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GLOBALIZATION OF LEGAL SERVICES UNDER WTO AND GATS : OPPORTUNITIES AND CHALLENGES FOR LAW PROFESSIONALS

Dr. Anand Pawar*
Rahul Mishra**

1.1 Prologue

> Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession.
>
> -Justice V. R. Krishna Iyer

Although the traditional mindset about legal profession still predominates in many countries, yet International Trade in Services currently amounts to well over two trillion US dollars, a sixth of total world trade. The service industries also account for a significant portion of the growth of the domestic economy and of job creation. In the past decades international trade in legal services has grown as a result of the internationalization of the economy. Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdictions often comes from their corporate clients who are involved in business activities across borders and prefer to rely on services of professionals who are already familiar with the firm's business and can guarantee high quality services. Some countries also favour international trade in legal services, as the establishment of foreign lawyers is seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment.[1]

The main obstacle to internationalize the trade in legal services is represented by the predominantly national character of the law and by the national character of legal education.[2] The national and local character of the legal profession is a reflection of the national character of the law and of the territorial jurisdiction of the courts. The principle role of the lawyer was originally that of an advocate, and the legal profession was organized around the courts with each bar associated to a specific local court. Lawyers were required to maintain physical

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1 "Legal Services", *Background Note by the Secretariat, Council for Trade in Services, World Trade Organization*, 6 July 1998; See also "Trade in Services: Opportunities and Constraints", *Report on Trade in Legal Services, Project Study* Sponsored by Ministry of Commerce, Government of India, available at *http://www.tradelawonline.com/search/ articles/??c629564-b8d2-4756-9558-eb0ab0e66d8f*

2 *Id.*

establishment in the territory of the local court in order to be accessible to other members of the bar and to the court itself. The paradigm of local court / local bar / local lawyer changed with the expansion of trade and with the emergence of new fields of the law such as business and trade law for which representation before a local court are relatively less important. Most of the times, these subjects require legal counseling in matters involving transactions, relationships and disputes not necessarily entailing court proceedings.[3]

India is a signatory to the WTO and member country to the GATS and could be said to have an obligation to liberalize its services including legal services, and thus open them up to foreign competition. This is currently seen as the key to the future for foreign lawyers to be granted rights of practice as India will be required to honor this commitment.

Keeping all these contemporary developments in view, this paper has dealt with the issues surrounding India's commitment to the WTO/GATS Agreement, particularly its implications on the image of legal services and profession. The researcher seeks to examine the opportunities and challenges for lawyers in this scenario and also deal with the contribution made by various GATT rounds of negotiation before the Uruguay Round, Negotiations in the Uruguay Round and the establishment of the WTO and various Annexes to the WTO. The researcher also zeros in on the General Agreement on Trade in Services (GATS), and its impact on various service sectors including the legal services.

1.2 GATS: Past, Present and Future

Certain aspects of globalization which have had an impact on legal profession deserve attention. In this age of globalization and interdependence, principles of international law affect all states alike, small and large, rich and poor, weak and powerful.[4] Many of the structural changes that have taken place in the world economy since the early 1980s resulted in the liberalization of capital markets. Manufacturing was also no longer a domestic process. This led to the loss of control on local markets, goods, and finances by the National governments.

As a matter of fact, globalization has both positive and negative aspects. On the positive side, it has led to greater international economic, cultural, and political cooperation. On the other hand, it has had profound implications for states including the undermining of the autonomy and policy-making capability of states.[5] Many governments see their role as not to regulate markets but to

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3 *Id.*

4 See generally Guido Bertucci and Adriana Alberti, "Globalization and the Role of the State: Challenges and Perspectives", available at *http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf*

5 "Globalization: Threat or Opportunity", *International Monetary Fund*, corrected January 2002, available at *http://www.imf.org/external/np/exr/ib/ 2000/041200.htm#II*

facilitate their expansion. Globalization and regional interactions are wiping out national borders and weakening national policies.[6]

In this regard, we must understand developments during the Uruguay Round which heralded the establishment of WTO. Moreover, the service sector contributed to more than 40 – 60% but it was mainly out of the GATT system. As a consequence, investments required guarantees, the IPRs required better guarantees and the proper dispute settlement mechanism was also to be in place. As GATT could not address all the above-mentioned areas, the Uruguay round of negotiations attracted a lot of importance.[7]

1.2.1 The Aims and Accomplishments of the Uruguay Round

The goals of the Uruguay Round were to – (1) further liberalization of trade by reducing tariffs and other barriers to trade; (2) properly reflect the modern developments in the world trade by including in the GATT negotiations for the first time TRIMS, GATS, and IPRs; (3) bring an end to exemptions of the GATT rules such as those granted to the agriculture, clothing and textiles sectors and resubmit them to GATT; and (4) improve and strengthen the GATT dispute settlement procedure for effective implementation of international trade regulations.[8]

1.2.2 Uruguay Round - Tribulations and Forecasts

No other international treaty has been less understood and has raised much concern and hostility in India. Wide ranging apprehensions have been expressed in many developing countries including India. These include concerns relating to sovereignty, agriculture and drug prices. Main contentious issues were and have been those related to agricultural subsidies, public distribution system, patenting of seeds and life forms, and textiles and clothing. The Uruguay Round established the WTO and annexed a wide range of multilateral trade agreements to the WTO, which will have impact on all aspects of the international trading system.[9]

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6 See generally, Montek Singh Ahluwalia, "India's Experience with Globalisation", *Australian Economic Review*, Vol. 39, pp. 1-13, March 2006; Chandrasekaran Balakrishnan, "Impact of Globalisation on Developing Countries and India", available at *http://economics.about.com/od/globalizationtrade/l/aaglobalization.htm*

7 See M.K. Smith, and M. Doyle (2002) "Globalization" the *Encyclopedia of Informal Education*, available at *www.infed.org/biblio/globalization.htm.*

8 "Understanding the Uruguay Round", *World Trade Organization*, available at *http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm*

9 Pierre Sauvé, OECD Trade Directorate, "Completing the GATS Framework: Addressing Uruguay Round Leftovers", available at *http://www.cid.harvard.edu/cidtrade/Papers/Sauve/sauvegats.pdf*

1.2.3 Uruguay Round Parleys and Legal Services

Legal services were included in the GATS negotiations at the insistence of the United States. Given the substantial differences among national regulatory systems, U.S. negotiators initially envisioned a special annex on legal services, similar to the Annex on Financial Services, to specifically address the regulatory barriers facing lawyers. Under the terms of the GATS, obligations of such an annex would be binding on all GATS members and would have required all GATS members to allow foreign lawyers some minimum level of access to their legal markets.[10]

1.2.4 The Anatomy of GATS

The GATS, which was also negotiated during the Uruguay Round, sets out a comprehensive framework of rules governing trade in services. It sets out a set of basic rules, a clear set of obligations for each member country and a dispute-settlement mechanism to ensure that the rules are enforced. The GATS applies to all service sectors and all forms of trade in services, though with adjustments and exceptions tailored to the type of service. The types of services covered include telecommunications, insurance and financial services, research and development services, computer and information services and professional services. Professional services include legal services, as well as accounting services, engineering services, architectural services, among others.

We can identify the following as the two key components of GATS.

(a) **Most Favoured Nation Obligation**: The unconditional Most Favoured Nation (MFN) obligation is a core general obligation of the GATS. It essentially requires that each service supplier from a Member country must receive from other Members treatment no less favorable than is accorded to other foreign service suppliers.

(b) **Specific Commitments:** In addition to creating general obligations, the GATS also provides a legal basis for negotiating the multilateral elimination of barriers to trade in services. The GATS negotiations are designed to improve market access[11] and to reduce discrimination against service suppliers based on nationality.[12]

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10 Alan Oxley, "The Achievements of the GATT Uruguay Round", available at *http://epress.anu.edu.au/agenda/001/01/1-1-A-5.pdf.*

11 Market Access is a negotiated right and obligation under the GATS. A Member is obliged to provide market access to services suppliers from other Members only in those sectors which the Member has included in its schedule.

12 National Treatment is a second negotiated right and obligation under the GATS. If a Member includes a service sector in its schedule of National Treatment obligations, that Member must "accord to services and services suppliers of any other Member . . . treatment no less

1.3 The GATS and the Legal Services: New Vista of Trade

The GATS applies to legal services and therefore, once a country signs it; its regulation of legal services is automatically subject to certain provisions of GATS. For example, all GATS signatories are subject to a transparency requirement, which specifies that all relevant measures be published or otherwise publicly available.[13]

In addition to these general requirements, most countries have included legal services on their Schedule of Specific Commitments, which means that legal services are subject to many additional provisions of GATS. For example, if a country lists legal services on its Schedule, then its regulation of legal services not only must be transparent, but must also be administered in a reasonable, objective and impartial manner.[14]

The globalization of legal services is a serious issue, which needs an attention of the all stakeholders. At present, the legal services industry is experiencing a fundamental transformation as a result of the expansion of trade and development of new fields of law, which include corporate restructuring, privatization of government departments, cross-border mergers and acquisitions, issues dealing with intellectual property rights and competition law have generated increasing demand for more sophisticated legal services. This has led to the emergence of a new type of lawyers mainly involved in advisory services—as opposed to the traditional local court advocate—expected to provide advice to clients in respect of transactions and investments covering countries around the world.

The regulation of lawyers has historically been a domestic policy issue. In order to uphold the integrity of their laws and the judicial systems, countries have enacted elaborate regulatory schemes to control those who provide legal services and how they are provided. During the last two decades, globalization of the legal services industry has increased the general awareness of the effects of national regulations, particularly as they affect foreign lawyers. The globalization of markets and the internationalization of trade in services have increased scope for lawyers, while reducing traditional protective barriers. Consequently, globalization of legal services has and will continue to lead, increasingly, to issues of regulation.

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favourable than that it accords to its own like services and services suppliers." This obligation essentially prohibits discrimination against foreign providers of services.

13 "Trade in Legal Services", *A Consultation Paper on Legal Services Under GATS*, available at *http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf*

14 "Guide to reading the GATS schedules of Specific Commitments and the List of Article II (MFN) Exemptions", available at *http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm*

1.4 The Outsourcing Industry: A Curtain Raiser

The story goes that, International trade in services has recorded a rapid growth in the recent past. The services sector accounts for an increasing share of the investment flows in the world. While in the early 1970s, services constituted only a quarter of the global Foreign Direct Investment flows, in the recent past this share has gone up to two third of the total FDI. Technological developments, demographics, the growing internationalization of production processes, and economic liberalization are among the key driving forces behind the increasing globalization of services. The sea-change in India's approach towards trade and investment liberalization in services may be attributed partly to the growing importance of the services sector in India's economy and its trade and investment flows in the recent years. India's services sector recorded an average annual growth rate of 9 per cent in the 1990s; while India's GDP grew at an average annual rate of 7.5 per cent during the same period. The average growth rate of services attained a still higher mark during the last five years i.e., 8.6 per cent. According to the *RBI Annual Report*, in 2005-06, the services sector has recorded a growth rate of 10.3 per cent, contributing almost three-fourths of the overall real GDP growth of India.

Due to a large knowledge pool and a significant cost arbitrage, few countries like India, Philippines and China are front runners in providing outsourced services. After achieving great success in Business Process Outsourcing, India is now looking for a big leap in Legal Process Outsourcing (LPO). India automatically becomes a natural choice if we analyze the comparative costs of various aspects of LPO for different countries. The comparative advantages of having a huge labour pool and English speaking professionals are aiding this growth.

1.4.1 Legal Process Outsourcing: An Emerging Phenomenon

Legal outsourcing refers to the practice of a law firm obtaining legal support services from an outside law firm or legal support services company. When the outsourced entity is based in another country the practice is sometimes called Off shoring.

Legal Process Outsourcing has gained tremendous ground in the past few years in the United States. Legal Outsourcing companies, primarily from India, have had success by providing services such as document review, legal research and writing, drafting of pleadings and briefs and providing patent services. Although the off shoring of IT services, software code and call centres and other low-end business processes to lower-wage countries has now been underway for the last 15 years, the offshoring of legal services is still in its nascent stage.

The services that will be offshore within the broad area of legal and paralegal services include, (1) Electronic Document Management Services, (2) Research

Services (3) Due diligence Services (4) Contract Drafting and Proof Reading of Contracts (5) Document Discovery in Litigation (6) Intellectual Property Services.

With respect to the offshoring of legal services, the following models seem to be emerging:

(a) **Captive Centres formed by US Law Firms and their Subsidiaries:** Currently, Indian law does not allow 'foreign' (i.e., non-Indian) law-firms to practise in India. Hence, some law firms in the US and India are setting up subsidiaries, so that they do not practise law in India, but provide legal and paralegal services only for export purposes.[15]

(b) **Joint Ventures by US-based Firms:** Rather than opening their own captive centres, several US-based firms have joint ventures with firms in India. A good example is *Cantor-Colbourn Esq.*, who has joined hands with *Lall and Sethi*, however, since statistically most joint ventures fail especially in India – one needs to be cautious while treading this path.[16]

(c) **Third Party Vendors Providing Services to Law-Firms and In-house Corporate Attorneys:** Evalueserve is a prime example of a third-party provider and currently has over 100 professionals providing legal support services. Evalueserve hires Indian engineers and lawyers and trains them to become proficient in US law and various USPTO, PCT and WIPO rules and regulations.[17]

1.4.2 Brickbats and Bouquets of LPO

In fact, the reduced labour costs, and therefore, the increased profit margins for the end-clients, are the most compelling reasons for these clients to offshore legal services to low-wage countries such as India. Besides the reduced labour costs, there are some other important reasons why many organizations–large, medium and small–offshore some of the work.

First, due to the substantially lower labour costs in India, Indian legal professionals can take substantially more time in doing a unit of work, thereby, making the additional end deliverable more robust and complete. Since this deliverable is then reviewed by a US attorney, such a deliverable is likely to have a better quality than a similar one produced in the US because of the extra attention it has received. Secondly, Offshoring also enables organizations to take advantages of multiple shifts and time zone advantages, which is especially

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15 Alok Aggarwal, "Best Practices in Offshoring of Intellectual Property Services", available at *http://articles.practice.findlaw.com/2007/Jun/25/274.html*

16 *Ibid.*

17 *Ibid.*

important for contracts, legal research, electronic document management, document discovery, and in situations with strict deadlines. Thirdly, since the work done by Indian legal professionals is the same as that provided by a US associate with 2-3 years experience, US lawyers can move up the value-chain and provide a broader array of services to their clients. For example, if Indian lawyers complete most of the drafting, the US lawyers can provide more litigation services and spend more 'face time' with their clients.

However, there also exist some major challenges to LPOs. First, the legal services industry has long had an aversion to risk. This is particularly true within the corporate legal area, where stakes are very high. Here the general counsel and other in-house lawyers are more comfortable outsourcing work to known US based law-firms. Secondly, since the cost of client acquisition in the legal services industry is rather large, many law-firms and solo practitioners try to maximize the number of billing hours from each client. However, when they have to outsource or offshore some of the work, they need to reveal this to the client. Thirdly, sending work offshore also raises the risk of losing confidentiality; although more and more research and development work is being done offshore, sending confidential material offshore still creates apprehensions in the minds of US lawyers. Fourthly, conflict of interest issues are very important for law-firms, solo practitioners and in-house attorneys. And, most legal services providers in the US are bound by ethics and guidelines that incorporate such issues.

1.5 GATS and the Indian Legal Profession: On the Upgrade

Considering India's obligations following GATS, it is felt that the must be considered while restructuring a proper regulatory regime. First, there is a distinction between those foreign lawyers who want to practice in Indian courts and those who want to work primarily as Foreign Legal Consultants. Second, most foreign firms are interested in non-litigation legal consulting business. Third, any regulatory regime must be decided after consulting the Bar as well as the various Bar Associations, Bar Councils, Law Officers and leading law firms. It is important that the regulatory regime addresses issues pertaining to reciprocity rights of the Indian lawyer in the foreign country's jurisdiction, discipline, control and maintenance of ethical standards as prevailing in India and undertakings that the FLCs will not practice Indian law or employ.

The law governing and regulating the legal profession in India is the Advocates Act, 1961. Section 29 of the Act states that: "Advocates to be the only recognised class of persons entitled to practise law - Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates." "Advocate" is defined in S.2 (1) (a) of the Act as "an advocate entered in any roll under the provisions of this Act". The general view had

always been that the practice of law referred to under the Act meant the practice of law in courts i.e. litigation and it was in respect of that aspect of the practice of law that the Act afforded Indian advocates a monopoly in India. The perceived wisdom was that the Act was enacted only to consolidate the classes of legal practitioners who would be entitled as a matter of right to an audience before a court, to regulate such practice by establishing an all-India Bar and Bar Councils with whom such persons were required to be registered etc.

It was not intended to cover other forms of legal activity such as consultancy, advice, drafting of documents, negotiating etc. - work of a kind undertaken by only a handful of lawyers at the time and mainly in Mumbai, the overwhelming majority of Indian lawyers then as indeed still only concerning themselves with litigation.

This view was challenged in 1995 when the Lawyers' Collective, a Mumbai based forum of lawyers, commenced proceedings in the Mumbai High Court against a number of Indian institutions including the Reserve Bank of India ("RBI"), the Government of India, the Bar Council of India and a number of other Bar Councils and the only three foreign firms holding licenses for liaison offices from the RBI - the US firms of White & Case, Chadbourne & Parke Associates and the English solicitors, Ashurst Morris Crisp. The litigation in essence challenged the right of non-India and lawyers to do any legal work in India including in relation to UK and US law.

Development of legal profession in India has been restricted in India on account of the number of impediments in the current regulatory system which hinders Indian law firms from competing effectively against foreign firms. First, there are a number of restrictions, which severely limit the scope of growth in the legal profession, In India there is an absolute bar on advocates advertising and soliciting for any purpose,[18] and indicating any area of specialization.[19] Restrictions on advertising by lawyers in India have resulted in a situation where consumers cannot make an informed choice from the competitive market since the information relating to service is not available to them. Moreover restriction on professional firms on the informing potential users on range of their services and potential causes further injury to the competition. Secondly, the Bar Council of India Rules, 1975 in Chapter III, Rule II[20], prohibits advocates from entering into partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate. Lawyers cannot enter in cooperation with non-lawyers. *Prima facie* there seems to be no pro competitive justification for such a regulation. Such a measure has hampered the delivery of

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18 The Bar Council of India Rules, 1975, Rule 36.

19 *Ibid.*

20 An Advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an Advocate.

services to the consumer and anticompetitive.[21] This absolute bar has been lifted to some extent with the institute of Chartered Accountants permitting tie -ups between lawyers and Chartered Accountants.

Thirdly, the regulatory and legal system in India has the effect of limiting the size of legal establishment. Section 11 of the Companies Act, 1956 stipulates that a partnership or any form of association with more than 20 members if not registered as a company shall be an unlawful assembly.[22] Fourthly, in India only natural persons can practice law, as is evidenced by combined reading of Sections 24[23], 29[24] and 33[25] of Advocates Act and artificial body cannot act as a lawyer. The justification for such restriction is on public policy grounds and in particular to ensure professional responsibilities and liabilities. Thus a legal service provider cannot be incorporated as a company and still continue in practice the profession of Law in India, as per the provisions of Advocates Act 1961. Fifthly, the requirement that Advocates enter into partnerships only with other Advocates has the effect of prohibiting partnerships with foreign firms.[26] The effect of this provision is that partnerships cannot be entered into between Indian Lawyers and those of other countries. These restrictions on incorporation and size of partnerships , prohibition on entering into partnerships with foreign Law firms and lawyers , has limited the size and growth of the profession as well as professionals and prevents them from being globally competitive. Sixthly, the lack of restrictions on partnerships across the world has given rise to firms with a number of partners. Big law firms having wide controlling, regulating and functioning power nationally and internationally. In sharp contrast Indian firms are small and incapable of associating with legal experts from other countries .This way Indian law firms are at disadvantage to law firms of U.S. and E.U.[27]

Having functioned in such a limiting framework for the past forty-four years, the Indian legal profession is today ill-equipped to compete on par with international lawyers, who have grown their practices in liberalized regimes and have vast resources at their disposal. It is further to be noted that there are only a few firms in India having the expertise to handle commercial work for multinationals.

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21 The Competition Act, 2002, Section 19 (a) and 19 (c)

22 *Id.*, *See also,* Section 19 (e) and Section 19 (f) of the C.A, 2002

23 The Advocates Act, 1911, Section 24 prescribes the qualifications to become an advocate.

24 Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

25 Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.

26 *Supra* note 18, Chapter III, Rule I.

27 Legal Services, Background Note by the Secretariat, S/C/W/43, 6th July 1998, WTO Council for Trade in Services at pp. 8.

1.6 Why India's response should be Affirmative?

There are several good and valid reasons, for the Indian government and indeed, the Indian lawyers' community to favourably consider the entry of foreign law firms in India. As India opens up its economy and enters the global trade and commerce mainstream, any form of prohibition on the use of legal and/or financial advisers will be adversely viewed by overseas investors. Lawyers are perceived as an integral part of the investment process and foreign companies want their preferred lawyers with them as much as their own bankers. Foreign lawyers will bring modern know-how and practices which would be of great benefit to Indian law firms. Indian law firms are, relative to their Western counterparts, are less organised less well structured. They tend to be dynastic in their management practices rather than performance oriented. This will change for the better, including improvement of career prospects for Indian lawyers in India and abroad, greater confidence among Indian law firms to pitch for business in foreign markets, etc. Indian business itself stands to benefit greatly from the adoption of quality contractual documentation, which will come in with foreign law firms. Already, significant changes in contractual documentation have occurred despite minimal contacts and these have begun to be apparent in the nature of commercial deals. The process will get accelerated greatly, when foreign law firms start practising in India.

The Law Commission, headed by Justice Jeevan Reddy, published a "Working Paper on the Review of the Advocates Act 1961" in 1999[28]. Section 4 is entitled "Entry of Foreign Legal Consultants and Liberalisation of Legal Practice". The Paper has suggested that Section 29 of the Act be amended to include all services such as advising, research, documentation etc. besides representation in courts, tribunals and other statutory bodies. It has further stated that the Act should be amended to recognize qualifications in law obtained outside India for the purpose of admission of a foreign legal consultant as advocate.

It added that the Council should immediately proceed to frame rules necessary to standardize conditions for entry of foreign legal consultants and building up a fair and transparent regulatory system, as required under GATS. Additionally, the Council should choose a model of liberalization that suits the country as well as a regulatory regime to be adopted to regulate the entry and function of the foreign lawyers.

The Working Paper suggested that India could adopt both "full" and "limited"

Licensing approaches as recommended by the International Bar Association for the regulatory system. Under full licensing, foreign lawyers are integrated as full

[28] *http://pib.nic.in/archieve/lreleng/lyr2000/rjan2000/r05012000.html*

members of local profession with no restriction on the scope of practice, provided they fulfill certain basic conditions.

In contrast, under limited licensing approach, the scope of practice is limited to advice on home country law, excluding all court work, host country law and law of any other jurisdiction where the foreign lawyer is not qualified and licensed. The debate is going on in the subject. There is still fairly strong opposition from the Indian legal profession to the idea of permitting the entry of foreign lawyers to practice in India, though many lawyers in India are showing a willingness to come to terms with foreign law firms provided the ground rules are properly framed. It can be expected therefore that the Indian legal profession will not wish to surrender its monopoly lightly.

1.7 Conclusion

Suffice it to say, any attempt to liberalize trade in legal services must strike a balance between the concerns of national regulators regarding the practice of foreign attorneys and the benefits of increased international competition in the global legal market. Some of the restrictions imposed on foreign lawyers by national regulators are objectively justifiable and facilitate the effective and reliable provision of legal services in the domestic market. Such restrictions should not be sacrificed in an attempt to increase international competition. However, many of the restrictions on foreign lawyers are unreasonably discriminatory and should be eliminated.

Since India is also a signatory to the General Agreement on Trade in Services (GATS), it will have to enter into negotiations regarding opening up of service sectors to the Foreign Service suppliers. This involves the opening up of legal services to foreign lawyers and FLCs and foreign law firms. However it is hoped that before entering into any commitment that may affect the interests of legal profession in the country, the Government will have to consult the legal profession.

CONSUMER PROTECTION AND THE COMPETITION LAW

Dr. Sushila*

1.1 Introduction

The consumer movement in India is as old as trade and commerce. In Kautilya's *Arthashastra*, there are references to the concept of consumer protection against exploitation by the trader and retailer with respect to quality, short weight, measurement and adulteration of goods. Yet until the late 1970s, there was no systematic movement in the country for safeguarding the interest of consumers. But now it is widely acknowledged that the level of consumer awareness and protection is a true indicator of development of the country and progressiveness of civil society. The main reason for this is the rapidly increasing variety of goods and services which modern technology has made available. In addition, the growing size and complexity of production and distribution systems, the high level of sophistication in marketing and selling practices and in advertising and other forms of promotion, mass marketing methods and consumers' increased mobility resulting in reduction of personal interaction between buyers and sellers, have contributed to the increased need for consumer protection[1].

The consumer protection policy creates an environment whereby the clients, customers, and consumers receive satisfaction from the delivery of goods and services needed by them. Good governance requires efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, impartiality and participation of citizens. The concern of consumer protection is to ensure fair trade practices; quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase. Thus, proper and effective implementation of consumer protection law promotes good governance.

The Consumer Protection Act, 1986 was enacted in the year 1986 based on United Nations guidelines with the objective of providing better protection of consumers' interests[2]. The Consumer Protection Act provides for effective

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1 Protection of consumer rights in modern times dates back to 1962. On 15 March 1962, the Consumer Bill of Rights was proclaimed by the United States President in a message to the Congress. The message proclaimed: (i) the right to choice, (ii) the right to information, (iii) the right to safety, and (iv) the right to be heard. Subsequently, the right to consumer education, the right to a healthy environment and the right to basic needs (food, clothing, and shelter) were added by Consumer International. See Eleventh Five Year Plan 2007-12, Vol. I, Chapter 11.

2 The concern in the Indian Constitution for protection and promotion of an individual's rights, and for the dignity and welfare of the citizen makes it imperative to provide for the welfare of the individual as a consumer, a client and a customer. The rights under the Consumer

safeguards to consumers against various types of exploitations and unfair dealings, relying on mainly compensatory rather than a punitive or preventive approach. The Consumer Protection Act applies to all goods and services unless specifically exempted, and covers the private, public, and cooperative sectors and provides for speedy and inexpensive adjudication. The rights provided under the Consumer Protection Act are:

- The right to be protected against marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods and services, as the case may be, to protect the consumer against unfair trade practices
- The right to be assured of access to a variety of goods and services at competitive prices
- The right to be heard and assured that consumer interest will receive due consideration at appropriate fora
- The right to seek redressal against unfair or restrictive trade practices or unscrupulous exploitation of consumers
- The right to consumer education[3].

Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The Right to Information Act, 2005 which has opened up governance processes of our country to the common public also has far-reaching implications for consumer protection.

3 The Introduction to the Consumer Protection Bill, 1986 reflects the need and purpose behind the law. For the felicity of reference, the same is quoted below:
The industrial revolution and the development in the international trade and commerce has led to the vast expansion of business and trade, as a result of which a variety of consumer goods have appeared in the market to cater to the needs of the consumers and a host of services have been made available to the consumers like insurance, transport, electricity, housing, entertainment, finance and banking. A well organised sector of manufacturers and traders with better knowledge of markets has come into existence, thereby affecting the relationship between the traders and the consumers making the principle of consumer sovereignty almost inapplicable. The advertisements of goods and services in television, newspapers and magazines influence the demand for the same by the consumers though there may be manufacturing defects or imperfections or short comings in the quality, quantity and the purity of the goods or there may be deficiency in the services rendered. In addition, the production of the same item by many firms has led the consumers, who have little time to make a selection, to think before they can purchase the best. For the welfare of the public, the glut of adulterated and sub-standard articles in the market has to be checked. In spite of various provisions providing protection to the consumer and providing for stringent action against adulterated and sub-standard articles in the different enactments like Code of Civil Procedure, 1908, the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Indian Penal Code, 1860, the Standards of Weights and Measures Act, 1976 and the Motor Vehicles Act, 1988, very little could be achieved in the field of Consumer Protection. Though the Monopolies and Restrictive Trade Practices Act, 1969 arid the Prevention of Food Adulteration Act, 1954 have provided relief to the consumers yet it became necessary to protect the consumers from the exploitation and to save them from adulterated and sub-standard goods and services and to safe guard the interests of the consumers. In order to provide for better protection of the interests of the consumer, the Consumer Protection Bill, 1986 was introduced in the LokSabha on 5th December, 1986.

1.2 Consumer Protection and Competition Law

Consumer is considered to be King in a free market and the sellers are supposed to be guided by the will of a consumer in such markets. There is a constant need for harmonizing the protection of consumer rights with promoting free markets.

The modern competition law usually seeks to protect the process of free market competition in order to ensure efficient allocation of economic resources. It is commonly believed that competition law is ultimately concerned with the protection of the interest of the consumers. Conversely, it may be said that consumers' detriment is generally presumed to be present when the competitive process is thwarted or damaged.

Promotion of consumer welfare is the common goal of consumer protection and competition law. At the root of both consumer protection and competition law is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance. Competition law also seeks to forestall other forms of market failure, such as formation of cartels, leading to collusive pricing, division of markets and joint decisions to reduce supply. Mergers and acquisitions also need to be regulated as they reduce competition.

1.3 Evolution of Competition Law in India

The first competition law, the Monopolies & Restrictive Trade Practices Act, 1969 ('the MRTP Act'), was enacted in the year of 1969 following the recommendations of the Monopolies Inquiry Committee (MIC) and sought to provide structural remedies in its attempt to curb monopolistic behaviour since it presumed size beyond a threshold to affect competition adversely. The MRTP Act was enacted to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices as are prejudicial to public interest.

The MRTP Act, 1969 has its genesis in the Directive Principles of State Policy embodied in the Constitution of India. Clauses (b) and (c) of Article 39 of the Constitution lay down that the State shall direct its policy towards ensuring that the ownership and control of material resources of the community are so distributed as to best serve the common good and that the operation of the

economic system does not result in the concentration of wealth and means of production to the common detriment[4].

As the MRTP Act had become obsolete in certain areas in the light of international economic developments, a committee was appointed by the Government to propose a modern competition law. Accordingly, a High Level Committee on Competition Law and Policy was constituted which submitted its report to the Government in May 2000. After consultations with all concerned, including the trade and industry associations and the general public, the Government decided to enact a new law on competition *i.e.* the Competition Act, 2002 ('the Act'). The Competition Act is a Central law in India *i.e.* a law of the Union Government and there is no corresponding law enacted at the level of the constituent States.

The Competition Act was part of India's economic reform and globalization process which necessitated aligning the economic laws of the country with the new economic scenario. The Statement of Objects and Reasons to the Competition Bill, 2001 states the reasons for enacting the new law. It *inter alia* states that in the pursuit of globalization, India has responded by opening up its economy, removing controls and resorting to liberalization. The natural corollary to this is that the Indian market should be geared to face competition from within the country and outside. The MRTP Act has become obsolete in certain respects in the light of international economic developments, relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition[5].

Accordingly, the competition law has been enacted to provide, keeping in view the economic development of the country for the establishment of a commission to (a) prevent practices having adverse effect on competition; (b) to promote and

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4 Constitution of India, 1950
Article 39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
.....
(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
.....

5 Statement of objects and reasons to the Competition Bill:
'1. In the pursuit of globalization, India has responded by opening up its economy, removing controls and resorting to liberalization. The natural corollary to this is that the Indian market should be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969, has become obsolete in certain respects in the light of international economic developments, relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.-------'

sustain competition in market; (c) to protect the interests of consumers; and (d) to ensure freedom of trade carried on by other participants in markets, in India[6].

These objectives are further reflected in the various provisions of the Act and, in particular, under section 18 of the Competition Act as per which the Commission is enjoined upon, inter alia, to protect the interests of consumers and ensure freedom of trade carried on by other participants in the markets[7]. Further, from the provisions contained in section 19(3) of the Competition Act, it is manifest that accrual of benefits to consumers is to be taken into consideration by the Commission while determining whether an agreement has an appreciable adverse effect on competition or not[8].

Recently, the Hon'ble Supreme Court of India also highlighted this aspect in its judgment in the case of Competition Commission of India v. *Steel Authority of India Ltd.*[9], and for the sake of ready reference, the relevant part of the judgement is quoted below:

> [T]he principle objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effects on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country. In other words, the Act requires not only protection of trade but also protection of consumer interest.

Thus it can be noticed that protection of consumers' interest has engaged the parliamentary attention while enacting the Competition Act and the same has

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6 The Competition Act, 2002; Long title:
An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

7 *Id.*, Section 18:
Duties of Commission
Section 18. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

8 *Id.*, Section 19(3) enumerates the factors which are required to be taken into consideration by the Commission for determining whether an agreement has an appreciable adverse effect on competition under section 3 of the Act. It *inter alia* includes accrual of benefits to consumers as a relevant factor.

9 Civil Appeal No. 7779 of 2010, decided on 09.09.2010.

also been reiterated by the Hon'ble Supreme Court of India. Therefore, the function of the Competition Commission of India is not only to supervise and sustain competition in the market but also to protect the interests of consumers.

1.4 Competition Commission of India (Structure, Powers, Functions and Remedies)

To appreciate the remedies which are available to consumers under the Competition Act, it would be profitable to refer to the powers, functions and structure of the Competition Commission of India set up thereunder.

14.1 Structure of the Commission

1.4.1.1 The Commission

The Competition Commission of India has been established under section 7(1) of the Competition Act. Under section 7(2) of the Competition Act, the Commission has been declared as a body corporate by the name Competition Commission of India having perpetual succession and a common seal with power, subject to the provisions of the Competition Act, to acquire, hold and dispose of property, both moveable and immoveable, and to contract and shall, by the said name, sue or be sued[10].

The Commission consists of a Chairperson and not less than two and not more than six other members to be appointed by the Central Government[11].

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[10] *Id.*, Section 7
Establishment of Commission
Section 7. (1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India".
(2)The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.
(3) The head office of the Commission shall be at such place as the Central Government may decide from time to time.
(4) The Commission may establish offices at other places in India.

[11] *Id.*, Section 8:
Composition of Commission
Section 8. (1)The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.
(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.
(3) The Chairperson and other Members shall be whole-time Members.

Further, under section 17(1) of the Competition Act, the Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions. It may also be noted that under section 17(3) of the Competition Act, the Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under the Competition Act[12].

Under the scheme of the Competition Act, an appeal is provided to the Competition Appellate Tribunal (COMPAT) against the direction/decisions or orders made by the Commission[13]. A further appeal is provided to the Supreme Court of India[14].

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12 *Id.*, Section 17:
Appointment of Secretary, experts, professionals and officers and other employees of Commission
Section 17.(1)The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.
(2) The salaries and allowances payable to and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.
(3) The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.

13 *Id.*, Section 53 A:
Establishment of Appellate Tribunal
Section 53A.(1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –
(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;
(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.
(2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

14 *Id.*, Section 53 T:
Appeal to Supreme Court
Section 53 T. The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them; Provided that the Supreme court may, if it is satisfied that the applicant was prevented

1.1.4.2 Office of the Director General

The Central Government under section 16 of the Competition Act has appointed a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of the Competition Act and for performing such other functions as are, or may be, provided by or under the Competition Act[15].

It is instructing to note that the Director General is appointed by the Central Government unlike the Secretary and other officers who are appointed by the Commission to ensure the independence of the investigation process[16].

Thus, the Office of the Director General, under the scheme of the Competition Act is conceived to be an independent investigating arm of the Commission.

1.4.2 Enforcement Functions of the Commission

The functions of the Commission may be broadly classified into the following categories:

The Competition Act prohibits or regulates:

(i) Anti-competitive agreements, prohibited by section 3 of the Competition Act[17],

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by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

15 *Id.*, Section 16:
Appointment of Director General, *etc.*
Section 16. (1)The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.
(1A)The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.
(2) Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.
(3) The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.
(4) The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

16 *Supra* note 13.

17 *Supra* note 6 Section 3:

Anti-competitive agreements

Section 3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be *void.*

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

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

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

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

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict-

(ii) Abuse of dominant position, prohibited by section 4 of the Competition Act[18], and

(iii) Combinations, regulated by sections 5 and 6 of the Competition Act[19].

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-
(a) the Copyright Act, 1957 (14 of 1957
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

[18] *Supra* note 6, Section 4:
Abuse of Dominant Position
Section 4. (1) No enterprise or group] shall abuse its dominant position.
(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group-
(a) directly or indirectly, imposes unfair or discriminatory-
(i) condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service.
Explanation.- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or
(b) limits or restricts-
(i) production of goods or provision of services or market therefor; or
(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
(c) indulges in practice of practices resulting in denial of market access in any manner; or
(d) makes conclusions of contracts subject to acceptance by other parties of supplementary obligation which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.
Explanation-For the purposes of this section, the expression-
(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-
(i)operate independently of competitive forces prevailing in the relevant market; or
(ii)affect its competitors or consumers or the relevant market in its favour;
(b)"predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.
(c)"group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

1.4.2.1 Anti-Competitive Agreements

Section 3(1) of the Competition Act prohibits any agreement with respect to production, supply, distribution, storage, acquisition, or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India. Further, section 3 (2) provides that any agreement in contravention of this provision shall be void[20].

The term 'agreement' itself is defined in section 2 (b) of the Competition Act; it includes any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings[21]. Clearly, the definition which is inclusive and not exhaustive is a wide one. The agreement does not necessarily have to be in the form of a formal document executed by the parties.

The term 'appreciable adverse effect on competition', used in section 3 (1) has not been defined in the Competition Act. However, section 19 (3) states that while determining whether an agreement has an appreciable adverse effect on competition under section 3, the Commission shall have due regard to all or any of the following factors:

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services; and
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services[22].

The first three factors relate to negative effects on competition while the remaining three relate to beneficial effects. Thus, in assessing whether an agreement has an appreciable adverse effect on competition, both the harmful and beneficial effects, as reflected in the above factors, are to be considered.

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19 *Id.*, Section 5 defines 'combination' whereas section 6 provides for regulation of combinations.

20 See *supra* note 18.

21 *Supra* note 6, Section 2(b):
"agreement" includes any arrangement or understanding or action in concert,-(i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

22 *Id.*, Section 19 (3) enumerates the factors which are required to be taken into consideration by the Commission for determining whether an agreement has an appreciable adverse effect on competition under section 3 of the Act. It *inter alia* includes accrual of benefits to consumers as a relevant factor.

1.4.2.2 Horizontal and Vertical Agreements

Competition law usually places anti-competitive agreements in two categories- horizontal agreements and vertical agreements, with horizontal agreements being viewed more seriously than vertical agreements. The Competition Act does not specifically use the terms horizontal agreement and vertical agreements. However, the agreements referred to in section 3 (3) are horizontal agreements and those referred to in section 3 (4) are vertical agreements.

Horizontal agreements of the types described in section 3 (3) are presumed to have an appreciable adverse effect on competition. These are agreements including cartels, which (a) directly or indirectly determine purchase or sale prices; (b) limit or control production, supply, markets, technical development, investment, or provision of services; (c) share the market or source of production or provision of services by way of allocation of geographical market, or type of goods or services, or number of customers in the market; and (d) directly or indirectly result in bid rigging or collusive bidding. Thus, cartels and similar horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive.

Section 3 (3) includes, apart from an agreement, a practice carried on, or a decision taken by an association.

It is common for enterprises to enter into or form joint ventures for specific or agreed purposes. The proviso to section 3 (3) excludes any joint venture from the 'shall presume' rule if such 'joint venture' is efficiency enhancing.

Section 3 (4) deals with vertical agreements. It lists, in particular, five categories of vertical agreements which would be in contravention of sub-section (1) if these cause or are likely to cause an appreciable adverse effect on competition in India. Vertical agreements are therefore subject to the rule of reason, and not to the 'shall presume' rule of sub-section (3). This softer treatment acknowledges that vertical agreement can have beneficial aspects as well, and these need to be weighed against the harmful effects to see if the agreement is on balance anti-competitive. The harmful effects may include restrictions on intra-brand competition, foreclosure of competition, and compartmentalization of markets, and the pro-competitive effects can include efficiency gains, increase in inter-brand competition, and prevention of free-riding.

1.4.2.3 Abuse of Dominant Position

Section 4 (1) prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in the explanation (a) to section 4 which states that dominant position means a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate

independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour[23].

Dominant position is, thus, related to the relevant market and it is therefore necessary first to determine the relevant market in which the dominant position is alleged. The term 'relevant market' itself has been defined in section 2 (r) as the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets[24]. The terms 'relevant geographic market' and 'relevant product market' have also been defined in the Competition Act[25].

Once the relevant market has been determined, the next stage would be to inquire whether the enterprise enjoys a dominant position. The Competition Act does not prohibit the mere possession of a dominant position, but only its abuse, thus recognizing that a dominant position may have been achieved through superior economic performance. Section 19 (4) provides that while inquiring whether an enterprise enjoys a dominant position or not under section 4, the Commission shall have due regard to all or any of the factors mentioned therein[26].

The next question that arises is whether there has been an abuse of dominant position. Section 4 (2) states illustratively, and not exhaustively, the abuses which include exploitative abuses such as unfair or discriminatory conditions or prices as well as exclusionary abuses such as denial of market access.

1.4.2.4 Regulation of Combinations

The Competition Act contains provisions for regulation of combinations *i.e.* for 'merger control'. While the definition of combination is contained in section 5, the regulation thereof is provided in section 6. Section 6 (1) states that no person or enterprise shall enter into a combination which causes or is likely to cause an

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23 See *supra* note 19.

24 *Supra* note 6, Section 2 (r):
"relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

25 *Id.*, Section 2(s):
"relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas;
Section 2(t):
"relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

26 *Id.*, Section 19(4) enumerates the factors which are required to be taken into consideration by the Commission while enquiring whether an enterprise enjoys a dominant position or not.

appreciable adverse effect on competition within the relevant market in India, and such a combination shall be *void*[27].

1.4.3 Powers

The remedies that can be ordered by the Commission in cases of contravention of section 3 (relating to anti-competitive agreements) or section 4 (relating to abuse of dominant position), as the case may be, have been provided in section 27 of the Competition Act[28].

Under this provision, where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of sections 3 or section 4, it may pass all or any of the following orders:

(i) *'cease and desist'* order[29];
(ii) impose a penalty not exceeding 10 per cent of the average turnover of the preceding three years. In the case of a cartel, the penalty could be 10 per cent of the turnover or three times the amount of profits made out of the cartel agreements, whichever is higher[30];

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27 *Id.*, Sections 5 and 6 have been notified w.e.f. 01.06.2011.

28 *Id.*, Section 27:
Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:-
(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.
(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:;
(g) pass such other order or issue such directions as it may deem fit.
Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

29 Section 27(a) of the Competition Act, 2002.

30 *Id.*, Section 27 (b).

(iii) modification of the agreements[31] and
(iv) such other order or directions as deemed fit[32].

Further, under section 28 of the Act, the Commission may direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position[33].

In the case of combinations, the Commission may approve the combination, deny approval, or approval it with modifications[34].

1.5 Protection of Consumer Interest and the Competition Act (With Special Reference to Case Law)

The prohibition under the Competition Act against anti-competitive agreements extends to enterprise or association of enterprises or person or association of persons. On the other hand, the prohibition against abuse of dominant position extends only to an enterprise. Further, the prohibition against anti-competitive combinations extends both to persons and enterprises.

The term enterprise has been given a broad definition in the Competition Act and it includes a person and a department of the Government, other than a department having sovereign functions and the departments of the Central Government dealing with atomic energy, currency, defence and space. Such departments excluded in the definition of term enterprise will, therefore, not be liable to action under the Competition Act[35].The Competition Act covers under its ambit both goods and services[36].

Under section 19 (1) of the Competition Act, the Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 *interalia* on the receipt of any

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31 *Id.*, Section 27 (d)
32 *Id.*, Section 27 (g)
33 *Id.*, Section 28 enables the Commission to order division of the enterprise enjoying dominant position.
34 *Id.*, Section 31
35 *Id.*, Section 2(h):
"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
36 *Id.*, Sections 2(i) and 2(u) define 'goods' and 'services' respectively.

information from any person, consumer or their association or trade association. The term person and consumer have been defined under the Competition Act[37].

Since the provisions of sections 3 and 4 of the Competition Act have been notified with effect from 20.05.2009 and the provisions of sections 5 and 6 of the Competition Act have been notified with effect from 01.06.2011, a brief survey of case law during this period will be apposite. The analysis of the orders of the Commission would indicate that the same have gone a long way in protecting *inter alia* the interest of consumers.

In *FICCI – Multiplex Association of India* v. *United Producers / Distributors Forum*[38],the informant FICCI-Multiplex Association of India had filed an information against United Producers/Distributors Foru (UPDF), the Association of Motion Pictures and TV Programme Producers and the Film and Television Producers Gild of India Ltd. alleging *inter alia* that UPDF *vide* their notice dated 27.03.2009 had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant.

It was held by the Commission that the opposite parties by entering into the impugned agreement have contravened the provisions of section 3(1) read with section (3)(a) and (b) of the Competition Act and also caused appreciable adverse effect on competition in India in terms of section 19 (3) of the Competition Act as the alleged agreement controlled/limited the supply of films to the multiplexes besides, increasing the price of tickets. Accordingly, the Commission directed the opposite parties to refrain from indulging in such anti-competitive practices in future. Besides, a penalty of rupees one lakh was also imposed on each of the opposite parties.

In *MCX Stock Exchange Ltd.* v. *National Stock Exchange of India Ltd.*[39], the Commission imposed a penalty of Rs 55.5 crore on the National Stock Exchange (NSE) for "abusing its dominant position in the currency derivative market by cross subsidising this segment of business from other segments where it enjoyed virtual monopoly." Further, the Commission in exercise of powers under section 27(a) of the Competition Act, directed NSE to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant Currency Derivative market with immediate effect.

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37 *Id.*, Section 19 enables the Commission to inquire into contraventions of the Act. The procedure for inquiry is provided under section 26 of the Act.

38 Case No. 01 of 2009.

39 Case No. 13 of 2009.

In *Belaire Owners' Association* v. *DLF Limited*[40], the Commission examined the various clauses of the Flat Buyer's Agreement and noted that the same give DLF Ltd. sole discretion in respect of change of zoning plans, usage patterns, carpet area, alteration of structure etc. In case of change in location of the apartment, Preferential Location Charges (PLC) is determined at the discretion of the builder and if a refund is due, no interest is paid. No rights have been given to the buyers for raising any objections. Further, even if the buyer has paid the full amount, the builder can raise subordinate mortgage on the property for finances raised for its own purpose and the consumers are subjected to this mortgage. Despite knowing that necessary approvals were pending at the time of collection of deposits, DLF Ltd. inserted clauses that made exit next to impossible for the buyers. Similarly, in event of delay, the builder would pay compensation at Rs 224 5 per square foot per month for delays beyond 3 years. In sharp contrast, if there is a delay on part of the buyer, the interest charged is 15 % per annum for the first 90 days, increasing by another 3% after that.

The Commission held the DLF guilty of abuse of dominant position in the relevant market as the nature of clauses of Flat Buyer's Agreement and conduct of DLF were found to be blatantly unfair, even exploitative in contravention of provisions of section 4(2)(a) (i) of the Act. Resultantly, the Commission directed DLF to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon besides directing it to suitably modify unfair conditions imposed on its buyers. A penalty of Rs. 630 crore was also imposed. It will be useful to quote the following observations of the Commission:

> These are some of the clauses that show how heavily loaded the buyers' agreement is in favour of DLF Ltd. and against the buyer. Under normal market scenario, a seller would be wary of including such one-sided and biased clauses in its agreements with consumers. The impunity with which these clauses have been imposed, the brutal disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair. The course the progress of the project has taken again indicate that DLF Ltd. beguiled and entrapped buyers through false solicitations and promises.

In *Uniglobe Mod Travels Pvt Ltd.* v. *Travel Agents Federation of India*[41], the case pertained to a boycott call given by trade associations of the travel agents in India against a few international airlines on account of the shift from 'commission basis' fee structure to 'transaction fee' structure, and the demand to

[40] Case No. 19 of 2010.
[41] Case No. 03 of 2009.

restore the former business model. One of the members of opposite party, trade association *i.e.* the Informant in the present case, did not heed to the boycott call, which resulted in its expulsion from the association. The informant filed the information before the Commission for alleged violation of section 3(1) and 3(3) of the Act by the opposite party trade association. The Commission in its order directed the opposite parties to refrain from indulging in such anti-competitive conduct in future. A penalty of Rs.1 Lakh each was also imposed on the three trade associations involved in the case.

In *Reliance Big Entertainment Limited* v. *Karnataka Film Chamber of Commerce*[42] and similar connected matters, a number of cases have been filed under the provisions of section 19(1) (a) of the Competition Act alleging certain anti-competitive acts on the part of Karnataka Film Chambers of Commerce (KFCC) and other film bodies/associations which are associated with the business of film distribution and exhibition in the territories under their control in India. The basic issue raised by the informants in all these cases was common and identical *i.e.* the film bodies/associations have indulged in various anti-competitive activities in contravention of the provisions of sections 3 and 4 of the Competition Act by asking the producers-distributors to compulsorily register their films with them, forcing them to abide by their unfair and discriminatory rules, directing their members not to deal with the non-members, putting restrictions such as limit on the number of cinema theatres for exhibition of films, discriminating non-regional films against the regional films, undue long holdback period for satellite, DTH and other rights in respect of exhibition of films and imposing bans, penalties and giving a call of boycott against those who violate the rule and regulations of the associations. The Commission on finding contraventions imposed a penalty on each of the associations @ 10% of the average of the three years receipt/income. Besides, the Commission also directed all the associations to cease and desist from following practices and take suitable measures to modify or remove them from their articles of association, rules and regulations since they are anti-competitive. The Commission accordingly issued the following directions:

a) The associations should not compel any producer, distributor or exhibitor to become its members as a pre-condition for exhibition of their films in the territories under their control and modify their rules accordingly;
b) The associations should not keep any clause in rules and regulations which makes any discrimination between regional and non-regional films and impose conditions which are discriminatory against non-regional films;
c) The rules of restrictions on the number of screens on the basis of language of or the manner in which a particular film is to be exhibited should be done away with;

[42] Case No. 25 of 2010.

d) Associations should not put any condition regarding hold back period for release of films through other media like CD, Satellite etc. These decisions should be left to the concerned parties and

e) The condition of compulsory registration of films as a pre-condition for release of any film and existing rules of association as discussed in the preceding paras of this order on the issue should be dispensed with.

However, there are some cases in which the Commission did not find any contravention of the provisions of the Competition Act and a brief survey of some such landmark cases may also be made.

In *Neeraj Malhotra* v. *Deustche Post Bank Home Finance Ltd.*[43], Shri Neeraj Malhotra, Advocate ('the Informant') filed the information to advocate and espouse the cause of the consumers who avail home loans and are required to pay pre-payment penalty ('PPP/ pre-payment charges') on foreclosure of such loans. However, the Commission through its majority order did not find any contravention of the provisions of the Competition Act by holding as follows:

> This is a multi-dimensional case involving macroeconomic as well as consumer issues. We have, therefore, identified and determined the issues in this case very carefully within the four walls and boundaries laid down by the Act. It is evident from our analysis and determination of these issues earlier in the order that there is a vibrant market in provision of home loans, with the number of service providers and the variety in products growing consistently and continuously over a period of years. There is no bank/HFC in the market which can be deemed to be dominant by any of the parameters used for determining dominance. The question of abuse of dominance, therefore, does not arise. It is equally clear that there is no agreement amongst the various service providers i.e. the banks/HFCs, nor is there any uniform practice being followed by them. They are operating as competitors in a vibrant competitive market. Neither the violation of Section 3 or Section 4 of the Act has been established, nor is there any evidence whatsoever of an appreciable adverse effect on competition in the home loan market in India in this context.

However, in this case, Shri P N Parashar, Member *vide* his separate order dissented from the majority view and held that the agreements entered into by the banks with the consumers are neither transparent nor specific on the issue. The consumers are not made aware of the basis for charging prepayment penalty. Further, it was held that the main objective for charging PPP is to check and prevent a switchover by the borrowers which in consequence, leads to preventing the new entrant banks from entering into market, debarring the consumers from

[43] Case No. 05 of 2009.

availing the facility of lower rate of interest loans offered by other banks. Hence, the practice of PPP as adopted by the opposite parties and as is prevalent today, is against the interests of the consumers and hinders their free mobility. It has an appreciable adverse effect on competition in the market because it is creating barriers on entry for the new entrants which offer lower rate of interest on home loans. This certainly is to the detriment of consumers and is violative of the provisions contained under section 3(1), 3(3)(a) and 3(3)(b) of the Act.

In *Consumer Online Foundation* v. *Tata Sky Limited*[44], an information was filed against DTH service providers alleging by arguing that the DTH operators by not allowing inter-operability of set top boxes are indulging in anti-competitive acts and also using their dominant position in contravention of the provisions of sections 3 and 4 of the Act. The Commission while repelling the challenge held as follows:

> ...this Commission is of the view that the practice of supplying STB / CAMs by DTH service providers alongwith the subscription is not due to any tacit agreement or action in concert, but due to limitations of the existing technology and its cost. Moreover, the sector regulators are fully seized with the matter and at this stage, there is no competition angle involved. Similarly, STB / CAM is an intrinsic part of the service of direct to home transmission and therefore, there is no aspect of vertical restraint being imposed on any person. Finally, even a cursory application of factors given in sub-section (3) of section 19 of the Act to the DTH industry in India reveal that none of the factors are applicable. The empirical data available in public domain point to the fact that DTH market is fairly competitive and will be expanding vigorously over the coming years. There is no indication of entry barriers or foreclosure of competition apparent from the facts discussed above. For these reasons, there is no contravention of any of the provisions of section 3 of the Act in the instant case.

Further, the Commission also rejected the challenge based on section 4 of the Act by holding as follows:

> The DG has also discussed the issue of abuse of dominance by the opposite parties by restricting interoperability. The DG noted that this is a very vague allegation and was not established through investigation. It further observed that Indian law does not recognize collective abuse of dominance as there is no concept of 'collective dominance' which has evolved in jurisdictions 107such as Europe. The word 'group' referred to in section 4 of the Act does not refer to group of different and completely independent corporate entities or enterprises. It refers to

[44] , Case No. 02 of 2009.

different enterprises belonging to the same group in terms of control of management or equity. This is not the case with the opposite parties. The contention of the informant that each of the DTH respondents is individually dominant is not sustainable. This Commission agrees with the informant to the extent that market share is not the only determinant of dominance. But the concept of dominance does centre on the fact of considerable market power that can be exercised only by a single enterprise or a small set of market players. Every single player in any relevant market cannot be said to possess such dominance, as seems to be the contention of the informant. All service providers of the entire DTH industry cannot be said to be individually dominant. Individually, none of the DTH operators has dominant position in terms of Explanation (a) to section 4. It is noteworthy that the Competition Act uses the article "an" and not "any" before 108 the word "enterprise" in subsection (2) of section 4. For a plural interpretation of "an" the combined entity should be an identifiable artificial juridical person such as association of persons (AOP) or body of individuals (BOI) mentioned in subsection (l) of section 2 of the Act. That is why the Act includes the term "group" separately because a "group" of firms with joint management control can have collective decision making and can exercise joint dominance. In this case, the respondents cannot be said to be AOP or BOI. Therefore, they cannot be said to be "an enterprise" for the purpose of section 4.

From the analysis of the orders passed by the Commission during its short period of working after the notification of the relevant provisions, it may be noticed that its orders have a mixed bearing upon the interests of the consumers[45].

1.6 Conclusions

One of the avowed objectives of the Competition Act is to protect the interests of consumers and the same is sought to be achieved within the framework provided thereunder. The Consumer Protection Act also protects the rights of the consumers, however, the same differs in some respects from the Competition Act. The Competition Act defines the term 'consumer' in a broader manner by including a person who buys goods or hires services for commercial use. Under the Consumer Protection Act, such a person is not a consumer. While under the Consumer Protection Act, consumer needs to be an end user and must use the goods for his personal purpose whereas under competition law consumer might be a commercial entity using the goods or services for commercial purposes. The Consumer Protection Act provides rights and relief to an individual consumer *i.e.* a person can claim compensation for the particular instance of failure to provide

[45] *Supra* note of the provisions of section 3 and 4 have been notified w.e.f. 20.05.2009 whereas the provisions of sections 5 and 6 have been notified w.e.f. 01.06.2011.

adequate goods and services in a particular case, whereas the Competition Commission's powers are more directed to ensure fair competition in the market. The objective of competition law is to provide a regulatory framework for ensuring free competition in the market and to protect the interests of consumers. It is not to provide compensatory or equitable relief to individuals who complain.

There is, indeed, a greater recognition now all over the world to supplement and bolster consumer protection via maintenance of competition. The Competition Act, 2002 was also enacted inter alia to protection the interest of consumers. The Competition Commission of India has been enjoined upon to protect the interest of consumers. Protection of consumer interest permeates the entire scheme of the Competition Act, 2002.

From the experience of the working of the Competition Commission of India during its short span of working, it is evident that concerns of consumers have weighed heavily while deciding the cases relating to anti-competitive agreements and abuse of dominant position. Though, some decisions of the Competition Commission of India have gone against the consumers, on the whole, the beginning of the working of the Competition Commission of India is a good augury for the interests of consumers.

A vibrant and dynamic competition law would supplement and complement the consumer protection regime provided under the Consumer Protection Act, 1986 and the other extant laws.

MERGERS IN THE INDIAN BANKING SECTOR : A LEGAL PERSPECTIVE

Arneet Kaur*

1.1 Introduction

Globalisation, liberalization and technological changes have made mergers and acquisition quite common and a major way of corporate restructuring throughout the world; financial services industry has also experienced merger waves leading to the emergence of very large banks and financial institutions. This changing market drives the mergers which have been part of the historical process of change in the developed economies but in the emerging economies like India this process is gaining pace in the recent times. With liberalization in the Indian Economy, the phenomenon of mergers and acquisitions (M&As) as a means of business restructuring has come to the fore. The banking sector is no exception, and India has witnessed amalgamations of a number of banks, particularly, in the post-liberalization era. With the changing times, Indian banking system is moving from a system with large number of small banks to a system where in there are small number of large banks.

As mergers and acquisitions of companies are regulated by law, so are the mergers of banking companies. Legal regulation aids in achieving the perceived benefits of any merger and acquisition transaction, but only to a certain level. But too much stringent laws, may prove to be a hindrance to economic growth. As remarked in *Ion Exchange (India) Ltd.*[1] by Justice *Dhananjaya Y. Chandrachud.*

> Corporate restructuring is one of the means that can be employed to meet the challenges and problems which confront business. The law should be slow to retard or impede the discretion of corporate enterprise to adopt itself to the needs of changing times and to meet the demands of increasing competition.

Therefore, this paper will make an humble attempt to analyse the legal and regulatory framework for bank mergers in India, highlight the prominent areas of concern and provide suitable suggestion for this sensitive issue on which financial stability of our economy depends.

1.2 An Overview of Indian Banking Industry

India has an extensive and a well developed banking network in both urban and rural areas. The Indian banking sector has widespread coverage as well as expertise in providing banking services. Extensive banking expertise in India stems

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1 (2001) 105 Comp Cases 115 (Bom).

from the diversified banking entities, i.e. public sector, private sector and foreign banks existing historically and catering to the needs of the different sections of the economy. This co-existence of different groups of banks along with the deregulation of various banking activities led to efficiency gains across the banking groups in India.[2]

The banking system has three tiers. There are the scheduled commercial banks, the regional rural banks which operate in rural areas not covered by the scheduled banks and the co-operative banks and the specialized banks.

Commercial banks are categorized as scheduled and non-scheduled banks but for the purpose of assessment of performance of banks, the Reserve Bank of India categorizes them as public sector banks, old private sector banks, new private sector banks and foreign banks.[3] Specialized banks are Exim Bank, NABARD etc where as in the category of development banks, we have Industrial Development Banks of India (IDBI) and Industrial Finance Corporation of India (IFCI). Co-operative banks are further categorized as Primary Credit Society, Central Co-operative Banks and State Co-operative Banks. At the top of all these is our central banking institution, the Reserve Bank of India (RBI). It is the sole authority for issuing bank notes and the supervisory body for banking operations in India. It supervises and administers exchange control and banking regulations and administers the government's monetary policy. It is responsible for Indian Banking system since 1935.[4]

1.3 Motives Behind Mergers and Acquisitions in the Indian Banking Sector

If we carry a review of mergers in the Indian banking sector, we can easily narrow down the motives behind M&As to the following:

(i) Growth: As organic growth takes time, therefore powerful banks prefer acquisitions to grow quickly in size and geographical reach to capture the opportunities in the market.

(ii) Synergy: The merged entity, in most cases has better ability in terms of both revenue enhancement and cost reduction.[5]

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2 "Competition and Consolidation", available at *rbi.org.in/scribds/publicationsview.aspx?id=10495*, last accessed on 15 February 2012.

3 Ruchi Sahay, "Roles and Responsibilities of CCI in Bank Mergers", available at *www.cci.gov.inresults*, last accessed on 22 February 2012.

4 Akhil Bhan, "Mergers in Indian Banking Sector– Motives and Benefits", available at *http://ssrn.com/ abstract=1467813*, last accessed on 15 February 2012.

5 R. Srinivasan et al, "M&As in the Indian Banking Sector: Strategic and Financial Implications", available at *http://tejas-iimb.org/articles/01.php*, last accessed on 22 February 2012.

(iii) Technological Benefits: New generation private sector banks have developed or started many value added services with the help of their technological superiority which may attract some old generation banks for merger due to their incapacity to face these challenges.

(iv) Strategic Motives: Two banks with complementary business interests can strengthen their positions in the market through merger.[6]

(v) Customer Base: In order to utilize the capacity of the new generation private sector banks, they need huge customer base. Creating huge customer base takes time. Therefore, these banks have started looking for target banks with good customer bases to develop a good customer base for themselves.

(vi) Managerial Efficiency: If the acquirer bank has a good managerial efficiency, it can better manage the resources of the target whose value, in turn, rises after the acquisition. In India, top 5-6 banks have solid management and they can improve the functioning of smaller banks.

(vii) Tax Shields and Financial Safeguards: Tax concessions act as a catalyst for a strong bank to acquire distressed banks that have accumulated losses and unclaimed depreciation benefits in their books. This is because section 72A of the Income Tax Act, 1961 provides for carry forward of losses of sick companies which can be written off against future profits of profitable corporations.

(viii) Transfer of Skills: Moreover, when merger happens, transfer of skills takes between the two banking organizations and this transfer of skills leads to higher efficiency on the part of the merged bank.

(ix) Other Motives: Globalization, economic liberalization, drastic increase in market competition, innovation of new financial products and consolidation of regional financial system and national financial system are the other important motives, for which banks are going for mergers around the world.

(x) Regulatory Intervention: The RBI also steps in to force the merger of a distressed banks in order to protect depositors and prevent the de-stabilisation of the financial services sector though the Narsimham Committee in its report has discouraged forced mergers.

Thus, M&As provide a fast and easy method for many banks to enter areas where they lack a presence.

1.4 Legal and Regulatory Framework for Bank Mergers in India

The regulatory framework for M&As in the banking sector is laid down in the Banking Regulation (BR) Act, 1949. In the post-independence era, the legal

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6 *Ibid.*

framework for amalgamations of banks in India is provided in the Act. The amalgamations of private sector banking companies can be classified into four categories. The first two are regulated under the Banking Regulation Act, 1949 and the other two under Companies Act, 1956.

1.4.1 Voluntary Amalgamation

The voluntary amalgamation is provided under section 44A of the Banking Regulation Act, 1949. As explained in the judgment of *Bank of Madura Shareholders Welfare Association* v. *Governor, RBI*,[7] the provision contained in the Banking Regulation Act namely section 44A is a complete code on the amalgamation of banking companies. It was further held that:

> A close reading of the provisions of section 44A of the Banking Regulation Act shows that it departs from the provisions of the Companies Act, 1956, in two important aspects, namely, the High Court is not given the power to grant its approval to the scheme of merger of banking companies and the RBI is given such a power and, secondly, the RBI is also empowered to determine the market value of shares of the shareholder who has voted against the scheme of amalgamation. If the petitioner association is really aggrieved that the market value of both the companies has not been determined properly, it is always open to it to get the market value of shares evaluated by the Reserve Bank of India, and obtain the value of the shares from the banking company.

Section 44A of the BR Act provides that the scheme of amalgamation of banking company with another banking company is required to be approved individually by the board of directors of both the banking companies and subsequently by the two-thirds shareholders (in value) of both the banking companies. Further, Section 44A of the BR Act requires that after the scheme of amalgamation is approved by the requisite majority in number representing two-third in value of shareholders of each banking company, the case can be submitted to the Reserve Bank for sanction. However, the Reserve Bank has the discretionary powers to approve the voluntary amalgamation of two banking companies under section 44A of the BR Act. The experience of the Reserve Bank has been, by and large, satisfactory in approving the schemes of amalgamation of private sector banks in the recent past and there has been no occasion to reject any scheme of amalgamation submitted to it for approval. There have been quite a few voluntary amalgamations between the private sector banks so far. Most of these voluntary mergers were between healthy banks, somewhat on the lines suggested by the first Narasimham Committee. The Committee was of the view that the move towards the restructured organization of

[7] (2001) 3 Com LJ 212 Mad.

the banking system should be market-driven and based on profitability considerations and brought about through a process of M&As.[8]

1.4.2 Compulsory Amalgamation

Insofar as compulsory amalgamations are concerned, these are induced or forced by the Reserve Bank under Section 45 of the BR Act, in public interest, or in the interest of the depositors of a distressed bank, or to secure proper management of a banking company, or in the interest of the banking system. In the case of a banking company in financial distress, the Reserve bank under Section 45(2) of the BR Act may apply to the Central Government for an order of moratorium in respect of a banking company and during the period of such moratorium, may prepare a scheme of amalgamation of the banking company with any other banking institution (banking company, nationalized bank, SBI or its subsidiary). Such a scheme framed by the Reserve Bank is required to be sent to the banking companies concerned for their suggestions or objections, including those from the depositors, shareholders and others. After considering the same, the Reserve Bank sends the final scheme of amalgamation to the Central Government for sanction and notification in the official gazette. The notification issued for compulsory amalgamation under Section 45 of the BR Act is also required to be placed before the two House of Parliament. The amalgamation becomes effective on the date indicated in the notification issued by the Government in this regard.

1.4.3 Amalgamation of a Non-banking Financial Company (NBFC) with a Banking Company

This category of amalgamation would not be governed by the provisions of the BR Act and would be regulated by the sections 390 to 395 of the Companies Act, 1956, instead. Power to sanction the scheme lies with the High Court. After getting approval of their shareholders and clearance of RBI, the scheme is submitted to High Court for its sanction. However, if it is found that any arrangement or compromise under section 390 of the Companies Act has been proposed for the purposes of, or in connection of a scheme of amalgamation between a banking company and a non-banking financial company, then the High Court cannot sanction the said compromise or arrangement unless the same is certified by the RBI in writing as (a) not being incapable of being worked, and (b) not being detrimental to the interest of the depositors of the banking company.[9] So, in such a case also the RBI would have a supervisory role, and the actual sanctioning power would remain vested in the High Court.[10]

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8 *Supra* note 2.

9 The Banking Regulation Act, 1949, Section 44B (1)

10 Sunandan Majumdar, "RBIs Role as Regulator of Bank Mergers: One Step Forward Two Steps Back", *Company Law Journal*, 2007, Vol. 6, pp. J19-J27, at pp. 22-23.

It was held by Bombay High Court in *Indus Ind Enterprises and Finance Ltd., in re,*[11]

> On a plain reading of section 44A of the Banking Regulation Act, 1949, it is clear that the section applies when one banking company is to be amalgamated with another banking company. It does not apply where a non-banking finance company is proposed to be amalgamated into a banking company. No sanction of the Reserve Bank of India is necessary.

One added incentive of merger of this nature would be gaining the ability to provide the widened customer base with a package of financial services through a single window, and hence pave the path towards genesis of universal banks in India. Few prominent illustrations of such type of mergers would be those of merger of Twentieth Century Finance Corporation with Centurion Bank in 1998[12], ICICI Ltd with ICICI bank in 2002[13] and Ashok Leyland Finance Ltd. with Indus-Ind Bank in 2003.[14]

1.4.4 Merger of Banking Companies Ceasing Banking Operations with Manufacturing Companies

These mergers also formed part of the history of bank mergers when in 1969, 14 banks were nationalized under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 with retrospective effect from 19 July 1969 under which the assets and liabilities of all the banks were vested with a new bank with the same name. The new company formed remained a shell company with only asset cash/securities in the form of bonds, promissory notes of the Government of India etc.

Some of these shell companies which were earlier carrying on the banking business instead of winding up the company and distributing the proceeds to the shareholders, chose to amalgamate with well reputed companies at that time and in that process of amalgamation obtained shares in the merged entity.[15] Some illustrative cases of these type of mergers are merger of Bank of India with Ahmadabad Manufacturing and Calico Pricing Company Ltd. and the Merger of Bank of Baroda Ltd. with Mahindra Ugine Steel Co. Ltd.

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11 (2004) 50 SCL 68 (73) Bom; (2004) 120 Com Cases 457 (Bom), also see ICICI Ltd., in re, (2004) 119 Com Cases 941 (Bom).

12 For details, see, S. Ramanujam, *Mergers et al*, Wadhwa and Company, Nagpur, 2007, pp. 649-656.

13 *Handbook on Mergers Amalgamations and Takeovers*, The Institute of Company Secretaries of India, New Delhi, 2010, pp. 72-73.

14 *Supra* note 12, pp. 644-649.

15 S. Ramanujam, 2007, p. 659.

1.4.5 Merger of Public Sector Banks

The statutory framework for the amalgamation of public sector banks, viz., nationalized banks, State Bank of India and its subsidiary banks, is, however, quite different since the foregoing provisions of the BR Act do not apply to them. As regards the nationalized banks, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and 1980, or the Bank Nationalization Acts authorize the Central Government under Section 9(1)(c) to prepare or make, after consultation with the Reserve Bank, a scheme, *inter alia*, for the transfer of undertaking of a 'corresponding new bank' (i.e., a nationalized bank) to another 'corresponding new bank' or for the transfer of whole or part of any banking institution to a corresponding new bank. Unlike the sanction of the schemes by the Reserve Bank under Section 44A of the BR Act, the scheme framed by the Central Government is required, under Section 9(6) of the Bank Nationalization Acts, to be placed before the both Houses of Parliament. Under this procedure, the only merger that has taken place so far relates to the amalgamation of the erstwhile New Bank of India with Punjab National Bank, on account of the weak financials of the former. As regards the State Bank of India (SBI), the SBI Act, 1955, empowers the State Bank to acquire, with the consent of the management of any banking institution (which would also include a banking company), the business, including the assets and liabilities of any bank. Under this provision, the consent of the bank sought to be acquired, the approval of the Reserve Bank, and the sanction of such acquisition by the Central Government are required. Several private sector banks were acquired by State Bank of India following this route. However, so far, no acquisition of a public sector bank has taken place under this procedure. Similar provisions also exist in respect of the subsidiary banks of the SBI. Thus, there are sufficient enabling statutory provisions in the extant statutes governing the public sector banks to encourage and promote consolidation even among public sector banks through the merger and amalgamation route, and the procedure to be followed for the purpose has also been statutorily prescribed.[16]

1.5 RBI's Guidelines for Merger/Amalgamation of Private Sector Banks

The RBI in 2005 communicated new guidelines for merger/amalgamations of private sector banks. These guidelines have been formulated based on the recommendations of the Joint Parliament Committee (2002), a working group to evolve guidelines for voluntary mergers involving banking companies. Based on the recommendations of the group, the guidelines lay down the process of merger proposal, determination of swap ratios, disclosures, the stages at which boards will get involved in the merger process and norms of buying/selling of shares by the promoter before and during the process of mergers. A brief overview of the guidelines is as under:

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16 *Supra* note 2.

- The draft scheme of amalgamation be approved individually by two-thirds of the total strength of the total members of board of directors of each of the two banking companies.
- The members of the boards of directors who approve the draft scheme of amalgamation are required to be signatories of the Deed of Covenants as recommended by the Ganguly Working Group on Corporate Governance.
- The draft scheme of amalgamation be approved by shareholders of each banking company by a resolution passed by a majority in number representing two-thirds in value of shareholders, present in person or by proxy at a meeting called for the purpose.
- The swap ratio be determined by independent valuers having required competence and experience; the board should indicate whether such swap ratio is fair and proper.
- The value to be paid by the respective banking company to the dissenting shareholders in respect of the shares held by them is to be determined by the Reserve Bank.
- The shareholding pattern and composition of the board of the amalgamating banking company after the amalgamation are to be in conformity with the Reserve Bank's guidelines.
- Where an NBFC is proposed to be amalgamated into a banking company in terms of Sections 391 to 394 of the Companies Act, 1956, the banking company is required to obtain the approval of the Reserve Bank before the scheme of amalgamation is submitted to the High Court for approval.

1.6 Aftermaths of Narasimham Committee Reports

The need for consolidation or mergers in the Indian Banking system was highlighted by the Committee on Financial System under the chairmanship of Shri. M. Narasimham. The post 1990s economic reforms brought a number of prominent M&A's in the banking sector. The template for that structural change was provided by the Report of the Narsimham Committee in 1991 which, among its other recommendations, envisaged a structure under which three to four large banks would provide global coverage, eight to ten banks would provide national coverage and the rest would be confined to local operations and rural areas.[17] Another Committee on Banking Sector Reforms was set up under the chairmanship of M. Narasimham in 1997 which reiterated in its report in 1998 the assertion of the first that a few mega banks would be effective instruments of domestic and international competition.[18] The committee recommended the use of mergers to build the size and strength of

17 Amya Kumar Bagchi and Subhanil Banerjee, "How Strong are the Arguments for Bank Merger?", *Economic and Political Weekly*, 19 March 2005, pp. 1181-1185, at p. 1181.

18 *Ibid.*

operations for each bank. The 1998 report recommended that mergers amongst banks and between banks and NBFCs must make sound commercial banks. The committee opined:

> Mergers should not be seen as means of bailing out weak banks. Merger between strong banks/FIS would make for greater economic and commercial sense and would be a case where the whole is greater than the sum of its parts and, have a 'force multiplier effect.[19]

Following this, there was a notable increase in the incidence of voluntary amalgamations amongst banks in the private sector, and those between banks and non-banking financial corporations. The spurt of voluntary amalgamations overshadowed the RBI induced bail out amalgamations under section 45.[20] In the post reform era, after the reforms were brought out on the recommendations of the Narsimham Committee I and II, the Indian banking sector started to grow leaps and bounds.[21] Indian banking sector saw the merger of Times Bank with HDFC bank in 2000[22] ICICI Ltd. with ICICI Bank Ltd. in 2002[23], Standard Chartered acquired ANZ Grindlays Banks[24], Bank of Punjab Ltd. with Centurion Bank Ltd. in 2005, Lord Krishna Bank Ltd with Centurion Bank of Punjab in 2007 and last but not the least Centurion Bank of Punjab Ltd. with HDFC Bank Ltd in 2008.[25]

So this was the time of growth of the private banks like ICICI, Axis Bank, HDFC Bank. It is not that merger did not happen in the pre reforms era, they did happen but most of these mergers were directed by RBI as they were for acquisition of weak banks by strong banks to protect the interest of the depositors and financial stability of the economy. But in the present era, strong banks are merging amongst themselves to compete internationally.

There is clear indication that the forces of competition are playing into the Indian banking sector as well. To safeguard themselves and to remain in the market the banks have started to capture their emerging competitors. Thus, this has started the first merger wave in the banking industry in India.[26] Since the onset of reforms in 1990, there have been 22 bank amalgamations.[27]

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19 Report on Banking Sector Reforms, Chapter V, 1998, paras. 5.13-5.15.
20 *Supra* note 10.
21 *Supra* note 4.
22 *Supra* note 12, pp. 635-642.
23 *Supra* note 13.
24 *Supra* note 5.
25 For details, see, "Are Bank Mergers in Indian Entering a New Era?", available at *http://knolwedge.whartoupenn.edu/india/article.cfm?articleid=4268k*, last accessed on 15 February 2012.
26 *Supra* note 4.
27 *Supra* note 3.

1.7 Areas of Concern for Bank Mergers

No doubt, bank mergers have gained momentum in recent years and are unstoppable, but there are some areas of concern in bank mergers which require immediate attention they are:

1.7.1 Regulatory Issues

The RBI had the power to sanction schemes for amalgamations between private banking companies but this power is limited when compared to the power of High Court in sanctioning amalgamation between companies as once the RBI grants approval, the amalgamation takes place by operation of law, and no more inference by the RBI is warranted whereas the High Court has the power to supervise and modify it if it thinks there is need for modification while implementing the scheme. So RBI should also has such power of modification. In 2003, a bill was introduced in the Lok Sabha that sought to broaden the regulatory net of the RBI by bringing NBFC, public sector banks and banking co-operative societies within the ambit of section 44A of the Banking Regulation Act. But the bill was never passed. This bill should be reintroduced in the parliament.

The RBI guidelines issued in 2005 in pursuance of the recommendation of the Joint Parliamentary Committee, but these guidelines do not bring the NBFC fully into the regulatory net of the RBI by making section 44A applicable to them. Instead they state that the banks have to obtain the approval of the Reserve Bank of India after the scheme of amalgamation is approved by its shareholders and then it has to be submitted to the High Court for its sanction. These guidelines has made RBI more of a cleaning authority than an exclusive sanctioning authority. This also needs suitable modification.

1.7.2 Competition Issues in Banking Mergers

The government tabled the Banking law (Amendment) Bill before the Lok Sabha in 2011. The amendment seeks to exempt mergers and acquisition in the banking sector from the scrutiny of the competition commission of India.[28] The demand of block exemption by the Reserve Bank for the notified merger regulation under the Competition Act 2002 through Banking (Amendment) Bill 2011 should be considered on a wide canvass of the rationale of competition law and policy.[29]

A distinction should be made between prudential regulation of banks by RBI and competition regulation of the whole economy, including financial sector, by CCI. Prudential regulation is largely centered on laying and enforcing rules that limit risk-taking of banks, ensuring safety of depositors' funds and stability of the

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28 *Ibid.*

29 Nikhil Gurnani, "Regulation of Bank Mergers - An Analysis of Regulatory Tussle on Competition Issues", *CLA (Mag)*, September 2011, Vol. 1, No. 104, pp. 215-219, at p. 219.

financial sector. Thus regulation of M&As by the RBI would be determined by such benchmarks. Competition regulation of M&As in the banking sector on the other hand is a different matter. This is aimed at ensuring that banks compete among themselves in fighting for customers by offering the best terms, lower interest rates on loans and higher rates on deposits and securities. Merger regulation by CCI would be therefore intended to ensure that such activities are not motivated by the desire to collude and make excessive profits at the expense of customers or to squeeze other players out of the market through abusive practices. While CCI does not have either the expertise on prudential regulation, RBI does not have the expertise to regulate anticompetitive behaviour.

Thus, it will not be advisable to exempt the banking sector from the ambit of competition law. To the top of it all, the other sectors may also lobby to seek exemption from the whole ambit of law. Moreover, ideologically the competition law should be applied to all sectors engaged in commercial activity to allow its benefits to cascade down to all players.

1.7.3 Cultural Issues

The merger of bank sometimes pose difficult issues of management. Different banks have different cultures of services to customers, and even branches of banks in different regions have different cultures in this respect.[30] This factor may pose problems post integration of banks. Thus before merging two banks, ground situation should be analyzed properly and both parties have to commit for cultural audit as a component of due diligence process. This can help both businesses understand each other's cultures and gain a sense of the cultural traits that they hope to either preserve on or after the merger. Cultural integration is an essential pre-requisite for a successful merger, where two banks aim to take the "best of both" and create a new culture.[31]

1.7.4 Human Resource Issues

In the context of consolidation, one of the major issues, which need to be handled, is in regard to the treatment of the employees of the transferor bank consequent upon the merger or acquisition. Human resource function is one of the most complicated organizational issue in mergers. Human resource management issues like reward strategy, service conditions, employee relations, compensation and benefit plans, pension provisions, law suits and trade union actions are critical to

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30 *Supra* note 17.

31 Marion Devine, "Successful Mergers: Getting the People Issues Right", *The Economist*, London, 2003, quoted in M. Jayadev, "Mergers in Indian Banking: An Analysis", available at *http://uhra.herts. ac.uk/dspace/bitstream/2299/3465/1/902962.pdf*, last accessed on 23 February 2012.

the viability for the deal and merger plan.[32] For example, in acquisition of Bank of Madura (BoM) by ICICI Bank in 2001, the BoM employees faced difficulties as ICICI Bank has no trade union system whereas BoM had a one. All the HR issues such as selection, retention and promotion opportunities need to be effectively communicated to staff, emphasizing the degree of transparency and fairness in order to establish credibility and moreover so that no problem is created post merger. In the case of *New Bank of India* v. *Union of India*[33] the Supreme Court held that the Central government had the powers to frame such a scheme and the court would be entitled to interfere with such a scheme only if it comes to the conclusion that either the scheme is arbitrary or irrational or based on extraneous considerations. In all cases of mergers, the Central government will have to formulate a suitable scheme for continuation and other service conditions, applicable to the employees of the transferor bank consequent upon merger.

1.8 Conclusion

To conclude, we can say that in an emerging environment post liberalization of our economy in 1991, banks were compelled to think that today and tomorrow customers cannot be best served with yesterday's structures when the whole world is being converted into a single market. When revolutionary ideas of bank mergers were sweeping the world, India could not afford to ignore them. This lead to major bank mergers India namely Times Bank with HDFC Bank, ICICI Ltd with ICICI Bank, Oriental Bank of Commerce with Global Trust Bank, ICICI Ltd took over Bank of Madura and last but the least HDFC acquired Centurion Bank of Punjab. But certain areas of concern arise in case of bank mergers which should be taken care of to improve financial stability of our economy. The regulatory net of RBI should be strengthened to include powers of supervision and modification of scheme as it is with High Court in case of mergers of companies. The regulatory net of RBI should be broadened to bring NFBC mergers wholly within its ambit.

Last but not the least, prudential regulation of banks by RBI should go hand in hand along with competition regulation by CCI. There is room for both CCI and RBI in the banking sector and the economy stands to benefit if both are allowed to exercise their expertise. There is need for suitable legal and regulatory deliberations in the direction of forming an amicable base for concurrent jurisdiction of both. The sooner the two regulators sit down and work out a cooperation agreement the better for the whole industry and our economy.

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32 M. Jayadev, "Mergers in Indian Banking: An Analysis", available at *http://uhra.herts.ac.uk /dspace/bitstream/2299/3465/1/902962.pdf*, last accessed on 23 February 2012.

33 1996 (8) SCC 407.

VICTIM COMPENSATION : ANALYSIS OF PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE, 1973*

Gurneet Singh**

1.1 Introduction

Criminal justice system in India is based on the British pattern and aims at punishing the accused person to reform and rehabilitate him/her in the society as a good citizen. In the jail also the accused person availed all the human rights available to the citizens enshrined in The Constitution of India. Prisons have also been converted into correctional centers, where the criminals while undergoing imprisonment are given adequate training in some trade, so that after their release from the jail they easily become part of society without being burden on it. The growing emphasis on probation, parole and suspended sentence is also aimed at reformation and assistance to fit in the present day society.

The victim of crime, however, remained neglected during the investigation, trial and thereafter. He is simply treated as an informant to lodge FIR and to depose as a prosecution witness against the accused during the trial. It is rightly said that "It is a weakness of our jurisprudence that victim of crime and distress of the dependents of the victim don't attract the attention of law. In fact the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system which must be rectified by the legislature."[1]

The Indian Penal Code, 1860 does not contain any provision for awarding compensation to the victim. However, under offences against property, chapter XVII, the stolen property if recovered is liable to be returned to the victim/owner. The Code of Criminal Procedure, 1898 had contained Sections 545 and 546 which empowered the trial court to award compensation to the victims out of fine imposed on the accused when he is convicted and sentenced. But the payment was allowed only when the judgment had become final and that was also subject to recovery of the fine. Paying capacity of the accused person is to be kept in view by the court when imposing fine. There may be cases where the accused being too poor or unidentified or not apprehended the court cannot award compensation. In such a situation the State, that has failed to protect the life, liberty and property of its citizens, shall compensate the victim out of its own funds.

The Code of Criminal Procedure, 1898 has been thoroughly revised and re-enacted as the Code of Criminal Procedure, 1973[2](herein after referred as Code).

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1 *Rattan Singh* v. *State of Punjab*, (1979) 4 SCC 719

2 Act 2 of 1974.

Provisions of Section 545 and 546 of the old code were retained as such in the new code as Sub-Sections (1), (2) and (5) of Section 357 and Sub-Sections (3) and (4) were newly inserted to make Section 357 more victim friendly. The new provisions are meant to be dealt with those offences where fine is not part of the substantive punishment and to enhance the discretionary powers of the trial/appellate courts.

In some cases where the trial courts did not award compensation, the victims started approaching the higher courts under Section 482 of the Code but the same was not favoured by the Apex court on the ground that in view of existing provisions under Section 357, such a petition was not maintainable as: "If there was an express provision governing a particular subject matter, there is no scope for invoking or exercising the inherent powers of the court because the courts ought to apply the provisions of the statute. Hence the application made by the heirs of the deceased for compensation couldn't have been made under Section 482 since it expressly confers powers on the court to pass an order for payment of compensation."[3]

Indian legislature had not defined the term victim of crime under any law till 2008. In simple words victim implies, any person suffering physical harm or financial loss as a direct result of crime committed by known or unknown accused persons. The term 'Victim' includes spouses, children, parents and other dependents of the direct victim[4]. The United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted in November, 1985 gives an exhaustive definition of the phrase which is as follows:

> Article 1: 'Victim' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
>
> Article 2: A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.....The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

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3 *Planiappa Gounder* v. *State of Tamil Nadu*, (1977) 2 SCC 634

4 1985 UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power

The victim of crime is an important person in the administration of justice both as a complainant/informant and as a witness of the prosecution. His role is vital both at the stage of investigation and trial.

In Section 2 of the Code after clause (w), the following clause has been inserted vide amendment, namely: '(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;''. Sub-Section (8) of the Section 24 of the Code, the following proviso shall be inserted, namely: "Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this Sub-Section.[5]

According to Oxford Dictionary: "Victim is a person who is put to death or subjected to misfortune by another; one who suffers severely in body or property through cruel or oppressive treatment; one who is destined to suffer under some oppressive or destructive agency; one who perishes or suffers in health etc., from some enterprise or pursuit voluntarily undertaken."

According to Collins English Dictionary 'victim' means a person or thing that suffers harm, death, etc. from another or from some adverse act, circumstance, etc.

According to New Webster's Dictionary, 'victim' means a person destroyed, sacrificed, or injured by another, or by some condition or agency; one who is cheated or duped; a living being sacrificed to some deity, or in the performance of a religious rite.

1.1.1 Compensation in Criminal Cases

The word compensation means a thing or financial help given to the victims of crime with a view to make good the loss of property or injury sustained by the victim in person. This would show that the whole purpose of compensation is to make good the loss sustained by the victim or the legal representatives of the deceased. This concept is not new to India. Manu clearly says that if limb is injured or a wound is caused or blood flows, the assailant shall be made to pay for the expenses incurred on cure as a whole. He further says that he who damages the goods of another, be it intentionally or unintentionally, shall give to the owner a kind of fine equal to the damage. To make it more clear the maxim-tooth for tooth and eye for eye based on the retributive theory of punishment gives the victim a kind of relief to satisfy his/her vengeance by punishing the wrong doer. The compensation to crime victim is not considered a punishment to the offender. It has been an obligation on the part of the society to re-impose

[5] The Code of Criminal Procedure (Amendment) Act, 2008

faith and confidence on the victim which has been lost due to the offender's act of delinquency and crime.

In ancient times the victimized persons themselves used to choose punishment to the offenders and if possible inflict the same themselves. With the development of the society, right of vengeance of the individual victim transformed from individual to the group to which he belonged and aggression on the individual was considered as an act of aggression on the entire group. With the emergence of the barter economy, the society accepted money or goods as symbolic compensation and restitution of crime in place of awarding punishment themselves.

Victims of war and accidents have the right to claim compensation under the relevant statutes. However, there is no such right available to other victims though in some cases compensation is awarded at the discretion of the court. However, some statutory provisions have been added in the Code after its amendment from time to time. Moreover, the Hon'ble Supreme Court in appropriate cases helped the victims in its writ/PIL jurisdiction and awarded compensation to the victims or their heirs in case of death of victims.

The Apex Court held that the victim died in police custody as a result of extensive beating given to him. The Sub-Inspector of the Police was sentenced to a fine of Rupees 50,000 and other convicted persons sentenced to pay Rupees 20,000 each and the entire amount of fine on realization was directed to be paid to the heirs of the deceased.[6]

1.1.2 Position of Victim in Criminal Cases

The two important components of criminal justice system are the perpetrator who commits the crime and the victim against whom the crime is committed. Neither the victim nor the perpetrator has been defined by any penal statute. Ordinarily a person is liable for his own guilty acts. However in certain situations one is held liable for the criminal acts committed by others also.

There is no society in the world that is not confronted with the problem of criminality. Crime prevention and treatment of offenders is engaging attention of the criminologists. There may be situations where person committing crime may not be free agent. The present day trend is to rehabilitate and reform the accused rather to award deterrent punishment. There are two systems of administration of criminal justice system present in the world. One is accusatorial, which is prevalent in common law countries and the other is inquisitorial followed in some European countries like France. Under first category the burden of proving that the accused person violated some law is on the prosecution whereas under

6 *State of M.P.* v. *Shyam Sunder Trivedi*, (1997) 7 SCC 614

the second the burden is on the accused to prove that he is not guilty. India is following the pattern of common law countries and therefore accused has been given rights in the administration of the criminal justice system to ensure that one innocent is not convicted rather guilty persons may be acquitted.

1.1.3 Plight of the Victims of Crime

A victim of crime or his heirs after suffering at the hands of the offender, have the choice either to move a court of law or to go to police station to lodge an FIR. He is hesitant to go to the police because of the indifferent behaviour of the police officers firstly in recording the FIR and then during investigation to call the victim time and again. Various High Courts and The Supreme Court of India has been time and again pressing for the need to record FIR immediately on receipt of an information regarding commission of a cognizable offence. However, police avoids recording FIR on one pretext or the other. The practice to verify the information before recording FIR is against the statutory provisions of law. Section 154 of the Code says that every information of the commission of a cognizable offence, if given orally to an officer incharge of the 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 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. The principle object of the FIR is to set the criminal law into motion and to take suitable steps by the police for the investigation of the case and to bring the offender to book. The police is duty bound to hold the investigation of a cognizable offence without obtaining any order of the court.

There is no provision of verifying the information received before recording the FIR. However after completion of the investigation the officer incharge of the police station is empowered to submit police report to the Magistrate in the shape of (1) charge sheet, if there is sufficient evidence in support of allegations levelled in the FIR, (2) failure report, if enough evidence cannot be collected to prove the allegation, and (3) cancellation report, if the allegations are found to be baseless and false. In the case of cancellation report the informant has to face action under Section 182 of the Indian Penal Code, 1860 for giving false information with intent to cause public servant to use his lawful power to the injury of another person.

The Magistrate may or may not accept the failure or cancellation reports. However, the informant must be given an opportunity of being heard so that he may make his submissions to persuade the Magistrate to take cognizance of the offence and issue process.

In the present criminal justice system, offences registered by the police are treated as offences against the State, which after investigation by the police sent to the court through prosecution agency for trial of the offender. The victim of crime has no say during the investigation except examining him as a prosecution witness under Section 161 of the Code. Similarly, during the trial of the case also, the victim is examined as a witness before the court. He has no jurisdiction to oppose the bail application of the accused before the court. Similarly, at the stage of the framing of the charge or passing an order of discharge, the views of the victim are not gathered. He is not consulted or his views are not considered by the trial court at any stage of the case. Even after the case ending in conviction or acquittal, the victim has no right to file an appeal against acquittal or inadequate sentence. An accused has a statutory right to be heard under Section 235(2) and 248(2) of the Code before passing order of sentence.

1.2 Compensation to Victims of Crime: Provision Under the Code

Section 357 of the Code is regarding the order to pay compensation to the victim of crime/dependents. Under this Section when a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment order the whole or any part of the fine recovered to be applied: (a) In defraying the expenses properly incurred in the prosecution, (b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion, of the court, recoverable by such person in a Civil Court; (c) When, any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death; (d) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto. Under Sub-Section (2) if the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an, appeal be presented, before the decision of the appeal. Further when a court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. An order under this Section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision. At the time of awarding compensation in any subsequent

civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this Section.

Section 357 of the Code contains basic law relating to crime victim which is in vogue since the enactment of old Code of 1898. Sub-Section (1), (2), and (5) of the new Code are the same which were contained in Section 545 and 546 of the 1898 Code. However, Sub-Section (3) and (4) are newly inserted. Sub-Section (1) and (3) are the main provisions relating to award of compensation to victims of crime. According to Sub-Section (1) compensation can be ordered to be paid only when the accused is punished with a sentence of fine or with some other sentence of which fine forms a part. It further provides that the compensation should be ordered to be paid from the amount of fine recovered from the accused. Quantum of compensation, therefore, should not exceed the amount of fine ordered to be paid. The court has to keep in view the pecuniary limits of fine which have been imposed upon it under law. Section 29 of the Code empowers the Court of Magistrate first class to pass sentence of fine not exceeding Rupees 10,000 and the Magistrate of second class not exceeding Rupees 5,000. This limit has to be kept in view while imposing fine and ordering compensation out of fine imposed on the accused person.

Section 357-A has been newly inserted by the Code of Criminal Procedure (Amendment) Act, 2008. This Section says that every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Now whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred. Under Sub-Section (3) of Section 357-A of the Act says that if the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. Further where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation. On receipt of such recommendations or on the application the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in

charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.[7]

1.2.1 Order for Compensation

(i) The order for compensation, under Section 357(1) of the Code to the victim or for defraying expenses in prosecution or both should be part of the judgment. The expenses incurred in the prosecution include process-fee, stamps, pleader fee and other charges reasonably incurred. Compensation under Sub-Section 357(1) (b) can only be awarded if the victim is entitled to get a decree for compensation in a civil court.

(ii) As provided under Section 357(1) (b) of the Code, the accused may be ordered to pay compensation to the person who has suffered any loss or injury as a result of offence committed against him or his property provided that the compensation is recoverable by such person in a Civil Court.[8]

1.2.2 Persons Entitled to Compensation

Under Section 357(1) (b) of the Code the person/persons who suffer loss or injury caused by the offender is/are entitled to compensation. Dependents of such person/persons are also entitled to compensation in case of loss or injury to the victim and the compensation is recoverable in a civil court. Loss means loss which can be measured in terms of money. Injury is defined under Section 44 of the Indian Penal Code, 1860 as any harm whatsoever illegally caused to any person in body, mind, reputation or property.

Under Section 357(1) (c) of the Code the person who is entitled to damages under the Fatal Accidents Act, 1855, is also entitled for compensation under this Sub-Section from the fine recovered from the accused for causing or abetting death of another person.

Though there is power to combine a sentence of death with a sentence of fine, that power is sparingly exercised, because the sentence of death is an extreme penalty and adding to that penalty a sentence of fine is hardly calculated to serve any social purpose. Even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. Before imposing a sentence of fine to the sentence of death the court must consider whether sentence of fine is called for and if so, what shall be the adequate fine. Only because compensation is to be paid to the heirs of deceased a heavy fine should not be imposed.[9]

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7 *Supra* note 5

8 *Palaniappa Gounder* v. *State of Tamil Nadu*, AIR 1977 SC 1323

9 *Ibid.*

When any person is convicted of any offence which includes theft, criminal breach of trust, criminal misappropriation or cheating and the stolen property is recovered from the bonafide purchaser who purchased it without knowing it to be stolen. The bonafide purchaser is entitled to compensation from the amount of fine imposed and recovered from the accused if the property is restored to its real owner. It may be borne in mind that conviction under Section 357(1) (d) of the Code may not only be for the offences mentioned above but it may be for any other offence for which any offence mentioned in this Sub-Section is an ingredient.

1.2.3 Payment of Compensation in Appealable Cases

When the case in which fine is imposed and compensation awarded out of the amount of fine, is appealable, the compensation should not be paid before the expiry of the limitation period for filing appeal. In case appeal is filed, compensation may not be paid till decision of the appeal. If order of the lower court is set aside in appeal or revision the compensation is extinguished. Appellate/Revisional Courts are empowered to award compensation if not awarded by trial court or may enhance or modify the same if deemed proper the compensation awarded to the victim is recoverable as if it were a fine.

Payment of compensation under Section 357(1) (b) and Section 357(3) of the Code to be awarded to the party or directing the party to pay compensation to the victim would not be an enhancement of punishment. But it is an additional power invested in the court to award the compensation to the victim while passing the judgment of conviction and the court can in addition to conviction order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power of court to award compensation is not ancillary to the other sentences but it is in addition to compensate the victim who has suffered the agony.

In cognizable cases, it is the state which is the aggrieved party and the code does not provide that a private complainant should be heard in appeal arising out of the trial of such cases. A criminal court while recording conviction of an accused has the discretion to grant compensation for any loss or injury caused by the offence, but a private complainant has no right to insist that compensation must under all circumstances be awarded to him. The effect of a judgment of acquittal in appeal is that the conviction recorded by the trial court becomes nonexistent. When a conviction is set aside, the award of compensation to a complainant also disappears. When compensation is awarded to a complainant, it is always subject to the right of appeal which vests in the convict...In a suitable case it may be proper for an appellate court to hear a complainant or an injured witness who has been awarded compensation, but the order of acquittal passed by it cannot be set

aside in exercise of revisional powers, only on the ground that it failed to hear an injured witness who has been awarded compensation.[10]

In Section 372 of the Code the following proviso has been inserted which gives right of appeal to victim. It begins as: "Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."[11]

1.2.4 Order of Compensation when Fine not part of Sentence

Under the old Code of 1898, compensation was confined to only those cases where fine was imposed. But under the Code Section 357(3) provides for compensation where sentence of fine does not form part of the sentence awarded. The Apex Court while explaining the purpose of Section 357(3) observed:

> The object of Section 357(3) is to provide compensation payable to the persons who are entitled to recover damages from the person sentenced even though fine does not form part of the sentence. In awarding compensation, it is necessary for the court to decide whether the case is fit one in which compensation has to be awarded. If it is found that the compensation should be paid, then capacity of the accused to pay compensation has to be determined in directing compensation, the object is to collect the same and pay to the person who has suffered the loss. The purpose will not be served if accused is not able to pay the fine or compensation, for imposing a sentence in default for nonpayment of fine or compensation would not achieve the object. It is the duty of the court to take into account the nature of crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine/compensation.[12]

On the same subject, The Supreme Court observed:

> Section 357 of the Code of Criminal Procedure, 1973, is an important provision but the courts have seldom invoked it, perhaps due to ignorance of the object of it. This Section of law empowers the court to award compensation while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other

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10 *Gurbax Singh* v. *State of Punjab*, 1973, CLR 247

11 *Supra* note 5

12 *Sarwan Singh* v. *State of Punjab*, AIR 1978 SC 1525

sentences but it is in addition there to. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent a constructive approach to crime. It is indeed a step forward to our criminal justice system....such compensation must be reasonable, fair and just, depending on the facts and circumstances of each case. The quantum of compensation may be determined by taking into consideration the nature of the crime, the veracity of the claim and the ability of the accused to pay. If there are more than one accused, they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending on the acts of each accused. Reasonable period of payment of compensation, if necessary or by installments may also be given. The court may enforce its order by imposing sentence in default.[13]

1.2.5 Mitigation of Sentence of Imprisonment and Application of Section 357 of the Code

The power of courts to award compensation to victims under Section 357 is not ancillary to other sentences but is an addition thereto. It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. It is to some extent a constructive approach to crimes, a step forward in our criminal justice system; therefore, all courts are recommended to exercise this power liberally so as to meet the ends of justice in a better way. Any such measure which would give the victim succor is far better than a sentence by deterrence. Sub-Section (3) of Section 357 provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted that power to award compensation is not ancillary to other sentences but it is in addition thereto. In awarding compensation the court has to decide whether the case is fit one in which compensation has to be awarded. If it is found that compensation should be paid, then the capacity of the accused to pay compensation has to be determined. It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation and other relevant circumstances in fixing the amount of compensation. Their Lordships were of the view that the submissions made as stated herein above were entitled to acceptance. The medical evidence negatived any wound as having been sustained by the deceased. The arms possessed by the accused were not inherently dangerous to infer that the intention of the accused was to cause death or that the accused had knowledge that by inflicting the injuries as was done, death was likely to be caused. There was no evidence or finding as to who caused the fatal injuries which resulted in the death of Balbir Singh. Considering the nature of the crime, the fact that the accused and the victim were near relations, that it was a property issue which ended in the

[13] *Hari Krishan and State of Haryana* v. *Sukhbir Singh*, (1998) 4 SCC 551

calamity, the fact that the accused were admittedly in a position to pay, their Lordships were of the view that this was a fit case, in which Section 357(3) could be invoked and a just and reasonable compensation given to the family of the deceased Balbir Singh.[14]

In another case, The Apex Court held that when the police force of a State acts as Punjab Police has done in this case, the State whose arm that force is must bear the consequences. It must in token of its failure to enforce law and order and protect its citizens and to compensate in some measure those who have suffered by reason of such failure. The Supreme Court directed the State of Punjab to pay to the legal representatives of each of the seven said persons the amount of Rupees 1.50 Lakhs within two weeks. Later when the guilty are identified the state should endeavour to recover the said amount which is the tax-payers money.[15]

Now, where the accused was found guilty of offence under Section 304 of the Indian Penal Code, 1860 and his sentence of imprisonment was reduced to the period already undergone but he was additionally fined Rupees 20,000 by way of compensation to be paid to the widow of the deceased under Section 357.[16] Similarly an accused a homeopath doctor, operated a lady for causing abortion and the lady died within few hours. The Supreme Court reduced the sentence of imprisonment but enhanced the fine from Rupees 5,000 to Rupees 1 Lakh, which was ordered to be deposited in a nationalized bank in the name of the minor son of the deceased lady.[17]Further in another case the accused killed his brother leaving his wife and four minor children. The Supreme Court directed the accused to pay compensation of 10,000 Rupees to his decease brother's wife. The Court further ordered that if the compensation is not paid within three months from the date of order, the same will be realized as a fine under Section 431 and paid to her. The Court made it clear that the power to award compensation under Section 357 (3) is not ancillary to other sentences but it is in addition to them.[18]

1.2.6 Scope of Section 357 and difference between Sub-Section (1) and Sub-Section (3) of Section 357 of the Code

Sub-Section (1) of Section 357 of the Code deals with a situation when a court imposes a fine or a sentence (including sentence of death) of which fine also forms a part. It confers discretion on the court to order as to how the whole or any part of fine recovered was to be applied. For bringing in application of Sub-

14 *Baldev Singh and another* v. *State of Punjab*, 6 SCC 593
15 *Inder Singh* v. *State of Punjab and other*, AIR1995 SC 1949
16 *Swaroop Singh* v. *State of Haryana*, AIR 1995 SC 2452
17 *Jacob George* v. *State of Kerala*, (1994) 3 SCC 430
18 *Balraj* v. *State of U.P*, AIR 1995 SC 1935

Section (1) of Section 357 it was a statutory requirement that fine is imposed and thereupon makes further orders as to disbursement of the said fine in the manner envisaged therein. If no fine is imposed, Sub-Section (1) of Section 357 has no application. In the case at hand no fine was imposed by the trial court or the High Court. Sub-Section (3) on the other hand deals with the situation where fine does not form part of the sentence imposed by a court. In such a case, the court when passing a judgment can order the accused persons to pay by way of compensation such amount as may be specified in the order to the person who has suffered a loss or injury by reason of the act of which the accused person has been so convicted and sentenced. The basic difference between these Sub-Sections was that in the former case the imposition of fine is the basic and essential requirement, while in the latter even in the absence thereof empowers the court to direct payment of compensation. Such power is available to be exercised by an appellate court or by the High Court or Court of Sessions when exercising revisional powers. Sub-Section (5) deals with a situation when the Court fixes the compensation in any subsequent civil suit relating to the same matter. While awarding compensation the court is required to take into account any sum paid or recovered as compensation under Section 357 of the Code.[19]

The object of granting compensation is one and the same under these provisions. When the order of compensation granted under Sub-Section (1) gets automatically stayed in the event of filling an appeal there is no reason as to why the stay shall not operate in respect of the compensation granted under Sub-Section (3) of Section 357 of the Code. Merely because Sub-Section (2) is coming under Sub-Section (1) and speaks of fine imposed by the court in an appealable case the benefit if the stay given under the Section cannot be restricted to Sub-Section (1) alone nor its application be excluded to the provision of Sub-Section (3) thereof. It is manifest now even the compensation granted under Sub-Section (3) of Section 357 shall have to be recovered only as if it were a fine. Consequently the stay provided under Sub-Section (2) equally applies to compensation granted under Sub-Section (3) of the Code. It is not a case of suspending the sentence of fine where it is open to the court to impose a condition either for deposit of a part of the fine or for such condition as is appropriate in the context, Section 357, which enables the court to grant compensation inheres in itself a bar for such payment of compensation under Sub-Section (2) which operates automatically.[20]

1.2.7 Inability of the Accused to pay Compensation

No useful purpose would be served by directing payment of compensation where the accused is not in a position to pay it. The statutory liability is only on the accused person who has caused loss or injury. The statute does not declare the

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19 *Mangilal* v. *State of M.P*, 2004 (1) Crimes 177

20 *V. Prasada Rao* v. *State of A.P.*, 2002 Cri LJ 395

liability of the state in this behalf in any manner or to any extent however, desirable it may be to have such a statutory provision. Emerging theories of victimology support grant-in-aid and assistance to the victim or the dependents of a victim in a case of homicide or accidental death. It is desirable that an enlightened State which has proceeded half-way by enacting statutory provisions in the Code and the Motor Vehicle Act, 1988 shall devise ways and means of ensuring expeditious payment of the compensation.[21]

An accused person cannot be denied legal assistance. In case the accused has resources to engage a lawyer of his own choice, his valuable right cannot be scuttled by crippling his financial resources by realization of heavy amount of fine or by asking him to pay compensation while his appeal is pending disposal. The realization of such sums of money from the accused is likely to financially handicap the accused and deprive him of his opportunity of engaging a lawyer of his choice and he would have to knock the doors of the court to provide him with free legal assistance is not enough as the accused may like his case to be argued by a senior advocate of his own choice.[22]

Under Section 357(1) (b) of the Code compensation can be awarded for any loss or injury caused by the offence. This can only be awarded when the court is of the opinion that the compensation would be recoverable by the said person in a civil court. Compensation can only be awarded when it is open to the person to file a suit and recover damages in law for any loss or injury caused.[23]

1.2.8 Where Compensation cannot be Awarded?

A court can impose a sentence of fine or a sentence of fine forms a part, when passing a judgment. The order must be part of the judgment. An order for compensation passed after the delivery of judgment cannot be sustained. An award of compensation after pronouncing judgment and crediting fine to the treasury is illegal.

Section 357 of the Code does not empower the court to award compensation in a case where the accused person is acquitted or discharged and no fine is imposed.

It is improper to award compensation to the victim of crime in petty cases where no pecuniary loss has been sustained. Where a victim is beaten without provocation award of compensation was set aside by the appellate court on the ground that frivolous complaints were undesirable. Similarly compensation for loss of time of the court cannot be granted. This Section also does not apply to such expenses which are incurred in bringing the accused person before the court. Compensation cannot be awarded for such offences for which the accused

21 *State of M.P.* v. *Mangu*, 1995 Cri LJ 3852
22 *Umesh* v. *State of U.P.*, 1992 JIC 781 (All)
23 *Vijay Kumar B. Agarwal* v. *Govindbhai Dayal Mange*, 1999 (3) Mh LJ 81

is not charged. Similarly a bribe giver is not liable for payment of compensation out of fine levied from the accused.

1.2.9 Compensation to the Victim/Dependents in Heinous Crimes

The Punjab and Haryana High Court had disagreed with punishment under Section 302 of the Indian Penal Code, 1860, imposed by Sessions Court and altered it to life imprisonment from death. No specific finding was recorded and that it also awarded fine or confirmed fine awarded by Sessions Court. It should be deemed that High Court had awarded only sentence of life imprisonment and not fine. Award of compensation by the High Court in exercise of power under Section 357(3) of the Code was legal but compensation of Rupees 2 lakhs per accused awarded by the High Court was exorbitant figure. As the appellants were owning agricultural land, tractor trolley and Maruti car. They were held reasonably affluent by the Supreme Court and compensation payable reduced to Rupees 1 lakh each.[24]

Where the criminal court orders that out of fine recovered, a sum be paid to the injured or to the heirs of the deceased, as the case may be, the amount is ordered to be paid as compensation which is, indeed the only rationale for such payment. It is, thus, a payment which is made directly on account of and as a consequence of the injuries suffered by the heirs of the deceased arising from the death of the deceased. Fine amount cannot be set off against compensation awarded.[25]

1.2.10 Recovery of Compensation

The provision of Section 431 of the Code provides for recovery of any amount other than fine and Section 421 of the Code relates to recovery of fine. Under Section 357(3) of the Code when compensation is awarded there is no specific provision to order imprisonment in case of default in the payment of compensation. The provision of Section 431 and 421 of the Code further make it clear that the amount of compensation under Section 357(3) can be recovered under the Punjab Land Revenue Act, 1887[26]

1.3 Plea Bargaining and Compensation to Crime Victims: New Provision Under the Code

In 1991 the Law Commission of India in its 142nd report considered Plea Bargaining to overcome problems of delay and mounted arrears of criminal cases and recommended its adoption in Indian criminal justice system. In 1996 the Law Commission in its 154th report strongly recommended that Plea Bargaining should be made an essential part of Indian criminal justice system. After that in

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24 *Rachhpal Singh* v. *State of Punjab*, AIR 2002 SC 2710
25 *Rattan Kaur* v. *Ranjit Singh*, AIR 1983 P&H 260
26 *Rajendran* v. *Jose and another*, 2002 Cri LJ 3911 (Ker.)

2001, The Parliamentary Standing Committee of Home Affairs in its 85th report recommended the introduction of Plea Bargaining in India. In 2003, the Parliamentary Standing Committee again in its 111th report introduced in Rajya Sabha the Criminal Law (Amendment) Act 2003 for introducing Plea Bargaining in the Code. But the bill was not passed. In 2003 Justice Malimath Committee on criminal justice reforms recommended in its report that Plea Bargaining should be introduced in the criminal justice system of India for the earlier settlement of criminal cases.

Due to ever increasing litigation, Indian courts have been overburdened with this the backlog of pending cases has also increased at all levels. The maxim, Justice delayed is justice denied, has become true because court trials take years, decades or in some cases even quarter of a century due to procedural delays. Final decision is further delayed due to their pendancy in the appellate/revisional courts. Therefore, the accused persons, mostly belonging to poor families remained confined to jail for a long time.

Plea Bargaining is an incentive to all concerned, especially to accused persons. Accused gets small dose of imprisonment that too, in most cases converted to probation of good conduct under Section 360 of the Code or the Probation of Offenders Act, 1958 as the case may be. A set off under Section 428 of the Code is also available to the accused in respect of the imprisonment already undergone. The victim gets compensation for which there is no provision under traditional system of criminal procedure except Section 357, which needs necessary amendments to make it beneficial to the victim. The court is also benefited to save time and energy which can be utilized in disposing off other important cases. The prosecution cases end in conviction and increase in the pendency of cases is also decreased. The Government is also benefited because its jails which are already overcrowded may also get some relief in saving some expenditure and ration. The society is also relieved because the accused is saved from the jails and mixing with hardened criminals. There are volumes of Law Commission recommendations, expert reports and opinions of renowned jurists highlighting the problems of delay and suggesting ways and means for early disposal of cases, however the system has not been able to bridge the gap between the institution of cases and their disposal.

The concept of "Plea Bargaining" is as an Alternative Dispute Resolution System has been very beneficial in deciding civil cases. This system is already applicable vide Section 89 of the Civil Procedure Code, 1908 which contained detailed procedure for the settlement of civil disputes outside the court. Under this provision court refers the disputes for settlement through (a) Arbitration (b) Conciliation (c) Lok Adalat or (d) Mediation.

The object and purposes for the introduction of the concept of Plea Bargaining in the Indian criminal system is as follows:

(1) To curtail delay in the disposal of cases through summary procedure, (2) The Judgment of trial court shall be final and no appeal shall lie in any court against such judgment except Special Leave Petition in the Supreme Court and a writ petition in the High Court, (3) The delay is the root cause of other ills which have crept into the criminal justice system of India, (4) The Hon'ble Supreme Court of India has held that, "Even a delay of one year in the commencement of the trial is bad enough, how much worse it could be when the delay is as long as three or five or seven or even ten years."[27] It was further held about accused persons languishing in jails, "The offence with which some of them are charged are trivial, which even if proved would not warrant punishment for more than few months, perhaps for a year or two and yet these unfortunate specimen of humanity are in jail...for a period ranging from three to ten years without even as much as their trial having commenced.", (5) Justice delayed is justice denied. Confidence of public is required to be restored for which Plea Bargaining concept would be very useful, (6) This concept would give relief and incentive to all concerned i.e. prosecution case ends in conviction, trial Magistrate is relieved from over burden of pending cases. The victim gets compensation and the accused gets light punishment even released after admonition or on probation under Section 360 of the Code (7) The Scheme is applicable to first offenders only so that the first beneficiary may not repeat the commission of the same crime time and again, (8) Persons who are charged with serious offences punishable with more than seven years of imprisonment or offences against women or children under fourteen years of age or economic offences have been excluded from this scheme, (9) The scheme would reduce the backlog of pending cases at all levels, (10) The burden of overcrowding jails will also be relieved.

This concept is used vigorously in order to give benefit to the poor persons accused of minor crimes by getting their cases decided without any delay. Under traditional system trials are prolonged and untold harassment to the accused is caused but under this concept the burden of trial is lessened and speedy disposal of cases is ensured. Plea Bargaining can help further in working out a mutually satisfactory agreement between the accused, prosecutor and the victim. The accused gets minor punishment even released after admonition or under probation; case of prosecution ends in conviction and the victim gets compensation.

An ever increasing amount of litigation in India has led to the courts becoming overburdened at all levels and jails becoming overcrowded. Criminal trials in courts often take years, decade or even quarter of a century for conclusion and the accused have to languish in jails for a long time because after conclusion of trial, appellate/revisional courts also take quite longer time for disposal of appeals/revisions. Delay in the dispensation of justice, adversely affect all

[27] *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360

concerned i.e. the Judge and Prosecutor are over burdened due to pendency of criminal cases and decrease in the percentage of conviction. The accused persons languished in jails for a long time because in many cases criminal trials did not commence normally for three to four years which in many cases exceeded the maximum punishment which can be awarded to them in case they are found guilty of charged offence against them. The victim did not get justice for a long time and in case of acquittal of accused due to abnormal delay, he is adversely affected second time. Consequently due to delay in dispensation of justice some persons take law into their own hands and create a law and order problem for the Government. Under these circumstances general public also lose confidence in the judiciary and the judicial system.

Under the instructions of the Government, the Law Commission of India has been endeavouring for a long time to tackle the problem of delay in the dispensation of criminal justice. Consequently the Law Commission recommended alternative dispute redressal measures and 'Plea Bargaining' concept is one of them. The United States of America and other Western Countries have been using 'Plea Bargaining' for a longer period. These countries therefore have succeeded in curtailing delay in dispensation of criminal justice by adopting this concept. In the United States of America, 'Plea Bargaining' is the norm than an exception in the disposal of criminal cases and therefore percentage of conviction in criminal cases has increased to a large extent. In India we have not copied this concept as is prevalent in the United States of America, but have evolved our own system by inserting necessary changes to make it beneficial under Indian environment. Most accused persons and victims in India are illiterate and belong to poor families. The concept is, therefore, made beneficial so that the victims of crimes are not exploited by unscrupulous persons. In order to avoid public criticism, necessary safeguards have been introduced in this concept.

The privilege of Plea Bargaining is available to the accused persons on the below mentioned grounds: (a) that the report under Section 173 of the Code has been forwarded to the court by the officer in charge of the police station or in a complaint case, process under Section 204 of the said Code has been issued, (b) that the offence for which the accused is charged is punishable with imprisonment for a term not exceeding seven years, (c) that the accused is not a previous convict of the same offence, (d) that the application of the accused for 'Plea Bargaining' is in the specified form and contained brief description of the case relating to which the application is filed including the offence to which the case relates. It shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred the application after understanding the nature and extent of the punishment provided under the law for the offence and that he has not been previously convicted by a court in a case relating to the same offence, (e) That the application has been filed in the court before which

the offence is pending for trial. The privilege of Plea Bargaining is not available to the accused, if (a) the offence is punishable with death, (b) the offence is punishable with life imprisonment,(c) the offence is punishable with imprisonment exceeding seven years, (d) the offence relates to the socio-economic condition of the country to be determined by the Central Government by notification, (e) the offence is against a woman or a child under fourteen years of age, (f) the accused is a previous convict of the same offence for which he is again charged, (g) the application is found to be involuntarily made. Compensation and other expenses as agreed upon in the mutually satisfactory disposition shall be awarded by the court for payment to the victim by the accused.

The court will accept the application of 'Plea Bargaining' if the application is found to have been filed voluntarily and give time to (a) the Public Prosecutor or the complainant as the case may be, (b) the accused person, (c) the victim, (d) the investigating officer, to work out a mutually satisfactory disposition including compensation and other expenses to be paid by the accused to the victim. The court shall satisfy that the disposition is voluntary. The disposition shall be prepared by the court and signed by the above mentioned persons and the presiding officer of the court. The court shall reject the Plea Bargaining application if it is found to be made involuntarily. Similarly, if no satisfactory disposition is worked out, the court shall record such observation and proceed further to try the case in accordance with the provisions of the Code from the stage of the application. If a satisfactory disposition has been worked out, the court shall dispose of the case by awarding compensation to the victim as agreed and hear the parties on the quantum of punishment or release the accused on probation of good conduct or after admonition under Section 360 of the said Code. If it is found that minimum punishment has been provided, the court may sentence the accused to half of such punishment otherwise sentence the accused to one fourth of the maximum punishment provided for the offence.

The procedure prescribed for disposal of cases under the concept of 'Plea Bargaining' is very expeditious and beneficial to all concerned. The accused obtains speedy disposal of the case and in exchange for guilty plea gets light punishment including benefit of probation and in some cases even released after admonition. The case of the prosecutor ends in conviction. The court also gets relief due to early disposal of the case and time saved can be utilized for disposing of other important cases. The victim gets compensation which is not payable under the traditional criminal justice system.

Justice N. Pradeep, Judge of Delhi High Court while speaking at a legal discourse, organized by the Law College of Bharti Vidyapeeth, deemed University' convocation said, "Plea Bargaining can help in working out a mutually satisfactory agreement between the accused and the prosecutor in a

case". He further pointed out that in Western countries, there were three facets to Plea Bargaining: charge bargaining, fact bargaining and sentence bargaining of which only one-sentence bargaining is applicable in India. In India, the concept has itself provided that in exchange of guilty Plea by the accused he shall be given benefit of probation or even release after admonition under Section 360 of The Code or under the provisions of the Probation of Offenders Act, 1958 as the case may be. It has further been provided that where benefit of probation cannot be given, and the relevant Section contained provision for minimum sentence then one half of the minimum sentence fixed for the offence is to be awarded and where there is no provision for minimum sentence then one fourth of the maximum sentence fixed for the offence can be given. The scheme is definite and clear. The right to withdraw the 'Plea Bargaining' is absolutely ruled out. The benefit of set off regarding period of detention already undergone in the same case is also available vide Section 428 of the Code. The scheme of 'Plea Bargaining' made applicable in India is basically different from that prevailing in Western Countries. The important areas of difference are:

(a) There will be no contact between the Public Prosecutor and the accused for the purpose of invoking this scheme. The Public Prosecutor will have no role to play. There is no apprehension of pressure of any kind from prosecution.

(b) The decision to accept or reject the application of the accused for 'Plea Bargaining' will rest solely with the judicial officer functioning as a plea judge; the public prosecutor is not involved at this stage.

(c) The concept will be applicable in respect of offences punishable with imprisonment for less than seven years only.

(d) The plea once made will not be allowed to be withdrawn and accused will not know what the judicial officer will do. Accused will only submit an application for concessional treatment as would be appropriate and the decision to give relief shall be with the plea judge.

(e) There will be no risk of underhand dealings or for coercion or inducement by the Prosecutor because the sole arbiter in deciding to accept or reject the application or to impose the sentence of imprisonment will be the Plea Judge. The aggrieved party and the Public Prosecutor will have a right to be heard only.

(f) The bargaining in this scheme relates only to the quantum of compensation and other expenses to be decided by the victim, Public Prosecutor, accused and the investigating officer and there is no bargaining on any other point at any other stage.

(g) The risk of an innocent person pleading guilty is also taken care of in the modified system is made applicable to India, since a judicial officer would apply his mind to the material on the file and would be required to reject

the application if there is prima facie no material spelling out the offence with which the accused has been charged.

Section 320 of the Code provides for the compounding of certain offences with the permission of the court and certain other offences even without the permission of the court but there is no provision for compensation under this Section.

This concept was generally discarded by the Indian judiciary prior to Plea Bargaining. The Supreme Court of India has held, "It is obvious that some convictions based on plea guilty entered by the applicant as a result of plea bargaining cannot be sustained. It is our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be in violation of Article 21 of The Constitution. It would have the effect of polluting the pure foundation of justice because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial."[28]

To sum up the above discussion, it would be clear that quick decision without any delay under the concept of 'Plea Bargaining', serves a better public purpose than a punishment awarded after a decade of litigation, when both sides tired and thereby public confidence in the criminal justice system is almost shaken. 'Plea Bargaining', if implemented properly, will do wonders for the criminal justice delivery system by reducing the back breaking delays, which are responsible for the overburdening of the criminal courts and for overcrowding of jails. It will offer great relief to under trial prisoners languishing in jails waiting firstly for the trial to commence and secondly after commencement to its end. Though there is some truth in the apprehension that innocent and poor people might be forced by the circumstances to plead guilty, in order to avoid the cumbersome trial process. However, the fault does not lie with the concept of 'Plea Bargaining' but the courts are required to ensure that the accused makes the Plea voluntarily and not under any compulsion or threat of any kind. The court has the power to reject the application if it is found to be involuntary or the accused is found a previous convict.

1.4 Payment of Costs in Non-Cognizable Cases

Section 359 of the Code is regarding order to pay costs in non-cognizable cases. In this Section whenever any complaint of a non-cognizable offence is made to a court, the court, if it convicts the accused, may, in addition to penalty imposed

[28] *Hasam Bhai Abdul Rehman Bhai Shekh* v. *State of Gujrat*, AIR 1980 SC 834

upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees witnesses and pleader's fees which the court may consider reasonable. An order under this Section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

Whenever any complaint of a non-cognizable offence is made to a court, under Section 359 of the Code, the Court if it convicts the accused may in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees, witnesses and pleader fee which the court may consider reasonable. Order under this Section may also be made by the appellate court or by the High Court or the Sessions Court.

1.5 Conclusion

The victim of crime remains neglected during the investigation, trial and thereafter. He is simply treated as an informant to lodge FIR and to depose as a prosecution witness against the accused during the trial and after that he is 'Mr. No body'. However, certain victim friendly provisions have been made in the Code for the welfare of victims of crime. Certain amendments in the Code have been made to make the provisions more victim friendly.

It is pertinent to note that the trial courts have seldom resorted to the powers conferred on them under Section 357 of the Code literally. The Apex court directed all courts to exercise powers under the above mentioned Section i.e. Section 357 of the Code and to award compensation to victims liberally. Section 357 of the Code is an important provision but the courts have seldom invoked it, perhaps due to ignorance of the object of it. This Section of law empowers the court to award compensation while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. Section 357-A has been newly inserted by the Code. This Section says that every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

The existing procedure of getting compensation is also time consuming and creates many problems for the victim as he is the first to go through a criminal

trial to establish the culpability of the offender and then go through a civil trial for getting proper compensation as the compensation under Section 357 of the Code is almost illusory. This should be put to an end in the new victimologically oriented jurisprudence by merging both the trials i.e. the criminal trial to find the culpability of the offender and the civil trial to award compensation to the victim should be merged into one trial so that both the objectives can be achieved within the same period and within one trial. However, there is no statutory basis for the same in our criminal law and source of funds for awarding compensation has also not been created so far.

A new Chapter XXI-A, titled 'Plea Bargaining' containing Sections 265-A to 265-L have been added in the Code vide the Code of Criminal Procedure (Amendment) Act, 2005. All concerned are benefited to a large extent by this concept of 'Plea Bargaining' as follows: (1) The victim gets compensation; (2) The accused gets light punishment and benefit of probation and even get released after admonition in certain cases, (3) The case of prosecution ends in conviction, (4) The court also gets relief due to early disposal of the case, (5) Early disposal of cases under this concept also enables restoration of the confidence among general public in criminal justice system of the country to a large extent.

Further, the provisions of Section 357-A, newly inserted by the Code of Criminal Procedure (Amendment) Act, 2008 would empower the State Government in co-ordination with the Central Government to prepare a scheme for creation of funds for the purpose of awarding compensation to the victim of crime or their dependents. The District/State Services Authority already in existence under the Legal Services Authorities Act, 1987 would be the competent authority under Section 357-A for awarding compensation to the victim of crime or their dependents whether the case ends in conviction or acquittal on the recommendation of the trial court. Provisions for awarding interim compensation for first aid/medical expenses or any other relief for the injured on certificate from the officer in charge of the police station concerned or the Magistrate of the area has also been made. To avoid delay, statutory period of two months has been fixed for completing enquiry and awarding compensation. In cases where the offender is not traced but the victim is identified or the case ends in acquittal or where no trial takes place the victim or his dependents have been authorised to submit the application to the competent authority for awarding compensation. However, this amendment is yet to be made applicable.

Under Section 358 (1) of the Code whenever any person causes a public officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground causing such arrest, the Magistrate may award compensation to be paid by the person so causing the arrest to the person so arrested for his loss of time and expenses in the matter as the Magistrate thinks fit.

Whenever any complaint of a non-cognizable offence is made to a court, under Section 359 of the Code, the court if it convicts the accused may in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees, witnesses and pleader fee which the court may consider reasonable. Order under this Section may also be made by the appellate court or by the High Court or the Sessions Court.

The object of Section 250 of the Code is twofold: (1) to discourage and deter criminal proceedings against innocent persons without reasonable ground, and (2) should such a case arise, the Magistrate should exercise the power to compensate the victim there and then. It is no doubt a very salutary provision of law which is embodied in this Section. It is meant to serve as a check on propensities to rush to court recklessly to level accusations against innocent people knowing or having reason to believe that they are innocent. It is, however, not to be indiscriminately used so as to be a check on legitimate complaints which may be difficult of proof owing to some reason for which the complainant may not be responsible. Indiscriminate use of the provisions of this Section might often deter a timid person from approaching the law courts for fear that if perchance his witnesses turned round or somehow do not inspire confidence in the court, he may be imposed fine.

Legal systems all over the world which provides compensation to the victim as a right, besides punishment to the offender, are considered ideal. Justice demands that when the society and state are resorting to every possible measure of correction and rehabilitation of the criminal, equal protection must be granted to the victim of crime also. Providing compensation for the loss and injury suffered by the victim is most essential and a sacred duty to be performed by the society and the State.

MOTOR ACCIDENT COMPENSATION : A REVISIT TO THE UNDERLYING PRINCIPLES IN DEATH CASES

Ajay Gulati *

The decision rendered by Supreme Court of India in *Sarla Verma and Others* v. *Delhi Transport Corporation and Another*[1] is a beautiful specimen of judicial interpretation. Law relating to motor accident compensation is recognised as a classic example of beneficial legislation; and there cannot be two views about the same. Undoubtedly, the manner in which Motor Vehicles Act, 1988 has been amended and the provisions relating to grant of compensation, in case of death or injury sustained in a motor vehicular accident (use of a motor vehicle in a public place), have been incorporated clearly reflects the sensitivity of law for human suffering.

There can never be devised any standard to assess the loss of a human life. The pain of losing a parent or a child or a sibling can only be felt and not described and even though time is a great healer, the vacuum created by the death of a blood relative always exists. Infact, the loss often transcends the circle of relations and encompasses relationships which law does not recognise for the purpose of compensation. In much the same manner, it is impossible to assess the pain and suffering for the injuries suffered in an accident e.g. loss of a hand, leg, a fracture, permanent disablement and so on. This is probably why the Courts classified 'loss of income' as the benchmark for assessing compensation in motor accident cases as it is the most objective indicator of the loss suffered.

It is a matter of debate whether monetary compensation is the only way to make good the loss suffered by the victim or his family. It would be relevant to make a reference to famous Indian movie (*Dushman)* in which the court orders the protagonist (who happens to be a reckless driver) to live with and support the family of the person whom he kills by running him over, probably in a state of drunkenness/ rashness. That of course was splendid fiction in which our movie makers excel at any point of time. But nevertheless it does throw up the need to at least discuss viable possible alternatives to simply making a mathematical calculation by assessing the loss of income of the injured or the deceased.

Reverting to the approach of the Hon'ble courts in awarding a reasonable compensation to the family of the deceased, prior to the decision of Hon'ble the Supreme Court in *Sarla Verma (supra)*, the courts (especially the Motor Accident Case Tribunals - MACT) struggled to apply a uniform law simply because there existed none. There was a significant difference in the way in

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1 2009 (6) SCC 121

which the total compensation was assessed, the most variable factor being the multiplier. Assessment of income was the easier part since that involved appreciation of evidence but applying the multiplier was at the sole discretion of the tribunal which resulted in inadequate compensation. Another variable input was the deduction towards personal expenses of the deceased, from his assessed annual income. There were no guidelines as to how much should be deemed to be have been spent by the deceased on himself. It was again left to the wise discretion of the court as to how much deduction would be reasonable.

There were a few principles which stood firmly established e.g. the underlying principle of compensation being 'just and reasonable'; compensation claim in case of a motor accident should not result in a windfall for the family of the deceased; and in determining the multiplier, it is the age of the claimants or the deceased, whichever is higher, which should be considered. But these principles were not capable of guiding the subordinate courts in applying law uniformly, leaving much to the discretion of the Tribunal.

It is in this backdrop that the Supreme Court took a serious note of the situation and proceeded to lay down a uniform law so as to guide the subordinate courts in awarding a reasonable compensation. The Judgment in *'Sarla Verma'* is significant in many aspects. The division bench traced in a concise and yet comprehensive manner the entire chain of case law relating to the grant of compensation and the principles derived from English decisions which have been made the basis by Indian courts (the higher judiciary) in motor accident compensation claims. It is a short encyclopedia for anyone interested in gaining knowledge about the law governing motor accident compensation in case of death. The guidelines / principles laid down therein have to a great extent simplified the whole process of arriving at a reasonable compensation. Infact, it has also resulted in expedited justice not only at the stage of Tribunal but even at the Appellate stage i.e. before the High Court by way of FAO.

However, law is dynamic and so it must change. It must change for the better by incorporating the wisdom gained over a period of time by the application of existing legal principles. The decision in *'Sarla Verma'* itself is an illustration in this regard. It is time for some serious thinking on issues which would enable the courts to further sensitise the law relating to motor accident compensation.

1.1 The Multiplier

The first such issue is that of the 'Multiplier'. This is the most important variable in assessing the total compensation (by multiplying the 'multiplier' with the annual dependency) and prior to the decision in *'Sarla Verma'*, was being used without guided discretion. The Supreme Court made a departure

in the multiplier system[2] by providing for a higher multiplier than what is given in the Second Schedule. Multiplier represents the number of years' purchase on which the loss of dependency is capitalized. Sans the complicated legal jargon, in simple words, multiplier refers to the 'number' which when multiplied by the annual dependency would yield the same amount perpetually i.e. annual dependency, by way of interest (on the basis of the prevailing bank interest). Technically speaking, there cannot be a better way to award monetary compensation with the annual dependency coming by way of interest income and the actual amount standing intact as well. However, the problem arises because the actual multiplier is discounted by taking into consideration some factors which, may not have any relevance.

In the case of *Susamma Thomas*[3], while explaining the principle of Multiplier, the Court states that the actual multiplier would have to be scaled down by taking into account 'uncertainties of future', 'immediate lump sum payment' and the 'capital feed which also would be spent over the period of dependency'. Of the above listed factors 'uncertainties of life' is such a vague concept that it ought not to find any place in questions pertaining to legal determination which always has to be on the basis of hard and substantiated facts. It is most ironical that when we are trying to work out the compensation for the death of a man, uncertainties should be taken into consideration. It is not even clear as to whether uncertainties refer to the deceased or to his family members or both? In either case, 'uncertainty factor' ought not to be applied. Consider this, how can you talk about uncertainties about the life of a person who is not even alive? Alternatively, how much is it logical to talk about the uncertainties of the lives of those who are dependent on the deceased when their life is yet to unfold? The Courts ought not to play god and reduce the multiplier on the basis of such factors.

The second factor of discount i.e. immediate lump sum payment is equally unworthy of any consideration in death compensation matters. Courts must keep in mind that there is sufficient time gap between the death of the person concerned and the actual receipt of payment. It is some time before the claimants actually get hold of the money considering the fact that in 90% of the cases, claimants have to travel to High Court for enhancement of the compensation. The hassle of going through court process and payment of professional fees of a lawyer upfront are factors which courts have not bothered to take note of it till now. If at all Court should be bothered about

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2 For this, the *Apex Court* relied on the table of multiplier as specified/clarified in *UP State Road Transport Corporation* v. *Trilok Chandra* [1996 (2) SCC 362]; General Manager, *Kerela State Road Transport Corporation* v. *Susamma Thomas* [1994 (2) SCC 176]; and *New India Assurance Co. Ltd.* v. *Charlie* [2005 (10) SCC 720].

3 1994 (2) SCC 176

outside factors, it is these factors which would implore the Courts to award a higher compensation rather than taking into consideration unworthy factors. Once we arrive at an amount which is the annual dependency, should we thereafter penalize the claimants by reducing the multiplier simply because they would be getting the money in accelerated mode? This exercise appears to be patently against the spirit of any welfare legislation.

Compensation is a right of the claimants which is conferred by law and not charity. Accelerated payment by way of compensation is not a matter of choice for the claimants but sheer compulsion and this fact must be borne in mind by the law makers and courts. The only factor which has any logic is that of the consumption of 'capital feed' over the period of dependency. Minus the discounted factors, the multiplier system would work in those cases where the annual dependency is less but where the annual dependency is running into more than a lakh, the multiplier system would fall flat because firstly, there cannot be any fixed multiplier since it will have to be worked out in each case depending upon his income and secondly, in certain cases it may go well past the maximum of 18, a possibility which the Supreme Court has already negatived in *Susamma Thomas* case (supra) while rejecting the *Nuance* method and preferring *Davies* method. The importance assigned to each of the factors of discount in determining the range of multiplier is not clear. Neither the Second Schedule of the Motor Vehicle Act nor any of the judgments till date give any idea as to how the highest multiplier is pegged at 18. Even if factors necessitating discount have to be taken into consideration, their bearing on the working out of the multiplier must be clear but it is not so.

It seems that there is profound influence of English law, where the multiplier in motor accident cases does not go beyond 16, against the argument for a higher multiplier. In so far as the English law is concerned, our courts have followed the *Davies method*[4] in the choice of multiplier. I find no reason to follow the law of a foreign land especially in matters as sensitive as death compensation. We must consider the vast difference in social security measures undertaken by the British governments and the social security measures in our country which are practically non-existent. One can not dispute the fact that while assessing the loss of claimants resulting from the death of someone on whom they were dependent, the English Courts would involuntarily keep in mind the support system offered by the Government to the citizens of that country.

The peculiar conditions of our country especially rising inflation, lowering bank interest rates, cumbersome judicial process and of course corruption in

4 *Davies* vs. *Powell Duffryn Associated Collieries Ltd.* 1942 (1) All England Reporter 657

public services make out a strong case for the revision of the manner in which multiplier is worked out so that a higher rate of compensation is available to the claimants. The benchmark for assessing the annual dependency remains the same i.e. monthly income minus the personal expenses multiplied by 12 (months in a year). Only the multiplier needs to be enhanced. There has to be a different bench mark for determining the suitable multiplier. There can be two possible benchmarks. One could be the age of retirement in case of Government service with grace years added to it i.e. till 65 years. The other could be the average life expectancy as determined by the official sources of the Government of India. Of these two, preference should be given to the retirement age as determined under government service rules since that can be the most objective criterion.

Average life expectancy would continue to increase and hence the need to raise the multiplier also would arise much too frequently. However, the question, while determining the dependency, is not about the average life expectancy but the monetary loss to the claimants which can be best determined by the number of fruitful work years which the deceased would have most likely put in had he been alive. The multiplier should also start from the age group as determined by the Central Government service rules for entry into service which could be 18 years (as in case of defence services through NDA examinations) or 21 (as in case of UPSC examinations for entry into civil services). A more pragmatic approach would be to take 25 as the average age of entry into service, given that one usually attains the age of 23- 24 years while pursuing a graduate or postgraduate degree. If 25 is taken as the starting age for applying multiplier, 35 would be the highest multiplier, if 60 is taken as the retirement age. However, the discounting factor of 'capital feed' has to be taken account of in view of which the highest multiplier can be reduced by '5' units to 30. For the subsequent age groups it will be in reducing mode (e.g. 25 – 30 (multiplier of 30); 31 – 35 (multiplier of 25); 36 – 40 (multiplier of 20); 41 – 45 (multiplier of 18); 46 – 50 (multiplier 15); 51 – 55 (multiplier of 10); 55 – 65 (multiplier of 9). For the grace years beyond the age of 60, the monthly income should be reduced by half.

The Judgment in *Sarla Verma's* case provides for a multiplier of 5 for the age group beyond 65. In this regard I would propose that the working out of compensation for the age group beyond 65 should not be on the basis of income but on the consideration of 'consortium', 'loss of love and affection' and 'loss of estate'. In order to achieve this, the Apex Court or the Statute has to travel beyond the limit set for conventional heads in *Sarla Verma (supra)* i.e. Rs. 20000. The Apex Court has very wisely put limits on the conventional heads since these heads are not capable of being assessed monetarily. However, in the system that I have proposed above, in order to

provide some reasonable compensation for the death of a person who has attained the age of 65 years, the limit of conventional heads should be raised to a higher fixed sum which could be Rupees one lakh each for loss of consortium, loss of estate and loss of love and affection. Out of these 3 factors, compensation should be available to the children, even if major, on account of loss of love and affection and if applicable, loss of estate as well, whereas in case of surviving spouse, compensation should be available under all three heads. It may be highlighted here that the meaning of the term 'estate' should be enlarged to include loss of status also.

Support may be drawn for a higher fixed sum of compensation from the measure of compensation as provided under the the Railways Act, 1989. Under the said Act, any bona fide passenger of the Indian Railways who dies as a result of a train accident is entitled to a fixed sum of Rupees four lakhs as compensation. Infact, this limit of Rupees four lakhs can also be made the basis for awarding a fixed sum of Rupees four lakhs in case of death of minors i.e. till the age of 18. In the circumstances of a deceased being in the age group of 18 – 25 and employed, which is a possibility in case of defence services or even a causal daily wage earner, the multiplier of 30 should be applicable. Similarly, in case the deceased was holding an office for which the retirement age is beyond 60 years which is a possibility in case the deceased was holding a constitutional post, the limitation of reducing the salary by half after 60 years should be waived.

1.2 Future Prospects

The second issue which requires consideration is regarding the increase in future income of a deceased. The Supreme Court has provided for further increase in income but has limited its scope for reasons which are not clear. It restricts the scope of increase of future income only in case of those persons (i.e. deceased) who had a permanent job. There is no plausible reason to restrict such an important variable only in case of persons having a permanent job. Considering this that even in the case of daily wagers, the respective state governments revise the table of wages periodically. Apart from that, inflation and rise in living costs must also be taken into consideration. The increase in future income has been allowed without distinction of government or private job, the only requirement being that the same should be permanent. However, it is a known fact that increase in income, in case of private sector jobs, does not follow any specific pattern as in the case of government jobs. In most cases, it is the fancy of employer which is the determining factor. If that be the case, why should the mere fact of being permanent or ad-hoc make such a big difference so as to deny the claimants the benefit of future increase in income? The Courts can make a reasonable presumption that a person, whether employed on a permanent or

temporary basis, is bound to have increased income with the passage of time. This presumption can be based on two principles – firstly, the person acquires expertise in whatever he does over a period of time which calls for a higher wage and secondly, with the increase in cost of living, there is a natural tendency of the incomes to rise. Even in the case of self-employed persons, the same principle of natural increase in income should apply subject of course to some objective guidelines, as laid down by the Supreme Court in the case of regular salaried employees.

An extra measure is suggested in those cases where deceased was having agricultural land but there is no evidence with the claimants to prove the same. There being no tax on agricultural income, there is no requirement for the farmers or agri-cultivators to file income tax returns. The only available evidence in most cases is the testimony of the middlemen or "artiyas' as they are commonly known in the Punjab- Haryana region. In a large proportion of cases, the MACT's tend to disbelieve their oral as well as documentary evidence and proceed to do guess work. However, there is sufficient and reliable official data available regarding the yield per acre/ hectare in various parts of the country. This data can be made use of by multiplying the cultivable land with yield per acre. The resulting calculation can then be multiplied further with the minimum support price for wheat and rice and that can be taken as the annual income of the deceased, since Indian farmers are usually into the rice-wheat cycle.

1.3 Deduction of Personal Expenses

Another important issue is regarding the deduction towards personal expenses in case of bachelors and the status of 'father' as a dependent. The Supreme Court has held that in case of bachelors there is a tendency to spend more on self rather than making contribution to the family. Relying on this premise, the Court has held that deduction towards personal expenses shall be 50% in case of bachelors. There could be a different opinion, which might appeal to the Court that Indian society is based on strong filial binding which has been the basis of our rich culture. The fact is that so long as the son / male earning member is a bachelor, he would prefer to give the maximum part of his earning to his parents (if alive) or utilize the same for the benefit of his immediate family e.g. siblings. Considerations and priorities change only after marriage.

Principle of 50% deduction towards personal expenses in case of a bachelor results in double whammy for the old parent-claimants. Firstly, the insurmountable loss of a son. Secondly, the compensation i.e. by way of annual dependency is greatly reduced because the deduction towards personal expenses is 50%. Thirdly, compensation is still further reduced because the multiplier in case of a bachelor is taken on the age of the

claimant-parents. Law does not take into consideration the hardship of the parents who have lost their only son. It is only concerned about the monetary loss which the parents have suffered. If that be the only measure of assessing compensation, then reality should prevail and the deduction in case of bachelors should be reduced from 50% to 25%. The only situation in which 50% deduction towards personal expenses should be carried out is where the deceased bachelor was living at a place different than his parents in which case he would obviously be spending a sizeable amount on himself also.

There can be another scenario where the deceased had major siblings capable of supporting the parents or where the parents were living with another son and not with the deceased bachelor. In such a case, going by the logic of leaving out father as a dependent, even the mother would not be entitled to anything or entitled to a much less percentage of the deceased's earnings. Such a view will not be taken by the Courts because welfare legislation has to be interpreted as broadly as possible.

1.4 Status of Father and Siblings

Status of 'siblings' in case of a bachelor also needs to be raised. In case of an earning father, the responsibility of raising the siblings would naturally be on the father but to hold that mother alone is the dependent on a bachelor would be a bit harsh. Siblings who are minor or are receiving education or not gainfully employed[5]/married would naturally benefit from the contribution of the deceased. Mother is the last person in our society to spend something on self – for females, family comes first, and there is no need to prove this aspect; The courts may take judicial notice of this. Siblings (if minor or still receiving education) should be included in the list of dependents in case of a deceased bachelor.

Status of 'father' as a dependent on the deceased is not clear despite the guidelines laid down by the Apex Court (in *Sarla Verma*) and hence, the same requires clarification. 'Father', in case of a bachelor, has been held to be not entitled for compensation. Even siblings of such a deceased bachelor have been held to be dependent on the father. There is no dispute regarding the broad parameters of the aforesaid principle. However, the ambiguity arises in case of a married deceased because exclusion of 'father' as a dependent is only in case of a bachelor and not otherwise. Relying on the aforesaid principle in case of bachelors, some Courts have started treating 'father' as a non-dependent even in case of a married deceased. Rather, it should not make any difference in the status of the father as a dependent on whether the deceased was married or not. What be relevant is whether the

[5] Subject to an age limit beyond which the person would be deemed to be earning at least as a daily wager.

father was earning or he was in a capacity to earn by reason of his physical or mental status? It would be more appropriate if a cut off age, say 60/65 years, is taken as the bench mark to determine the status of father as a dependent, irrespective of the marital status of the deceased.

There can be numerous instances where the deceased was a bachelor, well past his marriageable age and the father too old to work gainfully. There can be another situation where after the son has started to work, the father has stopped working altogether or the father may be physically or mentally unfit to work. In such a case, it would be unfair to leave out the father as a dependent. However, to make it objective, a cut off age as already mentioned above, should be adopted which should coincide with the average fruitful working years of a human. There is another argument favouring the inclusion of father as a dependent. Section 166 states that an application for compensation shall be made on behalf of all the Legal Representatives of the deceased. The corollary is that compensation shall be received by all the LR's in which case the case of 'father' is clearly covered. The term 'dependent' is a judicial innovation which was possibly devised to ensure that compensation amount goes in the hands of those who actually need it. Nevertheless, use of the word Legal Representative does make out a case for inclusion of 'father' as a dependent, subject of course to the limitations as set out above.

1.5 Looking Beyond Annual Dependency - An Unchartered Course

The aforesaid discussion was restricted to suggesting possibilities for further humanizing the existing law relating to grant of compensation in case of death under the Motor Vehicles Act. As a continuation of this effort, it is proposed to divert this discussion towards a path which has not yet been trekked by the Courts. At the beginning of this discussion a mentioned was made about an old movie (*Dushman)* in which the Court imposes a unique sentence on the lead protagonist vide which he is to live with and look after the family of the deceased whom he had run over. Taking a cue from this movie it is believed that there is a possibility of devising an alternative basis for awarding compensation which takes into account not just the income of the deceased but the needs of the family of the deceased. In this regard reference is made to a very crucial observation of the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries Ltd*[6]. While discussing the measure of compensation the House of Lords observed as under:

> the general rule, which has always prevailed in regard to assessment of damages and Fatal Accident Act is well settled, namely that any benefit accruing to a dependent by reason of the relevant death must

6 1942 (1) All England Reporter 657

> betaken into account. Under those Acts, the balance of loss and gain to a dependent by death must be ascertained, the position of each dependent being considered separately.

It appears that this particular observation has been lost track of by the courts while assessing compensation. The method currently adopted only talks about the collective dependence which is arrived at by deducting the personal expenses of the deceased from his monthly assessed income. Out of this dependency also, cuts are imposed as already discussed above. So where is the scope for assessing the need of each dependent separately or independently?

There is a reasonable case for giving due recognition to alternative means of awarding compensation which may not be applicable across the board in all types of death cases but in specific cases. Such an alternative method must keep two crucial issues in mind – education and health care. The first such case is where the only son (unmarried) dies leaving behind the old parents and / or minor siblings or unmarried daughter. Here, the income based compensation would not be sufficient. The Courts can consider directing the insurance company to setup a panel of doctors / hospitals who would provide health care to the parents / family either free of cost or on a nominal charge. In case the vehicle was not insured and the liability is to fall on the owner, he should be directed to, in addition to paying compensation, take out medical insurance policies for the dependents. Such health care should also include the possibility of emergency treatment whereby panel of doctors / hospitals make arrangements for the patient to be picked up from home.

The second case is where the deceased leaves behind his wife, minor children, parents and / or minor siblings. Here in addition to healthcare, education of children is also critical. It is proposed that where the children of the deceased are school going, the Government should step in take up the responsibility their education and must share this burden (in equal terms) along with the Insurance Companies or the owner / driver of the offending vehicle. If they are already attending school, the Government / Insurance Companies / Owner should shoulder the responsibility of ensuring their education in the same school till 10^{th} or 12^{th} as the case may be and thereafter, till graduation (in case of a professional course) and post-graduation (in other cases) at the fee rates applicable in public universities. Same principle should apply in case of siblings with modifications as may be logical / desirable. Where the children are not studying but are in the age group that they can be imparted gainful education / vocational education, the Government should put such children in government schools / institutions and ensure their education to the bounds of their capabilities subject to the limitations as set out above.

One might be critical of this suggestion on the ground that why should the State be burdened with such a responsibility but the same can be countered. Firstly, under the principle of *Parens Patrie* which has been recognised and reiterated repeatedly by the Supreme Court, Government should take on this responsibility. So far as the children are under the natural guardian ship of their father, the responsibility is his. However, once the parental umbrella is exposed leaving the minors vulnerable to anti-social forces, the Government must step in and act like the guardian. The second argument in favour of such a step is that it will go a long way in preventing destitution which will in turn prevent deterioration of the social fabric. In addition to the above arguments, it is believed that State should welcome any such development (if it ever comes about through the medium of Courts) because it will be a positive step towards becoming a welfare state in the true sense. In any case, the burden is to be shared for which, in so far as the Insurance Companies are concerned, an insurance policy with a higher premium can be issued after informing the owner of the same.

1.6 Alternate Dispute Resolution for Assessing Compensation

To sum up the Judgment rendered in *Sarla Verma (supra)* has greatly simplified the applicable law. It has become much easy for the Courts to arrive at a reasonable compensation. Irrespective of whether the suggestions made in this paper are accepted or at least debated upon, the suggestion hereinafter must find ready acceptance. I propose that with a bit of fine tuning, we can have a situation where the law officers of the insurance companies and the lawyers / representatives of the claimants can arrive at out of court settlement. It is only where seriously disputed questions of facts are in question that the matter should go to MACT.

Let us consider the advantages of this proposal. Firstly, it will be a great encouragement to the development of alternate dispute resolution. Secondly, the law officers of the insurance companies can be much better utilised in this manner. Thirdly, lawyers who are not interested in court litigation would have an alternative professional field in which they can specialise in. It will also be a viable professional alternative for young lawyers. Fourthly, it will be a great relief to the clogged courts, not just the MACT's but even the High Courts. Fifthly, the insurance companies would save a huge amount on professional fees of litigation lawyers which in turn would make them moderate in agreeing for a reasonable compensation. On the basis of personal experience as a lawyer the author observes that in most of the cases coming before the High Courts seeking enhancement in compensation, the option before the court is to apply the guidelines laid down in *'Sarla Verma' (supra).* Finally, if this recommendation is accepted, even law clinics/ legal aid clinics being set up in most law colleges can also render their services as

conciliators/negotiators in such cases. The final year law students can be trained to offer their services for which they can be paid also be the legal services authorities.

1.7 Conclusion

The views expressed in this article are radical, to say the least. Some of the views may find ready acceptance, some may find limited approval but some of them especially the multiplier issue may only initiate academic discussion. However, in so far as the multiplier system is concerned, sooner or later the Courts may think to travel beyond the limitation of English law and re-invent 'multiplier' on the basis of the remainder of fruitful working years of the deceased. With the same conviction it is suggested as an alternative way of awarding compensation which is not income based but is need based and humane in content. It is finally believed that suggestions if accepted would certainly need of ends of justice contemplated in the democratic and welfare state.

COMBATING MONEY LAUNDERING : SOME INTERNATIONAL EFFORTS

Moamil*

1.1 Introduction

Money laundering is an issue that has gained increasing significance following the events of 9/11(attack on the twin towers in the US). Since then the world has focused its attention on the entire concept of money laundering and has recognized it as a source of the funding of terrorist activities. The globalization process and the communications revolution has made crime increasingly international in scope, and the financial aspects of crime have become more complex due to rapid advances in technology. The spread of international banks all over the world has facilitated the transmission and the disguising of the origin of funds. This may have devastating social consequences and poses a threat to the security of any country, large or small. It provides fuel for drug dealers, terrorists, illegal arms dealers, corrupt public officials and all types of criminals to operate and expand their criminal activities. Laundering enables criminal activity to continue. Money laundering causes a diversion of resources to less productive areas of the economy which in turn depresses economic growth. The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society.

Money laundering is defined as "the process that disguises illegal profits without compromising the criminals who wish to benefit from the proceeds" (i.e; drug trafficking, terrorist activity or other serious crimes).[1] According to estimates, as much as $1 trillion of funds are laundered internationally per year.[2] The process usually involves three stages: placement, layering, and integration.[3] In the placement stage, funds are removed from the criminal act by placement in a bank.[4]

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1 U.N. Office on Drugs and Crime, *The Money Laundering Cycle*, available at - http://www.unodc.org/unodc/en/money_laundering_cycle.html. (last visited 15 March 2011) [*hereinafter The Money Laundering Cycle*]. .

2 Wendy Chamberlin, *Introduction, The Fight Against Money Laundering, Economic Perspectives*, May 2001, at 2, available at - http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf .(last visited Mar. 20, 2011)

3 Paul Bauer & Rhoda Ullmann, Commentary, *Understanding the Wash Cycle*, Economic Perspectives, May 2001, at 19, available at - http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf. (last visited 20 March 2011)

4 Lester M. Joseph, *Money Laundering Enforcement: Following the Money, Economic Perspectives*, May 2001, at 11, available at – http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf. (last visited 20 March 2011)

Because the money at this stage is in the form of cash, it is bulky and difficult to transport.[5] Money at this stage is most vulnerable to being lost, stolen, destroyed, or detected.[6] U.S. legislation has primarily targeted this stage by focusing on financial institutions.[7] Criminals respond by attempting to avoid these institutional regulations.[8] In the second stage, layering, the launderer distances the illegal money from the crime through a series of complex financial transactions. This is the most international stage, as launderers often utilize offshore financial institutions to conceal funds.[9] The purpose of creating such a complex trail is to so obscure the connection between the money and the crime that detection by law enforcement becomes impossible.[10] The final stage integration, occurs when the funds are fully assimilated into the mainstream economy and become available to the criminal for any purpose.[11]

Money laundering is a problem not only in the world's major financial markets and offshore centers. Any country integrated into the international financial system is at risk. As emerging markets open their economies and financial sectors, they become increasingly viable targets for money laundering activity. Increased efforts by authorities in the major financial markets and in many offshore financial centers to combat this activity provide further incentive for launderers to shift activities to emerging markets.

1.2 International Efforts

The international community has acted on many fronts to respond to the growing complexity and the international nature of rapidly evolving methods of laundering money and financing terrorism. The emphasis is on promoting international cooperation and establishing a coordinated and effective international Anti-money laundering (*hereinafter* AML) regime. The specific obligations of countries in relation to AML/CFT (counter financing of terrorism) vary depending on their adherence to various treaties. These obligations are quite complex and can overwhelm countries with limited resources and relatively underdeveloped financial, legal and regulatory institutions. Many international agencies have helped countries develop capacity to prevent and counter money laundering. Since

5 *Supra* note 4, Bauer & Ullmann

6 *Supra* note 2, *The Money Laundering Cycle*

7 Andres Rueda, *International Money Laundering Law Enforcement & the USA Patriot Act of 2001*, 10 MSU-DCL J. INT'L L. 141, 174 (2001).

8 *Ibid.*

9 Offshore financial institutions with tax havens, strict bank secrecy rules, or lax statutory enforcement are preferred. *The Money Laundering Cycle*, *supra* note 7. Other techniques include Shell banks (banks with no real address or location, sometimes existing solely on the internet),"loan-backs" (where the criminal transfers his money to an offshore entity that he owns and then transfers it back), "double invoicing" (keeping two sets of books), and the purchase of big-ticket items (that are bought and then resold). *Id.*

10 *Ibid.*

11 *Ibid.*

September 2001, they have extended their mandate to address the financing of terrorism. The main elements of the global and regional initiatives are presented below:

1.2.1 Efforts In United Nation {UN}

Efforts by United Nations has played an integral role in the global community's fight against illicit drug trafficking and money laundering.[12] In 1988, the U.N. passed the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (popularly known as "Vienna Convention"). Superseding the Single Convention on Narcotic Drugs of 1961, [13] the Vienna Convention is an important new weapon against narcotics trafficking and money laundering. The Vienna Convention created internationally acknowledged drug trafficking offenses to be criminalized under the domestic laws of signatory countries. Moreover, the Vienna Convention has embraced a framework for international cooperation that seeks to penalize drug traffickers as well as those who accept drug trafficking proceeds.

In the Vienna Convention, the U.N. requests that its members to adopt a system of criminal offenses under their domestic laws that address all facets of illicit drug trafficking.[14] Included among this provision's list of offenses are matters such as the manufacture, distribution, or sale of illicit drugs and the organization, management, or financing of illicit trafficking activities.[15]

Article 3(1)(b) of the Vienna Convention specifically addresses the problem of money laundering, requiring all parties to the agreement to formally establish money laundering as a criminal offense.[16] This provision also criminalizes the

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12 Duncan E.Alford: "Anti-Money Laundering Regulations-A Burden on Financial Institutions", *19 N.C.J.Int'l & Com.Reg.* 437 (1994) (offering definition of money laundering); See also Nicholas Clark, "The Impact of Recent Money Laundering Legislation On Financial Intermediaries", *14 Dick J.Int'l L.* 467, 469 (defining money laundering as "the process by which the proceeds of crime or fraud are made to appear as if they have emanated from a legitimate-source.")

13 Single Convention on Narcotic Drugs of 1961, entered into force Dec. 13, 1964, 18. U.S.T. 1407, T.I.A. S.No. 6298, 520 U.N.T.S. 151.

14 Vienna Convention, Article 3 (1) (a). Article 3 of the Vienna Conference, hailed by several as the "cornerstone of The Convention", represents the end-product of detailed deliberations as to which specific elements should be encompassed in an effective regime aimed at countering drug-trafficking.

15 *Id.*, Article 3 (1) (a) (i) prohibits: The production, manufacture, extraction, preparation offering, offering for sale, distribution, sale, delivery on any terms whatsoever brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance.

16 *Id.*, Article 3 (1) (b) (ii) prohibits: The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offen[se] or offen[ses] established in accordance with [Article 3 (1) (a)]...or from an act of participation in such an offen[se] or offen[ses].

conversion or transfer of property derived from drug related money laundering, as well as the concealment or disguise of its true nature or source. The obligation to establish these money laundering related offenses is, however, subject to the constitutional principles and legal systems of each member-state.[17]

In addition, Article 5 of the Vienna Convention requests that members empower their courts and other relevant authorities to freeze or seize the proceeds or converted property derived from drug trafficking.[18] This article further proposes that signatories authorize their courts and other competent authorities to order that bank, financial, or commercial records are available to law enforcement authorities.[19] Under this provision, a party who fails to make such records available to law enforcement authorities faces the penalty of seizure. The Vienna Convention also calls for its members to afford one another the widest measure of mutual legal assistance possible in investigations, prosecutions, and judicial proceedings relating to drug trafficking and money proceedings relating to drug trafficking and money laundering offenses.[20]

1.2.2 Efforts In European Union {EU}

While law-abiding citizens enjoy numerous benefits from the European Union single market white collar criminals see advantages that they can exploit for their own selfish and anti-social behavior. Furthermore, they perceive a low risk of being caught and punished under an elaborate network of different legislative systems, which are easier to dodge than a judicial complex set up for a single nation state. Economic and financial crime has become a serious and growing threat. High priority is being given to tackling the problem.[21]

The European Union too has issued a new Money Laundering Directive in December 2001 to amend its earlier Directive of 1991, which already contained

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17 *Id.*, Article 3 (1) (c), 28 I.L.M. at 500. This limitation upon the requirements of Article 3 (1) (b) is due largely to the difficulties encountered between the negotiators at the Vienna Conference in designing precise definitions that were acceptable to differing legal systems.

18 *Id.*, Article 5 (4) (b) provides that upon request by another party having jurisdiction over an offense established in accordance with Article 3 (1) that the requested party shall "take measures to identify, trace, and freeze or seize proceeds property instrumentalities...for-the-purpose-of-eventual-confiscation".

19 Under this provision, a party may not decline to comply with this paragraph on the grounds of bank secrecy. The inclusion of this affirmative obligation has been characterized by many as a major breakthrough in anti-money laundering legislation.

20 From the law enforcement perspective, perhaps the most significant provision of the Vienna Convention can be found in Article 7 (5) which prohibits signatories from declining to provide mutual legal assistance on the grounds of bank secrecy. Thus, bank secrecy may not be used as a justification for refusing to provide legal assistance under the Vienna Convention or any of-the-bilateral-treaties-affected-by-it-provisions.

21 Chasing white collar crime across the European Union single market, *available at* http://ec.europa.eu/justice_home/fsj/crime/economic/fsj_crime_economic_en.htm.(last visited 10 July 2011)

strong anti-money laundering measures which required financial institutions to know their customers, maintain appropriate records and establish anti-money laundering programmes. The Directive of 2001 extends coverage to bureau de change, money transfer companies and investment firms. Definition of 'criminal activity' is also expanded to cover not only drug trafficking, but also all serious crimes including corruption and fraud against EU. The Directive significantly brings within its ambit lawyers, auditors, accountants, tax advisers, real estate agents and notaries when they participate in the movement of money for their clients. They have to now report to the authorities any transaction that indicates laundering of money. The European Council is determined to ensure that concrete steps are taken to trace, seize and confiscate the proceeds of crime.[22]

The Directive also provides a precise definition of money laundering to include the following:

(a) Transfer of property with the knowledge that it is derived from criminal activity;

(b) Concealment of nature, source, location, disposition, movement, rights and ownership of property with the knowledge that it is derived from criminal activity;
(c) Acquisition, possession and use of property with the knowledge that it is derived from criminal activity; and,
(d) Participating in, associating with, attempting to commit as well as aiding, abetting, facilitating and counseling any of the above activities.[23]

Money laundering is at the heart of practically all criminal activity. It has given stragic priority at European Union level. A decision was adopted by the EU Council of Ministers concerning arrangements for cooperation between financial intelligence units of the member states. The EU member states have signed the protocol to the convention on mutual assistance in criminal matters between the member states.

For the first time ever, the Ministers of the EU Council of Finance and Justice and Home Affairs met at a joint meeting in October 2000 and decided on arrangements for cooperation between financial intelligence units of the Member States and a Council Act of November 2000 amending the terms of the Europol Convention to extend the competence of Europol to money-laundering in general, not just drugs-related money laundering. Since then, the EU has been actively pursuing the war against financial crime by fostering greater cooperation and engagement of Member States and through its Directives that are obligatory for the Member States to incorporate in their local laws on money laundering and financial crime.

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22 EU putting a stranglehold on dirty money, available at - http://ec.europa.eu/justice_home/fsj/crime/laundering/fsj_crime_laundering.en.htm. (last visited 16 September 2011)

23 *Ibid.*

The European Commission is a member of the Financial Action Task Force and participates fully in international bodies such as the OECD and the Council of Europe.[24] The Commission has also negotiated on behalf of the EU in respect of the relevant money-laundering provisions of the United Nations Convention on Transnational Organized Crime.[25]

Due to the increasing use of the internet for commercial and financial transactions, it has become imperative for the EU to track the financial transactions and bank operations of the citizens and institutions. This has led to protests from civil liberty groups, demanding removal of any infringement of the privacy.[26] In conformity with EU Directive all countries have legislation on personal data protection in place: they also have a supervisory authority in this field, interested with ensuring compliance to legislative provisions, which has the appropriate powers.[27]

The European Union Directive of 2001 is in fact a stronger piece of framework legislation, which is binding on all its member states. Not only does it go beyond the standards laid down in the US law and the UN Convention, but is also more effective as it covers many major financial centres of the world located in the territory of EU. The reason that such strong measures are not being rejected by society as 'draconian' is perhaps that the events of September 11 have increased the tolerance of greater intrusion of governments in the lives of citizens.

February 2002 saw a meeting of lawmakers at the conference of EU parliaments against money laundering at Paris. The resultant 30-point Paris Declaration called money laundering "a major threat to democracies" and "a perversion of international financial circuits". It also equated the need to combat money laundering with that of fighting terrorism and called both as "equally urgent tasks". The Paris Declaration calls for drastic steps such as banning business dealings with countries on the Financial Action Task Force (FATF)'s list of "non-cooperative countries and territories"(NCCTs).The Paris Declaration also recognizes that money laundering and related crimes transcend national borders and therefore suggests steps to plug loopholes and increase legal, police and administrative cooperation between states to cut off money supply to terrorists.[28]

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24 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, [DAFFE / IME / BR (97) 20], available at - oecd.org. The Council of Europe Criminal Law,[European Treaty Series No. 173] at www.coe.inter.Civil Law Conventions on Corruption,[European Treaty Series No. 174], available at - www.coe.int.

25 EU putting a stranglehold on dirty money, available at - http://ec.europa.eu/justice_home/fsj/crime/laundering/fsj_crime_laundering_en.htm. (last visited 16 September 2011)

26 *Ibid.*

27 *Ibid.*

28 Available at - http://www.eurolegal.org/internat/moneylaun.htm. (last visited 12 December 2011).

1.3 Efforts in United Kingdom {UK}

The money laundering legislation in the U.K is, Proceeds of Crime Act, 2002 (POCA).The legislation is wide in its ambit and encompass mere possession of criminal or terrorist property as well as its acquisition, transfer, removal, use, conversion concealment, or disguise. In the U.K, , money laundering need not involve money alone, it could include all forms of tangible and intangible property. There is no lower limit to what has to be reported by people, a suspicious transaction involving a single $5 note may be required to be reported. All persons are technically required to report and obtain consent for, their own involvement in crime or suspicious activities involving money assets of any kind.[29]

The U.K legislation was relaxed slightly in 2005 to allow banks and financial institutions to proceed with low value transactions involving suspected criminal property without requiring specific consent for every transaction, yet the reporting of these transactions is still required.[30]

There were about 200, 000 suspicious activity reports made in the year 2006 and about 165m of assets were recovered in 2005. The U.K is also under the obligation to update its laws with EU Directive.[31]

The U.K has also taken a reasonable yet robust approach in legalizing the hawala. They have established a simple list of requirements needed in order to run a hawala business. CATCH; the five requirements by the U.K. customs comprise of:"Confirming the identity of their customers, Appointing a money laundering reporting officer, Training their staff, Control business by having anti-money laundering systems in place, and Hold all records for at least five years."[32]

1.4 Efforts In United States of America {USA}

The US Congress passed the USA Patriot Act of 2001 within 43 days of September 11, on October 26, 2001. This Act made as 52 amendments to the existing Bank Secrecy Act of 1970(*hereinafter* BSA).The scope of these new provisions touched every financial institution and business not only in the US, but also in most of the world. One of the changes made in the BSA requires every financial institution to establish anti-money laundering programmes. Moreover, the list of business now defined as financial institutions is wide ranging and includes banks, brokers and dealers in securities or commodities, currency exchanges, insurance companies, securities or commodities, currency exchanges, insurance companies, credit card operators, dealers in precious metals, stones and jewels, travel agencies, businesses engaged in the sale of vehicles including automobiles,

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29 David Faulkner, "U.K. Regulation of Money Service Businesses," *World Bank Working Paper*, No. 1 (2003) : 45.

30 UK Proceeds of Crime Act, 2002, Section 328 (1)

31 *Ibid.*

32 *Ibid.*

air planes and boats, casinos and gaming establishments, and even telegraph companies and US postal service. It also adds underground banking systems, such as 'Hawala', to the definition of financial institutions. It creates customer identification and due diligence duties. At the same time, it grants immunity to financial institutions and their employees for sharing reports of suspicious activities with any government agency or with each other. It also makes it a crime to conceal more than US $10, 000 in currency or monetary instruments while entering or leaving the US.[33]

As a result, hundreds of thousands of financial institutions and businesses, who were not previously concerned about money laundering, now have to maintain anti-money laundering programmes requiring them to "develop internal policies, procedures and controls", "designate a compliance officer", conduct "ongoing employee training programmes" and perform "independent audit functions". The US intelligence agencies can now have access to reports and records of financial institutions and businesses including suspicious activity reports (SARs) filed by them. One of the major changes is prohibition of correspondent accounts for foreign shell banks, which have no physical presence anywhere. A foreign bank must have a fixed address, employ at least one full-time employee, maintain operating records and be inspected by a banking authority to qualify for a correspondent account.[34]

Apart from amending the BSA, the USA Patriot Act of 2001 also made changes in the Money Laundering Control Act of 1986. By now acquires extra-territorial jurisdiction to combat terrorist funding and criminal proceeds. The law covered funds representing proceeds of nearly 200 specified unlawful activities (SUAs) such as fraud, kidnapping, gambling, espionage, drug trafficking etc. It now covers bribing of foreign public official, embezzlement of public funds, smuggling or export control violations involving items covered by the Arms Export Control Act as well as crimes of violence. The new law requires the financial institution to provide information regarding customers within 120 days if the account is in the US and within seven days if the records are maintained outside the US in respect of correspondence accounts. The new law also strengthens forfeiture powers over funds of foreign persons and institutions. The US authorities now have enormous power to track and seize laundered money that finances terrorist activities and to punish the persons involved.[35]

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33 Healy, Nicole. M And Judith A.Lee,; "Adhoc Task Force on Professional Responsibilities Regarding Money Laundering. Patriot Act And Gatekeepe Update", *The International Lawyer*, Volume 37, No. 2, Summer 2003, p.631-639.

34 "Capital Market, Prevention of Money Laundering And Terrorism: An Indian Perspective", available at - *www.emeraldinsight.com/journals.htm?articleid=1537238&show=pdf* (last visited 14 December 2011).

35 Available at - http://www.fincen.gov/statutes-reg/patriot/index.html. (last visited 19 December 2011).

The USA Patriot Act of 2001 has also seen a jump in filing suspicious activity reports (SARs).The US Finance Crimes Enforcement Network (FINCEN) reported an increase in SARs by over 40 per cent in the year 2002 compared to the preceding year. The compliance costs for the financial institutions have gone up but many think that this may be a small price to pay to be able in a world with reduced risks of terrorists attacks.[36]

The Department of Treasury[37] Department of Justice[38] Department of Homeland Security[39] Board of Governors of the Federal Reserve System and the United States Postal Service[40] are together responsible for checking the menace of money laundering and terrorist financing in the United States and abroad.[41]

The purpose of USA Patriot Act is to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and specified that financial institutions take specific actions to 'Know Your Customer' norms.

Thus, the USA has in place a well organized legal and enforcement mechanism, although the Patriot Act has faced severe criticism for privacy infringement and providing unchecked powers to law enforcement agencies in certain cases.

1.5 Intergovernmental Group Financial Action Task Force on Money Laundering

Intergovernmental groups have also taken action against the rising levels of global money laundering. The creation globally orchestrated effort to curb the occurrence of money laundering. The main international body engaged in continuous, comprehensive efforts both to define policy and to promote the adoption of countermeasures against money laundering is the Financial Action Task Force (*hereinafter* FATF).The FATF currently consists of twenty-six countries[42] and two international organizations.[43] The FATF is an intergovernmental organization whose purpose is the development and promotion of national and international policies to counter money laundering and terrorist financing. In an effort to create

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36 *Ibid.*

37 Office of Terrorism and Financial Intelligence, Internal Revenue Service.

38 Federal Bureau of Investigation, Drug Enforcement Administration, Criminal Division, National Drug Enforcement Centre, Organized Crime Drug Enforcement Task Force.

39 Immigration and Customs Enforcement, Customs and Border Protection.

40 United States Postal Inspection Service.

41 Money Laundering Threat Assessment, December 2005.

42 The member countries of Financial Action Task Force on Money Laundering ("FATF") are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland Ireland, Italy, Japan, Luxembourg, the Kingdom of the Netherlands, New-Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

43 International organizations that are members of FATF are European Commission and Gulf Cooperation Council.

anti-money laundering policies that cover all relevant aspects of money laundering the FATF created the Forty Recommendations. In 1990 it adopted a set of 40 Recommendations on money laundering, which were revised and amended in 1996 and 2003 to reflect new developments in money laundering methods. In October 2001, the FATF expanded its mission to include combating the financing of terrorism, and it put forward a set of Nine Special Recommendations on the financing of terrorism, which, together with its initial 40 Recommendations on money laundering, constitute a compelling framework for preventing, detecting and suppressing both money laundering and the financing of terrorism.

The Recommendations are measures that all member countries of the FATF have agreed to implement, and that all other countries are encouraged to adopt.[44] Designed to be universal in application, the recommendations set forth a general framework for anti-money laundering efforts.

They cover the criminal justice system and law enforcement; the financial system and its regulation, and international cooperation. The Recommendations reflect the fact that different countries have diverse legal and financial systems and cannot implement identical measures.

The Recommendations constitute principles for action in the area of money laundering prevention which countries can tailor to their particular constitutional frameworks. This allows countries a degree of flexibility rather than stipulating every detail. The FATF works to generate the necessary *political will* to bring about legislative and regulatory reforms in these areas. These measures are essential for the creation of an effective anti-money laundering framework. Thats why it has published 40+9 recommendations in order to meet this objective. These 49 recommendations today constitute the guiding principles and backbone in combating money laundering and terrorist financing across the world.

1.6 Basle Committee Minimum Standards

In 1988, the Basel committee put forward some basic principles as part of its statement on the *Prevention of criminal use of the banking system for the purpose of money-laundering*. These principles cover some important self-regulatory measures which bank managements are expected to adopt with respect to proper customer identification, high ethical standards and compliance with laws, cooperation with law enforcement authorities, and policies and procedures required in order to adhere to the statement.[45]

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44 As the Recommendations represent minimal standards that members should adhere to, members may institute more stringent standards if they so choose.

45 Moshi, Humphrey P B; "Fighting Money Laundering. The Challenges in Africa", *ISS Paper 152, Published by the Institute for Security Studies*, October 2007.

In 1992, the Basle Committee issued new minimum standards with respect to governmental supervision and regulation of international banks.[46] The distinguishing elements of the New Minimum Standards are that all international banks and banking groups should receive consolidated supervision by a home country regulator, international banks should obtain the prior consent of both host and home regulators before opening a branch or other banking establishment in a foreign country, banking regulators should have the right to collect information from international banks, if a bank fails to meet the minimum standards, a host regulator may impose sanctions against the bank, and information exchanges between banking regulators in different countries should continue to be encouraged..Albeit a vast improvement in the area of bank regulation, the New Minimum Standards contain gaps that banks could exploit in an effort to escape regulation.[47] One such weakness is the fact that the standards target the creation new branches, but do not explicitly apply to existing branches.

Moreover, the New Minimum Standards are not a treaty and consequently lack the force of law. As a result, the Basle Committee must rely on regulators' moral authority and informal pressure to enforce the standards. Finally, the New Minimum Standards encourage countries to implement standards independently, thus making it difficult for continuity to develop among nations.

In 1997, the Basle committee issued its *Core principles for effective banking supervision*. One of these principles deals with KYC policies and procedures. Finally, in 2001, the committee added new standards relating to customer due diligence, verification and KYC measures. These standards are important for the fight against money laundering, but they are also essential to the safety of banks and their investments and the integrity of banking systems.[48]

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46 The Basle Committee created the New Minimum Standards as a result of the closure of the Bank of Credit and Commerce International ("BCCI") on July 5, 1991. The closure of the US$20 billion bank represents one of the largest bank failures in international banking history. The immediate reason for the closure of BCCI was a report received by the Bank of England, which was prepared by Price Waterhouse, detailing massive fraud allegedly committed by senior officials at BCCI. The bank suffered tremendous losses. In order to cover these losses, senior managers at BCCI siphoned off deposits to cover these losses. The report also stated that several senior officials at BCCI made fictitious loans, failed to record deposits, and dealt in their own shares in an effort to manufacture profits. BCCI officials hid the losses caused by fraudulent practices, bad trades, and unpaid loans by shifting assets between subsidiaries. All Things to All Men, Economist, July 27, 1991, at pp. 67-68 (describing events leading to BCCI failure).

47 Under the New Minimum Standards, a host country regulator is only required to institute restrictions which it deems are "necessary and appropriate" on a financial institution. For example, a host regulator can choose to permit a foreign banking institution to operate in the country in spite of the home country regulator's non-compliance with the Minimum Standards.

48 Moshi, Humphrey P B; "Fighting Money Laundering. The Challenges in Africa", *ISS Paper 152, Institute for Security Studies*, October 2007, p. 5.

Thus, prudent banking policy demands that no single customer becomes a dominant client, so that it reduces the possibility of involvement of financial firm with the criminals or criminals undertake the activities of financial firms.

1.7 Other Organisations and Initiatives Against Anti-Money Laundering

Among others, there are many international groups active in the fight against money laundering. These include INTERPOL,[49] the Bank for International Settlements,[50] the Egmont Group,[51] and the International Chamber of Commerce,[52] the Council of Europe,[53] the European Union,[54] International Money Laundering Information Network (IMoLIN),[55] Wolfsberg AML Principles[56] and the

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49 INTERPOL is an International Criminal Police Organization whose membership includes almost all states of the world. INTERPOL "Exchanges and analyzes information, supply national police forces with data and analyses to recognize international criminal structures and connections, provides the tools that enable them to work together when something international has to be dealt with." Fulvio Attina, "Globalization and Crime: The Emerging Role of International Institutions *(Univ. of Catania Department of Political Studies, Jean Monnet Working Papers in Comparative and International Politics*, JMWP07.97, 1997), available at -http://www.fscpo.unict.it/EuroMed/jmwp07.htm. (last visited 21 January 2012).

50 Basel Committee on Banking Supervision, Customer Due Diligence for Banks (October 2001), available at - http://www.bis.org/publ/bcbs85.pdf. (last visited 12 Jan 2012).

51 The Edgmont group is a global enforcement mechanism linking Suspicious Activity Reports received by financial intelligence agencies in eighty-four countries. Allison S. Bachus, "From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering after 11 September 2001", *21 ARIZ. J. INT'L & COMP.L. 855, (2004)*. For more information, *See* http://www.egmontgroup.org. (last visited 9 January 2012).

52 The International Chamber of Commerce issued a *Guide to Prevention of Money Laundering* in 1998. *See*, Anti-corruption conventions and treaties, available at - http://www.u4.no/document/treaties.cfm#3. (last visited 24 November 2011).

53 The Council of Europe (an international organization formed in 1949 that currently has forty seven member states) signed the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on November 11, 1990. The Convention requires signatories to implement domestic legislation criminalizing money laundering-related offenses in a variety of contexts. However, countries are not required to criminalize money laundering if doing so would conflict with the nation's constitution or legal system. Because the Convention specifies a *mens rea* of knowledge, it is difficult to apply the Convention to IVTS. Madelyn J. Daley; "Effectiveness of United States and International Efforts to Combat International Money Laundering, 2000" *St. Louis-Warsaw Trans'* 1175, 187.

54 "The first concrete reference to money laundering within the European Union can be trace to the European Parliament Resolution of October 16, 1986, which urged the Council of Ministers, the EU's main decision-making organ, to take concerted action against all aspects of drug trafficking, including money laundering." Reuda, *supra* note 9, at 154. In 1991, the European Union (also called the Commission of European Communities) issued a directive requiring members to implement anti- money laundering legislation Council Directive 91/308/EEC, Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166).

55 IMoLIN is an Internet-based network assisting governments, organizations and individuals in the fight against money laundering and the financing of terrorism. IMoLIN has been developed with the cooperation of the world's leading anti-money laundering organizations, available at - http://www.imolin.org/ (last visited 2 January 2012).

Organization of American States[57] have also taken steps in the fight against money laundering. Most of the global banks operated in different countries are following the rules and principles of these international agencies. Money laundering is an increasingly ramified, complex phenomenon that must be tackled in an integrated and interdisciplinary fashion. Towards this, there are many organizations throughout the world working coordinately.

1.8 Conclusion

Thus, one can see the panoply of efforts taken by the international community to fight the menace of money-laundering. As the financial systems of the world grow increasingly interconnected, international cooperation has been, and must continue to be, fundamental in curtailing the growing influence on national economies of drug trafficking, financial fraud, other serious transnational organized crime, and the laundering of proceeds of such crimes.[58]

The international effort to develop and implement effective anti-money laundering controls has been marked by the persistent, ever present need to balance, on the one hand, the interests of government in access to financial records and even affirmative disclosure of suspicious activity, against, on the other hand, the interests of financial institutions in being free from unduly burdensome regulation, along with the interests of their customers in maintaining an appropriate degree of financial privacy.

The international effort on AML consists mainly of the standards and obligations set down by AML institutions for the purpose of criminalization of money laundering and on international cooperation in the area of investigation, interim measures, such as seizure, freezing and confiscation of properties, mutual legal assistance, law enforcement, recovery of properties and extradition of offenders. FATF, UK, UN, EU and USA have laid down the standards as to how to define money laundering offence, its ingredients and other criminal law standards for the benefit of countries to incorporate in their respective AML legislations. The national law enforcement authorities have to cooperate with each other in detection, investigation, prosecution and mutual legal assistance in the

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56 The Wolfsberg Group is an association of eleven global banks, which aims to develop financial services industry standards, and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies, available at - http://www.wolfsberg-principles.com/ (last visited 2 January 2012).

57 The Organization of American States (OAS) references money laundering in its Inter-American Convention Against Terrorism. Inter-American Convention Against Terrorism Article 4, 3 June 2002, 42, I.L.M. 19, (2003).

58 International Strategies to Combat Money Laundering Remarks of Joseph M. Myers, Assistant Director (International Programs) Financial Crimes Enforcement Network, U.S. Department of the Treasury for the International Symposium on the Prevention and Control of Financial Fraud Beijiing 19-22 October, 1998, available at - <http://www.icclr.law.ubc.ca/Publications /Reports/myer_pap.pdf> (last visited 23 January 2012).

enforcement of the money laundering crime. Countries have obligation to provide all assistance to another country while investigating and enforcing money laundering offences. A FIU[59] (Financial Intelligence Unit) in a country has obligation to exchange information with its counter part in another country of suspicious money laundering activities. Countries have a duty to empower its AML agencies in the investigation and prosecution of money laundering offences.

The International cooperation in the area of AML is mainly intended to facilitate free exchange of information and cross border investigation and prosecution of money laundering offenders. For that purpose every country has specific obligation to provide information requested by authorities in other countries on money laundering offences. For that purpose countries have to ensure that AML authorities have enough powers to carry out the request from another country. Similarly, in the area of investigation and prosecution, countries have obligation to render all legal assistance in the form of interim measures to freeze, seize and confiscate properties so that they are available for confiscation Also countries have to render each other assistance in the form of serving processes, taking evidence, availability of witnesses and extradition of offenders. Thus, the main feature of the enforcement regime is to remove all barriers so as to facilitate detection, prosecution and punishment of money laundering offenders.

To conclude, it is submitted that at one hand the international community is responding, trans-governmental groups made up of financial, regulatory and judiciary specialists are working in a variety of ways to share information and expertise to fight money laundering and other crimes while on the other, still the crime of money laundering, and the fight against it, are both relatively recent phenomena, and much work remains to be done.

[59] Financial Intelligence Unit-India (FIU-IND) is the central, national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to enforcement agencies and foreign FIUs.

THE INTERNATIONAL CRIMINAL COURT AND RESPECT FOR HUMAN RIGHTS AND HUMAN DIGNITY

Ivneet Walia*
Gurmanpreet Kaur**

Among the primary aims of law must be to ensure that each person receives his due, at every level of social life. The recognition that the human person is by nature the subject of certain rights which no individual, group or State may violate represents a significant juridical achievement and must be considered as an essential principle of international law.

- By Pope John Paul II[1]

1.1 Introduction

One of the most significant international organizations to be created since the United Nations, the International Criminal Court, ushered in a new era of the protection of Human Rights. The direct descendant of the Nuremberg and Tokyo trials, as well as those of the more recent international Criminal tribunals for the former Yugoslavia and Rwanda, the International Criminal Court prosecutes genocide, crimes against Humanity and War Crimes when national justice systems are either unwilling or unable to do so themselves. The role of the International Criminal Court is recognized in a multilateral system that aims to end impunity, strengthen the rule of law, promote and project respect for human rights and establish world peace, in accordance with international law. Human dignity, the very essence whereof is synonymous with human conscience, stands at the very core of the law which the International Criminal Court applies. While the Court stands as a symbol of progress for humanity, it is also the target of criticism from sceptics who argue that the highly politicized institution remains plagued by inefficiency and institutional deficiencies.

1.2 International Criminal Court

Numerous conflicts and killing of hundreds have resulted since the fall of the Berlin Wall in 1989. Reflections over the nature of abusive acts committed during violent conflicts have evolved over the years. The entire enterprise of holding war criminals individually responsible for their actions goes back to the Nuremberg and Tokyo trials after the World War II. Then, in 1993, the conflict in the Former Yugoslavia erupted, and War Crimes, Crimes Against Humanity

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1 Address to the World Jurist Association of the World Peace Through Law Center, 9 May 1992.

and Genocide in the guise of "ethnic cleansing" once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future. Although the Nuremberg model did not persist in time, the notions which formed its core, can be found in contemporary International Law. The 'common design' and 'superior responsibility' doctrines have become firmly established as modes for incurring individual responsibility.

The establishment of the International Criminal Court is a 130 years long hard fought struggle to serve the cause of human rights and human dignity. The first proposal ever to establish such a court was made in 1872 by Gustave Moynier, the then President of the International Committee of the Red Cross (ICRC). The proposal was linked to the 1864 *Geneva Convention* for the Amelioration Condition of the Wounded in Armies in the field. His opinion was that the convention be complemented by provisions of criminal law enabling state parties to deal with the violations of the Convention. The idea of an International Criminal Court was presented for consideration by Trinidad and Tobago at the 44th Session of the General Assembly in 1989.

However, prosecution and punishment of international crimes are the inescapable responsibilities of every country. After more than half a century's efforts, *the Rome Statute* of the International Criminal Court was signed on 17th July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court. On 1st July 2002, this first permanent international criminal judicial organ in history was established at The Hague.[2] This is an important Milestone in the development of International Criminal Law; it will have significant effects in the field of International Law, International Criminal Law and International Relationships. During 2002 internationalized courts continued to develop in four parts of the world: Cambodia, East Timor, Kosovo, Sierra Leone, in addition, wholly national trials of international crimes is taking place in Indonesia.

The Rome Statute recognizes specific roles for the United Nations and the Security Council. In addition, both the General Assembly and the Security Council regularly discusses issues and themes relevant to the mandate and activities of the Court. Effective cooperation with the United Nations is particularly important to the Court. The Relationship Agreement, concluded on 4th October 2004 by the President of the Court and the Secretary-General of the United Nations on behalf of their respective institutions, affirms the independence of the Court while establishing a framework for cooperation.

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2 The ICC will not have retroactive jurisdiction and therefore will not apply to crimes committed before 1 July 2002, when the Statute entered into force.

Reality of differing convictions about justice is more accentuated in the international domain. The cumulative development of International Criminal Law from Nuremberg through the *ad hoc* Tribunals' jurisprudence to *the Rome Statute* of the ICC – demonstrates the importance accorded to finding a fair balance when holding individuals responsible for group crimes. International Criminal Court has a competent jurisdiction that covers the so called 'Core Crimes', i.e. Genocide, Crimes Against Humanity, and War Crimes and also addresses the Crime of Aggression, which the International Criminal Court will exercise jurisdiction over only after the State parties agree on the crime's definitions and pre conditions. The International norms have assisted in laying down penalties and defined the procedures to be observed, from investigation to the execution of those accused of such crimes. However, as a systematic and comprehensive examination of the subject matter demands, the analysis of these crimes is not limited to the approach taken to them in *the Rome Statute*. When adjudicating International Crimes, domestic courts are faced with a choice between the application of international law or national law. The crimes under the International Criminal Law are mostly of a systematic, large scale and collective character, while domestic criminal law mainly deals with less complex crimes that are normally committed by individuals who can easily be linked to the crime.

The main purpose of complementary jurisdiction is to respect the sovereignty of every State. In *the Rome Statute* of the International Criminal Court, provision is made for the requisite 'state of mind' necessary for establishing the offender's criminal responsibility. By making a certain 'state of mind' on the part of the perpetrator a precondition for his or her punishment, the international criminal statute builds on the firm ground of International Customary Law. There can be no doubt that both the codification and standardization of the mental element, if carried out in a proper and consistent manner, would add to the process of consolidation of International Criminal Law and push International Criminal Law closer to becoming fully developed legal order.[3]

Various controversial issues have risen while analyzing each of these crimes, for instance, genocidal act is inclusive of prevention of births within a group, whereas, imposing birth control as a means to control population or for health reasons doesn't fall within the preview of this crime. Drug trafficking and Terrorism are not included under the Crimes Against Humanity, as they were not considered as serious as crimes of Genocide or Crimes Against Humanity and were proposed to be resolved by way of treaty cooperation. The fight against terrorism is multifaceted and includes measures imposed by the United Nation

[3] Gerhard Werle, "Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law", *Journal of International Criminal Justice*, Oxford University Press, London 2005, p. 56.

Security Council. Terrorist's acts can be prosecuted in an International Court at present only if they amount to War Crimes or Crimes against Humanity. Only one internationalized court, the Lebanon Tribunal has jurisdiction over terrorist's acts, but this is limited under the Lebanese tribunal itself and does not fall within the sphere of International Criminal Court[4]. There are two types of War Crimes as mentioned in *the Rome Statute* i.e. crimes at the time of International Conflict and at times of Internal Armed Conflict. Use of Anti Personnel Land Mines and Use of Nuclear Weapons, are excluded from the definition of War Crimes. Suggestively, both use of Anti Personnel Landmines which are controlled by treaty and use of Nuclear Weapons may be expressly provided under the Banning Methods of Warfare.[5]

The court must function in fair, independent and effective manner. The main goal of the court is to put an end to impunity for the perpetrators of these crimes and thereby contribute to the prevention of such crimes as stated in the Preamble of *the Rome Statute*. The main purpose and function of the court is to prosecute war criminals and others guilty of "enumerated" crimes[6] and also ensure proper implementation of the provisions of *the Rome Statute*. International Criminal Law must protect the highest interests of the international community i.e. peace, security and well being of the world. International Criminal Law diverges from the traditional conception of International Law because it only addresses itself to the individuals and not to the States. The establishment of the International Criminal Court challenges the Sovereignty and Impunity; it does reveal the continuing importance of state cooperation and compliance. The treaty overrides any immunity that States may grant to presidential, parliamentary, or legislative officials in their domestic systems.

Perhaps what makes *the Rome Statute* significantly different from all predecessors, and in particular from the two *ad hoc* tribunals, is that for the first time victims of crimes and their families can access the Court to express their views and concerns and to claim reparation for the wrongs suffered. An International Criminal Court should exist in order to ensure protection of the dignity of the human person. This dignity is shared by every human person, regardless of his age, race, ethnic origin, status as a combatant or non-combatant, sex or stage in human life, from the unborn to the elderly. As each person shares

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4 Christopher C. Joyner, *International Law in the 21st Century*, Rowman and Littlefield Publishers, Lanham, 2005, p. 65.

5 Retrieved from < *http://clg.portalxm.com/library/keytext.cfm?keytext_id=124*> last visited on 21st October, 2010 at 20: 52 IST.

6 There is much disagreement, even at this late stage in the negotiations, about just which crimes should be enumerated, or whether or not to enumerate crimes. Our Global Neighbourhood recommends the court prosecute violations of international law, contending that "...the very essence of global governance is the capacity of the international community to ensure compliance with the rules of society" Retrieved from <*http://www.sovereignty .net/p/gov/iccanalysis.htm*> last visited on 17 October 2010 at 21:34 IST.

the human dignity, each person, without exception, is entitled to the protection of the law. The statutes and the crimes which shall always be under the jurisdiction of the Court must reflect this equal dignity shared by all.

Those who are responsible for commission of the most heinous crimes which offend the conscience of the human family, must be made to accept their responsibility in accordance with the universal norms. It is indeed the right of the society to manifest, by means of law and juridical structures, those objective and eternal values which protect and order the human family and human dignity.[7] Antonia Cassese remarked that, "The basic problem is the protection of the human dignity, which may sound like an empty slogan but it's a reality. The existence of the International Criminal Tribunals shows that the international community is given the right to respond to so many crimes committed in the world, namely a response that is not based on revenge, on simply execution or punishment, but on a proper trial. That is what the Americans rightly suggested in 1945 when the British were reluctant to set up a tribunal in the Nuremberg and thought it would be sufficient to execute some 10,000 senior German officers, and the Americans rightly said the proper response is to put them on the trial to see who is guilty, who is innocent and then to sentence the guilty people".[8]

The International Criminal Court is destined to flesh out and bring into effect those peremptory norms of International Law which safeguard such fundamental values as human dignity, the respect for life and limb of innocent persons, and the protection of ethnic, religious or racial groups. Also, individuals come to play the central role that befits them: it is individuals who constitute the delinquents, the victims or the witnesses, respectively. Perpetrators and victims thus acquire their rightful place in the world community. It is worth emphasizing that the International Criminal Court is more advanced than the European and the Inter-American Human Rights Courts. Unlike those two courts, which are regional in character, the International Criminal Court is universal or at least potentially universal; in addition, it breaks the veil of the State personality, in that it reaches directly to the individuals, either as perpetrators, victims or witnesses. Furthermore, the Statute of the International Criminal Court has swept aside all the traditional immunities national and international, personal and functional those were intended to shield the State officials from outside scrutiny and prosecution. These officials are now openly subject to the most penetrating

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7 Retrieved from *<http://www.ewtn.com/library/CURIA/STATICC.HTM>* last visited on November 5th, 2010 at 11:39 IST. Also see, Totten, Samuel, *Pioneers of Genocide Studies*, Transaction Publishers, New Brunswick, 2002, United Nations Department of Public Information, *United Nation Today*, United Nations Publication, 2008, Uvin Peter, *Aiding Violence: The Development Enterprise in Rwanda*, Kumarian Press, West Hartford, 1998. Waller, James, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford University Press, Oxford, 2002.

8 Retrieved from *<http://www.rnw.nl/international-justice/article/antonio-cassese-protecting-human-dignity>* last visited on 5 November 2010 at 11:24 IST.

international exposure, that which takes place in an international court of law. But, despite of the advance that *the Rome Statute* represents, there is a long way to be followed, especially because all states that make part of the treaty must understand that the International Criminal Court has its basis on the complementary principle, and it is not a violation of sovereignty, but a tool to strengthen national sovereignty.

Another significant and novel feature of the Court is that it was conceived as an instrument for harmonizing national and international criminal justice. This is the first time that an international criminal tribunal has been constructed in this way, though existing International Courts of Human Rights are similarly "subsidiary" to the national courts. Prosecution and punishment of the serious offences against human dignity are still entrusted to the national or the territorial State. Territoriality and Nationality remain central concepts in the international community, although for all their merits they reflect old values: the bonds of blood and territory. Jurisdiction has a broad meaning in the statute and includes the competence of the prosecutor to investigate. The great majority of states wanted the court to have automatic jurisdiction regarding Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression. A few states including the United States, wanted automatic jurisdiction only for genocide, whereas for the other crimes, they preferred some form of a consent regime: either opting in or opting out, or consent on individual cases.[9]

The threat to cut off military aid, coercive actions undertaken recently in the Security Council to get exemption for peace keepers are part of a multi pronged effort by the United States to undermine the international justice. Basing the history of the United States, it is appalling and shameful that India which stands for justice and peace would join hands with the United States. India, known formerly for its policies of non alignment is the only country supporting and assisting the United States to pursue its national interests thereby undermining the interests of humanity as a whole. India is making a grave mistake if it considers her national interests matches with those of the United States.[10]

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9 Robert Melson, *Revolution and Genocide: On the Origins of the Armenian Genocide and the Holocaust*, University of Chicago Press, Chicago, 1996, p. 43, Also see, Michael Charles, *The United Nations and Regional Securities*, Lynne Rienner Publishers, London, 2003, p. 105, Mills Nicholas, *The New Killing Fields: Massacre and the Politics of Intervention*, Basic Books, New York, 2002, p. 68.

10 Alexander Laban, *Genocide: An Anthropological Reader*, Blackwell Publishers, Oxford, 2002, p. 89, Lawrence, *Politics in the United Nation System*, Duke University Press, USA, 1990, p. 89, Eric Leed, *No Man's Land: Combat and Identity in World War I*, Cambridge University Press, England, 1979, p. 250, Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C., 1944, p. 87.

The main objection taken by India at the last stage of the conference was related to the non inclusion of terrorism and the first use of nuclear weapons in the list of crimes. The Indian delegate described terrorism as "the most condemnable form of international crime". It was further pointed that the statute treats the offenses such as murder as an international crime, but refuses to treat the first use of nuclear weapons as an International Crimes. It is ironic that India, which has tabled an amendment in Rome to include the use of Nuclear Weapons as a crime, has signed an impunity agreement with the United States, which in its current strategic posture has stated that it will use nuclear weapons in the face of "surprising developments" even against non nuclear states. India's ratification of the International Criminal Court Treaty is a way of creating an international obligation for criminal acts committed by persons within the country. It is therefore, a high time for India to ratify *the Rome Statute*. With the recent trend of globalization, India cannot afford to have a rigid approach to the concept of sovereignty and blindly cling to die hard nationalism. India's staunch opposition to the creation of any super national body, to which it may have to be accountable, is merely an absolutist version of sovereignty. Its time India realizes that such an approach is rapidly becoming an anachronism.

On 16 October 1998, Senator Augusto Ugarte Pinochet, the former President of Chile, was arrested in London pursuant to a request for his extradition to Spain to face charges for Crimes Against Humanity which had occurred while he was head of the state in Chile. This marked the first time a former head of the state had been arrested in England on such charges, and it was followed by legal proceedings which confirmed that he was not entitled to claim immunity from the jurisdiction of the English Courts for crimes which were governed by an applicable International Convention. Seven months later, on 27 May 1999, President Slobodan Milosevic of the Federal Republic of Yugoslavia was indicted by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia for atrocities committed in Kosovo. This marked the first time that a serving head of state had ever been indicted by an international tribunal. These developments, taking place in a period of less than a year, indicated the extent to which the established international legal order was undergoing a transformation, and the emergence of a new system of 'International Criminal Law'.[11]

The International Criminal Court reflects how the International Humanitarian Law evolved. The Principles it enshrines, the experiences the court may encounter and the continuing development in the field of International Humanitarian and Criminal Law have scope for solutions for some of the above problems to evolve over a period of time. By keeping victim's interests, concerns and rights among its primary objectives, the International Criminal Court Statute

[11] Philippe Sands, *From Nuremberg to the Hague,* Cambridge University Press, London, 2003, p. 10.

is poised to do justice with a human face and help in the healing process and the recovery of the victims, which is and ought to be the ultimate goal. The criminalization of the core international crimes brought about a change of paradigm, a moral revolution in which the value of human life and dignity was placed above ideas, ideologies that justified mass murder and other atrocities. The very prohibition of murder implies an affirmation of the value for human life. This value is further enhanced by the effective punishment of those who committed the specific type of murders on a large scale that constitute core international crimes. The impunity ended with the Nuremberg Trials and through the evolution of global justice that culminated in the creation of the International Criminal Court. This process intensified the protection of human life and dignity. If international criminal justice failed to respect these values, it would contradict its very foundations.

1.3 Human Rights and Human Dignity

An International Criminal Court should exist in order to ensure protection of the dignity of the human person. This dignity is shared by every human person, regardless of his age, race, ethnic origin, status as a combatant or non-combatant, sex or stage in human life, from the unborn to the elderly. As each person shares the human dignity, each person, without exception, is entitled to the protection of the law which such a Court would oversee. The statutes and the crimes which shall must always be under the jurisdiction of the Court must reflect this equal dignity shared by all.

Those who are responsible for violations of the most heinous crimes which offend the conscience of the human family, the crimes which will fall under the jurisdiction of this Court, must be made to accept their responsibility in accordance with the universal norms. It is indeed the right of the society to manifest, by means of law and juridical structures, those objective and eternal values which protect and order the human family and human dignity.[12]

Antonia Cassese remarked that, "The basic problem is the protection of the human dignity, which may sound like an empty slogan but it's a reality. The existence of the international criminal tribunals shows that the international community is given the right to respond to so many crimes committed in the world, namely a response that is not based on revenge, on simply execution or punishment, but on a proper trial. That is what the Americans rightly suggested

[12] Retrieved from *<http://www.ewtn.com/library/CURIA/STATICC.HTM>* last visited on 5 November 2010 at 11:39 IST. Also see, Totten, Samuel, *Pioneers of Genocide Studies*, Transaction Publishers, New Brunswick, 2002, United Nations Department of Public Information, *United Nation Today*, United Nations Publication, 2008, Uvin Peter, *Aiding Violence : The Development Enterprise in Rwanda*, Kumarian Press, West Hartford, 1998. Waller, James, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford University Press, Oxford, 2002.

in 1945 when the British were reluctant to set up a tribunal in the Nuremberg and thought it would be sufficient to execute some 10,000 senior German officers, and the Americans rightly said the proper response is to put them on the trial to see who is guilty, who is innocent and then to sentence the guilty people".[13]

The Universal Declaration on Human Rights was pivotal in popularizing the use of 'dignity' or 'human dignity' in human rights discourses. The statutes of the ad hoc international criminal tribunals and *the Rome Statute* establishing the International Criminal Court have incorporated similar references to outrages upon the personal dignity.[14] The use of 'dignity', beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common under-standing of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and often over the time within the particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. That is one of its significant attractions to both the judges and litigators alike. Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances.[15]

The belief in a core of universal values (peace, respect for human rights, self-determination of peoples) that all members of the international community must respect. In other words, alongside national interests and reciprocal relations among the states, there also exist common interests and concerns that transcend each single state and unite the whole of mankind. Indeed, the need to acknowledge these common interests and concerns has given rise to the notion of

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13 Retrieved from <*http://www.rnw.nl/international-justice/article/antonio-cassese-protecting-human-dignity*> last visited on 5 November 2010 at 11:24 IST.

14 The Agreement for and Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 3, pro-hibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, en-forced prostitution and any form of indecent assault ' ; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Hu-manitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994, Art. 4; Rome Statute of the International Criminal Court, 17 July 1998, Art. 8, prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment.

15 Retrieved from <*http://www.ejil.org/pdfs/19/4/1658.pdf*> last visited on November 5th, 2010 at 11:51 IST. Also see, Sydney Dawson, *The United Nations: A Concise Political Guide,* MacMillan Press Ltd., London, 1995, T. W. Bennett, *Using Children in Armed Conflict: A Legitimate African Tradition; Criminalizing the Recruitment of Child Soldiers,* Pretoria Institute for Security Studies, 1998, Ted Galen, *Delusions of Grandeur: United Nations and Global Intervention,* Cato Institute, Washington, 1997.

community obligations and community rights. These are obligations (for instance, not to attack other States, not to trample upon fundamental human rights of individuals, not to oppress peoples) that each State owes to all other States. By the same token, each State is entitled to demand that all other States respect these obligations, and the basic values they are intended to safeguard, regardless of their national self-interest.[16]

The emergence in the world community of a set of basic values that no one may disregard has resulted in the birth, on a supranational level, of a phenomenon that has been common to all national legal systems since time immemorial: a hierarchy of legal standards, whereby some general rules (known as peremptory norms or *jus cogens*) are of such overarching importance that States are not allowed to deviate from them in their private dealings.In areas other than that of human rights, community rights have been proclaimed, but no institutional mechanism has been established for their implementation. Their vindication is still left to the individual States, which are expected to be motivated by community interests, but unfortunately still tend to be driven by self-interest and are therefore loath to act on the basis of the universal values[17].

The International Criminal Court is destined to flesh out and bring into effect those peremptory norms of international law which safeguard such fundamental values as human dignity, the respect for life and limb of innocent persons, and the protection of ethnic, religious or racial groups. Also, individuals come to play the central role that befits them: it is individuals who constitute the delinquents, the victims or the witnesses, respectively. Perpetrators and victims thus acquire their rightful place in the world community.

It is worth emphasizing that the International Criminal Court is more advanced than the European and the Inter-American human rights courts. Unlike those two courts, which are regional in character, the International Criminal Court is universal or at least potentially universal; in addition, it breaks the veil of the State personality, in that it reaches directly to the individuals, either as perpetrators, victims or witnesses. Furthermore, the Statute of the International Criminal Court has swept aside all the traditional immunities (both national and international, personal and functional) that were intended to shield the State officials from outside scrutiny and prosecution. These officials are now openly subject to the most penetrating international exposure, that which takes place in an international court of law.

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16 See, Niezen, Ronald, *The Origins of Indigenism: Human Rights and the Politics of Identity*, University of California Press, Berkeley, 2003, Power, Samantha, *A Problem from Hell: America and Age of Genocide*, Basic Books, New York, 2002, R. Brett and M. McCallin, *Children the Invisible Soldiers*, Ridda Barnen, Stockholm, 1996, Richard Gardener, *The Future of the United Nations Secretariat*, Pennsylvania State University, Pennsylvania, 1972.

17 Christophe Swinarski, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, ICRC, 1984.

Another significant and novel feature of the Court is that it was conceived as an instrument for harmonizing national and international criminal justice this is the first time that an international criminal tribunal has been constructed in this way, though existing international courts of human rights are similarly "subsidiary" to national courts. Prosecution and punishment of serious offences against human dignity are still entrusted to the national or the territorial State. Territoriality and nationality remain central concepts in the international community, although for all their merits they reflect old values: the bonds of blood and territory.[18]

The threat to cut off military aid, coercive actions undertaken recently in the Security Council to get exemption for peace keepers are part of a multi pronged effort by the United States to undermine the international justice. Basing the history of the United States, it is appalling and shameful that India which stands for Justice and peace would join hands with United States. India, known formerly for its policies of non alignment is the only country supporting and assisting the United States to pursue its national interests thereby undermining the interests of humanity as a whole. India is making a grave mistake if it considers her national interests matches with those of United States.[19]

The main objection taken by India at the last stage of the conference was related to the non inclusion of terrorism and the first use of nuclear weapons in the list of crimes. The Indian delegate described terrorism as "the most condemnable form of international crime". It was further pointed that the statute treats the offenses such as murder as an international crime, but refuses to treat the first use of nuclear weapons as International Crimes. It is ironic that India, which has tabled an amendment in Rome to include the use of Nuclear weapons as a crime, has signed an impunity agreement with the United States, which in its current strategic posture has stated that it will use nuclear weapons in the face of "surprising developments" even against non nuclear states. India's ratification of the International Criminal Court Treaty is a way of creating an international obligation for criminal acts committed by persons within the country. It is therefore, a high time for India to ratify *the Rome Statute*. With the recent trend of globalization, India cannot afford to have a rigid approach to the concept of sovereignty and blindly cling to die hard nationalism. India's staunch opposition

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18 See, Melson, Robert, *Revolution and Genocide: On the Origins of the Armenian Genocide and the Holocaust*, University of Chicago Press, Chicago, 1996, Michael Charles, *The United Nations and Regional Securities*, Lynne Rienner Publishers, London, 2003, Mills Nicholas, *The New Killing Fields: Massacre and the Politics of Intervention*, Basic Books, New York, 2002.

19 See, Laban, Alexander, *Genocide: An Anthropological Reader*, Blackwell Publishers, Oxford, 2002, Lawrence, *Politics in the United Nation System*, Duke University Press, USA, 1990, Leed, Eric, *No Man's Land: Combat and Identity in World War I*, Cambridge University Press, England, 1979, Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, D.C., 1944.

to the creation of any super national body, to which it may have to be accountable, is merely an absolutist version of sovereignty. Its time India realizes that such an approach is rapidly becoming an anachronism.

The International Criminal Court reflects how international humanitarian law evolved. The Principles it enshrines, the experiences the court may encounter and the continuing development in the field of international humanitarian and criminal law have scope for solutions for some of the above problems to evolve over a period of time. By keeping victim's interests, concerns and rights among its primary objectives, the International Criminal Court Statute is poised to do justice with a human face and help in the healing process and the recovery of the victims, which is and ought to be the ultimate goal.

1.4 Conclusion

The criminalization of the core international crimes brought about a change of paradigm, a moral revolution in which the value of human life and dignity was placed above ideas, ideologies that justified mass murder and other atrocities. The very prohibition of murder implies an affirmation of the value human life. This value is further enhanced by the effective punishment of those who committed the specific type of murders on a large scale that constitute core international crimes. The impunity ended with the Nuremberg Trials and through the evolution of global justice that culminated in the creation of the International criminal Court. This process intensified the protection of human life and dignity. If international criminal justice failed to respect these values, inherent in the rights of prisoners, would these values, inherent in the rights of prisoners, it would contradict its very foundations.

WOMEN'S RIGHT TO REPRODUCTIVE HEALTH : SOCIO-LEGAL CRITIQUE ON SURROGACY WITH SPECIAL REFERENCE TO THE UNION TERRITORY OF CHANDIGARH

Dr. Kamaljit Kaur*
Mr. Jishnu M Nair**

> Do not be afraid for I am with you, I will bring your children from east and gather you from the west, I will say to the North, give them up! and to the South, Do not hold them, Bring my sons from far and my daughters from the earth.
>
> Isaiah: 43:5-6

India has become the favoured destination for infertile couples across the globe because of lower cost, lack of regulations and availability of surrogate mothers. Different factors ranging from patriarchy, poverty, lack of livelihoods, need for a biological child to stigmatization of infertility complicate situations on the ground. Debates on the issue tend to focus on more elementary questions like payment to the mother for being surrogate, the age limit and how many times can a woman act as a surrogate? The question on legality of surrogacy contract revolves around the models of rights jurisprudence and regimes of state responsibility. The Former insists on the importance of institution of rights as such approach represents majorities' promise to the minorities that their dignity and equality will be respected the latter addresses the issue of the extent of state intervention to render such contracts as unenforceable and illegal. Thus it is pertinent to analyze the issue and the validity of surrogacy contracts in light of the above mentioned jurisprudential models from both the perspectives.[1]

In ancient Hindu society there existed a practice known as *niyog pratha* wherein a woman who was childless because her husband was impotent was allowed to conceive through her brother in law. The child belonged to the couple and the brother in law had no claim over it. Niyog pradha was surrogate fatherhood and not surrogate motherhood. It was much less complicated, legally and emotionally, surrogate motherhood. The scholars of Islam have pronounced a Fatwa regarding surrogacy, it is considered illegal and

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1 *www.nydailynews.com/news/usworld/2010*

immoral for a woman to carry the child of any man other than the Husband's.[2] The bible promotes the idea of surrogate motherrhood.[3] However as far as the earlier law of Christians are concerned it promotes surrogate fatherhood.[4] The primordial urge to have a biological child of one's own flesh, blood and DNA aided with technology and the purchasing power of money coupled with the Indian entrepreneurial spirit has generated the **"reproductive tourism industry"** estimated at Indian Rupees 25,000 crores[5] (US dollars 5,000 million) today. This comes as a boon to childless couples all round the world. At the same time it raises serious ethical and legal concerns and mirrors the plight of the poor of an underdeveloped country who are willing to sell something as sacrosanct as a women's motherhood.

Countries around the world treat surrogacy in different perspectives. For instance all states in Australia (except Tasmania which bans all surrogacy under the Surrogacy Contracts Act 1993), altruistic (non commercial) surrogacy has only recently become legal. However, in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offence, although the Northern Territory has no legislation governing surrogacy at all and there are no plans to introduce laws on surrogacy into the Northern Territory Legislative Assembly anytime soon.[6] In a developed country like UK no contract or surrogacy agreement is legally binding since 2009. But the compensation must be paid which should only be for the reasonable expenses.[7] In most States in the US, compensated surrogacy arrangements are either illegal or unenforceable. However in California the Supreme Court has held that the gestational surrogate has no parental rights to a child born to her, since a gestational contract is legal and enforceable because the intended mother is the natural mother under the Californian law.[8] Since 1997 ovum and sperm donation is legal in Georgia. In Canada and New Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany and Italy, surrogacy, commercial or not is unlawful. In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." This law made Israel the first country in the world to implement a form of state-controlled

2 *http://www.mukto-mona.com/Articles/kasem/women_hinduism.htm*

3 Genesis 16:2 So she said to Abram, "The LORD has kept me from having children. Go, sleep with my slave; perhaps I can build a family through her."

4 Deuteronomy (5th book of Hebrew bibles chapter 25 verse 5)

5 *http://www.futurepundit.com/archives/007452.html* 228th Law Commission Report

6 "Assisted Reproductive Technology (ART) Glossary". Reproductive Technology Council. *http://www.rtc.org.au/glossary/index.html*. Retrieved 2010-02-03.

7 Brahams D (February 1987). "The hasty British ban on commercial surrogacy". *Hastings Cent Rep* 17 (1): 16–9. doi:10.2307/3562435. PMID 3557939. Section 30 of the Human Fertilization and Embryology Act, 1990

8 *Johnson* v. *Calvert* (1993) 5 CAL 4th 484

surrogacy in which each and every contract must be approved directly by the state.[9] Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates.[10] The numerous restrictions on surrogacy under Israeli law have prompted some intended parents to turn to surrogates outside the country. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangement.[11]

What is it that then prompts India to enact a proposed law to make surrogacy agreements legally enforceable? Is to protect the genetic parents, surrogate mother or the child. In India there is a 126 page document regulating the technologies used in surrogacy. In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued Guidelines in 2005 to check the malpractices of Assisted Reproductive Technology (ART). These national guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 are non statutory, have no legal sanctity and are not binding. Silent on major issues, they lack teeth and are often violated. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are often misused with impunity.

India's surrogacy boom began in January 2004 with a grandmother delivering her daughter's twins. The success flashed over the world literally spawned a virtual industry in the State of Gujarat in India. Particularly in the small town namely„ Anand' today India boasts of being the first country intending to legalise commercial surrogacy to legitimize both intra and inter-country surrogacy which is rampantly abound.

Would-be parents from the Indian Diaspora in the US, UK and Canada and foreigners from Malaysia, UAE, Afghanistan, Indonesia, Uzbekistan, Pakistan besides Nepal are descending on sperm banks and In-Vitro Fertilisation (IVF) centres in India looking for

South Asian genetic traits of perfect sperm donors. Equally, renting wombs is another easy and cheap option in India. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and lack of any law to regulate these practices is attracting both foreigners and Non-resident Indians (NRIs) to sperm banks and surrogate mothers in India. India, surreptitiously, has become a booming

9 Teman, Elly. *Birthing a Mother : The Surrogate Body and the Pregnant Self.* Berkeley: University of California Press (2010).

10 Weisberg, D. Kelly. *The Birth of Surrogacy in Israel.* Florida: University of Florida Press (2005).

11 *http://www.japantoday.com/jp/news/430424KyodoNews*

centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Indian Rupees 25,000 crores (US dollars 5,000 million) today. Clinically called "Assisted Reproductive Technology" (ART), it has been in vogue in India since 1978 and today an estimated 200, 000 clinics across the country offer artificial insemination, IVF and surrogacy.

1.1 Certain Cases

1. In the decision of the Supreme Court on 29 September 2008 in Baby Manji Yamada's case,[12] it was observed that "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: *wombs for rent, outsourced pregnancies or baby farms*". It is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. However, the changing face of law is now going to usher in a new rent-a-womb law as India is set to be the only country in the world to legalise commercial surrogacy. The complicated case of Japanese baby Manji born on 25 July 2008 to an Indian surrogate mother with IVF technology upon fertilization of her Japanese parents eggs and sperms in Tokyo and the embryo being implanted in Ahmedabad, triggered off complex, knotty issues. The Japanese biological parents got divorced and the mother disowned the infant upon its birth in India. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to production and custody of baby Manji Yamada. Her request to the apex court for permission for the infant to travel with her and for issuance of a passport under consideration with the Central Government was directed to be disposed off expeditiously. Following the directions of the Supreme Court dated 29 September 2008, the Regional Passport Office in Jaipur issued an "Identity Certificate" to the baby on 1 November 2008. Thereupon, the grandmother Emiko Yamada flew out to Japan with the baby. However, her citizenship status remained unclear. A pandora's box has opened with a floodgate of questions and issues related to ethics and legality surrounding surrogacy with Japanese baby Manji's case.

2. In another separate case, Israeli gay couple Yonatan and Omer Gher became parents in India on 12 October 2008, when their child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra. It is reported that a 3.8 kilo baby boy was born to them at Hiranandani Hospital in Powai (Mumbai) on 12 October 2008. Reportedly, Yonatan and Omer had been together for the past seven

[12] *Baby Manji Yamada* v. *Union of India (UOI) and Anr.* AIR 2009 SC 84

years and had decided to start a family. But since Israel reportedly does not allow same sex couples to adopt or have a surrogate child, India became their choice to find a surrogate mother. Yonatan and Omer reportedly first came to Mumbai in January 2008 for an IVF cycle when Yonatan is stated to have donated his sperm. Thereafter, they selected an anonymous "mother". Accordingly, the child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra. After the child was born, the gay couple left for Israel with the child on 17 November 2008.

3. Subsequently, in the year 2010, another gay couple, Dan Goldberg and Arnon Angel from Israel to whom twin baby boys were born in Mumbai from an Indian surrogate mother, were stranded in India after the refusal of „The Jerusalem Family Court' to allow a paternity test to initiate the process for Israeli citizenship for the twins. The issue was debated in „The Knesset' (Israeli Parliament) where Prime Minister Benjamin Netanyahu had to intervene so that the infants could be brought to Israel following legal procedures. Ultimately, in appeal, the Jerusalem District Court, accepted the claim that it was in the best interest to hold a DNA paternity test to establish that Dan Goldberg was the father of the twin baby boys Itai and Liron. The DNA samples of Goldberg and the twins were brought to the Sheeba Medical Centre in Israel which established Goldberg as the father of the infants. After being stranded in Mumbai for over 3 months, Goldberg and his twin baby boys returned to Israel in May 2010 after being granted Israeli passports.

4. In *Jan Balaz* v. *Union of India*[13], the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. The court observed: "We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance." The court considered the surrogacy laws of countries like Ukraine, Japan, and the United States. It was also stated in the judgement that there is an extreme urgency to push through the legislation answering all these issues.

5. After a frustrating two year legal battle in India on behalf of their surrogate sons – Nikolas and Leonard – German couple Jan Balaz and Susan Anna Lohald got to go to Germany after the Supreme Court of

[13] SLP No. 3020 of 2009.

India intervened and in a Court hearing on 26 May 2010, the Indian Government agreed to provide them exit permits. The twin babies were born in the State of Gujarat in January 2008 and registered as children born of a foreign couple through an Indian surrogate mother. Upon being declined birth certificates, Jan Balaz moved the Gujarat High Court which ruled that since the surrogate mother is an Indian national, therefore, the children will also be treated as Indian nationals and will be entitled to Indian passports. However, the Government of India challenged this decision stating that the toddlers being surrogate children, they could not be granted Indian citizenship, which rendered the twins stateless as they got neither German nor Indian citizenship. The German authorities had also refused visas to the twins on the ground that German law did not recognize surrogacy as a means to parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter-country adoption process in India, upon which the Indian Government granted exit permits to the German surrogate twins to enable their journey back home to Germany.

The country is facing two unprecedented situations whereby the grant of citizenship to a child born to an Indian surrogate and the issue of an Indian Passport to a child born out of surrogacy has being discussed and decided by the Indian courts but there is no clear cut law on the subject.

1.2 The Position of Indian Law on the Subject of Surrogacy

In India the parties participating in Surrogacy arrangements can be covered under the informal system as they are neither covered nor regulated under the formal system. It is a free trading market, flourishing and thriving in the business of babies.

Surrogacy in UK, USA and Australia costs more than US Dollars 50,000 whereas advertisements on websites in India give varying costs of about US Dollars 10,000 besides offering the services of egg donors and surrogate mothers.

The law commission has stated in 228th Law Commission Report[14]

- Surrogacy arrangements should be governed by Conract amongst the parties which will contain all the terms requiring the consent of the surrogate mother to bear a child, agreement of the Husband and other family members for the same medical procedures of artificial insemination, reimbursement of all, reasonable expenses for carrying child, to full term, willingness to handover the child born to the

[14] *www.lawcommissionofindia.com*

commissioning parents etc.

- A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and the subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.

Child adoption in India is a complicated issue. Genuine adoptive foreign and NRI would be parents too are pitted against an insurmountable wall. It is over burdened with knotty legal processes and complicated lengthy procedures for those who want to give a new home and a new life to reported 12 million Indian orphans. Even though the Indian Constitution ordains it to be a sovereign, socialist, secular, democratic republic, 60 years of Independence have not given a comprehensive adoption law applicable to all its citizens, irrespective of the religion they profess or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). Resultantly, those who cannot by law adopt and can be appointed only as guardians under personal Indian laws, turn to options of IVF clinics or rent surrogate wombs. It is in this perspective that India now needs to adopt another law to turn to actual reality, the dreams of those who live abroad rather than turning to unhappy and some times unethical practices.

A silent revolutionary change is fast heralding a new dawn in matter of inter-country adoptions. However, the plethora of Indian laws, does not improve the plight of 12 million orphaned children in India who need adoptive parents. The Guardian and Wards Act (GWA), 1890 permits guardianship and not adoption. The Hindu Adoption and Maintenance Act (HAMA), 1956 does not permit

non-Hindus to adopt a Hindu child. Requirements of immigration have further hurdles even after adoption. Should law not change because these children need adoptive parents? May be the urge to be a parent has now taken over in the form of "embryo adoption" wherein fertilized sperms and eggs developed into an embryo are successfully implanted in Indian clinics and nurtured by foreign mothers in their homeland ensuring hassle free adoption of Indian embryos without complicated procedures. Technology has overtaken law. Time is now ripe for Indian laws also to legitimize adoptions. It must be pointed out here that the laws would only be successful in achieving their ends if and only if an international viewpoint is visibly reflected. Society has engineered changes. Indians whether NRIs, OCIs or PIOs are all Indians and must get the first benefit of adopting Indian children. In the interest of the children and justice to the child ,intercountry adoptions legislations needs to be enacted so that adoption can be alternative to surrogacy arrangements particularly wherein out of both the partners

1.3 Empirical Study in the Union Territory of Chandigarh

Empirical study was carried out in the UT of Chandigarh to study various. Important issues relating to women's reproductive health and welfare of the Child. The opinion of lawyers, doctors, law students and the general public was sought. An analysis of the study is as follows:

- On a question relating to governance of IVF(In-vitro fertilization) clinics by laws or guidelines the legal opinion pointed to the fact that legislation is the best way out rather than any guidelines.
- On the question,whether the embryoligts,physician or clinics should do what is best for children or parents all the doctors stated that the reproductive health of the parent is of primary importance reiterating the importance of right to reproductive health surprisingly the doctors were equally divided in favor of parents and children.
- When asked about the acceptable unit for a child born through IVF as one father and one mother or any patient going through IVF the majority opinion was in favor of the institution of marriage.
- On a question with respect to the maximum age for women who choose to use donor eggs the safe age as suggested by doctors should not be more than 40 years.
- On a question relating to availability of sex selection doctors and lawyers were totally in contrast.The correct opinion was that of the doctors as the declining sex ratio in India calls for a no to sex selection.
- The new Assisted Reproductive Technology (Regulation) Bill & Rules, 2010, legalises commercial surrogacy, stating that the surrogate mother may receive monetary compensation for carrying the child in addition to health-care and treatment expenses during pregnancy.Both the

couple or individual seeking surrogacy through the use of Assisted Reproductive

- Technology, and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.
- The surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of commissioning parent/s.
- The prescribed age-limit for a surrogate mother is between 21- 35 years. The proposed Bill also states that no women shall act as a surrogate mother for more than five children including her own.
- Single persons, men or women or single parents, unmarried couples can also have children using a surrogate mother. In case of a single man or a woman, the baby will be his
- /her legitimate child. A child born to an unmarried couple using a surrogate mother and with the consent of both the parties shall be their legitimate child.
- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.

1.4 Analysis of the Art Bill and Rules 2010

In a phenomenal exercise to legalise commercial surrogacy, The Assisted Reproductive Technology (Regulation) Bill & Rules – 2010[15], a draft bill prepared

[15] The proposed Bill which is called an Act "to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto" provides the constitution of a National Advisory Board for Assisted Reproductive Technology, comprising of members not exceeding 21, whose functions are confined to promoting the cause of reproductive technology. The salient details are:

- The new Assisted Reproductive Technology (Regulation) Bill & Rules, 2010, legalises commercial surrogacy, stating that the surrogate mother may receive monetary compensation for carrying the child in addition to health-care and treatment expenses during pregnancy.
- Both the couple or individual seeking surrogacy through the use of Assisted Reproductive Technology, and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.
- The surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of commissioning parent/s.
- The prescribed age-limit for a surrogate mother is between 21- 35 years. The proposed Bill also states that no women shall act as a surrogate mother for more than five children including her own.
- Single persons, men or women or single parents, unmarried couples can also have children using a surrogate mother. In case of a single man or a woman, the baby will be

by a 12 members committee including experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare, Government of India has been posted online recently for feedback. This Bill, earlier also floated in 2008 for comment, is stated to be an Act to provide for a national frame work or the Regulation and Supervision of Assisted Reproductive Technology and matter connected therewith or incidental thereto as a unique proposed law to be put before the Indian Parliament. Abetting surrogacy, it legalizes commercial surrogacy stating that the surrogate mother may receive monetary compensation

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his /her legitimate child. A child born to an unmarried couple using a surrogate mother and with the consent of both the parties shall be their legitimate child.

- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.
- A foreigner or foreign couple not resident in India or an NRI individual or couple seeking surrogacy in India shall appoint the local guardian legally responsible for taking care of the surrogate child during and after pregnancy.
- The party seeking surrogacy must ensure and establish to the ART clinic that the party would be able to take the child born through surrogacy outside India to the country of the party's origin or residence as the case may be.
- A child born out of surrogacy shall be the legitimate child of both the parties or of the single man or woman as the case may be. The birth certificate will contain the name or names of the genetic parent or parents (as the case may be) who sought such use. If parties get divorced or separated, the child shall be the legitimate child of the couple. The birth certificate of a child born through the use of Assisted Reproductive Technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.
- If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.
- Foreigners or NRIs coming to India seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy till the child is delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking surrogacy must ensure and establish through proper documentation that the country of their origin permits surrogacy and that the child born through surrogacy in India will be permitted entry in the country of their origin as a biological child of the commissioning couple /individual. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obliged to take the child and be free to hand over the child to an adoption agency. In case of adoption or the legal guardian having to bring up the child in India, the child will be given Indian citizenship.
- Surrogacy be recommended for patients for whom it is medically impossible / undesirable to carry a baby to term.
- ART clinic must not advertise surrogacy arrangements. The responsibility should rest with the couple or a semen bank.
- ART clinic must ensure that the surrogate woman satisfies all the testable criteria (sexually transmitted or communicable disease that may endanger the pregnancy).
- A prospective surrogate mother must be tested for HIV and shown to be a seronegative for this virus just before embryo transfer

and will relinquish all parental rights. Single parents can also have children using a surrogate mother. Foreigners, upon registration with their Embassy can seek surrogate arrangements. It also legalizes commercial surrogacy for single persons, married or unmarried couples stating that the surrogate mother shall enter into a legally enforceable surrogacy agreement.[16] The 2010 draft bill states that foreigners or NRIs coming to India to rent a womb shall have to submit documentation confirming that their country of residence recognizes surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from an Indian mother.

Before the law is put on the anvil, it needs a serious debate. Ethically, should women be paid for being surrogates? Can the rights of women and children be bartered? If the arrangements fall foul, will it amount to adultery? Is the new law a compromise in surpassing complicated Indian adoption procedures? Is the new law compromising with reality in legitimising existing surrogacy rackets? Is India promoting "reproductive tourism"? Does the law protect the surrogate mother? Should India take the lead in adapting a new law not fostered in most countries? These are only some questions which need to be answered before we drape the new law. Let us delve into our hearts and with introspection decide carefully. Are we looking at a bane or a boon? We should not wait for time to test it. We should decide now. The surrogacy bill needs to be discussed threadbare.

Despite the legal, moral and social complexities that shroud surrogacy, there is no stopping people from exploring the possibility of becoming a parent. Women who rent their womb for surrogate pregnancy are slowly shaking off their inhibition and fear of social ostracism to bring joy to childless couples.

The proposed Bill which is called an Act "to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto" provides the constitution of a National Advisory Board for Assisted Reproductive Technology, comprising of members not exceeding 21, whose functions are confined to promoting the cause of reproductive technology. The salient details are:

- A foreigner or foreign couple not resident in India or an NRI individual or couple seeking surrogacy in India shall appoint the local guardian legally responsible for tak ing care of the surrogate child during and after pregnancy.
- The party seeking surrogacy must ensure and establish to the ART clinic that the party would be able to take the child born through surrogacy outside India to the country of the party's origin or residence as the case may be.
- A child born out of surrogacy shall be the legitimate child of both the parties or of the single man or woman as the case may be. The birth certificate will

[16] Mr. Anil Malhotra, Advt. Punjab and Haryana High Court

contain the name or names of the genetic parent or parents (as the case may be) who sought such use. If parties get divorced or separated, the child shall be the legitimate child of the couple. The birth certificate of a child born through the use of Assisted Reproductive Technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.

- If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.
- Foreigners or NRIs coming to India seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy till the child is delivered to the foreigner or foreign couple or t he local guardian. Further, the party seeking surrogacy must ensure and establish through proper documentation that the country of their origin permits surrogacy and that the child born through surrogacy in India will be permitted entry in the country of their origin as a biological child of the commissioning couple /individual. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obliged to take the child and be free to hand over the child to an adoption agency. In case of adoption or the legal guardian having to bring up the child in India, the child will be given Indian citizenship.
- Surrogacy be recommended for patients for whom it is medically impossible/ undesirable to carry a baby to term.
- ART clinic must not advertise surrogacy arrangements. The responsibility should rest with the couple or a semen bank.
- ART clinic must ensure that the surrogate woman satisfies all the testable criteria (sexually transmitted or communicable disease that may endanger the pregnancy).
- A prospective surrogate mother must be tested for HIV and shown to be a seronegative for this virus just before embryo transfer.
- The draft bill states that foreigners or NRI'S coming to India to rent a womb will have to submit two documents, one confirming the country of residence recognizes surrogacy as legal and second it will give citizenship to a child born through the agreement from an Indian mother.

1.5 Anomalies in the Art Regulation Bill 2010 and Suggestions

- The bill tends to regularize and promote the interest of the providers of these technologies rather than regulate and monitor current practices. The bill should be concentrating on the protecting the interest of the woman and the child.
- The bill is inadequate in protecting and safeguarding the rights and health of women who undergo these procedures.
- The bill takes some steps to regulate the process of surrogacy in the

context of growing numbers of foreign couples coming to India. The equally important issue of Indian women also becoming egg donors for foreign couples is not taken into consideration.

- The Bill has neither designated, nor authorised nor created any Court or Judicial Forum to resolve issues which will require adjudication in problems arising out of Surrogacy, ART and Surrogacy Agreements. This is a very big lacunae in the Bill. There has to be a Designated or a Defined Court as in the Hindu Marriage Act or the Guardian and Wards Act which has to be vested with the authority in law to decide disputes arising under the proposed law.
- The National and State Advisory Boards are only authorities who will promote ART Technology, Surrogacy Arrangements and related procedures. The proceedings of these Boards have been deemed to be "Judicial Proceedings" before Civil Courts for limited purposes. There is no designated Court, Judicial Officer or Judge appointed, created or nominated for this purpose. Therefore, how far these Advisory Boards will be able to perform the "Judicial Proceedings" "deemed to be a Civil Court" remains to be seen.
- The bill making commercial surrogacy legal prohibits the use of the egg of the surrogate mother for attaining pregnancy. This implies that an infertile couple will have to look for a surrogate as well as an egg donor. Further a woman with a healthy reproductive system (surrogate) will be subjected to a complicated hazardous and expensive procedure like In Vitro Fertilization (IVF) rather than Intra Uterine Insemination (IUI). Right to health that has been guaranteed under the Article 21 of the Indian Constitution which is infringed has to be protected.
- The legislation is self contradictory when it comes to protecting the anonymity of the surrogate. The document while insisting on the number of measures to be taken to ensure the anonymity of the surrogate states that the surrogate mother should register under her own name for the purpose of medical treatment and provide the name of the couple for whom she is acting as surrogate. If the legislation makes it mandatory for the surrogate to disclose her identity then it is unclear as to how her privacy and anonymity will be maintained. This aspect needs to be seriously addressed.
- As of now, in the case of foreigners or non-Hindu couples, single parents or gay parents, they can only claim guardianship of a child under the GWA in respect of children born out of surrogacy arrangements. The adoption process can take place only in the foreign parent's country of nationality or permanent residence as the case may be. This is because the HMGA and HAMA do not allow any adoption proceedings to non-Hindus and thus any foreign non-Hindu parent cannot invoke HAMA/HMGA for adoption proceedings in India. Unless, these Indian enactments are amended or

a new provision is enacted, adoption may be difficult for non-Hindu couples or foreigners.

- In case the intended couples are NRI'S or foreigners, the legislation makes provision to appoint a guardian to be legally responsible for taking care of the surrogate during the gestation period till the child is delivered to the foreigner or the foreigner couple but there is no clarity on who can be the local guardian and guardians exact responsibility. Also the role of the local guardian in case of any mishap to the surrogate or the child does not find a mention in the legislature. This needs to be addressed.
- Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of Section 9 of The Indian Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardian and Wards Act for seeking an order of appointment for a declaration to be declared as the Guardian of the surrogate children.
- Under Section 10 of the Indian Contract Act, 1872 all agreements are contracts, if they are made by free consent of parties competent to contract, are for a lawful consideration, are with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. Thereafter, under Section 9 CPC, it can be the subject of a civil suit before a Civil Court to establish all /any issues relating to the surrogacy agreement and for a declaration/injunction for the reliefs prayed for.
- The legal parentage has not being discussed where the intended couple no longer want the child, split up, pass away or abandon the child.
- The bill states that woman may act as a surrogate for three successful births in her lifetime including a maximum of three attempts of pregnancy for a particular couple. This states the number of time she can undergo the IVF cycles to a high figure, thus jeopardizing her physical and mental health. Along similar lines the bill allows a women to donate her eggs six times in life at intervals of three months which can again be hazardous for the women but an important aspect of the maximum number of eggs that can be retrieved in each IVF cycle is still left untouched in the legislation. Thereby completely leaving in the hands of the ART Clinics to decide on this. Therefore this will lead to exploitation of the surrogates.
- Surprisingly semen banks have been made an important player in the ART industry and are supposed to provide donor semen but also donor oocytes and surrogate. Egg or ooocyte retrieval from a donor unlike semen collection is a complicated process and calls for sophisticated equipment as well as expertise. The process of equipping the semen banks for these procedures is not clear. The legislation is silent on the

regulation of semen banks inspite of giving them important roles.[17]

- Other issues, which have now cropped up for opinion are as to whether a single or a gay parent can be considered to be the custodial parent of a surrogate child. As of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. Japanese Baby Manji Yamada's case (JT 2008 (11) SC 150) and the Israel gay couples case who fathered the child in India are clear examples to establish that this is possible. Under para 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of children born through ART (which were the basis of the claim in the Japanese baby's case in the Supreme Court), this claim can be made. However, only in a petition for guardianship under GWA and / or in a suit for declaration in a Civil Court, the exclusive custodial rights can be adjudicated by a court of competent jurisdiction upon appreciation of evidence and considering all claims made in this regard.
- What would be the status of divorced biological parents in respect of the custody of a surrogate child. Essentially, this is a question which will require determination in accordance with the surrogacy agreement between the parties. There would be apparently no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a court of competent jurisdiction.
- Would biological parent/s be considered the legal parent of the children? In answer to this question it can be stated that the biological parents would be considered to be the legal parents of the children by virtue of the surrogacy agreement executed between the parties and the surrogate mother. Under para 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of the child born through ART, it is stated that "a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Even in the 2010 Draft Bill and Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman shall be the legitimate child of the couple man or woman as the case may be.
- Disputes concerning custody which come before the courts should be decided according to the principle of paramount importance of the welfare of the child.
- In the event that a surrogate decides that she wishes to keep the baby the court should decide the issue of parental rights in accordance with the best interest test much like that which is employed in divorce cases.

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[17] Dr. Kanwal D.P. Singh. 'Surrogacy in India'

- In the interest of the women and children born out surrogacy arrangements, all countries should come together and decide on a common solution to the issue of surrogacy.

Every child when born brings with it the hope that God is not yet disappointed with man

-Rabindranath Tagore

SELECTION OF SEX OF OFFSPRING : AN ANALYSIS OF ITS METHODS AND LEGALITY

Census 2011 showed that India's child-sex ratio had dipped to 914 girls as against 927 per 1,000 boys recorded in 2001 Census — the worst dip since 1947[1].

Anil Trehan*

1.1 Introduction:

Sex selection is the attempt to control the sex of the offspring to achieve a desired sex. It can be accomplished in several ways, both pre- and post-implantation of an embryo, as well as at birth. It has been marketed under the title family balancing.

Sex determination refers to the mechanisms employed by organisms to produce offspring that are of two different sexes. Sex selection means choosing the sex of a future child, either before or after conception. In most of the world, it is used to promote the birth of boys, which exacerbates discrimination against girls and women. Prenatal screening followed by sex-selective abortion is still the primary means of ensuring sons, and has created lopsided sex ratios in countries such as India and China. New technologies such as sperm sorting and pre-implantation genetic diagnosis (PGD), which provide additional ways to select sex, are being openly promoted in the United States.

Sex selection raises concerns about exacerbating sex discrimination and violence against women, and normalizing the "selection" and "design" of children. The use and marketing of sex selection technologies are largely unregulated in the United States. Although the ongoing attacks on abortion rights complicate efforts to address even pre-pregnancy methods, a number of countries—including Canada, Germany, and the United Kingdom—prohibit "social" sex selection without affecting abortion rights.

In many cultures, male offspring are desired in order to inherit property, carry on family name, to provide support for parents in old age.

A 2009 study at the University of Ulster found that having sisters, as compared to brothers, can enhance the quality of life of an adult.

Evidence suggests couples in the United Kingdom tend to pick sons and daughters in roughly even numbers[2].

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1 *www.providence.edu.com.* visited on 1 February 2012.

1.2 An Analysis

An analysis of Census 2011 by the Union health ministry on the eve of the crucial meeting of the Pre-conception and Pre-natal Diagnostic Techniques Act's (PC & PNDT Act) Central Supervisory Board (CSB) has shown that the hideous crime against a girl child has become more prevalent among families in rural India.

India has about 35,000 ultrasound clinics. Earlier, studies had said about 5-7 lakh girls a year, or 2,000 girls a day go missing in India due to female feticide. Census 2011 showed that India's child-sex ratio had dipped to 914 girls as against 927 per 1,000 boys recorded in 2001 Census - the worst dip since 1947.

Consider Delhi, where sex selection was common among the urban population. Census 2011 says Delhi's rural child-sex ratio (CSR) fell by 41 points against just two points in urban areas. West Bengal's rural CSR dipped by 11 points compared to five points in urban areas.

Rural CSR in Jammu and Kashmir fell by 97 points as against 19 points in urban CSR. Uttarakhand saw a similar trend. Rural CSR in the hill state fell by 24 points against a dip of 8 points in urban areas.

In Chhattisgarh, rural CSR fell by 10 points against six points in urban areas. Madhya Pradesh too recorded a massive drop in rural CSR - minus 22 points against a fall of 12 in urban settings.

Rajasthan's rural CSR fell by 28 points against 18 points in urban areas, while Sikkim's CSR fell by 14 points among its rural families. Nagaland saw a massive tumble of its rural CSR: it fell by 37 points, while urban areas saw an increase by 40 points. Maharashtra saw a 36-point fall in its rural CSR against a 20-point dip in urban areas. Andhra Pradesh, Lakshadweep and Goa also recorded a fall in their rural CSR.

A Union ministry official said, "Overall across India, child-sex ratio fell by 15 points in rural India as against 4 points in urban India. Earlier, sex selection was more an urban phenomenon. Now, the trend has clearly shifted to rural areas. One of the main reasons for this is portable ultrasound machines. Operators of these machines and doctors realized that the market was in rural India."

This is why India has decided to ban unregistered "on call" portable ultrasound machines.

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[2] "US Clinic Offers British Couples The Chance To Choose The Sex of Their Child", *The Times*. 22 August 2009 at p. 4.

Agenda number V of the CSB meeting says, "Amendment with regard to regulation of portable ultrasound equipment to curb their widespread misuse".

An increasing number of portable ultrasound machines are being registered as being "on call", or they could be taken anywhere anytime to conduct an ultrasound test.

Delhi was the first state to register such "on-call" portable ultrasound machines, a trend that has spread across the country. An official added, "Such portable machines are being taken in two-wheelers to conduct the sex determination of an unborn child."

India has short-listed 18 states that have been worst affected. The nation is turning on the heat on institutes involved in providing a quick crash course on using ultrasound machines for jobs in "sex-selection shops".

In January 2010 the Chinese Academy of Social Sciences (CASS) showed what can happen to a country when girl babies don't count. Within ten years, the academy said, one in five young men would be unable to find a bride because of the dearth of young women—a figure unprecedented in a country at peace.

The number is based on the sexual discrepancy among people aged 19 and below. According to CASS, China in 2020 will have 30m-40m more men of this age than young women. For comparison, there are 23m boys below the age of 20 in Germany, France and Britain combined and around 40m American boys and young men. So within ten years, China faces the prospect of having the equivalent of the whole young male population of America, or almost twice that of Europe's three largest countries, with little prospect of marriage, unable to a home of their own and without the stake in society that marriage and children provide. The country's sex ratio of newborns stood at 119.45 boys to 100 girls in 2009, according to the latest figure announced by the National Bureau of Statistics (NBS) in February. Experts have suggested more effective action against illegal pregnancy gender scans and discrimination of women so as to curb the sex ratio imbalance in China.

1.3 History and Folk Beliefs

There are a wide variety of social sex selections methods which have not been demonstrated to be effective. Because even implausible and ineffective methods have a "success" rate of 50%, many continued to be recommended by word of mouth.

As early as 330 BC, Aristotle prescribed the ligation (tying off) of the left testicle in men wishing to have boys[3].

Some people believe that timing conception according to astrological charts can influence a baby's sex, though there is no evidence to support this or any other timing method. A 13th century Chinese conception chart purports to be able to identify the sex of the baby before birth.

Sperm sorting utilizes the technique of flow cytometry to analyze and 'sort' spermatozoa. During the early to mid 1980s, Dr. Glenn Spaulding was the first to sort viable whole human and animal spermatozoa using a flow cytometer, and utilized the sorted motile rabbit sperm for artificial insemination. Subsequently, the first patent application disclosing the method to sort "two viable subpopulations enriched for x- or y- sperm[4]" was filed in April 1987 as US Application Serial Number 35,986 and later became part of US Patent 5,021,244; and the patent included the discovery of haploid expression (sex-associated membrane proteins, or SAM proteins) and the development of monoclonal antibodies to those proteins. Additional applications and methods were added, including antibodies, from 1987 through 1997[5]. At the time of the patent filing, both Lawrence Livermore National Laboratories and the USDA were only sorting fixed sperm nuclei[6], after the Application Serial Number 35,986 patent filing a new technique was utilized by the USDA where "sperm were briefly sonicated to remove tails[7]". USDA in conjunction with Lawrence Livermore National Laboratories, 'Beltsfield Sperm Sexing Technology' relies on the DNA difference between the X- and Y- chromosomes[8]. Prior to flow cytometric sorting, semen is labeled with a fluorescent dye called Hoechst 33342 which binds to the DNA of each spermatozoon. As the X chromosome is larger (i.e. has more DNA) than the Y chromosome, the "female" (X-chromosome bearing) spermatozoa will absorb a greater amount of dye than its male (Y-chromosome bearing) counterpart. As a consequence, when exposed to UV light during flow cytometry, X spermatozoa fluoresce brighter than Y- spermatozoa. As the spermatozoa pass through the flow cytometer in single file, each spermatozoon is encased by a single droplet of fluid and assigned an electric charge corresponding to its chromosome status (e.g. X-positive charge, Y-negative charge). The stream of X- and Y- droplets is then separated by means of

3 Hoag, Hannah, *Cherry-picking from the dish of life*. Drexel University Publication (2009).
4 US Patent 5,021,244, column 9, Sorting Sperm; http visited on 02 February 2012.
5 US Patent 5,021,244, column 5, Sorting Sperm; http visited on 02 February 2012.
6 Johnson LA, Flook JP, Look MV, Pinkel D, "Flow Sorting of X and Y Chromosome-Bearing Spermatozoa into Two Populations" (1987).
7 Johnson LA, Flook JP, Look MV "Flow Cytometry of X and Y Chromosome-Bearing Sperm for DNA Using an Improved Preparation Method and Staining with Hoechst" (1987).
8 Garner DL, Seidel GE. "History of commercializing sexed semen for cattle". *Theriogenology* 69 (7), April 2008, p. 88.

electrostatic deflection and collected into separate collection tubes for subsequent processing[9].

Recently, a study published in 2006 indicated that mothers with toxoplasmosis have a significantly higher sex ratio of boys to girls. This has been discussed in connection with the manipulation hypothesis of parasites[10]. Another study found a link between sex and the diet of the mother, but this may be due to statistical chance, and has yet to be confirmed.

1.4 Methods of Sex-Determination

There are two major tests of Sex-determination in a broader sense and these are as under:

- Pre-Implementation Test and
- Post-Implementation Test.

1.4.1 Pre-Implementation Test

Two major types of pre-implantation methods can be used for social sex selection. Both of them are based on actively rendering the second sex chromosome to be either an Y chromosome (resulting in a male), or an X chromosome (resulting in a female) [11].

1.4.1.1 The Ericsson Method

The Ericsson method, first applied in a clinical setting in the 1970s by Dr. Ronald J. Ericsson, uses higher concentrations of sperm of the desired sex to increase the likelihood of conceiving that gender. The method has a 70-72% success rate for boys and a 69-75% success rate for girls.[4] Currently, approximately 50 gender selection centers in the United States use the Ericsson Method for artificial gender selection[12].

The Ericsson method separates male and female sperm by passing them through a column filled with blood protein, human serum albumin. As the sperm enter the human serum albumin, the differences in mass between the X and Y chromosomes manifest as the lighter male sperm push deeper into the protein than the females dragged down by the weight of the extra "leg" of the X sex

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9 Seidel GE, Garner DL,"Current Status of Sexing Mammalian Spermatozoa". *Reproduction* (2002).

10 Flegr, Jaroslav; Sulc, J; Nouzová, K; Fajfrlík, K; Frynta, D; Flegr, J, "Women infected with parasite Toxoplasma have more sons" (2007).

11 Dugdale, David, M.D. "Chromosome", 19 February 2009.

12 Silverman, M.D., Ph.D., Andrew Y. "Gender Selection Ericsson Method". Retrieved 13 February 2011.

chromosome[13]. This tiny difference creates separate layers of concentrated male and female sperm. The layers of gender-selected sperm are of higher concentrations but not pure. This lack of purity explains the 30% chance of gender selection failure of the Ericsson method[14].

1.4.1.2 IVF/PGD Technique

After ovarian stimulation, multiple eggs are removed from the mother. The eggs are fertilized in the laboratory using the father's sperm in a technique called in vitro fertilization (IVF). "In vitro" is Latin for "within glass". Fertilized eggs are called embryos. As the embryos develop through mitosis, they are separated by sex. Embryos of the desired gender are implanted back in the mother's uterus.

Prior to fertilization with IVF, the fertilized eggs can be genetically biopsied with pre-implementation genetic diagnosis (PGD) to increase fertilization success[15]. Once an embryo grows to a 6-8 cell size, a small laser incision in the egg membrane (zona pellucida) allows safe removal of one of the cells[16]. Every cell in the embryo contains an identical copy of the genome of the entire person. Removal of one of these cells does not harm the developing embryo[17]. An embryologist then studies the chromosomes in the extracted cells for genetic defects and for a definite analysis of the embryo's gender[18]. Embryos of the desired sex and with acceptable genetics are then placed back into the mother. The IVF/PGD technique is favored over the Ericsson method because of the stricter control of the offspring gender in the laboratory. Since only embryos of the desired sex are transferred to the mother, IVF/PGD avoids the small likelihood present in the Ericsson method of an undesired sperm fertilizing the egg. Gender selection success rates for IVF/PGD are very high. The technique is

13 Dmowski, WP; Gaynor, L; Rao, R; Lawrence, M; Scommegna, A. "Use of albumin gradients for X and Y sperm separation and clinical experience with male sex preselection." *Fertility and Sterility* (1979).

14 Chen, M.; Guu, HF; Ho, ES. "Efficiency of sex pre-selection of spermatozoa by albumin separation method evaluated by double-labeled fluorescence in-situ hybridization". *Human Reproduction* (1979).

15 Pehlivan, T; Rubio, C; Rodrigo, L; Romero, J; Remohi, J; Simón, C; Pellicer, A. "Impact of preimplantation genetic diagnosis on IVF outcome in implantation failure patients". *Reproductive Biomedicine Online* (2003).

16 Boada, M.; Carrera, M.; De La Iglesia, C.; Sandalinas, M.; Barri, P. N.; Veiga, A. "Successful use of a laser for human embryo biopsy in preimplantation genetic diagnosis: report of two cases."*Journal of Assisted Reproduction and Genetics* (1998).

17 Rice, Mary, "Children born after PGD as healthy as those born after conventional IVF treatment". European Society of Human Genetics. Retrieved 12 February 2012.

18 Bredenoord, Annelien; Dondorp, Wybo; Pennings, Guido; De Die-Smulders, Christine; Smeets, Bert; De Wert, Guido, "Preimplantation genetic diagnosis for mitochondrial DNA disorders: ethical guidance for clinical practice". *European Journal of Human Genetics* (2009).

recommended for couples who will not accept a child of the undesired gender[19][20].

4.1.1.3 Timing Methods

Timing methods aim to affect the sex ratio of the resultant children by having sexual intercourse at specific times as related to ovulation, but have shown no influence on the sex of the baby[21].

- The Shettles method, first formally theorized in the 1960s by Landrum B. Shettles, proposes that sperm containing the X (female) chromosome are more resilient than sperm containing the Y (male) chromosome. The method advocates intercourse two to four days prior to ovulation. By the time ovulation occurs, the cervix should contain a higher concentration of female sperm still capable of fertilization (with most of the male sperm already dead). Intercourse close to ovulation, on the other hand, should increase the chances of conceiving a boy since the concentration of Y sperm is being higher at the height of the menstrual cycle[22].

- The Whelan method is an "intercourse timing" method that advocates the opposite of the Shettles method. The Whelan method suggests intercourse four to six days prior to ovulation to increase likelihood of fertilization by male sperm[23].

4.1.1.4 Sperm Sorting

Sperm sorting is an advanced technique that sorts sperm "in vitro" by flow cytometry. This shines a laser at the sperm to distinguish X and Y chromosomes and can automatically separate the sperm out into different samples. The technology is already in commercial use for animal farming[24]. It is currently being trialed on humans in the US under the trademark Microsoft; it claims a 90% success rate but is still considered experimental by the FDA[25][26].

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19 Kanavakis, E; Traeger-Synodinos, J., "Preimplantation genetic diagnosis in clinical practice". *Journal of Medical Genetics* (2002).

20 Silverman, M.D., Ph.D., Andrew Y. "Determine baby gender with IVF/PGD". Retrieved 12 February 2011.

21 Wilcox AJ, Weinberg CR, Baird DD, "Timing of Sexual Intercourse in Relation to Ovulation. Effects on the Probability of Conception, Survival of the Pregnancy, and Sex of the Baby" (1995).

22 Gray, RH "Natural family planning and sex selection: fact or fiction?" *American journal of obstetrics and gynecology*. (1991).

23 Shettles, L.; D.M. Rorvick, "How Do They Compare?" In Martin J. Whittle and C. H. Rodeck. *How to Choose the Sex of Your Baby: The Method Best Supported by Scientific Evidence*. New York: Random House. p. [1]. ISBN 978-0767926102, (2006).

24 ABC Landline, Dairy Farms Use Gender Selection Process (2006).

25 "Microsoft Information". Microsoft, Inc... Retrieved 13 February 2011.

26 Mayor S "Specialists Question Effectiveness of Sex Selection Technique" (2001).

4.1.2 Post-Implementation Test

4.1.2.1 Prenatal Diagnosis

Amniocentesis and/or ultrasound is used to determine sex of an offspring, leading to subsequent sex-selective abortion of any offspring of the unwanted sex. The more recent technique of fetal blood now makes it possible to test the sex of the fetus from the seventh week of pregnancy[27][28].

4.1.2.2 Post-Birth

Sex-selective infanticide - Killing children of the unwanted sex. Though illegal in most parts of the world, it is still practiced.

Sex-selective child abandonment - Abandoning children of the unwanted sex. Though illegal in most parts of the world, it is still practiced.

Sex-selective adoption - Placing children of the unwanted sex up for adoption. Less commonly viewed as a method of social sex selection, adoption affords families that have a gender preference a legal means of choosing offspring of a particular sex.

1.5 Ethical Concern

The application of these techniques to humans creates moral and ethical concerns in the opinion of some, while the advantages of sensible use of selected technologies are favored by others.

In contrast, in an interview study, sex-selection technology providers generally argued that sex selection is an expression of reproductive rights, was initiated and pursued by women, and was a sign of female empowerment that allowed couples to make well-informed family planning decisions, prevented occurrences of unintended pregnancy and abortion, and minimized intimate partner violence and/or child neglect. In contrast, primary care physicians questioned whether women could truly express free choice under pressure from family and community. In addition, primary care physicians voiced the concerns that sex selection led to invasive medical interventions in the absence of therapeutic indications, contributed to gender stereotypes that could result in child neglect of the lesser-desired sex, and was not a solution to domestic violence[29].

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27 Devaney SA, Palomaki GE, Scott JA, Bianchi DW "Noninvasive Fetal Sex Determination Using Cell-Free Fetal DNA". (2011).

28 Roberts, Michelle, "Baby Gender Blood Tests 'Accurate'". *BBC News Online,* 10-08-2011.

29 Puri S, Nachtigall RD, " The Ethics of Sex Selection: A Comparison of the Attitudes and Experiences of Primary Care Physicians and Physician Providers of Clinical Sex Selection Services" (2010).

1.6 Legality

Sex selection is officially prohibited in China, but the Chinese government admits that the practice is widespread, especially in rural areas of China and among lawless groups such as ghettoized migrant workers in cities (despite denials by the government-sponsored studies)[30].

Social sex selection is illegal in India. To ensure this, prenatal determination of sex through ultrasound is also illegal in India. These laws are instituted to combat the prevalent practice of sex-selective abortion. However, these laws have generally failed to be effective in rural areas and, despite education efforts, sex-selective abortion continues to be widely practiced there.

Sex selection is legal in most of the world, and it is practiced particularly in Western countries, but is more limited in Eastern countries, such as India or China. There is fertility tourism from the United Kingdom to the United States for sex selection, because preimplantation genetic diagnosis (PGD, a potential expansion of IVF), which can be used for sex selection, is prohibited in the UK, except when it is used to screen for genetic diseases, while the laws in the US are more relaxed in this subject[31].

1.7 Concluding Remarks and Remedial Measures

Sex-selective abortions have negated reductions in female mortality though improved care with an estimated 80 million missing females in India and China. To combat the practice of female foeticide and infanticide in the country through misuse of technology, done surreptitiously with the active connivance of the service providers and the persons seeking such service, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted on September 20, 1994 by the Government of India. The Act was amended in 2003 to improve regulation of technology capable of sex selection and to arrest the decline in the child sex ratio as revealed by the Census 2001 and with effect from 14.02.2003, due to the amendments, the Act is known as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The main purpose of enacting the PC & PNDT (Prohibition of Sex Selection) Act, 1994 has been to:

- Ban the use of sex selection techniques before or after conception
- Prevent the misuse of pre-natal diagnostic techniques for sex selective abortions

30 *http://fsi.stanford.edu/news/gender_imbalance_in_china* visited on 14 February 2012.

31 'US clinic offers British couples the chance to choose the sex of their child', The *Time*, 22 August 2009.

- Regulate such techniques Stringent punishments have been prescribed under the Act for using pre-conception and pre-natal diagnostic techniques to illegally determine the sex of the foetus.

The appropriate Authorities at the District and State levels are empowered to search, seize and seal the machines, equipments and records of the violators. The sale of certain diagnostic equipment is restricted only to the bodies registered under the Act.

The Government has also taken various steps to support implementation of the legislation, including through constitution of a National Inspection & Monitoring Committee (NIMC), Central and State Supervisory Boards, capacity building of implementing agencies, including the judiciary and public prosecutors and community awareness generation through PRIs and community health workers such as Auxiliary Nursing Midwives (ANMs) and Accredited Social Health Activists (ASHAs). The Census 2001 figures reveal that the child sex ratio for the age group of 0-6 years is comparatively lower in Punjab (798), Haryana (819), Chandigarh (845), Delhi (868), Gujarat (883), Himachal Pradesh (896) and Rajasthan (909) as compared to the national average of 927 girls per thousand boys. Though there is no established causal relationship between adverse sex ratio and spurt in cases of sex related crimes, this could be one of the factors resulting in some forms of violence against women.

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted to curb the malpractice of identifying and terminating the foetus. The stated purpose of the legislation is to prohibit the use of prenatal diagnostic techniques for the determination of the sex of a foetus, which results in "female foeticide". This is described as "discriminatory against the female sex" and "affecting the dignity and status of women." The PCPNDT Act regulates all pre-natal diagnostic techniques and prohibits sex selection per se. Act prohibits all technologies of sex selection, which would also include the new chromosome separation techniques.

1.8 Is Total Ban Necessary?

With the blanket prohibition of sex selection under the PCPNDT Act, it is not possible in India to use pre-natal diagnostic techniques to abort foetuses whose sex (and the family history) indicate a high risk of certain sex-linked diseases or to choose a foetus whose sex is less susceptible to certain sex-linked diseases. This contradicts the Medical Termination of Pregnancy Act 2002 which permits abortion of a foetus that is at a risk of being born with serious physical or mental disabilities. While it is legally permissible to abort a foetus at risk of serious physical or mental disabilities, it is not permissible to select foetus of a sex which is less likely to suffer from a sex-linked disease. Legal and ethical

questions involved in sex selection for elimination of sex-linked diseases are open for debate.

The two laws related to abortion create ethical dilemmas for doctors as well as pregnant women. The MTP Act contains general provisions but also restricts abortion due to contraceptive failure to married women alone. This effectively gives doctors the power to provide or refuse abortions depending on their personal views. While the MTP Act permits abortion of a foetus with serious abnormalities, the PCPNDT Act does not permit the identification of the sex of the foetus for the purpose of eliminating sex-linked disorders.

1.8 Remedial Measures

Some remedial measures are as under:

- Rules and laws should be made at community level (Micro level Planning).
- Public protest mainly by women can be effective for uplifting the low status of women that is the real cause of female foeticide (Dowry system, Decling sex ratio, domestic abuse, Mortality Rate, Economic & Financial Contribution etc.
- Empowerment of women: Keeping the above indicators in mind campaign should be designed to promote awareness about issues affecting women the worst.
- Legislation that looks after the needs of affective women must make more avenues where women can seek help when needed.
- Human Right Commission of India should work coordinately with women and health commission of India for effective implementation of the laws relating female foeticide.
- Micro level monitoring of sonography and auditing of form 'F', completion of its 24 Columns must be done at regular intervals.
- Sting operation must be performed in order to check the implementation of laws.
- Awareness through workshop, Seminars, Discussion group at local community centers, media, etc. with the remedial measures at NGOs level must be done.
- Child marriage must be stopped.

NGO should involve in formation, functioning and capacity building of mahila mandal and self help group (S.H.G) to facilitate them for a systematic protest against female foeticide.

HISTORY AND ROOTS OF CORPORATE INSOLVENCY LAW

Parvinder S. Arora*

1.1 Introduction

In a society that facilitates the use of credit by Companies, there is a degree of risk that those who are owed money by a firm will suffer because the firm has become unable to pay its debts on due date. The primary purpose of insolvency law is to replace the free-for-all attendant upon pursuit of individual claims by different creditors with a statutory regime in which creditors rights and remedies are suspended, wholly or in part, and a mechanism is provided for the orderly collection and realization of assets and the distribution of net realizations of the assets among the creditors in accordance with statutory scheme of distribution.[1]

Corporate Insolvency Law is now a separate body of law from personal bankruptcy law. Historically the Law relating to Corporate Insolvency developed separately from the Law relating to Insolvency of Individuals, although these have shared historical roots. The Law of Insolvency in India, like most other laws, owes its origin to English law. Before the British came to India, there was no indigenous law of Insolvency in India.[2] The Common Law of England did not deal with the subject of bankruptcy. The Bankruptcy Law was purely a creature of Statute.[3] English Law has developed parallel systems for dealing with insolvent Individuals and insolvent Companies. In the United Kingdom, unlike the United States, the term "bankruptcy" is reserved for the insolvency of Individuals and Companies as such do not go into bankruptcy.[4] In American law the term "bankruptcy" is used in the sense of legally declared insolvency which applies alike to Individuals and Corporations; whereas, in English Insolvency Law there is no such generic term. Individuals become bankrupt, or go into bankruptcy; Companies go into Liquidation, or Winding-Up.[5] This dichotomy mirrors the separate provisions of earlier times for insolvent traders (called bankruptcy law) and for other insolvent individuals (called insolvency law).

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1 Royston Miles Goode, *Principles of Corporate Insolvency Law*, 3rd edn., Sweet & Maxwell, p.1.

2 Mulla, *Law of Insolvency in India*, pp. 1-2, para. 2 (1958).

3 Cf. Jowitt, *Dictionary of English Law*, Vol. I, p. 205, right (1959).

4 Fiona M. Tolmie, *Corporate and Personal Insolvency Law*, 2nd edn., Cavendish Publication, p.7.

5 *Supra* note 1, p. 1.

1.2 Concept of Bankruptcy - Origin

Tracing the concept of debt forgiveness back all the way to the Old Testament, we see Moses referencing a Jubilee, or Holy Year to take place once every fifty years. During that year, it was decreed that all debts would be eliminated and those Israelites that had sold themselves into slavery would be freed.[6] Deuteronomy 15:1-2 increases the frequency of these debt forgiveness periods to every seventh year.

Moving to ancient Greece, the notion of debt forgiveness was unknown. If a man owed a debt that he was unable to pay, his entire family including any servants he may own became debt slaves. Some regions did protect such slaves from bodily harm and, further, limited the debt slavery period to a maximum of five years. Bankruptcy is also documented in the Far East. According to al-Maqrizi, the Yassa of Genghis Khan contained a provision that mandated the death penalty for anyone who became bankrupt three times.

It is speculated that the word's origin actually stems from the French expression *banque route*, table trace. But the most widely-accepted theory on the origin of the word "bankruptcy" comes from a mixing of the ancient Latin words *bancus* (bench or table) and *ruptus* (broken). The Ponte Vecchio, literally Old Bridge, is a famous medieval bridge over the Arno, in Florence, Italy, noted for having shops (mainly jewelers) built along it. It is said that the economic concept of bankruptcy originated here: when a merchant could not pay his debts, the table on which he exposed (the "*banca*") was physically broken ("*rotta*") by soldiers, and this practice was called "*bancarotta*" (broken table).[7]

1.3 Roots of Bankruptcy Law

Bankruptcy law originally derives from the Law Merchant, a medieval body of law of Common European usage whose origin could be traced back to Roman law[8] via the mercantile laws of Italy. Professor Harry Rajak, in his inaugural lecture at the University of Sussex in March 1999, gave a riveting account of the laws in the Ancient World, mentioning notably the Roman Law of Twelve Tables[9], which provided that a debtor who failed to make good payment to his creditors could be '*in parti secanto*' (cut into pieces) or sold into slavery. It was also common for insolvency to result in the loss of civil rights.

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6 See Leviticus 25: 10-13

7 *Supra* note 4, p.7

8 *Cession bonorum* (the assignment of property for the benefit of creditors), *distraction bonorum* (the forced liquidation of assets), *remisso* and *dilation* (compositions with creditors).

9 Lex XII *Tabularum*, Traditionally dated 451-450 BC, were the first known Codification of Roman Law.

1.4 Insolvency Law in the early Republic

The first known law dealing with debt collection in Rome was found in the Twelve Tables (circa 450 BCE). These were written by a Commission of Noblemen, the *Decemviri Consulari* ("the ten Consuls"). The early treatment of debt as described in The Twelve Tables was severe. Under the Twelve Tables, after the grace period, the remedy involved a "laying on of hands" by the creditor, the *manus injectio*.[10] If the debtor contested the debt he could send a *vindex* or representative to court, but if no defence were given, or if the debtor did not prevail in court, an order of the *praetor* issued whereby the debtor was assigned over to the creditor(s) in *addictio* for a period of 60 days.[11] The unfortunate debtor so "addicted" during this interim period was brought into the public market place, or before the *praetor*, or both, on successive occasions in the hope that friends, family or others could be persuaded to come to the debtor's financial assistance.[12] If no adequate assistance were forthcoming the debtor was either sold as a slave *trans Tiberium* ("across the Tiber")[13] or executed.[14]

In early Republican Rome, there also developed a kind of voluntary mortgage upon the debtor's person, or upon the person of his guarantor, called *nexum* which permitted the creditor, on default of an obligation, to seize the defaulter's body and hold him as a slave. *Manus injectio* and addiction seems in early law to have resulted in permanent enslavement. The *nexi* were abolished as the result, we are told, of a particularly egregious example of creditor "lust and cruelty". The historian Livy[15] reports that in 326 BCE. a "usurer", Lucius Papirius, held as *nexus* one Gaius Publilius, a handsome. Reportedly, Gaius spurned the lewd advances of Papirius, despite reminders of his servile status. The scorned Papirius then had the youth "stripped and scourged". "The boy, all mangled with the stripes, broke forth into the street, crying out upon the money-lenders lust and cruelty..."[16] A throng of outraged Romans marched to the Forum and into the Curia, demanding that the Senate change the law. From this was enacted the Lex Poetelia Papiria. This law abolished contracts for servitude as security for

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10 Gaius, *Institutes*, 4.21, Gordon and Robinson trans., Cornell Univ. Press, Ithaca (1988).

11 See *Andrew Stephenson, A History of Roman Law.*, Little Brown & Co., at pp. 483-84 (1912).

12 William Smith, *A Dictionary of Greek and Roman Antiquities*, with Explanatory Article by George Long at pp. 795-798, Nexum, London (1875).

13 In the early period there seems to have been a reluctance to sell a Roman citizen as a slave within the boundaries of the city of Rome. See A. Watson, *Rome of the XII Tables*, at p. 81, Princeton Univ. Press (1975).

14 See also W. Buckland, *A Textbook of Roman Law From Augustus to Justinian*, at p. 638, Cambridge Univ. Press (1921).

15 Titus Livius, *Roman Historian, Circa* 64 BCE to CE 17, Known to the Modern World as "Livy".

16 Livy: *History of Rome*, VIII, 27 Loeb Translation (1926).

defaulted debt and provided that thereafter only the debtor's goods could be mortgaged as security for debt.[17]

Commencing in about the second century BCE, an alternative remedy developed which bears a resemblance to our involuntary bankruptcy. Upon default of any debt an action by a creditor or creditors could be filed before the praetor for an order permitting seizure of the debtor's goods, the *bonorum venditio*.[18] This appears to have involved a public edict or *proscribere* of the praetor for creditors to meet and appoint one of their number as *curator bonorum*[19] to perform much as trustees do today in seizing the debtor's property. After at least a thirty day holding period the *curator bonorum* would sell all of the debtor's property *en bloc* to the highest bidder, proceeds to be (eventually) divided among creditors according to their due.[20] If the proceeds of estate assets were insufficient to pay all debt, the debtor remained liable for any deficiency.

The next stage of development in Rome's laws dealing with debt adjustment was greatly influenced by the cross currents of social upheaval, political turmoil and civil war which dominated the decades from the end of the dictatorship of Sulla, Circa 78 BCE, to Julius Caesar's death in 44 BCE. Although public office was nominally unpaid, it was expected of all patricians and equites to hold periodic magistracies within the government of the Roman Republic, known as the *cursus honorum* ("sequence of offices") with ascending levels of *dignitas*. Attainment and retention of office was directly tied not only to a citizen's *existimatio* (reputation) and to his *fides* (trustworthiness, faith) but also to his wealth. To qualify for the Senate, a man must have attained a minimum census of 400,000 sesterces[21] and he could be banned from the senate by the censors if his properties were too heavily mortgaged, as this put his fides in question.[22]

Even so it was not unusual for Roman aristocrats to borrow heavily from each other, or from professional moneylenders, in order to finance games to coax votes from the *plebs urbana*, to place strategic bribes, or even to lend to other ambitious and influential Romans to strengthen their web of alliances. A good

17 See Stephenson, *Supra* note 11, at p. 505.

18 E. Metzger, *A Companion to Justinian's Institutes*, at p. 120, Cornell Univ. Press (1998).

19 The curator bonorum could, apparently also be appointed from outside the creditor body. Dig.42.8.4 (Ulpianus On the Edict, Book LXV).). Dometius Ulpianus (Ulp.) (circa 170-223 CE) known as Ulpian was a Roman jurist of Syrian extraction who wrote approximately 80 books of commentary on the Juris Civilis and is the most quoted of all jurists in the Digests

20 Max Kaser, *Das Römische Privatrecht*, Vol. 2, at p. 441, München (1975).

21 Professor Crook asserts the minimum for membership at property worth was not less than 1,000,000 sesterces, but this number may pertain to a later period. Crook, *supra* note 15, at p. 64.

22 Catherine Edwards, *The Politics of Immorality in Ancient Rome*, at p. 185, Cambridge Univ. Press (1993); M.W. Frederiksen "Caesar, Cicero and the Problem of Debt", *The Journal of Roman Studies*, Vol. LVI (1966) at p. 128.

example is Julius Caesar. Caesar borrowed heavily from other nobles, notably Marcus Lucinius Crassus, to finance his aedilian games in 65 BCE.

In 49 BCE the Republic was plunged into civil war as Caesar's legions crossed the Rubicon and marched on Rome while Pompey and his senatorial allies retreated to the south. Financial instability followed the political turmoil. Debtors and creditors could be found simultaneously on both sides of the Pompey/Caesar divide. But Caesar was careful not to embrace the more radical debt cancellation proposals. Instead he issued a decree that assessors should make valuations of land at pre-war prices and that creditors were obliged to accept these in settlement of debt, in the expectation that prices would eventually return to normal levels.[23] To help alleviate the liquidity crisis, Caesar discouraged hoarding by renewing an older law forbidding the holding of more than 60,000 sesterces in gold or silver coin. In about 47 or 48 BCE Caesar cancelled all rents accrued for one year to up to two thousand sesterces, cancelled all interest that had accrued since the civil war began, and further directed that any payments previously made on account of interest since the war would be added to the pre-war valuations of properties when given in settlement of debt. In all it was reckoned these measures accounted for about a one fourth forgiveness of debt.[24]

Some of the principal aspects of Caesar's temporary measures became permanently embodied in a new law which is the ancestor of much of our modern bankruptcy jurisprudence, the *Lex Julia de bonis cendenis* ("Lex Julia"). This law is also known by the description of it as a remedy, *cessio bonorum* ("cession" or "assignment" of goods). But unlike the decoction agreements, *cessio bonorum* did not depend on the voluntary forbearance of creditors. Instead, this was a proceeding in view to compel debt relief, although apparently the granting of relief by the praetor was discretionary. In return for assignment of all of his properties to a curator, except an amount necessary to sustain some minimal livelihood, the debtor would become exempt from actions in *addictio* against his person and free from any future actions on the debts. Moreover, the debtor who filed a *cessio bonorum* proceeding would avoid *infamia*. Just as in modern bankruptcy proceedings, a prerequisite to relief in *cessio bonorum* was a showing that the debtor was in good faith, that is, absence of fraud.

With the advent of *cessio bonorum* we can see how far the law had evolved from its harsh beginnings under the Twelve Tables. Debtors were seen as having basic rights as human beings to dignity, peace and some minimal subsistence, irrespective of ability to repay their debts. Debtors who filed

23 Julius Caesar, *The Civil War*, III, 1 Trans. J.M. Carter, Rise & Phillips, Warminster (1993).

24 Suetonius, *The Lives of the Caesars*; The Deified Julius, 42 J.C. Rolfe Trans., Harvard Univ. Press (1920).

cessio bonorum proceedings in good faith could expect that liability for past debts would be confined to past assets and only so much of future assets as became available above the subsistence level. While we cannot speak of a "discharge" as we understand it in modern terms, under *cessio bonorum* creditors were considerably restrained. The absolutist approach of the earlier era had given way to the more humane view. This fundamental change of attitude underlies all modern approaches to insolvency law.

1.5 The Earlier Insolvency Laws in England

The earliest insolvency laws in England and Wales were concerned with individual insolvency (bankruptcy) and date back to medieval times.[25] Earlier common law offered no collective procedure for administering an insolvent's estate but a creditor could seize either the body of a debtor or his effects- but not both.[26] Creditors, moreover, had to act individually, there being no machinery for sharing expenses. When the person of the debtor was seized, detention in person at the creditors' pleasure was provided for. Insolvency was thus seen as an offence little less criminal than a felony.[27] The debtors developed methods of avoiding imprisonment; these included flight from the kingdom and, since entry into someone's house for the purpose of, executing civil process was forbidden, 'keeping house'.

The first measures of collective insolvency law were introduced into English law by statute in Tudor times. The idea that creditors might act collectively was recognized in 1542 with the enactment of the first English Bankruptcy Act which dealt with absconding debtors and empowered any aggrieved party to protect the seizure of the debtor's property, its sale and distribution to creditors, 'according to the quantity of their debts.'[28] This was the introduction of the *pari passu* principle into English law.

The 1542 Act, however, did not provide for rehabilitation in so far as it did not discharge the bankrupts liability for claims that were not fully paid. Elizabethan legislation of 1570 then drew an important distinction between traders and others, including within the definition of a bankrupt only traders and merchants: those who earned their living by 'buying and selling', probably because it was this category of people who were most likely to have incurred credit and whose

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25 Cork Report Ch. 2, paras 26-34 - The Cork Committee, chaired by Kenneth Cork produced the Report of the Review Committee on Insolvency Law and Practice, Cmnd 8558 (1982). The central argument of the report was that too many companies were simply left to die, when they could be revived, saved or brought to a close in a more orderly way. Cork advocated that the law should encourage a "rescue culture", to restore companies back to profitability, which would be in the longer term interests of creditors.

26 See generally J.Cohen, 3 Jo of L Hist 153, (1982).

27 L.F. Fletcher, *The Law of Insolvency*, 2nd edn., p. 6, Sweet & Maxwell London (1996).

28 *Id.*, at p. 7.

assets were of a nature that made it relatively easy to abscond with them. Non-traders could not be declared bankrupt.

For centuries the bankruptcy legislation was confined to traders, on the theory that while traders might become insolvent through accident or misfortune, such as loss of a ship, the insolvency of a private individual was almost invariably due to his or her profligacy. This preferential treatment was probably due to the feeling that traders were the only people liable to become insolvent through no fault of their own.

From the 16th century onwards, there were those who recognized the futility of imprisoning insolvent debtors in an attempt to extract payment from them. The Privy Council[29] in the 16th and early 17th century and subsequently, Parliament[30] found *adhoc* means of relieving insolvent debtors from imprisonment. Also, the public opinion became increasingly disturbed by the imprisonment of debtors, both by the harsh treatment[31] and by the inefficiency of the system.

The Elizabethan legislation of 1570 was amended and enlarged by Statutes of 1604 & 1623. Discharge was first introduced in 1705, probably in an attempt to persuade insolvent debtors to co-operate with the bankruptcy process.[32] This Statute relieved the traders of liability for existing debts. This concession was almost immediately restricted with the requirement in 1706 of the approval of 4/5th of the creditors, the Commissioners and the Lord Chancellor for discharge. The requirement of creditor approval for discharge was not abolished until 1842 and gave undue power to vindictive minority creditors. In 1842, the power to grant discharge was given to Court; there followed a period in which British Parliament tried to distinguish those who should be granted discharge from those who did not deserve it.[33]

The definition of a trader was extended both by Statute and by judicial interpretation, but by the mid-19th century it still excluded large numbers of those engaged in business activity including, for example, farmers and builders. During the 19th century attitude towards trade credit and risk of default changed. A depersonalization of business and credit was encouraged by British Parliament's enactment of the Joint Stock Companies Act 1844 together with

29 By arranging composition with creditors of a debtor.

30 By Acts of British Parliament releasing imprisoned insolvent debtors, for example, the 1759 Act commonly called the Lord's Act.

31 Graphically described in various Victorian novels, particularly by Charles Dickens

32 The 1705 Act also permitted the debtor to keep some of his/her assets for the first time, probably also to encourage cooperation. At the same time as this amelioration of the consequences for the compliant bankrupt, the penalties on those found guilty of fraud became harsher with the introduction of the death penalty for the fraudulent debtor who became bankrupt.

33 In 1849, for example, three categories of bankrupt were identified: the virtuous, the unfortunate and the spendthrift. It was not until 1976 that discharge became almost automatic.

notions that credit might be raised on an institutional basis and capital through stocks rather than both of these dealt with as matters of individual standing.

The distinction between traders and non-traders was finally abolished in 1861 when bankruptcy proceedings became available for non-traders.[34] Soon afterwards the Debtors Act, 1869 abolished imprisonment for debt. The Act of 1861 was later replaced by a series of bankruptcy statutes culminating in the Bankruptcy Act, 1914 (UK), which codified bankruptcy law and remained in force until 1986, when it was repealed by the Insolvency Act, 1985.

1.6 The birth of Corporate Insolvency Law

The Bankruptcy law never applied to Companies. In the 14th century, the word 'Company' was adopted by certain merchants for trading overseas. By the end of 16th century Royal Charters granted monopoly of trade to members of the company over a certain territory. These companies were called regulated companies. By the end of the 17th century all these companies or merchant guilds and many regulated companies which the Crown had incorporated, meanwhile had established permanent fixed capitals represented by shares which were freely saleable and transferable. In 1834, the Trading Companies Act, 1834 was passed empowering the Crown to confer by Letters Patent any of the privileges of incorporation except limited liability. The Chartered Companies Act, 1837 re-enacted the Act of 1834 providing for the first time that personal liability of members might be expressly limited by the Letters Patent to a specified amount per share.

The birth of Corporate Insolvency Law goes back no further than 1844, when British Parliament enacted the Joint Stock Companies Act, 1844, the first general Act to provide for the incorporation of a company as a distinct legal entity, albeit with unlimited liability for its members.[35] The Joint Stock Companies Act 1844 was followed by the Joint Stock Companies Winding-Up Act, 1844, which enabled a company to be made bankrupt in the same way as an individual[36] and the Joint Stock Companies Winding-Up Act, 1848 & 1849, conferring general winding up jurisdiction on the Court of Chancery, a jurisdiction overlapping that of the Bankruptcy Court until the passing of the Joint Stock Companies Act, 1856 and Joint Stock Companies Winding-Up (Amendment) Act, 1857, which

34 The Bankruptcy Act 1861 (UK), Section 69.

35 Prior to the Joint Stock Companies Act, 1844, a company could be incorporated only by Charter from the Crown or by Special Act of Parliament, which might or might not leave the members of the company liable for its debts.

36 See the Joint Stock Companies Winding-Up Act, 1844 (UK), Section. 1.

left the Court of Chancery with exclusive jurisdiction and thus formally separated bankruptcy and winding up procedure.[37]

But Corporate Insolvency Law initially piggy-backed on bankruptcy law and did not assume a truly distinctive status until the advent of limited liability for the members of a Company with the enactment of the Limited Liability act 1855; and the first modern Company law statute was the Companies Act, 1862, which contained detailed winding up provisions, including a provision for *pari passu* distribution.[38]

Thus the law dealing with Company insolvencies developed independently from the law on the bankruptcy of individuals. By the late 19th century two separate bodies of law governed individual and corporate insolvency matters and these were dealt with by different Courts, under different procedural rules[39] and offering different substantive remedies. The Insolvency Act, 1986 (UK) was passed on the Cork report consolidating the Insolvency Act, 1985 and Insolvency Provisions of Companies Act, 1985 (except in relation to the disqualification of directors).

1.7 The advent of Insolvency Law in India

The known Economic history of India begins with the Indus Valley civilization. The Indus Valley civilization, the first known permanent and predominantly urban settlement that flourished between 2800 BC to 1800 BC boasted of an advanced and thriving economic system. Its citizens practiced agriculture, domesticated animals, made sharp tools and weapons from copper, bronze and tin and traded with other cities. But there is no recorded evidence of indebtness and its treatment.

Some ancient sources such as Laws of Manu VIII and Chanakya's *Arthashastra* have rules for lawsuits between two or more sreni (a sort of business entity) and some sources make reference to a government official (Bhandagarika) who worked as an arbitrator for disputes amongst sreni from at least the 6th century BC onwards.

Manusmriti is perhaps the oldest and the most important and earliest metrical work of the Dharmaśāstra textual tradition of Hinduism. The study of Manusmirti[40] reveals a mechanism for recovery of debts from a debtor and imposition of fine for falsely denying a debt. These also reveal that the only way

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37 See L.C.B.Gower, *Principles of Modern Company Law*, 6th edn., Chap. 2 and literature there cited, Sweet and Maxwell (2003).

38 See Royston Miles Goode, *Supra* note 1, p. 5.

39 See *supra* note 27, p. 12.

40 Extracts from The Laws of Manu. Translated by G. Bühler. Vol. XXV of *The Sacred Books of the East*, F. Max Müller (editor), pp. 253-327, Oxford: Clarendon Press (1886).

of discharge of debtor was by payment of the debt, though a person of low caste had an option to repay the debt by personal labour. There was also a provision to recover the debts from the Surety or the family of a deceased debtor.

During the Maurya Empire (c. 321-185 BC), there were a number of important changes and developments to the Indian economy. It was the first time most of India was unified under one ruler. With an empire in place, the trade routes throughout India became more secure thereby reducing the risk associated with the transportation of goods. The empire spent considerable resources building roads and maintaining them throughout India. The improved infrastructure combined with increased security, greater uniformity in measurements, and increasing usage of coins as currency enhanced trade. During this time, the Arthasastra ("Science of the State") was written by the Chanakya, an adviser to Chandragupta Maurya. The Arthasastra has a scant reference to recovery of debts and what would happen in case of inability of a debtor to repay the debt.[41]

In modern India, the necessity for an insolvency law was first felt in the three Presidency-towns of Calcutta, Bombay and Madras where the British carried on their trade. The earliest rudiments of insolvency legislation can be traced to Sections 23 and 24 of the Government of India Act, 1800 (39 and 40 Geo. III c.79), which conferred insolvency jurisdiction on the Supreme Court at Fort William and Madras and the Recorder's Court at Bombay. These Courts were empowered to make rules and orders for granting relief to insolvent debtors on the lines intended by the Act of the British Parliament called the Lord's Act passed in 1759 (32 Geo. II c.28).[42]

The next step was taken in 1823 when Statute 9 (Geo. IV c.73) was passed, which can be said to be the beginning of the special insolvency legislation in India. Under this Act, the first insolvency courts for relief of insolvent debtors were established in the Presidency-towns. Although the insolvency court was presided over by a Judge of the Supreme Court, it had a distinct and separate existence. The insolvency court was to sit and dispose of insolvency matters as often as was necessary. But the court at Calcutta was to sit at least once a month. The Act of 1828 was originally intended to remain in force for a period of four years, but subsequently legislation extended its duration up to 1848 and also made certain amendments therein.[43]

A further step in the development of insolvency law was taken in 1848 when the Indian Insolvency Act, 1848 (11 and 12 Vic. c. 21) was passed. The Act preserved the distinction between traders and non-traders in certain respects on

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41 See Kautilya. *Arthashastra*. Translated by R. Shamashastry, Chapter XI, *"Recovery of Debts"* in Book III, pp. 187-252, Bangalore: Government Press (1915).

42 Law Commission of India, *Twenty-Sixth Report on Insolvency Laws* (1964), p. 1.

43 See Mulla, *Law of Insolvency in India*, N.M. Tripathi, Bombay (1958), p.16.

the lines of the corresponding Bankruptcy statutes then in force in England. It continued the courts for relief of insolvent debtors established by the Act of 1828 in the Presidency-towns. The Indian High Courts Act, 1861 (24 and 25 Vic. c. 104) abolished the Supreme Courts in the Presidency-towns and in their place the present High Courts were set up. The insolvency jurisdiction in the Presidency-towns was thus transferred from the Supreme Court to the High Court.[44]

The Act of 1848 was in force in the Presidency-towns until the enactment in 1909 of the present Presidency-Towns Insolvency Act, 1909. This Act contained provision for compositions and schemes of arrangement.[45] The distinction between traders and non-traders was abolished. The Act also contained provision for appointment of Special assignees with object to secure for the creditors some control over the proceedings in insolvency, including appointment of a Committee of creditors to supervise insolvency proceedings.[46] A clause was inserted to enable debtors to apply to the Court for a protection order from arrest.[47] The existing criminal jurisdiction of the Insolvency Court was maintained but the procedure to be followed has been outlined.[48]

While there was special insolvency legislation for the Presidency-towns, there was no insolvency law in the mofussil. The main reason for this difference was the absence of any flourishing trade and commerce in the mofussil. In the mofussil for a considerable period the ordinary principle of distributing the sale proceeds pro-rata among the decree-holders after satisfaction in full of the amount due to the attaching decree-holder seems to have prevailed.[49] The first attempt to introduce insolvency law in the mofussil was made in 1877. Some rules were incorporated in the Chapter 20 of the Code of Civil Procedure, 1877, which conferred jurisdiction on the district courts to entertain insolvency petitions and grant orders of discharge. These ruled were re-enacted with certain modifications in Chapter 20 of the Code of Civil Procedure, 1882. But these provisions were limited to cases in which legal proceedings were instituted and judgment obtained. Creditors of a debtor were not entitled to file an insolvency petition. These defects were removed by the Provincial Insolvency Act, 1907[50]. This Act created a special insolvency jurisdiction laying down the conditions under which a debtor could be adjudicated on his own petition or on a petition by a creditor. The Act of 1907 was repealed by the Provincial Insolvency Act,

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44 See *supra* note 97, p. 2.
45 See Presidency-Towns Insolvency Act, 1909, Sections 28 to 32.
46 *Id.*, Part IV and V.
47 *Id.*, Section 25.
48 *Id.*, Part VIII.
49 See the Civil Procedure Code of 1859.
50 Act No. 3 of 1907.

1920[51] which is the Act now in the mofussil. The Act suffered from some defects, but the primary defect was the absence of provisions to sufficiently define the power of Courts to decide questions of law and fact (e.g., a question of title to property) which may arise in insolvency proceedings. This question became subject of conflicting decisions of the Allahabad and Calcutta High Courts. In Nilmoni Choudhary v. Durga Charan Choudhary[52] the Calcutta High Court dissenting from the Allahabad High Court[53] held that the Insolvency Court has not such power, and that a question of title to property should be tried in a separate suit. To terminate this conflicting decision and having regard to the prevailing benami transactions on India and importance of arming Courts with adequate powers for speedy realization of assets in the interest of creditors, a provision[54] was made empowering Insolvency Court to decide all questions arising in insolvency.[55]

Acting on the recommendation of Law Commission,[56] both the Presidency Town Act, 1909 and Provincial Insolvency Act, 1920 were amended by Amending Act, 28 of 1978.[57] However, both these statutes exclude corporations from insolvency proceedings to be conducted under these statutes.[58]

1.8 Corporate Insolvency Law in India

Company Law in India owes its origin to the English Company Law, and hence rightly been called the cherished child of the English parents. Our various Companies Acts have been modeled on the English Acts. The first legislative enactment for registration of Joint Stock Companies was passed in the year 1850 which was based on the English Companies Act, 1844. This Act recognized companies as distinct legal entities but did not introduce the concept of limited liability. The concept of limited liability, in India, was recognized for the first time by the Companies Act, 1857 closely following the English Companies Act, 1856 in this regard. The Act of 1857, however, kept the liability of the members of banking companies unlimited. It was only in 1858 that the limited liability concept was extended to banking companies also. Thereafter in 1866, the Companies Act, 1866 was passed for consolidating and amending the law relating to incorporation, regulation and winding-up of trading companies and other associations, which was based on the English Companies Act, 1862. The

51 Act No. 5 of 1920.

52 22 C.W.N. 704.

53 See *Bansidhar* v. *Kharagjit*, (1915), I.L.R. 37 All. 65.

54 By Introduction of S. 4, in the Provincial Insolvency Act, 1920 on the lines of Section 7, of the Presidency-Towns Insolvency Act, 1909.

55 See Statement of Objects and Reasons of the Provincial Insolvency Act, 1920.

56 See Law Commission of India, Third Report on Limitation Act, 1908.

57 Such Clause was inserted vide Section 9 (2), the Presidency Towns Insolvency Act, 1909 and Section 6(2) of the Provincial Insolvency Act, 1920.

58 The Provincial Act, 1920, S. 8 of the Presidency-Towns Act, 1909, Section 107.

Act of 1866 was recast in 1882 to bring the Indian Company law in conformity with the various amendments made to the English Companies Act of 1862. This Act continued till 1913 when it was replaced by the Companies Act, 1913 following the English Companies Consolidation Act, 1908. Till 1956, the business companies were regulated by this Act.

At the end of 1950, the Government of independent India appointed a Committee under the Chairmanship of Shri H.C. Bhaba to go into the entire question of the revision of the Indian Companies Act, with particular reference to its bearing on the development of Indian trade and Industry. This Committee submitted its report in March 1952. Based on the recommendations of this Committee, the Companies Act, 1956 was passed. This Act, once again largely followed the English Companies Act, 1948.

The Companies Act, 1956, has since provided the legal framework for corporate entities in India. The Companies Act, 1956 provides for law relating to corporate insolvency and inter-alia contains the provisions of winding up of companies.[59]

After a hesitant beginning in the 1980s, India took up its economic reform programme in the 1990s.[60] Equally, a need was felt for a comprehensive review of the Companies Act, 1956. The need for streamlining this Act was felt from time to time as the corporate sector grew in pace with the Indian economy, with as many as 24 amendments taking place since 1956.

In 1981, Reserve Bank of India (RBI) appointed a committee[61], to examine the legal and other problems faced by the banks and financial institutions in rehabilitation of sick industrial units and to suggest remedial measures for effectively tackling the problem of sickness. The committee, in its report stressed the need for comprehensive legislation to deal with the problems of sick industrial units. Following the recommendations of the Tiwari Committee, the Government of India enacted the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA). The Act, inter alia, provided for setting up of the Board for Industrial and Financial Reconstruction (BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR).

In the year 1999, the Government of India set up a High Level Committee headed by Justice V.B. Balakrishna Eradi, a superannuated Judge of Supreme Court of India for remodeling the existing laws relating to insolvency and winding up of companies and bringing them in time with the international

59 See Part VII (Sections 425 to 590)

60 Seven Major Areas of Reforms were identified - viz. (a) Fiscal ; (b) Trade ; (c) Industrial ; (d) Financial ; (e) Agricultural ; (f) Poverty-alleviation; and (g) Human Resource.

61 Committee headed by Sh. T. Tiwari (Chairman, Industrial Reconstruction Corporation of India).

practices in this field. Acting on the report of the Committee[62] the Govt. amended Companies Act in 2002[63], proposing setting up of a National Company Law Tribunal[64] (NCLT) and its Appellate Tribunal[65]. However, the constitutional validity of the amendments for setting up of NCLT was challenged before Hon'ble Madras High Court,[66] which gave its ruling on 30th March, 2004, holding certain provisions as invalid rendering them non operational. The Union Government challenged the verdict in Supreme Court. The Supreme Court has come out with a landmark judgment sanctifying the Constitutional validity of the Companies (Second Amendment) Act, 2002.[67] This paves the way for the Government to go ahead with the setting up of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCALT) to deal exclusively with company cases, including winding up in an expeditious manner. In its unanimous opinion authored by Justice Raveendran, the Court held that the Act which created the National Company Law Tribunal and National Company Law Appellate Tribunal has unconstitutional "defects", which are capable of being "cured" by suitable amendment (presumably a reference to the doctrine of eclipse). The Union Government had recently introduced Companies Bill 2011 in the Parliament, but nothing could be achieved due to the Lokpal debate. Consequently, the operation of this institutional structure has not yet been notified.

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62 See, the Committee completed its work and submitted its Report to the Prime Minister on August 31, 2000.

63 The Companies (Second Amendment) Act, 2002.

64 A New Part IB (Section 10 FB to 10 FP) has been incorporated by the Companies (Second Amendment) Act, 2002.

65 A new Part IC (Section 10 FQ to 10 GF) has been incorporated by the Companies (Second Amendment) Act, 2002.

66 In *Thiru. R. Gandhi President, Madras Bar Association* v. Union of India (UOI), represented by its Secretary, Department of Company Affairs, [2004] 120 Comp Cas 510 (Mad).

67 See *Union of India* v. *R.Gandhi, President Madras Bar Association* 2010 (3) CTC 517; [2010] 100 SCL 142; MANU/SC/0378/2010.

NEW DIMENSIONS IN PRISON REFORMS : A MICRO MACRO APPROACH

Dr Geeta Joshi*

> To live in prison is to live without mirrors. To live without mirrors is to live without the self.
>
> .....Atwood, Margaret Eleanor

Of all the powers of government; the power to incarcerate is second only to the power to take a life.[1] Imprisonment affects every aspect of an inmate's life and implicates fundamental rights even after the sentence has been served. From times immemorial, incarceration of man has been considered as the despicable punishment. The dark dungeons of yesteryears have given way to hi- tech prisons. But even then today the famous words of Oscar Wilde hold true :

> We who live in prison, and in whose lives there is no event but sorrow, have to measure time by throbs of pain, and the record of bitter moments.

The dehumanizing conditions of a prison merely accentuate the appalling misery of an incarcerated person. It is often a depiction of two contrasting facets: one showing that the convict as a dreaded criminal who is just too reluctant to change, and the other demonstrating hordes of innocent masses caught in a crime jam by an archaic criminal justice system. Whether prisons are abodes of hell, epitomes of depravation and misery or they are huge fortified walls of concrete with abundant space for song and dance where there is no trace of disease and filth as portrayed by vested interests, is a matter of debate. And it is never ending!

An appraisal of policies of prison administration shows that there remains much to be done. The prisoner is still a forgotten entity a mere scum of the earth and lowest on the priority of reforms. However under the huge clamour of human activists and NGOs the statutory authorities had to arise from their slumber and perforce reconsider the prison administration and to make it less dehumanizing and to respect the human rights of a prisoner.

The general conception of a prisoner, the inhabitant of this doomed place called the prison, is -constantly being watched, uniformed, and having his head shaved, the prisoner has exchanged his name for a number; a person whose ego is

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1 Cf. U.S. CONST. Amend. XIV, (prohibiting deprivation of "life , liberty, or property, without due process of law")

"thoroughly squashed and trampled"; a person who surrenders to the despair of prison routine.

What is always the same about prisons, therefore, is what they make of their prisoners. The system is ingeniously calculated to break a man's spirit. Every last vestige of a man's individuality and independence is stripped from him. Life in prisons can be best described in the words of Johnny Cash...The culture of a thousand years is shattered with the clanging of the cell door behind you....all you have with you in the cell is your bare animal instincts.

1.1 Need for Reforms

There are twin objectives of punishment. An important function of the correction system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offences. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while it is hoped, the rehabilitative process of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Rehabilitation effort as a necessary component of incarceration is part of the Indian criminal justice system as also of the United States. A rehabilitative purpose is or ought to be implicit in every sentence of an offender unless ordered otherwise by the sentencing court.[2] Finally, central to all other correctional goals is the institutional consideration of internal security within the corrections facilities themselves.

So, our prisons are expected to be correctional houses, not cruel iron aching the soul. But the startling facts revealed by the South Asia Human Rights Index 2008 speak a different story.[3]

The notion that prisoners are dangerous criminals assumes that our police is, in the first instance, able to nab the culprits- dacoits, murderers, black marketers, smugglers; that prosecution then does take place; that notwithstanding the delays, criminals are convicted-whether they are rich or poor. Although incarceration is a punishment and punishment is meant to be unpleasant, the fact

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2 This correctional attitude has been incorporated as a standard by the National Advisory Commission on Criminal Justice Standards and Goals

3 Prison conditions are very poor across India. According to the statistics of the National Human Rights Commission, there were a total of 3,32,112 (international: 332,112) prisoners against the total capacity of 2,38,855 (238,855) prisoners in the 1315 jails in India as on 31 December 2004. Out of total prisoners, 2,32,731 (232,731) inmates were awaiting trial. This equates to 70% of the total prisoners. This included 12,276 women and 1,570 children.

that prisons will always be unattractive places does not mean that all inmate difficulties can be ignored. Places of incarceration are largely impermeable to the outside world. Inaccessibility and lack of accountability, coupled with the indifference of the public towards prisoners have led to the gross violation of their rights and the current condition of Indian prisons. While society no longer demands that inmates leave prisons changed for the better, it is both counterproductive and inhuman for inmates to leave prisons in much worse shape than they entered. Indeed, this principle has been acknowledged by the courts, which have declared that the inmates have a constitutional right to treatment for serious emotional disorders, including disorders that are instigated or aggravated by prison experiences.

1.2 A Bird's Eye View of the State of the Prisoners in Indian Prisons

A peep into the sound proof, sight proof precincts of prison houses, where often dissenters and minorities are caged, endorses the new thinking on prisons that convicted persons go to prison *as* punishment and not *for* punishment.[4]

The condition of a substantially large number of prisons continues to be bad, dehumanizing and violative of the residuary rights of inmates. Crime in India is showing an increasing trend while there is a decreasing trend in the reported crime, and there is an overall upward trend in prison population. Comparatively, majorities of the prison population consist of first offenders involved in technical or minor violations of law. Half of the prison population is under trial, which is the main reason for overcrowding in prisons. [5]

Overcrowding is the greatest practical hindrance to efforts of reforming the Indian prison system. It contributes to a greater risk of disease, higher noise levels, surveillance difficulties, which increase the danger level. This apart, life is more difficult for inmates and works more onerous for staff when prisoners are

4 *Charles Shobraj* v. *Superintendent, Tihar jail,* AIR 1978, SC 1514

5 Machang Lalung , a 77 years old, was arrested in his village in the state of Assam in 1951 and charged with "causing grievous hurt". He was shunted around jails and psychiatric hospitals until local rights activists took up his case. Even his family had forgotten about him. Mr Lalung's initial charge of "causing grievous hurt" would normally carry a 10-year sentence if proven. Police soon said there was no evidence to support the allegation and within a year of his arrest, Mr Lalung had been transferred to a psychiatric institution. In 1967, the authorities at the institution certified Mr Lalung as "fully fit" and said they intended to release him. But instead of being freed, police transferred him to another jail. They did not send him to trial but just kept him in prison. His relatives and family members forgot about him and only last year was his case taken up by local human rights activists. They brought the case to the attention of the National Human Rights Commission, which immediately sought his release. Mr Lalung was finally freed in July 2005 after paying a token personal bond of one rupee. Thus before you is an example of an Indian 'snail-paced and inefficient' legal system. Glaringly what was at stake is the question of life and liberty of a person in judicial custody for 54 years, who was not brought to trial even long after his recovery from mental illness." Ironically, he has been awarded Rs 300,000 compensation by the Supreme Court.

in over capacity. Some prisons house as much as three times more inmates than their capacity. The highest overcrowding rate was reported from Jharkhand with 195.2% overcapacity Delhi with 149.7%, Chhattisgarh with 94.5% and Gujarat with 91.5 % sanctioned capacity. The showpiece of India's prisons, Tihar Jails had 13,025 prisoners, including 479 female, against the total sanctioned capacity of 6250 as on 31August 2007 resulting in 52% overcrowding.[6] . Of the total prison population, 10,652 prisoners or 81.7% were under-trials. However, the figure came down to about 12,300 prisoners in the Tihar Jail as on 18 November 2007 following measures for decongestion initiated after a spate of prisoner deaths in Tihar Jail.

To add to this saga, there is no segregation of prisoners inside the prisons. All categories of inmates are huddled together in most of the prisons including women, children and young offenders and adults. Delay in trial finds an under trial prisoner in jail for a longer period while awaiting the decision of the case. Due to inordinate judicial delay, many prisoners have been kept in jails for years.[7] That the inmates live in deplorable conditions depriving them of lives with dignity, is evident from a peep in nationwide figures of four custodial deaths per day from 2002-2007, (according to Asian Centre for Human Rights-(ACHR)). These deaths can be attributed to illness, failed attempt to escape, suicides, attacks by other criminals, riots, accidents and alleged torture. [8]

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6 South Asia Human Rights Index 2008

7 On 3 January 2007, an undertrial identified as Santosh Dhanvare threw his chappal (slipper) at the judge of the trial court after being frustrated with repeated assigning of new dates for hearing of the case. Santosh was arrested in a petty theft case in July 2004 and was denied bail. Each time, he was sent back to custody with a new date for hearing. On 13 February 2007, the Supreme Court directed the Registrar Generals of all High Courts to submit within six weeks reports giving details of all the undertrials whose cases have not been posted for hearing for years and also of those who have been sent to mental asylum. The apex court took suo motu cognisance of a news report that one Ramjeevan Yadav has been in a jail in Uttar Pradesh for 38 years without trial.

8 As of 27 October 2007, at least 10 prisoners died in the custody of the Cherlapally Jail in Hyderabad, Andhra Pradesh since 1 January 2007. While 9 prisoners including Sanjeeva and Laxman have died due to various *easily curable illnesses*, at least one prisoner identified as D.Bhaskar (32), a life convict, was *allegedly beaten to death by the jail staff.* Most of the deceased belonged to poor and underprivileged sections of society. - Bhuttu Chowdhary who died due to alleged *negligence* at Beur jail at Patna in Bihar on 13 November 2007; - Adol Basumata at Alipurduar jail in West Bengal on 2 November 2007; - Arsul Pradhan at Berhampur Circle Jail in Ganjam district of Orissa on 26 October 2007; - Rashpal Singh at Jalandhar Central Jail in Punjab on 17 September 2007; - Nagina Singh at Gaya Central jail in Bihar on 10 September 2007; - Virender at Jind jail in Haryana on the night of 2 September 2007; - Jawala Singh at Central Jail, Bathinda in Punjab on 1 September 2007; - Muktikanta Muduli at Balasore Jail in Orissa on the night of 28 August 2007; - Balram Sharma at the Raipur Central Jail of Chhattisgarh on 21 August 2007; - Bimal Roy at Jalpaiguri Central jail in West Bengal on 31 July 2007; - Gollu Kanna Rao (40) who died at Government General Hospital in Vijayawada in Andhra Pradesh on 29 July 2007.(Statistics provided by the South Asian Human Rights Violators Index 2008).

To add to the woes of the prisoners are the inadequate medical services, neglect of health and hygiene and absence of psychiatric services. In some jails there are mentally ill-persons who have not committed any crime. The prisoners do not enjoy the access to medical expertise that free citizens have. Their incarceration places limitations on such access; no physician of choice, no second opinions, and few if any specialists. Due to the conditions on their incarceration, inmates are exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap. Jail conditions do not conform to international standards and most lack basic amenities such as adequate food, drinking water, sanitation, and health services.[9] There is an urgent need to increase the capacity in jails to accommodate those awaiting trial and for convicted prisoners as well as the need to improve sanitation in prisons and provide adequate housing to prison personnel.

While in jail, communication with outside world gets snapped with a result that the inmate does not know what is happening even to his near and dear ones. This causes additional trauma.

One cannot ignore the infrastructure available to the prisoners including the buildings .Following is the account, reported in The Hindu, given by a human rights initiative visitor of the building visited by her-

> Even though the building stood fortified, it did ask for much do-up. The pillars were old enough to have seen four generations of prisoners. The barracks looked unkempt and least maintained. One single cell housed three times the capacity making it too uncomfortable for the inmates to even move about, apart from the fact that they slept in shifts. Those small coops, called cells, contained people from all walks of crime — petty thieves, murderers, bride burners, scamsters, anti-socials and a whole sty of under trials.

Prison industries and work programs are archaic and devoid of any rehabilitative value for inmates. The insertion of section 433-A in the Criminal Procedure Code, making mandatory for the life convicts to serve at least 14 years of actual imprisonment before being considered for premature release has jumped their spirits for improving their behaviour and work skills. There are allegations about prevalent corruption, mal-practices and mal-treatment of prisoners. Trafficking in drugs, use of intoxicants, favoritism and unwarranted use of office, gangsterism, political influence and deprivations are common things in our prisons. There is no effective system or machinery for looking into even the genuine grievances of prisoners.

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9 In its 2007-2008 Annual Report, the Ministry of Home Affairs accepted "the deterioration of the condition of prisons, prisoners, and prison staff because of inadequate allocations for the maintenance and upkeep of prisons from the States".

Nothing rankles more in the human heart than a feeling of injustice. Those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and Rule of Law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests. The condition of a prisoner is hapless who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend his constitutional or legal rights or to protect himself against torture and ill treatment or oppression and harassment at the hands of his custodians. It is also possible that he or the members of his family may have other problems where legal assistance is required but by reason of his being incarcerated it may be difficult if not impossible for him/members of his family to obtain proper legal aid or advice.

The condition of prison staff is none the better. They have a long story about their own deplorable existence. Most of them have been stagnating in the same position for more than ten years without any opening for promotion or change. Due to terrible paucity of staff, those supposed to be on security duties are on ministerial tasks. Salaries and other service conditions are unjustifiably lower than those of their counterparts in other sister organisations. Training of prison personnel has remained woefully neglected in India. The prison officials have to learn that an inmate is no different than them, only in the sense that he has broken the law. The conditions of sub-jails and police lock ups are extremely deplorable. In fact they are the most neglected institutions of our criminal justice system. Sadly any attempt by voluntary agencies to extend their services for the welfare of prisoners is looked upon with suspicion by prison personnel.

The plight of women, children and young offenders in prison is really an issue of grave concern. The social stigma attached to a woman prisoner is much more worse compared to a man inmate. The total strength of women inmates in the country is 14,657 and the average in Tamil Nadu is about 1,000 which is about 6% of the total prison population in the State. Tamil Nadu is one of the few States where women inmates are housed in prisons exclusively built for them, keeping in view their special requirements. An analysis of the crime profile of women prisoners in Tamil Nadu reveals that of the 172 convicted inmates, 127 are involved in murder cases which are mostly crimes of passion and not premeditated. Of the 800 inmates who are under trials, nearly 50 percent are involved in illicit liquor and drug offences. In the dowry cases, women in the age group 50 years and above are involved. [10]

[10] According to the latest reports of 2009, Gujarat has topped the list of states with maximum number of complaints about "oppression" of women prisoners in its jails, according to the latest data of the National Human Rights Commission (NHRC). The statistics reveal that out of the total 103 complaints received by the NHRC during 2008-09 in connection with

1.3 History of Reforms and the Prison Laws

Although incarceration is a punishment, and punishment is meant to be unpleasant, the fact that prisons will always be attractive places does not mean that all inmate difficulties can be ignored. While society no longer demands that inmates leave prisons changed for the better, it is both counter productive and inhuman for inmates to leave prisons in much more worse shape than when they entered. Indeed, this principle has been acknowledged by the courts, which have declared that inmates have a constitutional right to treatment for serious disorders, including disorders that are instigated or aggravated by prison experiences.[11]

The contemporary Prison administration in India is a legacy of the British rule. It is based on the notion that, the best criminal code can be of a very little use to a community unless there be a good machinery for the infliction of punishments. First time, in 1836 reforms at Indian prisons was initiated upon the recommended by Lord Macaulay. A committee namely: Prison Discipline Committee, was appointed, which submitted its report on 1838. The committee recommended increased rigorous of treatment while rejecting all humanitarian needs and reforms for the prisoners. In 1864 the second Commission of Inquiry into Jail Management and Discipline was appointed. While recommending in the same liner as the 1836 Committee, the Commission made some specific suggestions regarding accommodation for Prisoners, improvement diets, clothing, bedding and medical care. In 1877 a Conference of Experts met to inquiry into prison administration. The conference proposed the enactment-of a prison law and a draft bill was prepared. But no attempt has made at legislating the proposed draft bill. In 1888, the Fourth Jail Commission was appointed. On the basis of recommendation of the Jail Commission of 1888, a consolidated prison bill was prepared. Provisions regarding the Jail offences and punishment were specially examined by at conferences of experts on Jail Management. In 1894 the draft bill became law by obtaining the assent of Governor General of India. It is the Prisons Act, 1894, on the basis of which the present jail Management and administration is operating in India, even after hundred years of the inception. The Archaic Prison Act, 1894 has hardly undergone any substantial change. However, the process of review of the prison problems in

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oppression of women prisoners across the country, 23 are from the jails in Gujarat alone. This accounts for about 22.33 per cent of the total number of complaints received by the rights body from various jails across the country. The statistics show that the state has witnessed a sudden surge in the number of such complaints in the last three years. Uttar Pradesh comes a close second with a total of 21 such complaints filed since 2008. This state had accounted for 26 such complaints in 2007-08 and 16 in 2006-07. Maharashtra, which stands third in the list, has accounted for a total of 11 complaints during 2008-09. Last year also, the NHRC had received 11 such complaints from the state.

11 Kenneth Adams, "Adjusting to Prison Life", *Crime and Justice*, Vol 16, pp. 275-359. The University of Chicago Press (1992).

India continued even after this. The domestic legislation pertaining to the management and administration of prisons in India are scattered in different Acts at the national level. The existing laws are: The Prison Act, 1894;[12] The Prisoners Act, 1900; The Transfer of Prisoners Act, 1950; The Prisoners (Attendance in Courts) Act, 1955. The forthcoming Laws are : The Indian Prisons Bill 1996; The Prisons Administration and Transfer of Prisoners Bill 1998; The Prisons Management Bill 1998;

Prison as a subject of legislation is placed under Entry 4 in List-II [state list] of the seventh Schedule of the Constitution of India. Hence, prisons in different states vary in their organization, rules and models. Broadly speaking there are four legislations that govern the administration of prisons in India with necessary amendments varying from state to state. Besides the above, there are various miscellaneous legislations such as Identification of Prisoners Act, 1920, Civil Jails Act, 1874, Borstal Schools Act and Habitual Offenders Act. The day-to-day administration of prisons in all the states and union territories of India are governed by the respective Jail Manuals containing the Rules, Regulations, Orders and the various amendments thereto inserted on a regular basis.

Keeping in view that the laws are now archaic and that the Prisons Act, 1894 was drafted during the period of British rule experts and committees have been demanding the enactment of a new law. The All India Committee on Jail Reforms [1980 - 83] more popularly known as the Mulla Committee in fact

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12 The Prisons Act, 1894, streamlines .a general and uniform footing of prison administration throughout the country. It has provided for separation of prisoners on the basis of age, gender, stage of proceeding, nature of crime and punishment. The Inspector General (Prison) has made the supreme authority for the general administration, supervision and coordination of prisons in a state. Each prison generally headed by a Superintendent assisted by other subordinate. The medical officer has made responsible for over all health condition and care of prisoners. According to the provision the sick prisoners can report to Deputy Superintendent of prison if there is an genuine problem of health service 26. The power of prison executive staff to inflict punishment for prison offences are restricted to maintain discipline. Only the officers equal to the rank of Superintendent and above are empowered for prison punishment. While the Prison Act, 1894 is based on the principles of deterrent theory of punishment but female and civil prisoners are excluded from punishment of handcuff, bar fetters or whipping. If an inmate commits willful disobedience, assault, use of criminal force, insult, treating immoral and indecent behavior, refuses to work, causes willful damage, tempering, false accusation and conspiring to escape than in order to control them the Act provides for punishments like: warning, labour (7 days), hand cuff, fitter, confinement, penal diet, etc., subject to the examination and issue of certificate of fit by the medical officer in order to sustain the punishment. In case a prisoner committed a heinous crime, the Act provides for initiation of process by the District Magistrate upon the recommendation of the Prison Superintendentz7. Besides the above, the Act enumerates comprehensive plans on the issues like, prison administration, health care, clothing, bedding, sanitation, pre-release and employment of prisoners under different chapters. With the aforesaid mandates the Prisons Act since the date of inception i.e., 1st day of July - 1894 has been providing a comprehensive legal frame work for the management of Prisons in India.

drafted a model prison bill on the lines of the standards recommended by the Standard Minimum Rules for Treatment of Prisoners, 1955.

The National Human Rights Commission of India proposed two model prison bills for consideration by state governments and re-enactment of the prison legislations in their states in accordance with the standards prescribed by the Commission. These were the Indian Prison Bill of 1996 and The Prisons [Administration and Treatment of Prisoners] Bill of 1998 respectively. A few states namely Delhi, Jammu & Kashmir and Rajasthan had come out with new bills/ legislations. The Ministry of Home Affairs which is responsible for administration of prisons in India, then circulated the draft bill of 1998 to all the state governments for consideration.

Presently the prisons department of the Bureau of Police Research & Development [BPR&D] under the Ministry of Home Affairs is engaged in drafting a Model National Prison Manual relying on Article 252 of the Constitution of India which provides the Parliament of India to legislate for two or more states by consent and adoption of such legislation by any other state.

To get the support of all state governments in getting the Model Manual accepted, the BPR&D enlisted the services of prison officers in drafting the manual along with a few other academics and retired prison experts. While CHRI is yet to review and critique the draft, a few NGOs have critiqued the draft and said that it does not provide for much room for community intervention and participation in prison reforms and that this is a direct fall-out of enlisting so many prison officers most of whom would not prefer to have any outside party in their prison turf/ domain.

1.4 Reforms Proposed in Prison Administration

Hate the crime and not the criminal

Mahatma Gandhi

All men are born equal and are endowed by their creator with some basic rights. These rights are mainly right to life and liberty, but if any person doesn't comply with ethics of the society then that person is deprived of these rights with proper punishment. Many experts believe that the main objective of prisons is to bring the offenders back to the mainstream of the society. Various workshops had been organized by the State Government in collaboration with NGO's to bring reforms in the current prison systems.

Many reforms can be made in jail administration, which are mainly:

- A-Class prisoners can meet their own expenditure by depositing certain amount fixed by the Government for enjoying special services like tea,

newspapers, pillow, and 3 times non vegetarian food in a week and if they are vegetarian they will be served ghee, dhal and buttermilk. Many inmates usually complain about inadequate quality and quantity of food, which is required to be improved. The food is required to be prepared in better hygienic conditions.

- Rehabilitation of inmates will be meaningful only if they are employed after release and for that purpose educational facilities should be introduced or upgraded. In many jails, inmates including hardcore criminals and women had joined various courses offered by IGNOU and their respective State Universities. Courses mainly offered by then are BA, MA, MBA & other post graduation courses. The inmates can also join the classes of 10th and +2 for basic guidance.[13]
- In some prisons the inmates are provided training in carpentry and fabric painting.
- Many jails have also initiated programs for women empowerment by training then in weaving, making toys, stitching and making embroidery items.
- Wage earning and gratuity schemes and incentives can also be used to reduce the psychological burden on the convicts.
- Various seminars are organized by jail authorities to enlighten the prisoners on their legal rights, health and sanitation problems, HIV/AIDS and issues of mental health, juveniles, minorities and steps to reduce the violence in prisons.
- The open prison system has come as a very modern and effective alternative to the system of closed imprisonment. The establishment of open prisons on a large scale as a substitute for the closed prisons, the latter being reserved for hardcore criminals shall be one of the greatest prison reforms in the penal system.

Though several steps have been taken to improve the conditions of prisons, much more is required to be done. Central Government along with NGO's and prison administration should take adequate steps for effective centralization of prisons and a uniform jail manual should be drafted throughout the country. The uniformity of standards can be maintained throughout all the States. Thus such practices will help in changing the traditional and colonial outlook of the Indian Prison System and also help the prisoners to become more responsible, creative and potential.

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[13] In many jails with a view of imparting vocational training a fully fledged computer training centers has been established. Recently, the Government of Himachal Pradesh had lifted ban on wearing Gandhi cap in jails.

The Mulla Committee had decades ago recommended transfer of prisons to concurrent list. The recommendation should be implemented.

1.5 Proposed Model: A Micro Macro Approach

There should be a separate ministry of cabinet level for the department of prisons which may be termed as the Central Bureau of Prisons headed by a cabinet minister and related bureaucracy.

Thus a full time department is recommended

The objectives to be achieved by such a model can be manifold: viz., more progressive and human care of inmates to be achieved; professional prison service to be provided; a consistent and a uniform administration to be provided; uniformity in budget to be maintained; maintenance also to be achieved in prison laws and manuals; to provide the facility of a legal cell to cater to all the legal aspects under one roof ; to act as a watch dog over State units for checking corruption, malpractices and other vices; to offer training of all the personnel at various levels; to make available variety of programmes for the inmates to reduce recidivism; to have a computerized record of every inmate as regards his age, his nature of crime, under trial history, record of habitual offenders, photographs, relations addresses ,etc.; provisions for resocialisation, rehabilitation.

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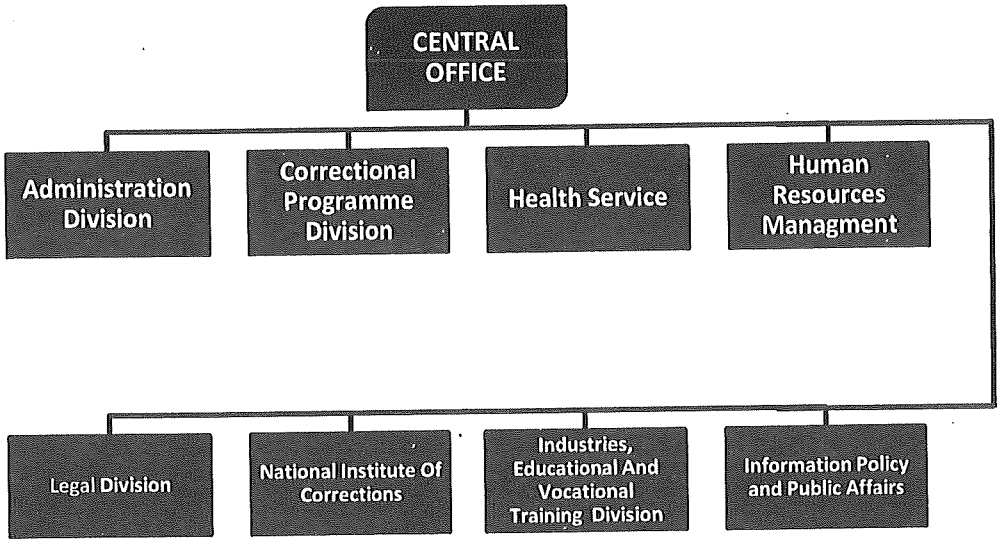
1.5.2 Orgnisational Chart



A. CENTRAL OFFICE

In New Delhi under the ministry

It will have 8 divisions, namely:-

[1] ADMINISTRATIVE DIV.

- [a] will look after financial and facility management
- [b] responsible for budget development and execution. FINANCE
- [c] all procurement and property matters
- [d] renovation, maintenance and overseeing facility programme

[2] CORRECTIONAL PROGRAMME DIV.

- [a] to ensure proper implementation of national policies and procedures
- [b] to provide safe , secure institutional environment for inmates and staff

[c] to provide leadership and policy direction in correctional services, correctional programmes, inmate skill dev. psychology services, inmate systems management

[3] HEALTH SERVICES

[a] responsible for supervising medical, dental and mental health services for inmates

[b] infectious diseases management

[c] occupational safety

[d] environmental health

[e] fire protection

Separate staff recruited as doctors on permanent basis for prisons[separate cadre] separate health care positions are recommended for each district

[4] HUMAN RESOURCES MANAGEMENT

[a] responsible for all matters of personnel including pay, leave, administration, incentives, awards, retirement, diciplinary actions, ACRs, recruitement, etc

[b] conduct natinal training programmes for warders, assoc. warders, line staff, prison staff

[5] INDUSTRIES, EDUCATIONAL AND VOCATIONAL TRAINING DIV.

[a] responsible for all educational, occupational, parenting programmes

[b] impart education for 10 + 2 , graduation, post graduation, computers, etc

[c] leisure time programmes

[d] programmes to enhance post release employment

[6] INFORMATION POLICY AND PUBLIC AFFAIRS

[a] collection, development, dissemination of useful information to offices of various depts. , MHA, government agencies, public, replying to RTI, etc

[b] development of agency software

[c] directives, forms, electronic publishing

[7] NATIONAL INSTITUTE OF CORRECTIONS

[a] provide training, technical assistance, information services, program development to all correctional agencies

[b] to frame all correctional policies

[8] LEGAL DIV

[a] to supervise branches in every state

[b] appoint regional legal officers

[c] to provide legal support to inmates

[d] legal advice to prison administration.

[e] to defend the government against all claims etc

[f] advise government about needed amendments in statutes

B. REGIONAL OFFICES

THESE will be working state wise and will work under the guidance of the central office. They will be the implementers of the various schemes, directives, policies, etc of the central office.

C. STAFF TRAINING CENTRES

[a] national correctional academy

[b] staff training academy

these will provide specialised training to officers and staff of prisons, latest techniques of inmate control, psychological training etc.

D. PRISON FACILITIES

FACILITIES regarding fooding, clothing, visiting hours, contact information, special facilities for female inmates, for their small children, crèches for babies, educational institutions etc , security levels, classification of prisoners, shall all be catered to by regional offices under direct supervision of the central office.

A system of checks and balances shall be developed and a daily report of the activities of each regional office be sent to the central office.

All this institutionalization will only save the crumbling condition of prisons. What is needed is not a patch work but starting afresh.

The reforms whether proposed or recommended by high level committees, lack the vigour, the teeth, and the will to be implemented. The will of the legislature to make new laws is absent. The State Jail Manuals remain black and white (in fact the white has turned into yellow as they have become archaic now) and the will of the jail authorities to bring about any transformation is absent. The whole system needs an overhauling. The laws are outdated and must be replaced by the new ones. Long ago in 1983, the Mulla Committee recommended that the constitution be amended to shift the subject of prisons from the State List to the Concurrent List. That never happened. The recommendations have become archaic. Mulla came as Indira Gandhi went to jail. Do we need our top politicians to go to jail to bring new reforms in the prison world? But there are examples of some politicians who go to prisons (as convicts) and make them as their 'homes'.[14]For too long our parliament, state legislatures and the guardians of law and order have been oblivious to what goes on in places like police stations, jails and detention centres where justice and punishment are presumably awarded. The time has arrived for the government to give urgent attention to this much neglected area of our criminal justice system and initiate basic prison reforms proposed above. Lets strive to understand once these '*hells*' and wipe away the tear from every eye that cries there.

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[14] One can find a few influential men, finally nabbed by the long arm of the law, for whom a jail sentence is not all that distressing. The recent elections focused on many such characters. Mitrasen Yadav who lent a helping hand for his party, a co-accused in murder case who enjoyed presidential pardon after being given life imprisonment, later accused of cheating, dacoity and rioting is no stranger to jail. He is one of the VIPs of Indian jails.
Amarmani Tripathi, prime accused in poetess Madhumita Shukla murder case, addressed a public meeting in Lakshmipur assembly segment over a mobile phone from inside Dehradun jail.
Another Politician, Abhay Singh with a known criminal background, conducted a meeting of his supporters inside the jail working out a strategy for the election campaign of his wife. He was also accused of giving threatening calls to voters from inside the prison. r. Yet another don, who found virtue in politician's clothes, was reported to have been constantly sending "messages" to voters to vote for him.
For influential politicians and others, jail is no barrier to their normal lives. A raid in Meerut Jail recently led to recovery of cell phones and other prohibited items. The recovery led to a fight between to police and the inmates of the high-security prison. The inmates injured several policemen and snatched back the cell phones and other articles seized from them. Selling unauthorized and contraband items inside the jail, for a heavy price, is common. Cigarette could cost Rs 20 a stick, a meal of the inmate's choice, Rs 500, a local call Rs 20 and Rs 100.
The former U.P. Minister, Amarmani Tripathi, serving his sentence in jail for murdering his mistress is reported to have hosted a wedding anniversary bash for a co-accused in the murder case inside the jail State Minister's comment on this was "you can't stop anyone from celebrating an occasion concerning him, his family or near and dear ones- within the premises of the jail. As per my knowledge, there was no violation of the Jail Manual."

DOMESTIC VIOLENCE IN INDIA : SOCIO-LEGAL ASPECTS

Dr. Sharanjit*

1.1 Introduction

Violence against women is a very old phenomenon. Women in India are subjected to domestic, physical, emotional and mental violence. In the male dominated society, women are exploited both in the house and outside the house. They have to bear the brunt of varied forms of abuses(at home and at work place) like sexual harassment, forced marriages, sexual abuse of the girl child, bride burning, dowry related physical and mental torture, medical neglect, rape, prostitution etc.

The women is treated as a second class citizenry. They are in the back seat far from the men. Though half of the world's population is women, still they suffer even today, the course of discrimination.[1]

Although there is a formal recognition of women's rights and a legal acceptance of women's equality with men, extensive data gathered by the United Nations and other sources show that women constitute to face discrimination and marginalization. They have less money, less education, lower status, lower self esteem and less power.[2]

A serious form of crime against women is domestic violence where a women is subjected to violence by her near and dear ones. Domestic violence has a very wide meaning as it includes harms or injuries which endanger women's health, safety, life or well being. It may be through physical, sexual, verbal, emotional and economic abuse of the women.

In the post independence period of Indian life, much has been done for liberation of Indian women in all classes and religions of the country. But it cannot still be declared that women have got redemption from the clutches of male domination. Cruel treatment with the female sex, including minor girls is a recognized social behavior. As the problem of domestic violence has grave repercussions in the social set up of our country therefore the object of this research paper is to analyze the social and legal aspects of domestic violence in India.

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1 P.K. Das, Universal's Handbook on Protection of Women from Domestic Violence Act and Rules, p.3, Second Edition, Universal Law Publishing House, New Delhi (2007).

2 Thomas B Jeyaseelan, *Women Rights and Law*, Indian Social Institute, New Delhi, p. 2 (2002).

1.2 Domestic Violence a Bitter Truth

The problem of violence against women is not new. Women in the Indian society have been the victims of humiliation, torture and exploitation for as long as we have written record of social organization and family life. In spite of the legislative measure adopted in favor of women in our society after Independence, the spread of education and women's gradual economic independence, countless women still continue to be victims of violence.[3]

To quote Virginia Woolf "On marriage the weakest, the stupidest, the most insignificant man in the world receives a license to rape and beat".[4] Dowry deaths, murder, suicide and bride burning are symptoms of peculiar social malady and are an unfortunate development of our social set up. This development is peculiarly Indian, a "Black Plague" spawned by the dowry system.[5]

Domestic violence includes wife battering. Wife battering is perhaps one of the most frequently committed and socially accepted crimes against women in India. It occurs not merely in illiterate homes, but also among highly educated people. The wife is beaten, not merely by husband but also by the mother-in-law, sisters of the husband and sister in law. The wife has also to put up with such other things as verbal abuse, mental torture, deprivation of food and money, denial of permission to meet friends and relatives etc.[6]

1.2.1 Victims of Violence

If we take all the cases of violence against women into consideration, we find that the victims of violence are generally those:[7]

- Who feel helpless, depressed, have a poor self image and suffer from self devaluation, or those who are emotionally consumed by the perpetrators of violence, or who suffer from altruistic powerlessness;
- Who live in stressful family situations or who live in families which, in sociological terms, cannot be called normal families, that is, families which are structurally complete (both parents being alive and living together), economically secure (satisfying basic and subsidiary needs of members), functionally adequate (have rare quarrels) and morally conformists;

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3 Ram Ahuja, *Social Problems in India*, Rawat Publication, Jaipur, p. 243 (1997).

4 As quoted in Anil Sachdeva's *"An Exhaustive Commentary on the Protection of Women from Domestic Violence Act and Rules*, 2nd Edition, 2008, Capital Law House, New Delhi, 511

5 K.D Gaur, *Text book on the Indian Penal Code,* fourth edition, Universal Law Publishing Co., New Delhi, p. 514 (2010).

6 Dr. S. Gokilavan and Dr. S.G. Jelestin, *Marriage, Dowry Practice and Divorce,* p. 21, Regal Publication, New Delhi (2008).

7 *Supra note* 3 at p. 251

- Who lack social maturity or social interpersonal skills because of which they face behavioral problems;
- Whose husbands/in laws have pathological personalities; and
- Whose husbands are alcoholic.

1.2.2 Victimizers of women

Similarly, seven types of victimizers of women may be identified. They are those:[8]

- Who have depression, inferiority complex and low self esteem;
- Who have personality disorders and are psychopaths;
- Who lack resources, skills and talents;
- Who have possessive, suspicious and dominant nature;
- Who face stressful situation in family life;
- Who are victim of violence in childhood and
- Who are frequent users of alcohol.

1.2.3 Types of Violence

If we were to develop a typology of violence against women, we may give six types of violence:[9]

- Violence which is money oriented;
- Violence which seeks power over the weak;
- Violence which aims at pleasure seeking;
- Violence which is the result of the perpetrators pathology;
- Violence which is the result of stressful family situation; and
- Violence which is victim precipitated.

What makes domestic violence different from any other form of violence against women is that the violence is committed by an intimate partner or family members living together in a joint family relationship. The implications of such violence for the women is that often she is reluctant to complain against those who she considers near and dear and part of her own family.[10]

In *Kundula Bala Subrahmanyam* v. *State of Andhra Pardesh,*[11] the Supreme Court showed its very concern about the women harassment and torture. It held that of late there had been a alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. This

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8 *Id.* p. 252.
9 *Id.* at p. 252.
10 Thomas B. Jeyaseelen, *Women Rights and Law,* p. 250, Indian Social Institute, New Delhi, (2002).
11 (1993) 25 SCC 684

growing cult of violence and exploitation of the young brides, though keep on sending shock saves to the civilized societies wherever it happens, continues unabated.

1.3 Legislative Check on Domestic Violence in India

The problem of domestic violence is increasing on a rapid pace. Women whether educated or illiterate have to encounter this problem at some point of time in their lives. In 2005, the Parliament enacted the Protection of Women from Domestic Violence Act, 2005. Prior to this Act, relevant laws on this issue are Sections 304 B and 498 A of the Indian Penal Code, Sections 112 and 113 B of the Indian Evidence Act, 1872, the Dowry Prohibition Act the Hindu Marriage Act, 1955, the Commission of Sati (Prevention) Act, 1987, the Immoral Traffic (Prevention) Act, 1956, the Medical Termination of Pregnancy Act, 1971, the Muslim Women (Protection of Rights on Divorce) Act, 1986, Section 125 of the Code of Criminal Procedure etc. But as the above mentioned Acts could not contain the problem of domestic violence in its entirety so urgent need was felt for the creation of a comprehensive law specifically designed to deal with the problem of domestic violence.

1.3.1 The Protection of Women from Domestic Violence Act, 2005

The Protection of Women from Domestic Violence Bill having been passed by both the Houses of the Parliament and received the assent of President on 13.09.2005. It came into force on 26.10.2006. This Act is for the purpose of restricting the violence against women. This is an Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

The Act is in tune with International recommendations on this issue. For instance – the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1495) have acknowledged that the domestic violence is undoubtedly a human rights issue and serious deterrent to development. Similarly, the United Nation Committee on Convention on Elimination of All Forms of Discrimination Against Women had recommended that State parties should act to protect women against violence of any kind especially that occurring within the family. [12]

[12] The United Nations Convention on Elimination of All Forms of Discrimination Against Women defines discrimination against women as "...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 a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

1.3.1.1 Definition of "Domestic Violence"

Section 3 of the Protection of Women from Domestic Violence Act, 2005 has provided the definition of "domestic violence" and it includes that any act, omission, commission or conduct of the respondent shall constitute domestic violence in cases of:

- Incest,
- Child marriage,
- Wife bettering,
- Bride burning and dowry death,
- Sati,
- Neglect,
- Verbal abuse,
- Cruelty, humiliation and
- Torture.

In work places and on streets, women becomes victim of

- Eve teasing,
- Sexual harassment,
- Molestation,
- Immoral trafficking,
- Rape and
- Murder.

Domestic violence is a state of things which gives rise to a cause of action for the aggrieved woman or anybody on her behalf to commence proceedings under this Act against the respondent. Anything done which violates the right to life of a woman comes within the scope of this section. It may be oral offending her sensibilities, it may be physical causing injuries to her body. It may be threats to do any of these things. It may also be the deprivation of the woman of the necessities of her life and of her children on one side and similar acts or threats against persons in whom the woman is interested with a view to coerce her to submission. Further such acts may be with a view to secure dowry. Selling away any properties of the woman or of the respondent to deprive woman of her rights and privileges come within the scope of domestic violence. More important of all these are acts which amount to sexual harassment. In substance, anything done or threatening to cripple a woman physically and mentally amounts to domestic violence. [13]

[13] N.K. Acharya, Commentary on the Protection of Women from Domestic Violence Act, 2005, (4th Edition), p. 23, Asia Law House, Hyderabad (2010).

1.3.1.2 Domestic Relationship

The scope of this Act is wide. Under section 2(f) of this Act, "domestic relationship" means a relationship between two person 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 in a joint family.[14]

In *Renu* v. *Sarika*[15], it was held that a complaint against a female is maintainable under this Act. The expression of proviso to section 2(q) of the Protection of Women from Domestic Violence Act, includes female relatives as well. However, it will not be necessary for female to personally appear as an accused in the complaint. She would be entitled to be represented by an advocate. It will be open to the trial court to drop the proceedings against her on merits in case, at any stage, if it is found that she has been unnecessarily implicated as a respondent in the proceedings.

In *Nandan Singh Manral* v. *State*[16], the notice was served on brother-in-law. It was held that the husband of married sister who lived far away from the family of the husband can under no stretch of imagination be said to have lived in shared household with the aggrieved person as no domestic relationship existed. Hence, the notice served on the brother-in-law was quashed.

In comparison, the scope of S. 498 A of the Indian Penal Code is essentially to curb the tendency of the unbridled conduct of the husband towards his wife.[17] Mainly the perpetrator of domestic violence against woman is the male. Such person may be female if she is related to her husband. If the husband commits acts of domestic violence through his female relatives or through his male relatives, it is deemed that there is domestic violence for which the husband and his relatives can be made responsible. The order the Magistrate may issue will bind them all and any violation of the Magistrate's orders committed by any or all of them amounts to offence punishable under Section 31. It is not correct to

14 S. 2(f) The Protection of Women from Domestic Violence Act, 2005

15 2011 (1) RCR (Criminal) 269 (P&H)

16 2011 (2) RCR (Criminal) 271, Delhi

17 Section 498 A - Husband or relative of husband of a woman subjecting her to cruelty – Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation – For the purposes of this Section, "Cruelty" means

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

assume that only males will be respondents. But it is correct to say that women only could be the complainants and that no man could be treated as aggrieved person capable of filing any complaint under the Act.

The Act has created a machinery by which the aggrieved woman living in the shared household may be redressed. The Act is only a protective measure and not a punishing legislation. Therefore, the Act created an officer called Protection Officer. The Act also created by designation two other institutions namely, Shelter Home and an institution called Medical Facility.

1.3.1.3 "Aggrieved Person"

Aggrieved Person means any women 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.[18]

1.3.1.4 Procedure under the Act

Domestic violence is equated for purpose of this Act as a series of domestic incidents involving exercise of violence against women. When a domestic incident occurs, firstly the woman aggrieved may approach the Protection Officer for his help or she may approach the Magistrate directly for appropriate relief's. If she approaches directly or through Protection Officer, the shelter home, will provide her with accommodation. If she approaches directly or through Protection Officer or through Shelter Home, the Medical Facility will provide her medical relief. What all the Magistrate could provide the aggrieved woman is to provide her with maintenance directing the respondent to pay her the amount. The Magistrate can also direct the respondent not to throw out the aggrieved woman from the shared household and also provide her with residence. If she has a child, the Magistrate may make appropriate orders for its maintenance and custody. If the circumstances warrant, the Magistrate may grant the aggrieved woman compensation for all the injuries she suffered. If the Magistrate comes to the conclusion that in the course of domestic violence suffered by the aggrieved woman, there are events warranting prosecution of the respondent, he may frame charges and try the case himself or commit it to the Sessions Court.[19]

An application under section 12 of the Protection of Women from Domestic Violence Act has to be treated in accordance with the provisions given under this Act. The Act provides for obtaining the Domestic Incident Report. The Domestic Incident Report Performa is given in form 1 of the Schedule 2 of Domestic Violence rules. This Performa is in detailed analytical form wherein the details of each incident of domestic violence are to be entered with date, time and place of

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[18] *Supra note* 14, Section 2 (a)

[19] *Supra note* 13 at p. 26

violence and person who caused domestic violence. The purpose is that all allegations made in application must be specific and the court should not exercise jurisdiction without considering the domestic incident report since it is necessary for the court to know before issuing notice to respondent as to who was the respondent who caused domestic violence and what was the nature of the violence and when it was committed. The Performa specifies different heads of physical violence, sexual violence, verbal and emotional abuse, economic violence, dowry related harassment and other forms of violence. The Performa also provides for filling of documents in support of the application like medico-legal certificate, list of istridhaan and other documents. This DIR has to be signed by the aggrieved person[20].

Thus the Act provides a full procedure for the aggrieved woman to secure relief specified under this Act. Independent of domestic violence if any crimes are committed against her the ordinary law of crimes and procedure will apply.

1.3.1.5 Appointment of Protection Officer

Accordingly the Government appoints a person by name Protection Officer under Section 8 and the duties of the Protection Officer are detailed in Section 5.

When an event of domestic violence comes to the knowledge of the Police Officer or the Protection Officer or Service Provider or the Magistrate or any of them witnesses the event of domestic violence, their first duty is to contact the woman aggrieved and inform her about the existence of the Protection of Women from Domestic Violence Act of 2005 and acquaint her with the several benefits she has under the Act and the steps she may take to secure them. She should be informed that she can apply to the Magistrate for protection order, order for monetary relief, order relating to custody of children, if any and order for providing her with residence and order for payment of compensation for injuries she suffered. She must also be informed of the assistance she may get from the Protection Officer and the Service Provider and also of her right to free medical treatment at Medical Facility. She must be told that if she desires, she can seek and obtain free legal aid from the Legal Services Authority. If she is so interested she may be advised to file a complaint under Section 498 A, if the facts of the case come within the purview of that section of the Criminal Procedure Code. So far are the obligations cast on the above Officers. But that does not relieve the Police Officer or the Magistrate from their duty to take such action as is permissible under law against an accused in relation to the cognizable offences committed in the course of domestic violence. [21]

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20 *Bhupender Singh Mahra* v. *State NCT of Delhi and another*, 2011 (2) RCR (Criminal) 360 (Delhi)

21 *Supra note* 13 at p. 28

1.3.1.6 Cause of Action

The cause of action for instituting a case under the Act is the occurrence of domestic violence in present or which are continuing. Such violence may be inflicted by the husband or his male or female accomplices living within the household or outside it. Where the accomplices are within the household whether males or females they would be held responsible for providing all the relief's the aggrieved woman is entitled to under the Act. If the acts of domestic violence are committed by outsiders, the magistrate may proceed against them under appropriate provisions of the criminal law but not under this Act.

In *Gautam Sapra* v. *State Govt. of NCT of Delhi* [22], an Indian citizen married a Uzbekistani citizen and both lived at Gurgoan. Acts of violence were committed on women and she was compelled to leave the matrimonial home. The women started living in Delhi in a rented house. She filed an application under section 12 of this Act in a Delhi Court. It was held that her stay at Delhi qualifies her to file an affidavit under section 12 of this Act.

In *Sunitha* v. *State of Kerala*[23], the question of territorial jurisdiction to file a complaint under this Act was involved. While in the case of a criminal offence the place of trial is ordinarily before a court within whose local limits the offence was committed, the forum for entertaining an application u/s 12 of the Act is the judicial magistrate of the first class or the metropolitan magistrate as the case may be, within the local limits of which-(a) the aggrieved person permanently or temporarily resides or carries on business or is employed; or (b) the respondent resides or carries on business or is employed.

1.3.1.7 Who may File the Complaint

Complaint can be filed on behalf of the aggrieved woman by any of the members of the household against any other member or members of the household. The father-in-law can file the complaint on behalf of the aggrieved woman. So also the husband of the aggrieved woman can similarly file the complaint on behalf of his wife against other members of the family who are committing acts of domestic violence against the aggrieved woman.

1.4 Conclusion

Domestic violence is a serious hindrance to the matrimonial harmony and it should not be tolerated at any cost. Every effort should be made to ensure that women get proper respect both inside and outside the house. Urgent need to change the mindset of the people in our male dominated society. But it is equally important that women should not misuse the special laws which are basically

22 2011(2) RCR (Criminal) 339 (Delhi)
23 2011(2) RCR (Criminal) 750 (Kerala)

meant to protect them from oppression. It should always be remembered that the foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance of each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles and trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. A too technical and hyper sensitive approach would be counter productive to the institution of marriage.

CONCEPTUAL AND FUNCTIONAL DIMENSIONS OF RAPE : AN EVALUATIVE STUDY OF SECTION 375 OF INDIAN PENAL CODE

***Dr. Aditi Sharma**

> All history attests that man has subjugated woman, to minister to his sexual pleasure, to be instrumental in promoting his comfort...He has done all he could do to debase and enslave her mind and now he looks triumphantly on the ruin he has wrought, and says the being he has thus injured is his inferior.[1]

Rape, one of the gravest offences known to mankind, rests on the idea of inferiority and subjugation. It originated to safeguard the 'masculine pride in the exclusive possession of a sexual object.' Criminal law, a body of societal norms approved by the legislature, seeks to prevent undesirable, perilous human conduct. *Ronald J Waldron* has rightly observed that: 'Criminal law has been described as an important instrument of social control by which organized society defines certain human conduct as criminal and attempts to prohibit and restrain such conduct by a system of procedures and penalties'.[2] The term 'social control' refers to those arrangements which have been evolved in response to deviance and law breaking. Criminal law also endeavors to protect the easily persuadable classes of people (i.e, the young and weak minded) against the abuse of their persons and property.[3] It seeks to protect them by designating certain unsocial acts as offences punishable by law. One such universal offence is 'rape'.

The Indian Penal Code, 1860 is the main repository of Indian Criminal Law and the assumptions on which it works have far-reaching consequences. Thus, this paper attempts to explore the existing lacunas and required measures to fill in the gaps in 'rape' laws.

1.1 The offence of Rape and Historical Perspectives

The word 'rape', derived from *Latin* word *rapio,* means 'to seize'. Rape is, therefore, a forcible seizure of a woman without her consent. Historically, rape was categorized a property crime against the man to whom the woman

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1 PP Rao, "Do Women's Rights Differ from those of Men?", BK Pal (ed.), *Problems and Concerns of Indian Women,* p. 114, ABC Publishing House, New Delhi (1987).

2 Ronald J Waldron, *The Criminal Justice System- An Introduction,* Harper and Row Publishers, New York (1989).

3 Nigel Walker, *Sentencing in a Rational Society*, Penguin, New Delhi (1969).

belonged.[4] In patriarchal society, the loss of virginity was considered a loss to the father or prospective husband. In such cases, the law would void the betrothal and demand financial compensation from the rapist, payable to the woman's household, whose "goods" were "damaged". In Roman law, rape, or *raptus* was classified as a form of *crimen vis*, "crime of assault." The concept of *raptus* was applied to the abduction of a woman against the will of the man under whose authority she lived, and sexual intercourse was not even a necessary element. According to Biblical law, the rapist might be compelled to marry the unmarried woman if her father agreed. This was especially prevalent in laws where the crime of rape did not include, as a necessary element, the violation of the woman's body.

This approach towards rape victim reveals the psychology of the ancient law makers guided by strong patriarchal values. They refused to hold rape as an act against a woman: rather they perceived it as a crime against the male estate.

In medieval Europe, severe punishment, in form of gouging out the eyes or severing the testicles were also prescribed. Despite the harsh laws, women got raw deal. Cases concerning rapes of women from lower strata were rarely brought forward. If somehow these cases managed to hearings, the same usually ended with small monetary fine or a marriage between the victim and the rapist. The First (1275 AD) and Second Statute (1285 AD) of Westminster attempted to make rape a serious offence on women. It proposed to lengthen the period of appeal by the victim and fix the minimum amount of punishment for the offence. Still, marital rape was never taken in its purview as the 'consent' of the wife was considered to have been given on marriage and could not be withdrawn.

However, the conviction rates were low because women were reluctant to bring up charges of rape because it damages the social standing of her family. Besides, the courts tended to be skeptical of the charges and in the event that the accusation could not be proved, the victim could be accused of committing adultery. Moreover the prostitutes were altogether denied any justice in case of rape. Thus, it was not the plight of the woman but the disgrace and dishonour done to the family which remained central issues in rape offences.

When European society was grappling in dark regarding gender issues, India depicted a picture of more gender sensitivity.

1.1.1 Woman and Ancient Indian Society

Manu writes, "A father excel ten *Upadhayas* in glory but a mother excels thousands father." During the Vedic period, man and woman were treated on

[4] If she is maiden, she is considered a property of father and if married, husband.

an equal footing. The birth of a daughter was welcomed in the family. *Upanayana* or the ceremonial initiation into Vedic studies was common in case of girls and boys. The marriageable age for girls was 15 or 16. Till then, they pursued their studies with dedication and determination and some girls even preferred to stay unmarried in order to attain high levels of intellectual and spiritual salvation.

With the passage of time, the situation changed. The status of women in Indian society was on a gradual decline. Whereas in Vedic period, a woman who had been violated or criminally assaulted was treated with sympathy and accepted back by the families after they performed certain purification rituals. In later days, society closed its door to such women. The offence which was once a disgrace to a woman and her inner self, ceased to be so; it transformed into a wrong done to a man in the enjoyment of his property. As pointed by *Donald Dripps* "Female sexual autonomy had little to do with rape. The law struck a balance between the interests of males-in-possession and their predatory counterparts.....the law assured the male-in-possession that if another male forcibly invaded his interest, the predator would receive the maximum penalty."[5]

1.2 Legislative Approach towards Rape

The offence of 'rape' occurs in Chapter XVI of Indian Penal Code (hereinafter cited as IPC). It is an offence affecting the human body. In this chapter, there is a separate heading for sexual offences which encompasses Sections 375 and 376, 376-A, 376-D of IPC. Drastic changes have been made in the law on rape in 1983.[6] A minimum of 7 years imprisonment has been imposed as punishment for rape as defined under Section 375, the maximum being imprisonment for life or imprisonment for a term which may extend to 10 years. Imposition of fine is made compulsory. The proviso to sub-section (1) of Section 376 says that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than 7 years.

Sub-section (2) of Section 376 enumerates certain aggravated forms of rape like rape by a police officer, a public servant, a member of the management or staff of a jail, remand home or a hospital etc. on a person in custody or care, rape on a pregnant women, gang rape, rape on a woman below twelve years. The punishment for these aggravated forms is severe. The minimum sentence is ten years rigorous imprisonment and maximum is imprisonment for life.

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5 Donald A. Dripps, "Beyond Rape:An Essay on the Difference Between the Presence of Force and the Absence of Consent", *Columbia Law Review*, Vol. 92, No.7, (1992), p.1780.

6 See Criminal Law (Amendment) Act, 1983 which amended the provisions in Indian Penal Code, 1860; Code of Criminal Procedure, 1973; and Indian Evidence Act, 1872.

Again, the proviso to sub-section (2) says that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 10 years.

(i) **Section 375**. Rape-A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

Firstly -Against her will.

Secondly -Without her consent.

Thirdly-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly-With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom, she is or believes herself to be lawfully married.

Fifthly- With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication, or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception – Sexual intercourse by man with his wife, the wife not being under fifteen years of age, is not rape.

Section 228 A[7]Disclosure of identity of the victim of certain offences-

(1) Whoever prints or publishes the name or any matter which may make known the identity of the person against whom an offence under Sections 376, 376-A, 376- B, 376-C and 376-D is alleged or found to have been committed (hereinafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is :

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7 Act 45 of 1860.

(a) by or under the order in writing of the officer- in- charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by or with authorization in writing of the victim; or
(c) where the victim is dead or minor or of unsound mind, by or with the authorization in writing of, the next of kin of the victim: Provided that no such authorization on shall be given by the next of the kin to anybody other than the chairman or the secretary, by whatever name called; of any recognized welfare institution or organization.
(d) Explanation – For the purpose of this sub-section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to on offence referred to in sub–section (1) without the previous permission of such court shall be published with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation – The printing or publication of the judgment of any High Court or Supreme Court does not amount to an offence within the meaning of this section.

Section 327 of the Code of Criminal Procedure, 1973 has been amended directing the inquiry into a trial of rape to be conducted in camera. In Indian Evidence Act, 1872, Section 114A has been inserted after Section 114 according to which, in a prosecution for rape under Section 376(2) of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

The law relating to different aspects of trial and punishment of the offence of rape has undergone a sea change in our country due to the consistent efforts of the courts. The case law is replete with decisions in which the traditional approach of insisting on corroboration of the statement of the victim and of absence of her consent has been categorically abandoned by the courts. The Supreme Court has now added a new dimension to the law by implicitly admitting that rape is not a simply a physical assault but a psychological violence.[8]

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[8] *State of M.P.* v. *Munna Chowbey* (2005) 2 SCC 710, where the Apex Court has reiterated that rape affects the dignity of woman. *See also: State* v.*Gangula Satya Murthy* (1997) 1SCC 272; *PUDHR* v. *Union of India,* AIR 1982 SC 147; *Bandhu Mukti Morcha* v. *Union of India,* AIR 1984 SC 802 .

1.2.1 Legal Parameters of Law of Rape

1.2.1.1 Sexual Intercourse

In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stain.

In *Gopal Kakkad*[9] case where the question as to what constitutes sexual intercourse and rape was discussed, it was held:

> To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial Penetration of the penis with the *labia major* or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. In such a case the medical officer should remain the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition, Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion not a medical one.[10]

This shows that our judiciary is now appreciative and sensitive towards the sociological and psychological aspect of rape. This could be a scenario in which the victim is stripped, naked, molested but never penetrated, what would then be the offence? Sexual assault, molestation or rape? If the accused degrades woman and he does everything other than penetration, would be then be charged with a lesser offence? There is indeed a very thin line between sexual abuse, molestation and rape. Finally, it seems that law is progressing and evolving towards recognizing this aspect of sexual offences.

In *Madan Lal* v. *State of J & K*[11] the Apex Court while holding the accused guilty of committing the offence of attempt to rape observed:

> If an accused strips a girl naked and then making her flat on the ground undress himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that is was a

9 *Gopal Kakkad* v. *Naval Dubey* (1992) 3 SCC 204.
10 *Id.*, at p. 222, para 37.
11 (1997) 7 SCC 677: 1997 SCC (Cri.) 1151.

case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC.[12]

1.2.1.1.1. Absence of Injury

In 1978, the Supreme Court pronounced a judgment against a conviction of the *Bombay* High Court under section 375, IPC and acquitted the accused in *Tukaram* v. *State of Maharashtra*[13], popularly known as the *Mathura* Trial. Here, the Session Judge found the evidence insufficient to convict the accused. The *Bombay* High Court reversed the finding and sentenced the accused to rigorous imprisonment.

The Supreme Court reversed the decision of the *Bombay* High Court and held the accused not guilty on three grounds;

1. There were no injuries shown by the medical report and thus "stiff resistance having been put by the girl" is false. The alleged intercourse was a peaceful affair;
2. The court disbelieved the testimony that she had raised alarm;
3. The court held that under section 375, IPC only fear of death or hurt can vitiate consent for sexual intercourse. There was no such finding recorded and therefore, since the girl was "habituated to sexual intercourse" there was consent.

This judgment was not accepted silently. There were marked protests and it was highlighted that, *firstly*-there were inadequate laws to protect women who are victims of rape and *secondly*, there were not enough legal safeguards to protect women who are summoned to a police station.

The case piloted the voice for amendment in the existing penal provisions to make them more effective in providing justice to the victims. The presumption that if no physical injury is evident on the victim, no sexual intercourse her taken place or rape has not been committed, ignores the fact that rape is not only an offence involving physical violence, but also psychological violence. Perhaps this trauma has been recognized in a case where it was held that the absence of injuries on private parts of the prosecutrix would not rule out her being subjected to rape. In *Rafiq* v. *State of U.P.*[14] the decision of the Supreme Court resulted in the conviction of the accused despite non-existence of any injury on the victim who was raped while she was sleeping.

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12 *Id.*, at p. 689, para 12.
13 (1979) 2 SCC 143: 1979 SCC (Cri.) 381.
14 (1980) 4 SCC 262: 1980 SCC (Cri.) 947.

In a similar spirit the Supreme Court in *Sheikh Zakir*[15] Case has held.

> The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim, who was by force prevented from offering serious physical resistance, she cannot be disbelieved.[16]

1.2.1.1.1.1 Corroboration by Medical Evidence

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at higher pedestal than an injured witness. In the latter case, there is injury in the physical form, while in the former it is physical as well as psychological and emotional.[17]

In *State of Punjab* v. *Gurmit Singh* [18] the Supreme Court brought about a logical conclusion to the controversy over the rules of corroboration and prudence. This case is in essence the culmination point of the evolution of law discussed so far. The Supreme Court, in this case, has clearly explained the importance of the victim's testimony:

> The courts must, while evaluating evidence, remained alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. The testimony of the victim in such cases is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. The evidence of a victim of sexual assault stands almost on par with the evidence of an injured witness and to an extent is even more reliable.[19]

Krishna Iyyer J, who is famous for his humanistic approach towards law, observed in *Rafiq* Case:[20]

> When no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole,

15 *Sheikh Zakir* v. *State of Bihar* (1983) 4 SCC 10.
16 *Id.*, at,p. 18, para 8.
17 *Aman Kumar* v. *State of Haryana*, AIR 2004 SC 1497.
18 (1996) 2 SCC 384 : 1996 SCC (Cri.) 316.
19 Id.,at pp. 393- 396, para 8.
20 *Rafiq* v. *State of U.P.* (1980) 4 SCC (Cri.) 947.

> the case spoken by the victim strikes a judicial mind as probable. When a woman is ravished what is inflicted is not merely physical injury, but 'the deep sense of some deathless shame.' Judicial response to human rights cannot be blunted by legal bigotry.[21]

A similar view has been reiterated by the Supreme Court in *Wahid Khan* v. *Sate of M.P.*[22] placing reliance on the statement of prosecutrix, if found to be worthy of credence and reliance, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

1.3 Existing Loopholes and Suggestive Measures in Law of Rape

1.3.1 Victorian Definition of 'Sexual Intercourse'.

Section 375 of the Code, 1860 does not define the term 'sexual intercourse.' But the explanation makes it clear that for the purpose to rape penetration is necessary. The judiciary has interpreted the term penetration as implying penile-vaginal penetration only. The existing law requires proof of penetration of the vagina by the penis. In other words, the requirement excludes all sorts of other ways in which women experience sexual abuse or violence that are no less humiliating, for example, insertion of the penis into the woman's mouth or anus or insertion of fingers or the objects into her vagina.

Moved by alarming increase in sexual abuse of women in 1997, *Sakshi* [23] filed a writ petition in the Supreme Court. It asserted that the narrow understanding of term rape under Sections 375/376 of IPC as penile /vaginal penetration only and treating the other forms of penetrations as lesser offences falling under either Section 377[24] or 354 IPC is incompatible with the current notion of rape as humiliation and degradation. Such traditional interpretation denies sexual integrity and autonomy of the victims in violation of Article 21 of the Constitution as well as frustrates the very purpose of newly added clause (f) of Section 376 (2) of IPC. [25] Such outdated interpretation also goes against the international obligations imposed on the State through CEDAW[26] as well CRC.[27] Thus, it requested the court, *interalia,* to declare that the term 'sexual intercourse' in Section 375 is not limited to penile/vaginal penetration only. Rather it includes all forms of sexual penetration of any orifice of the body.

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21 *Id.*, at p. 265, paras 6 and 7.

22 (2010) 2 SCC 9.

23 This Delhi-based organization provides legal, medical, residential psychological help to women victims particularly to woman suffering from sexual violence.

24 Section 377 deals with unnatural Offences.

25 Clause (f) of section 376 (2) deals with rape on a woman under twelve years of age.

26 *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981, ratified on 9 July 1993).

27 *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990, ratified on 11 December 1992).

On this the Supreme Court directed the fifteenth law Commission of India to explore the flaws in the rape laws and suggest needed amendments. After thorough and continued discussion with National Commission for Women, Sakshi, IFSHA [28] and AIDWA,[29] the Law Commission submitted its One Hundred and Seventy-second Report in 2000. The Commission suggested that all sorts of penetrations in any orifice of the body as well as oral sex should be covered under the proposed offence of sexual assault.[30]

1.3.1.1 Meaning of Consent

Consent is regarded as the most important element in order to constitute the offence of rape under Indian law. Ironically, the term 'consent' has not been defined anywhere in positive terms. Section 375 of IPC defines consent in negative. The section fails to distinguish between 'consent' and 'a real consent.' In the absence of any definition given to it in Section 375, it is capable of ample interpretations. Hence, the Law Commission in its Eighty-fourth Report[31] and One Hundred and Seventy-second Report[32] suggested the substitution of the word 'consent' by 'free and voluntary consent', which they felt indicated active consent as distinguished from consent implied by silence or mere submission.

However, it is felt that, despite the Commission's efforts to lay down suggestive amendments, there are some areas that need to be answered. In line with the recommendations of the Eighty-fourth Law Commission Report, the *third* clause of Section 375 should be widened in its scope. It covers only the consent given under fear of death of a human being or under fear of hurt. It fails to give protection against sexual intercourse obtained under non-violent threats, spreading of scandalous information etc.

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28 Interventions for Support, Healing and Awareness.

29 All India Democratic Women's Association.

30 Sexual assault means-
(a) penetrating the vagina (which term shall include the *labia majora*), the anus or urethra of any person with-
(i) any part of the body of another person or
(ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;
(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the *labia majora*), the anus or urethra of the offender by any part of the other person's body;
(c) introducing any part of the penis of a person into the mouth of another person;
(d) engaging in cunnilingus or fellatio; or
(e) continuing sexual assault as defined in clauses (a) to (d) above.

31 Law Commission of India, Eighty-fourth Report on 'Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence (1980).'

32 Law Commission of India, One Hundred and Seventy-second Report on 'Review of Rape Laws, (2000).'

The *fourth* clause of section 375 again reflects the conservative pro-male notions of sex. It fails to cover a large number of cases where the dishonest men allure innocent women on the false assurances of marriage. And after enjoying biological favours, they refuse to marry the victims. The pro-male notions of the judiciary could be seen in *Hari Majhi* v. *State* [33] where the accused procured sexual favours from a girl on the false assurance of marriage. The court declared the accused not guilty of rape on the ground that he has neither misrepresented nor cheated the girl. She willingly consented to the act. Similarly, secret marriages performed without any valid formalities, whereby the treacherous males make the women believe to be legally wedded by just putting vermilion on their foreheads are not covered by this clause.

Despite the addition of Section 114A Indian Evidence Act, 1872, the courts, by and large enthused by historical values have insisted that the burden of proof for absence of consent is on the victim. On the same lines the *fifth* clause places burden on the woman to prove that because of intoxication or stupefying or unwholesome substance administered by the accused she was unable to understand the nature and consequences of that to which she gave her consent.

While glancing through the development of law of rape, it can be clearly visualized that the consent has by and large, been used as a strong and valid defensive weapon.[34]

A woman may successfully prosecute a man for rape who had sexual intercourse with her consent when the man knew that he was not her husband and that she had consented believing him to be someone else to whom she was or believed herself to be lawfully married.[35] A similar mistake about the identity of the accused made by an unmarried, widowed or divorced woman provides her with no protection even if the man knows that she consented to the sexual intercourse believing him to be someone else. The message is clear. The tie between marriage and sexuality is unmistakable. The law protects virgins and chaste married women. A woman who is not married if she decides to be sexually active, she does so at her own peril. A man can swindle her for her promiscuity without any risk to himself. Any sexual activity beyond the private sphere of marriage is not worthy of legal protection.[36]

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33 1990, Cri. LJ, 650 Cal.

34 Meena Rao, "Ramifications of Harassment of Women", *Journal of India Law Institute*, Vol. 43, No. 1, January-March 2001, p. 308.

35 The Indian Penal Code, 1860, Section 375, clause fourth.

36 Ved Kumari, "Gender Analysis of the Indian Penal Code", *Engendering Law-Essays in Honour of Lotika Sarkar*, Eastern Book Company, Lucknow (1999).

1.3.1.1.1 Child Abuse

It is felt strongly that there should be a separate section aiming at curbing the galloping incidents of child rape.[37] To combat the menace of child rape, the following steps are suggested:[38]

1. Instead of dealing with rape of a child like the rape of an adult female, a separate section may be inserted in the Indian Penal Code punishing any type of sexual abuse of a female child below 14 years of age, whether it is rape, attempt to rape or sexual assault with an intent to outrage or insult the modesty of a female child. A minimum sentence may be prescribed without giving any discretion to the courts to award a lesser sentence below the minimum.
2. The rules of evidence and the procedure have to be simplified and a time – limit has to be set for deciding these cases at the trial and appellate stages.
3. These cases have to be investigated, inquired into and tried by victim-oriented female personnel and the trial has to be held in camera. The victim has to be kept informed of the status of investigation and trial.
4. The impact of the crime on the victim has to be taken into consideration by the court while awarding compensation to the victims.
5. State sponsored victim support schemes have to be set up to play an active role as a representative, advocate or advisor of the victim. Centres manned with trained counsellors have to be set up to provide services for rape victims, the most important of which is to provide a place where these girls, who have raped or sexually assaulted can be placed and provide them with help in dealing with any official agencies such as police or medical services.

1.3.1.1.1.1 Sentencing Policy

Given the limits of discretion in sentencing by the legislature, the courts have to decide the quantum of punishment to be inflicted in each case. In practice, in almost every rape case, a less than minimum sentence is awarded.[39] Recently on 22 February, 2011 Justice *Markandey Katju* and Justice *Gyan Sugha Mishra* delivered their verdict in a gang rape case,[40] where lower courts had awarded 10

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37 *Ruchika's* molestation case shows the infirmities in the Indian Judicial System. Indian Penal Code does not recognize Child Abuse and only criminalizes 'rape' and 'sodomy'. Anything less than 'rape', is called 'outraging the modesty', leaving a sexually abused child without legal protection.

38 (2001) 2 SCC (J) at p. 31-32.

39 *Dhananjoy Chatterjee's* case in India is probably the only case where a death sentence was awarded for rape. The accused was sentenced to death by the *Alipore* Sessions Court in 1991. The hon'ble High Court and Supreme Court dismissed his petition and awarded death penalty which was later affirmed by the President.

40 *Baldev Singh and Others* v. *State of Punjab*,Cri. Appeal No.749 of 2007.

years rigorous imprisonment and fine of Rs. 1,000 each to *Baldev Singh* and two others who were convicted under Section 376(2) (g) and Section 342of IPC.[41] The accused had already completed three and half years of imprisonment.

The Double Bench awarded imprisonment less than the statutory and ruled "we uphold the conviction of the appellant but we reduce the sentence to the period of sentence already undergone in view of the provision to Section 376(2) (g) which for adequate and special reasons permits imposition of a lesser sentence. However, we direct that each of the appellant will pay a sum of Rs. 50,000/-." The reasons given by the court were that after three and a half years in jail, an application was filed before the Supreme Court "stating that the parties want to finish the dispute, have entered into a compromise, and that the accused may be acquitted as there is no misunderstanding between them."[42]

The culprits should always be given the statutory minimum "not less than ten years but which may be for life" without the milk of human kindness flowing for the offender. The tendency of the courts has been to sympathize with the accused and takes notice of the repercussions of the offence on him and his family. The courts, including the Apex Court, do not even try to find out what happened to the victim of the crime and there is no mention of the consequences of the offence on the victim in most of the decisions on rape.[43] By and large therefore, the approach of the courts towards rapists has been mechanistic and unimaginative. Reasons for confirmation, reduction or enhancement of sentences have been immediately stated. Application for enhancement of the sentences or appeal on behalf of the State for the purpose is seldom take up.[44] It is no doubt true that deterrence does not come from mechanized increase of punitive severity

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41 Section 376 (g) IPC says "Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."Explanation I- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section." Therefore, on one hand court convicts the culprits for the crime committed by them and on the other hand reduces their imprisonment by six and half years against the provisions of the Code.

42 When Court implies that 'rape' is a 'dispute' between the contending parties; that conviction need not result in punishment and that rape can be done away as a misunderstanding – it means that our struggle of decades to bring justice and a sense of constitutional morality in the public domain especially for women, have been ripped apart by this single judgment.

43 *Madan Gopal Kakkad* v. *Naval Dubey* (1992) 3SCC 204: 1992 SCC (Cri.)598 is one of the few cases wherein, the Apex Court tried to find out the consequences of the offence on the victim.

44 In *T.K. Gopal* v. *State of Karnatka* (2000) 6SCC 168: 2000 SCC (Cri.) 1037, notice was issued to the accused to show cause why sentence of 10 years rigorous imprisonment should not be enhanced to life imprisonment. However, having regard to the extenuating circumstances, specially the fact that the accused's two daughters have come of age and are to be married, the Supreme Court held that enhancement of sentence is not called for.

but from quick investigation, prompt prosecution and urgent finality. But this does not mean that undue leniency be shown to the rapists thereby reducing the confidence of the victims in the criminal justice administration. A number of women activists believe that the existing laws should be implemented stringently without leaving room for loopholes. Sometimes, the rapist has cunningly offered to marry the victim. The proposal comes prior to the pronouncement of the court verdict.[45]Such a marriage proposal cannot absolve the rapist of this crime.

1.3.1.1.1.1.1. Special Courts Headed by Women Judges

To deal with the huge backlog, the Central Government has evolved a scheme by establishing special courts in the name of fast track courts. The fast track Courts within four years have not only brought the backlog of 24000 Sessions cases to nil, but has also enhanced the speed of disposal of Sessions cases double to the rate of institutions. This has significantly brought down the crime rate in the State. The Fast track Courts have been established with the especially constituted team and special task which has created conducive atmosphere different from the routine functioning of the courts.[46]

Such courts must be brought in for the trial of rape cases. As far as possible, such courts should be manned by women judges as emphasized by the Supreme Court in several cases over the years. The presence of women judges would ensure the dignity and respectability of the victim in the court as well as a sympathetic and forbearing attitude towards them.[47]

1.3.1.1.1.1.1.1 Provisions under Procedural Law

Rules of evidence and procedural laws, regarding cases of child rape should not be the same as for other cases of rape. A summary trial for punishing the child rapist is must. There should be a provision to have the statement of the child victim recorded in familiar surroundings of her own dwelling, without the accused being present.

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45 In Session's court in Delhi, the rapist who had gouged out the victim's eye proposed that he be allowed to marry the victim 'to wash off her stigma and re-establish her in society.' Strangely, instead of reprimanding the accused for such a humiliating proposal, the judge took up the offer and delayed the judgment giving the victim time to consider. The victim boldly refused the offer and went on to say that the rapist's offer "is to further humiliate, insult and denigrate my dignity." The judge then awarded life sentence to the rapist saying that the last minute marriage offer was malafide, available at http://www.cpiml.org/liberation/year_2005/june/marriage _with_ones_rapist.htm (last accessed26 January2012).

46 As observed by *N.M. Mathur, J.* in. *Suo Motu* v. *State of Rajasthan* RLW (2005) 2 Raj LW 1385.

47 Dipa Dube, *Rape Laws in India*, Lexis Nexis Butterworths (A Division of Reed Elsevier India Pvt. Ltd.), New Delhi, 2008.

These should be a stipulation in the procedural laws making it obligatory for a competent magistrate to record the statement of a raped woman immediately and to get the medical examination done. The medical examination report should be taken as sufficient proof. It has been recommended that in rape cases the report under Section 177 of Criminal Procedure Code should include the medical examination report. It is suggested by the National Commission for Women and the Law Commission that the investigation including the collection of evidence and trial of these cases to be conducted by women police officers. If the victim happens to be a child less than 18 years, she should be questions only in the presence of her parents. All the investigation work such as preparation of statements of witnesses, medical examination of the victim etc. should be done by women officers.

The need for speedy trial in rape cases seems to have been properly appreciated by the Law Commission. It has thus proposed that trials of rape cases should be completed within a period of two months from the commencement of the examination of the witness.

1.4 Marital Rape: An Undue Exemption

Criminal law provides, "Sexual Intercourse by a man with his own wife, not being under 15 years of age, is not rape.[48] Only two groups of married women are covered by the rape legislation –those being under 15 years of age and those who are separated from their husbands.[49] This allows husband to have complete sexual control over their wives in direct contravention to human rights regulations. The law simply echoes what social mores often take for granted, that women have no right to their own bodies and that their will is subject to that of their husbands. The undeniable confusion is that a wife is presumed to have given irrevocable consent to sexual relationship with her husband over though there is no presumption of consent for any other purpose, including the marriage itself. The option of puberty given by Hindu and Muslim Laws relating to marriage allows woman to revoke their marriages performed before attainment of majority but there are no sanctions against a husband establishing sexual relationship within such a marriage. The husband is punishable at par with other rapists only if the wife is too young physically for sexual intercourse. Her mental maturity or her clear withdrawal from matrimony by living separately is of little protection to the woman against aggressive sexual access of her husband. It is submitted that though husband has every right to have conjugal relations but that

48 The Indian Penal Code, 1860. Exception to, Section 375.
49 *Id.*, 1860, Section 376-A.

does not give him the right to rape his wife.[50] The proper remedy should be to approach the court for restoration of conjugal relationship.

The initial underlying idea behind this exemption was the assumption that on marriage, property of the father gets transferred to husband. Jurists over the years unanimously discarded this concept and expressed the opinion that for twenty-first century woman this has no rationale. Years of extensive scrutiny, sustained criticism and persistent activation have resulted in some jurisdictions taking significant, positive and far reaching steps to abolish this exemption. In *England*, House of Lords in *R v. R*[51] announced that husband's immunity no longer exists. It was followed by enactment of Sexual Offences Amendment Act of 1994, which formally abolished this exemption in *England*.[52] In 1993, marital rape became a crime in all fifty–states of *USA* under at least one or the other section of the sexual offence codes.

In India also a significant development was made when Section 376A was introduced as an amendment based on the recommendations of the Joint Parliamentary Committee on the Indian Penal Code (Amendment Bill), 1972 and the Law Commission of India. According to this section, a husband can now be imprisoned upto two years, if *firstly*, there is a sexual intercourse with his wife, *secondly*, without her consent and *thirdly*, she is living separately from him, whether under decree or custom or any usage. When the Law Commission in its Forty-second Report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope.[53] The Joint Parliamentary Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age. The National Commission for Women in India released a report, "Rape a legal study" which recommended the abolition of marital rape exemption. Unfortunately, it did not find favour with the Law Commission of India.

The much awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Act, 2005 amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc. mental, physical or sexual. It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful it is not about the freedom of decision of a

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50 Stellina Jolly and M.S.Ravte, "Rape and Marriage: Reflections on the Past, Present and the Future", *Journal of Indian Law Institute*, Vol. 48, No. 2, April-June 2006, p. 281.

51 (1991) 2 ALL ER 747.

52 Sexual Offences Act, 1994, Section 147.

53 The Law Commission of India, Forty-second Report on 'Indian Penal Code (1971).

woman's wants. It is about the fundamental design of the marital institution that despite being married, she retains an individual status, where she doesn't need to concede to every physical overture even though it is only be her husband. Honour and dignity remains with an individual, irrespective of marital status.

Section 122 of the Indian Evidence Act, 1872 prevents communication during marriage from being disclosed in court except when one married partner is being prosecuted for an offence against the other. Since, marital rape is not an offence, the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in court, combining the provisions of the DVA, 2005 and IPC will be a nearly impossible task.

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. The legal provisions continue to be reflective of the double standard we carry towards women. We treat rape as a crime but are far from recognizing that rape is a rape no matter who does it.[54] In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.

1.5 Victim's Rights in Indian Criminal Justice System

The role of the victim of a crime in our criminal justice system, which follows the common law colonial tradition, is restricted to that of a witness in the prosecution of an offence. This stems from a negative perception of the victim of a crime as a person who has "suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."

Absent a viable, effective statutory regime for compensation,[55] the courts in their constitutional law jurisdiction have had to forge new tools to give effect to the right of victims of crime to be compensated.[56] The decision of the Apex Court in *Delhi Domestic Forum* v. *Union of India* [57] is of great significance as it recognized the victim's right to legal representation and assistance, right to speedy trial, right to anonymity in trials, right to receive civilized treatment

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54 *Supra note* 50 at p. 283.

55 The Code of Criminal Procedure, 1973, section 357 (1), empowers a court imposing a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, in its discretion, *inter alia,* to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.

56 The earliest of these cases was *Rudal Shah* v. *State of Bihar* (1983) 4 SCC 141. The inadequacy of the provisions in criminal law to deal with custodial torture is reflected in the judgment in *State of M.P.* v. *Shyamsunder Trivedi* (1995) 4 SCC 262.

57 (1994) 3 SCALE 11.

during trials and their right to compensation. The court directed payment of Rs. 10,000 as *ex gratia* to each of the victims. In *Gudalure M.J. Cherian* v. *Union of India*[58] the State of *U.P.* was directed to pay sum of Rs. 2,50,000 as compensation to two sisters on whom had been committed by unidentified assailants. So far, the present law on compensation is inadequate. The answer could lie in attributing more active role to the State.[59]

1.6 National Commission for Women: Empowering Indian Woman

The United Nations Commission on the Status of Women in its twenty-fifth report had recommended to all member States to establish national commissions or similar bodies with a mandate to review estimate and recommend measures and priorities to ensure equality between men and women and the full integration of women in all spheres of national life. Acting on this resolution and on the demands of several women's organizations, the government of India set up a committee in 1971 known as the Committee on the Status of Women. Keeping in view the desirability of a commission for women at national level, the National Commission for Women Bill, 1990 was introduced in the *Lok Sabha* on 22 May 1990.[60]

The National Commission for Women (hereinafter cited as NCW) was set up as statutory body in January 1992 under the National Commission Act, 1990. It was constituted to look into the issues related to women and the researcher attempts to study the working, strengths and weaknesses of the women commission particularly in context of sexual offences in India to draft a holistic factual dimension of rape issues and laws in India.

1.6.1 Important Interventions by NCW

The Section 10(1) (f) of the Act, 1990 authorizes the Commission to take *suo moto* notice of matters which relates to the subjugation of women rights and non implementation of laws formulates to protect the women. The Commission in such a situation can take up the cases with the concerned authority. The Commission has on many occasions used its power and initiated action against the persons and authorities involved in the denial of women rights. On more than one occasion, the Commission constituted

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58 (1995) Supp 3 SCC 387.

59 The State government has notified formation of state and district level Criminal Injuries Relief and Rehabilitation Boards for rape victims as per the directions of the Supreme Court and the Centre. The Boards will be headed by the respective district collector or district magistrate. The state board, to be headed by the principal secretary (Women & Child Development), will act as a coordinator besides monitoring the functions of the districts boards. It will ensure proper disbursement of the funds allocated to it by the central government and supplemented by the state government, to the district boards the board can issue directions to the appropriate authorities for ensuring proper medical, psychological and legal assistance to the victims.

60 The National Commission for Women Act, 1990.

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60 The National Commission for Women Act, 1990.

separate committees and sent its delegates to the different parts of the country where these ghastly incidents of injustice have been reported.

1.6.1.1 Bhateri gang Rape

Shrimati Bhanwari Devi was working as a ***sathin*** under Women Development Program in the village *Bhateri* of *Rajatshan*. Her efforts to stop child marriage infuriated some families of *Gujjar* community. In order to take their vengeance, they gang raped her on 22 September 1992 after tying her husband. Her efforts to get justice got futile because the powerful lobby of the *Gujjar* community dominated the government machinery. Her medical examination was done fifty two hours after the incident and the High Court came up with a strange notion and reason in denying her justice.[61] This infuriated the intellect of the country. The NCW immediately formed a committee and visited the village. They held discussions with the police, medical experts and the workers of WDP. They also met the Chief Minister and urged him to take stringent action against the guilty persons. The Commission took up the issue with Human Resource Development.[62] The persistent efforts of NCW and its deliberation with even Prime Minister of India forced the case to be handed over to CBI to grant *Bhanwari Devi* justice.

1.6.1.2 Marine Drive Rape Case

On 21 April 2005, a heinous act of rape was perpetrated at a police *chownki* located adjacent to the Marine Lines Railway Station in South Mumbai by a police constable who was on duty named *Sunil Atmaram More*. The abhorrent incident was committed by a policeman upon the victim of age of about seventeen years in the police *chownki* The incident compelled the Commission to take immediate cognizance of the matter. On 04 May 2005 the Commission sent its team to meet the teenage girl (victim).

The team later met Police Commissioner *A. N. Roy* and discussed the incident as well as security of women in the metropolis. The Commissioner apprised the team of the immediate inquiry and filing of the charge sheet against *More* and his dismissal from the force, The Committee not only demanded justice for the victim but also proposed certain measures to the Commissioner for the security and safety of women in metro. The inquiry committee suggested that every police outposts should have at least one women police officer.

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61 Smita Narula, *Broken people: Caste Violence Against India's "untouchables"* Human Rights Watch, p. 176 (1999).

62 Kalpana Roy, *Encyclopedia of Violence Against Women and Dowry Death in India*, Vol. 1, Anmol Publications, New Delhi (1999).

1.6.1.3 Imrana Rape Case

On 06 June 2005 in *Charthawal* village in the *Muzaffarnagar* district Uttar Pradesh, *Imrana*, 28 years old at the time, and the mother of five children, was raped by her 69 year-old father in-law *Ali Mohammad.* After the incident, a local Muslim *panchayat* (council of elders) asked her to treat her husband *Nur Ilahi* as her son and declared their marriage null and void. The leading Islamic seminary *Darul Uloom Deoband* issued a *fatwa* or opinion, which quotes from Quran 4:22: *wa la tankihoo ma nakaha aaba-o-kum*, "And marry not women whom your fathers married", and not distinguishing between rape and adultery, said that as a result of her father-in-law's act, she should now be treated as the mother of her husband. The *fatwa* persecuted *Imrana* instead of her rapist father- in- law as she was being ordered to leave her husband and begin her life with her rapist. The All India Muslim Personal Law Board and even *Uttar Pradesh* Chief Minister *Mulayam Singh Yadav* endorsed the view of the *Darul Uloom* that *Imrana* can no longer live with her husband.

After *Imrana's* case was highlighted by the national media, the NCW directed authorities in *Muzaffarnagar* to take action. The Commission's chairperson *Girija Vyas* asked the *Uttar Pradesh* government to punish the guilty and sought a report on the incident. On the findings of the Commission, the authorities in *Muzzafarnagar* were directed to file a rape case against the accused and asked the State Welfare Minister to draft the proper action plan against the accused and rehabilitation of the victim and her family. The accused was punished and the victim was rehabilitated and given a job in university with adequate security.

1.6.1.4 Pipli Rape Case

A three-member team of the National Commission for Women began a probe into the rape and attempt to murder of 19 year old dalit girl at *Pipli* in *Odisha's Puri* district. The girl was admitted at the hospital following *Orissa* High Court direction. The High Court had been monitoring the treatment and investigation into the case. The victim is suffering from speech impairment since rape incident took place on 28 November 2011 and as the miscreants had tried to kill her by strangulation. Though the girl was allegedly raped by four persons on 28 November 2011, police registered an FIR on 09 January 2012 after the State Human Rights Commission intervened. The Women's Commission lambasted the local police for initially refusing to register an FIR despite the family's complaint.[63]

[63] The press release of NCW said: "The Commission took note of media reports that the girl was allegedly raped by some persons in *Pipli* area on 28 November 2011. The most important factor which determined the course of legal action in the case and nature of medical treatment received by the girl is the failure of local police station to register the case on the date of incident and even in November 2011, when the family lodged a written complaint." Headlines

The National Commission for Women not only acted swiftly as evident from some of the above-mentioned cases but has also tried hard to introduce new reforms in rape and sexual laws. The need for a new law on sexual assault was felt as the present law does not define and reflect the various kinds of sexual assault that women are subjected to in our country. The Bill as drafted by Advocate *Kirti Singh* of AIDWA with the support of NCW is based on the 172nd report of the Law Commission to amend laws relating to sexual assault in Sections 375, 376, 354 and 509 of Indian Penal Code and the relevant sections of the *Code of Criminal Procedure*, 1973 and the *Indian Evidence Act,* 1872 to deal effectively with the rape and other sexual offences.[64]

1.6.2 National Commission for Women: In Need of Empowerment

Many a time NCW has failed to deliver justice to the victim where it found itself helpless in confrontation with bureaucratic and political influence. Since NCW has no concrete legislative powers. All of its findings and bills are recommended to the legislature. Few of its bills and suggestions manage to become the law of the land. For example, the NCW's recommendations on new definition of Sexual Offences are merely rusting on papers. Secondly, The Commission does not have the power to appoint its own members. Its members are selected by the Union Government. It infuses subjectivity and favouritism among members. Thirdly, The Commission is dependent on grants from the Union Government for its financial functioning and this could compromise the independence of the Commission. Finally, The Commission's jurisdiction is not operative in *Jammu and Kashmir* and considering the present political unrest and human rights violations in the region, the Commission's presence there is all the more a necessity. It is the demand of time to empower the Commission and create an independent corpus for it so as to work without bureaucratic interference and perform its duties in a better way.

1.7 Conclusion

Patriarchy, by and large, has been an all-pervasive phenomenon cutting across the diverse composition of the Indian populace. It has been interwoven into the warp and woof of our cultural fabric. Radicalism thus is inevitable. Till the fabric is torn, 'she' can never hope to break free from the patriarchic shackles which have annihilated her identity as a free individual. Violence against women is a matter of grave concern. Rape, particularly is one of the most brutal forms of aggression against women which shatters the life of the victim. In addition to the

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Today Bureau on 17 February 2012. *Headlines Today* has been running a campaign seeking justice to the victim and her family. The 19 year old victim has been in a state of coma in a *Cuttack* hospital since the incident. Associates of local BJP MLA *Pradeep Maharathy* , who had resigned as the state's minister "on moral grounds", were allegedly involved in the gang rape.

64 *Supra* note 30.

trauma of rape itself, the victims have to suffer further agony during the legal proceedings. Most of the victims develop post-traumatic stress disorders.

Rape is a crime in which the accused is innocent till proven guilty, but the victim is guilty from the moment it is reported. CPM politburo member *Brinda Karat* points out that accusations about "dressing provocatively" are not the only ones rape victims have to face. Innuendo about the victim having had clandestine relations with the accused is common place too. In general, the notion that the victims have somehow invited rape is "depressingly" widespread. The problem lies not with the victim but it emanates from the deep-rooted "Gender Ideology." All over the world, in all life situations women are more vulnerable than man in public and private life. Violence subjects women not only to servitude and subordination but also keeps them in a state of despair and dehumanization, indignity and humiliation.

The penal provisions apply equally to all persons irrespective of them being men or women. Apparently, the Indian Penal Code seems essentially an inherently gender neutral law. This approach, however, does not take into account the differential impact of the scheme of provisions on men and women due to the differential status, socialization, role expectations and resources available to men and women in reality. The criminal law with regard to rape, marital rape, dowry etc. has changed in response to the demands by the women's movement but it still incorporates patriarchal values.

In the ultimate analysis there can be no two opinions about the need for stringent laws, sensitive judiciary, effective law and enforcement machinery and women's groups to deal with such atrocious crime. But what is needed more than anything else is a total revolution in the thinking of our society. It is submitted that criminal law provisions needs to be gender sensitive and in the process of its sensitization, to the law makers and administrators must be sensitive to the prevailing social and cultural contexts in which they are applying criminal law.

THE BOOK REVIEW

Dr. J.N. Barowalia, Commentary on the Consumer Protection Act, Universal Law Publishing Pvt. Ltd., New Delhi, 3rd Edition, 2008.

Renuka Salathia*

Consumer Protections Act is a social welfare legislation, which aims, *inter-alia*, to promote and protect the rights of consumers.

Author of the book Dr. J.N. Barowalia, who is a member of the subordinate judiciary is an eminent jurist and is working as Principal Secretary of Himachal Pradesh. He has authored many other books also.

The book under review being commentary on the Consumer Protection Act, 1986 is a section-wise treatise with a complete review of the Act, incorporating the latest statutory amendments and the law laid down by the Supreme Court of India, National Consumer Disputes Redressal Commission and various State Commissions. The first edition of the book was reviewed by Eminent Jurists Hon'ble Mr. Justice V. Krishna Iyer. The commentary on the Consumer Protection Act, 1986 stands out for an indpeth analysis of Consumer Protection Act, the highlighting point in the book is its conceptual clarity, comparative perception and critical insight. The author in this book apart from dealing elaborately with the provisions of the Consumer Protection Act, 1986 has also extensively given his personal views based upon his experiences as a member of subordinate judiciary and as a President of District Consumer Disputes Redressal Forum.

The commentary on the Consumer Protection Act by the author is an extensive section wise detailed and systematic analysis of the Consumer Protection Act which runs into 1453 pages.

The highlighting feature of the book is the detailed analysis of the Consumer Protection Act, 1986 along with latest case laws. The book is designed and organized in a very systematic manner wherein each and every provision of the act have been explained in detail and the commentary is a definite value addition to the library owing to its content value and the pricing of the book at Rs. 1395 is also reasonable considering the content value of the book. The book under review of considerable assistance to judges, Advocates, Law students, consumer associations and all those who have to deal with this legislation.

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* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab

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