in which the invention is protected. Patent provides incentives to the creator for his invention. Filing of patent application to patent office is mandatory. A patent is granted by a national patent office or regional patent office onthe basis of application. Every country has its own patent office and its own patent law for the protection of innovative ideas. Patents are issued for inventions which are solutions to specific problems in the field of technology. Invention may be related to a product or a process. In order to get a patent for an invention, the invention should have the following characteristics. A patent can be

3 *supra* note 1.
4 WIPO, http://www.wipo.int/about-ip/en/patents/

granted for an invention so long as it[5]:

1. is new or "novel": the invention must never have been made in public in any way, anywhere, before the date on which the application for a patent is filed.

2. involves an inventive or "unobvious" step: this step must not be obvious to others with good knowledge and experience of the subject of the invention.

3. is capable of industrial/useful application: an invention must be capable of being made or used in some kind of industry.

India also has a Patent Act in accord with other countries protecting the rights of the inventors and its commercial usage.

HISTORICAL EVOLUTION OF PATENT LAW IN INDIA

The development of India's patents regime reflects the country's journey from colonization to independence to globalization and start up driven economy. Three distinct periods can be identified, each of which is detailed below.

The Colonial Period

The first patent law in India was inherited from the British. The British implemented the first patent statute in India in 1856,[6] based on the British Patent Law of 1852 India's Act VI of 1856, "On Protections of Inventions," provided certain exclusive privileges to inventors of new manufactures for a 14-year term.

The 1856 Act was modified in 1859 and renamed as the "Act for granting exclusive privileges to inventors"[7] According to a leading Indian treatise, the purpose of this legislation was "to enable the English Patent holders to acquire control over Indian markets."

The year 1872 saw enactment of the Patents and Designs Protection Act, followed by enactment of the Protection of Inventions Act in 1883.The 1872 and 1883 acts were thereafter consolidated in the Inventions and

5 *What is a Patentable Invention?,* CLARIVATE ANALYTICS, http://ip-science.thomsonreuters.com/support/patents/patinf/patentfaqs/invent/.

6 P. NARAYANAN, PATENT LAW 7 (3d ed. 1998).

7 NARAYANAN, INTELLECTUAL PROPERTY LAW 1 (2005).

Designs Act of 1888.[8] During this period, India's domestic technology sector grew. Although still primarily an agriculture-based economy, the nation's technology industries grew significantly from the 1880s onward. By World War I, India was ranked fourteenth among industrialized nations of the world. Large-scale industrialization during this period was dominated by production of textiles, food processing, and metals.

Meanwhile, British enacted the Indian Patents and Designs Act, 1911 which created for the first time a system of patent administration in India under the direction of a Controller of Patents.[9] The 1911 Act established a form of intra-British Empire priority system such that an applicant for an Indian patent who had within the previous twelve months filed an application for the same invention in the United Kingdom was entitled to the benefit of the earlier United Kingdom filing date; Patents granted under the 1911 Act expired sixteen years after their filing date, although extensions of up to seven additional years were available[10] The 1911 Act remained in effect, with various amendments, until an independent India enacted its first indigenous patent law more than 50 years later.

Post-Independence Period

Just after gaining independence, The Indian government appointed a committee to "review the patent laws in India with a view to ensure that the patent system was more conducive to national interests." The committee was chaired by Indian Supreme Court Justice BakshiTek Chand and published in 1950. This committee explored the failure of India's patent system to "stimulate invention and encourage exploitation of new inventions for industrial purposes". The Chand Report recommended for

1. Issue of compulsory licenses and

2. Evolving an efficient machinery to tackle abuse of patents.

On the recommendation of Chand Committee, a patent bill was introduced in Parliament in 1953 but the bill lapsed. However the compulsory licensing provisions of the 1911 Act were amended in 1950 and 1952 . These provisions were not much fruitful as the patent owners right to oppose the grant of such licenses and appeal any such grants was retained.

The second government-commissioned report was the most important

8 ELIZABETH VERKEY, LAW OF PATENTS (2005).
9 Indian Patents and Designs Act, 1911, No. 2 of 1911.
10 Janice M. Mueller, *In Depth Analysis of Indian Patents Law,* University of Pittsburgh Law Review Spring (2007).

catalyst for the Patents Act, 1970. The Ayyangar Report, issued in 1959, was prepared for the Indian Ministry of Commerce and Industry and authored by a commission chaired by retired Indian Supreme Court Justice RajagopalaAyyangar. The Ayyangar Report, which has been described as "forming the backbone of the Indian patent system," recommended "radical" modifications of India's existing patent laws to accommodate India's fledgling technological advancement and industrialization, the need to encourage and reward inventors, and the increasing number of Indian research institutes and emphasis on technical education. The Ayyangar report recommended for:

1. Identification of types of inventions for which patent protection should be available

2. Determination either to prohibit the granting of Indian patents to foreign entities or to require working of such patents in India.

3. Determination to withstand international pressures on India to join international intellectual property conventions such as the Paris Convention, which required national treatment.

After 10 years of the Ayyangar Report, The Indian Parliament passed The India Patents Act, 1970 which came into force on April 20, 1972 . This milestone was attained after long deliberations in Joint Select Committees and indepth debate in both the Houses of Parliament preceded by recommendations of high-powered TekChand and Ayyengar commissions .The prior Patents and Design Act, 1911, was repealed.

This Act of 1970 prohibited patents on "substances intended for use, or capable of being used, as food or as medicine or drug, or relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds)."However Processes for the making of such substances remained patentable but with an extremely short patent term. Process patents would only last the shorter of five (5) years from sealing or seven (7) years from the date of the patent, while the term of all other types of patents (e.g., mechanical devices) was fourteen (14) years from the date of the patent.

The Patents Act, 1970, also included expansive compulsory licensing provisions, such that patented processes for manufacturing substances capable of being used as medicine or food were deemed automatically endorsed with the designation "licenses of right." India strongly justified its compulsory licensing provisions stating that "patents are granted to encourage inventions and to secure that the inventions are worked in India

on a commercial scale and that they are not merely granted to enable patentees to enjoy a monopoly for the importation of the patented article".

Through the Indian Patent Act 1970, the patent laws were restructured to achieve its national priorities.

Globalization Period

India became signatory to many international arrangements with an objective of strengthening its patent law and coming in league with the modern world. One of the significant steps towards achieving this objective was becoming the member of the Trade Related Intellectual Property Rights (TRIPS) system.

Significantly, India also became signatory of the Paris Convention and the Patent Cooperation Treaty on 7th December 1998 and thereafter signed the Budapest Treaty on 17th December 2001.

Being a signatory to TRIPS, India was under a contractual obligation to amend its Patents Act to comply with its provisions. India had to meet the first set of requirements on 1st January 1995 to give a pipeline protection till the country starts granting product patent.

In this direction, Patents (Amendment) Act, 1999 was passed on 26th March1999 which came into force with retrospective effect from 1st January 1995. The main amendments are as follows:

1. Provision for filing of applications for patent in the field of drugs, medicines and agro-chemicals. These applications were kept pending in the mailbox or black box. This mailbox was to be opened on 1st January 2005.

2. Provision of Exclusive Marketing Rights (EMR). Thus, pipeline protection was provided for pharmaceutical and agro-chemical manufacturers whose applications for product were lying in black box.

The second phase of amendment was brought in by the Patents (Amendment) Act, 2002 which came into force on 20th May 2003. The main features of the amendments included:[11]

1. Term of patent was extended from 14 to 20 years, wherein the date of patent was the date of filing of complete specification. Alsothe

11 *Inside WIPO:* What is WIPO, World Intellectual Property Organization. http://www.wipo.int/about-wipo/en/

difference in term of a drug/food patent and other patent was removed.

2. The definition of "invention" was made in conformity with the provisions of TRIPS Agreement by introducing the concept of inventive step, thereby enlarging the scope of invention

3. Introduction of the provision of publication of application after 18 months from the date of filing thereby bringing India at par with the rest of the world.

4. Section 39 was reintroduced thereby prohibiting the Indian residents to apply abroad without prior permission or first filing in India.

As required by TRIPS, India brought its laws into compliance with the provisions of the Paris Convention for the Protection of Industrial Property, which entered intoforce in India on December 7, 1998. India henceforth had to abide by inter alia the Convention's national treatment principle, which forbids discriminatory treatment of foreign applicants,[12] as well as its right of priority, which allows foreigners who have previously filed an application for patent in their home countries a twelve-month priority period in which to file an application directed to the same invention in India while retaining the benefit of their earlier home country filing date.[13]

Also, as a Patent Cooperation Treaty(PCT) signatory,[14] India had to begin accepting national phase filings of international applications originally filed abroad under the PCT and designating India; previously patent applications could only be filed directly with the Indian Patent Office. Accordingly, the Patents (Amendment) Act, 2002, included numerous provisions formally integrating Paris Convention and PCT terminology and provisions into the framework of India's principal Act.As of 2006, about sixty percent of patent applications received by the Indian Patent Office were PCT national phase filings; almost all of these were foreign-owned. However, India's membership in the PCT is not a benefit solely for foreigners, India's own citizens are filing international applications under the PCT in growing numbers. In 2005, India was ranked third highest (following the Republic of Korea and China) among the world's developing countries in the number of PCT international applications filed

12 WIPO, *Contracting Parties to the Paris Convention: India,* http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=246C

13 Article 2 of the Paris Convention for the Protection of Industrial Property (Jul. 14, 1967) http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

14 WIPO, Contracting Parties to the PCT: India, www.wipo.int/treaties/en/Remarks.jsp?cnty_id=500C

by its nationals[15]

The third amendment to the Patents Act, 1970 came by way of Patents (Amendment) Ordinance, 2004, which was later replaced by The Patent (Amendment) Act, 2005, passed on 4th April 2005 and Patents (Amendment) Rules, 2006 with retrospective effect from 1st January, 2005.

With the third amendment India met with the international obligations under the TRIPS. Significant achievements of this amendment were[16]

1. Extension of product patent protection to all fields of technology (i.e., drugs, foods and chemicals)

2. Deletion of the provisions relating to Exclusive Marketing Rights (EMRs) (which would now become redundant), and introduction of a transitional provision for safeguarding EMRs already granted;

3. Introduction of a provision for enabling grant of compulsory license for export of medicines to countries which have insufficient or no manufacturing capacity, to meet emergent public health situations (in accordance with the Doha Declaration on TRIPS and Public Health);

4. Modification in the provisions relating to opposition procedures with a view to streamlining the system by having both Pre-grant and Post-grant opposition in the Patent Office.

LAUNCH OF STARTUP INDIA INITIATIVE

With the launch of the Startup India Action Plan by the Indian government, Patent rules had to be amended to empower startups to grow through innovation. AccordinglyThe Patent Rules 2003 was replaced by Patent Amendment Rules, 2016which came into effect from May 16, 2016.

According to the amended rules by the Government of India, a “startup” is defined as a new company/Limited Liability Partnership (LLP)/a registered Partnership firm;

1. That has been founded not more than 5 years ago

2. That does not have a turnover of more than INR 25 crores i.e.,

15 http:// wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_436.html.

16 Ministry of Law and Justice, The Patents (Amendment) Act, 2005, WIPO, www.wipo.int/edocs/lexdocs/laws/en/in/in018en.pdf.

approximately USD 3,850,000 in any financial year, in the last 5 years' time, and

3. That is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

BENEFITS OF STARTUPS

The key benefits for startups with respect to the patents amendment rules, 2016[17] are:

Cost-wise, startups are now are on par with individual persons: The startups have been introduced as a new entity type apart from individual, small entity and large entity, i.e., they are entitled to get fee reduction equivalent to "individual persons" instead of small entity/large entity in amended rules.

Rebate on fees: As the startups are now being considered as a new entity, this is going to bring down the patent fees and make them eligible for 80% rebate on official fees, as per the startup action plan. The application fees for startups will now be INR 1600/- and for companies INR 8,000/-

Faster examination process: In the amended rules, the fast tracking of patent applications that has been introduced only for startups makes sure that a request for expedited examination mandates the Controller to issue the First Examination Report (FER) within 105 days, when the expedited examination request is accepted. For the expedited examination fee, the startups will now have to pay only INR 8000.

Faster response to First Examination Report (FER): Now, the response to an FER is to be filed within 6 months (extendible by up to 3 months), and the Controller has to dispose the applications within 3 months from the date of receipt of last reply, or within 3 months from the last date to put the application in order for grant, whichever is earlier. This helps in getting the patent application granted in much less time.

Refund for application withdrawals: For the first time, an applicant will be entitled to a refund of 90% of the patent fees upon withdrawing an application, only before the FER is issued. In other words, patent fees can now be reimbursed when the application is withdrawn after filing the

17 Khaja Safiullah Haruni, *Patent (Amendment) Rules 2016: Benefits for Start Ups,* LEXORBIS (Jun. 3, 2016) https://www.lexorbis.com/patent-amendment-rules-2016-benefits-for-startups/

request for examination but before issuance of FER.

Foreign filing licensing request is issued in a shorter period: The foreign filing license request will be disposed of within 21 days from the date of request where the applicant opts for filing patent application in foreign country without filing the application in India.

Thus, the startups will now be able to register patents in a much easier way and at a lesser cost under the latest patent amendment rules 2016. The Indian government has also assured that the patents will be granted within approximately two and a half years, instead of the existing five to seven years. The new rules emphasize on fast tracking option for patent applications so that start-ups can realize the value of their IPR at the earliest possible time.

The Government also provided for choosing a facilitator by the startups who will study the patentability of an invention and help in filing a patent application. Intellectual Property Facilitation center (IPFACE) are established which aims to promote awareness and adoption of intellectual property rights amongst entrepreneurs and MSMEs in India while also making accessible high quality IP services and resources.

OTHER BENEFITS OF PATENT AMENDMENT RULES, 2016

In addition to inducing Startups, the Amendment Rules 2016 have further brought down costs toa greatextent and ensure that extra claims of any Applicant can now be deleted which weren't allowed earlier. Also, the government has further permitted filing national phase applications under Patent Cooperation Treaty. Further, allowing deletion of claims at the time of National Phase Entry will certainly help applicants in reducing costs for National Phase Entry in India by deleting any unnecessary claims which may not be patentable subject matter in India. These steps certainly reflect the intention of the government in further simplifying the current Patent regime prevalent in the country.[18]

The Government has also sanctioned 373 additional posts in the Patents Wing, including 252 posts of Examiners of Patents and Designs and 76 posts of Controller of Patents and Designs in the 12th Plan under the Plan Scheme for Modernization and Strengthening of Intellectual Property Offices (MSIPO). Further, the Ministry of Commerce and Industry has

18 Chadha & Chadha Intellectual Property Law Firm, *India: New Patents (Amendment) Rules 2016 - Analysing the Key Highlights,* LEXOLOGY (Jun. 7, 2016) http://www.lexology.com/library/detail.aspx?g=831f1291-bb26-40eb-b907-1c446db9b2fe.

also created 263 contractual posts of Examiners of Patents and Designs. Online facility for filing of applications has also been strengthened both in Patents and Trademarks wings so as to reduce the workload at the office and also to save the time of applicants.[19]

These measures envisage India's positive attempts towards an all-encompassing Patent Policy, streamlining procedures for filing and disposal of applications and facilitating the examination of work and optimizing the speed and quality of examination. While global pharmaceutical companies and drug brands shall still strive for further relaxation to India's Intellectual Property rules and against its price controls and marketing restrictions, these amendment rules are sure to promote a holistic and conducive ecosystem to catalyze the full potential of intellectual property for India's growth and socio-cultural development, while protecting public interest.

With the government announcing various Tax Benefits under the Financial Bill 2016 for investors in general, these amendments to the Patent Law shall not only make the Indian market attractive to the foreign investors, but also ensure that the current entities in the country do not lose their goodwill in this fast-developing world of technology. For certain rules, electronic transmission has been considered as the only way through which certain documents can be filed. This ensures that documents are not only preserved, catalogued and maintained efficiently but are also traceable and available for review expeditiously. Providing a fee cap for sequence listing is another welcome move as now several applicants who were paying high fees for high volumes of sequence listing pages shall not be excessively charged. This shall also end the ongoing litigation regarding this issue.

CONCLUSION

To summarize, India got its first patent statute during the latter half of the 19th century when it was under the colonial rule of the British. Although India gained its independence from the British in 1947, it was unable to enact its first independently-drafted patent laws until the 1970s due to deep political and policy divisions over the value and role of patent protection in the nation's developing economy. India's Patents Act, 1970 , the principal act on patents came into force during the "post-independence" period. Although modeled on Great Britain's Patents Act, 1949, the Indian Act incorporated major departures intended to lessen the social costs imposed by largely foreign-owned patents. The Patents Act, 1970 prohibited patents on products useful as medicines and food, shortened

19 http://www.ipindia.nic.in/IPActs_Rules/Patent_(Amendment)Rules_2016_16May2016.pdf.

the term of chemical process patents, and significantly expanded the availability of compulsory licensing[20] During the "globalization" period from approximately 1986 , India's participation in the debates over the inclusion of intellectual property within the General Agreements on Tariff and Trade (GATT) framework and its eventual entry into the World Trade Organization (WTO), along with its accession to the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty,[21] compelled significant strengthening of the nation's patent laws.

For StartUps and Entrepreneurs with limited resources, Intellectual Property (IP) provides the much-needed business and competitive advantage in the market. It helps a startup to kickstart, stabilize, and grow the business. However, a startup has to ensure that the IP particularly patent is properly protected and safeguarded as Unprotected IP is considered to be in the public domain, free for all to use and it may affect the start-up's business in future. In addition to protecting its Patents and other forms of IP, a start-up must also know how to use such Patents and other forms of IP for its business benefit. The Government of India Under the Startup India Action Plan[22] for innovations has come up with fast Track Patent Examination Mechanisms and 80% rebate on Patent filing applications by Start Ups India has to wait and watch how best the Startups will make use of the amended provisions of Patent Rules, 2016 and make India the hub of Innovations, design and Startups.

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20 P. NARAYANAN, PATENT LAW 7 (3d ed.,1998)

21 PCT Notification No. 129 Patent Cooperation Treaty (PCT), www.wipo.int/treaties/en/Remarks.jsp?cnty_id=500C

22 *Action Plan,* STARTUP INDIA (Jan. 16, 2016) http://www.startupindia.gov.in/actionplan.php

THE CONCEPT OF THE RIGHT OF A CHILD: A REALITY OR A RUSE?

Amuda-Kannike Abiodun (SAN)*

ABSTRACT

The children are the most vulnerable group of human beings on earth and there is a saying that goes; "Children are the leaders of tomorrow" If his adage is true, then the law must seriously protect and guide the leaders of tomorrow. The United Nations, the African Union and various world bodies including Nigeria, among several countries have at several times promulgated laws to protect the right of the child which are very unique and appreciated. In conclusion, we deem it necessary to say that even though the Rights of the child is known and guaranteed by most of the Nations of the world, and as at now, the child's right Act in Nigeria, there is still very serious information of child abuse and generally the rights of the child being infringed upon. In fact some people up till now do not consider it necessary to discuss the issue of the Rights of the children because to them, a child is still under parental care and all his/her Rights must be dictated by the parents. This study pointed out quickly that the various laws and regulations, especially the United Nations Convention, the African charter and various Countries of the world have all contributed uniquely to what is known today as the Rights of the child but there are still rooms for improvement.

INTRODUCTION & GENERAL BACKGROUND OF THE RIGHT OF THE CHILD

It is an understanding and well accepted conclusion that children are the most vulnerable and powerless members of the society as a whole. During the good old days, it is a general and accepted notion that the adults and the parents especially know the best interest of the child and there is no need to think of the rights of children save whatever interest that their parent desire to protect on their behalf.[1]

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1 I.A.Ayua and I.E. Okagbue, *Rights of the child in Nigeria*, Published by Nigerian Institute of Advance Legal Studies.

With the reform movements of the 19th century, there emerged very serious concerns for what should be known as the protection of the dignity, equality and basic human rights of the children and as such, children now constitute an important aspect of the society, worthy of protection upon whose behalf there ought to be laws to be enacted for protection against the abuse by parents and other adults, protection against economic exploitation and social neglect etc.

It is also important to say that children's rights have moved further from protection and in the world today, these rights of children have also been improved to encompass what is known as right of "self determination" and to a certain extent the children enjoy this right to the fullest.

As far back as 1825, it should be noted that the rights of children was known and being made a subject of awareness by writers and this was why Freeman noted in the article about the said rights. It should also be noted that the founder of Save the Children Fund and who is one of the founding fathers of children's rights Eglantine Jebb (1876 – 1928.) This Human right activist after considering the number of children who died during the first world war and the children who died in their millions, contributed immensely and became a factor which led to the drafting of the declaration of Geneva on the rights of the child which was formally adopted by the members of the league of Nations in the year 1924, which said instrument was for the protection of the rights of the child.

The Geneva Declaration was the first serious International attention which focused on the rights of children and that the pre-amble to the said declaration of Geneva on the Rights of the child are succinct and apt to the point and for ease of reference it is better to quote part of it. It is thus;

"...mankind owes to the child the best that it has to give..."

By 1946, many Human focused Right activists and people who have symphaty for the rights of the children focused their attention to the United Nations and their efforts yielded result by the United Nations Creation of UNICEF in 1946 which said body was responsible for the provision of relief assistance to the children who were affected by the terrible calamities of the second World War.

The General Assembly of United Nations, after much persistent lobby by Human Right Activists and well meaning individuals, adopted the United Nations Declaration on the Rights of the child but the United Nations in doing this had to utilize the document with regards to Geneva Declaration which we have earlier on mentioned. This Declaration came into being in 1959.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The afore-mentioned declarations were only statement of the principles and not a binding document which will end the sufferings of the children. It is against this background that in 1978, during the preparations for International year of the child, Poland proposed that the event be marked by a treaty giving force to the right of the children. The General Assembly of the United Nations in 1979 requested U.N Commission on Human Rights to set up a working group to draft a convention.

Furthermore, ten years later, the United Nations General Assembly adopted the convention on the Rights of the child on November, 20th 1989. A total of 61 countries signed the convention on January, 26, 1990 and by September, of 1989, 20 ratifications were obtained which was the required number ARTICLE 49, to enable the convention to come into force.

Another further initiative after the above convention was that a world summit for children was held in September, 30th, 1990 at the United Nations Headquarters in New York. The Summit adopted a declaration on the Survival, protection and Development of children. It also gave its blessings to a plan of action for implementing the stated goals of the declaration to ensure the survival, development and protection of children through programmes designed to combat malnutrition, preventable disease and illiteracy.

THE AFRICAN CHARTER

At their Sixteenth ordinary Session in 1979, the Assembly of Heads of State and Government adopted a Declaration on the Rights and Welfare of the African Child while in 1990, a formal convention which is the charter on the Rights and Welfare of the African child was subsequently adopted. [2]The African charter is similar to United Nations convention except that the African charter recognizes specific cultural setting in which it is to operate by calling for a consideration of the cultural heritage, historical background and values of African Civilisation which should inspire these issues. Also in 1992, O.A.U at an International conference in Dakar-Senegal, adopted what is referred to as the Dakar Consensus which recognizes accelerated action for alleviation of African Women and children development against poverty and it was also declared that the 16th day of June every year in all member states should be declared as the "Day of the African Child.

2 Nigeria ratified this by Ratification and Enforcement Act 1983 now cap 10 LFN 2014.

WHAT IS CHILD ABUSE?

The term child abuse has become one of the greatest problems of our time and this made a lot of peoples' attention to be focused on it. There is the problem of what to call child abuse and various scholars have had to define this term as the situation demands.

R.J. Gelles in his book defend the concept in his words as follows;

> *"The Current concept of child abuse is perhaps more political than scientific…. It implies behavior that is considered immoral and improper, but fails to provide a specific, precise definition of the nature of that behavior. The definition of child abuse has become increasingly broad since 1962 and has encompassed an extensive range of behaviors and misbehaviors by parents and Caretakers-. The consequences of this are that many, if not most of the research investigations that measure the extent, patterns and causes of child abuse are not suitable for obtaining insight into the extent, patterns and causes of criminal violence towards children for acts of violence get lumped into the more general child welfare concerns with child abuse and neglect".*

Furthermore, Kempe et al and Green define child abuse as "non-accidental injury inflicted on a child by a parent or guardian."

In other words, the term child abuse is a relative concept and no concrete definition has been worked out for it up till now. It depends on each and every one's perception.

CAUSES OF CHILD ABUSE

The causes of child abuse are numerous and wide, but for purpose of this paper, we shall restrict ourselves to the following:

1. Lack or failure of mother-child bonding
2. Low self – esteem.
3. Depression, aggression, emotional arousal tress and withdrawal.
4. Intergenerational transmission of child abuse/violence people who were abused as children grow up to become abusive parents.
5. Stress-Parents become more abusive when they are stressed.

6. Low socio-economic Status.

7. Unemployment and Low education.

8. Social Isolation. A Sparse network of social support from relatives, friends etc.

9. Cultural Legitimation/accommodation of injurious violence against the child. Legitimization

10. Psychopathy, sociophathy, immaturity, self-centeredness, defective character structure.

THE RIGHTS OF THE CHILD

It is pertinent to mention that among other rights that the child has or which the child is entitled to, the following listed below are paramount and for the purpose of this paper each of these rights will be discussed seriatim. The said rights are as follows:

1. The Right of the Child Education

2. The Right of the child to health

3. The Right to Welfare

4. The Right with respect to child Labour

5. The Right against all forms of abuse.

6. The Right of a child in relation to treatment of Juvenile offenders

1. Right to Education

The World Declaration on the Right of the child to education says that every person, child youth and Adult, shall be able to benefit from educational opportunities designed to meet basic learning needs.[3]

Furthermore, it also indicates that there must be access to, and improve quality of education for girls and women and to remove every obstacle that hampers their active participation.[4]

The right to education is therefore one of the most important rights being

3 Article 1 of The World Declaration of the Right of the Child.
4 Article 3 of The World Declaration of the Right of the Child.

promoted by the United Nations convention on the rights of the child and the African Charter on the Right and Welfare of the child.[5] The Nigerian Government has accepted all that is contained in the Article which are;

1. Provision of free and compulsory education to all her children including the disabled and disadvantaged.

2. Encouragement of the development of different forms of secondary education, including general and vocational training, making them available and accessible and taking appropriate measures such as the introduction of free education and offering financial assistance in case of need.

3. Making higher education accessible to all on the basis of capacity by every appropriate means.

4. Making educational and vocational information and guidance available and accessible to all children.

5. Taking measures to encourage regular attendance at schools and the reduction of drop – out rates.

6. The Right of The Child to Health

The United Nations Convention also provide that the Rights of the child will include right to survival through having unlimited access to health care services such as immunization against child-hood diseases, oral rehydration therapy (ORT) and access to good and clean water. This particular right is provided for under of the United Nations Convention.[6]

However, the Learned Author, F. Akpan,[7] in his contribution to the Article which is to the effect that many children in African Countries are caught in the cross current of poverty, under development, economic depression, and foreign debts and this affected negatively the health and emotional development of the children leading to so many bad health situations. I entirely agree with him and the situation instead of improving is getting worse every day.

7. The Right to Welfare

5 Article 28 of The World Declaration of the Right of the Child.
6 Article 24 of The World Declaration of the Right of the Child.
7 The Reporter, p.5., Oct. 11, 1990.

Under the United Nations Convention and under the O.A.U charter, the Rights of the child with regards to the Welfare rights are guaranteed and they are as follows;

1. Right of the child to enjoyment of the highest attainable able standard of health and to facilities for the treatment of illness and rehabilitation of health.[8]

2. Right of benefit from social security, including social insurance.[9]

3. Right of every child to a standard of living adequate for the child's physical, mental, spiritual and social development.[10]

4. Right of the child to education on the basis of equal opportunity.[11]

5. Right of the child to rest and to leisure, to engage in play and recreational activities.[12]

6. Right of the child to fully participate in cultural and artistic life provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.[13]

7. Right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.[14]

Furthermore under the African Union, (African Charter) on the Rights and Welfare of the child, the provision that dealt with these issues is wide and contains the followings;

1. Right to education[15]

2. Right to leisure, recreation and cultural activities.[16]

8 Article 24 of The World Declaration of the Right of the Child.
9 Article 26.
10 Article 27.
11 Article 28.
12 Article 30.
13 Article 31.
14 Article 32.
15 Article xi.
16 Article xii.

3. Right to health and health services.[17]

4. Right to care and support for handicapped children.[18]

5. Right to protection from economic exploitation.[19]

6. Right to protection from all forms of torture, inhuman or degrading treatment.[20]

It is to be not noted that for any meaningful development to occur in the long-run, the quantity and quality of the welfare services which is put in Place for the children, from infancy up to adolescence must be strong. Child development and child social welfare therefore go hand in hand.

7. The Right With Respect to Child Labour

It is not in doubt that all over the World, there are children working like slaves and begging on the streets, toil under the sun in the fields and plantations, work day and night in the sweat shops and factories. These various situations are no exception to Nigeria.

As a result of the negative implications of child Labour, the government of most of the Countries in the world saw the necessity to enact labour Laws to regulate the admission of children into paid labour and the laws also described the type of Labour which the children can engage in. All these point to the fact that the child has a right with respect to his Labour.

The United Nations convention on the Rights of the child,[21] states that State-parties are to take appropriate measures, legal, administrative and other wise to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental spiritual, moral or social development.

Furthermore, the United Nations children's Education Fund (UNICEF) list out some issues that will indicate the presence of child Labour and the list includes the follows;

1. full time work at too early an age;

17 Article xiii.
18 Article xv.
19 Article xvi.
20 Article Xvii.
21 Article 32 of The World Declaration of the Right of the Child.

2. Too many hours spent on work within or outside the family leading to excessive fatigue;

3. Depriving children of their right to education where schools are available or interfering with their education;

4. Participating in work that results in excessive physical, social and psychological strains on the child.

5. Working and living on the streets.

6. Too much responsibility for a child.

7. Low wage and

8. Work that does not facilitate the physical development of the child, for example, dull repetitive tasks which do not stimulate a child's creative abilities.[22]

9. Starting The A. U Charter on the Rights and Welfare of child to which Nigeria is a party also provides that state-parties should;[23]

1. Through legislation provide minimum age for admission to employment

2. Provide for appropriate regulation of hours and conditions of employment.

3. Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the Article.

4. Promote the dissemination of information on the hazards of child Labour to all sectors of the community.

In Nigeria, the Labour Act provides that persons below the age of 18 years may not be employed in any employment which is injurious to health, dangerous or immoral and subject to certain exceptions where the child is above 16 years. Also no young person shall be employed during the night (10 pm)-6 am).[24]

22 The situation of working children and street children (1986) E/UNICEF/ C.R.P3.
23 Article xv (2).
24 See sections 58(1) (3) (4) (5) of the Labour Act LFN 1990.

5. The Right against all Various Forms of Abuse

The child has right against anything that could come under the definition of abuse. The various forms of child abuse among other ones, could be categorized under the followings;s

1. Child Labor
2. Child Sexual Abuse
3. Physical abuse
4. Verbal and emotional abuse
5. Child neglect – economic, health, educational, emotional and affection.

Of all these various abuses we have mentioned above, the ones that give us much concern for full analysis are those that has to do with physical abuse, child Labour and sexual abuse.[25]

The correction and discipline of children by beating, hitting, and ridicule (shaming) are the normal practice under most Nigerian cultures and in determining the physical abuse, it must be noted that the cultural or normative threshold of abuse, that is the point at which the legitimate correction and discipline end, and the abuse begins. Parke and Collmer observe that "Child abuse is a community defined phenomenon which must be viewed in the context of community norms and standards governing the appropriate conduct of adults in their interactions with their own and others' children.[26]

Therefore the use of corporal punishment in the discipline of children is very likely to lead to physical injury and abuse. The conclusion that can therefore be drawn is that there is a widespread use and endorsement of corporal punishment in the Country. The use of corporal punishment, particularly beating the children with cane Leads to abuse. Corporal Punishment, whenever it becomes severe and frequent, constitutes a physical abuse (aggression) against the child.

Also child sexual abuse, unlike child labour which we have earlier on discussed is generally condemned in most cultures. Sexual abuse of the

25 Prof Umozurike, *An Article in Perspective on Human Rights* at page 45.

26 R.D. Parke and C.W. Collmer, Child Abuse. *An Inter disciplinary Analysis in .M. Hetherington E.D Review of Child Development research,* Vol. 5 Chicago: University of Chicago Press 509 – 590 1975.

child raises health, bio-psychological development and moral concerns.

6. The Right of a Child in Relation to Treatment of Juvenile Offenders

It is to be noted that all crimes whether committed by adult or Juveniles are usually subject of investigation, prosecution and sanctions. In all jurisdictions of the world, the treatment of young offenders and that of the adult are always not the same, because of the recognition of the fact that emotional, mental and intellectual capacities of children are not at the same level of maturity as those of adults.

The United Nations standard minimum Rules[27] for administration of Juvenile justice provides that[28] the aim of Juvenile Justice should be to emphasize the well being of the Juvenile and to ensure that any reaction to Juvenile offenders shall always be in proportions to the circumstances of both the offender and the offence, while the disposition of Juvenile cases[29] should be guided by consideration of the needs of the Juvenile as well as the needs of the society among other things. While the rules are not binding on states, it was adopted by United Nations Congress on prevention of crime and Treatment of offenders on November 29, 1985.

Furthermore, the International Convention which is binding on ratifying State- parties also contain provisions on the administration of Juvenile Justice and this is the African Charter on the Rights and welfare of the child to which Nigeria is a signatory.

The Article provides that[30] every child accused or found guilty of having infringed penal Law shall have the right to special treatment in a manner consistent with the child's sense of dignity, and worth and which reinforces the child's respect for human rights and fundamental freedom of others.

Back home in Nigeria, earlier before now, the children and young persons' Act, Cap 32 Laws of the Federation and Lagos 1958, made provisions affecting children and young persons in Nigeria, and in its stated purpose, it read thus;

> *"…to make provision for the welfare of the young and the treatment of young offenders and the establishment of Juvenile Courts."*

27 Rule 5.
28 Rule 17.
29 Article xvii (i).
30 Section 277 of the 2003 Child's Right Act also.

The Act defines a "Child" to mean a person under the age of 14 years and a "Young Person" is defined as a person who has attained the age of 14 years and is under the age of 17 years. This is provided for under section 2 of the Children and Young Persons Act but the Act did not define the word "Juvenile"[31]

Under the United Nations Convention on the Rights of the child and the African charter on the Rights and welfare of the child, a "Child" is defined to be human being under the age of 18 years, but he United Nations Convention Contains a provision to the effect that the definition of a child may be adjusted to accommodated Laws under which a child attains majority at an earlier age. These are contained in Article 1 of the United Nations Convention and Article II of the African charter respectively.

The general rule is that in most Jurisdictions, the age (or ages) upon which a Juvenile will not in cure criminal responsibility for his actions are selected arbitrarily. The age of criminal responsibility therefore differs widely in different Jurisdictions. In Nigeria, a child below the age of 7 years is not criminally responsible for any act omission. A Child between the ages of 7 and 12 will also not normally be liable unless it can be proved that at the time of doing the act or making the omission, he had the capacity to know that he ought not to do it. A child of above 12 years old is fully responsible for his actions.[32] However, a 12 years old child does not become subject to criminal Jurisdiction of the ordinary Court. Under the children and Young persons' Act, he remains subject to criminal proceedings in a Juvenile Court until he attains the age of 17 years.[33] Also where a child under 7 years commit an offence, this does not mean that the state is without remedy. Children below this can still be brought before the Juvenile Court in exercise of its Civil Jurisdiction, if they are beyond control or in need of care and protection.

The Juvenile Court for the purpose of hearing these cases is presided over by a magistrate either sitting alone or with others appointed by the Chief Judge of the State, and persons sitting with the Magistrate on the Juvenile Court are commonly referred to as Assessors.[34]

A remand home serves primarily as a place for detention for Juvenile offenders awaiting trial but a Juvenile offender may also be committed

31 Section 30 Criminal Code, Section 50 Penal Code.
32 Sections 2 and 6 (1) of the C.Y.P.A.
33 Sections 26 (1) and 27 C.Y.P.A.
34 Child's Rights Act 2003, Act No. 26 of the National Assembly, with commencement date as 31st July, 2003.

to a remand home after a finding of guilt by a Juvenile Court. The rules regulating the operation of remand homes require that inmates be provided with reasonable occupation and recreation.

THE RIGHT OF THE CHILD IN NIGERIA UNDER THE ACT

The right of the child in Nigeria was formally codified as an Act of the National Assembly[35] and the said Act came as a recognition and adoption of the United Nations resolution of the right of a child, by Nigeria, but not all the states in Nigeria have adopted the Act and until it is adopted, the Act may not be applicable.

It is to be noted that the said Act mentioned the right of the child to include;

1. Right to survival and development[36]
2. Right to a name[37]
3. Freedom of association and peaceful assembly[38]
4. Freedom of thought, conscience and religion [39]
5. Rights to privacy and family life[40]
6. Right to freedom of movement[41]
7. Right to freedom from discrimination[42]
8. Right to dignity of a child[43]
9. Right to leisure, recreation and cultural activities[44]
10. Right to health and health services[45]
11. Right to parental care, protection and maintenance[46]

35 Section 4 of the Act.
36 Section 5 of the Act.
37 Section 6 of the Act.
38 Section 7 of the Act.
39 Section 8 of the Act.
40 Section 9 of the Act.
41 Section 10 of the Act.
42 Section 11 of the Act.
43 Section 12 of the Act.
44 Section 13 of the Act.
45 Section 14 of the Act.
46 Section 15 of the Act.

12. Right to free, compulsory and universal primary education[47]

13. Right to special protection measure by any child who requires the same[48]

14. Right against harm to an unborn child[49]

15. Right of a child to contract of necessities[50]

With the greatest respect, all these rights as mentioned above may be very difficult to implement and run into the problem of non justiceability and the breach of the constitutional provision with regards to the issue of fundamental right in certain aspect.

For example, it will be difficult for any parent or state government who is poor to provide for leisure, recreation and cultural activities, health and health services including special protection measure for a child who requires same. The question is, can such matter be maintained successfully in a court of law? How far has the government provided for the parent of a child in terms of employment, salary, entitlements and other basic necessities of life to enable such parent to be challenged? How will you go to court to challenge a breach of the right against a state government who fails to make certain basic provisions for the child? Certainly, it will be very difficult and no wonder, most of the states of the federation have refused to adopt and passed as law the said child's right Act.

Another area of contradiction with respect to the Act is where it states that every parent, guardian, institution, person or authority responsible for the care, maintenances, upbringing, education, training, socialization, employment and rehabilitation of a child has the duty to provide guidance, discipline, education and training for the child to secure his assimilation, appreciation and observance of responsibility. Any parent or authority can capitalize on this area of law, to say that right to association and peaceful assembly, right to leisure, recreation and cultural activities will not allow good upbringing for the child as he may not appreciate life and become a "spoilt child".

Furthermore, the issue of Tatoos or skin marks which is prohibited by the act may lead to the parent challenging this aspect of the act especially in the Northern part of Nigeria, where it is prevalent because such parent can also

47 Section 16 of the Act.
48 Section 17 of the Act.
49 Section 18 of the Act.
50 Section 20 of the Act.

rely on the constitutional provision of the protection of his fundamental right to his culture and cultural practices so far it is not inimical to health.

The most important question is; can the right of the child be implement in Nigeria as provided by the Act? The simple answer is, it is difficult if not impossible to implement the same because:

1. The government in Nigeria has failed over the years to provide basic necessities of life to its citizens, which will encourage them to perform their utmost best in carrying out their duties under the Act.

2. The compliance machinery is weak because of corruption and difficulties in arresting the defaulters as those who would have been arrested are guilty of one form of breach of the act or the other. Most influential persons today were brought up by working as house maid/ stewards and on their own. The practice is still going on.

3. The parents who will fight for the child are themselves guilty of the acts complained of, or how many times will a government officer on his own initiate the move to enforce the right of the child for him or her and how many of the children can enforce their rights on their own against their parents, guardian or government? Certainly these difficulties are too grave and unfortunate.

4. The provisions of the Act is only applicable to Federal institutions and federal capital territory, Abuja. For the Act to be applicable to the "States" in Nigeria, each of the states have to adopt the Act through the respective States House of Assembly accepting the law as applicable to the states. It is pertinent to note that less than 30% of the states in Nigeria have made this law part of the domestic laws of the state. This is one of the reasons which made the Child Right in Nigeria an illusion rather than a reality.

To show us about the problem facing the child Rights Acts, on Tuesday June, 22nd 2010, the Guardian Newspaper published on page 76, "Law Column" wherein, during an interview, **Mrs. Ojiaka Chigoziri** the president, Lagos branch of International Federation of female lawyers stated thus;

> *"The governors of all the states that have adopted this child right law should look at the implementation of the law, because, without implementing the law, the whole essence is useless"*
>
> *"...we have the child Rights Act at the national level and about 28*

states have adopted this law in their states and they now have the child Right law of the state but what I can say is that it is not really fulfilling I the enforcement of the right…" (Underlining mind.)"

CONCLUSION/ RECOMMENDATION

In conclusion, we deem it necessary to say that even though the Rights of the child is known and guaranteed by most of the Nations of the world, and as at now, the child's right Act in Nigeria, there is still very serious information of child abuse and generally the rights of the child being infringed upon. In fact some people up till now do not consider it necessary to discuss the issue of the Rights of the children because to them, a child is still under parental care and all his/her Rights must be dictated by the parents. However, it must be pointed out quickly that the various laws and regulations, especially the United Nations Convention, the African charter and various Countries of the world have all contributed uniquely to what is known today as the Rights of the child but there are still rooms for improvement.

It is against this background that we make the following suggestions and recommendations with regards to Rights of the child. The suggestions and recommendations are as follows;

1. There should be improved counseling of the parents, teachers and our policy makers on the rights of the child to education.

2. There should be improvement in the health status of every child and for the child to have access to safe water, good sanitation and healthy environment. There should be elimination of some traditional practice which are harmful to the female child for example, early marriage, female circumcision and preference for a male child.

3. There should also be serious improvement in the child welfare. There should be a more comprehensive programme by the government in alliance with the parents with regards to child welfare. The establishment of a Trust Fund and a Monitoring Unit in every State will help to improve the standard.

4. There should be correct definition of what child Labour entails and to make sure that this issue of child Labor is well protected under the law and also enforceable.

5. The Juvenile offenders and those in Remand homes should be treated as human beings and government should make sure that the social

welfare centres are fully refurbished and infrastructural facilities should be in place.

6. The other Federating states in Nigeria should adopt the child Right Act and make it their states law.

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COMBATING CYBER CRIMES IN INDIA AND USA: A COMPARATIVE ANALYSIS

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ABSTRACT

With the development of computer technology and internet, the cyber-crime becomes one of the most intricate and complex issues in the cyber space. USA is the birthplace of internet and experience the first computer related crime in the year 1969.[1] Cyber space has become a place to do all sorts of activities which are prohibited by law. It is being used for gambling, trafficking in human organs, pornography, hacking, infringing copyright, terrorism, violating individual privacy, money laundering, fraud, software piracy, prohibited drugs and corporate espionage etc. So, the cyber-crimes affect the whole world at large. There is need of laws governing fast paced cyber-crimes. Thus, the present paper is an attempt to compare the Indian present status of cyber legislation with the legislations of USA for exploring the deficiencies and inadequacies of Indian Cyber Laws.

INTRODUCTION

Internet has created a virtual world without any boundary the virtual space in which the information technology mediated communication and actions are taken place is generally referred to as cyber space. Nowadays, social networking sites have become very popular. These sites have provided a space to go their feelings get new and connect with old friends.[2] The evolution of information technology gave birth to cyber space wherein internet provides equal opportunities to all the people to access information, data storage, analyse etc. with the use of high technology. [3]Some Persons exploit the Internet and other network communications for their own benefit which are international in scope. Now situation is becoming more alarming; Cyber-crime is an upcoming and is talk of the

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1 TALAT FATIMA, CYBER CRIMES p. 45 (2011).

2 David DecaryHetu and Carlo Morselli, *Gang Presence in Social Network Sites,* Vol. 5 No. 2 IJCC 876 (2011).

3 FAROOQ AHMAD, CYBER LAW IN INDIA, p. 367 (2008).

town in every society. Theoretically and practically this is a new subject for researchers and is growing exponentially. Though lot of work has been done but endless has to be go because the invention or up gradation of new technology leads to the technical crime i.e. the digital or we can say the cyber-crime or e-crime. This is because every day a new technique is being developed for doing the cyber-crime and many times we are not having the proper investigating method/ model/ technique to tackle that newly cyber-crime.[4]

The socio-economic and cultural facets of life have been tremendously affected owing to the rise of globalization. The cyberspace has been a blessing to human civilization.[5] The main task of the Internet is to connect the people around the world with the desire to know about the indispensable human nature which led to the unearthing of the cyber world. Societies and their inhabitants into Knowledge Networkers who are more informed of the events happening locally and globally. Their actions are based on the strong foundation of knowledge which is universal, objective, timely and retrieved from various sources.[6]

Due to the information technology people are becoming more conscious about their rights and opportunities and all the credit for this revolutionary change goes to computer, internet and information technology. In 21st century to the globalization the way of the people to communicate and interact with each other all over the world has been changed and the communication of earlier times which was only paper based is being substituted by electronic communication. Organised cyber-crime are threat to security of Nation as well as world.

Comparatively some organizations have identified organized cyber-criminal networks as its most potential cyber security threat and some are ready to defend such security threats. The digital world is increasingly intertwined with the traditional offline world and therefore safety in cyberspace has become a prerequisite for a well-functioning society. A secure cyberspace means a cyberspace where (and from where) no crime is committed.[7]

4 Ajeet Singh Poonia, *Cyber Crimes: Challenges and its Classification* Vol. 3 No. 6 IJETTCS 119 (2014).

5 TanayaSaha and Akanchs Srivastava, *Indian Women at Risk in the Cyber Space: A Conceptual Model of Reasons of victimization,* Vol. 8 No. 1, IJCC 57-58 (2014).

6 Justice T. Ch. Surya Rao, *Cyber laws – Challenges for the 21st Century*, ANUDDRA LAW TIMES, p. 20 (2004).

7 RutgerLeukfeldt, Sander Veenstra, et.al., *High Volume Cyber Crime and the Organization of the Police: The Results of Two empirical Studies in the Netherlands,* Vol. 7 No. 1, IJCC 1 (2013).

CONCEPT OF CYBER-CRIME

The term *Cyber* denotes the cyber space i.e. virtual space and it means the informational space modelled through computer, in which various objects or symbol images of information exist. Therefore, it is the place where the computer programs work and data is processed.[8] Cyber-crimes are nothing but crimes of the real world perpetuated in the medium of computer and hence there is no difference in defining a crime in cyber world and real world. Only the medium of crime is different.[9]

Cybercrime is "international" or "transnational" – there are 'no cyber-borders between countries'.[10] Computer crime, cyber-crime, e-crime, hi-tech crime or electronic crime generally refers to criminal activity where a computer or network is source, tool, target or place of crime as well as traditional crime through the use of computers like child pornography, Internet Fraud. In addition to cyber-crime, there is also 'computer supported crime' which covers the use of computers by criminals for communication and document or data storage.[11]

Cyber-crime may be defined as "any illegal act fostered or facilitated by a computer, whether the computer is an object of a crime, an instrument used to commit a crime, or a repository of evidence related to a crime."[12] An online dictionary defines "cybercrime" as "a crime committed on a computer network."[13] Cybercrimes can be plainly defined as "crimes directed at a computer or a computer system." [14] But the complex nature of cybercrimes cannot be sufficiently expressed in such simple and limited terms.[15] According to Pavan Duggal,Cybercrime refers to all activities done with criminal intent in cyberspace or using the medium of internet. These could be either the criminal activities in the conventional sense or activities, newly evolved with the growth of the new medium. Any activities which basically offend human sensibilities can be included in the ambit of cybercrimes.[16]

8 Jyoti Rattan, *Cyber Laws & Information Technology,* 215 (2014).
9 D. Latha, *Jurisdiction Issues in Cybercrimes,* Vol.4 *Law Weekly Journal* 86 (2008).
10 Guillaume Lovet Fortinet, Fighting Cybercrime: Technical, Juridical and Ethical Challenges, Virus Bulletin Conference (2009).
11 *supra* note 9.
12 Sameer Hinduja, *Computer crime Investigations in the United States: Leveraging Knowledge from the Past to Address the Future,* , Vol. 1, No. 1 IJCC (2007).
13 Susan W. Brenner, *At Light Speed: Attribution and Response to Cybercrime/ Terrorism/ Warfare,* Vol. 97, No. 2 Journal of Criminal Law & Criminology 382(2007).
14 Peter Stephenson, *Investigating Computer – Related Crime,* p.3 (2000).
15 *supra* note 1.
16 PAWAN DUGGAL, CYBERLAW- THE INDIAN PERSPECTIVE, p. 256 (2002).

INDIAN CYBER CRIME LEGISLATIONS

Parliament of India has passed the first legislation in the year 2000, i.e, Information Technology Act. Chapter XI of the IT Act, 2000 under the heading of 'offences' deals with the various types of offences which are committed in the electronic form or concerning with computer, computer system and computer networks. Further IT Act, 2000 was amended in 2008. Section 66(A) was added by the 2008 amendment which deals with an offence to send offensive message. An offence to receive stolen computer resource is also added under section 66(B). sections 66(C), 66(D), 66(E) and 66(F) were inserted to declare identity theft, cheating, privacy in cyber space, video voyeurism and cyber terrorism. Section 67-A, 67-B and 67- C were also added which provides punishment for obscenity and child pornography etc. Information technology Act 2000 further amends the Indian Penal Code 1860, the Indian Evidence Act, 1872, the Bankers Books Evidence Act, 1891 and the Reserve Bank of India Act. The Indian Judiciary played an important role in handling cyber-crimes in India.

USA CYBER CRIMES LAWS

The USA has enacted various federal and state laws for the protection of computer, computer network from various cyber-crimes. The Wire Fraud Statute was the first law to prosecute the computer criminals in USA.[17] This was an effective statute as it was to overcome defrauding to obtain money, property by false representation or promise; modus operandi being radio or television communication, signs or signals.[18] The Computer Fraud and Abuse Act (CFAA) was enacted by the congress as an amendment of the existing computer fraud law which says that a person is guilty of an offence if he causes a computer to perform any function with intent to secure access to any programme or data held in any computer or he access to secure in unauthorized, and he knows at the time when he cause the computer to perform the function that is the case.[19] Then after Data Protection Act, 1998 was enacted which also control the use and storage of persona data or information relating to individuals. In USA, there are two child pornography laws, that is, the Child Pornography Prevention Act, 1996 and Child Online Protection Act, 1998. The Communication Decency Act, 1996 has been passed to protect the minors from pornography.

17 Rajlakshmi Wagh, *Comparative Analysis of Trends of Cyber Crimes Law in U.S.A and India,* Vol. 2 No. 1 IJACSIT (2013).

18 *Ibid*.

19 Section 1 (i) of The Computer Fraud and Abuse Act, 1998.

In USA almost every state has laws dealing with cyber stalking. US passed the federal laws on cyber-squatting which is known as Anti Cyber Squatting Consumer Protection Act, 1999. To stop trade secret misappropriation the National Stolen Property Act and VirginiaInternet Policy Act comprising of 7 bills have been passed.

There is large no. of cyber laws passed and amended in USA. The United States Legal system more technology savvy and specialized to tackle the various crimes.

COMPARATIVE ANALYSIS

In cyber world, every state should have its national law having extraterritorial jurisdiction to cover extraterritorial character of cyberspace activity as there is no international instrument relating to cyber jurisdiction. Covering this aspect among others, the UN Commission on International Trade Law adopted a model law on E-Commerce in 1996 which was adopted by the General Assembly by its Resolution. The General Assembly recommended that all states should give favourable consideration to the said model law on commerce. India being the signatory to said Model Law enacted The Information Technology Act, 2000 to make law in tune with the said Model Law.[20]

Jurisdiction under the IT Act is prescribed under sections 1 (2) and 75, which are to be read along with the relevant provisions of the Indian Penal Code, 1860. Section 1(2) of the IT Act, 2000provides for the jurisdiction of Indian courts in cyber-crimes and contravention. IT Act is silent on the point of the State of Jammu Kashmir, which means that the IT Act extends over the State of Jammu Kashmir. This section provides the extra-territorial jurisdiction over offence or contraventions committed against any computer, computer system and computer network located in India.

In USA, a number of traditional principles relating to jurisdiction are being interpreted in the light of borderless world of cyberspace, jurisdictional problems remain a thorny issue and many experts are of opinion that mere availability of a website is not enough to establish minimum contact to entrench the cyber-criminal.[21] In torts matters, the *lex loci delicti,* or the rule that the place in which the injury occurred is the place of trying the case, was followed. But now, the ever-expanding boundaries of the internet have, both in civil and criminal matters, exposed the defendant to universal jurisdiction. The question that is often asked whether a defendant

20 Jyoti Rattan, *Cyber Laws & Information Technology,* 346 (2014)
21 *supra* note 1.

who neither ever went out of his jurisdiction nor intended to do so, would rightly be subjected to multiple or foreign jurisdictions and applicable law?[22] In *rem*, jurisdiction might apply to the assertion of claims for jurisdiction based on e-mail storage box or stored file that is located on a computer server in the forum jurisdiction.[23]

In both the countries the term *"cyber-crime"* has not been defined while the various authors in the respective countries have attempted to define it. There is no statutory definition exists in both the countries yet. The term *'cyber-crime'*, or *'cyber offence*' is neither defined nor this expression is used under the Information Technology Act, 2000 which was further amended in 2008. In fact, the Indian Penal Code, 1860 also does not use the term 'cyber-crime' at any point even after its amendment by the Information Technology (Amendment) Act, 2008.

The US have not provided any formal categorisation of cyber-crimes while in India the cyber-crimes are given under Chapter XI of the Information Technology Act, 2000 under the heading of '*Offences*' which deals with the various types of offences .

In India, before the amendment made by the Information Technology (Amendment) Act, 2008, the offence covered under section 66 was 'Hacking with Computer System'. But now hacking is replaced by 'Computer related offences'. Under section 66 hacking becomes an offence only when it is committed dishonestly or fraudulently under section 43 the Act. Because before such amendment it was a plain and simple offence with the remedy of compensation and damages only, in that section, here it is the same act but with a criminal intention thus making it a criminal offence. We can also say that if any person causes a computer resource to perform a function with dishonest or fraudulent intent to secure access, knowing that the access he intends to secure is unauthorized then that person is liable under this section.

In the United State of America Computer Fraud and Abuse Act, 1986 deals with the offence of '*Hacking*' which is per se illegal only with respect to computers used exclusively by the Government of the United States. Hacking to all other computers, for instance, those used non exclusively by the federal government, including computers containing national security records, and those containing financial and credit records require some

22 F. Lawrence Street and Mark P. Grant, *Law of the Internet,* 3-8 (2004).
23 Shaffer v. Heitner, 433 US 186: 53 L Ed 2d 683 (1997).

further act or damage to occur in order for criminal penalties to apply.[24] Other Acts like Data Protection Act, 1998 has been passed to control the use and storage of personal data or information relating to individuals under § 1030 and the Spyware Control and Privacy Protection Act, 2000 is such an Act to prevent and control hacking in the USA.[25]

In *Briggs v. State of Maryland case,*[26] the US Court held that the statute of the state of Maryland that criminalizes unauthorized access to computers was intended to prohibit use of computers by those not authorized to do so in the first place, and may not be used to criminalize the activities of employees who use employers' computer system beyond the scope of their authority to do so.

In India, there was no specific section under the originally IT Act, 2000 under which sending of threatening emails, which may cause harassment, anxiety nuisance and terror or which may seek to promote instability, have been made a penal offence. Cyber war and cyber terrorism do not find any mention in the Indian Cyber law. But now the Information Technology (Amendment) Act 2008 for the first time made the provision for cyber terrorism and defines it in section 66F which provides for punishment for cyber terrorism which provide the highest punishment under this Act. Clause 1(A) of this section deals with cyber terrorism that directly affects or threatens to affect the people with the purpose to threaten the unity and integrity or security of the nation and to fill the terror into the mind of the peoples. Clause 1(B) of this section deals with cyber terrorism that directly affects the State by unauthorized access to restricted information, data or computer database. In 2008, serial blasts in Ahmadabad, Delhi, Jaipur and Bangalore are the live examples of the cyber terrorism in India. In 2008 attack on Mumbai Taj Hotel which is also known as 26/11 and the Varanasi blast in 2010 had the trails of cyber terrorism. The main purpose of the cyber terrorist is to gather the restricted information and to spread terror by cyber communications method for disruption of national security, unity, integrity and peace etc.[27]

In the USA, the Computer Fraud and Abuse Act, 1986 has been passed which was further amended in 1994 and 1996. But after Sep. 11, 2001, an attack on World Trade Centre and Pentagon, the USA passed the Patriot Act, 2001 and recognised hacking as cyber terrorism and for the first time

24 Tonya L. Putnam and David D. Elliott, *International Responses to Cyber Crime,* Vol. 1 University of Petroleum and Energy Studies Review 39-40 (1999).
25 M. DASGUPTA, CYBER CRIME IN INDIA- A COMPARATIVE STUDY, 74 (2009).
26 348 MD.470 (1998) USA.
27 Available at Times of India (Nov.26, 2016).

defines the term "cyber terrorism". It provides that if any person who causes unauthorized damage to a protected computer by either knowingly causing the transmission of a program, information, code, or command, or intentionally and unauthorizedly accessing a protected computer shall be liable to punishment.[28]

In India, the IT Act, 2000 was deficient in dealing with obscenity before amendment by IT Amendment Act, 2008. It has reformed the Indian law of obscenity to a greater extent.Now, the Information Technology Act, 2000 after amendment states that storing or private viewing of pornography is legal as it does not specifically restrict it. On the other hand transmitting or publishing the pornographic material is illegal. There are some sections of Information Technology Act, 2000 which prohibit cyber pornography with certain exceptions to Section 67 & 67A. The combined effect of sections 66 E, 67, 67A and 67 B is to differentiates between cyber pornography, child pornography and mainstream pornography and to bring the online pornography within the legal regime.

State of Tamil Nadu v. *SuhasKatti*[29] is a landmark case which is considered to be the first case of conviction under section 67 of Information Technology Act in India which makes this section is of the historical importance. In this case, some defamatory, obscene and annoying messages were posted about the victim on a yahoo messaging group which resulted in annoying phone calls to her. She filed the FIR and the accused was found guilty under the investigation and was convicted under section 469, 509 of IPC and section 67 of Information Technology Act.

In USA, there are two child pornography laws i.e. The Child Pornography Prevention Act, 1996 and the Child Online Protection Act, 1998. The former Act prohibits the use of computer technology to knowingly produce child pornography, that is, depictions of sexually explicit conduct involving or appearing to involve minors. The latter Act requires commercial site operators who offer material deemed to harmful to minors to use bonafide methods to establish the identity of visitors to their site. The Communication Decency Act, 1996 has been passed to protect minors from pornography. The CDA provides any person, who knowingly transports obscene material for sale or distribution either in foreign or interstate commerce or through the use of an interactive computer service, shall be liable to imprisonment up to five years for a first offence and up to ten years for each subsequent offence.

28 http://en.m.wikipedia.org>wiki>sepate.
29 *Case of 2004,* law mantra.co.in.

In *United States* v. *Hiltoncase*[30], a federal grand jury charged Hilton for criminal possession of computer disks containing three or more images of child pornography in violation of 18 U.S.C. $ 2252A (A)(5)(B). He challenged the state without denying the charges. He contended to dismiss the charges on grounds that the Act was unconstitutional under the First Amendment. The U.S. district court was also agreed with his contention regarding the vagueness of the definition of child pornography but in this case the issue was raised whether the CPPA poses substantial problems of over breadth and which would sufficient to justify overturning the judgment of the law-making branches. It was held by the court that the CPPA is not unconstitutionally overbroad and the judgment of the district court is reversed.

In India, there were no laws which directly regulate cyber stalking prior February 2013 it was covered under section 66A,72 and 72 A of IT Act, 2000. In 2013, Indian parliament made amendments in Indian Penal Code, 1860 by introducing cyber stalking as criminal offence by passing Criminal Law (Amendment) Act, 2013. Cyber stalking is not directly recognized cyber-crimes in India under Section 66 A by the Information Technology (Amendment) Act 2008 and under section 72, 72A. Section 66 A provides punishment for sending offensive messages through communication service etc and section 72 provides for breach of confidentiality and privacy. The Hon'able Supreme Court declared section 66 A as unconstitutional and against the freedom of speech and expression and struck it down in *Shreya Singhal* and others v. *Union of India*.[31] This section had been misused by police in various states to arrest the innocent person for posting critical comments about social and political issues on networking sites. *Ritu Kohli's*[32] case was the India's first case of cyber stalking, which was registered by Economic Offences Wing of Delhi Police under section 509 IPC for outraging the modesty of a woman. Section 503 0f IPC provides for stalking and also harassment. Further, section 504 provides a remedy for use of abusive and insulting language. This is another form in which cyber stalking takes place where abusive words etc. are sent through e-mail.

In United States, cyber stalking is a criminal offence under American anti-stalking, slander, and harassment laws. A conviction can result in a restraining order, probation, or criminal penalties against assailant, including jail. Cyber stalking specifically has been addressed in U.S.

30 167 F.3d 61 (1" GR.), cert. denied, 120 S. Ct. 115 (1999).
31 AIR 2015 SC 1523.
32 www.nalsarpro.org>moduls >module 4.

federal law. For example, the Violence against Women Act passed in 2000, made cyber stalking a part of the federal interstate stalking statute. Still, there remains a lack of federal legislation to specifically address cyber stalking, leaving the majority of legislative at the state level. A few states have both stalking and harassment statutes that criminalize threatening and unwanted electronic communications.[33] The first anti-stalking law was enacted in California in 1990, and while all fifty states soon passed ant-stalking laws, by 2009 only 14 of them had laws specifically addressing "high-tech stalking.[34]

So, in USA almost every state has laws dealing with cyber stalking. US federal Code 18 under section 2261 A (2) states that whoever with the intent uses the mail, any interactive computer service, or any facility of interstate of foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of, or serious bodily injury shall be liable under section 2261 B (b) for a imprisonment which may extend upto life imprisonment if the death of the victim results; for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results; for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense.

New Jersey v. *Dharun Ravi,*[35] is a case of cyber stalking in which a college student named Ravi secretly made a film of his roommate's sexual intimation with another man and then posted this online. By this act of Ravi, she committed suicide and Ravi was convicted for bias intimidation and invasion of her privacy. In 2012, the judges ruled that they believe Ravi was acted out of colossal insensitivity, not hatred and sentenced him for 30 days in jail and also with fine.

The term *'cyber defamation'* is not specially used and defined under section 66A of the IT Act, 2000 but it makes punishable the act of sending grossly offensive material for causing insult, annoyance or criminal intimidation in India. Indian Penal Code, 1860 deals with menace of cyber defamation under section 499 which was got extended to 'speech' and 'documents' in electronic form by the IT Act, 2000. The offence of defamation under section 499 provides for making a publishing of an imputation concerning a person such imputation has been made with intent to harm a having reason to believe that it will harm reputation of such persons. The

33 *Cyber Stalking* WIKIPEDIA (Jun.21, 2017) http://en.wikipedia.org/wiki/cyberstalking.

34 Christa Miller, *High-Tech Stalking, Law Enforcement Technology* (May 1, 2009) http://www.officer. com/article/10233633/high-tech-stalking

35 https://en.m.wikipediaorg.>wiki>new.

defamatory matter is published i.e. communicated to some person other than the person about whom it is addressed. In India, an e-mail making allegations against the person to whom it is sent would not quality as a defamatory state so long as it a not sent to a third person. Statements on mailing lists and the World Wide Web world are defamatory as they would be available to persons other than the person to whom they refer. But in 2015, the Apex court declared section 66A as unconstitutional in its entirety and against the freedom of speech and expression and struck it down in *Shreya Singhal* and others v. *Union of India.*[36] Because misuse of Section 66-A by police in various states to arrest the innocent person for posting content deemed to be allegedly objectionable on the internet.

In USA, the Communications Decency Act (CDA), 1996 is one of the most valuable tools for protecting freedom of expression and innovation on the internet. Section 223 of the Act lays down that any person who puts the information on the web which is obscene, lewd, lascivious, filthy or indecent with intent to annoy, abuse, threaten or harass another person will be punished either with imprisonment or with fine. Section 230 of the Act provides for protection for private blocking and screening of offensive material. The section says that no provider or user of an interactive computer service shall be considered as the publisher or speaker of any information provided by any other information content provider.

In *Stratton Oakmont, Inc.* v. *Prodigy Services Company*[37] case, the defendant is a publisher which led to the court for holding a finding that it would be a hurdle for a plaintiff to overcome in pursuit of their claims because one who repeats or republishes a libel is subject to liability as if he had originally published it. In this case the US court clearly indicated and followed the decisions given in cubby case and held that it would be impossible for the provider to monitor every message posted.

In *Cubby, Inc.* v. *CompuServe, Inc.*[38] case, the issue was raised that whether the service provider exerted enough control over or had knowledge of or reason to know, the contents of allegedly defamatory statements posted on one of its bulletin boards. In this case the court held that the service provider was liable defamatory statements posted on its bulletin boards, notwithstanding the fact that the control it exerted over content was intended to improve its service and keep them free from objectionable material.

36 AIR 2015 SC 1523.
37 (1995) N.Y. Misc. LEXIS 229, 1995 WL 323710 N.Y. Sup Ct. (May 24, 1995).
38 776 F. Supp. 135 (S.D.N.Y. 1991).

The term '*Phishing*' is not used anywhere in India as given under IT Act, 2000 before the amendment Act, 2008. But now it is a punishable offence under section 66, 66A, 66C, 66D of IT Act, 2000 and under IPC, 1860. Section 66 A of Information Technology Act provides punishment for sending offensive messages through communication service etc. Section 66 C of Information Technology Act, 2000 which is inserted by Amendment Act, 2008 provides punishment for Identity Theft if any person whoever fraudulently or dishonestly make use of the electronic signature, password or any other unique identification features of any other person. Section 66 D is applied to any case of cheating by personating which is committed by using a computer resource or a communication device which can be used for phishing but not directly.

On January 26, 2004, the US Federal Trade Commission filed the first lawsuit against a suspected phisher. The defendant, a Californian teenager, allegedly created a webpage designed to look like the America Online website, and used it to steal credit card information.[39] After this, Senator Patrick Leahy introduced the Anti-Phishing Act in Congress on March 2005 which would punish and fined those cyber criminals who created the fake websites and sent bogus e-mails with the purpose of defrauding consumers. But it did not pass. In Jan. 2007, Jeffrey Brett Goodin of California was become the first convicted cyber-criminal by a jury under the CAN- SPAM Act, 2003 for sending thousands of e-mails to America Online users which prompted customers to submit personal credit card information. In USA, The CAN- SPAM Act, 2003 is the direct response of the growing number of complaint over spam e-mails and is also the first USA cyber law which establishes national standards

The term 'cyber fraud' is neither defined in the Indian Penal Code, 1860 nor in the IT Act, 2000. Section 66-D was inserted by the Amendment Act, 2008 for providing punishment for cheating by personation by using computer resource which is also used for cyber fraud but not directly. According to this section if any person who by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.[40] This offence is bailable, cognizable and triable by the court of Judicial Magistrate of First Class.

The USA has enacted the Computer Fraud and Abuse Act, 1996 for

39 JeordanLegon, *Phishing Scams Reel in Your Identity,* CNN NEWS, (Jan. 26, 2004) http://edition.cnn. com/2003/TECH/internet/07/21/phishing.scam/index.html?iref=newssearch.

40 Section 66 D (Inserted Vide Information Technology (Amendment) Act, 2008.

prohibiting and punishing computer and internet fraud which was further amended and also amended by the Patriot Act, 2001 and in 2008 by the Identity Theft Enforcement and Restitution Act. U.S Criminal Code's provisions are also applicable on the cyber fraud and the violators can be prosecuted under title 18 i.e. no. 1028 prohibits social security cards fraud and credit card frauds, no. 1029 prohibits identity fraud including telemarketing fraud, no. 1341 prohibits mail fraud, no. 1343 prohibits wire fraud etc. The Federal Statute title 18 U.S. Code s. 1030 also prohibits fraud and other related activities in connections with computers.[41]

In *United State* v. *Pirello case,* [42]the defendant Pirello placed four advertisements on internet classified-ads websites for soliciting the buyers for computers with the purpose of fraudulently selling it online. By doing this, he received three orders and then he deposited the entire money received from the orders in his personal bank account but he did not delivered computers to the buyers. The court determined the issue that whether USSG 2F1.1 (b) (3), which instructs courts to enhance a sentence by two levels if the offense was committed through "mass-marketing," applied to defendant's fraudulent internet advertisements. The court held that the use of the internet website to solicit orders for non-existent computers violated the USSG and affirmed the lower court's enhancement of his sentence.

Lastly, in India, Section 66 E is inserted in IT Act, 2000 after amendment in 2008 for providing punishment for violation of privacy. This section applies to the violation of the bodily privacy of any person by three stages i.e. capture, publication and transmission. This section criminalizes any of these stages that are done without the consent of the victim. It is irrelevant that whether the person to whom the mail is sent read the mail or not.

But in USA, the Electronic Communication Privacy Act, 1986 (ECPA) a criminal wiretap statute which uses the word "anyone" who commits the breach and on whom the liability can be fixed under section 2511 (1) (a). On the basis of the recommendation of the Federal Trade Corporation, the Online Privacy Protection Act, 2000 has been passed for providing protection to individual privacy.

CONCLUSION AND SUGGESTIONS

After analysing the comparative study which is based on the legislations of both countries, it can be concluded that USA has enacted several laws for

41 https://en.m.wikipedia.org>wiki>title.

42 255 F. 3d 728 (9th Cir. 2001) (USA).

combating cyber-crimes; despite this many complicated legal issues are still unresolved. In the context of India, though Information Technology Act, 2000 is a comprehensive legislation for combating cyber-crimes, still it is only a gap-filler and there are so many legal issues which have no mentioned yet. The legal positions relating to electronic transactions and civil liability in cyberspace is still confused or not clear by the reason of not having any adequate laws on globally. There is a need to pass the comprehensive cyber laws globally.

In India, there has been found the number of cases of cyber-crimes like cyber defamation, cyber stalking and cyber harassment etc. but there is no specific definition under the Information Technology Act, 2000. It is found that a number of these types of crimes are either not registered or are registered under the existing provisions of Indian Penal Code, 1860 which are ineffective and do not cover the said cyber-crimes. The Information Technology Act, 2000 has undergone with some amendments one of them is the recognition of electronic documents as evidence in a court of law. Indian Government emphasizing on encouragement to electronic fund transfers and also help in promoting electronic commerce in the country. But the result is not similar as it is. The cyber-crime cells are doing training programmes for its forces and plans to organize special courses for corporate to combat cyber-crime and use the Information Technology Act effectively.

There are thousands of cases taking place in the countries but only the few cases are lodged as a complaint. Because many of the victims' due to the threat and fear of getting abused in the society does not move any complaint against the cyber criminals, some of the cyber victims accept this incident as nightmare or bad destiny or as wished by God and moving on the life by forgot all the incidents. But due to this the cyber criminals are more encouraged to get involved in such type of cyber-criminal activities. There is need to encourage more and more complaint to be lodged for combating cyber-crimes both at national and international level.

Further complicating cyber-crime enforcement is the area of legal jurisdiction. No one country cannot by itself effectively enact and enforce laws that comprehensively address the problem of internet crimes without cooperation from other nations. While the major international organizations, like the OECD (Organization for Economic and Cooperation and Development) and the G-8, are seriously discussing cooperative schemes, but many countries do not share the urgency to combat cyber-crimes for many reasons, including different values concerning piracy or espionage or the need to address more pressing social problems. These countries, inadvertently or not, present the cyber-criminal with a haven to

operate.[43] There is a need to decide the issue of investigation at globally.

The Information Technology Act does not have any specific provision for defining and punishing cyber spamming. In the contemporary time spamming is the most threatening act of cyber world. Therefore, there is a need to adopt the Anti-Spam law for the protection of children. In USA, the CAN- SPAM Act, 2003 is the direct response of the growing number of complaint over spam e-mails and is also the first USA cyber law which establishes national standards for sending of commercial e-mail.

United States passed the federal laws on cyber-squatting which is known as Anti-Cyber Squatting Consumer Protection Act in 1999. In India, the Information Technology Act does not have any specific provision for defining and punishing cyber-squatting and these cases are decided under Trade Mark Act, 1999. Therefore, there is a need to adopt the Anti-Squatting law.

There are large number of cyber laws passed and amended in U.S.A and India. But instead of these laws the cyber-crimes are increasing day by day. For example, a total of 8, 045 cases were registered under Information Technology Act during the year 2015 as compared to 7, 201 cases during the previous year 2014 and 4,356 cases during 2013, showing an increase of 11.7% in 2015 over 2014 and an increase of 65.3% in 2014 over 2013.[44] As compare to India, in USA for the year 2015, Cost of Data Breach Study by IBM and the Pone Mom Institute revealed that the average total cost of a data breach increased from $ 3.52 million in 2014 t0 $ 3.79 million. Another study said that cyber-crime will become a $ 2.1 trillion problem by 2019.[45]

In U.S.A Cyber Crime Laws are very stringent and strictly enforced. However, in India Information Technology are very loosely framed and enforcement is also lenient. USA is fully digitalized but India is not completely digitalized till now. So, in India people are not literate in Computer and are not aware about the cyber Crime. Indian police are also not fully equipped with tools and technology to combat Cyber Crimes.

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43 Loknath Behera, *Investigating External Network Attacks,* The Indian Police Journal 27 (2004).

44 National Crime Records Bureau, Ministry of Home Affairs, cyber Crimes in India, at 163-164 (2015), available at: http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf.

45 LimorKissem, "2016 Cyber Crime Reloaded: Our Prediction for the Year Ahead", (Jan. 15, 2016), available at: https://securityintelligence.com/2016-cybercrime-reloaded-our-predictions-for-the-year-ahead/

DECODING TAX HEAVEN 'TALISMAN' THROUGH DOUBLE TAXATION AVOIDANCE AGREEMENT: A PARKING SPOT FOR MULTI DECKER BUS CALLED 'BLACK MONEY'

Anindhya Tiwari*

ABSTRACT

The present paper interlinks four aspects-tax havens, DTAA, its effect on economy and black money. A tax haven is a country that offers foreign individuals and businesses little or no tax liability in a politically and economically stable environment. Double Tax Avoidance Agreements (DTAA) are created so that a resident of a country , who has an income in a second country as a result of business or job, is not taxed for the income in the home country if he has already paid tax on the income in the contracting country. Tax Havens brings in issue of black money however, India is coming up with accounting systems such as implementation of International Financial Reporting Standards (IFRS),Direct Tax Code (DTC) updated with provisions such as General Anti-Avoidance Rules (GAAR) and the Controlled Foreign Corporation (CFC). This paper deals with tax havens creations and reasons, their functions, roles, etc. It also deals with the relationship of tax havens and DTAA. This paper explains in great length the methods that are employed by companies and individuals to avoid taxes in DTAA countries and policies of government for curbing this menace.

INTRODUCTION

According to Prof. *A. Huebert, "a tax haven is a country that offers foreign individuals and businesses little or no tax liability in a politically and economically stable environment. Tax havens also provide little or no financial information to foreign tax authorities. Individuals and businesses*

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that do not reside a tax haven can take advantage of these countries tax regimes to avoid paying taxes in their home countries. Tax havens do not require that an individual reside in or a business operate out of that country in order to benefit from its tax policies."[1]

Key factors in identifying tax havens:

1. No or nominal tax rates.
2. Lack of effective exchange of information.
3. Lack of transparency.
4. No substantial activities.

TAX HAVEN AND ECONOMY

Tax competition occurs when different countries seek to attract investment and multi-national companies, by offering lower tax rates. Usually tax competition refers to corporation tax, but can also include competition on income tax on labour. Tax competition is unhealthy as it reduces overall economic welfare. The pressure group Tax Justice Network estimated that losses arising because of the global system of taxation through tax havens up to 255 billion dollars per year, but these figures are not accepted unanimously.[2]

Tax havens are considered harmful for the economy because the money invested in tax havens is easy to disguise but difficult to detect. To curb the growing menace of tax havens The Organization for Economic Co-operation and Development (OECD) has been setup. The Ministerial Communiqué of May 1996 called upon the Organization to: *"develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and report back in 1998."*[3] Tax havens are considered harmful for the economy because they erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally. The taxes, which are evaded through these havens, form part of black money and thus reduce the confidence of people in tax systems.[4]

1 Professor Emiritus, Nottingham University.
2 Daniela Iuliana Radu ,Lawyer, PhD student, Faculty of law, University of Bucharest, Romania, Tax Havens Impact on *The World Economy,* WC-BEM 2012.
3 OECD, http://www.oecd.org/about/
4 For an empirical examination of this tendency see e.g. Oates (1985) or Ram (1987).

Standard theories of tax competition are largely motivated by the view that competition for capital leads to inefficiently low tax rates and public expenditure levels. This view was articulated by and Wilson (1986). Numerous subsequent writers have extended and refined the view that tax competition lowers welfare.[5]

In public finance theory we can and the famous Wagner's Law which states *that countries on a higher level of economic development tend to increase the scope of activities of their governments and therefore experience higher tax rates.*[6] Standard theories of tax competition are largely motivated by the view that competition for capital leads to inefficiently low tax rates and public expenditure levels.[7] This view was articulated by and Wilson (1986). Numerous subsequent writers have extended and refined the view that tax competition lowers welfare.[8]

The major reason why tax havens are criticized is not only because they are contributing towards black money but also because it makes it difficult for the government to raise revenues as it only makes the rich even richer. Only the richest individuals or corporations can take advantage of these tax havens, thereby increasing inequality. The government in case any case needs revenues for smooth running of the country the taxes which have been evaded by these individuals/ corporations will be collected from others i.e., generally the lower income groups by increasing the tax rates. This leads to the overburdening of these classes. Tax havens are also known for facilitating financial crimes and money laundering.[9]

Tax havens represent a problem continues, that adversely affect the budgetary revenue of countries with higher taxation and thereby lead to growth, tax avoidance, particularly that of legal, lawful and unlawful migration to the capital, causing financial instability, and by circumvention of financial control, financial crises.[10]

A recent study published by the International Monetary Fund (IMF) reaffirmed that foreign direct investments are affected by the level of taxation, so that the measure adopted by the Romanian State will have a positive effect upon the medium and long term, because the internal tax

5 See Wilson (1999) for a review.
6 For an empirical examination of this tendency see e.g. Oates (1985) or Ram (1987).
7 Oates (1972) and formally modeled by Zodrow and Mieszkowski (1986)
8 See Wilson (1999) for a review.
9 Tejvan Pettinger, *Tax Haven*, ECONOMICSHELP (Sep. 24, 2013) http://www.economicshelp.org/blog/glossary/tax-haven/.

10 *supra* note 3.

laws have the potential to influence the behaviour of corporations and individual entrepreneurs, resulting in the most direct manner locating their businesses and internationalization of economic activities.[11]

TAX HAVENS AND DTAA: THE BLACK MONEY ISSUE

"In the pursuit of black money, India has been scoring a self-goal by arguing against taking tough action, citing secrecy and privacy. In contrast, courts in the U.S. went ahead successfully in unearthing black income, ignoring such arguments and despite non-cooperation and threats by Switzerland." [12]

In popular Indian imagination; a tax haven is generally associated with Switzerland and its numbered bank accounts. But tax havens are numerous, have grown in importance, and are the routes through which half of international trade now takes place. Tax havens come in all shapes and sizes. Each has its own comparative advantage, whether in terms of cost or time taken to set up structures, discretion used, or links to particular countries. Nevertheless, they have some common characteristics such as ease of setting up companies/trusts/foundations, minimal disclosure requirements, the possibility to hide beneficial ownership, and low or no effective taxation on income or wealth.[13]

The issue of black money is not just important because the government loses its revenue but also because there are several illegal activities, which are solicited with this black money. The black money can be divided into two parts- one, which is done with the intention of evading tax and saving money for a luxurious lifestyle or for any personal or professional purpose, the other may be when the money is used for terror financing, gunrunning, or drug money or flesh trade. The earlier one though illegal, is less dangerous whereas the other one is illegal and dangerous too. It is not only about lost taxes, but also about what kind of nefarious activities it may be financing, including possibly terrorism and gangsterism.[14]

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11 *Id*. Offshore Financial Center, 2000.

12 Arun Kumar, *Secrecy in the Name of Privacy,* THE HINDU (Nov. 1, 2015) http://www.thehindu.com/opinion/lead/lead-article-secrecy-in-the-name-of-privacy/article6553153.ece.

13 Dikshit Sengupta, *The Problem of Secretive Tax Havens,* THE HINDU (Apr. 11, 2016) http://www.thehindu.com/opinion/op-ed/the-problem-of-secretive-tax-havens/article8458300.ece

14 R Vaidyanathan, *A Dummy's Guide To Tax Havens And Black Money,* INDIABULLS (Dec. 20, 2014)http://www.firstpost.com/politics/a-dummy%e2%80%99s-guide-to-tax-havens-and-blackmoney-42574.html

BLACK MONEY: REASON

In the sixties and seventies, tax rates used to be very high in India. At the margin, it was more than 90 percent in many years. This meant that for every Rs 100 earned in the upper income brackets, more than Rs90 would go as taxes. Hence, rich persons began to accumulate wealth abroad to avoid such "usurious" taxes. The high levels of taxes were the result of "Nehruvian socialism" which felt that the rich should be soaked to improve the lot of the poor. The latter did not happen, but such policies "improved "the ability of tax officials to extract money as bribes from the rich and encouraged the latter to look out for secretive jurisdictions to store their wealth. Foreign exchange controls were also so stringent that businessmen found they could not afford to stay in decent hotels when travelling abroad for business. They could not send their sons and daughters to get an Ivy League education. Hence the need to maintain dollars abroad often in tax havens.

Double Taxation Avoidance Agreement (DTAA) also referred, as Tax Treaty is a bilateral economic agreement between two nations that aims to avoid or eliminate double taxation of the same income in two countries.[15] As of now, India has DTAA with 84 nations, including Armenia, Bangladesh, Finland, Ireland, Japan, Kazakhstan, Greece, Italy and several others. Further, India is constantly gearing to establish DTAA with other nations as such agreements work towards promoting trade and investments among contracted nations.

Bilateral Double Taxation Avoidance Agreements (DTAAs) with particular reference to India's network of DTAAs are analyzed here to assess national benefits from DTAAs and make suggestions for future policy directions for India's DTAAs. Though DTAAs are a tool of tax coordination used by nations to apportion tax bases in the global fiscal commons, there are potential costs from DTAAs if too many taxing rights are ceded to a partner country and also since DTAAs can facilitate tax avoidance and evasion.[16] A typical DTA Agreement between India and another country covers only residents of India and the other contracting country who has entered into the agreement with India. A person who is not resident either of India or of the other contracting country cannot claim any benefit under the said DTA Agreement. Such agreement generally provides that the laws of the two contracting states will govern the taxation of income in

15 Roshni Aggarwal, *What is Double Taxation Avoidance Agreement (DTAA)?,* GOOD RETURNS (July 29, 2016) http://www.goodreturns.in/classroom/2013/07/what-is-double-taxation-avoidance-agreementdtaa-193501.html

16 Arindam Das Gupta, *Economic Analysis of India's Double Tax Avoidance Agreements.*

respective states except when express provision to the contrary is made in the agreement.[17] DTAAs are intended to make a country an attractive investment destination by providing relief on dual taxation. Such relief is provided by exempting income earned abroad from tax in the resident country or providing credit to the extent taxes have already been paid abroad. DTAAs also provide for concessional rates of tax in some cases.[18]

As per an estimate made by Global Financial Integrity, about $462 billion worth of black money has been sneaked out of India between 1948 and 2008, most of which has apparently gone into tax havens.[19] In the past two years, the outflow of investments from India has risen from $16.07 billion in 2008- 09 to *$18 .1 billion in 2009-10. A significant portion of India's black money is kept in banks in Switzerland, which is also a major tax haven. Nearly $1 trillion out of $ 2.8 trillion of Swiss money is black money. The Times of India in one of its article said that$181 billion Indian black money in tax havens. Between six and seven trillion dollars' worth of black wealth lies hidden in tax havens across the world, according to a fresh estimate by a trio of senior economists from the Bank of Italy.*[20] India's biggest source of FDI is India itself, money departing on a short holiday to a tax haven and then routed back as FDI.[21]

This unaccounted wealth can be sent from India into the tax havens via two routes. Firstly, by the setting up of shell companies and opening of bank accounts in the name of such companies. Once this is done, then the unaccounted money is slowly deposited into such accounts and the size of the deposits are kept small to escape any regulatory attention after which these are wired to accounts in tax havens. Secondly, by handing over the unaccounted money to a hawala operator who, through his links

17 Arunkumar G, Arvind Srinath, Ashok Giri, Ramaprasad Alwa, B Ravichandran Iyer & Sudhakar Reddy, *International Tax Avoidance using tax havens and loopholes in DTAA*.

18 Parvatha Vardini C., *All you wanted to know about DTAA,* THE HINDU BUSINESS LINE (May 16, 2016) http://www.thehindubusinessline.com/opinion/columns/all-you-wanted-to-know-boutdtaa/article8607732.ece

19 Manila M Sarkaria, *Tax Havens-Black Money:* A Nexus, SAARCLAW, http://www.saarclaw.org/expert_talk_detail.php?eid=1020

20 Subodh Varmal, *181 Billion Black Money in Tax Havens,* THE TIMES OF INDIA (Mar. 21, 2016), http://timesofindia.indiatimes.com/india/181-billion-Indian-black-money-in-tax-havens/articleshow/51487042.cms G. Sampath, The Hidden Wealth of Nations, THE HINDU (Jan.21, 2016),

21 G. Sampath, *The Hidden Wealth of Nations*, THE HINDU (Jan.21, 2016), http://www.thehindu.com/opinion/lead/black-money-the-hidden-wealth-of-nations/article8130657.ece the Hindu in its article

with operators in other countries and by a series of transactions, makes sure that the foreign currency is finally deposited into the relevant bank account in a tax haven. This money is then invested back into India as white money. Thus, the cycle is completed smoothly, converting black money into white money, without paying any tax. More so, such money will not be taxed even on subsequent earnings since most of the tax haven countries have signed a Double Taxation Avoidance Agreement (DTAA) with India whereby the income so generated is mostly taxed in either of the two countries, and if such income is taxed in the tax haven, then the rate of tax is minimal. Thus, complete evasion of tax is maintained.[22] In some cases, such as agreements with Mauritius, Cyprus, Singapore, Egypt etc. capital gains tax is exempted which can be a boon to taxpayers as they can use the DTAA agreement to minimize taxes.[23]

As per the Budget, the Foreign Tax Division of the Central Board of Direct Taxes has been strengthened and a dedicated cell for exchange of information will soon be set up to work on this agenda. The TIEAs will be a great tool for gaining information regarding unaccounted money because under such an agreement, India shall be able to seek specific information pertaining to the accounts held by certain depositors in the tax havens.[24] Both UPA and the present NDA government submitted an affidavit to Supreme Court stating that if we disclose the information relating to individuals having bank accounts in countries with which we have DTAA, it will amount to breach of confidentiality of the persons concerned and will be viewed as violation of the terms of DTAA between two countries. It will hamper further flow of information from these countries. Then, India cannot succeed in its mission of unearthing huge black money lying abroad. Mere accusation like *"Assets disproportionate to the known sources of income"*[25] will not be accepted as a valid reason for sharing the information by the other countries with India. DTAAs provide clarity on how certain cross-border transactions will be taxed and this encourages foreign investors to take the plunge.[26] However, given India's narrow tax base, it can ill-afford a tax regime that allows big fish to completely evade the tax net, citing a DTAA. Hence, the ongoing drive to plug loopholes in these agreements.

22 *supra* note 22.

23 *Double Taxation Avoidance Agreement,* BANK BAZAAR (Aug. 8, 2016), https://www.bankbazaar.com/tax/double-taxation-avoidance-agreement.html

24 *supra* note 26.

25 Pannvalan, *Understanding Double Taxation Avoidance Agreement (DTAA) V. Black Money Controversy in India,* ALL BANKING SOLUTIONS, http://www.allbankingsolutions.com/articles/articles-pan-dtaa.htm.

26 *supra* note 21.

BASE EROSION AND PROFIT SHARING

Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. Under the inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle BEPS.[27]

The international tax system is changing rapidly because of coordinated actions by governments and of unilateral measures designed by individual countries, both intended to tackle concerns over base erosion and profit shifting (BEPS) and perceived international tax avoidance techniques of high-profile multinationals. The recommendations of the BEPS Project led by the Organization for Economic Cooperation and Development (OECD) and published in October 2015 are at the root of much of the coordinated activity, although the timing and methods of implementation vary.

The BEPS Project had been initiated by the G20 countries but it effectively also encompassed the other OECD Member States from the outset. As the project progressed, engagement in the discussions was extended to other large non-OECD states and representatives of developing countries. The OECD published over 1600 pages in the 'final' reports in relation to all 15 BEPS Action items in October 2015. The UN, IMF, World Bank and OECD are developing toolkits to assist "lowest income countries" in implementing the outcomes of the BEPS Project, as far as they are relevant to those countries or to address related issues. A framework has been agreed for all countries to participate in further BEPS work on an equal footing, broadly if they commit to implementing the minimum standards.

BEPS schemes themselves can be extremely complicated, but the basic idea is simple: shift profits across borders to take advantage of tax rates that are lower than in the country where the profit is made. Three popular mechanisms for doing this are hybrid mismatches, special purpose entities (SPE), and transfer pricing.[28] Opportunities for MNEs to pay less tax harm everybody. Governments lose revenue and may have to cut public services and increase taxes on everybody else. But businesses suffer too. Small businesses, businesses working mainly in one national market and new firms cannot compete with MNEs who shift profits across borders to

27 *Base Erosion and Profit Sharing,* OECD, http://www.oecd.org/ctp/beps/

28 OECD Statistics Directorate, *Statistical Insights: What Role for Supply Use Tables?*, https://oecdinsights.org/2013/07/19/what-is-beps-how-can-you-stop-it/

avoid or reduce tax. In addition, an MNE that does not shift profits is at a disadvantage compared to its BEPS-ing rivals.

INSTANCES OF GROWING MENACE OF TAX HAVENS: PANAMA PAPER REVELATIONS[29]

The Greens/ European Free Alliance in the European Parliament on its website discuss the role of USA as a tax haven. On the same week of the publication of the Panama Papers' database by the International Consortium of Investigative Journalists, providing a useful resource to track shell companies often created with the objective to evade taxes or launder dirty money, the **Greens launched a new report** on why the United States are becoming the biggest tax haven on the planet. At the heart of the Panama Papers scandal was how Mossack Fonseca, a law firm based in Panama, helped its clients create shell companies in more than 20 tax havens in order for them to hide from the authorities behind a smoke screen.

Many countries in the world are very lax when it comes to checking whom the real physical persons behind a company or a trust are – an essential feature though to ensure that these entities have a legitimate purpose and are not just meant to hide the proceeds of illegal activities. However, tax havens are not as exotic as one could imagine. **Actually, according to a research, the U.S. is becoming one of the biggest tax havens, precisely because its legislation has loopholes when it comes to knowing who owns and control companies.** The U.S. is a major financial center but the transparency of its legal framework is not consistent with the responsibility involved in being a major financial hub. Indeed, an investigation in 2012 found that creating an anonymous shell company is easier in the U.S. than in the rest of the world and states like Wyoming, Delaware and Nevada are among the most likely to supply untraceable shell companies to foreign clients.

New measures announced by President Obama to increase financial transparency are not ambitious enough to close the current gaps in US laws, which allow bad actors to deliberately use U.S. companies to hide money laundering, tax evasion and other illicit financial activities. **In addition to these loopholes, the U.S. hasn't fully committed to automatic exchange of tax information with other countries, according to the new international standards developed by the Organization for**

29 http://www.greens-efa.eu/the-role-of-the-united-states-as-a-tax-haven-15525.

Economic Cooperation and Development (OECD). Instead, the U.S. decided to sign a series of bilateral agreements with namely European countries but the exchange of tax information is not done through an equal partnership. Our research found that EU countries have to provide more tax information to the U.S. than this country is sending to Member States. This can create a strong incentive for those trying to hide from tax authorities to move their assets to the U.S., with less chance to be reported to EU authorities. **On this basis, the paper made a series of recommendations, including calling on all countries to create public registries of beneficial owners.** This is a topical request, just ahead of the London Summit on anti-corruption organised by the UK. One of the key demands indeed for this Summit is to ensure that the UK will pressure its overseas territories to commit to implement public registries for companies. **Another recommendation was the request for the European Union to carefully screen the U.S. when they will elaborate their common European blacklist of tax havens.** Determining that who is a tax haven or not should not be a political exercise but a thorough analysis based on objective criteria. Should the U.S. not meet basic standard of transparency and cooperation, the EU should seriously consider including the U.S. on its upcoming blacklist of tax havens.

The co-founder of Mossack Fonseca, Ramon Fonseca, accuses richer countries of hypocrisy.*"I assure you there is more dirty money in New York, Miami and London than there is in Panama," he told the New York Times.*[30] *"There is a double standard: many developed countries host or support jurisdictions where there is an absence of financial transparency,"* says Alex Cobham of Tax Justice Network. Switzerland leads the ranking with its almost impenetrable tradition of secrecy in banking, even if - under international pressure - it has recently made some concessions towards identifying the owners of accounts linked to international tax evasion investigations. The Panama Papers reveal that nearly one third of Mossack Fonseca's business came from its offices in Hong Kong and China - making China the firm's biggest market and Hong Kong the company's busiest office. Hong Kong allows so-called bearer shares, which facilitate the movement of funds without knowing to whom the money belongs.

POLICIES TAX HAVENS MAKE TO ATTRACT OPERATIONS

1. Mauritius Route: Article 13(4) of the DTAA with Mauritius specifies that gains other than from the alienation of immovable property or

30 Max Seitz, *Why The Top 10 Tax Havens Don't Include Panama,* BBC NEWS (Apr. 8, 2016), http://www.bbc.com/news/business-35998801.

gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed only in Mauritius. Article 13(4) means that acquisition of other capital assets such as shares in Indian companies by companies in Mauritius is only taxable in Mauritius and not in India. This article of treaty is very attractive to investors since Mauritius doesn't have capital gains tax. It has led to many companies setting up façade establishments in Mauritius to channel their investments in Indian (in the form of shares) and repatriate the Capital gains without paying any tax. This process followed by companies is generally termed as 'Mauritius route'.

2. Cayman Islands & Bermuda: Besides high level of secrecy, there is no corporate tax for holding companies. This makes those countries attractive to create a holding company which in turn will form another company in Mauritius. The capital gain earned by the Mauritian company (which is not taxed in India or Mauritius due to the DTAA) is channeled back to their holding companies, in effect not paying taxes in any of the three countries. This method only defers tax, because once the money is brought back to the origin country (mostly the US), the tax has to be paid on the profit. However, there is a practice to give 'interest free loans' to citizens to other countries by such holding companies, which is in a way paying back of profits without paying taxes.

3. Cyprus & Luxembourg: Similar to Cayman Islands & Bermuda, Cyprus too has very minimal formalities to setup offshore corporations and there is no capital gains tax, withholding, or dividend tax for income earned by offshore corporations. Luxembourg, though has a 10% tax rate, however, the authorities are very lax in tax collection. Also, No tax on bank interest, investment dividends, or capital gains for non-residents.

TAX HAVENS: BENEFITS

It is not that entire money is that is invested in tax havens is immune. Tainted money and ill- gotten wealth stashed away in foreign banks are not covered by the confidentiality clause. Especially when it can be proved that

the money was earned through illegal means by tax evasion, corruption, arms trade, terrorism finance etc., the countries are bound to offer full co-operation to the investigating agencies and the countries to find out the true origin of such money. When a person does not respect the laws of the country where he lives and amasses wealth without disclosing it to the law enforcement agencies, he automatically loses the cover of secrecy available to protect his identity. If it can be proved that the black money lying in the banks could be used for dreadful activities like financing and promoting of terrorism networks across the world, procurement of arms that may be used for overthrowing elected governments, manufacture and trade of psychotropic substances etc., every country will come forward to disclose the true identity of the individuals having deposit accounts. So, once we receive the information from other countries, we must investigate and establish that the money actually belongs to our country and not the individual depositors. This task is not an easy one and it is the most challenging part of the whole process. As soon as the charge-sheets are filed before Indian courts, the foreign countries will be prepared to co-operate with us further, so as to reach the logical end i.e. punishing the culprits and confiscating their wealth.

TAX HAVENS: FUTURE

Tax havens and DTAA are here to stay. Though the latest developments and the actions by OECD and different countries have brought in transparency in place of opacity, it has opened doors for the tax havens to compete for investments legitimately by offering a low tax opportunity. Now many countries and companies offer tax saving instruments that take advantage of business models supported by tax regimes of former 'grey list' countries.[31]

For e.g. after Switzerland altered its secrecy laws to comply with the OECD TIEA rules, money started pouring in through legitimate channels to take advantage of its low tax regime. The same applies to former 'grey list' countries such as Liechtenstein, Andorra, and Monaco etc.., This is helped in part by the rising tax regimes in countries such as the UK and the US fuelled by the financial crisis.

As far DTAA is concerned, these agreements will stay, with harmful clauses removed through negotiations between different contracting countries. For example in India, the accounting system is getting overhauled with the implementation of International Financial Reporting

31 *supra* note 20.

Standards (IFRS). Also, the Direct Tax Code (DTC) is getting updated with provisions such as General Anti-Avoidance Rules (GAAR) and the Controlled Foreign Corporation (CFC) that would allow India to override treaties and provide taxmen with the means to plug existing loopholes. Other countries, including Canada, Australia, Italy, UK and South Africa, have already taken such steps to discourage corporates from using loopholes in the DTAAs and using tax havens to evade taxes. DTAAs are a necessity to make International commerce attractive by making tax regimes transparent and efficient.[32]

ACTIONS BY GOVERNMENT TO CURB MENACE UNDER DTAA

1. Tax Information Exchange Agreements (TIEA): Model agreement on exchange of information on tax matters, developed by the OECD Global Forum Working Group on Effective Exchange of Information. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information. It was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.[33]

2. Peer review and white list: The OECD has published a list of jurisdictions have adopted global standards on transparency and exchange of information, set by the OECD. This list includes the white list and the black list. Another step taken by the OECD countries is a regular peer review of the countries in the white list to ensure that they comply with the norms setup for information exchange.[34]

3. Global pressure on tax havens: Global authorities are pressurizing tax havens to release information. Due to this Switzerland has recently made it easier for foreign governments to hunt tax cheats by lowering the threshold for the amount of information foreign tax agencies must provide in order to gain help from Swiss banks.

32 *Id.*

33 Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Information Exchange Agreements,* OECD, https://www.oecd.org/tax/transparency/taxinformationexchangeagreementstieas.htm.

34 *supra* note 40.

4. Individual countries passing regulations: Countries such as the US are passing their own legislations for combating the tax avoidance. For example, UBS agreed to share information on 4450 secret accounts of Americans with the bank used to hide money under the Foreign Account Tax Compliance Act (FACTA). In India too, pressure is on the central government to enact legislation that would bring transparency to the bank accounts held by Indians abroad.

5. Revision of DTAAs: Countries such as Germany & UK led other countries to sign revised DTAA with Switzerland and other countries. India too has a revised DTAA with Switzerland, Mauritius, Australia, Philippines, and Nepal etc.., and is working on revising the DTAA with other Tax havens.

6. Offensive action: 2008 Liechtenstein tax affair is a series of tax investigations in numerous countries whose governments suspect that some of their citizens may have evaded tax obligations by using banks and trusts in Liechtenstein. This offensive action was started by Germany after it unearthed tax evasion by top executives in the country and obtained a CD with information on account holders in LGT bank in Liechtenstein. Several governments have since started investigations into potential tax evasion using Liechtenstein and other non- cooperative jurisdictions such as Monaco and Andorra.

Most provisions to address profit shifting by multinational firms would involve changing the tax law: repealing or limiting deferral, limiting the ability of the foreign tax credit to offset income, addressing check-the-box, or even formula apportionment. President Obama's proposals include a proposal to disallow overall deductions and foreign tax credits for deferred income, along with a number of other restrictions. Changes in the law or anti-abuse provisions have also been introduced in broader tax reform proposals. Provisions to address individual evasion include increased information reporting and provisions to increase enforcement, such as shifting the burden of proof to the taxpayer, increased penalties, and increased resources. Individual tax evasion is the main target of the HIRE Act, the proposed Stop Tax Haven Abuse Act, and some other proposals.[35] Parliament had passed Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Bill, 2015, which seek to

35 Jane G. Gravelle, Senior Specialist in Economic Policy, Tax Havens: International Tax Avoidance and Evasion, (Jan. 15, 2015).

unearth unaccounted wealth stashed abroad.[36]

ANALYSIS

A list of around 627 people was sent to the Supreme Court in 2014 and it was sent to the Special Investigation Team (SIT). *Public curiosity about the illegal wealth of Indians, rich and corrupt, in foreign banks, broadly termed as Swiss banks, has been high ever since the Modi-led Bharatiya Janata Party (BJP) campaign during the 2014 general election focused on the issue of black money and its promise of Rs.15 lakh to every family as a share of the spoils. Public expectation went up further when the Union Finance Minister Arun Jaitley recently said that the Congress party would be embarrassed by the disclosures.*[37] It was said that the information asked from the tax havens would violate the DTAA policy intention of secrecy in tax havens. It is often said that the black money that is sent abroad is generally brought back to India by converting it into white money. This money is sent outside India through Havala transactions. These are not deposits in Swiss banks. Out of the funds taken abroad, a part returns in the form of "round tripping." There are several channels for this return of capital, one of which is the Participatory Note (PN) route. Thus, only a part of the money taken out of the country remains there. The black money is held in liquid form in most of the banks of these tax havens including Switzerland, Geneva, etc. The OECD's have been pressurizing these tax havens to release information which is why the Swiss Bank issued the list of 627 Indians holding accounts in it.

It was argued that data about money held in these accounts are covered under the DTAA, which is why the data relating to it cannot be disclosed but the Central government argued that DTAA only applies to accounted-white money and not black money therefore, no exemption can be granted to them. There is a clause in these treaties about the exchange of information regarding incomes. This information can be used for purposes of taxation. *The Supreme Court cases on black incomes are a part of court proceedings. So, this information can be legitimately given under DTAA. Further, if the Court passes on the information to the SIT to investigate black incomes that would also be legitimate. The government's argument that this would lead to a drying up of information from other countries does not hold water. Also, if new treaties are signed in the future, they can be examined then; they should not be allowed to hold up information from courts now*

36 Press Trust of India, *Black Money: Era of Tax Havens Has Come to an End, says Arun Jaitley,* THE INDIAN EXPRESS (May 26, 2016) http://indianexpress.com/article/india/india-others/black-money-era-of-tax-haven-has-come-to-an-end-says-arun-jaitley/#.

37 *supra* note 13.

since the present treaty does not prevent it. The biggest problem relating to prosecution in India is the pendency of suits. Contrast this with the Birkenfeld-UBS case in the United States. In spite of non-cooperation by the UBS Bank and the threats by the Switzerland government, courts in the U.S. pressed ahead ignoring the argument of secrecy and confidentiality of information. UBS was forced to admit wrongdoing, pay a fine of $780 million and provide a list of 4,500 names of U.S. citizens who had accounts with it. Recently, Credit Suisse was also fined $2.5 billion for such fraud. Apart from all this the steps taken by government are not sufficient enough to deal with the issue of black money. It is not just the individuals but various MNC's and corporate entities involved in tax evasion hence, major steps need to be taken in this regard.

CONCLUSION

The Tax Justice Network pressure estimated that losses arising as a result of the global system of taxation through tax havens up to 255 billion dollars per year, but these figures are not accepted unanimously. The OECD estimated that the capital placed in 2007 through offshore companies in tax havens reached a value between 5,000 and 7,000 billion dollars. The most significant impact in terms of tax avoidance through tax is at havens on emerging countries which do not possess the necessary tools to force an exchange of information.[38]

Tax Havens may appear to be a very fascinating concept yet has damaging effects on the global economy. The race to combat the menace of tax havens proves the international interdependence of economies as it is these tax havens receive money from the entire world. These steps may seem to be infringing sovereignty of other nations because countries are free to formulate their domestic policies but the lure to evade taxes has turned the concept evil. People are taking advantages of benefits given to them to facilitate international trade which in turn is hampering it. However, steps are being taken by the governments to curb this menace which will hopefully bring down the volume of black money.

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38 *supra* note 3.

FANDOM V. AUTHORS: LEGAL STATUS OF FANFICTION

Chandrika Tewatia*

ABSTRACT

"The difference between fanfic and a "real" novel is that fanfic is honest about its inspiration."

Mary Robinette Kowal[1]

The world of fan fiction can be seen as a shadowy parallel universe where all the standards of a pre-established status are changed, modified by fans or sometimes critics who want a storyline to go in a certain direction. The success of fan fiction or its relevance can be seen through the vast popularity of '50 Shades of Grey' written by E.L. James which is based upon a rich businessman and a sadomasochistic women but was actually pictured on the famous 'bloodsucker' Edward Cullen and the human Bella Swan from the Twilight series written by Stephanie Meyer. Fan fiction may infringe the copyright and trademark rights of the content owners. Despite its important role in the present era, fan fiction's legal status remains unclear without any statutory provision. Many fans including fan authors believe that fan fiction is free entertainment and can be protected under fair use which is an exception to the right of copyright. On the other side of the balance stands the right of the copyright owners of the original works. The dispute against fan fiction is usually between the content creator and the fan author regarding the use of characters which might be registered under the trademark act or the work has been registered under the copyright act. The owner may object because a fan work borrows extensively from the author's own work which infringes the copyright of the author. Therefore the researcher in this paper is proposing to analyze the legality of fan fictions, the infringement which can be done through trademark and copyright and the remedies available with appropriate suggestions.

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1 Mary Robinette Kowal, 2008 recipient of the Campbell Award for Best New Writer.

INTRODUCTION: RISE OF FAN FICTION TODAY

Fan-fiction is a written work which has been published on the Internet and recognizably based off of some other work, either by using characters from an established work or obvious mechanics/elements from the setting of an established work. Fan-fiction is a grassroots movement that has grown exponentially with the advent of the read/write web, but for ages readers have re-written fairy tales, or rewritten stories with unsatisfactory endings, or written new narratives with existing characters.[2] For example, if a story contains Harry Potter, it's fanfic. If a story has original, brand new characters going off to Hogwarts, it's fanfic. Fairy tale retellings fall into a gray area here since they often use recognizable characters but give the story a new perspective.[3] Parody is not fanfic, though some fanfic is parody. The distinction lies in the above criteria. Stories that use well-known concepts or tropes are not fanfic. It's been said (in many different ways) that there are only a limited number of ideas, and that every creative work is a rehashing of those ideas put together in (usually) new ways. Since there is no authoritative definition of what fanfic actually is, it's all subjective and can vary from fan to fan.

The modern development of fan fiction as an expression of fandom and fan interaction was popularized and defined via Star Trek followers and their fanzines printed within the 1960s. the first Star Trek fanzine, Spockanalia, contained some fan fiction; several others followed its example. These fanzines were created via offset and mimeography, and mailed to other fans or sold at science fiction conventions for a small fee to assist recoup prices not like other aspects of fandom, girls dominated fan fiction authoring; 83 of Star Trek fan fiction authors were feminine by 1970, and 90th by 1973.[4] One scholar states that fan fiction "fill the requirement of a largely feminine audience for fictional narratives that expand the boundary of the official supply product offered on the TV and movie screen."[5]

Fan fiction has become a lot of widespread and widespread since the arrival of the globe Wide Web; in line with one estimate, fan fiction contains one third of all content concerning books on the net.[6] Additionally to ancient

2 J. Cowley, J. Lunny, N. Prentice, S. Waseem, *What is Fanfiction?,* Fanfiction for Literacy https://sites.google.com/a/ualberta.ca/fanfiction-for-literacy/fanfiction-basics/what-is-fanfiction.

3 Jim C. Hines, *What is fanfiction?* (Jun. 4, 2010) http://www.jimchines.com/2010/06/what-is-fanfiction/.

4 Coppa, Francesca, *A Brief History of Media Fandom;* Hellekson, Karen, Busse, Kristina, Fan Fiction and *Fan Communities in the Age of the Internet.* Jefferson, North Carolina: McFarland & Company. p. 41–59 (2006).

5 Bacon-Smith, Camille*, Science Fiction Culture,* p. 112–113 (2000).

6 Boog, Jason, *Brokeback 33 Percent.* Mediabistro (Sept. 18, 2008).

fanzines and conventions, Usenet cluster electronic mailing lists were established for fan fiction moreover as fan discussion. Online, searchable fan fiction archives were additionally established. The net archives were initially non-commercial hand-tended and fandom- or topic-specific. These archives were followed by non-commercial automatic databases. In 1998, the not-for-profit website FanFiction.Net came on-line, that allowed anyone to transfer content in any followers.

The flexibility to self-publish fan fiction at associate simply accessible common archive that didn't need corporate executive information to hitch, and also the ability to review the stories directly on the positioning, became widespread quite quickly.[7] One widespread example of contemporary fan fiction is E. L. James' Fifty reminder gray. This series was originally written as fan fiction for the Twilight series of books and flicks and vie off the characters of Bella and Edward. So as to not infringe on copyright problems, James modified the character names to Anna and Christian for the needs of her novels,[8] that may be a observe called 'pulling-to-publish'. Anna Todd's 2013 fan fiction when concerning land boy band One Direction secured a book and flick manage renamed characters in 2014.[9]

On May 22, 2013, the net merchandiser Amazon.com established a new publishing service, Kindle Worlds. This service would modify fan fiction stories of bound accredited media properties to be sold within the Kindle Store with terms together with 35th of income for works of 10,000 words or a lot of and two hundredth for brief fiction starting from 5000 to 10,000 words. However, this arrangement includes restrictions on content, copyright violations, poor document information and/or exploitation deceptive titles.[10]

A similar trend in Japan additionally began showing round the 1960s and 1970s, wherever severally printed manga and novels, called dōjinshi, are oftentimes printed by dōjin circles; several of those dōjinshi are supported

7 Karen Bradley, *Internet lives: Social context and moral domain in adolescent development,* WILEY ONLINE LIBRARY (Dec. 2005) http://onlinelibrary.wiley.com/doi/10.1002/yd.142/abstract;jsessionid=89288D7A1E8 EF895A39F87135FAE6F37.f02t04.

8 Marah Eakin, *Holy crow! Fifty Shades Of Grey is crazy similar to its Twilight origin story,* AV CLUB (Feb. 12 2015) http://www.avclub.com/article/holy-crow-fifty-shades-grey-crazy-similar-its-twil-215185.

9 Joseph Brenan, *'Let's Get a Bit of Context': Fifty Shades and the Phenomenon of 'Pulling to Publish' in Twilight Fan Fiction,* SAGE JOURNALS (Aug. 1, 2014) http://journals.sagepub.com/doi/10.1177/1329878X1415200105.

10 Julianne Pepitone, *Amazon's "Kindle Worlds" lets fan fiction writers sell their stories,* CNN TECH (May 23, 2013) http://money.cnn.com/2013/05/23/technology/amazon-fan-fiction/?iid=HP_LN&hpt=us_bn5.

existing manga, anime, and computer game franchises. Manga authors like Shotaro Ishinomori and Fujiko Fujio fashioned dōjin teams like Fujio's New Manga Party. At this point, dōjin teams were utilized by artists to create a professional debut. This modified in the returning decades with dōjin teams forming as college clubs and also the like. This culminated in 1975 with the Comiket in Yeddo.

There is much to recommend a text-intrinsic definition, most of all that it'd be easier if we could create a taxonomy in which every text belonged to a given genre regardless of contextual information. The most obvious choice in defining fan fiction as a genre is to characterize it by its derivative/transformative character. After all, that is a generally accepted definition of fan fiction: fiction that expands/comments on/criticizes existing media texts. Creating a taxonomy that relies on the transformative process, however, expands the category to near uselessness.[11] While this downside might be circumvented by process fan fiction as solely those texts who are intertextual with business and copyrighted media texts, this definition is likewise imperfect in so far because it depends on the fairly absolute copyright laws that always have more to try and do with protection of copyright owners than literary or genre classes. Moreover, such a definition would exclude giant swaths of fan fiction that are, for the foremost part accepted as fan fiction by most, together with historical Real people Fiction (RPF), Bible and mythological fan fiction, similarly as fan fiction transforming Shakespeare and Jane Austen and everybody who's fallen out of copyright.[12]

Fan fiction is beyond the fangirlish/fanboyish drabbles, etc, that are just there to pair up favorite couples, etc. There are fics that may well be critical of the stances in the original work and jumped into the world to "right a wrong" that the ficker perceived. Many times, fanfic is about minor characters, or some aspect of the original story that was not deeply explored, or sometimes only just touched upon, which irked the writer of the fanfiction's interest.

FANFICTION: IPR INFRINGEMENT?

As the amount of fanfiction being created grew larger, the demand from fans to more simply publish and access different fanfiction led to the creation of fanfiction websites. This created it simple for fans to present

11 Kristina Busse, *Derivative By Any Other Name; or, A Cultural Approach to Fan Fiction Genre Theory,* ANTENNA (Apr. 21, 2010) http://blog.commarts.wisc.edu/2010/04/21/derivative-by-any-other-name-or-a-cultural-approach-to-fan-fiction-genre-theory/.

12 *Ibid*.

their works to every different, and to browse and review the works of different fans. As a result of the recognition of fanfiction, the first content creators began to take note of the very fact that their revealed works were being altered by others and published with the fan's name on that instead of the content creators.

The lawfulness of fanfiction falls below copyright law and within the U.S. is classed as a "derivative work." A derivative work is outlined in copyright law as "an expressive creation that has major copyright-protected parts of a clever, antecedently created 1st work. The derivative work becomes a second, separate work independent in type from the primary." legally classifying fanfiction as a derivative work grants fans who write fanfiction the proper to try and do thus, as long as their work abides by the copyright laws of the first work and doesn't breach the doctrine of use (allows authors to use verbatim quotes from a piece while not the necessity for permission). The problem with this classification is that almost all fans writing fanfiction don't know how to follow the terms of a derivative work and end up obtaining sued by the content creators.

A copyright owner encompasses a right to ban anyone from repeating, distributing, performing, modifying, or displaying the work or characters within the copyrighted work while not his/her permission, or making "derivative works "of the copyrighted work.[13]

13 Section 14: "Meaning of copyright.—For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—
   i. to reproduce the work in any material form including the storing of it in any medium by electronic means;
   ii. to issue copies of the work to the public not being copies already in circulation;
   iii. to perform the work in public, or communicate it to the public;
   iv. to make any cinematograph film or sound recording in respect of the work;
   v. to make any translation of the work;
   vi. to make any adaptation of the work;
   vii. to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,—
   i. to do any of the acts specified in clause (a)

(c) in the case of an artistic work,—
   i. to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
   ii. to communicate the work to the public;
   iii. to issue copies of the work to the public not being copies already in circulation;
   iv. to include the work in any cinematograph film;
   v. to make any adaptation of the work;
   vi. to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

Any new work that relies on somebody else's copyrighted work is understood as derivative work. Fan fiction is also classified as derivative works as a result of they use the copyright protected characters from somebody else's creation. Fan fiction authors produce and create offered their work by posting them on-line. Copyright owners usually get offended by such work.

Moral rights of an author empowers him to require action against any mutilation, distortion etc. of his copyrighted work even when the copyright within the work has terminated. Fan fictions will affect moral rights of an author if the work therefore created mutilates or distorts the first work or the name of the author.[14]

Generally speaking, any work, whether a translation, dramatization, motion picture, or fictionalization, if it stems from another's copyrighted work, then the later work is deemed a derivative work of the first work. A derivative work is infringing on a copyrighted work if it is created without the consent of the copyright holder. Therefore, a fan fiction which inevitably stems from another author's work embodying the storyline or characters of the original work, is often categorized as a "derivative work" and is subject to copyright infringement lawsuit. For example, in *Anderson* v. *Stallone*, a case where a Rocky fan wrote a movie script based off Rocky character portrayed by Sylvester Stallone, the court held that the copyright of that derivative work belonged to Stallone. Also *60 Years Later: Coming Through the Rye,* a fan fiction created by a fan of The Catcher in the Rye featuring a story of 76-year old Holden Caulfield was held to be an unauthorized derivative work.[15]

Trademark is any word, name, image or device that is employed by a person (or meant to be used), to spot his product and to differentiate his product from those sold by others and that indicates the source of the

13 (d) in the case of a cinematograph film,—
   i. to make a copy of the film including a photograph of any image forming part thereof;
   ii. to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
   iii. to communicate the film to the public;
(e) in the case of a sound recording,—
   iv. to make any other sound recording embodying it;
   v. to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
   vi. to communicate the sound recording to the public."

14 Paul Kallenbach and Anthony Middleton, *50 Shades of Infringement: Fan Fiction, Culture and Copyright,* Australian Intellectual Property Law Bulletin.

15 Michael Nam, *Copyright Infringement in Fanfiction,* GEORGIA LAWYERS FOR THE ARTS (Mar. 23, 2016) http://glarts.org/copyright-infringement-in-fan-fiction/.

products. The trend has started wherever authors of varied books, novels and films have started registering their characters as logos. A trademark owner has the right to use, or to license the mark therefore on avoid any confusion to its client and to stop others from profiting off of the owner's intellectual property. The primary question in a case of alleged trademark infringement is whether or not there's a probability of confusion for customers.

Fan fictions are typically created using known characters from movies, books, novels etc. this could attract liability under Trademark dilution. Dilution makes a use of a known mark immaterial of the very fact whether or not any confusion is predicted or not, illegal. There's no scope of confusion once fan fictions are created however still they'll be liable beneath trademark dilution. Filmmaker used this idea to prevent pornographers from victimization Snow White or Sleeping Beauty in their films. Fan fiction authors who create offered their work to the world for a few commercial benefits is also accused of trademark dilution additionally to different intellectual property violations.[16]

Original content creators have invariably been divided on the concept of fanfiction. Some have even exercised their right because the content owner to sue fanfiction writers for violation on the idea that the fanfiction doesn't follow use.[17] A notable court case that created it up to the us District Court was between a Swedish fanfiction authors whose work featured a 76-year-old version of Holden Caulfield from J.D. Salinger's novel The Catcher within the Rye. The results of this case prevented the fanfiction from being revealed within the us as a result of the very fact that it's an instantaneous parody of the first work.[18]

Another fanfiction court case, that had a totally opposite ruling, was between Sun trust and therefore the Houghton Mifflin Company. It self-addressed the potential copyright infringement in Alice Randall's "The Wind Done Gone," that could be a fanfiction based on the literary classic "Gone With the Wind." The judge during this case dominated that Randall's fanfiction failed to breach any copyright laws; she found it to be a transformative piece as a result of it "provided social profit by shedding light on an earlier work, and within the method, making a new one." This

16 *Zoya Nafis, India:Legality of Fanfiction,* MONDAQ (Oct. 21, 2014) http://www.mondaq.com/india/x/348370/ Trademark/Legality+Of+Fan+Fictions.

17 Robert Wood, *Make Sure Your Fan Fiction Is Legal (Or Regret It Later),* STAND OUT BOOKS (Oct. 20, 2015) https://www.standoutbooks.com/fan-fiction-legal/.

18 Bailey Gribben, *Fanfiction: A Legal Battle of Creativity,* REPORTER (Feb. 5, 2016) http://reporter.rit.edu/views/ fanfiction-legal-battle- creativity.

case verified to each content creators additionally as fanfiction writers that even reimagined work created by fans will have a considerable social profit.

Contrary to authors who go thus far on sue their fans for writing stories, some authors truly appreciate and encourage fans to recreate their work and even provide to "canonize," or validate, the fans' creations. One content creator who supports the fanfiction genre truly wrote fanfiction herself before she began making her own original content. Once she was fifteen, rebecca Sugar, who later created the show "Steven Universe," wrote "Invader Zim" fanfiction stories.

Similar to Sugar, the author of the "Fifty reminder Grey" trio, E.L. James, began writing the primary book once seeing the "Twilight" picture show and reading the novels. James got thus absorbed into the "Twilight" series that she set to put in writing her own books to act as a sequel to the series that eventually led to "Fifty Shades." Another notable author who supports fanfiction is J.K. Rowling, who has aforesaid that she is "very flattered by the very fact there's such nice interest in her "Harry Potter" series which individuals take the time to put in writing their own stories."[19] However, she is additionally on the aspect of the authors who are hesitant to support fanfiction. She additionally aforesaid that her concern with fanfiction "would be to create certain that it remains a non-commercial activity to confirm fans don't seem to be exploited and it's not being revealed within the strict sense of ancient print publication."

Many content creators are supportive of fans taking the time to express their love for the content and revel in seeing however their fans area unit able to re-imagine their work. There's still the legal aspect of copyrighted content that fans invariably ought to keep in mind once making new fanfictions.[20] Fanfiction permits individuals to channel their inner inventive mind and use their love for a series to make new connections to a creator's content by creating characters that mirror their own attributes. It must exist so as to keep up originative and imaginative society which will work along and mix the concepts of others with their own, so long as they abide by the copyright protection laws or get permission from the first content creators to use their characters.

19 Matthew Gilbert, *Fan fiction: a world of what-ifs*, BOSTON GLOBE (Dec. 10, 2013) https://www.bostonglobe.com /arts/ books/2013/12/10/fan-fiction-world-what-ifs/ blecTQ0ECgBJsmEVEe4gsL/story.html.

20 Deb McAlister-Holland, *Copyright Myths from the World of Fan Fiction*, BUSINESS 2 COMMUNITY (Aug. 19, 2013) http://www.business2community.com/entertainment/copyright-myths-from-the-world-of-fan-fiction .

PROTECTION OF FAN FICTION IN USA

US law provides for protection of original work of arts through the Visual Artists Rights Act, 1990. Through this Act, it is given that alteration in the original nature of the work would lead to a violation of the right in the art. A fan fiction may be considered in a similar way as alteration in the literary work but the Act is only applicable to art work. Under the prevailing US Copyright Law, Section 106 gives the owner of a copyright the exclusive right to prepare derivative works based upon the copyrighted work.[21] Just like the 'fair use' doctrine in the USA, Indian law has incorporated the 'fair dealing' doctrine in Section 52 of the Indian Copyright Act, 1972 that works to differentiate between a legitimate bonafide use of a work from a blatant copy. But, there have been various judgments in the field of fan fiction by the US courts.

The most famous case is **Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books[22]** in which J.K. Rowling sued a fan site Harry Potter Lexicon, a free online guide to the Harry Potter world. It was contradictory to the fact that she had awarded the best fan site for Harry Potter when it was an online resource. The key issue of the case was the use of long quotes directly from the books. The court gave that the work constituted an infringement of their copyright and was not protected by the affirmative defense of fair use; hence the court ruled in favor of Rowling and stopped the publication of the book. But, in 2009, RDR Books released an edited version without the problematic long quotes. Therefore in the end it was neither a win nor a loss for J.K. Rowling.

In another case, Castle Rock, the copyright owner of Seinfeld, sued Carol publishing over a nonfiction trivia book published regarding the events and characters in Seinfeld. **Castle Rock entertainment opposition v.**

21 Section 106: *"Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:*

1. *to reproduce the copyrighted work in copies or phonorecords;*
2. *to prepare derivative works based upon the copyrighted work;*
3. *to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;*
4. *in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;*
5. *in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and*
6. *in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."*

22 575 F.Supp.2d 513 (SDNY 2008).

Carol publishing group,[23] There was no parody defense here. Instead, the nonfiction triviality book was same to inappropriately copy creative expression instead of facts. In alternative words, the Seinfeld characters and their words were creative expression in contrast to the amount of at bats a jock might have or the amount of times it's rained in September in California for the past twenty years.

In **Disclaimers v. Cease and desist case,** like the ineffectiveness of copyright disclaimers by fan fiction writers therefore to are several of the cease and abstain letters/emails/blog posts written by authors lacking in legal support. Simply as a result of the first creator doesn't like slash fiction or AU fiction that's loosely supported their work doesn't mean that the fan fiction work is infringing. In different words, the author of the first work doesn't decide what's infringing. C&D letters aren't legal determinations of wrongdoing either. Usually C&D letters are used merely to scare somebody into taking an action that the author of the C&D letter needs.

In **Mattel v MCA Records,**[24] United States Court of Appeals for the Ninth Circuit permitted the band Aqua's use of Mattel's trademark in "Barbie" to sell songs, that MCA had a valid parody defense, as Aqua needed to use the word "Barbie" in its song "Barbie Girl," based on the fact that the use of the mark was

1. Artistically relevant to the song and

2. Not explicitly misleading as to the source of the song.

Because there was a relatively small likelihood of confusion, the Ninth Circuit held that the First Amendment protected Aqua's use of the mark.

CONCLUSION: CURBING THE CREATORS?

Intellectual Property Rights are granted with an objective that they shall promote innovation and encourage creators to make more. They act as an incentive to create the work. they must never be used to impede innovation. Fan Fictions are creations by amateur creators who if given chance would possibly produce one thing great in future; thus a lenient and balanced approach should be taken towards them.

For the foremost part it seems that authors and fanficers will co-exist and thrive in their mutual respect for each other. While coexistence is

23 150 F.3d 132 (2nd Cir. 1998).
24 296 F.3d 894 (9th Cir. 2002).

feasible, fanfiction writers should still have respect for the original authors and recognize that like several relationship, there is a turn for the worse. Authors usually love fanfiction writers, however the studios that acquire rights to show books into movies usually don't like any sort of competition and will target the fanfiction writers.

It is necessary to safeguard a proprietary work from being tainted by unauthorized derivative works, as an example, JK Rowling would have an interest in prohibiting fanfiction that portrays her characters in sexually specific approach, characters that she created through years of analysis and imagination. On the opposite hand, there's a competitive interest, that the aim of copyright law is to promote arts, creative thinking and culture, that is that the very essence of the copyright law. Therefore, within the face of today's digital era, and infinite channels of that one will express their creativeness, an at hand got to accomplish the balance between two interests is called for.

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ROLE OF FORENSIC ODONTOLOGY IN ADMINISTRATION OF CRIMINAL JUSTICE SYSTEM

Mr. Saurabh Chandra* & Ms. Ankita Das**

ABSTRACT

This paper deals with one of the basic component of forensic odontology and its significance as a steam of science having interface with the Justice Delivery mechanism. Odontology plays a major role in investigation of the case and identification of offender thus playing major role in criminal justice system. Forensic odontology has three major areas namely the inspection and analysis of trauma to jaws, teeth, and oral structures secondly, the inspection of marks to eliminate or identification of a suspect as the executioner and thirdly inspection of dental from anonymous persons or bodies. The paper also deals with tooth anatomy, tooth morphology, identification. Forensic odontology also helps in age determination of individual, determination at the time of death, analysis of bite mark etc. The paper further analyses the role of forensic odontology in the administration of Criminal Justice.

INTRODUCTION

Forensic odontology is the application of dental science to legal investigations, primarily involving the identification of the offender by comparing dental records to a bite mark left on the victim or at the scene, or identification of human remains based on dental records. Forensic Odontology also known as forensic dentistry.[1]Forensic dentistry is viewed as the use of dentistry in criminal and civil laws that are employed by police agencies in a criminal justice system.

According to this context, forensic dentists play roles in identification of recovered human remains, identification of whole or fragmented bodies. Furthermore, forensic dentists have significant roles in determining

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1 *Forensic Odontology,* THE FORENSICS LIBRARY http://aboutforensics.co.uk/forensic-odontology/

various parameters including age, race, occupation, previous dental history and socioeconomic status of unidentified human beings.[2] However, it is possible to perform identification through comparing ante mortem and post mortem dental records and to depend on the unique features visible on dental radiographs. Forensic dentistry, also referred as forensic odontology, includes studying a lot topics such as individual identification, mass identification, as well as bite mark analysis. Forensic odontology participates in legal studies and makes a base of incriminating evidence.[3]

Forensic Odontology or forensic dentistry by KeiserNeilson in 1970 is defined as:

"that branch of forensic medicine which in the interest of justice deals with the proper handling and examination of dental evidence and with the proper evaluation and display of the dental findings". [4]

Forensic odontology has three major areas namely:

1. The inspection and analysis of trauma to jaws, teeth, and oral structures.

2. The inspection of marks to eliminate or identification of a suspect as the executioner.

3. The inspection of dental (involving all forms of dental restorations and prosthesis) from anonymous persons or bodies.

Human identity is the mainstay of civilization, and the identification of unknown individuals always has been of paramount importance to the society. Not only is it important to identify the deceased to ensure appropriate obsequies, but also there are issues such as criminal investigations, insurance settlements, and military proceedings that can be resolved only with a positive identification. The identification of a missing individual can aid tremendously in the process of grief resolution of the family and friends. Overall, in world-wide scenario; forensic dentists are playing an important role in human identification, bite mark analysis, maxillofacial trauma, and malpractices.[5]

Forensic Odontology serves the judicial system by the help of dentist's knowledge. In forensic science, the dental practitioners are giving their

2 TANDON MP, R TANDON, THE INDIAN PENAL CODE (18th ed.).
3 Dr. Gurjot Kaur, *Forensic Odontology and it's Indian Perceptive,* 9 JPAFMAT 22-28 (2009); 9(1).
4 Leung CKK, *Forensic Odontology,* 13 The Hong Kong Medical Diary 16-20 (2008).
5 *Forensic Odontology,* IFC Education Department (Revised on: Aug. 2009 / 2012).

opinion in relation to bitemarks interpretation, craniofacial trauma and malpractice and human identification.[6] The forensic experts are to collect, preserve and analyze the evidences, and then to present the results to the legal authority in a report form. Forensic Odontology show topics that can be classified: human identification and injury analysis. However, Forensic Odontologists have shown issues in relation to child abuse and protection of human rights, professional ethics and domestic violence.[7] Radiographs are an essential part of dental practice. Intraoral and extraoral radiographs are an essential part in clinical dentistry to diagnose dental disease and treatment planning. X-ray films are part of practice used mainly in identification and age estimation in forensic odontology. The dental records involve dental X-ray films, statistical dental charts, and written records.[8]

Forensic odontology has been with us since the beginning when, the first human Adam was convinced by Eve to have put a 'bite mark' on apple. The first reported case in 1453 in dental identification was that of the 80 years old warrior John Talbot, Earl of Shrews bury, who was traumatized in the Castillon battle.[9] In 1897 a paper was presented by Dr. Oscar Amoedo entitled, "The role of the Dentists in the identification of the victims of the catastrophe of the Bazar de la Charite, Paris in 4th May, 1897", at the international Medical Congress of Moscow. The first treatise on forensic odontology was written by Dr. Oscar Amoedo in 1898 and was entitled L"ArtDentaire en Medicine Legale. Dr. Oscar is also known as father of Forensic Odontology. The forensic science helps in identification of criminal cases was established only on blood groups, serological analyzes of protein polymorphism, and some genetic markers up to 1980s.[10] At the beginning of the twentieth century, forensic examination of biological samples initiated by application of the ABO blood group system in relation to crimes or human identification. A significant phase in the development of forensic sciences conducted at human identification started with the publication of the papers by Jeffreys et al (1985), who investigated radioactive molecular probes that could identify certain highly sensitive regions of DNA (mini satellites in human genome) that processed a type of DNA "fingerprint". For the first time in England, molecular typing of the genetic material was officially utilized by Jeffreys et al. (1985), for

6 International Organization of Forensic Odonto-Stomatology Regulations. (Aug. 12, 2007).
7 Al-amad*SH. Forensic Odontology.* 4 Smile Dental Journal 22-24 (2009).
8 SL .A Chiam, *Note on Digital Dental Radiography in Forensic Odontology,* 6 Journal of Forensic Dental Sciences 197-201 (2014).
9 Strom F, *Dental aspects of Forensic Medicine,* 4 Int Dent J, 527-538 (1954).
10 J Taylor, *A brief History of Forensic Odontology and Disaster Victim Identification,* 2 J Forensic Odontostomatol 64-74 (2009).

determining the immigration problem.[11] Although it has been reported that forensic odontology was used to identify victims of a fire in the Vienna Opera House in 18787, 11 the modern era of forensic odontology is said to have commenced with the identification of the victims of the Bazar de la Charité fire, which occurred on May 4, 1897 in Rue Jean-Goujon, Paris. One hundred and twenty six members of the Parisian aristocracy perished after an ether-oxygen film projector ignited a rapidly destructive fire. All but 30 of the victims were identified visually or by personal effects, mainly jewellery, on the day after the fire.[12]

AN OVERVIEW OF CONCEPTS OF BASIC DENTISTRY

This head deals with basic information regarding teeth like number of teeth, types of teeth, tooth anatomy and also tooth morphology. These are the basic information regarding teeth.

Primary teeth are often called as deciduous teeth. Deciduous comes from the latinword ,meaning to fall off or are shed(like leaves from a deciduous tree) and are replaced by the adult teeth that succeed them. Common nick names for them are ‘’milk teeth or temporary teeth’’ which, unfortunately denote a lack of importance. The dentition that follows the primary teeth may be called permanent dentition, but since many of the so-called permanent teeth are lost due to disease, trauma, or other causes, the authors have chosen to call it the secondary dentition (or adult dentition).

The primary teeth are twenty in number and ten in each jaw. They are classified as follows: -four incisors, -two canines, and -four molars in each jaw as numbered with the universal system of notation.

Morphology of Individual Tooth

Incisors: The crown is shaped like Chisel and is convex on its labial surface and concave on lingual surface except near the neck, where the surface becomes convex. The neck is slightly constructed. The root is single.

Canines: - They are larger that the incisors. The crown is large and conical, very concave on its labial surface and slightly concave on its lingual surface. Its masticatory edge tapes to a blunt point, which projects slightly beyond the level of the other teeth.The root is single, larger and thicken than that of an incisor.

11 Da Silva RHA, Sales-Peres A, De Oliveira RN, De Oliveira FT, Sales-Peres SHC, *Use of DNA Technology in Forensic Dentistry,*15 J Appl Oral Sci, 156-161 (2007).

12 G.Gustafson, *Forensic Odontology.,* London- Staples Press (1966).

Premolars or Bicuspids - They are smaller and shorter than the canines. The crown of each is nearly circular in cross section and slightly compressed mesio distally. The chewing surface has two cusps. The root is usually single but may be double.

Molar - They are largest with broad crown. The crown is cubical; convex on its labial and lingual surfaces, and flattened on its mesial and distal surfaces. It has three four or five cusps. Each upper molar has three roots and lower two.

Tooth Anatomy

The basic anatomy of teeth can be found in the diagram below. The chewing surface of the tooth is called the occlusal surface and it is here that the crown of the tooth can be found. The crown of a tooth is made of enamel, an extremely hard and brittle mixture of minerals (around 95-96% hydroxyapatite).[13] The enamel is formed in the gum and once fully formed contains little organic material. The demineralization of teeth can repair initial damage; however this is limited in nature. Dentin (sometimes termed dentine) is the tissue that forms the core of the tooth itself. It is supported by a vascular system in the pulp of the tooth. Dentin can only repair itself on the inner surface (the walls of the pulp cavity), but dentin is a softer material than enamel and once exposed by occlusal wear it erodes faster than enamel. The pulp chamber, in the centre of the diagram below, is the largest part of the pulp cavity at the crown end of the tooth.[14] The pulp itself is the soft tissue inside the pulp chamber, which includes the usual trio bundle of vein, artery and nerves (V.A.N.). The root of the tooth is the part that anchors it into the dental alveolus tissue (sockets) of the jaw (either the maxilla or mandible).[15]

Cementum is the bone type tissue that covers the external surface of the roots of teeth. The apex, or apical foramen, is the opening at the end of each root, which allows for the nerve fibers and vessels up the root canal into the pulp chamber. Heading back up to the occlusal surface of the tooth we encounter cusps of the crown, each of which have different individual names depending on their position. Upper teeth end with the prefix -cone whereas lower teeth end with the prefix –conid.

13 Gustafson G. *Forensic Odontology,* Aust Dent J 1962;7:293-305.

14 Schirnding H, *The Teeth and their Significance in Forensic Medicine, with Special Regard to the Identification of Corpses*, 79 The Dental Cosmos 853-859 (1934).

15 M. Anne Katzenberg, Shelley R. Saunders, *Biological Anthropology of the Human Skeleton,* https://www.unr.edu/Documents/liberal-arts/anthropology/Scott/Scott%20Dental%20morphology.pdf

AN OVERVIEW OF IDENTIFICATION MECHANISM

Death has major economic and financial ramifications for the kin arising from issue of inheritance and insurance. In criminal law, lack of identification seriously hampers murder enquires. Finally, false or unidentified cadavers offer an opportunity to illegally obtain identity documents and thereby switch identity.[16] The core of the identification procedure is comparing the post mortem remains with the ante mortem records. In civilized societies, it is socially and legally essential to identify the dead before a death certificate can be issued. Close relatives or associates who recognize facial appearance identify most human corpses.[17] In a small percentage of cases, postmortem putrefaction or severe damage to facial features may render such identification impracticable or undesirable, and finger- prints and palm prints may be used. Natural or intentional loss of this information leaves a small number of cases where identification by traditional methods is impossible.[18] At times forensic dentistry does not offer an objective method of identification comparable to either the fingerprint or, more recently, the use of DNA technology, but it is relatively *inexpensive, is capable of rapid results, and at best produces a virtually certain identification.* Even when data are sparse, it may result in recognized identification that can later be confirmed by more scientific techniques.[19]

The primary importance of dental identification occurs when the deceased person is, decomposed, cremated or skeletonised. The dental evidence provides main benefit in the sense is that, like other hard tissues of the body, dental tissues are even preserved after death. The combination of decayed, missing and filled teeth is significant and comparable at any fixed point in time when the status of a person's teeth changes throughout life.[20]

Collection of First Hand Information

1. The usual forensic protocol suggests that the evidence needs to be collected as soon as possible. Hence the forensic team including the forensic odontologist plays a very essential role in data collection

16 Ritz-Timme S, Cattaneo C, Collins MJ, Waite ER, Schutz HW, Age *Estimation: The State of the Art in Relation to the Specific Demands of Forensic Practis*, Int J Legal Med, 129-136. (2000).

17 Humble BH, *Identification by Means of Teeth,* 54 Brit Dent J 528-36 (1933).

18 Pretty IA, Sweet D *A look at forensic dentistry—Part 1: The Role of Teeth in the Determination of Human Identity.* Br Dent J 359-366 (2001).

19 Liversidge HM, Lyons F, Hector MP, *The Accuracy of Three Methods of Age Estimation Using Radiographic Measurements of Developing Teeth*. Forensic SciInt , 22-29 (2003).

20 Avon SL, *Forensic Odontology: The Roles and Responsibilities of the Dentist*, 7 JCDA 453-458 (2004)

before any changes or distractions occur in the crime scene.

2. In this respect the forensic odontologist takes multiple photographs of the subject's face both before and after cleaning. The photographs are then sent for evaluation and also for recognition by the family members before the inflammation sets in, which hinders identification.

3. As soon as the body reaches the morgue, the forensic odontologist takes the dental radiographs and photographs and completes the dental chart for the subject.

4. The forensic odontologist also performs various other important roles of gathering evidences by recording the impressions and preparing models in case of possible bite marks.

5. It might be very important in certain situations to make models of both the victim's and suspect's teeth for clearer understanding of the events that took place during the crime.

6. In case the suspect of sexual assault is in custody, it is the responsibility of the forensic odontologist to collect saliva samples of the suspect and make swab of the area of the bite mark in the victim so as to compare the DNA.[21]

Method of Identification

The fundamental principles of dental identification are those of comparison and of exclusion. For example, dental identification is used when antemortem records for the putative deceased person are available and circumstantial evidence suggests the identity of the decedent, and when antemortem records of other suspicious, unidentified persons are available and must be ruled out. Identification requires a list of the possible persons involved so that appropriate antemortem records can be located. The availability and accuracy of these records determine the success of identification. Unfortunately, dentists often maintain poor records, resulting in confusion that makes dental identification impossible.[22]

Regardless of the method used to identify a person, the results of the comparison of antemortem and postmortem data lead to 1 of these 4

21 Dr. Puneeth Hegde, *Role and Importance of Forensic Odontology in Identification*, International Interdisciplinary Journal of Scientific Research, 2200-9833

22 Spitz WU, Spitz and Fischer's, *Medicolegal Investigation Of Death: Guidelines for the Application of Pathology of Crime Investigation.* Springfield, Ill: Charles C. Thomas (1993).

situations.[23]

1. Positive identification: Comparable items are sufficiently distinct in the antemortem and postmortem databases; no major differences are observed.

2. Possible identification: Commonalities exist among the comparable items in the antemortem and postmortem databases, but enough information is missing from either source to prevent the establishment of a positive identification.

3. Insufficient identification evidence: Insufficient supportive evidence is available for comparison and definitive identification, but the suspected identity of the decedent cannot be ruled out. The identification is then deemed inconclusive.

4. Exclusion: Unexplainable discrepancies exist among comparable items in the antemortem and postmortem databases.

Radiographic Examination

Comparison of antemortem and postmortem radiographs is the most accurate and reliable method of identifying remains. Observations such as distinctive shapes of restoration, root canal treatment, buried root tips, bases under restorations, tooth and root morphology, and sinus and jawbone patterns can be identified only by examination of radiographs.[24] In some instances a single tooth may be all that remains, and upon comparison of radiographs, a positive identification can be made. Original antemortem dental radiographs are of immense value for comparison; therefore it is essential that all routine radiographs exposed during the course of a dental practice be adequately fixed and washed so that they remain viewable years later. The best results are obtained when the angulation of the film to the x-ray tube is the same as that of the original films. Identification becomes a problem when few restorations are available for antemortem–postmortem comparison. Today, fewer people have dental restorations because of the success of preventative intervention. When an antemortem record is unavailable, the postmortem chart of the deceased may be used to exclude his or her identity upon comparison with the available antemortem records of others.[25]

23 Guidelines for Bite Mark Analysis. American Board of Forensic Odontology, 3 Inc. J Am Dent Assoc 383-386 (1986)

24 Luntz L., *History of Forensic Dentistry,* 7 Dent Clin North Am 7-17 (1977).

25 Wood RE, Kirk NJ, Sweet DJ, *Digital Dental Radiographic Identification in The Pediatric, Mixed And Permanent Dentitions,* 5 J Forensic Sci 910 (1999).

Anthropologic Examination

Forensic anthropologists *(the study of human biological and physiological characteristics and their evolution)* and forensic odontologists may work together to resolve problems associated with identification. Both disciplines are concerned with the analysis of calcified structures of the body, namely the bones and the teeth. The bones and teeth of the craniofacial complex, key identification tools for the forensic odontologist, effectively distinguish one person from others and one population from another and are used to determine the race, age and sex of a person.[26] This anatomic material can be used for identification when the skull and facial bones are used as a foundation for the reconstruction of facial soft tissues. With the use of standard anthropologic thickness measurements at specific points on the face, soft-tissue thickness points can be connected with sculpting clay and the reconstructed features can sometimes be digitized on a computer screen. Because computers permit the addition of components directly to cranial features, computers have been useful for techniques involving facial superimposition.[27] The underlying skeletal structures can thus be viewed below the soft tissue, providing a means to check its accuracy. The result of these techniques is a recreation of the contour of the soft-tissue features that permits visual identification. Various versions can then be stored and reproduced for comparison.[28]

Identification based on teeth discoloration

In some cases, teeth that are obtained from the corpse or from the crime scene provide a lot of information regarding the individual's identity. In cases involving teeth discoloration, a detailed examination of the teeth by the forensic odontologist helps the investigators in identifying the root cause of poisoning. Fluorosis is a common condition seen in individuals living in areas that have very high fluoride content in their drinking water. The condition is characterized by the characteristic yellow brown pigmentations on the calcified structures of the body. Fluorosis is commonly identified by the mottled appearance of enamel surface of teeth. Many times the teeth may be the only structures remaining intact after destruction of other parts of the body due totrauma, decomposition or burns. Hence by detailed examination of the teeth, the poisoning may be ascertained.

26 Sylvie Louise Avon, *Forensic Odontology : The Roles and Responsibilities of the Dentist,* 7 Journal of the Canadian Dental Association 453 (2004).

27 Cameron JM, Sims BG, *Forensic dentistry.* Edinburgh: Churchill Linvingstone (1974).

28 Wood RE, Clark B, Brooks SE, Blenkinsop B, *Combined Physical and Computer-Aided Facial Reconstruction in Human Skeletal Remains.* 4 Can Soc Forensic Sci J 195-203 (1996).

COLOUR	CHARACTERISITICS
Yellow-Orange	Discoloration of the teeth is seen in individuals with high intake of the drug tetracycline during childhood.
Green	Characteristic of copper poisoning
Black	Poisoning
Silver	Poisoning
Blue	Chronic lead poisoning a characteristic is seen on the tooth surface

DETERMINATION OF THE TIME OF DEATH

Establishing the time of bite mark in relation to the time of death is an important information provided by the forensic odontologist. Based on the pattern of bite mark the forensic odontologistcan analyze the time of bite. Usually the forensic odontologist is called upon by the investigating team several hours after the death of the individual and the forensic odontologist has to deal with the condition called the rigor mortis which is characterized by stiffening of the muscles and the joints.[29] Hence the forensic odontologist might have to manually force open the jaws to gain access into oral cavity for examination. Based on the knowledge that the rigor mortis affects the muscles of mastication first and then spreads to other body parts and that the onset of rigor mortis may range from 10 minutes to couple of hours with maximum stiffness at around twelve to twenty hours after death, rigor mortis is usually used to establish the approximate time of death. It is believed that after around three days, once the decomposition sets in, the muscles tend to relax.[30]

Bite Mark

Biting is often a sign of a perpetrator seeking to degrade the victim while achieving complete domination. Generally, bite marks consist of superficial abrasion, and/or sub-surface hemorrhage, or bruising of the skin because of the bite. Bite mark examination is the one aspect of forensic odontology requiring an immediate response by the forensic dentist. The bite mark may be a result of either a physical alteration in a medium caused by the contact of the teeth, or a representative pattern left in an object or tissue by the dental structures of a human or animals. The marks, single and multiple in nature may be of varying degrees of severity, ranging from a mild making of the tissues to deep perforation of the epidermis and

29 *supra* note 22.
30 *Id*. at 64.

dermis.[31]

There is a one feature of forensic odontology is bite mark examination which require an instant response by the forensic dentist. The marks disappear quickly, both in the living and dead, changing appearance in within the span of hours and being late in examining may lead to loss of evidence.

Those patterned injuries (bitemarks) they help in reorganizing past events that adjoined the biting process because they are useful to legal authorities. For an instance, bite mark might reveal something about the criminal purpose of the executioner, whether sexual attack, child exploit or other form of assaults between the culprit and the victim. Forensic Odontologists can help in identifying the person responsible for the bite marks by differentiating the measurements and the locations of teeth marks in a bite mark with those of the suspect.[32]

Less aggressive bites may not penetrate the skin but will leave a partial or complete oval marks relating mainly to the anterior teeth (canine to canine). During biting, the victim (if alive) and the assailant will frequently be struggling so that teeth may produce scrape marks before the tissue is finally bitten.[33] The tissue is flexible and is distorted during the bite. If the bite is on a living person there will be post injury changes in the tissue, resulting in bleeding, swelling, and discoloration. In a dead individual there may be post-mortem changes that complicate the analysis of the mark.[34]

It is important to photograph the mark with standardized techniques. Special scales with imprinted marks have been produced for this purpose to allow the degree of distortion of the photographic image to be determined. A report should be prepared at this early stage before any suspects are interviewed so that no bias is introduced into the analysis of the mark.[35] Transparent photographic overlays are prepared from these study casts at the same scale as that located over the bite mark and arranged so that one can compare the characteristics of the dentition and the bite mark. Unless

31 *Guidelines For Bite Mark Analysis,* American Board of Forensic Odontology, 3 Inc. J Am Dent Assoc 383-386 (1986).

32 Yogesh Garg1 , D.J. Bhaskar, *ForensicDentistry : An Aid in Criminal Investigation,* 6 Int J Dent Med Res 160-163 (2015).

33 Wright FD, *Dailey JC, Human Bite Marks in Forensic Dentistry*, 45Dent Clin North Am 365-397(2001).

34 Rothwell BR, Thien AV, *Analysis of Distortion in Preserved Bite Mark Skin,* 46 J Forensic Sci 573-576(2001).

35 Bernstein ML, *Two Bite Mark Cases With Inadequate Scale References,* 30 J Forensic Sci ,958-964 (1985).

the bite is unusually clear and possesses characteristics that are unlikely to occur in more than one dentition, it is safer to exclude suspects through these techniques rather than to implicate them.[36]

ROLE OF FORENSIC ODONTOLOGY IN CRIMINAL JUSTICE SYSTEM

Forensic Odontology has helped a lot in Criminal Justice System. This is basically done through investigation of the case. In this context different case laws is being analyzed and had shown how forensic odnontology helps in solving the case.

Famous Bite Mark Case

This is the case where Ted Bundy has killed two girls using a wooden club. No solid evidence was found at the crime scene, which meant that the room had been wiped clean. Ted Bundy was known for his accuracy, and the investigators presumed that both girls were one of latest Bundy's victims. However their presumptions weren't a hard evidence for a conviction. The investigators requested suspect to provide a dental impression so that they could use the impression for comparison with the suspicious bite mark, but Bundy refused. The investigators obtained a search warrant that authorized them to get the impression in any possible way; a surprise trip was organized to prevent Bundy from grinding his teeth down in an effort to disguise his bite. An experienced dentist from Coral Gables, Dr. Souviron took several photographs of Ted Bundy's front upper and lower teeth and gums. An uneven pattern was recorded, which would make a match easier to make. Doctor outlined the structure of the unique alignment, the chips, the size of the teeth, and the sharpness factors of the bicuspids, lateral, and incisor teeth. The comparisons of both Bundy's teeth structure and the photograph of the bite-mark were put up on a board as an enlarged photo and laid over each other using a transparent sheet. There was a double bite involved. The attacker had bit once, then turned sideways and bit again. The top teeth remained in the same position, but the lower teeth left two rings. Twice as much evidence was obtained in order to prove his case. When questioned by the defense, Souviron explained that several experiments were done, using model teeth to be assured of the standardization of his analysis. Later in the case, the lawyer pointed out that the ruler in the photo had been lost, however Dr. Souviron countered with the obvious fact that it once had existed because it was in the photo.Dr. Lowell Levine, the chief consultant in forensic

36 Mansour Al-Sarhani, *Implementation of Forensic Dentistry in Criminal Investigation,* 10 European Scientific Journal, 24 (2014).

dentistry of New York City's Medical Examiner, was called into the court room by the state. He testified that the victim, Lisa Levy had to be lying passive for the marks to be left same position as they were found on the photograph. This evidence was found to be the best the prosecutor had.[37]

Delhi Gang Rape Case

First time in the Indian history of criminal prosecution in India, dental forensics has played a vital role in providing evidence leading to death sentences. In the Delhi gang rape case, a forensic dentist was able to link two of the accused to the crime. It was done by comparing the arrangement of the teeth with the bite mark which is left on the poor young victim. It was stated by a dental expert that photographs of bite mark seen on the victim and structure of the dentition of the two accused proved with some accuracy. Totally, six men were arrested, and one among them were juvenile. Consequently, among the five accused, two of the dentition matched with a bite mark. So it was finally stated by the dental expert that no two persons will have a similar arrangement of teeth.

CONCLUSION

Forensic dentistry plays a major role in the identification of those individuals who cannot be identified visually or by other means. The task of determining the identity of the deceased persons has paramount importance. Most dental identifications are based on restorations, caries, missing teeth, and/or prosthetic devices, such as complete removable prostheses, which may be readily documented in the record.

Several authors have observed that in cases of air disaster, Tsunami, defense organizations, etc., where the extremities are completely incinerated, some denture materials like posterior part of acrylic dentures and metal-based dentures survive. Thus, marked dental prostheses (full and partial dentures, mouthguards, and removable orthodontic appliances) would lead to rapid identification in the event of accidents and disaster.

Concluding that we should come up with more developed and advanced technologies for tooth identification and aiming that it will be give more accurate answer.

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37 Ted Bundy, *The Final Bitemark Case,* https://sites.google.com/site/tedbundythelastbitemark/the-famous-bitemark-case.

CORPORATE SOCIAL RESPONSIBILITY IN THE CONTEXT OF INDIAN MULTINATIONAL COMPANIES

Kanwal Marwaha*

ABSTRACT

Corporate Social Responsibility (CSR) refers to the development of economy in a systematic way for ethically business purpose. At present the concept of Corporate Social Responsibility has become increasingly popular in India. Many government and private Indian Companies are adopting the principles of Corporate Social Responsibility in today's competitive business environment. This Research paper will give the full information of some selected Indian Companies using CSR technique. This paper analyses the potential implications of mandate (CSR) under the recently enacted Companies Act, 2013 in India on firm incentives. This paper argues that notwithstanding the potential economic costs than may accompany mandated. Corporate Social Responsibility the provisions of the new Act are designed thoughtfully to balance the objectives of the corporation and its shareholders on the one hand and that of the society and its stakeholders on the other.

INTRODUCTION

> *"Successful people have a social responsibility to make the world a better place and not just take from it."* Carrie Underwood[1]

The concept of Corporate Social Responsibility has started gaining serious attention by researchers in the Indian context. Organized a roundtable discussion with a panel of entrepreneurs from the corporate sector and leaders of civil society debating on various contentious issues related to the concept of Corporate Social Responsibility, Sharma defines:[2]

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1 Carrie Marie Underwood an American Singer and Musician born on March 10, 1983 at U.S., associated with Brad Paisley and Keith Urban, www.brainyquotes.com.

2 Sanjeev Gupta & Nidhi Sharma, *CSA-A Business opportunity,* The Indian Journal of Industrial Relations, www.Jstor.org

Corporate Social Responsibility as it is the obligation of the firm to use its resources in ways to benefit society, through committed participation as a member of society, taking into account the society at large and improving the welfare of the society independently of the direct gains to the company.[3]

Corporate Social Responsibility activities are primarily inspired by Gandhi's concept of social trusteeship and thus focus on the well-being of employees and the common man.[4] This focus is likely also due to the nature of the industry and the fact that India is a developing nation. Manufacturers who can focus on social responsibility do so to take care of employees. Moreover India is still struggling to provide basic amenities to all of its people. Also, Indian factories particularly lack the resources needed just to treat their employees well then carrying out Corporate Social Responsibility along is a difficult task for them.[5]

The force of Globalization has led to rapid changes in the market place and increased competition.[6] This force has compelled organizations in India to adopt a fresh perspective. As Organization focused on customer mission and the organization's role they were forced to make changes. The paradigm Survival of the Fittest has become the order of the day resulting in an urgent shift in practices at the enterprise level that would focus on Organizational Performance. The current trend have brought a realization among the firms that in order to compete effectively in a competitive environment they need clearly defined business practices with a sound focus on the public interest in the markets.

The social context in which business operates at the beginning of the 21st century is highly uncertain, complex and dynamic.[7] Tensions exist between commercial opportunities on the one hand and potential social impacts of their exploitation on the other and sometimes hard choices have to be made. The activities of legitimate global business create havoc with climate, environment, biodiversity and the very basis of life on the planet.[8] The civil society's awareness of the need for corporate social responsibility is also increasing. There has been a growing interest in Corporate Social

3 *Ibid*.

4 Ananda Das Gupta, *Implementing Corporate Social Responsibility in India: Issues and the Beyond* SPRINGER INDIA (2014) http://www.springer.com/cda/content/document/cda_downloaddocument/9788132216520-c1.pdf?SGWID=0-0-45-1447705-p175456414.

5 *Ibid*.

6 John Gray, *The Era Of Globalisation Is Over,* NEW STATESMAN (Sept. 21, 2001) http://www.newstatesman.com/node/194169

7 *Id*. at 2.

8 *Id*. at 2.

Responsibility (CSR) across a range of disciplines.[9] Companies facing these challenges are aware that Corporate Social Responsibility can be of direct economic value. They view these activities not as a cost but an investment. They view it as a long-term strategy. As a result Corporate Social Responsibility has emerged as an inescapable priority for business leaders in every country.[10]

PUBLIC POLICIES IN CORPORATE CITIZENSHIP INCLUDE[11]

- No government intervention in the area of corporate citizenship.[12] This view is associated with critics of corporate citizenship who argue that companies should not concern themselves with issues other than maximising returns for shareholders and that government should not intervene to divert the attention of companies to other issues.[13]

- The traditional public policy approach of legislation and regulation. This path is already being followed by several governments around the world and is the preferred approach of Non-Government Organisations. Much of the proposed and existing legislation in this area relates to having mandatory social and environmental reporting for publicly listed companies.[14]

- Governments acting as demonstrators of best practice in corporate citizenship. Measures include government agencies adopting triple bottom line reporting, using government procurement and tender policies as well as public-private partnerships so that companies that wish to do business with government will need to have a demonstrable corporate citizenship strategy.[15]

In the age of globalization, Corporations and business enterprises are no longer confined to the traditional boundaries of the nation-state.[16] In the last 20 years, Multinational Companies (MNCs) have played an influential role in defining markets and consumer behavior. The rules of corporate governance have also changed. Reactions to this change

9 Christine A.Hemingway & Patrick W.Maclagan (2004).
10 *Ibid*.
11 Akanksha Jain, *The Mandatory Corporate Social Responsibility in India:* A Boon or Bane Vol.4 IJAR (2014).
12 *Ibid.*
13 *Ibid.*
14 *Id*. at 3.
15 *Id*. at 3.
16 *Corporate Social Responsibility Issues And Challenges In India,* I CHARITY, http://www.icharity.in/news/research-reports/93-corporate-social-responsibility-issues-and-challenges-in-india.html

have been varied. On the one hand, globalization and liberalization have provided a great opportunity for corporations to become globally competitive by expanding the production base and market share.[17] On the other hand, the conditions that favoured their growth also placed these companies in an unfavourable light.[18] Labourers, marginalized consumers, environmental and social activists protested against the unprecedented and undesirable predominance of multinational corporations. The revolution in communication technology and the effectiveness of knowledge- based economics threw up a new model of business and corporate governance. Hence there is a noticeable shift from accountability to shareholders to accountability to all stakeholders for the long-term success and sustainability of the business. Stakeholders include consumers, employees, affected communities and shareholders all of whom have the right to know about the corporations and their business. This raises the important issue of transparency in the organization.[19]

Corporate Social Responsibility (CSR) also known as Corporate Responsibility, Corporate Citizenship, Responsible Business, Sustainable Responsible Business (SRB) or Corporate Social Performance.[20] Corporate Social Responsibility (CSR) is a highly misunderstood & misinterpreted term in India. Some Indian companies believe that merely complying with laws & regulations fulfils their need for social responsibility. A responsible corporate recognizes that its activities have wider impact on the society in which it operates. Therefore it takes account of the economic, social, environmental & human rights impact of its activities on all stakeholders. Although India is a favourable business destination for western investors it is to be tremendously challenging for any business to remain competitive here in the long term. Unless poor people have equity in the growth of economy, India can never achieve the title of super economy.[21]

LAW RELATING TO CORPORATE SOCIAL RESPONSIBILITY IN INDIA

The much awaited Companies Bill, 2012 was passed by the upper house of Parliament on 8 August 2013 and received president's assent on 29th Aug, 2013.[22] From April 1, 2014, it has become legally binding for

17 *Ibid.*
18 *Ibid.*
19 *Id*. at 4.
20 *Corporate Social Responsibility* (CSR), EUROPEAN COMMISSION, http://ec.europa.eu/growth/industry/corporate-social-responsibility_en
21 *Ibid.*
22 BINDU SHARMA, CONTEXTUALISING CSR IN ASIA : CORPORATE SOCIAL RESPONSIBILITIES IN ASIAN ECONOMIES (4th ed., 2014).

companies in India to be socially responsible. Section 135 of the new Companies Act 2013, reads with the CSR Rules makes it mandatory for companies, meeting certain criteria to set aside two per cent of their net profits for undertaking and promoting socially beneficial activities and projects in India. To implement this, the Ministry of Corporate Affairs (MCA) recently issued the Corporate Social Responsibility Rules, 2014, to implement this legislative mandate, which came into effect on April 1, 2014.[23]

Corporate Social Responsibility refers to the development of economy in a systematic way for ethically business purposes.[24] At present the concept of Corporate Social Responsibility has become increasingly popular in India. Many government and private Indian companies are adopting the principles of Corporate Social Responsibility in today's competitive business environment. Indian businesses realized that they have to watch not only the companies aspect the ecological as well as social impact as we can say the three pillars of Corporate Social Responsibility.[25]

A Corporate Social Responsibility in India is finally veracity.[26] Indian organizations realized that they have to watch not only the economic dimension of their company but also towards ecological and environmental, social impact the three pillars of Corporate Social Responsibility. However to become a designed plan integral to the business success in Indian companies have a lot of catch up to do. Corporate Social Responsibility is in addition related to the broader word of Corporate Governance join it's to corporate governance if they in reality want to make a noticeable all the three pillars of Corporate Social Responsibility. In current pilot study by CII in Tamil Nadu Express Buzz just 40% of the companies practice Corporate Social Responsibility initiatives.[27] The pilot study that a majority of the companies did not obtain Corporate Social Responsibility seriously and those who did it only with a philanthropic outline of mind also revealed that more than 50% of the companies made their employee welfare performances as element of Corporate Social Responsibility initiative not in reality contributing to an external community or its growth Sustainable Corporate Social Responsibility programmes.[28]

As gentle socialism gave way the more radical policies of nationalization

23 *Id. at 5.*
24 *Id. at 5.*
25 *Id. at 5.*
26 Laxmi Rajak, *A study of CSR in Indian Organisation,* www.epw.in.
27 *Ibid.*
28 *Id*. at 6.

and policies in economic affairs resorted to large scale corporate welfare programs to demonstrate the socio-economic development of the nation and were not anti-people. Market based economic practice has further widened the scope of inequalities in the country. The emerging business culture of profit and competition has more and more marginalized social welfare issues.[29] There are many instances where corporate have played a dominant role in addressing issues of education, health, environment and livelihoods through their corporate social responsibility interventions across the country. Private business enterprises like TATA, Birla and Reliance are practicing the Corporate Social Responsibility for decades long before Corporate Social Responsibility emerged as a norm to develop a culture of social welfare and environmental sustainability among the leading economy.[30]

The concept of Corporate Social Responsibility whereby companies integrate social, environmental and health concerns in their business strategy policy and operations and in their interactions with stakeholders on a voluntary basis.[31] The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point The European Commission's definition of Corporate Social Responsibility is:[32]

> *"A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."* [33]

According to Corporate Social Responsibility Asia:[34]

> *"Corporate Social Responsibility is a company's commitment to operating in an economically, socially and environmentally sustainable manner whilst balancing the interests of diverse stakeholders".*[35]

The concept of Corporate Social Responsibility has undergone radical change.[36] It has integrated social as well as environmental issues into their missions and decisions. Companies take keen interest in informing

29 *Findings, Suggestions,* available at : www.shodhganga.inflibnet.ac.in
30 *Ibid.*
31 *Ibid.*
32 *supra* note 20.
33 *Ibid.*
34 *supra* note 20.
35 *Ibid.*
36 *Ibid.*

about their Corporate Social Responsibility activities to their stakeholders as well. Across the globe business enterprises have undertaken Corporate Social Responsibility initiatives in the areas of water conservation, healthcare, rural welfare, environment protection, poverty alleviation, education, community investment projects, culture and heritage, bio-diversity, disaster management and relief, culture and heritage, green environment, product responsibility, governance, waste management and gender equality.[37]

While proposing the Corporate Social Responsibility Rules under Section 135 of the Companies Act, 2013 the Chairman of the Corporate Social Responsibility Committee mentioned the Guiding Principle as follows:[38]

> *"Corporate Social Responsibility is the process by which an organization thinks about and evolves its relationships with stakeholders for the common good and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies.[39] Thus Corporate Social Responsibility is not charity or mere donations. Corporate Social Responsibility is a way of conducting business by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use Corporate Social Responsibility to integrate economic, environmental and social objectives with the company's operations and growth".[40]*

VARIOUS INDIAN COMPANIES

India has joined hands to fine-tune all its activities falling under Corporate Social Responsibility.[41] For this it has set up a global platform to showcase all the work done by Indian firms. Confederation of Indian Industry (CII) and the TVS Group collaborated to form the CII-TVS Centre of Excellence for Responsive Corporate Citizenship in 2007. It provides consultancy services and technical assistance on social development and Corporate Social Responsibility. According to a National Geographic survey which studied 17,000 consumers in 17 countries, Indians are the

37 *Ibid.*

38 Megha Kapoor, India : *Corporate Social Responsibility; Mandating Companies To Contribute Towards Society,* (Apr. 9, 2014)http:/ www.mondaq.com/india/x/305620/Corporate+Commercial+Law/ Corporate+Social+Responsibility+Mandating+Companies+To+Contribute+Towards+Society.

39 *Id*.at 8.

40 *Id*.at 8.

41 *supra* note 16.

most eco-friendly consumers in the world. India topped the Consumer Greendex where consumers were asked about energy use and conservation transportation choices, food sources, the relative use of green products versus traditional products, attitudes towards the environment and sustainability and knowledge of environmental issues.[42]

- Reliance Industries and two Tata Group firms Tata Motors and Tata Steel are the country's most admired companies for their corporate social responsibility initiatives, according to a Nielsen survey released in May 2009.[43] Mahindra & Mahindra Focuses on the girl child, youth and farmers through programmes in the domains of education, public health and environment. Mahindra Pride Schools provide livelihood training to youth from socially and economically disadvantaged communities and have trained over 13,000 youth in Pune, Chennai, Patna, Chandigarh and Srinagar.[44]

- As part of its Corporate Service Corps (CSC) programme, IBM has joined hands with the Tribal Development Department of Gujarat for a development project aimed at upliftment of tribals in the Sasan area of Gir forest.[45] SAP India, in partnership with Hope Foundation an NGO that works for the betterment of India's poor and the needy throughout India, has been working on initiatives for short and long-term rehabilitation of the tsunami victims. The financial services sector is going green in a steady manner. Efforts by companies such as HSBC India, Max New York Life and Standard Chartered Bank have ensured that the green movement has kept its momentum by asking their customers to shift to e-statements and e-receipts.[46]

- State-owned Navratna Company, Coal India Ltd (CIL) will invest US$ 67.5 million in 2010-11 on social and environmental causes.[47]

1. Public sector aluminium company NALCO has contributed US$ 3.23 million for development work in Orissa's Koraput district as part of its Corporate Social Responsibility (CSR). BHEL & Indian Airlines have been acclaimed for disaster management efforts. BHEL has also adopted 56 villages having nearly 80,000 inhabitants.[48]

42 *Ibid*.
43 *Id*.at 9.
44 *Id*.at 9.
45 *Id*.at 9.
46 *Id*.at 9.
47 *Id*.at 9.
48 *Id*.at 9.

Corporate like the Tata Group, the Aditya Birla Group and Indian Oil Corporation to name a few have been involved in serving the community ever since their inception.[49] Several other organizations have been doing their part for society through donations and charity events. India has been named among the top ten Asian countries paying increasing importance towards corporate social responsibility (CSR) disclosure norms. India was ranked fourth in the list according to social enterprise Corporate Social Responsibility Asia's Asian Sustainability Ranking (ASR), released in October 2009. Sustainability in Asia ESG reporting uncovered (September 2010) is based on four parameters viz. General, Environment, Social and Governance. In its study based on 56 companies in India, it observed that India is ranked second in country ranking in Asia and is ranked one ranking in general category. It is observed that reporting is strongly followed by companies as well as they seek international development standards.[50]

A study on the Corporate Social Responsibility activities of 300 corporate houses conducted by an industry body in June 2009 revealed that Corporate India has spread its Corporate Social Responsibility activities across 20 states and Union territories with Maharashtra gaining the most from them. The study also revealed that about 36 per cent of the Corporate Social Responsibility activities are concentrated in the state followed by about 12 per cent in Gujarat, 10 per cent in Delhi and 9 per cent in Tamil Nadu.[51] The companies have on an aggregate, identified 26 different themes for their Corporate Social Responsibility initiatives. Of these 26 schemes, community welfare tops the list, followed by education, the environment, health as well as rural development. Another study conducted by Economic Times revealed that donations provided by listed companies grew by 8 per cent during the financial year 2008-2009.[52]

CORPORATE SOCIAL RESPONSIBILITY IN SMALL MEDIUM SIZE ENTERPRISES (SME)

The Corporate Social Responsibility has extended to Small Medium size Enterprises as well.[53] This sector was never taken into account for deliberations and conventional approach to Corporate Social Responsibility is generally assumed to be the part of large companies. It is a well known fact that Small Medium size Enterprises produce

49 Dr.B.K.Jha & Rini Singh, CSR *In India,* www.ijherd.co.in
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 Samit Jain, *CSR: An Equal Responsibility Of SMEs*, INDIA CSR (Mar. 28, 2014) http://indiacsr.in/csr-an-equal-responsibility-of-smes/ .

large proportion of country's output provides huge employment and generate substantial revenues to the government not only in developed countries but developing countries as well. Small to medium-sized enterprises account for about 90 percent of businesses worldwide and are responsible for around 50 to 60 percent of employment. They potentially have a significant impact on social welfare.[54] As the Small Medium size Enterprises also include stakeholders and an impact on the society it is necessary to understand the role of Small Medium size Enterprises in Corporate Social Responsibility activities. However it is difficult to enroll the concept for Small Medium size Enterprises as they face challenges of survival, time and resource constraints, fear of additional regulations and no systematic incentives. General problems like lack of information, getting trained employees and getting support from related officials are other limiting factors for Small Medium size Enterprises to get involved in Corporate Social Responsibility activities. However there are several benefits available to Small Medium size Enterprises like small number of employees with quick communication and decision making, unique selling propositions and competitive benefits through their products and services, cost and efficiency savings.[55]

The European Commission in 2007 Corporate Social Responsibility in Small Medium size Enterprises Small Medium size Enterprises Good practice, Corporate Social Responsibility can positively influence Small Medium size Enterprises competitiveness in numerous ways.[56] Small Medium size Enterprises can provide with improved products, high customer loyalty, motivated employees, innovative and creative employees, cost savings, increased profitability due to optimum resource utilization, enhanced networking with business partners and improved company image.[57] Thus, it is advisable for the government to look into policies and legislations for the benefits of Small Medium size Enterprises adapting Corporate Social Responsibility and take up initiatives aimed at encouraging SME involvement in Corporate Social Responsibility which should be easily accessible and relevant. [58]

The threshold coverage levels for Corporate Social Responsibility are low. Companies are subject to the Corporate Social Responsibility requirements if they have for any financial year A net worth of at least Rs.5 billion (approximately U.S.$80 million) A turnover of at least Rs.10

54 *Id*.at 11.
55 *Id*.at 11.
56 *Id*.at 11.
57 *Id*.at 11.
58 *Id*.at 11.

billion (approximately U.S.$160 million) or Net profit of at least Rs.50 million (approximately U.S. [$800,000).[59] Companies meeting these thresholds are required to develop a Corporate Social Responsibility policy, spend a minimum amount on CSR activities and report on these activities or prepare to explain why they didn't. It is estimated that a total of 8,000 companies in India would be required to meet the Corporate Social Responsibility requirements among the 9 lakh active companies in India and the 2% Corporate Social Responsibility expenditure would translate to companies' spending around Rs.12,000 crore to 15,000 crore annually.[60]

CHALLENGES ARISES DUE TO CORPORATE SOCIAL RESPONSIBILITY IN INDIA

The survey conducted by Times of India group on Corporate Social Responsibility used a sample size of 250 companies involved in Corporate Social Responsibility activities through a method of online administration of questionnaire.[61] The questionnaire was evolved after due diligence including focus group meetings, consultations with key stakeholders and a pilot in four metros. Finally 82 organizations responded to the questionnaire. These comprised 11 public sector undertakings (PSUs), 39 private national agencies and 32 private multinational organizations. The respondent organizations form a satisfactory percentage of 33 per cent of the sample size given the fact that only those companies that had direct or indirect involvement in Corporate Social Responsibility activities were chosen to be approached for the survey.[62] The survey elicited responses from participating organizations about various challenges facing Corporate Social Responsibility initiatives in different parts of the country. Responses obtained from the participating organizations have been collated and broadly categorized by the research team. These challenges are listed below:[63]

1. Due to the lack of transparency:

Lack of transparency is one of the key issues brought forth by the survey.[64] There is an expression by the companies that there exists lack

59 *supra* note 49.
60 *Ibid.*
61 *supra* note 16.
62 *Id*.at 13.
63 Singh & Associates, *Corporate Social Responsibility and the Challenges Ahead,* LEXOLOGY (Nov. 30, 2012) http://www.lexology.com/library/detail.aspx?g=b22d13e7-1640-413b-9832-8a4d5454e8ab
64 *Ibid.*

of transparency on the part of the local implementing agencies as they do not make adequate efforts to disclose information on their programmes, audit issues, impact assessment and utilization of funds. This reported lack of transparency negatively impacts the process of trust building between companies and local communities, which is a key to the success of any Corporate Social Responsibility initiative at the local level.[65]

2. Due to the Non-Availability of Non-Governmental Organizations:

It is also reported that there is non-availability of well organized non-governmental organizations in remote and rural areas that can assess and identify real needs of the community and work along with companies to ensure successful implementation of Corporate Social Responsibility activities. This also builds the case for investing in local communities by way of building their capacities to undertake development projects at local levels.[66]

3. Due to lack of Visibility:

The role of media in highlighting good cases of successful Corporate Social Responsibility initiatives is welcomed as it spreads good stories and sensitizes the local population about various ongoing Corporate Social Responsibility initiatives of companies.[67] This apparent influence of gaining visibility and branding exercise often leads many non-governmental organizations to involve themselves in event-based programs in the process, they often miss out on meaningful grassroots interventions.[68]

4. Due to the Non-availability of Clear Corporate Social Responsibility Guidelines:

There are no clear cut statutory guidelines or policy directives to give a definitive direction to Corporate Social Responsibility initiatives of companies. It is found that the scale of Corporate Social Responsibility initiatives of companies should depend upon their business size and profile. In other words the bigger the company, the bigger is its Corporate Social Responsibility program.[69]

65 *Ibid.*
66 *supra* note 49.
67 *Id*.at 14.
68 *Ibid.*
69 *Ibid.*

5. Due to the Lack of Consensus :

There is a lack of consensus amongst local agencies regarding Corporate Social Responsibility projects.[70] This lack of consensus often results in duplication of activities by corporate houses in areas of their intervention. This results in a competitive spirit between local implementing agencies rather than building collaborative approaches on issues. This factor limits company's abilities to undertake impact assessment of their initiatives from time to time.[71]

MAJOR ROLE OF CORPORATE SOCIAL RESPONSIBILITY IN THE VARIOUS AREAS

1. Corporate Social Responsibility to community[72]

A Community consists of individuals, groups, organizations, families etc. They all are the members of the society. They interact with each other and are dependent on each other in almost all activities. There exists a relationship among them, which may be direct or indirect. Business being a part of the society also maintains its relationship with all other members of the society.[73]

2. Corporate Social Responsibility towards its employees[74]

Business needs employees or workers to work for it. These employees put their best effort for the benefit of the business. Therefore, it is the prime responsibility of every business to take care of the interest of their employees. If the employees are satisfied and efficient then only business can be successful. In the case of factor 2 the variable seven, eight and nine have loadings of 0.849, 0.812 and 0.766 respectively. This indicates that factor 2 is the combination of these three variables.[75]

3. Corporate Social Responsibility towards the customers[76]

No business can survive without the support of customers. As a part of the responsibility of business towards them, the business should provide the following facilities. In case of factor 3, the variables 10, 11 and 12 have

70 *Ibid.*
71 *Id.*at 14.
72 Carrie Marie Underwood an American Singer and Musician born on March 10, 1983 at U.S., associated with Brad Paisley and Keith Urban, www.brainyquotes.com
73 *Id.*at 15.
74 M.Chappel and J.Moon, *Corporate Social Responsibility* (2005).
75 *Ibid.*
76 *supra* note 63.

the loadings of 0.829, 0.806 and 0.619 respectively.[77]

4. Corporate Social Responsibility towards the natural environment:[78]

The effectiveness of an individual depends on the work environment in which he operates. Business activities are governed by the rules and regulations framed by the government. In case of factor 4 the variables 13, 14 and 15 have the loadings of 0.821, 0.808 and 0.396 respectively. This indicates that factor 4 is the combination of these three variables.[79]

SUGGESTIONS

Corporate Social Responsibility can be classified as those policies, activities or behaviour undertaken by an organization that goes beyond the traditional economic and legal obligations that the firm has with its target internal and external stakeholders. Corporate social responsibility is more than a business policy or a response to issues raised by society. It is a governing business philosophy. Responding to the ethical obligations must be voluntary in nature and if undertaken effectively should eventually benefit and improve the overall welfare of the community in which the firm operates. The following are the suggestions:

1. A study involving other independent variables such as Corporate Reputation, Organizational Climate and Sustainability can be undertaken to find out its effect on Corporate Social Responsibility.

2. Further study may focus on identifying and comparing the perception of line managers, staff managers and employees on Corporate Social Responsibility practices of the company.

3. Identification of reasons and benefits of practicing Corporate Social Responsibility in different sectors of business can have a scope for further research along with development of company ethics programme, integration of business ethics and ethics training to the staff.

4. Companies and organisations should integrate social entrepreneurship into their core culture by actively channelizing their research and development capabilities in the direction of socially innovative products and services.

77 *Ibid.*
78 *Ibid.*
79 *Ibid.*

5. Future study can look into Corporate Social Responsibility practices and Business performance of product oriented or services oriented companies.

6. Identification of programs and policies to enhance Corporate Social Responsibility practices is also a relevant area of research.

CONCLUSION

In India, the mission of business firms was exclusively economic. But with the business environment being characterized by various developments including the shift of power from capital to knowledge, increased levels of literacy and the shrinking of geographical boundaries due to faster means of travel and communication, people are by and large, becoming conscious of their rights which has led to a rise in the expectations of the common man from business in also. An organization receives inputs from society in the form of skilled / unskilled labour, raw material and natural resources like air, water and space for its operation and in turn, offers goods and services to society. Thus, businesses depend on society for further existence and it is, in their interest to take care of society.

The study and overall analysis reveals that concept of corporate social responsibility is gaining prominence from all avenues. Contrary to the general awareness of the term many of the managers and executives of services/enterprises are not fully aware of Corporate Social Responsibility. Not only the less educated and less informed managers of micro industries as well as many of the executives of high profile enterprises are not fully aware of Corporate Social Responsibility practice. Organizations must realize that government alone will not be able to get success in its endeavour to uplift the downtrodden of society. Many of the leading corporations across the world had realized the importance of being associated with socially relevant causes as a means of promoting their brands.

In addition to people-focused activities, current Corporate Social Responsibility activities in India particularly also tend to focus on improving society and protecting the environment. Society-related Corporate Social Responsibility activities largely focus on giving back to others in some way such as helping the underprivileged by providing them food, water, shelter and medical care. It is also found that the environment impacts a large number of people, therefore Corporate Social Responsibility activities should focus on environmental welfare. In India treating factory waste is a major problem. Unlike developed countries, India's legal system does not monitor whether or not factories are treating their waste properly.

Therefore even those activities which are required by governments in developed countries are considered a form of social responsibility in a developing country like India. Corporate Social Responsibility but there is little agreement as to exactly what Corporate Social Responsibility is. Moreover, most of the Corporate Social Responsibility definitions in literature are based on practices of companies in developed countries. To date there is no definition of Corporate Social Responsibility as it is practiced by firms in developing countries.

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CASE STUDY

HIRAL P. HARSORA AND ORS. V. KUSUM NAROTTAMDAS HARSORA AND ORS.

Dr. Rajender Goyal*[1]

All Women and Minors independently of the Adult Male Members can be Tried for Domestic Violence.

Hiral P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors., Civil Appeal No. 10084 of 2016, arising out of SLP (Civil) No. 9132 of 2015, decided on October 6, 2016 by the Hon'ble Supreme of India.

QUESTION OF LAW BEFORE THE SUPREME COURT

In the above appeal an important question as to the constitutional validity of Section 2(q) of the Protection of Women from Domestic Violence Act, 2005, (hereinafter referred to as "the 2005 Act") inasmuch as that the expression "adult male person" employed therein is a classification not based on any intelligible differentia, and not having any rational relationship with the object sought to be achieved by the 2005 Act arose before the Supreme Court of India.

FACTS AND BACKGROUND OF APPEAL:

On 3.4.2007, Kusum Narottam Harsora and her mother Pushpa Narottam Harsora filed a complaint under the 2005 Act against Pradeep, the brother/ son, and his wife, and two sisters/daughters, alleging various acts of violence against them. The said complaint was withdrawn on 27.6.2007 with liberty to file a fresh complaint. Nothing happened for over three years till the same duo of mother and daughter filed two separate complaints against the same respondents in October, 2010. An application was moved before the learned Metropolitan Magistrate for a discharge of respondent Nos. 2 to 4 stating that as the complaint was made under Section 2(a) read with Section 2(q) of the 2005 Act, it can only be made against an adult male person and the three respondents not being adult male persons were, therefore, required to be discharged. The Metropolitan Magistrate passed

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an order dated 5.1.2012 in which such discharge was refused.

In a writ petition filed against the said order, on 15.2.2012, the Bombay High Court, on a literal construction of the 2005 Act, discharged the aforesaid three respondents from the complaint. The said order attained finality since it was not appealed against.

However, mother and daughter filed a writ petition in Bombay High Court, being writ petition No.300/2013, in which the constitutional validity of Section 2(q) was challenged. Though the writ petition was amended, there was no prayer seeking any interference with the order dated 15.2.2012, which, as has already been stated hereinabove, has attained finality. The Bombay High Court by the impugned judgment dated 25.9.2014 held that Section 2(q) needs to be read down in the following manner.

"In view of the above discussion and in view of the fact that the decision of the Delhi High Court in Kusum Lata Sharma's case has not been disturbed by the Supreme Court, we are inclined to read down the provisions of section 2(q) of the DV Act and to hold that the provisions of "respondent" in section 2(q) of the DV Act is not to be read in isolation but has to be read as a part of the scheme of the DV Act, and particularly along with the definitions of "aggrieved person", "domestic relationship" and "shared household" in clauses (a), (f) and (s) of section 2 of the DV Act. If so read, the complaint alleging acts of domestic violence is maintainable not only against an adult male person who is son or brother, who is or has been in a domestic relationship with the aggrieved complainant- mother or sister, but the complaint can also be filed against a relative of the son or brother including wife of the son / wife of the brother andsisters of the male respondent. In other words, in our view, the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the DV Act, where they are co-respondent/ s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and such co-respondent/s. It must, of course, be held that a complaint under the DV Act would not be maintainable against daughter-in-law, sister-in- law or sister of the complainant, if no complaint is filed against an adult male person of the family."

RELEVENT LEGAL PROVISIONS

The relevant provisions of the statute are contained in the following Sections:

2. Definitions.—in this Act, unless the context otherwise requires,

a. "Aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

b. "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

c. "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

d. "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

3. Definition of domestic violence.—for the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) Harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

i. "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

ii. "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

iii. "Verbal and emotional abuse" includes—

a. Insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

b. Repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

iv "Economic abuse" includes—

a. Deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

b. Disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

c. Prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

26. Relief in other suits and legal proceedings.—

1. Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

2. Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

3. In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Sections 17, 18, 19, 20, 21, 22, 31 deal with the right to reside in a shared household, Protection orders, Residence orders, Monetary relief, Custody orders, Compensation orders, Penalty for breach of protection order by respondent respectively.

OBSERVATIONS OF THE HON'BLE SUPREME COURT

Male vis-à-vis Female and Daughter/Sister vis-à-vis Daughter-In-Law/ Sister-In -Law

The definition of "domestic relationship" contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways -blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member. The Hindu Succession Act,1956 was amended, by which Section 6 was amended, with effect from 9.9.2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case, when a member of a joint Hindu family will now include a female coparcener as well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of 'shared household' in

Section 2(s) of the Act would include a household which may belong to a joint family of which the respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read "adult male person", while Section 2(s) would include such female coparcener as a respondent, being a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment.

When Section 3 of the Act defines domestic violence, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral. When one goes to the remedies that the Act provides, things become even clearer. Section 17(2) makes it clear that the aggrieved person cannot be evicted or excluded from a shared household or any part of it by the "respondent" save in accordance with the procedure established by law. If "respondent" is to be read as only an adult male person, it is clear that women who evict or exclude the aggrieved person are not within its coverage, and if that is so, the object of the Act can very easily be defeated by an adult male person not standing in the forefront, but putting forward female persons who can therefore evict or exclude the aggrieved person from the shared household. This again is an important indicator that the object of the Act will not be sub-served by reading "adult male person" as "respondent".

This becomes even clearer from certain other provisions of the Act. Under Section 18(b), for example, when a protection order is given to the aggrieved person, the "respondent" is prohibited from aiding or abetting the commission of acts of domestic violence. This again would not take within its ken females who may be aiding or abetting the commission of domestic violence, such as daughters-in-law and sisters-in-law, and would again stultify the reach of such protection orders. When we come to Section 19 and residence orders that can be passed by the Magistrate, Section 19(1) (c) makes it clear that the Magistrate may pass a residence order, on being satisfied that domestic violence has taken place, and may restrain the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides. This again is a pointer to the fact that a residence order will be toothless unless the relatives, which include female relatives of the respondent, are also bound

by it. And we have seen from the definition of "respondent" that this can only be the case when a wife or a common law wife is an aggrieved person, and not if any other woman belonging to a family is an aggrieved person. Therefore, in the case of a wife or a common law wife complaining of domestic violence, the husband's relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them. But in the case of a mother-in law or sister-in-law who is an aggrieved person, the respondent can only be an "adult male person" and since his relatives are not within the main part of the definition of respondent in Section 2(q), residence orders passed by the Magistrate under Section 19(1) (c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.

When we come to Section 20, it is clear that a Magistrate may direct the respondent to pay monetary relief to the aggrieved person, of various kinds, mentioned in the Section. If the respondent is only to be an "adult male person", and the money payable has to be as a result of domestic violence, compensation due from a daughter-in-law to a mother-in-law for domestic violence inflicted would not be available, whereas in a converse case, the daughter-in-law, being a wife, would be covered by the proviso to Section 2(q) and would consequently be entitled to monetary relief against her husband and his female relatives, which includes the mother-in-law.

When we come to Section 26 of the Act, the sweep of the Act is such that all the innovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affecting the aggrieved person and the respondent. The proceeding in the civil court, family court or criminal court may well include female members of a family, and reliefs sought in those legal proceedings would not be restricted by the definition of "respondent" in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court or criminal court.

It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family. This anomaly again makes it clear that the definition of "respondent" in Section 2(q) is not based on any intelligible differentia having any rational relation to the object sought to be achieved by the 2005 Act. The restriction of such person to being an

adult male alone is obviously not a differentia which would be in sync with the object sought to be achieved under the 2005 Act, but would in fact be contrary to it.

Adult vis-à-vis Minor

Also, the expression "adult" would have the same effect of stultifying orders that can be passed under the aforesaid sections. It is not difficult to conceive of a non-adult 16 or 17 year old member of a household who can aid or abet the commission of acts of domestic violence, or who can evict or help in evicting or excluding from a shared household an aggrieved person. Also, a residence order which may be passed under Section 19(1)(c) can get stultified if a 16 or 17 year, all of which would only lead to the conclusion that even the expression "adult" in the main part is Section 2(q) is restrictive of the object sought to be achieved by the kinds of orders that can be passed under the Act and must also be, therefore, struck down, as this word contains the same old relative enters the portion of the shared household in which the aggrieved person resides after a restraint order is passed against the respondent and any of his adult relatives. Examples can be multiplied discriminatory vice that is found with its companion expression "male".

ARTICLE 14 OF THE CONSTITUTION, DOCTRINES OF SEVERABILITY AND READING DOWN/UP

Article 14- Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Article 14 is in two parts. The expression "equality before law" is borrowed from the Irish Constitution, which in turn is borrowed from English law, and has been described *in State of U.P. v. Deoman Upadhyaya* (1961) 1 SCR 14, as the negative aspect of equality. The "equal protection of the laws" in Article 14 has been borrowed from the 14th Amendment to the U.S. Constitution and has been described in the same judgment as the positive aspect of equality namely the protection of equal laws. Subba Rao, J. stated:

> *"This subject has been so frequently and recently before this court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows: All persons are equal before the law is fundamental of every civilized constitution. Equality before law is a negative concept; equal protection*

of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made."

The Court dealt with several cases cited before it by both sides on Article 14, reading down, and the severability principle in constitutional law viz. *Lachhman Dass v. State of Punjab,* (1963) 2 SCR 353; *D.S. Nakara v. Union of India,* (1983) 1 SCC 305; *Re: Special Courts Bill,* (1979) 2 SCR 476; *Maneka Gandhi v. Union of India,* (1978) 2 SCR 621; *Rattan Arya and others v. State of Tamil Nadu and another,* (1986) 3 SCC 385;*Subramanian Swamy v. CBI*, (2014) 8 SCC 682; *Union of Indiav. N.S. Ratnam,* (2015) 10 SCC 681)

In *Subramanian Swamy* v. *CBI* (supra) a Constitution Bench of this Court struck down Section 6A of the Delhi Police Special Establishment Act on the ground that it made an invidious distinction between employees of the Central Government of the level of Joint Secretary and above as against other Government servants. This Court, after discussing various judgments dealing with the principle of discrimination (when a classification does not disclose an intelligible differentia in relation to the object sought to be achieved by the Act) from para 38 onwards, ultimately held that the aforesaid classification defeats the purpose of finding prima facie truth in the allegations of graft and corruption against public servants generally, which is the object for which the Prevention of Corruption Act, 1988 was enacted.

Then Supreme Court turned to the doctrine of severability - a doctrine well-known in constitutional law and propounded for the first time in the celebrated R.M.D. *Chamarbaugwalla v. Union of India,* 1957 SCR 930. The crux of the said doctrine is that if the offending portion of a statute can be severed without doing violence to the remaining part thereof, then

such a course is permissible. This judgment has been applied in many cases since then.

The doctrine of reading down in constitutional adjudication is well settled. Justice Sawant in a Constitution Bench Judgment of Supreme Court in *DTC v. Mazdoor Congress* 1991 Supp (1) SCC stated: "It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so".

In *B.R. Kapur* v. *State of T.N.*, (2001) 7 SCC 231, Supreme Court dealing with the provisions of the Representation of People Act, 1951 held that Section 8(4) opens with the words "notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)", and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be "reading up" the provision, not "reading down", and that is not known to the law."

THE HON'BLE SUPREME COURT HELD THUS

Relying upon the above judgments the Supreme Court held that the microscopic difference between male and female, adult and non adult, regard being had to the object sought to be achieved by the 2005 Act, is neither real or substantial nor does it have any rational relation to the object of the legislation. In fact, as per the principle settled in the Subramanian Swamy judgment, the words "adult male person" are contrary to the object of affording protection to women who have suffered from domestic violence "of any kind". The Supreme Court, therefore, struck down the words "adult male" before the word "person" in Section 2(q), as these words discriminate between persons similarly situate, and far from being in tune with, are contrary to the object sought to be achieved by the 2005 Act. Having struck down these two words from the definition of "respondent" in Section 2(q), the next question that arises is whether the rest of the Act can be implemented without the aforesaid two words. An application of the aforesaid severability principle would make it clear that having struck down the expression "adult male" in Section 2(q) of the 2005 Act, the rest of the Act is left intact and can be enforced to achieve the object of the legislation without the offending words.

Under Section 2(q) of the 2005 Act, while defining 'respondent', a proviso is provided only to carve out an exception to a situation of "respondent" not being an adult male. Once the words 'adult male' are struck down, the proviso has no independent existence, having been rendered otiose.

The Supreme Court, therefore, set aside the impugned judgment of the Bombay High Court and declared that the words "adult male" in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q), being rendered otiose, also stands deleted.

With the above observations, the appeal was disposed off accordingly.

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LIVE-IN RELATIONSHIPS IN INDIA: A SOCIO-LEGAL ANALYSIS

Shalini Tyagi*

ABSTRACT

The concept of live-in relationships is far different from that of marriage. Marriage is a lifetime commitment whereas a live-in relationship is an arrangement that individuals may enter into at will at any time and accordingly evade it at will too. Everyone enjoys emotional/physical bondage and Live-in relationships allow a person to achieve that security without going through the ritual of Marriage. 'Live in relationship' has been a focus of debates and discussions for quite some time, as it is viewed as a challenge on our fundamental societal system. Although live in relationship is not considered as an offense and there is no law until date that prohibits this kind of relationship. However, Courts often refused to make any kind of obligatory agreements between these unmarried couples as this could go against the public policy. While the court in a few cases granted the status of married couple to live in couples, in some cases court held that live in relationship does not cast any obligation on the couple, as the whole idea of live in relationship is to evade such bondage, evincing a penchant towards an obligation less, free society. Nonetheless, another thought that seek attention is that if the law lobs same kind of obligation with respect to maintenance and succession as exist in the institution of marriage, then why will a couple prefer to get into a live in relationship, when the basis of getting into live in relationship is to evade all bondages and entanglement.

INTRODUCTION

Live-in relation i.e. cohabitation is an arrangement where two people decide to live together on a long-term or permanent basis in an emotionally and/or sexually intimate relationship. The term is most frequently applied to couples who are not married. The legal definition of live in relationship is an arrangement of living under which the couple which is unmarried live together to conduct a long-going relationship similar as in marriage.[1]

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1 legal-dictionary.thefreedictionary.com/Live-in relationship/ Last visited on January 29th, 2012 at 12:30 PM, Delhi.

SOCIAL PERSPECTIVE

There is a famous quote that "marriages are made in heaven". This old dictum however does not hold well in the present context of our modified social scenario. The general outlook of our youth towards marriage is changing. But whether this changing trend is welcomed by the society at large, considering the stage of social development is still a big question mark. Right from the ancient times, marriage has been considered to be a sacred social institution. Its meaning is not only confined to the mixing of two souls but much more than that. Even in Ramayana, the act of lord Rama to adopt 'ekpatnivrata' and hence known as 'maryadapurushottam' is the most appreciated and idealistic concept. The character of Lord Rama is adored even today but restricted only to the certain pockets of traditional elite classes of Hindus.[2] Unfortunately due to pressures of modern living there is a visible inability to cope up with the responsibilities attendant upon a permanent relationship inherent in the institution of marriage. Today's youth are drifting away from the age old institution of marriage and prefer live-in-relationships, which they can continue till such time as they find it meaningful.

The institution of marriage has found recognition amongst Hindus in the Hindu Marriage Act of 1956. Customary law relating to marriage was codified for the first time. Section 5 of Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the following conditions are fulfilled namely:

1. Neither party has a spouse living at the time of the marriage.

2. At the time of marriage nighters party.

3. Is incapable of giving a valid consent, to it in consequence of unsoundness of mind; or though capable of giving a valid consent, has been suffering from mental I disorder of such a kind or to such an extent as to be unfit for marriage and the I procreation of children; or has been subject to recurrent attacks of insanity.

4. The bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage.

5. The parties are not within the degrees of prohibitive relationship, unless the custom or usage governing each of them permits of marriage

2 Daksha Sharma, *Live-in Relationships - A Threat to the Institution of Marriage,* A.I.R Journal 137 (2009).

between the two.

6. The parties are not sapindas of each other, unless the custom or usage governing each of them permits of marriage between the two.[3]

Marriage amongst Hindus is both a sacrament and a contract. It is a sacrament because there is emphasis on the performance of the customary rites and ceremonies including 'Saptapadi'. And it is a contract because this section deals with capacity of the spouses to enter into an alliance for a marriage. The bare fact of a man and a woman living as husband and wife does not at any rate normally give them the status of husband and wife.[4]

It would be pertinent to point out that the purpose and concept of marriage is procreation whereas it is an exception, rather than the rule that, progeny is contemplated in live-in-relationships. A man and a woman in such relationships will never consider procreation as a necessity.[5] A solemnised marriage gives legitimacy to the children born out of the marriage. A married couple gets a respected status in the society and are considered to be its responsible citizens. Since the time immemorial the institution of marriage epitomises love, tolerance, patience, responsibility and concern. It, in turn paves - the way to another important social institution called 'Family'. Therefore, it is considered to be one of the pillars of the society whereas live-in-relationship is a transient arrangement which has emerged in the modem age wherein a couple stays together only as long as they wish. This practice has found favour with the large sections of our society who want to live-in accordance with their own whims and fancies without making compromises and adjustment by its very nature a live-in-relationship temporary and since these relationships are temporary in nature, they are bound to break up even from its inception due to lack of commitment. Also the concept live-in relationship is not an accepted practice in our society. Surely therefore the commission of such an act would strain the relationship of an individual with his/her parents and the community.[6]

Although, in today's era women have achieved an independent status in the society but the fact cannot be denied that they are still way behind when compared with their male counterparts who still play a dominant

3 Section 5 of The Hindu Marriage Act, 1956.

4 Ramesh Menon, *Securing Live-In Relationships,* INDIA TOGETHER (Nov. 16, 2008)

5 Ankita Anand, *The Complete Guide to Live-In Relationships In India,* QUARTZ (Nov., 28, 2014) https://qz.com/303608/the-complete-guide-to-live-in-relationships-in-india/

6 Caesar Roy, *Emerging Trend of Live-in Relationship in India – A Critical Analysis,* CLJ 44 (2012).

role in a marriage relationship, their unruly behaviour and the social dogmas. The social status of women in India is not so strong that they can indulge in such casual live-n-relationships. They would be looked down upon and would face social criticism everywhere. So this practice of live-in-relationships threatens the security and stability of women in India. The sole motive of the individuals involved in such relationships is to experience the pleasure but not pain; whereas contrary to this, marriage encourages long term emotional investments in the relationship and towards the society. As started by Barnett Brickner, a social analyst- "success in marriage does not come merely through being the right mate". Therefore in comparison with the sacred bond of heavenly wedlock, live-in relationship suffers from myriad flaws and faults.

Live-in relationships also endorse bigamy. For instance *Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others*,[7] here Rajendra Prasad, the person with whom plaintiff was living in was already married. While the court recognised the right of cohabitation of the plaintiff, what about the right of the wife of the person with whom plaintiff was cohabiting. The question that seeks an answer with the elevation of live in relationship is what will be the status of wife, if a person who is in live in relationship is already married as law also seek to protect the right of live in partner under statutes like Protection of Women from Domestic Violence Act, 2005. The recommendations of Law Commission, Malimath Committee is to recognise live in partner as wife in case of live in relationship of reasonably long time. The attitude of Apex Court towards such relation also evinces their alacrity in recognising live in relationships. Along with these, the suggestions to include live in female partner under the provision given in Section 125 of Cr.P.C. ends up equating the status of live in female partner and wife.

This promotes bigamy, as the person who is getting into live in relationship might be already married. The position of the wife is disadvantageous in such situation as court on the one hand is giving all the rights of wife to live in female partner, while on the other hand it prohibits bigamy. Law is ambiguous and disadvantageous for the weaker sex and is not being beneficial to anyone. While the right of legally wedded wife remains at stake, the right of live in female partner too does not become secure.

Even if rights of maintenance etc are provided to the live in female partner, there is no guarantee that she can actually avail those rights. Marriages grant social recognition, but there is no proof of live in relationship; a

7 AIR 2001 All. 254

person can easily deny the fact of live in relationship to evade liability. In sum and substance the rights of woman remains precarious.

When we talk about the after math of a live in relationship, the rights and liabilities of partners is deficient of delineation. And it's unclear to understand the rights and liabilities of such partners after separation or the death of one of the partner.[8] There is no law of succession and maintenance that mentions the stipulation that protects the right of such live in couples.[9]

Such relationships are fragile and can be dissolved any moment, there is no obligation and bondage, legal position with respect to live in relationship does not portray a discernible image. Live in relationship sponsor bigamy and adultery while posing a threat to the entire fabric weaved out of values and morals on which the Indian Society stands.[10]

JUDICIAL PERSPECTIVE

After analyzing the changing social trends in the attitude of the individuals, the judiciary has sought to provide shelter to the women involved in such relationships. The first move was made by defining the 'Domestic Relationship' in an act as a relationship between persons who live or have at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family.[11] As such this act has provided a firmer ground to those women who are involved in such relationships and are prey of domestic violence inflicted by their male partners. Further, the Supreme Court of India has held that by virtue of Section 114 of the Evidence Act,[12] the Courts can raise a presumption that the partners in a live-a-relationship are married to each other. The decisions of the Honourable Supreme Court of India with the relevant paragraph which have laid down the guiding principle are:

Madan Mohan Singh and Ors. v. *Rajni Kant and Anr.*,[13] the Court in para 21, has relied upon a decision reported in AIR 1992 SC 756 where it was

8 Srishti Shrivastava, *Live In Relationship – Review and Analysis,* https://www.scribd.com/document/100191621/Live-in-Relationships-Review-and-Analysis

9 Richardson David G, *Family Rights for Unmarried Couples,* Kansas Journal of Law and Public Policy, p. 34.

10 Universal's, *Guide to Judicial Service Examination* 41 (8th ed.).

11 Section 3(f) of the Domestic Violence Act. 2005.

12 Section 114 of the Indian Evidence Act says: *"The Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common."*

13 (2010) 9 SCC 209.

held that if man and woman are living under the same roof and cohabiting for number of years, there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate. And thereby concluding at para 22 has held that that the live-in-relationship if continued for such a long time, cannot be termed in as 'walk-in' and 'walk-out' relationship and there is a presumption of marriage between them which the appellants failed to rebut.

OBLIGATION OF BURDEN OF PROOF

As the Honorable Supreme Court has taken the support of Section 114 of the Evidence Act,[14] therefore it is important to analyse the scope and legislative intent of Section 114. It can be said that the Section 114 helps the Court in deciding, on whom the burden of proof, in certain situations is. A presumption of facts is to be raised to assist the Court for determining as to the burden of proof in a set of circumstances. As the Court can draw certain inferences either on basis of cumulative conclusion of circumstances or on a single circumstance, it would be in a position to fix up the responsibility on one or other party in case with the burden to reverse such inferred presumptions. It is needed to be noted here that precaution has to be taken that the presumption under this section may not be so stretched as to permit suspicion taking place of proof. However, in case of live-in-relationship the raising of a presumption that the existence of long relationship is equivalent to marriage or rather is marriage is very dangerous and destructive of the evidentiary jurisprudence as the presumption in favour of the person who is contending the existence of a relationship when under the Evidence Act under Chapter VII vide Section 102,103 and 104 provides that the burden of proof lies on the person who either asserts a fact or wants an order or judgment in his favour.[15]

Now, therefore if presumptions are raised then just because the conduct in some aspects (like living together) is similar to the human conduct after marriage, on basis of that impression, the entire form of relationship would also be considered to be a marriage and this would be in violation the principles of burden of proof as under the principles of burden of proof, as the burden of proof lies on the party who asserts a fact, failing or wants the judgment or order in his favour on the basis of which the Court would pass the order against the other party.

14 *supra* note 12.

15 MITRA A.C., THE HINDU LAW OF INHERITANCE, PARTITION, STRIDHAN AND WILLS p.56 (2009, reprint).

However, if such presumptions are taken then the theory of burden of proof is utterly trampled and on basis of mere contemplation that the partners might be married to each other the Court would be presuming a marriage , instead of requiring the party asserting a fact to fulfill his obligation under law and prove that fact.[16]

Further by raising such presumptions under Section 114, it can noticed that there is a conflict with the provisions of burden of proof which results into violation of the principles harmonious construction, which is the thumb rule to interpretation of any statute. An interpretation which makes the enactment a consistent whole should be the aim of the Courts and a construction which avoids inconsistency or repugnancy between the various sections or parts of the statute should be adopted. The Courts should avoid "a head on clash", in the words of the Apex Court, between the different parts of an enactment and conflict between the various provisions should be sought to be harmonized. It is a settled rule that an interpretation which results in hardship, injustice, inconvenience or anomaly should be avoided and that which supports the sense of justice should be adopted. The Court leans in favor of an interpretation which conforms to justice and fair play and prevents injustice.

DIVERGENCE FROM REALISM

Another important aspect that needs to be paid attention to is that notwithstanding the clear intention of the parties, that they never wanted to have relationship of married couple by virtue of marriage and therefore only they have preferred such a relationship, which is in contradistinction to marriage, a presumption is raised that there is a marriage between them just because of the long cohabitation between. In this context it is important to note that the Honourable Supreme Court held in case of *Kishorilal v. Chaltibai*[17] that when once facts are ascertained, presumption arising from conduct cannot establish a right which the facts themselves disprove.

In the case of live-in-relationship one fact is very clear that the partners in the relationship are not married to each other but they are only cohabiting with each other. It can be even said further that in fact the partners in order to avoid marriage are into the live-in-relationship. Therefore it can be said if such a presumption is raised which presumes a relationship not intended by the parties to be a marriage, in fact to be a marriage, it would not only be against the settled principles and tenets of law but also contradictory to rational thinking as the partners to the relationship are granted the status,

16 http://www.lawisgreek.com/live-in-relationships-supreme-court-verdict/.
17 AIR 1953 SC 441.

to avoid which the partners of the relationship have preferred the live-in- relationship. It is likewise totally illegal to confer upon the parties the status which they have impliedly denied by the express acts, omissions and conduct which have in their nature and form constituted the live-in-relationship and not marriage. Thus following the guiding principle that once facts are known there is no scope for presumption, a presumption should not be raised in favour of marriage as that presumption would itself be against the facts which clearly and cogently show that the parties are in relationship of marriage or rather they never intended to be in a relationship of marriage. Further raising presumption of existing long live-in-relationship being marriage is also not acceptable as before such a presumption is raised, it is necessary that the conditions of a valid marriage stood satisfied in the sense such a marriage was not prohibited under law. Under Hindu Law when a marriage is not solemnized in accordance with the customary rites and ceremonies it is not valid while in regards to Muslim Law, the Privy Council said that Nikah (marriage) in Muslim Law is a religious ceremony. Now the live-in-relationship does not fulfill these requirements of performance of the ceremonies which is necessary under personal laws to effectuate a marriage and as the it is settled principle of law that the non-performance leads to a marriage being void i.e. no marriage, it can be said that the live-in-relationship is no marriage as the same is not able to meet with the prerequisites of a marriage and therefore a presumption totally contrary which is not in compliance with the conditions of marriage cannot be raised. An apt reason for not raising a presumption of marriage is found in the judgment of the Honourable Supreme Court in the matter of *Gokal Chand v. Pravin Kumari* [18] where it was held that continuous cohabitation of a man and woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken or destroy that probability the court cannot ignore them. It can be said that the above referred authority fortifies the proposition that why such a presumption should not be caused. Now, when a presumption under the present section is to taken, a caution is put forth that if there are any circumstances which weaken or destroy then the presumption must not be taken.[19] If this is read in context to live-in-relationship then it can be said that the presumption of the long live-in-relationship being a marriage, should not be taken as every feature of the relationship is different from

18 AIR 1952 S.C. 231(15).

19 *A Misinterpretation & Un-Called Construction Of Section 114 Of Evidence Act Vis-À-Vis Live-In-Relationship* LEGAL SERVICES INDIA (Jun. 21, 2011) http://www.legalservicesindia.com/article/print.php?art_id=721

the features of a marriage and therefore all of these would features render circumstances which weaken or rather destroy the probabilities which because of certain similar elements arise and therefore raising such presumption would result into presuming something which the majority of the circumstances and facts surrounding the situation disapprove.

CONCLUSION

Though court has shown willingness in recognising the rights of women in such relationships, they are still not very certain. Like Protection of Women from Domestic Violence Act, 2005 recognises the right of a woman in such relationship; but one of the biggest drawbacks of this Act is that under the garb of protecting harassed women, it has also becomes a powerful tool in the hands of women to harass men and strip them off all their right. The Act can and has actually worsen the domestic problems leading to breakdown marriages as women have been found tempted with going to Courts/Police after trivial fights taking place between them and their partners. The Act not only gives sweeping powers to females but also takes away all the rights of men. While it imposes a lot of responsibility on men, it gives lots of rights to women without fixing any responsibility on them. There isn't any provision in the Act that will punish a woman who misuses the law.[20] While the presumption of marriage in case of live in relationships is 'rebuttable',[21] heavy burden lies on the person, who seeks to challenge such a relationship to prove that no marriage took place between them. As far as the right of child born under such relationship is concerned, under Hindu Marriage Act, 1955 such child will be legal, yet there is no such law apart from HMA, 1955 that endorses presumption of legality of child born out of live in relationship.[22] "Courts tend to take a different stand on this situation from time to .time: A baby born to a couple, who are not married, is called a love-child. Such children are treated as illegitimate, and denied any legal rights from the father's side".[23] It's time for the law to give clarity on the status of these relationships. But with the different judgments, this sort of ad-hoc approach, is creating confusion and causing harm to the legal fabric rather than sorting out the issue. From a rights perspective, choosing live-in over marriage is a risky business. Should things go wrong, it is unclear whether children from the relationship will have any inheritance rights or whether either party will

20 Satya Prakash, *Supreme Court Finds Fault with Domestic Violence Act* (Dec. 19, 2006) http://www.hindustantimes.com/india/sc-finds-fault-with-domestic-violence-act/story-dYAv1ekeWsBCq6qko3nhAI.html

21 *Definition of Capable of Being Rebutted,* http://www.thefreedictionary.com/Rebuttable/

22 http://www.india-forms.com/fourm_posts.asp?TID=104580/.

23 Gyanendra Misra, Advocate, Delhi High Court.

have any legal protection.[24]

While case by case basis court is adumbrating the law with regard to live in relationships, it has to be kept in mind that when law is giving legal sanction to live in relationships, it does not impede upon the institution of marriage as many a times men who get into live in relationship is already married. If live in relationships are recognised prima facie then it may implicitly promote bigamy. Law should have a discernible stance with respect to live in relationships and the aftermath of such relations. It cannot be stated marriage and live in relationship as same. People marry for reasons such as legal, social, emotional, economical, spiritual and religious. The institution of marriage came into being as societies wanted a secure environment for the perpetuation of the species, a system of rules to handle the grant of property rights and protection of bloodlines. In India, marriage is an institution preferred over any other form of union, whose significance cannot be diminished.[25] In case of arranged marriage, despite increasing divorce rate, at least there is some emotional, societal, and family pressure that prevents them-from taking hasty decision of divorce.

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24 New South Wales. Parliament: Legislative Council. Standing Committee on Social Issues, *Domestic Relationships: Inquiry Into de Facto Relationships Legislation.*

25 http://theviewspaper.net/the-iristitution-of- marriage- in-the-twenty-first-century/

LAWS RELATING TO TRADEMARK

Aastha Kalia*

ABSTRACT

In view of developments in trading and mercantile practice, increase in globalization of trade and industrialization, the need to encourage investment flow along with transfer of technology, and the need to simplify and harmonize trade mark management system it was necessary to bring out a legislation on the protection of trade mark, as a result Trade Mark Bill was introduced in the Parliament. The Trade and Merchandise Mark act was passed in the year 1958 and had been amended a number of times but in the view of extensive amendment it was thought fit to repeal and re-enact the Act to incorporate the necessary changes. The Trade Mark Bill after being passed by both the houses of the Parliament received President's assent on 30thDecember 1999 as The Trade Mark Act, 1999 which came into force on 15th September 2003 extending to the whole of India.

INTRODUCTION

In this era of hard core competition in market of goods and services, Trademarks have become a significant aspect for gaining advantage over the rivals in terms of sale and goodwill. The consumer choice is now heavily influenced by a Trademark due to the trust and goodwill associated with it. The necessity to protect Trade Marks has increased due to globalization and to curb the unfair trade practices. Companies spent enormous amount of money for the promotion of their goods and when the products and brand names become well-known, the undersized businessmen and public try to imitate the same to misuse the goodwill and reputation established by the reputed companies. Therefore, the brand name becomes famous and more often the product itself becomes synonym for the brand name.

One of the chief purposes of a Trademark is distinguishing goods and services from one another. It is important to protect a Trademark proprietor from any unauthorized use of his Trademark by any other person not entitled to use it. To protect the proprietor and the consumers the Trademark Act 1999 provides for infringement proceedings. Before

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getting into details, let us go through a brief introduction of Trademark and its functions. Trademark is mainly visually susceptible mark which is applied on any goods or services for distinguishing them from one another. Since it consists of a mark, the mark can be a device, name, signature, word, letter or any combination of colors thereof. Any mark which can be graphically represented and capable of distinguishing goods and services can fall under the definition of Trademark.[1]

The primary function of any trademark is to differentiate the goods and services of one proprietor from one another. They act as an identity card for the goods and services on which they are applied. Another important function of Trademark is that it identifies the source and quality of the commodity on which it is applied. Advertising is another important function performed by the Trademark which helps in increasing goodwill of the proprietor and expanding the customer base.

TRADEMARK: AN EXCLUSIVE RIGHT

An exclusive right is given to a Trademark proprietor to use Trademark in exclusion of others in respect of goods and services in which it is registered. Exclusive is where no one other than the registered proprietor of the Trademark can use it and earn its benefits. If someone else uses it without obtaining the prior authorization of the registered proprietor it constitutes an infringement and the registered proprietor has every right to claim for damages and restraining the unauthorized user from using his registered Trademark. The exclusive right to the use of Trademark is subject to conditions and limitations to which the registration is subject to.[2] The exclusive right is one for the use of the trademark in respect to the good for which the trade mark is registered.

A PREREQUISITE FOR INFRINGEMENT PROCEEDINGS

One must know that a proprietor id given protection against infringement only for a registered Trademarks. Section 27(1) of the Trade Marks Act 1999 clearly states that *no person shall be entitled to institute any proceedings or recover any damages in respect of an infringement of an unregistered trademark. Infringement proceedings can be invoked in cases of registered trademarks only.* In case where infringed trademark is not registered, the remedy available is passing off which is a common-law, whereas, infringement is a statutory remedy. An infringement suit can also be brought by a party whose application for registration of a trademark is

1 Section 2(1)(zb) of The Trade Marks Act 1999.
2 Section 28of The Trade Marks Act 1999.

still pendant. In *Mumtaz Ahmed v. Pakeeza Chemicals*[3] it was said that the plaintiff having applied for registration of a trademark prior to filing of suit, has the right to bring the suit for infringement of trademark. This means that pending of registration of a trademark cannot be taken as a defense.

The onus to prove lies on the person who alleges the infringement, the proprietor must prove his ownership followed the essential features of his trademark that have been copied and misused by the other person. Infringement is a continuing act of infringement gives rise to a fresh period of limitation from the date of each infringement. Section 29 of the Trademarks Act 1999 provides the statutory conditions which constitutes the infringement of a registered trademark.

DECEPTIVE SIMILARITY

The most vital issue that must be considered by the court is whether or not the impugned trademark is identical or deceptively like the registered trademark. Section 2(h) of the Trademarks Act 1999 defines deceptively similar as a mark if it so nearly resembles that other mark as to cause confusion or deception. The view of the probable customer must be taken into account. Whether a mark is capable to deceive or confuse the potential customer is a factual question and depends from case to case. In *Amritdhara Pharmacy v. Satya Deo Gupta,*[4] where the registration of the name 'Lakshmandhara' for medicinal purposes was opposed by the proprietors of the trade name 'Amritdhara' which was already registered in respect of similar medicinal purposes as claimed by the other party. The court held that since the Act does not lay down any criteria for determining deceptive similarity, the test for deceptive similarity should be applied from the point of view of a man of average intelligence and imperfect recollection. It was held in this case that the above two names are similar enough to cause confusion to a man of average intelligence.

In M/S Dyechem Ltd. V. Cadbury (India) Ltd[5] the Honorable Supreme Court emphasized on the dissimilar aspect as a test then the similar aspect as which were taken as test in the earlier case. The plaintiff started business in 1988 in four products like potato, chips, potato wafers, and corn-pops. In January1989 it started using the trade mark PIKNIK. It applied for registration in the year 1988. Respondent was found using the mark 'PICNIC' for chocolates. The appellant filed the suit of infringement

3 2003(26) PTC 567
4 AIR 1963 SC 449
5 (2000) 5 SCC573

of trade mark temporary injunction. Trial Court held that the two are Deceptively Similar Mark. High Court reversed of the judgment the trial court and held that the two marks are different in their appearance and word composition. Supreme Court held the view of the High Court and chooses to take the following grounds to decide the case

1. That whether there was any special aspect of the common features which had been copied.

2. That the mode in which the parts where put together differently, i.e. whether dissimilarity of the part or parts was enough to make the product dissimilar.

3. That whether, when there were common elements, should not pay more regard to parts which were not common while at the same time not disregarding the common parts?

Section 29(9) places on statutory footing the concept of phonetic similarity. It states that where the distinctive elements of a trademark include words, the trademark may be infringed by the spoken use of the words. The word "shapola" was taken phonetically similar to the trade name "saffola" and injunction was granted to the plaintiff.,[6] the phonetic similarity plays an important role in deciding the deceptive similarity between trademarks

CIVIL REMEDIES IN TRADEMARK:

1. Injunction

2. Damages

3. Accounts and handing over of profits

4. sealing of infringing material / accounts

5. Application under order 39 rule 1 & 2 of the CPC for grant of temporary or ad interim ex-parte injunction

In case of infringement or passing off trademark, the proprietor of the trademark can also file a criminal complaint. Under the Provisions of the Trade Marks Act, 1999, the offences are Cognizable, meaning there by that police can register an FIR (First Information Report) and prosecute the offenders directly.

6 *Bombay Oil Industries Pvt. Ltd v. Ballarpur Industries ltd.* (1988) 35 Del LT 64 (Del)

CONCLUSION

The legislature has tried to strike a balance between private interest and public interests by combining the infringement proceedings and providing limitations to the power of the exclusive right of the registered trademark holder by providing certain exceptions to it. There can be no clear-cut formula for finding deceptive similarity regarding trademarks and infringement would depend upon case to case. Similarly, the limits on registered trademarks have to be applied carefully keeping in mind the interest of the owner of the trademark and general interest of the public.

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MARITAL RAPE: AN INFIRENGMENT OF HUMAN RIGHT

Kritika Goswami Ahuja*

ABSTRACT

Despite the increasing recognition of the term marital rape, the work in this area remains sparse. In this article an attempt is made to bring out the current state of the marital rape. The article contains the brief introduction about what does the topic marital rape means. Later an attempt is been made to bring out the cause and legal position of the term marital rape in our Indian society. Thereafter the human rights of the victim is been discussed. Finally the article contains the conclusion. Through this article a seriousness of the topic marital rape is brought into light, which is considered as senseless by various people in our society.

INTRODUCTION

India a place where a female child is prayed like the goddess "NavDurga" and when she gets married, she is prayed like goddess "Laxmi". Then why is she being subjected to force and violence against her will. The term "Marital rape" is not new to our society but it's a term which is neglected in our society. The term rape was originated from the term "*Raptus*"[1], which was used for the violence committed on person. Therefore, the term Marital Rape is defined as spousal rape or a rape committed by one's partner.

Most of the people in our society consider it senseless under a belief that no one can be raped by one's own spouse if the marriage is legal. The various people have various viewpoint on the said term for example advocates might consider it as challenging case, social activists might consider as violence against one's right to life with dignity and so on. The confusion arises because of the reason that the nature of crime is unclear and it is not consider as a crime of grave nature if compared with the like rape.

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1 *Marital rape: A Great Denial of Human Rights,* LAWS MAGAZINE (Dec. 23, 2016) http://lawzmag.com/2016/12/23/marital-rape-a-grave-denial-of-human-rights/

However, it can be said that it is same as the offence of rape the only difference is that in the offence of Rape the offender is a stranger instead of one's own spouse. Therefore it can be said that marital rape is a license to rape which is given to the spouse.

It is shocking to see that in the National Crime Records Bureau data, Union minister of state for women and child development Krishna Raj said in the Lok Sabha said that 700 cases pertaining to rape by live-in partners or separated husbands were filed in 2015. However, these are those records which are being reported but there are many cases which remain unreported due to the presence of the marital rape exemption and the absence of judicial consciousness on the subject.

INDIAN LEGAL POSITION

India has been providing a defence to the offender of marital rape. The following are the evident example of the same. The first is that the High Court of Delhi in *Harvinder Kaur v. Harmander Singh*[2] stated that - "Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once intimate and delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond".

Again on February 2015,[3] the Supreme Court rejected the plea of a woman whose husband recurrently perpetrated sexual violence upon her person. The Bench consisting of Justices AR Dave and R Banumathi stated - "You are espousing a personal cause and not a public because...This is an individual case", thus stating that rape can only considered a crime in the public realm. Again in 2016[4] a controversial statement made by Maneka Gandhi stated that- "Marital Rape as understood internationally cannot be suitably applied in the Indian context due to various reason like level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament." However, with the above statements made by the prominent persons of India it can clearly be said that the laws of India are providing

2 AIR 1984 Del 66.

3 Kalpana Sharma, *Why Isn't Marital Rape a Criminal Offence in India ?,* TIMES OF INDIA (Sep 9, 2016) http://timesofindia.indiatimes.com/life-style/relationships/love-sex/Why-isnt-marital-rape-a-criminal-offence-in-India/articleshow/54223996.cms

4 *Ibid.*

a shield to the offender of the offence of marital rape. Further, as per the exception lay down in section 375 of IPC, 1860, it is written that sexual intercourse by man with his own wife not being under 15 years of age, does not amount to rape.[5] Hence, it clear that in Indian laws basic human rights of women is denied and is subjected to her marital status.

DENIAL OF HUMAN RIGHTS IN MARITAL RAPE[6]

It's a myth that a rape committed by one's partner is not rape if they are legally wedded. A rape will always be rape if it's not consented. The marital rape often leaves women not only in physical pain but also she is affected mentally. The united nation declaration of human rights (UDHR) is the International standards which have provided the people with certain rights by birth but the offence of marital rape violates the human rights like right to dignity, right to equality and also right to health as per UDHR regulations. Further, it is not required to explain as to how human rights are violated as it is well evident by the nature of offence itself.

CONCLUSION

The term rape is used make us understand the plight of the victim hence marital rape is not only a term but it's a heinous event which should be subject to punishment. The Human rights are the basic rights which a person gets by birth and which cannot be taken away. However, marital rape violates those basic rights of a person which is possessed by him or her by birth. It can be said that if a female is not safe in her own house, then how she will be protected outside. A woman when gets married completely trusts her husband for all the things in her new life be it protection, happiness and economic security but when such trust is broken and becomes such a harsh reality to live with someone or for trusting someone then such thing will lead to a shattered life. Therefore, it's the duty of each country to protect its citizen against such offences. Further, marital rape should be considered an offence in Indian laws and there should be a rigorous punishment against such crimes so that the victims of such a heinous event can get justice.

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5 Roli Shrivastava, *Mumbai Marital Rape: The Statistics Show How Real It Is,* THE HINDU (Sept. 16, 2016) http://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece

6 *supra* note 1.

ROLE OF PROTECTION OFFICER UNDER D.V. ACT, 2005

Nidhi Sharma* and Dr. Kanwal Sapra**

ABSTRACT

An officer appointed by the State Government under sub-section (1) of section 8 will be known as the Protection Officer. While acting or purporting to act in pursuance of any provisions of this act or any rules or orders made under it, the PO's are deemed to be public servants within Section 21 of the Indian Penal Code (IPC). The State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act. The Protection Officers shall as far as possible be women and shall possess such qualifications and experience as may be prescribed. The terms and conditions of service of the Protection Officer and the other officers subordinate to him shall be such as may be prescribed.

INTRODUCTION

Protection Officers nominated by the state government under the Protection of Women from Domestic Violence Act for conducting enquiries into cases of violence should play a pivotal role in resolving issues with a positive approach. Most Indian women, despite preferring complaints, are not inclined to break their marital bondage. Protection Officers should exercise their responsibility carefully and arrange for additional sittings between affected persons and their spouses, observed Hemant Laxman Gokhale, Chief Justice of the Madras High Court.[1]

Inaugurating the day-long workshop on the Protection of Women under Domestic Violence Act 2005 organized jointly by the Tamil Nadu Social Welfare Board and the Women's Integrated National Development Trust

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1 Chief Justice, Madras High Court.

here on Sunday, Justice Gokhale said that Protection Officers should ascertain the gravity of the problem and take efforts to extend maximum assistance to the woman.

He said that violence incidents warranted case-specific orders such as grant of immediate maintenance, 'residence order' directing the in-laws or spouse to allot a separate room for a woman vacating house under duress. He also suggested that the orders for sanctioning subsistence allowance, normally sanctioned for industrial workers placed under suspension, could also be considered. Justice Gokhale said that many families may not prefer to enter the portals of a court and the ambience of a court may not be conducive for the family members, especially those with children. He hoped that the workshop, the second of its kind in the state, would address the issues in resolving the domestic violence-related cases to a great extent.

Justice G.M. Akbar Ali, Judge of the Madras High Court, said that the workshop with joint participation by all the stakeholders - the police, advocates, judicial officers and counselors would go a long way in arriving at some clarification on procedures thereby ensuring an expeditious solution to domestic violence cases. Separate trainings organized for stakeholder did not yield the desired results due to various interpretations of the provisions of the Act. Early settlement of cases would keep the families intact.

Justice B. Rajendran, Judge, Madras High Court, underlined the need for a co-ordinated effort by the stakeholders. Rokkiah Malik, Chairperson, State Social Welfare Board, said the Act had extended protection to women against domestic violence. M.P. Nirmala Rani, Commissioner for Social Welfare, said that the state government has planned to nominate one Protection Officer for every court jurisdiction. She sought guidelines for appointment of Assistant Public Prosecutors for handling cases under these civil disputes which simultaneously involved criminal proceedings. [2]

Protection Officers nominated by the state government under the Protection of Women from Domestic Violence Act for conducting enquiries into cases of violence should play a pivotal role in resolving issues with a positive approach.

2 *Role of Protection officers in Resolving Domestic Violence Cases,* THE HINDU (Jan.3, 2010) http://www.thehindu.com/news/cities/Tiruchirapalli/Role-of-Protection-Officers-in-resolving-domestic-violence-cases-emphasised/article16835589.ece

Most Indian women, despite preferring complaints, are not inclined to break their marital bondage. Protection Officers should exercise their responsibility carefully and arrange for additional sittings between affected persons and their spouses, observed Hemant Laxman Gokhale, Chief Justice of the Madras High Court. Inaugurating the day-long workshop on the Protection of Women under Domestic Violence Act 2005 organized jointly by the Tamil Nadu Social Welfare Board and the Women's Integrated National Development Trust here on Sunday, Justice Gokhale said that Protection Officers should ascertain the gravity of the problem and take efforts to extend maximum assistance to the woman.

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3 *Ibid.*

DUTIES AND FUNCTIONS OF PROTECTION OFFICERS

1. It shall be the duty of the Protection Officer-

i. To assist the Magistrate in the discharge of his functions under this Act;

ii. To make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;

iii. To make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;

iv. To ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made;

v. To maintain a list of all service providers providing legal aid or counseling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;

vi. To make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;

vii. To get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

viii. To ensure that the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

ix. To perform such other duties as may be prescribed.

2. The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.[4]

APPOINTMENT OF PROTECTION OFFICERS-

1. The State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act.

2. The Protection Officers shall as far as possible be women and shall possess such qualifications and experience as may be prescribed.

3. The terms and conditions of service of the Protection Officer and the other officers subordinate to him shall be such as may be prescribed.

INFORMATION TO PROTECTION OFFICER AND EXCLUSION OF LIABILITY OF INFORMANT

1. Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

2. No liability, civil or criminal, shall be incurred by any person for giving in good faith of information for the purpose of sub-section (1).

DUTIES OF POLICE OFFICERS, SERVICE PROVIDERS AND MAGISTRATE

A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person

1. of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act;

2. of the availability of services of service providers;

4 Protection of Women from Domestic Violence Act, 2005.

3. of the availability of services of the Protection Officers;

4. of her right to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987);

5. of her right to file a complaint under section 498A of the Indian Penal Code (45 of 1860), wherever relevant:

Provided that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

PROTECTION OFFICERS AND MEMBERS OF SERVICE PROVIDERS TO BE PUBLIC SERVANTS

The Protection Officers and members of service providers, while acting or purporting to act in pursuance of any of the provisions of this Act or any rules or orders made there under shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

The International Foundation for Protection Officers (IFPO) Board of Directors established and maintains a voluntary certification process called the Certified Protection Officers (post nominals: CPO) course, which is based on current and valid standards that measure competency in the practice of private security for Security Officers. The IFPO requires that all programs that offer a certification must be maintained by the individual through a re-certification process. Therefore the CPO certificate is valid for a period of two years, at which time re-certification must be achieved.

Qualified Certified Protection Officers can also obtain the designation of CPO Instructor (post nominals: CPOI). This is a designation that requires qualification and the proper credentials.

After 1998, when the Universal declaration for Human rights defenders passed, many International and Regional NGOs created a post for protection officers. The post is for expertise in Security and risk assessment officers who are responsible for safety of Human rights defenders.[5]

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

An Act to provide for more effective protection of the rights of women

5 *Certified Protection Officers*, https://www.revolvy.com/topic/Certified%20Protection%20Officer&item_type=topic

guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:-

Prefatory Note-Statement of Objects and Reasons:

1. Domestic violence is undoubtedly a human right issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. The Bill, inter alia, seeks to provide for the following:-

i. It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or

the female partner.

ii. It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

iii. It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

iv. It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

v. It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

5. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill.[6]

Short Title, Extent and Commencement

1. This Act may be called the Protection of Women from Domestic Violence Act, 2005.

2. It extends to the whole of India except the State of Jammu and Kashmir.

3. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. This law applies to every person in India, except in Jammu and Kashmir.

6 The Protection of Women from Domestic Violence Act, 2005, http://www.vakilno1.com/bareacts/domestic-violence/domestic-violence-act-2005.html

Definitions

In this Act, unless the context otherwise requires

a. "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

b. "child" means any person below the age of eighteen years and includes any adopted, step or foster child;

c. "compensation order" means an order granted in terms of section 22;

d. "custody order" means an order granted in terms of section 21;

e. "domestic incident report" means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person;

f. "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

g. "domestic violence" has the same meaning as assigned to it in section 3;

h. "dowry" shall have the same meaning as assigned to it in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961);

i. "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973(2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place;

j. "medical facility" means such facility as may be notified by the State Government to be a medical facility for the purposes of this Act;

k. "monetary relief" means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved

person as a result of the domestic violence;

l. "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

m. "prescribed" means prescribed by rules made under this Act;

n. "Protection Officer" means an officer appointed by the State Government under sub-section (1) of section 8;

o. "protection order" means an order made in terms of section 18;

p. "residence order" means an order granted in terms of sub-section (1) of section 19;

q. "respondent" means any [adult male]* person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:[Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;]*

r. "service provider" means an entity registered under sub-section (1) of section 10;

s. "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

t. "Shelter home" means any shelter home as may be notified by the State Government to be a shelter home for the purposes of this Act.

The Supreme Court has declared the bracketed portions as unconstitutional and should therefore consider to be deleted from this provision.[7]

7 Section 37 of The Protection of Women from Domestic Violence Act, 2005.

CONCLUSION

Thus from the above discussion it is clear that protection officer is an officer appointed by the State Government under sub-section (1) of section 8. Protection Officers nominated by the state government under the Protection of Women from Domestic Violence Act for conducting enquiries into cases of violence should play a pivotal role in resolving issues with a positive approach.

The Protection Officers and members of service providers, while acting or purporting to act in pursuance of any of the provisions of this Act or any rules or orders made there under shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

It shall be the duty of the Protection Officer.

a. to assist the Magistrate in the discharge of his functions under this Act;

b. to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;

c. to make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;

d. to ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 (39 of 1987) and make available free of cost the prescribed form in which a complaint is to be made;

e. to maintain a list of all service providers providing legal aid or counseling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;

f. to make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;

g. to get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

h. to ensure that the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

i. to perform such other duties as may be prescribed.

The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.

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THE MENACE OF FIXING IN GAME OF CRICKET-ISSUES, IMPLICATIONS AND THE ROAD AHEAD

Kanishka Pandey*

ABSTRACT

The obsession of people in India with the game of cricket is unprecedented. One can recall the grand reception that the team received after winning the inaugural T-20 world cup and the 2011 World Cup. Recent demand of an investigation on 14th July, 2017 by former Sri Lanka Test Skipper Arjuna Ranatunga into his country's 2011 Cricket World Cup final defeat against India makes it timely to review the match fixing law.

INTRODUCTION

"Eat cricket, Sleep cricket and drink cricket" holds true for the millions of fans in India. The obsession of people in India with the game of cricket is unprecedented. One can recall the grand reception that the team received after winning the inaugural T-20 world cup and the 2011 World Cup. The disruptions caused at Eden Gardens when India played Sri Lanka in the semi-finals of the world cup in 1996 and the remorse on the first-round exit of Team India at the World Cup 2007 are pointers. and the cricket fans sometimes give the impression that they are more fanatics than fans obliterating the thin line between a fan and a fanatic.

Recent demand of an investigation on 14th July 2017 by former Sri Lanka Test Skipper Arjuna Ranatunga into his country's 2011 Cricket World Cup final defeat against India makes it timely to review the match fixing law. Ranatunga, in a video posted on his Facebook page, said he was shocked by Sri Lanka's six-wicket defeat in the final at the Wankhede Stadium in Mumbai. He said players could not hide the "dirt" with their clean white cricket clothing.[1]

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1 *Arujna Ranatunga makes Match-Fixing Claims over 2011 World Cup India-Sri Lanka Final, DECCAN CHRONICLES,* http://www.deccanchronicle.com/sports/cricket/150717/arjuna-ranatunga-makes-match-fixing-claims-over-2011-world-cup-india-sri-lanka-final.html

Modern day game of cricket and its recorded history of records of more than 100 years developed players and officers of cricket into CEOs and cricket clubs started working as elite centers of money power and politics. Cricket in India involves huge flow of money and investment for three decades. Though match –fixing is only one of the ills of the game of cricket, but it surpasses every other thing in destruction of the game, so deserves the attention. Cricket needs serious regulation in all aspects of game.

Match fixing is not only against the game, but also against honesty in wagering or speculation. It is comparable to killing a person to prove one's astrology skills/ prediction of death. Or to organize man made destruction just to make a fiction novel saleable. Betters put their money on teams knowing the skills or performance of players or Bowlers. Spectators reach the stadium to see the skill of game and not exhibition match; a fixed match is like seeing a movie or TV show. Match fixing play a fraud with feelings of all sections of persons who meet any aspect of game.

There is no specific law dealing with match fixing in cricket. The paper the recommendations of Justice Mukul Mudgal Panel Report set up by Supreme Court after the spot fixing scam rocked the 2013 season of Indian Premier League. The salient features of the Prevention of Sporting Frauds Bill, 2013 shall be reviewed. This paper does not deal with aspects of game but looks at few instances of match and spot fixing in cricket and existing framework of penal laws in India in relation to this menace.

INSTANCES OF ALLEGED MATCH FIXING AND SPOT FIXING IN CRICKET

Dishonesty in sports is probably as old as sports itself. The commercialization of sports has widened the horizons of manipulations. The 'match fixing' in Indian cricket came to light when players like Ajay Jadeja, Mohd Azharuddin and Manoj Prabhakar were all charged with 'fixing' the matches. Another instance is when South African captain Cronje was charged with fixing One-Day International match against India in 2000. The police intercepted and released transcripts of a conversation between the South African captain and a bookmaker. Cronje later confessed to accepting money from bookies in exchange for match information and asking some players to underperform. He was banned for life by the South Africa Cricket Board.[2] In another instance Marlon Samuels, the West Indies batsman was charged with match-fixing in 2008

2 Other prominent South African players were also linked to the scandal, including Herschelle Gibbs and Nicky Boje.

for disclosing information about his team's tactics. He was banned for two years from all formats of the game but he maintains he was innocent.[3]

Three Pakistan cricketers were found guilty of their involvement in spot-fixing in a match against England in London in 2010. The team captain Mr. Butt and the two bowlers were found to have conspired to bowl no-balls at predetermined times in the game. The scandal came to light following a sting operation by the oldest celebrated British tabloid 'News of the World'. The three players were convicted by a U.K. court of cheating and conspiracy to obtain and accept corrupt payments. All three were jailed in U.K. prisons and banned from the game for long periods. Recently in 2013, three Indian cricketers- Ankeet Chavan, Ajit Chandila and S. Sreesanth have been suspended following allegations of spot-fixing in matches of Indian Premier League. All the instances were dealt with by ordinary laws as applied to actions and transactions in match fixing, but not under any law dealing with match fixing.

MEANING OF MATCH FIXING

Match fixing' has not been defined in any law. The 'Central Bureau of Investigation the top most investigation agency of India gave a Report on Match Fixing allegation. While investigating it defined 'Match Fixing' as:

i. Instances where an individual player or group of players received money individually/collectively to underperform;
ii. Instances where a player placed bets in matches in which he played that would naturally undermine his performance;
iii. Instances where players passed on information to a betting syndicate about team composition, probable result, pitch condition, weather, etc.,
iv. Instances where grounds-men were given money to prepare a pitch in a way which suited the betting syndicate; and
v. Instances of current and ex-players being used by bookies to gain access to Indian and foreign players to influence their performance for a monetary consideration."[4]

It is very difficult for an individual player to execute match fixing. Fixing the result of a match is difficult to execute because it needs more than one player to join in. It's difficult to involve many players as the risk

3 Saptarishi Dutta, *Match Fixing Cases in Cricket, A History,* THE WALL STREET JOURNAL (May 16, 2013) https://blogs.wsj.com/indiarealtime/2013/05/16/match-fixing-cases-in-cricket/

4 *Central Bureau of Investigation(CBI)Report into Betting and Match Fixing in Cricket*

of exposing the fixing gets increased. For example, if Mr. A and Mr. B underperform in a game there is a chance that another star player in the team may single-handedly win a match for their team and there has been such real instances; this can spoil the fixers-bookies' plans.

SPOT FIXING: INTERPRETATION

Spot-fixing developed when newer modes of betting were unleashed. Mostly, it does not affect the result of match. Spot fixing flourished because of ease of execution. Spot-fixing refers to illegal activity in a sport in relation to a specific aspect of a game, unrelated to the result for which a betting market exists. Spot fixing ensures a certain fixed result at a given time in the game. The betting happens on the outcome of a certain ball or certain over in bowling. For Example: third ball of the first over of a bowler X will be wide delivery, or the bowler Y will bowl a full toss delivery first up of a new spell, etc. Spot-fixing is more difficult to detect than match fixing. The reason being it can be perpetrated by an individual fraudulent player without needing co-operation from other players or officials.

Spot fixing was traced when player like Mohammad Amir - were paid to bowl a 'no-ball' a predetermined ball of a given over. The players who were arrested - were allegedly paid to give a certain number of runs in a certain over. Interestingly, Spot fixing may not have much influence on the result of match - a no ball in a test match hardly influences the fact of who wins the match. An intentional mis-field or over throw, for example, to ensure say minimum 12 runs are scored in an over. This requires only one or two players in a team to be involved to ensure success and thus easier to execute.[5]

LEGAL FRAMEWORK FOR MATCH FIXING AND SPOT FIXING IN INDIA

Indian Penal Code, 1860 is the foremost statute dealing with substantive penal law in India. It defines acts, omissions along with required ingredients for each offence and prescribes the penalties for each offence.

Match-fixing is cheating the public, especially the millions of cricket crazy fans. Underperforming and nexus with bookies are acts of cheating for pecuniary benefits.[6] Section 415 of Indian Penal code defines Cheating as

5 *What is The Difference Between Spot Fixing and Match Fixing,* https://www.quora.com/What-is-the-difference-between-spot-fixing-and-match-fixing

6 Nishant Gokhale, Fixing the Fixers:The Justification of Criminal Liability for Match Fixing NUJS Law Review (2009).

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation- A dishonest concealment of facts is a deception within the meaning of this section."

For interpreting this section for purposes of match fixing one has to look into definition of Wrongful Gain, wrongful loss, dishonestly and Fraudulently.

Wrongful gain" is gain by unlawful means of property which the person gaining is not legally entitled.

"Wrongful loss"- "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully, losing wrongfully- A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property.

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly"

As per the definition cheating involves deceiving 'a person'. Cheating normally is not an offence which can be committed *in rem,* that is against the world at large; rather deception has to be *in personam,* that is, against a specific person. The issue of match fixing or spot fixing involves the deception of the public in general into thinking that the match is not fixed. Further, this section requires the transfer of property to take place between the accused and the victim. In match-fixing, there is no clear transfer of property form the victim to the alleged perpetrator

The unanswered question is whether in case of match fixing whether there is an element of 'dishonest concealment of fact' and whether it causes a wrongful loss or wrongful gain to someone. When a player conceals

the fact of receiving money from bookmakers, it can be construed as 'dishonest concealment of fact'. The fact that they cause wrongful gain to themselves construes wrongful loss to spectators. But to bring this 'dishonest concealment' under Cheating one must prove intention to cause wrongful loss to spectators. The wrongful loss to spectators is mere consequence of this act and is only incidental and thus lacks the intention of causing wrongful loss.

Section 120 A: Another provision is section 120A of the Indian Penal code, 1860 which defines Criminal Conspiracy as:

A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

When two or more persons agree to do, or cause to be done, -

1. *an illegal act, or*

2. *an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:*

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

One of the essential ingredients for the offence of criminal conspiracy, is that two or more persons must agree to do either an illegal act or a legal act by illegal means. The steps or actions which lead to Match-fixing are not illegal actions *per se.* Therefore, an agreement to fix a match will be difficult to cover under the provisions of criminal conspiracy. The means involved in order to fix matches may not necessarily be illegal and therefore, the ingredients would not be fulfilled and the offence would not be made out.

APPLICABILITY OF PREVENTION OF CORRUPTION ACT AND MATCH FIXING

As the team of BCCI represents and plays for India and with it is attached national pride, can the players be considered public servants. Even if they are not public servants, they appear to be in fiduciary position for the whole nation. The Prevention of Corruption Act provides for prosecuting corrupt

public servants as well as those persons who offer bribes. The term 'public duty' has been defined to mean a duty in the discharge of which the State, the public or the community at large has an interest. But the Act applies only in relation to public servants. This means that for a prosecution to be initiated under this Act, it is necessary that the person who takes the bribe is a public servant; or to prosecute a person for offering a bribe, it is necessary to show that the bribe was offered to a public servant.

The term 'public servant' has been defined under the Act (Code). On a very strict construction of the Act, these definitions would not apply to match-fixing. However, these constructions, if viewed in light of the decisions of the Supreme Court, in which it has been held that the BCCI performs enormous public functions and therefore, has a duty to act fairly, in good faith and reasonably, might serve to suggest otherwise.

In Zee Films vs Union of India case,[7] three judges held that the BCCI was not an instrumentality of the state and was therefore not "the state" within the meaning of Article 12 of the Constitution. But it noted that its "activities can be said to be akin to public duties or state functions." In a powerful dissent, Justice S B Sinha pointed out that the BCCI "was allowed by the state to represent the state or the country in international fora, it became a representative body of the international organizations as representing the country. The nature of function of such a body becomes such that having regard to the enormity thereof it acquires the status of monopoly for all practical purposes; regulates and controls the fundamental rights of a citizen about his right of speech or right of occupation, becomes representative of the country either overtly or covertly and has a final say in the matter of registration of players, umpires and others connected with a very popular sport".

The arguments and Judgment of Justice Sinha appears more convincing, and the proposition that the BCCI performs a public function or what may otherwise amount to a public duty may have to be accepted some later day. The officials of the BCCI as well as the players are likely to be accommodated within the meaning of the word 'public servant' under the Act. It is further possible to construe membership of the BCCI or its team representing India as a 'public office'. However, the other view should not be lost sight of that cricketers are mere professionals governed by independent contracts whose job is to entertain people by playing cricket. They do nothing sort of public duty and taking the first view might be stretching the argument too far.

7 Decided on Feb. 3, 2005 by the Hon'ble Supreme Court.

ICC'S CODE OF CONDUCT FOR PLAYERS AND TEAM OFFICIALS

The ICC Cricket Code of Conduct is a regulation regarding the conduct of professional players in cricket. Traditionally, cricket being Gentlemen's Game requires "gentlemanly" conduct from all players. The Code of Conduct is drafted and enforced by the International Cricket Council.[8]

Under the ICC regulations, players may be fined a percentage of the salary, banned for number of matches, or even banned for many years or life. The ICC appoints a match referee for each Test match, One Day International (s) and Twenty20 match formats; the Referee has the power to set penalties for most offences or breaches, the exceptions being the more serious breaches. The Code of conduct prohibits many actions, on breach of which penalties have been provided. There are penalties for ongoing game: some like arguing with umpires or objectionable behaviour on field, all are part of laws deliberated, enacted and acted upon in practice. ICC maintains a good record of achieving compliance with its rules or laws if we so refer the same.

The following are the general categories of serious offences, carrying the highest penalties:

- Gambling on matches (betting).
- Failing to perform in a match in return for a benefit, such as money or goods (match fixing).
- Inducing a player to perform one of the above two actions.
- Failure to report certain incidents relating to match-fixing or gambling.
- Other related actions in nature of offences.
- Other penalties for offences are categorized as Level 1, Level 2, Level 3, or Level 4. Offences relating to gambling or match-fixing carry penalties of ban from 12 months to life, and unlimited fines.

International Cricket Council in February 2001 enacted certain provisions in the ICC Code to prohibit gambling, betting, underperformance and inducement or encouragement to gamble, bet on or under-perform in a match or a series of matches.

8 Can it be argued as international persuasive law required to be enforced in countries which are members of ICC.

Moreover, suppression of information from the Anti-Corruption and Security Unit of the International Cricket Council has also been made actionable conduct under this Code. Further still, providing information about playing conditions or team compositions which have not been disclosed to the media in advance also amount to a violation of the Code of Conduct. The sanctions prescribed range from a fine, or a ban for a period of one year, to a life ban and an unlimited fine which must be determined based on the facts and the circumstances of the case.

The BCCI, because of the scandal of year 2000, conducted its own disciplinary enquiry into the allegations of match-fixing and suspended several players and the then team physiotherapist from playing or participating in any events or matches conducted by the BCCI or the ICC for periods ranging from a life ban to a ban for a period of five years. In addition to this, the BCCI also stated that neither the BCCI nor any of its affiliated bodies would conduct or allot any benefit matches for these players. Further, the contribution of the BCCI towards the Benevolent Fund for these persons would stand forfeited. Thus, in the absence of a strict legal regime, disciplinary actions have been tried to control the menace of match fixing or spot fixing or related offences.

ICC'S CODE OF CONDUCT: IS THAT ENOUGH?

Can disciplinary sanctions alone tackle match-fixing? Whether the Code of Conduct made by ICC is enough to tackle the issue is unanswered.[9] The ICC and the BCCI exercise a *de facto* monopoly with respect to the game of cricket in the international as well as in the national sphere in India.

But the ICC and BCCI do not control the admission and expulsion of membership. Moreover , there is a further possibility of the proliferation of leagues such as the Indian Cricket League (ICL) which are outside the purview of the BCCI or even the ICC. Therefore, any disciplinary sanctions taken by the ICC or the BCCI would not be applicable with respect to the players or officials of the ICL or other such leagues.

Under the disciplinary action formula of controlling match fixing, there is no effective mechanism to confiscate the ill-gotten gains from the perpetrators. Several benefits enjoyed by persons associated with sports such as going on foreign tours, tax exemptions, awards from the governments, quotas, etc. must be controlled. There is need to provide for forfeiture of ill-gotten money in all its formats of acquisition of property because malpractices in sports.

9 *ICC Cricket Code of Conduct,* https://en.wikipedia.org/wiki/ICC_Cricket_Code_of_Conduct

NEED FOR CRIMINAL LIABILITY FOR MATCH FIXING AND SPOT FIXING

Culpability is one the major ingredients for constituting an offence. Culpability reflects the mental element with which an offence is committed, such as intent, knowledge, or belief. In the case of match-fixing, the player, the official or the bookie all engage in the activity knowingly. Thus, the element of culpability is present *ab inito* and is inherent in match fixing or spot fixing.

The harms: With respect to match-fixing, the harms caused are manifold. The fans lose the value of the money that they have paid to watch the match at the stadium or on television, loss of interest in the game due to loss of confidence or trust deficit, loss of viewership, Broadcasting revenue. Match-fixing is a breach of the trust in the institution of sport, as well as the subordination of general interest of the people. o

Protagonists of Criminal Liability

Rahul Dravid[10] the former Indian Test Captain bats for criminal liability for match fixing. *"Fixing cricket matches must be made a criminal offence to strike fear into the hearts of potential offenders. Merely educating players of the perils of match-fixing was not enough. We must police it and have the right laws and ensure that people, when they indulge in these kind of activities, are actually punished," Dravid added that some lessons could be learned from the high-profile doping incidents that have blighted cycling. "The only people cyclists were scared of was not the testers, not the [cycling] authority... they were scared of the police. You read all the articles, the only guys they feared was the police and the threat of] going to jail."* [11]

Kapil Sibal former Law Minister opined that there is a need for a separate law to deal with the menace of fixing in cricket as the Indian Penal Code (IPC) does not recognize match fixing and spot fixing as offences. *"You have to have a separate definition and a separate law, which makes match fixing or spot fixing an offence, a criminal offence, and have separate provisions dealing with the punishment and trial." He was of the view*

10 The iconic Test batsman scoring more than 13,000 runs in 164 matches. Dravid in an interview published on ESPN cricinfo.

11 *Match Fixing in Cricket A Criminal Offence, says Rahul Dravid,* THE NATIONAL (Aug.7, 2013) https://www.thenational.ae/sport/make-fixing-in-cricket-a-criminal-offence-says-rahul-dravid-1.570244).

otherwise it is very difficult to get any conviction otherwise."[12]

MUDGAL PANEL REPORT 2013 IN SPOT FIXING IN IPL

The 2013 Indian Premier League (IPL) spot fixing and betting case arose when the Delhi Police arrested three cricketers, Sreesanth, Ajit Chandila and Ankeet Chavan on May 15, 2013 on the charges of spot-fixing. The three represented Rajasthan Royals in the 2013 Indian Premier League. In a separate case, Mumbai Police arrested Vindu Dara Singh and Gurunath Meiyappan, the CSK team official and son-in-law of BCCI President N. Srinivasan, for betting and having links with bookies. The Justice Mukul Mudgal Panel was set up by the Supreme Court after the IPL spot-fixing and betting scandal came to light in 2013. The Committee was headed by retired Chief Justice of Punjab & Haryana High Court. It submitted its inquiry report about the spot-fixing and betting scandal to Supreme Court after the BCCI's two-member committee found no evidence.

The committee has made many other inferences and recommendations. Some of them are as follows:

- The present measures undertaken by BCCI in combating sporting fraud are ineffective and insufficient. IPL governing body should be independent of BCCI.
- Players' agents should be registered and should not be allowed to travel with the players
- Employment of players in franchise group companies should be avoided. Players should not have stakes in agencies involved in cricket. There is a need for stringent and effective control on Players' Agents.
- Separate law, investigating agency and courts to deal with betting and match-fixing charges
- Law must be stringent like anti- terror and anti-drug laws
- Ban post-match parties where elements have free access to players
- List of undesirable elements maintained by BCCI should be circulated among players.

12 *Spot, Match Fixing to be Criminal Offence under New Law:Sibal,* ZEE NEWS (May 20, 2013) http://zeenews.india.com/sports/cricket/spot-match-fixing-to-be-criminal-offence-under-new-law- sibal_761712.html

- Senior players with unimpeachable record like Sachin Tendulkar, Rahul Dravid, Anil Kumble, and so on should caution and advise the younger players against pitfalls of indulging in malpractices like betting and match fixing/spot fixing. Such interactions with legends of the sport might be the most effective and deterrent means of preventing future wrong-doing.[13]

Investigating agencies are dissatisfied with the legal provisions for controlling match fixing. They lament the fact that for detecting sporting frauds they lack the tools to know the names of bookies and the amount that has been bet. They can only use sources of intelligence such as phone tapping to detect frauds which has privacy issues. The agencies have stated that legalizing betting would reduce the element of black money and reduce the influence of underworld and they would better detect of frauds and proper focus on investigation.[14]

PREVENTION OF SPORTING FRAUDS BILL, 2013

The Prevention of Sports Fraud Bill, which aims to prevent and combat sporting fraud affecting the integrity of sports and fair play can be a trend setter but its implementation is full of challenges.[15] The Youth Affairs and Sports Ministry had drafted Prevention of Sporting Fraud Bill, 2013. It was prepared by above referred Jutice Mukul Mudgal Committee. In 2015, it was sent for legal vetting. The Legislative Department made some changes to existing draft, but on June 1, 2017, the Sports Minister has stated that it is not on the active agenda of the government.[16] This Bill defines the 'Sporting Fraud' and contains provisions of penalty to the offenders and deals with the issue of Jurisdiction of Courts to adjudicate the matter, etc. The main features of this Bill are as follows: A person is said to commit the offence of sporting fraud if he, directly or indirectly: -

- manipulates or tries to manipulate sports result, irrespective of whether the outcome is altered or not,

13 Mukul Mudgal, *Law and Sports in India- Development, Issues and Challenges,* Lexis Nexis Butterworths Wadhwa.

14 Santosh Kumar, *Can Legal Betting Curb Fixing*? DECCAN CHRONICLE (Jul. 22, 2016) *http://www.deccanchronicle.com/opinion/op-ed/220716/dc-debate-can-legal-betting-curb-fixing html*

15 Debhargya Snyal, *Return of the Sporting Fraud Bill,* BUSINESS STANDARD (Jul. 23, 2015), http://www.business-s*tandard.com/article/current-affairs/return-of-the-sporting-fraud-bill-115072300559_1.html*

16 As reported by Tribune on June 2 2017.

- deliberately misapplies the rules of the sport,
- removes or reduces all or part of the uncertainty normally associated with the results of a sporting event,
- willfully fails to perform to his true potential, unless such under performance can be attributed to strategic or tactical reason deployed in the interest of that sport or team,
- discloses insider information, or
- fails to disclose knowledge of or attempt for Sporting Fraud.[17]

Thus, the bill considerably widens the scope by referring not just to players themselves but anyone including the officials. The Bill makes provisions for maximum punishment of 5 years with a fine of Rs. 10 Lakhs or five times the economic benefits derived by the person from sporting fraud, whichever is greater. The bill also makes provision that such cases cannot be tried by a court inferior to that of Metropolitan Magistrate or Judicial Magistrate of the first class.

The Prevention of Sports Fraud Bill is first draft national legislation that attempts to check sporting fraud in India. Also, Sports being a 'State' subject under the 7th schedule of the Constitution it will require the support of the States also for proper implementation. One of the major reasons is that sports in India is largely unorganized and unregulated and even the principles governing the doping, ethics and fair play are nascent.

But sports jurisdiction in India is at very budding stage. The bill does not make provisions to educate the relevant people about the fallouts of the sports fraud which is needed in the initial stage when awareness needs to be created.

The Bill was received with mixed reactions and has been criticized for its casual approach. There is nothing in the bill that addresses the (unethical) activities that could happen accidentally or without intention. The outline of the offense of sporting fraud is vague as mentioned the bill.

It reads that offence of sporting fraud is where a person who

17 *Mukul Mudgal Panel Report and Sporting Fraud Bill, 2013,* GENERAL KNOWLEDGE TODAY (Jan. 17, 2015) http://www.gktoday.in/mukul-mudgal-*panel-report-sporting-fraud-bill-2013/*

"manipulates sports result, irrespective of whether the outcome is actually altered or not, or makes arrangement of an irregular alteration of the field of play or the result of a sporting event including its incidental events or deliberately misapplies the rules of the sport, in order to obtain any economic or any other advantage or benefits or promise of an advantage or benefits, for himself or for any other person so as to remove or reduce all or part of the uncertainty normally associated with the results of a sporting event."

Thus, if some player even slightly deviates from the normal rule of the play would fall within the scope of this section.

There needs to be more clarity on the said provision to avoid different interpretations. Thus, the bill in present form needs to be more refined to help ensure sports are cleaner in India.

CONCLUSION

Cricket game acquired almost a status of religion in India. It is claimed as one of the most powerful factor that unites people transcending religious and geographical boundaries. The so-called Gentlemen's Game has had its share of untoward controversies like match fixing and spot fixing and is going through credibility crisis. The Black Letter law doesn't have any specific provision dealing with the issue. Disciplinary sanctions which have been put in place by the ICC, have often proved to be inadequate to deal with match-fixing as the Code addresses only specific instances of misconduct within the control of the governing body, whereas the problem is of much larger proportions and extends far beyond.

The need for a specific legislation to curb the menace of match fixing and spot fixing was long overdue. The 2013 Bill proposes to create "sporting fraud" as a special category of offence, which included the manipulation of result, deliberate under-performance, disclosure of inside information, and failure to report an offence. The said legislation will surely act as huge deterrent in any prospective case of fixing.

It is well accepted that it is impossible to legislate against human greed, but you can make it less profitable for the offenders. It is high time that such a legislation sees the light of the day which will restore back confidence of fans in this great game of cricket.

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MANADATORY REGISTRATION OF FIRST INFORMATION REPORT:- AN ASSESSEMNT OF THE CONTRIBUTION OF JUDICIARY

Satinder Kaur*

ABSTRACT

First Information Report is the information given first in point of time regarding cognizable offence and thereby sets the criminal law in motion. The non-registration of First Information Report disrupts the administration of justice and denies justice to the victim. If the first information report is not registered, the objective of criminal justice system, to reduce and prevent crime will not be achieved. This paper highlights the importance and relevance of First Information Report with regards to the criminal justice system and the victim. For rule of law to prevail and to preserve the respect for rule of law, the First Information report should be mandatorily registered as it will prevent lawlessness in the society. The Contribution of judiciary in affirming the fact that registration of First Information Report is mandatory, if the information discloses the commission of cognizable offence is also emphasized in this paper.

INTRODUCTION

Authoritative pronouncements of the Hon'ble Supreme Court pave way for new directions in development of law in criminal justice system. One such judgment was pronounced by Supreme Court on 12thNovember 2013 in the case of *Lalita Kumari v. Govt. of U.P,*[1] wherein the court held that the police officers are bound to register First Information Report (hereinafter referred to as FIR) upon receiving information of commission of a cognizable offence and have no option but to register an FIR unless the case falls in one of the exceptions mentioned by the court.[2] Most of the time, it is found that police tries to evade registering FIR and citizens have to silently suffer due to its non-registration.

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1 (2014) 2 SCC 1.

2 Facts of the case: A minor girl was kidnapped in Uttar Pradesh and police refused to register the FIR. The victim's mother moved the court challenging the refusal of police to register FIR on the basis of the complaint.

Non-registration of FIR's was reflected as a chronic problem of policing in the conference of DGPs of state and Central police force in Gujarat, in the year of 2015 and one of the presentation by an IPS officer claimed that only 9-21 percent of all crimes in India get registered by police, 30 percent people never report a crime to the authorities, while over 50 percent are turned away by the police.[3] These figures were arrived at by applying International Crime Survey Data to Indian scenario.[4]

FIR is the first step in the justice delivery system and sets criminal process into motion. The non-registration of FIR disrupts the administration of justice and denies justice to the victim. Crime and criminality create disastrous situation in the society and requires to be tackled immediately.[5] The criminals need to be identified and punished. For this purpose it is essential that evidence relating to crime are properly collected, suspected persons are identified and produced before the court. For all this to happen, i.e. for the initiation of investigation (though police can investigate otherwise also), it is required that police gets information. Section 154 of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C) talks about information to police officer in the case of cognizable offence and the information recorded is called FIR because it is the information given first in point of time with regard to commission of a cognizable offence. The police are often reluctant in registering FIR as it reflects badly on their record. The registration of FIR is of utmost relevance to ordinary citizen and criminal justice system as well. With regard to mandatory registration of FIR, on one hand, interest of victim and society is involved which demands mandatory registration of FIR and commencement of investigation on such information. Therefore no choice should be given to the police in deciding whether to register FIR or not. On the other hand, is the accused who should not be harassed in false cases through registration (mandatory) of FIR and commencement of investigation.The Supreme Court was faced with such issues in the case of *Lalita kumari.*[6]

MEANING AND RELEVANCE OF FIR

The first information report is not defined in the code but by bare perusal

3 *Crime rate in India is Low, Why?* http://www.policechannel.in/all-news/police-channel/crime-rate-in-india-is-lowwhy/ /

4 *Ibid*.

5 Pradeep Singh, *First Information report and Criminal Justice*, LXI IPJ 150 (2014).

6 *supra* note 1.

of Section 154 of the Cr.P.C,[7] it can said to be an information given to the police officer relating to the commission of a cognizable offence and is reduced in writing.[8] It is the information given first in point of time relating to a cognizable offence. In other words, FIR is the earliest report made to the police officer with a view to his taking action and on the basis of which investigation has commenced. Any person aware of the commission of any cognizable offence may give information to the police and may, thereby set the criminal law in motion. Such information is to be given to the officer-in-charge of the police station and the information so received shall be recorded in such a form and manner as is provided in section 154 of the Cr.P.C.

In *State of Bombay v. Rusy Mistry*,[9] it was held that "the first information report is the information recorded under Section 154 of the Cr.P.C. It is the information given to a police officer relating to the commission of an offence by an informant on which the investigation is commenced. It must be distinguished from information received after the commencement of the investigation which is covered by Sections 161 and 162 of the Cr.P.C." [10]Any vague, indefinite and cryptic information cannot be considered as FIR.[11]

7 The Code of Criminal Procedure, 1973, Section. 154 reads as:

1. *Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*

2. *A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.*

3. *Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."*

8 RATANLAL AND DHIRAJLAL, THE CODE OF CRIMINAL PROCEDURE 235 (21st ed., 2013).

9 AIR 1960 SC 391.

10 *Ibid*.

11 Tapinder Singh v. State of Punjab, AIR 1970 SC 1566.

The Supreme Court in *Suprintendent of Police,CBI v.Tapan Kumar,*[12] held that, the question whether the information can be said to be a "First Information Report" within the meaning of section 154 of the code is a question of law.

FIR need not be an encyclopaedia of all events and what is required to be stated is the basic prosecution story.[13] It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy.[14] FIR is made very important as it puts the criminal law into motion

The FIR is made to the police with the object of putting the criminal law into motion in order to investigate a crime. The special significance of the FIR lies in the fact that it is a record of the earliest information about an alleged offence, a statement given before the circumstances of the crime can be forgotten or embellished. First Information Report disclosing some cognizable offence leads the police to proceed with the investigation of the case.

It is often said that in a criminal prosecution, FIR is an important document and it is helpful in corroborating the oral evidence which is given in the trial. FIR can be used for contradicting the evidence of the person giving the information and helps criminal justice system of its purpose of maintaining law and order. FIR can also be used for impeaching the credit of the informer and for establishing the identity of the accused and witnesses which are helpful for proper administration of justice. A prompt FIR, providing details of the crime and names of the witnesses, can be a solid basis for the conviction of accused.[15] An FIR is a compilation of the preliminary information, which serves as basis for investigation.[16]

FIR holds special significance for the victim as well as criminal justice system. Criminal justice system is aimed at crime control and prevention and hence FIR holds a great relevance. The two accepted methods for enforcing administration of criminal justice system are; direct access and invocation of the court, while other is adopting the channel through (Police/ Investigating agency) the State agency. The criminal justice system is

12 AIR 2003 SC 4140.

13 Ramesh Maruti Patil v. State Of Maharashtra, AIR 1994 SC 28.

14 State Of U.P v. Naresh (2011)4SCC 324.

15 *Locating the Survivor in Indian Criminal Law Justice System: Decoding the Law,* LAWYER'S COLLECTIVE http://www.nipsa.in/uploads/country_resources_file/1215_Lawyers-Collective_15-March_Final.pdf

16 *Ibid.*

heavily dependent upon police as the police is investigating agency which provide the input into the system to operate. Criminal justice system has evolved to protect the society from crime and criminality and to prevent crimes.[17] The criminal justice system is essentially an instrument of social control. It is the job of the agencies of justice to prevent the dangerous behaviours by apprehending and punishing transgressors or deterring their future occurrence.[18] For the investigating agency, FIR is important as from that only they obtain information on the alleged crime.

For keeping crime and criminality at bay, it is important that police is aware of the crimes and if police is reluctant in filing FIR, how the objective of criminal justice system will be achieved? There is a general perception amongst public that police remains reluctant in registering FIR to keep the figures of crimes under control in order to show better ratio of crimes reported and solved cases.[19] If the FIR is not registered, how will police come to know about the crime being committed and how criminal law will be put into motion?

The Preamble of the Indian Constitution guarantees to its citizen's justice. The question arises how justice will be provided to the citizen if the police refuses to register FIR. When FIR is not registered by the police, how police will identify the alleged criminal activity and the offender. This negligence on the part of the police officer may hamper the law and order in the society. Hence, Relevance of FIR holds greatest importance for the victim as well the criminal justice system.

PERSPECTIVES ON MANDATORY REGISTRATION OF FIR

The efficacy of the police and government is generally measured by the rate of crime. There is Burking of crimes by refusing to register FIR in cognizable offences. A bare perusal of section 154 of the Cr.P.C shows the mandatory character of the provision as the word 'shall' is used but sometimes the use of word 'shall' is directory in substance.[20] The amendment in 2013 which added section 166A in Cr.P.C made registration of FIR mandatory but only in the cases related to offences against women.[21] Sections156(3), 190 and 202 of the Cr.P.C provide alternate remedies to

17 *supra* note 5 at 149.

18 Rahul Kumar Singh, *Objectives of Criminal Justice System,* http://www.legalserviceindia.com/articles/op.htm

19 189th Report of the Department Related to Parliamentary Standing Committee on Home Affairs, http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/189.pdf

20 Vageshwari Deswal, *Burking of Crimes by Refusal to Register* FIR, 55 JILI 364 2013.

21 *Id* at 365.

the person aggrieved by the refusal on the part of the officer and these provisions clearly indicate that in certain circumstances the police officer may refuse to register a FIR.[22]

By the virtue of Section 157 of Cr.P.C , police officer may not investigate a case after recording FIR if the complaint does not disclose sufficient grounds for investigation. This same reasoning is given by the police officers to defend the decision of refusal to register FIR.[23] The police argue that there should not be mandatory registration of FIR as there can be false filing of complaints which will lead to wastage of human potential and infrastructure of the police. Some discretion should be given to police officer so as to conduct preliminary inquiry in order to ascertain the truthfulness of the information. It is contended that preliminary inquiry before registration ofFIR will help in doing away with the frivolous complaints. The other view is that if the discretion is given to police to conduct preliminary inquiry there are chances of abuse of power .The other contention made in favour of the mandatory registration of FIR is that the section 182 of the Indian penal code,1860[24] will take care of the informants who file frivolous complaints. One other view against mandatory registration of FIR is that, it is violative of Article 21 of the Constitution as the mandate of article 21 requires police officer to protect a citizen from baseless allegations.[25] There should be given some discretion to police officer to look into the matter.[26]

In *State of Haryana v. Bhajanlal,*[27] the court held that police officer is duty bound to register FIR. The word 'credible' or 'reasonable' has not been used in section 154 of Cr.P.C as compared to section 41(1) a of the Cr.P.C as then,[28] wherein the word 'credible' or 'reasonable' has been used in

22 *Ibid.*

23 *Ibid.*

24 The Indian Penal Code,1860, Section 182 reads as:
"Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant-

a. to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

b. to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

25 *supra* note 20 at 374.

26 *Ibid*.

27 1992 AIR 604.

28 *supra* note 7, S.41(1) (a) reads as: "*Any police officer may without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned."*

reference to arrest. Credibility or reasonableness of the information is not condition precedent for the registration of FIR. In *Prakash Singh Badal v. State of Punjab,*[29] the court held that at the stage of registration of a crime, the police officer cannot embark upon an enquiry as to whether the information laid by the informant is reliable or not.

In *Ramesh Kumari v. State (NCT of Delhi),*[30] the court held that the lodging of FIR is mandatory and reasonableness or credibility of the information is not sine qua non for the registration of FIR as the word used under section 154 is 'information' and 'not credible information'.

In *lallan Chaudhary v. state of Bihar,*[31] the court held that section 154 of the Cr.P.C casts statutory duty upon the police officer to register FIR and proceed with investigation.

There were some judgments which held that police has the power to conduct preliminary inquiry and is not obliged to register FIR mandatorily.

In *Binay Kumar Singh v. State of Bihar*[32] the court held that police officer is not obliged to register FIR on any nebulous information received which does not disclose any authentic information regarding the commission of cognizable offence.

In *Selvi v.State of Tamil Nadu*[33] the court held that the SHO can conduct preliminary enquiry, before registering FIR under section 154 of Cr.P.C to ascertain the nature of offence i.e. whether the case is of commission of cognizable offence or non-cognizable offence.

In *Shashikantv. CBI,*[34] the court held that in case of doubt whether the information given discloses cognizable offence or not, the police officer can conduct preliminary inquiry. The CBI manual allows CBI officer to hold a preliminary inquiry.

The *Supreme Court in LalitaKumari v. State of U.P.,*[35] commented upon the callous attitude of police in registering FIR and lamented on the inaction of the police in tracing out a missing minor girl child.[36] The court

29 (2007) 1 SCC 1.
30 2006(2) SCC 677; facts of the case are- The controversy in the appeal was confined to the non-registration of the case by the police pursuant to a complaint filed by the appellant.
31 (2006) 12 SCC 229.
32 1997(1) SCC 283.
33 1981 Supp, SCC 43.
34 (2007) 1 SCC 630.
35 (2008) 3 SCC (Cri) 17.
36 K N ChandrsekharanPillai, Criminal Procedure, XLIV *ASIL* 205 (2008).

said that in spite of the law being in place the police authorities donot register FIR unless some direction is given to them by the Chief Judicial Magistrate or the High Court or this court. The court also categorically mentioned that in large number of cases investigations do not start even when the FIR has been registered. The court after noticing the disparity in registration of FIRs by police officers, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioner of Police to the effect that if steps are not taken for registration of FIRs immediately, they may move to the Magistrates concerned by filing complaint petitions for appropriate direction to the police to register the case immediately, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown. There were conflicting decisions of this court on the said issue and the court referred the matter to a larger bench.

In *Lalita Kumari v. Government of Uttar Pradesh (2013)*[37] *the court said that "We have carefully analyzed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue whether under Section 154 Cr.P.C., a police officer is bound to register an FIR when a cognizable offence is made out or the police office has an option, discretion of conducting some kind of preliminary enquiry before registering the FIR".* This Court also carved out a special category in the case of medical doctors where preliminary enquiry had been postulated before registering an FIR. The issue which arose for consideration in these cases is of great public importance. On one hand, interest of the victim and society i.e. it is essential to register FIR so that police commences with the investigation and the offender is punished. On other hand, the interest of accused against malicious prosecution is involved i.e. if no discretion will be given to the police officer there will be frivolous complaints. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court. The Hon'ble chief justice was requested to refer the matter to a higher bench.

REGISTRATION OF FIR IN LIGHT OF LALITA KUMARI JUDGMENT (2014)[38]

The matter relating to the mandatory nature of registration of FIR had

37 (2012) 4 SCC 1.
38 *supra* note 1.

plagued and perplexed the judicial mind in *Lalita Kumari* case,[39] and hence after analyzing the divergent cases on the matter, it was referred to a constitutional bench. Issue's that arose before the court were

1. Whether the immediate non registration of FIR will open a window for manipulation by the police which will affect the right of the victim?

2. Whether in the case where the information doesn't disclose the commission of cognizable offence and the FIR is mandatorily registered then does it affect the rights of the accused?

Contentions in Favor of mandatory registration of FIR

1. The use of word "Shall"

It was contended that the word used in section 154 of the Cr.P.C is 'shall" and thus section 154(1) is mandatory in nature.[40] No discretion is left to the police officer except to mandatorily register FIR. The word clearly implies a mandate and is indicative of the statutory intent.

2. Section 154 of the Cr.P.C merely mentions "Information"

The word Information is not prefixed with the words credible or reasonable. Hence credibility or reasonableness is not sine qua non for the registration of FIR.[41]

3. Clear and unambiguous provision

The statutory provision as envisaged in chapter XII of the Cr.P.C are clear and unambiguous and it would not be legally permissible to allow the police to make a preliminary inquiry into the allegations before registering an FIR.

Contentions against Mandatory registration of FIR

4. Preliminary enquiry will eliminate the misuse of the process

There should not be any mandatory registration of FIR as there can be

39 *Lalitakumari v. Govt of Uttar Pradesh: Touching Upon Untouched Issues, http://www.manupatra.co.in/newsline/articles/Upload/FD30EC39-2367-4E2E-B08801FA06971A5E.%20GOVT%20OF%20UTTAR%20PRADESH%20%20TOUCHING%20UPON%20UNTOUCHED%20ISSUES.pdf*

40 B. Premanandand ors v.Mohan Koikal, (2011) 4 SCC 266.

41 Bhajanlal v.State of Haryana, 1992 Supp. (1) SCC 335, Ramesh Kumari v NCT of Delhi (2006)2 SCC 677.

misuse of the process in frivolous complaints. The police officer should be given power to conduct preliminary enquiry before registration of FIR. Mr. Sidharth Luthra, elaborated on various judgments on the aforesaid. [42]He also pointed out that in matrimonial, commercial, medical negligence and corruption related offences, there exist provisions for conducting an inquiry or preliminary inquiry by the police, before registering an FIR. Various police rules prevailing in the States of Punjab, Rajasthan, U.P., Madhya Pradesh, Kolkata, Bombay, etc., provide for conducting an inquiry before registering an FIR. Crime Manual of the CBI also provides for preliminary inquiry before registering a case.[43]

He said that preliminary inquiry before registration of an FIR should be held permissible. The power to carry out an inquiry or preliminary inquiry by the police, before the registration of FIR will eliminate the misuse of the process, as the registration of FIR serves as an impediment against a person for various important activities like applying for a job or a passport, etc.

5. To check the credibility or correctness of the information

The police officer should record FIR on receiving information disclosing the commission of cognizable offence but in some situations when there is a doubt as to the correctness or credibility of information, police officer should be given discretion of holding preliminary enquiry .If a prima facie case is found out for investigation, then the police officer can register FIR.

6. Violation of Article 21 of the Constitution

Mr. Shekhar Naphade, senior counsel along with the above contentions said that two extreme positions should not be taken. One view that the police officer must register an FIR, the moment the information is give, without any scrutiny is an extreme proposition and is contrary to the mandate of Article 21 of the Constitution and the other that police must investigate the case substantially without registration of FIR are two extreme propositions. A middle way must be chosen. Every citizen has a right not to be subjected to malicious prosecution and every police officer has an in-built duty under Section 154 of Cr.P.C to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not prima facie satisfied, as regards commission of a cognizable offence and proceeds to register an FIR and carries out an investigation, it would result in putting the liberty of a citizen in jeopardy.

42 Sevi v. State of Tamil Nadu, 1981 Supp SCC 43.
43 *supra* note 1.

7. Mandatory registration of FIR only in certain cases

Registration of FIR is not compulsory for all offences other than what is specified in the section 166 A of Cr.P.C i.e. in the cases of offences against women.

8. Adequate remedies against refusal to register FIR

Cr.P.C has incorporated adequate remedies against the refusal to register FIR and to hold investigation in cognizable offences and this manifests the intention of the legislature that the police officer is not bound to record FIR merely because the ingredients of a cognizable offence are disclosed in the complaint.

Response to the contentions

9. According great importance to FIRs

FIR being one of the most important documents in the criminal law. From the point of view of the informant it sets criminal law into motion and from the point of view of the investigating authorities it gives them information about the alleged criminal activity.

10. Credibility or reasonableness of the information is not condition precedent for registration of FIR

At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, given by the informant is reliable and genuine or otherwise. The officer in charge of police station is statutorily obliged to register a case and then proceed with the investigation if reason to suspect the commission of an offence. The word used in section 154(1) of Cr.P.C is information and not credible or reasonable information that means credibility or reasonability of information is not sine qua non for the registration of FIR.[44]

11. Interpretation of the term 'shall'

The use of the word 'shall' in Section 154(1) of Cr.P.C clearly shows the legislative intent that police officer has to mandatorily to register FIR, if the information discloses the commission of a cognizable offence.

44 *supra* note 1.

Investigation of offences and prosecution of offenders are the duties of the State. Therefore, a duty has been casted upon the police to register FIR. If discretion, is allowed in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

12. Preliminary inquiry

As per the language of section 154 of the Cr.P.C, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. Thus the legislative intent is quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Conducting an investigation into an offence after registration of FIR is in conformity with the article 21 of the constitution and the right of the accused is protected under article 21 of the constitution of the FIR I registered first and then investigation is conducted. Inquiry under Cr.P.C is relatable only to a judicial act (i.e. judicial exercise undertaken by the court)and not to police.The CBI manual which allows preliminary inquiry is not a statute and is not enacted by legislature.It is a set of administrative orders for the internal guidance of the CBI.Hence the contention that CBI allows preliminary inquiry fails.

13. Reasons for registration of FIR at the earliest

FIR is aimed at two objectives; firstly, that it sets criminal process into motion and secondly, that the earliest information received will prevent any kind of embellishment.

It is necessary to keep check on the powers of the police and that can be done by documenting every action of theirs. Mandatory registration of FIR will not only ensure transparency in criminal justice system but also ensure judicial oversight. FIR has following advantages.

1. It is first step toward access to justice to the victim.

2. It maintains and upholds rule of law.

3. It facilitates swift investigation and also crime prevention.

4. It reduces the cases of ante-timed FIR.

The court said that Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath, also noticed the plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The committee urged for prompt registration of FIR.

5. Mere possibility of abuse is not a ground to strike down a law and Registration of FIR is mandatory and not the arrest

It was contended that mandatory registration of FIR will lead to arbitrary arrest and is contrary to article 21 0f the Constitution. The court said that FIR and arrest are two different things. Registration of FIR is mandatory and not the arrest of the accused on the registration of FIR. Arrest cannot be made in routine manner.[45] The court said that it is imaginary fear that if the FIR is registered the person will be arrested immediately.

Under Section 157 of the Cr.P.C, a police officer can foreclose an FIR before an investigation, if it appears to him that there is no sufficient ground to investigate the same. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.Hence the rights of the accused are intact. The Code not only ensures that the time of the police should not be wasted on false and frivolous information but also that the police should not intentionally refrain from doing their duty of investigating cognizable offences. As a result, the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature. The reason of delay also has to be mentioned in general diary.

6. Preliminary inquiry in certain cases

The categories of cases in which preliminary inquiry may be made are:

1. Matrimonial disputes /Family disputes
2. Commercial offences
3. Medical negligence cases
4. Corruption cases

45 Joginder Kumar v State of U.P (1994) 4 SCC 260.

5. Cases where there is abnormal delay in initiating criminal prosecution.

DIRECTIONS BY THE COURT

The court gave the following directions; *Firstly*, Registration of FIR is mandatory under Section 154 of Cr.P.C, if the information discloses commission of a cognizable offence. *Secondly*, there can be no preliminary inquiry except in certain cases. *Thirdly*, the preliminary inquiry can be conducted to ascertain the nature of the offence i.e. whether it is cognizable offence or non-cognizable offence. *Fourthly*, the scope of preliminary inquiry is not to verify the veracity of the complaint. *Fifthly*, the preliminary inquiry should not exceed 7 days. And delay if caused has to be mentioned in the general diary.

Modification in the Judgment of 2013

A writ petition was filed in the same criminal miscellaneous petition and the court modified a paragraph of the judgment in *Lalita Kumari.*[46] The court said that, "While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six week's time is provided".[47]

Special Categories Carved Out in Lalita Kumari Judgment[48]

There are certain categories which were carved out by the court in which preliminary inquiry can be conducted. The judgment provides that in relation to Prevention of Corruption Act, sanction is necessary before taking cognizance by the magistrate and the public servants are accorded some kind of protection so that vexatious cases cannot be filed to harass them. Therefore, the police have the power to conduct the preliminary inquiry before registering the FIR. In medical cases also the police can conduct preliminary inquiry. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint. The relationship between the doctor and patient is of trust. Hence to avoid the vexatious complaints be filed, police can conduct preliminary inquiry. The matrimonial cases and commercial offenses involve personal relations and are private affairs and that can be the reason why the court has given this category of the case in the judgment wherein preliminary inquiry can

46 *supra* note 1.

47 Lalita Kumari Judgment , Lalitakumari courtnic.nic.in/supremecourt/temp/wr%206808p.txt lalita kumara v.govt of up March 05, 2014

48 *supra* note 1.

be conducted.

Hence the Supreme Court while discussing the issue affirmed that the police is duty bound to register the FIR mandatorily.

CONCLUSION

> *"It is through the judicial process law develops. Judges while deciding individual cases lay down generalized principles and while doing so they explain the meaning of words and phrases found in the statutes, expand the scope of legal concepts, elaborate the procedures prescribed in the legislation. At times the higher courts lay down the guidelines or directions where there is legal vacuum or for providing guidance to subordinate courts."* [49]

The *Lalita kumari*[50] judgment and other judgments wherein the Supreme Court held that the police are bound to register FIR if the information discloses commission of cognizable offence are quite admirable as in most criminal cases people do not even approach police and secondly if the registration is made non-mandatory the situation would get worse.[51] FIR is the first step in the justice delivery system and sets criminal justice system into motion. The non-registration of FIR unsettles the administration of justice and negates justice to the victim. Mandatory registration of FIR holds great significance for victim as upon the registration of FIR investigation will commence.

Police should also be sensitized to respond to the complaints with promptness. There should not be any delay on extraneous grounds like jurisdiction. The police may also put in place a system of rewarding the personnel for timely response and punishment for wanton lethargy. One another issue that needs to be addressed is of Fair investigation. Mere mandatory registration of FIR is not enough; the police should also conduct fair investigation. If the evidences are properly collected, it will help in determining the guilt of the accused in the trial.

The Supreme Court also dismissed a public interest litigation petition which sought a direction from the Court to enforce the directions of the

49 Annual Survey of Judgments on Criminal Justice, https://www.academia.edu/9484211/Annual_Survey_of_Judgments_on_Criminal_Justice_by_Indian_Supreme_Court-2013.

50 *supra* note 1.

51 *supra* note 39

Court in *Lalita Kumari v. Government of Uttar Pradesh*,[52] when the matter was called for hearing, the Chief Justice of India TS Thakur asked the counsel appearing for Petitioner to give a specific instance where an FIR was not lodged as was mandated in LalitaKumari and no specific instance was given. Hence, the petition was dismissed.

Looking into the issue of mandatory registration of FIR, Dipak Mishra, J. observed that:[53]

> *"What is necessary is only that the information given to the police must disclose the commission of a cognizable offence, in such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence."*

The above exposition should remove doubts regarding mandatory registration of FIR. Refusing registration of FIR leads to burking of crime which ultimately dilutes the rule of law in the short run; and also has a negative impact on the rule of law in the long run since people stop having respect for the rule of law. Thus, non-registration of FIR's will leads to a definite lawlessness in the society.[54]

Hence, it is significant that FIR is registered mandatorily as it sets criminal law into motion. For rule of Law to prevail and to prevent lawlessness in the society, it is important that FIR is registered. FIR maintains and upholds rule of law. Mandatory registration of FIR will not only ensure transparency in criminal justice system but also ensure judicial oversight. It facilitates swift investigation and also crime prevention.

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52 *supra* note 1.
53 *State of Telengana v. Abib Abdullah Jeelani*, Special Leave Petition (CRL.) no. 5478 of 2015.
54 *Ibid*.

THE SOCIO LEGAL VALIDITY OF KHAP PANCHAYAT

Kanika Kaundal*

ABSTRACT

Khap Panchayats are the self-announced courts which appreciate full authenticity and specialist among the sections of their caste as the caretaker of respect. These Panchayats have no sacred premise and they are definitely not honest to goodness courts. Under this unlawful framework, all individuals hunkers around a tree in a town keeping in mind the end goal to take snappy, one-sided and incontestable choice on numerous issues like social transgression, marriage, offenses, property rights or in regards to circumstance debilitating serenity in a village. It is stressing to note that in the time when individuals make discussion by means of technology , the Indian culture has relapsed to the Dark Age. Today where the general public is administered by lawful standards and established experts, the bodies like Khap Panchayat posture obstacle to advancement and great administration. The pratices of Khap Panchayat are applauded by the general population of specific region or group in which "Khap" exists; this is the most essential obstruction for abrogation of Khap Panchayat. This paper is an endeavor to discover: why do Khaps still exist in India?.

INTRODUCTION

Khap is a cluster of villages united by caste, culture and geography. It is governed by the "panch" or the head who further leads a self- formed Khap Panchayat or the Kangaroo Courts. It consists of several members who not only belong to same gotra (clan) but share same ideologies. Marital ties are strictly prohibited amongst the members of same gotra (clan). Khap Panchayat lays down a moral code of conduct that is to be strictly adhered to by the members who reside in the village dominated by their existence.

THE SOCIAL VALIDITY OF KHAP PANCHAYAT

Khap Panchayat derives its social validity by people who obey and

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propagate their ideologies amongst the members of their village and family and further force or induce them to abide by the same. Khap Panchayats are units of number of villages organized into a political council for the sole purpose of dominant patriarchal societal control and decision-making on social issues. The social validity is backed by age norms, old customs, traditions, cultural values and regressive beliefs of the clan and decisions are made accordingly. The validity granted and agreed upon is also the result of notorious practices by the khap's of the panchayat who have created extreme fear and sense of insecurity amongst the minds of the residents by their modus-operandi.

THE LEGAL VALIDITY OF KHAP PANCHAYAT

The historical background of Khap Panchayat states that they were formed to regulate moral and social conduct of individuals in rural areas but they eventually derived extra power and position and ended up imposing their patriarchal ideologies on women. Their role changed drastically from protector to predator of the society. They not only started to impose their regressive and ruthless rules on girls and women but also started issuing 'diktats"[1] against the class of people who defied their ideology of supremacy of men over women. These diktats were issued as punishment for disobedience and were torturous in nature. The punishment included rape, honour killing, social boycott, banishment and other forms of highly disturbing and unjust punishment. Hence it would be proper and correct to label them as undemocratic and extra-constitutional bodies. They have no legal validity to issue an unwarranted order, judgment or decree against the people. They are nothing more than illegal social political groups who have emerged as a mock judicial system and command obedience by sentencing harsh and cruel punishments on the people. They have created a feeling of fear in the society that any contempt will lead to social boycott of an individual from the community as a whole which results in such obedience by the masses.

Forced Marriage

In Khap administration, some of the time marriage performed by pressurizing one or both the gatherings and without their choice and free assent. The casualty of such marriage is constrained through pressure, fear, kidnapping, danger, prompting and misleading. A constrained marriage can occur, between the general populations of any gathering, kids, a grown-up and a youngster or between grown-ups. The casualties

1 It means an order or decree imposed by someone in power without popular consent.

of constrained relational unions encounter torment, kidnapping, debilitate, mental and are even compelled to submit suicide.

Prohibition on Sagotra Marriage

Khap Panchayat prohibits Sagotra and inter-caste marriage. The marriages are governed by Khap on three important principles; those are:

a. Marriages within the same Gotras is forbidden since in that case a boy and girl are regarded as a brother and sister;

b. Marriages in the different Gotras are forbidden if a boy and girl belong to the same village or physically adjoining villages;

c. Inter-caste marriages are strictly barred[2]

In *Arumugam Servai v. State of Tamil Nadu*,[3] the Supreme Court strongly deprecated the practice of Khap Panchayats taking law into their own hands and indulging in offensive activities which endangers the personal lives of the persons marrying according to their choice.

Honour Killing

One of the most barbaric practices by Khap Panchayat is killing in the name of honor. Honor killing is widely practiced amongst them under the veil of cultural crimes. It is when a boy and a girl who belong to the same gotra get married against the whelms and wishes of the self-proclaimed Khap Panchayat, they issue an order allowing the family members of the gotra or anyone hurt by their actions to kill the deviant couple in the name of protecting the honor and integration of their culture. This merciless act is justified as a deterrent by them in order to prevent further commission of such incidents in future generations. This is the most deplorable kind of customary killing is forbidden by our constitutional scheme which guarantees every individual Right to Life and Liberty under Article 21.[4] it is the most paramount fundamental right enshrined by the law makers and cannot be abridged by such unconstitutional practices.

In a landmark judgment, in March 2010, the Karnal District Court ordered the execution of the five perpetrators in an 'honor killing' case of Manoj

2 Sakaar Srivastava, *Honour Killing in India,* http://www.academia.edu/4806197

3 CRIMINAL APPEAL NO. 959 of 2011 [Arising out of SLP (Criminal) No. 8428 of 2009

4 Article 21 of the Constitution of India, 1950 :
"No person shall be deprived of his life or personal liberty except according to procedure established by law."

& Babli, while giving a life sentence to the Khap head who ordered the killings of Manoj Banwala 'aged 23 years' and Babli aged 19 years'. Both were members of the same clan who eloped and married in June 2007 and later their mutilated bodies were found a week later from an irrigation canal.[5] In the verdict, district judge Vani Gopal Sharma stated:-

> *"This court has gone through sleepless nights and tried to put itself in the shoes of the offenders. Khap panchayats have functioned contrary to the constitution ridiculed it and have become a law unto themselves".*

The case was both the first court judgment convicting Khap panchayats and the first capital punishment verdict in an honor killing case in India. The Indian media and legal experts hailed it as a "landmark judgment". Also, few honor killing cases go to court, and this is the first case in which the groom's family in an honor killing filed the case.[6]

Also, a bench of Supreme Court in the case of *Lata Singh v.* State of Uttar Pradesh and others[7] headed by Justice Markandey Katju said, *"Honor killings are nothing but barbaric cold blooded murder and no honor is involved in such killings."* The Supreme Court while dropping all criminal proceedings against Singh's husband and her in-laws had gone to the extent of observing that *"inter-caste and inter-religious marriages should be encouraged to strengthen the social fabric of society."*[8]

Also on August 2010 the Supreme Court in a case of *State of U.P. v. Krishna master &Ors*[9] awarded life sentence to three persons who caused the death of six persons of a family in a case of 'honor' killing at a village in Uttar Pradesh in 1991. A Bench of Justices H.S. Bedi and J.M. Panchal reversed the order of acquittal passed by the Allahabad High Court. The Bench said: *"There is no manner of doubt that killing six persons and wiping out almost the whole family on the flimsy ground of saving the honor of the family would fall within the rarest of rare cases and, therefore, the trial court was perfectly justified in imposing the capital punishment on the respondents."*[10]

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5 Dr.Saraswati Raju Iyer, *Honor Killing – Crime against Mankind,* Vol. 10 Issue 3 IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 01-04 (2013).

6 http://www.thehindu.com/news/national/Death-sentence-commuted-in-Manoj-Babli-case/article14943294

7 Writ Petition (Crl.) 208 of 2004

8 *Ibid.*

9 Criminal Appeal No. 1180 of 2004.

10 *Ibid*.

INTERNATIONAL PERSPECTIVE ON HONOUR KILLING

"Honor killings" are a recognized form of violence against women in international human rights law because they violate women's rights to life and personal security of the women who share an equal right of protection in the society. International law casts a mandatory duty upon states to protect women from gender-based violence, including by family members, and to disqualify "honor" as a legal defense for acts of violence against women. In India, our constitution prohibits any such practice that promotes inequality amongst gender directly or indirectly[11]

'Honor killings' is grave abuse of human rights, violating the most basic of human rights- the right to life- as well as every other article in the UDHR (1948). The presence of laws that treat 'honor killings' is also a fierce contravention of the International Convention of Civil and Political Rights (1966), protecting individuals against the use of the death penalty except for the most serious of crimes. 'Honor killings' also disregards the Convention on the Elimination of All Forms of Discrimination against Women (1979).

"For the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field." [12]

Further the convention states that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

a. To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

b. To take all appropriate measures, including legislation, to modify

11 Article 14 in *The Constitution of India 1949: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*

12 Article 1 of Convention on the Elimination of All Forms of Discrimination against Women (1979).

or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

c. To repeal all national penal provisions which constitute discrimination against women."[13]

The General Assembly resolution of United Nation that established the Human Rights Council back in 2006 decided "that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner".[14] From the above procedures and rules, it can clearly be established that that United Nations has made all possible effort under its jurisdiction to prevent any crime arising out of hatred of men towards women and also to protect basic universal human rights.

CONCLUSION

I hereby conclude my paper in light of the above findings that takes away the validity of Khap Panchayats in every aspect whether it being social or legal. They are not only unconstitutional but an unreasonable self-proclaimed body of so-called flag bearers of culture, traditional, values and morals.

Not only I strongly condemn their regressive patriarchal ideologies, but I also castigate their power to play with the boundaries set by law and order. I also feel that there is an evident need for a very strong, efficient and competent law against such depravity and infringement ofbasic human rights that the society leads by an example thereon.

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13 Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (1979)

14 Suzanne Ruggi, *Commodifying Honor in Female Sexuality: Honor Killings in Palestine,* Middle East Research and Information Project.

A NEEDFUL APPROACH TOWARDS REHABILITATION OF SICK INDUSTRIES

Ms. Akshita Gupta*

ABSTRACT

Industries play a vital role in the economic development of any country especially the developing or under-developing countries. In spite of its importance many industries are beset with the problem of sickness. The sick industries become unable to utilise its production capacity, its sickness adversely affect the production and employment in the country therefore it becomes essential to recognise the sickness in its initial stage only, so that the process of corrective measure and rehabilitation could be initiated prior to the sickness consumes a serious proportion. It could further suggested that the financial institutions and the commercial banks should deal with the sick industries more generously at the time of crises such liberal financing can save the sick industries from an upcoming failure. The power of BIFR should be enriched so that the working regarding problem of sickness could be more effective. The BIFR should establish its own committee of experts for the dealing of problems regarding rehabilitation of sick unit rather than solely depending upon the operating agencies in all the concerned matter. There should be an equal responsibility of the operating agencies and the management for the better implementation of the schemes of rehabilitation. If there is a delay in implementation procedure due to the incompletion of the commitments of the promoters then the operating agencies must be permitted to take over the organisation.

INTRODUCTION

Industries play a vital role in the economic development of any country especially the developing or under-developing countries. In spite of its importance many industries are beset with the problem of sickness.[1] According to the Sick Industrial Companies (Special Provisions) Act, 1985, as amended in 1993 the sick industrial company is such industrial company (being a company registered for not less than five years)

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1 *Sick Industrial Companies* Act (SICA), http://www.investopedia.com/terms/s/sick-industrial-companies-act-sica.asp

which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

The sick industries become unable to utilise its production capacity, its sickness adversely affect the production and employment in the country therefore it becomes essential to recognise the sickness in its initial stage only, so that the process of corrective measure and rehabilitation could be initiated prior to the sickness consumes a serious proportion. The increasing trend of Industrial Sickness reaches to all types of industrial sector including the small, medium, and large scale industries, but the small scale industries are more prone to sickness in comparison to medium and large scale industries.[2]

The rapid growth and magnitude of industrial sickness has become alarming not only for present time but for all time to come, particularly for India. It becomes a matter of serious concern for all, as the crores of rupees are locked up in sick industrial units which severely affect the national growth. The sickness does not occur all of a sudden, there may be several reasons for industrial sickness, and majorly management failure could be one of the serious causes for it.

The key factors found to be responsible behind the emergence of sickness in the industrial unit could;

Licensing system

Restrictions imposed on foreign trade and collaboration

Rigidness of labour market etc.

Roots of Sickness

The proverb 'Prevention is better than cure' shows the importance to know the causes for industrial sickness so that the process of corrective measure could be adopted to avoid such sickness. As being humans we all fall sick either in the cause of born sickness or sickness during growing years, similarly the industry can also face the trouble either during the stage of its implementation or during its lifetime. If we try to conclude the factors causing sickness then it could be:[3]

2 Durgaprasad Navulla & Dr. G.Sunitha, *A Study on Indistrial Sickness in India,* 5 IJSTM 83 (2016)

3 *Evolution of Small Scale Industry in India,* http://shodhganga.inflibnet.ac.in/bitstream/10603/4912/8/08_chapter%202.pdf

1. **Lack of finances** which includes lack of utilization of assets, insufficient working capital, weaker equity base, non-presence of costing & pricing, inefficient planning and inappropriate diversion of funds.

2. **Bad production policies** if there is wrongful selection of site related to production could be another important reason for sickness. Also inefficient Plant & Machinery, improper maintenance of Plant &Machinery, lack of quality control also lower standard of research and development.

3. **Marketing and sickness** which includes inappropriate demand forecasting, selection of wrong production mix, lack of product planning, inefficient market research method and ineffective sales promotions.

4. **Personnel constraints** which could be the non- availability of skilled labour or manpower, disparity in wages of similar industry and general labour invested in the area.

5. **Marketing constraints** where the sickness arises due to liberal licensing policies, restrain of purchase by bulk purchasers, changes in global marketing scenario, excessive tax policies by government and market recession.

6. **Production constraints** which arises due to lack of raw material, shortage of power and fuel, also the import-export restrictions.

PRODROME OF SICKNESS

As the diseases can be identified by considering symptoms same as with the industrial sickness. The mentioned symptoms act as prime indicators of sickness, and if accordingly the immediate remedial actions were not taken, the sickness may lead to the extent where the organization will find its natural death.[4]

- Reduction in turnover continuously.
- Severe reduction in the net profit to sales ratio.
- Short term borrowings with higher rate of interest.
- Uninterrupted cash losses may lead to erosion of tangible net worth.

4 *Rehabilitation of Sick Industries,* http://www.newagepublishers.com/samplechapter/000922.pdf

- Failure in payment of interest upon borrowings and defectiveness in repayment of loan instalments.
- The continuous growth of 'sundry debtors' as well as the 'sundry creditors' and reach to the disproportionate higher level.
- Frequent approach to the banker for temporary over draft.
- Higher rate of personnel turnover, especially at senior levels.
- For the purpose of window dressing, fluent change in accounting procedure.
- Unnecessary delay in account finalization.

PHASES OF SICKNESS

Phase I: A Healthy Progress

According to Bidani & Mitra, "A unit is called normal when all its functional areas like production, marking, finance and personnel are functioning efficiently".[5]

Basically, a healthy unit shows the cash profit at a good level and also the positive value of net working capital and net worth as well.

For a summarized view, the following features reside within every healthy unit;

1. Efficient functional areas like, production, marketing, finance and personnel administration.
2. Generating cash profit.
3. Positive lead towards the value of net working capital or current ratio more than one.
4. Increased value of net worth towards positive level.
5. Satisfactory and balanced debt equity ratio.

5 *The Sick Industries: Reasons and Remedies for it,* https://www.slideshare.net/masumhussain1650/sick-industries

Phase II: Tending Towards Sickness

Whenever any industrial unit tent toward the stage of sickness, the foremost situation comes into picture is that the functional area begins to aberrant and also faces the external constraints. All of these reasons together leads to depreciation in cash profit with comparison to previous year's profits and may also results in accumulated cash loss even though the business unit may not have been listed as the defaulter in the records of financial institution and also must have been earning the positive value of net working capital and net worth.

This stage conveys the initial warning signal which should be considered cautiously and accordingly the protective measures should be taken with the close monitoring upon the actions.

The basic symptoms of this phase could:

- Depreciating profit during last year
- Accumulated losses of the current year

Phase III: Incipient Sickness

With the growth of sickness the stage gradually enters into incipient sickness for a very short period. This stage comes into picture when the industrial unit incur losses although the misbalancing financial structure may or may not appear. Basically it means that two or more financial indicators become negative and this value shows the alarming signal of sickness.

At this phase, most of the financial institution and other agencies along with management collectively review the overall performance of the unit and jointly take the beat suited remedial measure to prevent the sickness. [6]

The following feature gives a clear view of this stage:

- Cash losses incurred in previous year may occur in present year also
- Deterioration anticipated in debt equity ratio during current year

6 Dr. Navneeta Singh, *Industrial Sickness: Causes and Remedies,* http://ijmtpublication.com/files/AOMR_1_2_2011/AOMR_1_2_2011_3.pdf

Phase IV: The Terminal

At this Phase the industrial unit become finally sick due to failure in adopting the required remedial measures and the adverse factor of the incipient stage continuously affected the areas of finance, marketing and production of the business unit. At this, all the financial indicators like cash profit or loss, net working capital, net worth shows negative results. The industrial unit at this stage works below 20% of its installed capacity or below its B.E.P level.[7]

As per the Diagnostic Survey Report of Development Commissioner (Small Scale Industries), "a unit is categorized actually to be sick on the basis of following criteria:

- Depreciation in net worth by 50% or more
- Closure of industrial unit for a total period of 6 months and more during the previous year
- Failure in payment of loan instalments

Such industrial unit needs a comprehensive rehabilitation program for revival and intensive care for a certain period of time in case it is potential viable. Generally, it is observed that there is severe delay in adopting the remedial measures. Eventually it becomes an expensive affair to bring the sick unit back to its healthy state.

To sum up with it can only be said that if the sickness of industrial unit is not identified in the required time than such sickness leads to the ultimate closure of the industrial unit.

REVIVAL AND REHABILITATION: A HELPFUL HAND BY LEGISLATURE

The Companies Act, 2013

The chapter XIX of the act deals with the provisions regarding Revival and Rehabilitation of Sick Industries which thoroughly describes the circumstances which determine the declaration of a company as a sick company and also includes the revival and rehabilitation process of the same. The provisions of the revival and rehabilitation of sick companies predominantly revolve around secured creditors and the presence of

7 *Id.*

unsecured creditors is felt only at the time of the approval of the scheme of revival and rehabilitation.[8]

According to the Section 253 of the said act, a company is assessed to be a Sick Company only on the demand by the secured creditors representing fifty percent or more of its outstanding amount of debt which the company has failed to pay.

Detailed Provision

1. Where on a demand by the secure creditor of a company representing fifty percent or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of creditors any secured creditor may file an application to the tribunal in the prescribed manner alongwith the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick-company.

2. The applicant under sub-section (1) may, along with an application under that subsection or at any stage of the proceedings thereafter, make an application for the stay of any proceeding for the winding up of the company or for execution, distress or the like against any property and assets of the company or for the appointment of a receiver in respect thereof and that no suit for the recovery

of any money or for the enforcement of any security against the company shall lie or be proceeded with.

1. The Tribunal may pass an order in respect of an application under sub-section (2) which shall be operative for a period of one hundred and twenty days.

2. The company referred to in sub-section (1) may also file an application to the Tribunal on one or more of the grounds specified in sub-sections (1) and (2) above.

3. Without prejudice to the provisions of sub-sections (1) to (4), the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution

8 Abhay N., *Revival and Rehabilitation of Sick Companies under the New Act, 2013,* http://indiamicrofinance.com/revival-and-rehabilitation-of-companies.html

or a scheduled bank may, if it has sufficient reasons tobelieve that any company has become, for the purposes of this Act, a sick company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company:

Provided that a reference shall not be made under this sub-section in respect of anycompany by—

1. the Government of any State unless all or any of the undertakings belongingto such company are situated in such State;

2. a public financial institution or a State level institution or a scheduled bankunless it has, by reason of any financial assistance or obligation rendered by it or undertaken by it, with respect to such company, an interest in such company.

Where an application under sub-section (1) or sub-section (4) has been filed,—

1. the company shall not dispose of or otherwise enter into any obligation with regard to, its properties or assets except as required in the normal course of business;

2. the Board of Directors shall not take any steps likely to prejudice the interestsof the creditors.

3. The Tribunal shall, within a period of sixty days of the receipt of an application under sub-section (1) or sub-section (4), determine whether the company is a sick company or not:

Provided that, no such determination shall be made in respect of an application made under sub-section (1) unless the company has been given notice of the application and a reasonable opportunity to reply to the notice within thirty days of the receipt thereof.

4. If the Tribunal is satisfied that a company has become a sick company, the Tribunal shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make their payment of its debts referred to in sub-section (1) within a reasonable time.

5. If the Tribunal deems fit under sub-section (8) that it is practicable for

a sick company to pay its debts referred to in that sub-section within a reasonable time, the tribunal shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make repayment of the debt.

CONCLUSION

The synonym for the term industrial sickness could be business failure. Industrial sickness universally becomes a major obstacle in the way of industrial growth and the reason behind such sickness could be the rapid growth in the field industrialization. Industrial sickness arises due to a multitude of factors both external and internal to the firm. The major possible external factors that cause industrial sickness could be lack of raw material, labour issues, inefficient credit facilities, import restrictions, competition at global level, backward technology, unfavourable government policies, high rate of tax, improper investment climate and recession in market.

On the other hand, the internal factors which can cause sickness could arise due to inefficient functioningin the areas like production, finance, personnel administration and marketing. In India, the glimpse of Industrial sickness was first observed in early sixties and since then it keeps on growing at an alarming rate.

In the phase of sixties, government observed that industrial sickness was considered to be a great threat for the labour employment and policies regarding take over's and closure. In the later sixties a number were declared to be sick in the country in the aftermath of the depression and recessionary conditions. The appropriate remedy of the time for overcoming the problem of industrial sickness was Rehabilitation, especially for the industries which were on the threshold of collapse. This eventually led to the establishment of agency regarding principle reconstruction known to be the Industrial Reconstruction Corporation of India (IRCI) in 1971.

The government of India was forced under the prevalent circumstances to make effective changes in the policies of rehabilitation; the reason for this step was the alarming signals of industrial sickness emerging rapidly in the country. For the purpose of rehabilitation of sick industries the following policy measures were introduced by the government that are Soft Loan Scheme, Merger Policy -1977, Policy Guidelines on Sick Industrial Units-1978. Also for the functioning as the principal credit and reconstruction agency in India, The Industrial Reconstruction Bank of India (IRBI) was

set up in 1985.

In spite of the remedial measures initiated by the Government of India and the RBI the number of industrial units falling prey to the malady of industrial sickness every year has been increasing at a steady rate. A multiplicity of laws and agencies made the adaptation of a coordinated approach for dealing -with sick industrial companies difficult. A need has therefore been felt in public interest to seek an alternative legal route for the revival and rehabilitation of sick units or liquidation of companies. This led to the enactment of the Sick Industrial Companies (Special Provisions) Act, 1985.

The Board for Industrial and Financial Reconstruction (BIFR) was set up under the Act to determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and for proper implementation thereof.

In the process of rehabilitation the Board can change management, order transfer of ownership at prices fixed by it, order financial restructuring, impose on promoters the quantum of funds that they should bring in and determine changes in management structure.

For the revival of sick industries it is essential to implement the rehabilitation scheme with in a proper period of time. The timely implementation could be a great saviour in the revival process. For this purpose it is necessary to ensure that the participating agencies should extent their support, as any delay in such support could result in partial or defective implementation of the scheme.

For the success of schemes regarding rehabilitation it is required that the participating agencies gives their timely support as delay in providing support could severely affect the success of the scheme regarding rehabilitation. As per a random survey analysis it was observed that among the numerous agencies participating in the rehabilitation process, 49 percent of them were successful where they provided the timely support to the schemes specially in case of financial institutions and where there was a delay in such support the rate of success decrease to 9.5 percent. In case of government promoters and the labour the success rate in situation of timely support were 54.8 percent, 43.1 percent and 40 percent respectively. Further in case of delay in support regarding government the rate of success diminish to 25.6 percent and regarding the cases of promoters an labours if there was a delay in support than there will be a complete failure.

The above data indicates the importance of timely support provided by the agencies participating in rehabilitation process, this increases the probabilities of success of the schemes regarding the rehabilitation. Further, BIFR while acknowledging the poor performance of operating agencies in its Performance Review 1988 has observed:

"While some operating agencies were functioning very effectively some of the Operating Agencies have failed to perform their responsibility efficiently in terms of the Act.An undue delay in processing the submitted rehabilitation package by the companies, absence of qualitative appraisal of such proposals and also the casual approach while conducting techno-economic viability studies of the performance of companies have resulted in consequential delays in finalizing the rehabilitation schemes. At times operating Agencies, especially if they have happened to be the lead bank, have shown greater interest in formulating an One Time Settlement (OTS, proposal for recovering a substantial portion of their dues rather than working out an effective rehabilitation package for the company." [9]

PROPOSAL FOR CHANGE: AWAITED FOR IMPLEMENTATION

1. Industrial sickness is a slow process which causes into the decline in profit earning and finally resultant into the closure of industrial unit. Sick industries generally a report to the BIFR at the stage of forthcoming insolvency which arises due to loss of their overall net worth and it becomes difficult at this stage to rehabilitate such sick industries. The rehabilitation of sick industries becomes easy only if the sickness is identified at its initial stage.
2. It could further suggested that the financial institutions and the commercial banks should deal with the sick industries more generously at the time of crises such liberal financing can save the sick industries from an upcoming failure.
3. As it was an old say that prevention is always better than cure hence, in regard to the preventive measure a monitoring mechanism such as CRISIL, can be introduced which helps to identify the units which may be on the verge of initial sickness or which may be sailing with the diminishing profits. This may help the sick industries to take timely corrective and preventive measures.
4. The BIFR has introduced various rehabilitation measures in numerous of companies with uncertain possibility to take corrective measures in larger interest. This criteria resultant into the failure of such schemes

9 *supra* note 3.

in various cases. For the success of rehabilitation scheme it should be necessary that the company or the unit should be economically, commercially and technically sustainable. Viability could be the criterial only for the assortment of a sick industry for the rehabilitation.

5. The timely implementation regarding rehabilitation scheme is an essential element in the process of revival of sick industries, but this could be severely affected if there was delay in identifying the sickness by the unit which eventually leads to the failure of rehabilitation scheme. To cure this problem the penalty clause could be introduced in the cases of delay reporting of sickness by the industrial unit, and thus, there could be an assurance of timely reporting.

6. Regarding the rehabilitation process in the larger interest various sick industries continues to exist with the doubtful viability for a longer time with no possibility of revival. The longer existence of any sick industry could cause huge loss to the civilization. All such units should be immediately wound up so that the resources sunk in them could become operative and productive.

7. Generally the BIFR conducts an enquiry in which it appoints an operating agency which determines the sickness in the industrial unit, all this is a time consuming procedure which adversely affect the early implementation process of rehabilitation scheme. To cure this problem and to bring the speedy process a separate department of specialised expert should be established which assure the early determination of sickness.

8. The power of BIFR should be enriched so that the working regarding problem of sickness could be more effective. The BIFR should establish its own committee of experts for the dealing of problems regarding rehabilitation of sick unit rather than solely depending upon the operating agencies in all the concerned matter.

9. There should be an equal responsibility of the operating agencies and the management for the better implementation of the schemes of rehabilitation. If there is a delay in implementation procedure due to the incompletion of the commitments of the promoters then the operating agencies must be permitted to take over the organisation.

10. If BIFR appoints the special directors which shares the responsibility with the operating agencies and monitor the implementation process of the rehabilitation scheme, then this could be a really effective measure.

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SUSTAINABLE DEVELOPMENT, ENVIRONMENT PROTECTION AND ROLE OF JUDICIARY

Dr. J.P. Arya*

ABSTRACT

This research paper is an endeavor in the direction to describe the meaning and definition of "sustainable development", the ways and means of environment protection and role of judiciary in maintaining the pollution free, clean and green planet. The author while describing the concept of education for SD and education for Sustainable Life also points out that, in fact, there is not a single country in the world that says its development is sustainable. However, it is a concept that has been mobilizing many people in the fight for a better world. In this research paper the author also deals with the role of education to save the planet. Essentially, the Environmental Education aims at making people aware through means of their disposal. The author elaborates that the word "environment" relates to surroundings. It includes virtually everything. It can be defined as anything which may be treated as covering the physical surroundings that are common to all of us, including air, space, land, water, plants and wildlife. In this text, he presents environmental concerns e.g. climate change, energy, waste, water, food, consumption, land management etc. and questions the Science of Public Health on Some Issues. The author also presents the role of judiciary in developing the tortuous remedies in the cases involving the substantial or continuous environmental harm to the citizens. The author also cites the numbers of judgments which clearly highlight the active role of judiciary in environmental protection.

INTRODUCTION

We all know the story of Kalidas, the great Sanskrit poet, who was once such an ignoramus that he cut off the very branch on which he was sitting. Our legends go on to say that, with the blessings of the Goddess of learning, he attained immense wisdom and became one of the most famous poets the world has ever known. But we must admit that all may not be as lucky

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as Kalidas was.

Intelligence and knowledge ensure the success of individuals without any regard to the consequence of the success. The survival of society and welfare of people and environment protection depend on the wisdom and not only on the intelligence of individuals who form a part of it. Intelligence is not rare to find in today's world. This ability to learn, analyze and derive solution-options can be commonly found in people. What is not common is the ability to apply wisdom and choose the true option. Failure to look beyond immediate needs, self-centered interests, short-sighted objectives and reluctance to think in a larger perspective, will create pathways to defeat.

In 1987, the Brundtland Commission published its report, *Our Common Future,* in an effort to link the issues of economic development and environmental stability. In doing so, this report provided the oft-cited definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" .[1] Albeit somewhat vague, this concept of sustainable development aims to maintain economic advancement and progress while protecting the long-term value of the environment; it provides a framework for the integration of environment policies and development strategies. However, long before the late 20th century, scholars argued that there need not be a trade-off between environmental sustainability and economic development.

SUSTAINABLE DEVELOPMENT: DEFINITION AND PRINCIPLES

Although many definitions abound, the most often used definition of sustainable development is that proposed by the Brundtland Commission. [2]This broad definition, does not limit the scope of sustainability. The explanation does, however, touch on the importance of intergenerational equity. This concept of conserving resources for future generations is one of the major features that distinguish sustainable development policy from traditional environmental policy, which also seeks to internalize the externalities of environmental degradation. The overall goal of

1 United Nations General Assembly, *Report of the World Commission on Environment And Development: Our Common Future* (1987). Also see: Norway: United Nations General Assembly, *Development and International Co-operation: Environment.*

2 Cerin, P., *Bringing Economic Opportunity into Line With Environmental Influence: A Discussion On The Coase Theorem And The Porter And Van Der Linde Hypothesis,* Ecological Economics, 209-225 (2006).

sustainable development (SD) is the long-term stability of the economy and environment; this is only achievable through the integration and acknowledgement of economic, environmental, and social concerns throughout the decision making process. In the application of this definition of sustainable development, one issue concerns the substitutability of capital.

In addition to substitutability, this definition of sustainability is also founded on several other important principles. Contained within the common definition of sustainable development, intergenerational equity recognizes the long-term scale of sustainability in order to address the needs of future generations.[3] Also, the polluter pays principle states that "governments should require polluting entities to bear the costs of their pollution rather than impose those costs on others or on the environment".[4]Thus, government policy should ensure that environmental costs are internalized wherever possible; this also serves to minimize externalities. The precautionary principle establishes that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measure to prevent environmental degradation"[5]

Explicitly stated in the Rio Declaration, the notion of common but differentiated responsibilities recognizes that each nation must play their part on the issue of sustainable development. This principle also acknowledges the different contributions to environmental degradation by developed and developing nations, while appreciating the future development needs of these less developed countries.[6] The key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making. All other principles in the SD framework have integrated decision making at their core.[7] It is this deeply fixed concept of integration that distinguishes sustainability from other forms of policy. Institutionally, government organizations are typically organized into sectoral ministries and departments. In practice, sustainable development requires the integration of economic, environmental, and social objectives across

3 *Ibid.*

4 Dernbach, J. C. *Sustainable Development As A Framework For National Governance,* Case Western Reserve Law Review, 1-103 (1998).

5 United Nations Conference on the Human Environment, *Rio Declaration on Environment and Development,* Rio de Janiero, Brazil: United Nations. (1992).

6 Brodhag, C., & Taliere, S., *Sustainable Development Strategies: Tools for Policy Coherence,* Natural Resources Forum, 136-145 (2006).

7 Dernbach, J. C. *Achieving Sustainable Development: The Centrality And Multiple Facets Of Integrated Decision Making,* Indiana Journal of Global Legal Studies 247-285 (2003).

sectors, territories, and generations. Therefore, sustainable development requires the elimination of fragmentation; that is, environmental, social, and economic concerns must be integrated throughout decision making processes in order to move towards development that is truly sustainable.

In 1982, the UN approved the Nature Charter, defending all kinds of life and created (1993) the Global Commission on Environment and Development, headed by Norway's Prime Minister, Gro Harlem Brundtland. The commission aimed at creating proposals of how to overcome the situation and published a report four years later (1987) under the name Our Common Future, also called "Brundtland Report", in which the expression "sustainable development" appears for the first time. The Brandtland Report establishes several conditions for sustainable development:[8]

1. a political system that secures effective citizen participation in decision making;(2) an economic system that is able to generate surpluses and technical knowledge on a self reliant and sustained basis; (3) a social system that provides for solutions for the tensions arising from disharmonious development;(4) a production system that respects the obligation to preserve the ecological base for development; (5) a technological system that can search continuously for new solutions;(6) an international system that fosters sustainable standards of trade and finance, and(7) an administrative system that is flexible and has the capacity for self-correction.

The concept of "sustainable development" was definitely established during 1992 Earth Summit, the United Nations Conference on Environment and Development, whose main result was the Agenda21, which contained a set of proposals and objectives in order to reverse the process of environmental deterioration. Five years later (1997), a Protocol signed by 84 countries (except the United States) in Kyoto, Japan, aimed at the reduction of greenhouse gas emissions. A very high amount of gases in the atmosphere, such as carbon dioxide and methane, makes the Earth absorb a higher quantity of sunlight, causing the planet's "over-warming" The UN's report has showed that the growth rate of greenhouse gases emission is due to the energy sector, which has increased its emissions in 145% in the last 15 years; the transport sector's emission has increased in 120%; the industrial sector's in 65% and the forest sector' in 40%, due to deforestation.

8 The World Commission on Environment and Development (WCED), *Our Common Future,* Oxford: Oxford University (1987).

EDUCATION FOR SD AND EDUCATION FOR SUSTAINABLE LIFE

It is not enough to educate for sustainable development. We need to educate for a sustainable life. Sustainable Development is what we call the kind of development that fulfills our current needs without putting at risk the ability of future generations to fulfill their own. It is a concept that had a wide international consensus. In fact, there is not a single country in the world that says its development is sustainable. However, it is a concept that has been mobilizing many people in the fight for a better world.

We call sustainable life a lifestyle that harmonizes human environmental ecology by means of appropriating technologies, co-operation economies and individual effort. It is an intentional lifestyle whose characteristics are personal responsibility, commitment to other people and a spiritual life. A sustainable lifestyle is related to ethics in managing the environment and economy, trying to keep balance between fulfilling current needs and guaranteeing the fulfillment of the needs of future generations. While sustainable development refers mainly to the ways a society produces and reproduces human existence, a sustainable lifestyle is, first of all, related to options people make to their lives. So we cannot pay attention only to educating for development, but also for individual life.

Sustainability is a goal of humanity that points towards a route to a better future. If sustainability is this route, education for sustainable development is the "how", the mean that will conduct us to this trip to the future.

We need an Earth Pedagogy, based on a new paradigm, the Earth's paradigm, appropriate to the culture of sustainability and peace. It has been constituting itself slowly, profiting from various reflexions that have been made in the last decades, especially within ecological movement. It bases itself in a philosophical paradigm which has emerged from an education that proposes a group of interdependent knowledge and values necessary to a sustainable life. Among these values and principles, we can highlight:[9]

1. Educate for a global thinking - In the era of information, considering the speed in which knowledge is produced and grows old, there is no need for accumulating information. Given that, we need to reconsider what is knowledge, what is knowing how to learn, how to know, its methodologies and the organization of school work. Educate so that people learn that there is only one home. Educate to transform in

9 *Id*. at 22.

local and global levels. Some struggles are planetary. Our survival in the planet is a common cause. Educate people not to be neglectful, indifferent or conniving with the destruction of life in the planet.

2. Educate one's feelings - Human being is the only being who asks about what is the sense of life. Educate to feel, to care, to take care, to live every moment of our lives making sense. We are humans because we feel, not only because we think. We are part of a whole under construction.

3. Teach our identity in the Earth as a vital human condition - Our common destiny in the planet is to share life in the planet with others. Our identity is at the same time, individual and cosmic. Educate to be emotionally bound to Earth.

4. Educate for planetary awareness; understanding that we are interdependent - The Earth is a single nation and we, people from Earth, we are its citizens. We don't need passports. Nowhere in the Earth should we be considered foreigners. Separate the world in first and third world means to divide the world in order to let it be ruled by the most powerful; this is the globalist division, between globalizers and globalized, which is opposite to the process of planetarization.

5. Educate for understanding - Educate for human ethics and not for market's instrumental ethics. Educate for communication. Not an exploiting communication or to take advantage of others, but to better understand others. Pedagogy of the Earth is based on this new ethic paradigm and in new intelligence of the world. Intelligent is not the one who knows how to solve problems (instrumental intelligence), but the one who manifests a life project with solidarity; because solidarity is not only a value nowadays. It is a condition of our survival.

6. Educate for voluntary simplicity and quietness - Our lives need to be guided by new values: simplicity, austerity, quietness, peace, serenity, listening, and living together, share discover and build together. We have to choose between worlds that are more responsible against current dominant culture, a culture of war and act concretely. We need to choose a world that is more responsible in opposition to the current dominant culture; which is a culture of war and start to act concretely, sharing, putting sustainability in practice in our daily lives, in our families, at work, at school, in the street. The simplicity we defend is not synonymous to simple mindedness, and quietness is not culture of silence. Simplicity has to be voluntary, by willingly changing our consumption habits, reducing our demands.

ROLE OF EDUCATION TO SAVE THE PLANET

The Education for Sustainable Development's main goal is to influence on curricular change by introducing the theme sustainability. National responsibility is a decisive factor for promoting the Environmental Education for Sustainable Development. We need a bigger diffusion of information on the Decade in order to stimulate local and regional initiatives. We need to have clear political goals for choosing content and a appropriate pedagogy of sustainability. Finally, we need teaching-learning materials and methods whose production was based on principles and values for a sustainable life. An education for a sustainable development must be holistic, trans-disciplinary, critical, constructive, and participatory, in short, an education that is guided by the principle of sustainability.

We need to re-orientate existent educational programme in the sense of promoting knowledge, competences and abilities, principles, values and attitudes related to sustainability. A concrete strategy so that we can start this debate inside our schools and building an eco-audit in order to discover where exactly we are being unsustainable. In terms of level of teaching, we have to adopt different strategies: in primary school, for example, our children need to experience and they need to know the plants' and animals' needs, their habitat, how to reduce, re-use and recycle materials that have been used, how to keep ecosystems attached to forests and water. In a more advanced level, we need to discuss biodiversity, environmental conservation, alternatives of energy and global warming. At university level, besides diffusing environmental information, we need to produce new knowledge and do research that aim at looking for a new development paradigm.

To educate for a sustainable development is to educate for the use of renewable sources of energy, to save energy and re-think our lifestyle. The challenge is to change Earth's life system, the capitalist system. Marx used to say that capitalism does not exhaust only the workers. It also exhausts the planet. The capitalist model is being questioned because it is making people and the planet exhausted. Promotion of education to protect and promote the healthy environment is indeed a foundation for another possible world, for another society, less cruel to humanity; It is, therefore, an essentially solidary education a not only an education for a certain kind of development. Sustainability demands solidarity and the search for a common well-being, an old liberal thesis that is not very often put in practice by economical liberalism. An education for sustainable development is incompatible to the current state of aggressive diffusion and planetary promotion that is done by means of communication of

unsustainable lifestyle, of irresponsible consumption, promoted by unsolidary capitalism. The success of capitalist competitiveness represents the failure of sustainable development.

Essentially, the Environmental Education aims at making people aware through means of their disposal. Therefore, it will work with ethical values and principles which are related to people's sustainable life and to the planet's survival itself.

MEANING OF ENVIRONMENT

Environment is the wellspring of life on earth like water, air, soil, etc., and determines the presence, development and improvement of humanity and all its activities. The concept of ecological protection and preservation is not new. It has been intrinsic to many ancient civilizations. Ancient India texts highlights that it is the dharma of each individual in the society to protect nature and the term 'nature' includes land, water, trees and animals which are of great importance to us. . In the '*Atharva Veda',* the ancient Hindu Scepters stated "What of thee I dig out let that quickly grow over".[10]

At the same time, new innovations like, thermal power, atomic plant and so on without any sufficient natural assurance pose another danger to the situations, the aftereffect of which results in issues like global warming, climate change, acid rain, etc. There arises a requirement for a comprehensive analysis of the protection of the environment. In recent years, there has been a sustained focus on the role played by the higher judiciary in devising and monitoring the implementation of measures for pollution control, conservation of forests and wildlife protection. Many of these judicial interventions have been triggered by the persistent incoherence in policy-making as well as the lack of capacity-building amongst the executive agencies. Devices such as Public Interest Litigation (PIL) have been prominently relied upon to tackle environmental problems, and this approach has its supporters as well as critics.[11]

The word "environment" relates to surroundings. It includes virtually everything. It can be can defined as anything which may be treated as covering the physical surroundings that are common to all of us, including air, space, land, water, plants and wildlife.[12]

10 M.C. MEHTA, GROWTH OF ENVIRONMENTAL JURISPRUDENCE IN INDIA, p.71 (1999).

11 Former Chief Justice Mr. K.G. Balakrishnan, *The Role of the Judiciary in Environmental Protection* in D. P Shrivastava Memorial Lecture, p. 1, Mar.20, 2010.

12 DR. JAI JAI RAM UPADHYAY, ENVIRONMENTAL LAW, p.2, (2005).

According to the Webster Dictionary, it is defined as the "Aggregate of all the external condition and influences affecting the life and development of an organism.[13]

As per Section 2(a) of The Environment (Protection) Act, 1986, environment "includes water, air and land and the inter- relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.[14]

Thus, after analyzing all the above definitions, the basic idea that can be concluded is that environment means the surroundings in which we live and is essential for our life.

ENVIRONMENTAL CONCERNS

Climate Change

Global warming has been concerning scientists for decades, but Al Gore legitimized the crisis with his controversial film An Inconvenient Truth. From the melting polar ice caps to catastrophic weather and threatened ecosystems, not only is climate change real, scientists agree that humans are influencing climate change with our production of greenhouse gases (mainly stemming from carbon dioxide and methane). Despite the urgency of the crisis, there are various technological developments as well as meaningful lifestyle changes that may help.

Energy

Energy is second only to climate change in significance, but the picture isn't as clear as one might think. China is heavily criticized, but did you know the state of California is worse? Look for plenty of myth-busting and interesting news to come, as well as practical tips to reduce your own energy dependence. Though no single energy source is going to be the solution, positive developments toward a cleaner future are happening every single day.

Waste

With the immediate looming problems of climate change and energy, focus has shifted away from landfill waste, but this is a serious problem. The world has largely gotten accustomed to a throwaway lifestyle, but

13 R.M. LODHA, ENVIRONMENTAL RUIN: THE CRISES OF SURVIVAL, p.364.
14 Available at: envfor.nic.in/legis/env/env1.html

that's neither healthy nor sustainable. Waterways are choked with trash and modernized nations ship their undesirable leftovers to the developing world. Fashion, fast food, packaging and cheap electronics are just some of the problems. The amount of waste the industrialized world generates is shocking. Water bottles are the defining symbol of this critical issue. Fortunately, people are becoming aware of the consequences of "fast consumption".

Water

Pure Water is in short supply. Our global reserves of drinkable water are a fraction of 1% and 1 in 5 humans does not have access to potable (safe) water. Many people do not realize that strife has already broken out in some stressed regions. There are many potential solutions, some promising, others challenging. Desalinization is an energy-inefficient, expensive option. But there are many things you can do. (Hint: it starts with turning off the faucet when you brush.)

Food

Bio-fuels have turned into a global controversy – the idea that people may cause the starvation of millions in order to fuel their SUVs is sickening. And yet that's not the whole picture. For example, eating hamburgers has as much or more impact on the global food picture as the use of bio-fuels. It's all about resources and efficiency. There are big questions: can we support the world without turning to vegetarianism? Fortunately, there are a multitude of tasty diets that incorporate greener values, so it's not necessary to adhere to veganism, for example.

Consumption

This is directly tied to waste. It is well-known that the industrialized world simply consumes in a way that is not sustainable. And the developing world is rapidly imitating the model. Sustainability in the most compelling sense is about long-term solvency. The way we live now is borrowing against the future. Reducing consumption, and smart consumption, are both necessary – and there are many ways to go about doing this.

Land Management

From desertification to polar ice melting to erosion and deforestation, existing land management choices are not serving the planet or its inhabitants very well. The 1990s saw some headway with forest management. There is very little land left that is undeveloped, either with

structures or roads. And there is virtually no land left that is not subject to light or noise pollution. The modern green movement believes that in order to create a sustainable future, people will need to return to the conservation spirit.

Ecosystems and Endangered Species

Many more species are now under threat, including indicator species and evolutionarily unique species. The consequences can have global impact. From the most unusual endangered animals to a complete list of indicator species for key ecosystems and how you can help, you'll find plenty of fascinating information soon.

Science of Public Health- Some Issues

From genetic manipulation and cloning to public health issues and food and drug contamination, get to know the new, strange, important and most interesting green issues related to genetic science, agribusiness, public health and more. One can look forward to sane analysis that debunks myth and takes fear-mongering to task. There are more issues, but those are the most critical green challenges.

ROLE OF JUDICIARY FOR ENVIRONMENT PROTECTION

No one can overlook the harm caused to the environment by the nuclear bombs, dropped by airplanes belonging to the United States on the Japanese urban communities of Hiroshima and Nagasaki amid the last phases of World War II in 1945. Day to day innovation and advancement of technology, apart from development additionally expands the risk to human life. Accordingly, there arises an intense and an acute need of the law to keep pace with the need of the society along with individuals.

The remedies available in India for environmental protection comprise of tortuous as well as statutory law remedies. The tortuous remedies available are trespass, nuisance, strict liability and negligence. The statutory remedies incorporates: Citizen's suit, e.g.:

1. an activity brought under Section 19 of the Environmental (Protection) Act, 1986,

2. an activity under area 133, Criminal Procedure Code, 1973.and

3. an activity brought under the Section 268 for open irritation, under Indian Penal Code,1860

Apart from this, a writ petition can be filed under Article 32 in the Supreme Court of India or under Article 226 in the High Court.

Tortious liability

The Indian judiciary has developed the following tortuous remedies:

Damage

In the famous case of *Shriram Gas Leak,* involving a leakage of Oleum gas which resulted in substantial environmental harm to the citizens of Delhi, the Apex court held that the quantum of damages awarded must be proportionate to the capacity and magnitude of the polluter to pay. However, the Apex Court has deviated from this test in the *Bhopal Gas Tragedy.*[15]

Injunction

The purpose of injunction is to prevent continuous wrong. The grant of perpetual injunction is governed by Sec.37 to 42 of the Specific Relief Act, 1963.

Nuisance

Nuisance means the act which creates hindrance to the enjoyment of the person in form of smell, air, noise, etc. According to Stephen, nuisance is anything done to hurt or annoyance of lands, tenements of another and not amounting to trespass. Nuisance can be divided into two categories:

Private Nuisance – It is a substantial and unreasonable interference with the use and enjoyment of one's land.

Public Nuisance – It is an unreasonable interference with a general right of the public.

Trespass

It means intentional or negligent direct interference with personal or proprietary rights without lawful excuses.

The two important requirements for trespass are:

15 *Role of The Supreme Court in the Protection of the Environment,* urisonline.in/2010/…/role-of-supreme-court-in-environment-protection.

1. There must be an intentional or negligent interference with personal or proprietary rights.

2. The interference with the personal or proprietary rights must be direct rather than consequential.

Negligence

It connotes failure to exercise the care that a reasonably prudent person would exercise in like circumstances.

Strict Liability

The rule enunciated in Rylands v. Fletcher by Blackburn J. is that the person who for his own purpose brings on his land and collects and keeps there anything likely to be a mischief, if it escapes, must keep it as its peril, and if he does not do so is prima facie even though, he will be answerable for all the damage which is the natural consequence of its escape. The doctrine of strict liability has considerable utility in environmental pollution cases especially cases dealing with the harm caused by the leakage of hazardous substances.[16]

SOME REMARKABLE PRINCIPLES AND DOCTRINES PROPOUNDED BY THE INDIAN JUDICIARY

1. Doctrine of Absolute Liability

The Bhopal Case: *Union Carbide Corporation v. Union of India.*[17]

In this case, the court held that, where an enterprise is occupied with an inherently dangerous or a hazardous activity and harm results to anybody by virtue of a mishap in the operation of such dangerous or naturally unsafe movement coming about, for instance, in getaway of poisonous gas, the enterprise is strictly and completely obligated to repay every one of the individuals who are influenced by the accident and such risk is not subject to any exemptions. Accordingly, Supreme Court created another trend of Absolute Liability without any exemption.

2. Polluter Pays Principles

16 Available at: urisonline.in/2010/…/role-of-supreme-court-in-environment-protection
17 AIR 1990 SC 273

"If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water…"

– Plato

Polluter Pays Principle has become a very popular concept lately. 'If you make a mess, it's your duty to clean it up '- this is the fundamental basis of this slogan. It should be mentioned that in environment law, the 'polluter pays principle' does not allude to "fault." Instead, it supports a remedial methodology which is concerned with repairing natural harm. It's a rule in international environmental law where the polluting party pays for the harm or damage done to the natural environment.

Vellore Citizen's Welfare Forum v. Union of India.[18]

The Supreme Court has declared that the polluter pays principle is an essential feature of the sustainable development.

3. Precautionary Principle

The Supreme Court of India, in Vellore Citizens Forum Case, developed the following three concepts for the precautionary principle:

1. Environmental measures must anticipate, prevent and attack the causes of environmental degradation.

2. Lack of scientific certainty should not be used as a reason for postponing measures

3. Onus of proof is on the actor to show that his action is benign

4. Public Trust Doctrine

The Public Trust Doctrine primarily rests on the principle that certain resources like air, water, sea and the forests have such a great importance to people as a whole that it would be wholly unjustified to make them a subject of private ownership.

M.C.Mehta v. Kamal Nath and Others.[19]

The public trust doctrine, as discussed by court in this judgment is a part of the law of the land.

18 AIR 1996 SCC 212
19 (1997) 1 SCC 388.

5. Doctrine of Sustainable Development

The World commission on Environment and Development (WCED) in its report prominently known as the 'Brundtland Report' named after the Chairman of the Commission Ms. GH Brundtland highlights the concept of sustainable development. As per Brundtland Report, Sustainable development signifies" development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"[20] There is a need for the courts to strike a balance between development and environment.

Rural Litigation and Entitlement Kendra v. State of UP.[21]

The court for the first time dealt with the issue relating to the environment and development; and held that, it is always to be remembered that these are the permanent assets of mankind and or not intended to be exhausted in one generation.

Vellore Citizen's Welfare Forum.[22]

In this case, the Supreme Court observed that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco- system.

THE CONSTITUTIONAL ASPECTS ON ENVIRONMENTAL LAW

The Indian Constitution is amongst the few in the world that contains specific provisions on environment protection. The chapters directive principles of state policy and the fundamental duties are explicitly enunciated the nation commitment to protect and improve the environment. It was the first time when responsibility of protection of the environment imposed upon the states through Constitution (Forty Second Amendment) Act, 1976.

Article 48-A[23] the provision reads as follows: "The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country."The Amendment also inserted Part VI-A (Fundamental duty) in the Constitution, which reads as follows:

20 S. SHANTHAKUMAR, ENVIRONMENTAL LAW: AN INTRODUCTION, p. 122, 123 (2001).
21 AIR 1987 SC 1037
22 AIR 1996 5 SCC 647
23 The Constitution of India, 1950.

Article 51-A[24] (g) "It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes,, and wildlife and to have compassion for living creature."

In *Sachidanand Pandey v. State of West Bengal*.[25] the Supreme Court observed "whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48-A and Article 51-A (g).

CONCLUSIONS AND SUGGESTIONS

Sustainable Development stands for meeting the needs of present generations without jeopardizing the ability of futures generations to meet their own needs – in other words, a better quality of life for everyone, now and for generations to come. Sustainable development will not be brought about by policies only: it must be taken up by society at large as a principle guiding the many choices each citizen makes every day, as well as the big political and economic decisions that have to be taken.

As regards role of Judiciary is concerned, after the analysis of above cases, we find that, the Supreme Court is, at the present time, stretching the different legal provisions for environmental protection. In this way, the judiciary tries to fill in the gaps where there is laciness of the legislation. There are some recommendations which need to be considered:

The issue of environmental pollution can be checked by making mindfulness in the general population, in which media's part is extremely critical. The compelling agency of correspondence not just influences the mind of the individuals but is also capable of creating public awareness, developing thoughts and desirable attitudes of the people for protecting environment.

There is a requirement for a standard review apparatus, which can inspect and examine periodically every one of those exercises which are threatening the environment.

There is no means for any law, unless it's an effective and successful implementation, and for effective implementation, public awareness is a crucial condition. Therefore, it is essential that there ought to be proper awareness by way of environmental education. This contention is additionally maintained by the Apex Court in the instance of *M.C. Mehta v. Union of India.* Moreover, Law Commission of India in its 186th report

24 *Ibid.*
25 AIR 1987 SC 1109

made a proposal for the constitution of the environment court.[26] Hence, there is an urgent need to strengthen the hands of judiciary by making separate environmental courts, with a professional judge to manage the environment cases/criminal acts, so that the judiciary can perform its part more viably.[27]

I would like to conclude this with the excerpts from Prime Minister Shri Narendra Modi 's Speech delivered by him on the occasion of WED-2014, while seeking people's participation in protecting environment and also pledged to save the "mother Earth" through government efforts. He said, "World Environment Day is a day to bow to "Mother Earth" and to reaffirm our pledge to protect the Environment, making our planet cleaner and greener. Let's serve as trustees, where we utilize our natural resources for the present and at the same time ensure happiness of future generations. We are blessed to be a part of a culture where living in complete harmony with the environment is central to our ethos." Undoubtedly, along with government efforts, people's participation can make a big difference in creating a cleaner and greener planet.

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26 186th Report of The Law Commission, lawcommissionofindia.nic.in/reports/186th%20report.pdf

27 M.V Ranga Rao, *Role of Judiciary in Environmental Protection* , Vol.3 SCJ 9 (2001).

PRIVATE MILITARY CONTRACTORS AND INTERNATIONAL LAW

Ajay Kumar* & Aditya Kumar Singh**

ABSTRACT

Private Military contractors have been there in conflicts the world over since long but its only in recent years, their role has multiplied manifold and further they have come under scrutiny amidst the raging debate whether these PMC are governed by the International Law norms and further that the States/parties engaging them would be held liable for their (mis) conduct in conflict zone. This paper is an attempt to understand the concept of Private Military Contractor in the changing scenario; how various International instruments defines/ recognizes the PMC and what are the challenges under existing legal framework vis a vis Private Military Contractors towards their culpability for their act of violations under International Law.

INTRODUCTION

Private military corporations (PMC) are corporate entities offering a range of military services to clients. It is predominantly the state governments that use these services to make a military impact on a given conflict. These private military firms have a significant impact on the way in which the wars are planned and waged. Recent military interventions in Iraq, Afghanistan and Former Yugoslavia have been or are supported by private military and security companies (PMSCs). However, there is no commonly accepted definition of Private Military Corporations, neither has the word PMC been defined clearly under any international legal instrument.

Both International Humanitarian Law (IHL) and Human Rights Law (HRL) generally apply to conflicts in which states or international organisations rely on PMCs. The hiring state is responsible for the conduct of PMC and will be held liable in case of human rights and humanitarian law violations by the PMC employees. The hiring state will only be held responsible if the legal status of PMC employees who commit the violations is established under international law. Also, this question of legal status of PMC

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employees is of fundamental importance to the contractors as it defines their rights and obligations in armed

conflict and provides them with protections in case of capture by the adversary.

CAN EMPLOYEES OF PMC'S BE TREATED AS MERCENARIES?

The definition of mercenary is found in three documents: Article 47 of Protocol I of the Geneva Convention, the *"Convention on the Elimination of Mercenarism in Africa"* of 1977, and the *"International Convention against the Recruitment, Use, Financing and Training of Mercenaries"* adopted in 1989 by the United Nations General Assembly.

Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat for personal gain. They may be authorized to fight by a party to the conflict, but their allegiance to that party is conditioned on monetary payment rather than obedience and loyalty. For this reason, mercenaries are sometimes treated as "unlawful combatants" or "unprivileged belligerents," even though their employment is not strictly prohibited by international law.

According to Article 47 of Protocol I of the Geneva Convention,[1] a mercenary is any person who:

a. Is specially recruited locally or abroad in order to fight in an armed conflict;

b. Does, in fact, take a direct part in the hostilities;

c. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

d. Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e. Is not a member of the armed forces of a Party to the conflict; and

f. Has not been sent by a State which is not a Party to the conflict on

1 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

official duty as a member of its armed forces.

Mercenaries may not qualify for POW treatment under the Geneva Convention, and those meeting the definition of "mercenary" under the 1977 Protocol I to the Geneva Conventions are explicitly denied combatant status.[2]

For a PMC to be treated as mercenary under Geneva Convention all the above six criteria's have to be fulfilled by the PMC. This definition, which requires that all six conditions be fulfilled, has been judged unworkable by many authors and will very seldom be applicable to personnel of private companies. Also, Protocol I only applies to international armed conflicts. No similar provision is to be found in Additional Protocol II that applies in non-international armed conflicts.

Many jurists including Peter Singer have pointed out that some of the requirements are inherently difficult to prove, particularly the element of motivation. Moreover, the requirement of financial motivation is difficult to assess and it is also disputed whether receiving a regular salary amounts to being "profit driven". The criteria of mercenary being from a different nationality also poses a problem, for example , British or American employees of PMCs carrying out duties in Iraq during the war that started in 2003, would not have qualified as mercenaries since they were nationals of a party to the conflict, and do not fulfil the conditions of Article 47 (d). It can also be argued that the provision only applies to natural persons, thus a legal entity cannot be classified as a mercenary.

Other International legal instruments which define Mercenaries provide no help either.

The UN Convention[3] reproduces the wording of Article 47 of protocol I of the Geneva Convention whose limitations have been examined above, and has been ratified by a limited number of States only.

Article 1 of the OAU Convention identified mercenaries directly by referring to the purpose of their employment specifically if they were hired for the overthrow of governments or OAU-recognized liberation

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, *reprinted in* 16 I.L.M. 1391.

3 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, Article 1.

movements.[4] Bias is self-evident in the document. The OAU Convention has a broader definition but also presents major flaws such as the escape clause of the integration in the armed forces, and the necessity to demonstrate the motivation for private gain, among others. The regional nature of this instrument also limits its impact as it is binding only on African countries that have ratified it.[5]

Thus, no sweeping conclusion can be drawn that all private military company employees are mercenaries, either under the mercenary conventions or under international humanitarian law. Under both these bodies of law, the definition requires an individual determination on a case-by-case basis. Indeed, this factor alone renders the mercenary conventions sorely inadequate as a method of controlling (suppressing) or regulating the PMC industry as a whole. International law, as it stands now, is too primitive in this area to handle such a complex issue that has emerged just in the last decade.

CAN EMPLOYEES OF PMC'S BE TREATED AS COMBATANTS?

It is very essential to know that whether PMC's employees are combatants or not. *First*, so that opposing forces know whether they are legitimate military objectives and can be lawfully attacked; *second*, in order to know whether PMC employees may lawfully participate directly in hostilities; and the *third* reason, related to the *second*, is in order to know whether PMC employees who do participate in hostilities may be prosecuted for doing so. Therefore now it will be examined that whether PMC'S could be combatants within the meaning of AP I Article 43 or GC III Article 4A (1) or (2) in the context of an international armed conflict where the contractor is hired by a state.

In international armed conflicts, members of the armed forces of a party to a conflict are

defined in the Regulations annexed to the Fourth Hague Conventions of 18 October 1907

(hereinafter "the Hague Regulations"), Article 4 A (1), (2), (3) and (6) of the Third Geneva

Convention and Article 43 of Protocol I.

4 *Convention of the O.A.U. for the Elimination of Mercenarism in Africa* (Jul. 3, 1977) O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972) http://www1.umn.edu/humanrts/instree/1977e.htm.

5 OAU Convention on the Elimination of Mercenarism in Africa" of 1977, Article 1, [e]. and Article 1, [c].

The first means by which PMC employees may qualify as combatants is under Article 43.1 of Protocol I. It is thus necessary to assess whether private military company employees are incorporated within the armed forces of a party to a conflict, as defined in Article 43.1 of Protocol I. Article 43(2) stipulates that Members of the armed forces of a Party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities. Thus, where members of a PMC are incorporated under the armed forces of the state they will qualify as combatants under Article 43(2) and will enjoy POW status under Article 44(1). As combatants, they have the right to participate directly in hostilities and enjoy immunity from prosecution for their mere participation.

It is conceivable that in rare cases PMC's might be incorporated into the armed forces of the state. Indeed, if all of them were so incorporated, that would solve all regulation issues and pose no problems for their categorization under international humanitarian law. However, the whole point of privatization is precisely the opposite to devolve on the private sector what was previously the preserve of government authorities.

Incorporation therefore depends on the will and internal legal regime of the state in question.

We must not confuse the rules on attribution for the purpose of holding a state responsible for the acts of private contractors it hires with the rules on government agents that legally have combatant status. Even though it may be possible to attribute the acts of an employee of a private military company to a state, that relationship to a state, although perhaps sufficient for purposes of state responsibility, is not sufficient to make an individual part of a state's armed forces.

Thus, in situations where **Article 43 Protocol I** is applicable, personnel of private companies would be considered as combatants, according to Article 43, if they belong to an organized group or unit which is under a command responsible to a party to the conflict for the conduct of its subordinates, and is subject to an internal disciplinary system which enforces compliance with the rules of international law applicable in armed conflicts. In sum, five requirements must be satisfied by the PMC under Article 43 (1) in order for its employees to qualify as combatants under Article 43 (2):

1. The PMC must be subordinated to a party to an international armed conflict,

2. The PMC must be an armed group,

3. The PMC must be organised,

4. The employees must be under a command responsible to the party to the conflict and

5. The employees must be subject to a disciplinary system.

Organised Armed Group

The notion of an 'organized armed group' may be defined as a *"group that wishes to become involved in a conflict by supporting the military campaign of one of the parties"* .[6] The term

'organised' is a flexible term and mainly implies that the 'fighting' must have a collective character and must be exercised under control and according to rules. It further implies a structured internal hierarchical composition and subordination to a command.[7] In sum, for a PMC to be considered an organized armed group, it would have to engage in DPH on a regular basis and have a certain degree of organisation. Generally, PMCs have a hierarchical structure some of the largest PMCs even have structures quite similar to a military structure.

It is thus likely that PMCs would satisfy the requirement for qualifying as an 'organized group', in particular due to the collective character of its activities and internal structure of the company. Additionally, the state may, in principle, exercise control of the PMC through that structure and through the contract. However, not all contemporary PMC engage in Direct Participation in Hostilities (DPH) on a regularly basis, but primarily provide support functions. In sum, some PMCs could qualify as an "organized armed group", depending on its internal structure and the nature of the activities performed.[8]

Responsible Command

The fundamental question in regard to PMCs is what is required in order to put the PMC under the control and command of the state, is the contract sufficient or must contractors be subject to the military chain of command of the state's regular armed forces or even subject to the jurisdiction of

6 Expert meeting on *Private Military Contractors: Status And State Responsibility For Their Actions* (Aug. 29-30, 2005) p. 46 Organised by The University Centre for International Humanitarian Law.

7 ICRC Commentary on Article 43, para. 1672.

8 This view corresponds to the majority view of experts, cf. Expert Meeting (2005), supra note 6 at 81.

the state? In practice this would be unlikely since many states do not have extraterritorial criminal jurisdiction over contractors. Neither do the states nor the military commander have direct authority vis-à-vis the individual contractors as they are not part of the military chain of command. For instance, in the U.S. contractors are according to the U.S. Field Manual per definition not part of the military chain of command.[9]

Internal Disciplinary System to Enforce Compliance with IHL

The requirement in GC III Article 4A (2)(d) has been replaced by that of an internal disciplinary system in AP I Article 43 (1). The ICRC Commentary specifies that an 'internal disciplinary system' includes military disciplinary law and military penal law.[10] It is debatable whether contractors might fulfil this since contractors only in rare cases are subject to military jurisdiction and it is impossible for a PMC to have a disciplinary system with the capacity to impose legal sanctions. Sanctions for misbehaviour are thus limited to contract penalties. Contractors should not be excluded from combatant status on basis of such a strict interpretation; however, as the result would be that virtually no irregular groups could qualify for combatant status under Article 43 (1).

In addition to situations where they would be integrated in the regular armed forces of a belligerent, personnel of private companies would be categorized as combatants if they formed part of militias belonging to a party to the conflict and fulfilled the conditions provided by Article 1 of the Hague Regulations, and **Article 4A (2) of the Third Geneva Convention**

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

The opening paragraph requires that the militia must ''belong … to a Party to the conflict''.

Second, the four requirements must all be met by the group as a whole. This article thus demands that each private military company be considered on its own.

9 This argument was presented at an expert meeting, cf. CUDH, *supra* note 6 at 11.
10 ICRC Commentary to GC III Article 4A (2). Para 1676

The groups described in sub-paragraph 2 of GC III Article 4A are groups that are structurally independent of the armed forces of a state, i.e. they are not incorporated into the armed forces, but fight in coalition with them. It can been suggested that PMCs are 'volunteer corps' since the employment is voluntary. The fundamental distinguishing feature between de facto combatant status accorded under GC III Article 4A (2) and under AP I Article 43 (1) is the required nexus to the state. Article 4A (2) demands that the independent armed group 'belongs' to a party to the conflict; under AP I Article 43 it is sufficient that the group is 'under a command responsible'. From a literal understanding it entails more to 'belong to' a party than to be 'under a command responsible'[11] and the requirement has been interpreted very strictly as to requiring state authorization. Analogously, some experts find it unlikely that a PMC could be considered belonging to at party. However, the criterion of 'belonging to a party to a conflict' has not been interpreted so strictly since the 1899 and 1907 Hague Conferences. Secondly, since the Commentary to GC III Article 4A (2) stipulates that a factual nexus between the state and the irregular fighter suffices, provided that it is clear for which side the group is fighting. Therefore, a PMC could in principle fulfil the criteria of belonging to a party to a conflict.

On the other hand, if the conflict is a non-international armed conflict within the meaning of Common Article 3 of the Geneva Conventions (CA3), customary international law would no longer distinguish between "unlawful" and "lawful combatants." Contractors captured by enemy forces who had engaged in hostilities would be entitled to the minimum set of standards set forth in Common Article 3, but their right to engage in hostilities in the first place would likely be determined in accordance with the prevailing local law.

Despite the absence of explicit combatant status in NIACs, experts refer to three different categories of persons in NIACs: 1) fighters, i.e. persons belonging to an organisation of a party of a conflict that constitutes its armed forces, 2) protected civilians and 3) civilians who temporarily DPH. It is generally agreed that the criteria for membership in the armed forces of a state are unlikely to be different in IACs and NIACs. This also goes for the test determining whether contractors who 'fight on behalf' of an organised armed group in a NIAC could be members of it. For example, if contractors engage in DPH and act 'on the instructions' or 'under the direction or control' of an organized armed group, then they could be

11 *The Private Military Industry and Iraq: What have we learned and where to next?*, DCAF, Policy Paper (Nov, 2004) p. 2-3; Nicki Boldt, *Outsourcing War – Private Military Companies and International Humanitarian Law,* German Yearbook of International Law, Vol. 47 523 (2004).

regarded as fighting on behalf of that group. However, a PMC might even qualify as an independent party to a NIAC if the level of violence reaches the required threshold.

CAN EMPLOYEES OF PMC'S BE TREATED AS CIVILLIANS?

It will now be assessed whether contractors involved in IACs could be considered ***'civilians accompanying the armed forces'*** within the meaning of Article 4A (4) of GC III62.

General conventional definition of civilians is merely provided in the context of an IAC in AP I Article 50 (1). Civilians are negatively defined as persons who do not belong to the categories of combatants in GC III Article 4 (A) (1), (2), (3) and (6)71 and AP I Article 43 (i.e. members of armed forces). Although reference is made to civilians in substantive Articles of Protocol Additional II to the Geneva Conventions72 (AP II) it does not define civilians.[12] Generally, the definition of civilians as persons, whom are not members of the armed forces, is considered customary international law. A civilian who engages in DPH forfeits protection against direct attack but does not acquire combatant status.

GC III Article 4A (4) provides who are civilians accompanying the armed forces as:

"Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card…".

In other words, persons who fall under Article 4A (4) of GC III are civilians who are authorized by a state to follow the armed forces without being members hereof and who are entitled to POW status. The issues that needs clarification in order to determine whether contractors may be "persons who accompany the armed forces" within the meaning of Article 4A (4) is: 1) the nature of activities undertaken by persons belonging to Article 4A (4), 2) the required nexus between the armed forces and the civilians and 3) the importance of an identity card. The persons described in Article

12 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Jun. 8, 1977) The definition of civilians was included in the draft of AP II but removed from the final text in order to simplify the text, cf. CIHL Study, *supra* note 22 at 19.

4A (4) are all persons without combatant functions except from possibly civilian members of military aircraft crews and who were never intended to have such functions.

Normally, civilians are immune from attack. This is the basic principle of distinction in the conduct of hostilities. However, civilians lose their entitlement under the Conventions and Protocols to protection from attack for such time as they directly participate in hostilities.[13] Some PMC employees clearly have combat roles (such as target selection or even participation in combat) and therefore evidently do participate directly in hostilities. contractors fulfilling these requirements could fall within this category, but that contractors authorized by states to conduct hostilities on their behalf cannot be qualified as civilians under Article 4A (4)

However, a significant number of PMC employees are engaged in guard duties. In terms of assessing direct participation in hostilities, this activity falls into a grey zone; it has no clear place along a sliding scale of evaluation and can even correspond to the use of human shields. For example, one PMC in Iraq hired more than 17,000 Iraqis to ‘‘guard’’ an oil pipeline against looters, but also possibly against insurgents. If PMCs are used to guard military objectives, one could say they are engaging in combat, as one author argues (in relation not only to PMCs, but to all civilians).[14]

CONCLUSION

There is a gap remaining between responsibility of the hiring state and the conduct of the contractor. PMC can commit human rights and humanitarian law violations and neither the state nor the PMC can be held responsible for the same. State employing PMC personnel will always face less international responsibility qua attribution than would be the case if it relied on its own armed forces, and its responsibility will be more difficult to prove.

Another legal challenge raised by this new use of contractors is that despite playing essential roles in military operations, contractors are generally not part of the military and it is consequently the common perception that contractors are neither combatants nor civilians but fall into a legal grey area as “unlawful combatants”. The question of status is of fundamental importance to the contractors as it defines their rights and obligations in

13 Protocol I, Article 51.3.

14 Schmitt, *War, International Law, And Sovereignty: Re-Evaluating the Rules of the Game in a New Century – Humanitarian Law And Direct Participation in Hostilities by Private Contractors or Civilian Employees”, ,* Vol. 5 CJIL 511-541 (2005) .

armed conflict and provides them with protections in case of capture by the adversary.

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The CPJ Law Journal aims at publishing research that is original and in accordance with the scholarly integrity of the journal. Thus, the authors are requested to abide by the ethical duties and responsibilities and help maintain the scholarly integrity.

The authors submitting their manuscripts for publication in the journal are required to read and understand our ethics policy before submitting the manuscripts. Authors must be honest in presenting their results and conclusions of their research. Research misconduct is harmful for knowledge. It could mislead other researchers. The submitted papers/ articles/book reviews/ caste studies, etc. may be subjected to anti-plagiarism check so as to detect any possible overlapping and similarity in content. This is in accordance with our commitment to prevent ethical misconduct, which is a growing problem in academic and professional publications. In case any such content is found to be similar, the same shall be liable to be rejected.

1. Ethical Duties of the Authors:

They:

a. Shall ensure that all the work submitted by them is original and any content that requires due acknowledgement is fully referenced. Also, the author shall disclose the source of all data and third party material. Reproducing text from the work of others without giving due acknowledgement and credit to the author or producing many papers with the same content and language by the same authors themselves (self-plagiarism) is also not acceptable. Submitting the same conclusions and suggestions to multiple journals concurrently is unethical.

b. Shall provide accurate contact details for the corresponding author, who shall be responsible for the authorship of the paper and who shall be the corresponding author for any correspondence relating to originality of the paper. It may also include any queries or investigations that may arise in context with the paper submission.

c. Are also required to ensure that that there are no duplicate submissions, i.e., the same manuscript should not be sent for consideration to different journals at the same time.

d. Shall submit a duly filled and signed copyright form upon confirmation of acceptance of their work for publication, thereby transferring the copyright to the publisher of the journal.

e. Must be honest in presenting their results and conclusions on the basis of their research. Any inferences borrowed from the work of others shall be highly disregarded.

f. Shall be willing to cooperate and comply with any requests made by the editor and publisher with regard to source of data, proof of authorship or originality, etc. All authors have an obligation to inform and corporate with journal editors to provide prompt correction of errors in their published or unpublished works.

g. Can expect transparency, efficiency and integrity from the publisher and the editor during the review after the submission process.

h. In case any approval is required to be taken from any third party for reproduction of their authored content, the same shall be obtained and submitted along with the manuscript.

2. Ethical Duties of the Editor(s)

They shall:

a. Maintain the integrity and fairness as required by the Journal.

b. Protect the reputation of the Journal and publish work that is found to be of high quality and intellect and is of contemporary relevance.

c. Give due consideration to all those who have made a significant contribution and shall be cited as authors. Other individuals who have contributed to the work should also be acknowledged. Articles should include a full list of the current institutional affiliations of all authors, both academic and corporate.

d. Ensure that a thorough, objective and confidential peer review is conducted for all submissions and that they pass the required quality check and editorial assessment at the initial stages.

e. Also aim to provide fair and impartial review and publication process as far as it is possible, with due respect and acknowledgement accorded to the author(s).

f. Ensure that they shall give prompt responses to all communications

initiated by the authors and to give necessary recommendations to the authors. The editors shall also communicate the acceptance or rejection of all submissions to the authors in a timely manner and also give reasonable explanation and updates to authors during the submissions process as well as after a decision has been made.

g. Accept papers based only on original merit, quality and relevance of their content. They shall, as far as practicable, abstain from making decisions based upon personal preferences.

h. Ensure that all third party sanctions have been taken by the authors. In case such sanctions have not been obtained, the Editor shall remind the author to do the needful. In case of absence of Sanctions, the discrepancy shall be informed to the publisher.

i. Remain in good communication with both the publisher and the author(s).

3. The Review Committee and Ethics:

- The Review Committee shall follow the policy of confidential peer review for the selection of work for the journals. It shall be inclusive of the obligations to keep their identity hidden from authors and not to misappropriate work that is submitted to them for review.

- Every member of the committee shall accept to review work which relates to their own field of specialization and area of expertise. They shall also bear a moral obligation to review the submitted work in an impartial and timely manner. They shall also accept the duty to review future versions of the work and provide 'follow up' advice to the editor(s), if requested.

4. The Journal and Ethics:

- It shall be ensured that the integrity and reputation of the journal is not jeopardized and that work of highest quality shall be published.

The Journal Shall:

a. Make use of plagiarism detection software when necessary for any submission made to the journal at any stage of the submission and publication process.

b. Have a prescribed and detailed instruction manual for the authors

outlining the form and manner of submission with details pertaining to the referencing style, font size, font style, line spacing, requirement of abstract and suggestions, etc. Also, it shall be a transparent submission and publication process.

c. Take care of and investigate thoroughly, any allegations or suggestion of ethical misconduct surfaced at any stage of the submissions process. This can include, but is not restricted to, the following: plagiarism, redundant publication, fabrication or misuse of data and authorial disputes.

d. Reserve the right to retract articles which appear to be unethical, misleading or damaging and communicate the same to the corresponding author.

e. Remain in good communication with editors, authors, reviewers and society partners

In case any work is found to be unethical or plagiarized, the Journal shall reserve the rights to conduct a fair and transparent investigation into the same. Depending upon the decision/result of such investigation, the Journal may decide to either reject the manuscript or require the author to re-submit the same within the prescribed period. In case the paper is already published before the discovery of the unethical submission, the Journal reserves the right to retract the work, with a statement of explanation. The authors are expected to cooperate and render all support and cooperation sought from them by the Journal.

In case of any further queries relating to submissions, review, publication, etc., the editor of the Journals CPJ Global Review and CPJ Law Journal may be contacted at cpj.editorial@gmail.com or lawjournal.cpj@gmail.com, respectively.

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