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EDITORIAL

Research in law can be essentially understood as an intricate process that facilitates finding answers to legal questions; or going further and reviewing the potency and efficacy of laws enacted or yet to be enacted; and going even further and mapping the journey of a piece of law and voicing its pluralist, critical and relevant history. Looking at some of the papers in this issue, its heartening to see the different dimensions of law *vis-à-vis* women being explored: reproductive health and rights; sexual harassment; domestic violence and political participation and representations. The transforming configuration of society in India mandates law to be in tandem with the change, papers on Competition Regime, Corporate Social Responsibility, Patenting Biotechnological Invention and Trademark explore in detail and frame this metamorphosis. Papers on personal autonomy and judicial attitude on Arbitration highlight some of the grey areas of research and also point out the fluctuations and variations that creep into our systems invariably. RGNUL *Law Review* is grateful to all the contributors for their well-researched contributions. RGNUL *Law Review* feels privileged to provide platform to various voices taking part in the exploration of broad, dynamic and significant spectrum of law. As we continue our journey of publishing contemporary research and development in the field of law we welcome research contributions that underline the dynamics of law and comment on the newer debates confuting us.

Tanya Mander

RGNUL Law Review (RLR)

Volume V **July-December 2015** **Number II**

CONTENTS

A CRITICAL ANALYSIS OF THE RIGHT TO REPRODUCTIVE HEALTH OF A SURROGATE MOTHER: A HUMAN RIGHT CONCERN

Dr. Kamaljit Kaur*

1. Introduction

As surrogate motherhood in technical terms has been defined in many ways it is important to outline exactly what the term surrogate mother means and how it has been defined in different contexts. Surrogate mother, as defined by the Collins English dictionary is, *"a woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman"*. The ART Regulation Bill, defines the—*surrogate mother* as, *a woman who is a citizen of India and is resident in India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the couple/individual that had asked for surrogacy.*

There are different kinds of surrogacy fundamentally; there are two types of surrogacy i.e. traditional surrogacy and gestational surrogacy. In traditional surrogacy, a surrogate mother is artificially inseminated, either by the intended father or an anonymous donor, and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg, and the intended father or anonymous donor.

In gestational surrogacy, an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. The child is thereby genetically related to the woman who donated the egg and the intended father or sperm donor, but not the surrogate.[1]

Commercial surrogacy in India is legal in India since 2002.[2] The availability of medical infrastructure and potential surrogates, combined with international demand, has fueled the growth of the industry.[3] Surrogate mothers receive medical, nutritional and overall health care through surrogacy agreements. In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. India is a favorable destination for foreign couples who look for a cost-effective

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* Assistant Professor of Law, Army Institute of Law, Mohali.

1 Overview Process of Surrogacy, available on http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process, last visited on 24 December 2014.

2 The Associated Press "India's Surrogate Mother Business Raises Questions of Global Ethics". Daily News. (2007-12-30). Retrieved on 24 December 2014.

3 http://news.bbc.co.uk/2/hi/business/7935768.stm.

treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice.

However, this picture looks pretty only on paper. In most of the cases involving surrogacy, the surrogate mother is exploited as she is paid comparatively less for her services in India.

2. Profile of Surrogate Mothers

The women who engage in surrogacy are usually poor. They agree to conceive on behalf of another couple in return for a sum of money that would otherwise take many years to make. It is important to understand that these women generally do not have many career prospects as they are predominately uneducated, often engaged in casual work, sometimes migrants in search of better job opportunities and living in slum areas with inadequate housing facilities. The need for money is often felt so deeply that childless couples often negotiate a better price as a result of the competition.[4] There is a growing demand for fair-skinned, educated young women to become surrogate mothers for foreign couples. If one digs deeper the surrogates begin to reveal the trauma and turmoil they experienced before plunging into what some of them call the last decent resort to earn money. Even doctors in India are divided on this issue. There are those who feel that adoption is the best option for couples unable to conceive. However, most IVF doctors recommend surrogacy with stringent guidelines. Surrogacy turns a normal biological function of a woman's body into a commercial contract. Surrogate services are advertised, surrogates are recruited and operating agencies make large profits. The commercialization of surrogacy raises fears of a black market and baby-selling, breeding farms, turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. There have been instances where the contracting individual has specified the sex of the baby as well, refused to take the baby if it is not normal, and filed a suit against the surrogate saying she had broken the contract.

The supposed benefits of surrogacy are created by a capitalist patriarchal society. It is assumed that there is equal exchange money paid for the service rendered. In reality the contract between the parties to surrogacy would not exist if the parties were equal. The woman must give more than an egg to gestate a child an important gender difference. Within this framework the contract is always biased in favor of the financially secure male. Therefore, the freedom of the surrogate mother is an illusion. Most of the surrogate mothers interviewed were not willing to answer questions on how they felt after relinquishing the child. However field level observations note that the surrogate mothers would feel attached to the babies even though they were not biologically their own children.[5]

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4 Centre for Social Research (CSR)-Report on Surrogacy Motherhood-Ethical or commercial-Available at http://womenleadership.in/images/pdf/SurrogacyReport.pdf accessed on 27 December 2014.

5 *Ibid.*

The Centre for Social Research conducted a survey in the three main cities of Gujrat, Surat and Jamnagar where the practice of surrogacy is rampant and in its report entitled *Surrogate Motherhood-Ethical or commercial* has presented the following conclusions:

The surrogate mothers generally are from poor families and their average monthly income is not more than Rs. 2,500-3,000. Almost all of the interviewed surrogate mothers have already experienced child-birth before and have two kids of their own. In such a way, this implies that these women are capable of reproduction naturally and are made subjects of reproductive assistance techniques and become surrogate mothers. The majority of them are illiterate, employed as domestic helpers, construction workers or nurses. Thus, they are economically vulnerable and are in desire for some money. Hence, the need of money is the driving force for them to become surrogate mothers. Most of the surrogate mothers are married and live in nuclear family structure, which makes the surrogacy decision-making easier for the couple.

The surrogacy contract is signed between the surrogate mother (including her husband), the commissioning parents and the fertility physicians. In such a way, the clinic authorities evade legal hassles.

Almost none of the surrogate mothers have a copy of the written contract of surrogacy arrangement, though they are part of this contract.

The surrogacy arrangement contract rarely addresses issues related primarily to the well-being and health of the surrogate mother. It is only the health issues related to the fetus when the health of the surrogate mother becomes a prerogative.

In case the intended parents do not wish to continue with the pregnancy due to some fetal abnormalities or sex preference, the baby is aborted often without any say of the surrogate mother.

There is no fixed rule related to the amount of compensation for the surrogate mother. It is arbitrarily decided upon by the clinics. Convention goes that the surrogate mother is paid 1%-2% of the total amount received by the clinics from the commissioning parents in lieu of the surrogate baby.

In most of the cases, relationship between the surrogate mother and the commissioning parents remains as if it was harmonious, but from a distance. It should be taken into account that language remains to be a barrier and the doctor is the sole communicator between them. Most of the surrogate mothers stay in the shelter homes during the pregnancy period. According to them, they do not want to disclose their pregnancy to the surroundings due to the social stigma associated with it. In addition, the clinics also prefer them to stay in the homes instead of their respective villages in the interest of the surrogate baby, as the homes are better equipped to take care of the pregnancy-related issues and to prevent the surrogate mother from being infected with STDs or HIV/AIDS due to physical contact with her husband.

According to surrogate mothers the surrogacy arrangement distanced them from their friends and family members.[6]

3. Right to Reproductive Health and Surrogacy in India

Presently the guidelines given by the Indian council for Medical Research are to be strictly followed till the ART Bill is passed in order to protect the reproductive rights of the surrogate mother.

A brief analysis of the relevant provisions of Assisted Reproductive Technology Bill 2010 and 2013 are given below which either directly or indirectly have significance to the reproductive rights and right to health of a woman:

The surrogate mother has to relinquish parental rights over the child in case of ovum donor and a and the birth certificate of the baby born to a surrogate mother to automatically bear name of the commissioning parents. With reference to a surrogate mother, the provision seems to be too harsh considering the gestational period where she keeps the child for 09 months in her womb to later relinquish the parental rights. There have been strong propositions to change the approach to not treating the surrogate as a "surrogate" and rather treat her as a mother with adoption being the appropriate way of giving away the child to the commissioning parents. In absence of such changes the protection of reproductive rights of a surrogate mother will remain only in books and not in reality.

A woman is entitled to all expenses including those related to insurance, during pregnancy and after that till the child is handed over to the commissioning parents, as governed by the surrogacy arrangement. Major objection against this provision has been raised on the following grounds:

Considering that the volunteers to an arrangement of this kind are illiterate and in all probabilities are in major financial distress, there is absence of free consent on the ground of undue influence under Sections 10 and 16 of the Indian contract, which renders the contract unconscionable and thus void.

The object and consideration in a surrogacy agreement being handing and taking over of a child by the commissioning parents and the surrogate mother, with the surrogate mother receiving all expenses for the same falls within the ambit of Section 23 of the Indian Contract Act, 1872, as against public policy. Such an arrangement if allowed would squarely fall within the ambit of child trafficking which is punishable under the Immoral Traffic (Prevention) Act, 1956.

There has been a strong proposition favoring altruistic surrogacy as compared to commercial surrogacy to avoid commercializing womanhood, pregnancy and reproduction. But, the section supporting commercial surrogacy advocates it on the ground that the woman should be entitled for the basic expenses for delivering the child, which is justifiable in the given circumstances, but should not be paid for relinquishing the child.

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6 http://csrindia.org/blog/2012/03/05/surrogacy-motherhood/visited on 28.12.2014.

The age limit stipulated on a woman volunteering to be surrogate mother or donor to be between 21-35 years. If commercial surrogacy is anyways allowed as per the Bill, then the logic behind 18 years not being the lower end of the cap seems to be unreasonable, as for all other purposes a woman on completion of age of 18 is eligible for marriage. Thus, if commercial surrogacy is anyways permissible under the Bill, the age may be further relaxed to 18 years.

Limitation on the number of successful live births to 05, including her own children, limitation on a woman volunteering for embryo transfer to the same couple for not more than 03 times, and in case of ovum donation limitation on the number of such donations to 06 in entire life with a minimum gap between 02 such donations to be at least 03 months. The limitation on the number of live births seems to be unreasonable on the ground that in other cases of live births in case of married couples there is no such restriction, thus, not justifying the reason for the same.

In case of a married woman intending to be surrogate mother, consent of the spouse is mandatory. But, such a stipulation also leaves a scope for the wife being coerced to be a party to surrogacy on the pretext of the husband's consent. Thus, if the surrogate mother or the donors are major and competent to volunteer the participation of the husband can be curtailed

Most Indian surrogate mothers are paid in installments over a period of 9 months. If they are unable to conceive they are often not paid at all and sometimes they must forfeit a portion of their fee if they miscarry (Insight, 2006).[7]

With the Centre's proposed Assisted Reproductive Technology (ART) Bill likely to be tabled in the winter session of Parliament, foreigners and those not included in the "couple" category may be unable to avail the services of an Indian surrogate. Simply put, the Bill narrows the services to Indian couples or a foreigner married to an Indian citizen. This will put the brakes on the surrogacy business, which currently stands at Rs. 900 crore and is a growing industry. Also, by defining a couple as a married man and woman, the proposed Bill shuts the door on homosexuals and people in live-in relationships.[8] Whilst the 'ban virus' plagues free speech, viewing habits, dietary references and even the right of free thought all over the country in the shape of different rules, regulation and enactments, it also seems anomalous for the government to practice what it does not preach when it comes to surrogacy. The 2012 guidelines of the ministry of home affairs restricting the joy of parenthood through surrogacy to only foreign couples with at least two years of marriage, thereby

7 Haworth Abigail, Surrogate Mothers: Womb for Rent, Marie Claire, *http://www.marieclaire.com/world/articles/surrogate-mothers-india* (last visited 28 December2014) (Indian surrogates are paid between $5,000 to $7,000, the equivalent of upwards of 10 years" salary for rural Indians); see also The Feminist eZine, Is Paying the Poor to Have Children Morally Wrong?, *http://www.feministezine.com/feminist/international/Wombs-for-Rent.html* (claiming that Brahman surrogates can garner more in fees than those in lower castes); 'Surrogate Mothers Lined Up in Gujarat', *The Hindu*, March 2, 2006, (surrogates get paid between 1 and 2 lakhs); 'Celizic Wombs for Rent Grows in India' (Marketplace Radio Broadcast 27, December 2007).

8 *http://www.thehindu.com/news/cities/Delhi/art-bill-may-close-surrogacy-doors-for-foreigners-unmarried-people/article7793884.ece* Retrieved on 30th October 2015.

depriving single foreign parents their right to be father or mother, falls foul of the 2015 statutory guidelines of the ministry of women and child Development which permits any prospective adoptive single foreign parent, irrespective of his marital status, to adopt a child from India, the benefit of Article 21 of the Constitution available to all the persons, including foreign nationals in India guarantees the right of life to all. It envelops the right to privacy of which the right to reproductive autonomy is an inherent part. Therefore, the right to bear a child or the right to become a parent by surrogacy cannot be curtailed by government guidelines. Furthermore, the ban on conceiving children through surrogacy by single foreign parents also contradicts the new statutory mandate of adoption of Indian children by single foreign parent, the left and right hands of the government do not seem to be in tandem.[9]

4. Arguments in Favor of Surrogacy

Advocates of surrogacy argue that the surrogacy agreements are beneficial for all parties involved as the needs of two desperate women are met. It is often said that in the surrogacy arrangement, the "barren gets a baby, the broke gets a bonus."[10] The surrogate mothers often rarely utilize the money they earn. Others claim that the right to procreate is an important right. For example, in the United States this right is protected by the Constitution. The couple may exercise this right in the most practical way available to them given their infertility. However, this right is not literally spelled out in the constitution. Margaret Jane Radin[11] (1988) argues that if men are to donate sperm and receive money for that transaction, then surrogacy should also be allowed as an analogous transaction for women. Due to the substantive due process of privacy right the birth mother has a right to companionship of her children which cannot be overridden by contract. The liberal argument for surrogacy is autonomy and free choice. As long as one does not harm others, one has a wide sphere for doing what one wants. This relates to the intended parents as well as the surrogate mothers. Interestingly, there are very committed feminists on both sides of this issue. According to Radin,[12] feminists who do want to fully legalize surrogacy follow the reasoning that the world is non-ideal. Women and men are not equal and for years women have been relegated to a separate sphere at home, away from the marketplace. This has made women powerless, because the place of power is the marketplace, which is dominated by men. Allowing baby selling and surrogacy would mean that women remain being treated as anonymous interchangeable breeders and reinforces the objectification and subordination of women. Entering the market in this context is therefore far from liberating, but rather degrading. [13]

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9 Anil Malhotra, 'Evolve Secular adoption Law', *Daily Post*, E Paper, 19th October 2015.

10 Shannon, Thomas A., *Surrogate Motherhood: The Ethics of Using Human Beings*, Crossroad, 1988. P. 212.

11 Radin, Margaret Jane — 'Market Inalienability', *Harvard Law Review*, 100 (1988): 1849–1937.

12 Radin, Margaret Jane, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (2001).

13 Morgan, Derek, *Surrogacy & the Moral Economy*, Gower, 1990.

5. Arguments Against Surrogacy

According to Kembrell[14] (1988) "The practice of surrogacy exploits women economically, emotionally and physically. An important factor is that most women who get involved as surrogates do so because they are in desperate need of the money to maintain their family. In totality, agents are often drawn in and arrange contracts of questionable legality."[15]

The surrogate mothers are often unaware of their legal rights and due to their financial situation they cannot afford the services of attorneys. Once the surrogate mother has signed contract, it is impossible for them to escape. Kembrell (1988) goes even further saying: — "the practice of surrogacy represents a new and unique form of slavery of women". This is a view supported by Davis (1993). During times of slavery, slave women were often used as birth or genetic mothers and as surrogate mothers nowadays, who possessed no legal rights as mothers. In light of the commoditization of the children, and actually also of themselves, they have the same status as surrogate mothers have in contemporary times. Another similarity is that slave mothers could not speak freely about their pregnancy and the children they carried; an aspect that is also present in surrogacy as a result of social stigma.

Horsburgh (1993) is opposed to women because he believes surrogates are physically exploited once they have signed contracts agreeing to give birth to babies for clients. If there is a reason to abort the foetus, because of medical reasons or client's demands, the surrogate mother must comply. To make matters worse, if the pregnancy is indeed aborted, the surrogates often receive just a fraction of the original payment (Horsburgh, 1993). The contracts can also place liability on the mother for risks including pregnancy-induced diseases, death and post-partum complications (Kembrell, 1988). Foster (1987) states that many surrogate mothers face emotional problems after having to relinquish the child. However, other authors disagree with Foster.

6. Violation of Article 21 of Indian Constitution

According to Article 16.1 of the Universal Declaration of Human Rights 1948, "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family."[16] In India also, the reproductive right is a basic human right given under Article 21 of the Constitution of India. The Andhra Pradesh High Court in *B. K. Parthasarthi* v. *Government of Andhra Pradesh,*[17] ruled that reproductive right is a human right and its comes under right to privacy and also they agreed with the decision of the US Supreme Court in *Jack T. Skinner* v. *State of Oklahoma,*[18] which characterized the right to reproduce as "*one of the basic civil*

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14 *andrewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf.*

15 Macklin, Ruth, *Surrogates & Other Mothers: The Debate over Assisted Reproduction*, Temple University Press, 1994, P. 240.

16 The Universal Declaration of Human Rights, *http://www.un.org/en/documents/ udhr/ index.shtml#a16.*

17 AIR 2000 AP 156.

18 316 US 535.

rights of man."[19] Does this right allow exploitation of the basic human rights of other?

There is a great violation of women rights under Article 21, which grants, "No person shall be deprived of his life or personal liberty except according to procedure established by law."[20] As India is a male dominating society and for this reason the women from Poor Indian family, are forced by their husbands to become surrogates mother and sometimes for the donation of eggs for the want of money. This is great violation of the Article 21. Even if there is any complication during the delivery of child, the life of the unborn child is given more importance by the Reproductive Clinic and not the mother's life.

In a Recent Landmark Case the Kerala High Court stated that the Biological mother who has obtained the baby through surrogacy can claim the post-delivery maternity leave to take care of the new born Dealing with an urgent issue as to whether a 'biological mother' is entitled to the maternity leave in a case where she has obtained the baby through surrogacy, a bench of D.S. Naidu J. gave a landmark judgment in favour of the genetic/biological mother. The Court held that a mother who has obtained the baby through surrogacy is entitled to all the benefits an employee could have on post-delivery, i.e. the child specific statutory benefits. The Court examined the statutory scheme of the Maternity Benefit Act, 1961 and noted that "there cannot be any discrimination regarding the genetic mother in extending the statutory benefits to the extent they are applicable". The Court also examined the international treaties and conventions and noted that "welfare of the child shall be the primary consideration". The Court went through the decision of Madras High Court in *Kalaiselvi* v. *Chennai Port of Trust,*[21] where it was held that a women employee was entitled to avail 'child care leave' even in case where she got a child through an arrangement of surrogacy, and held that "though the petitioner has not undergone any pre-natal phase, however, from the day one, after the delivery, the petitioner is required to be treated as the mother with the new born, and thus without discrimination, the petitioner is entitled to all the benefits that accrue to an employee after the delivery". [*P. Geetha* v. *The Kerala Livestock Development Board Ltd*[22]]

7. Conclusion

With the inconsistency in the interpretation of various provisions of the Bill within the ambit of the prevailing laws in India, it is evident that allowing third party reproduction, specially surrogacy, in the existing form as per the ART Bill does not fit within the ambit of the UN objective of reproductive rights and right to health, thus, requiring a serious reconsideration of the various provisions. In India, there is a need to pass a new legislation by which commercial surrogacy related matters will be governed. Moreover, sufficient steps are necessary to be taken so that people can at

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19 Law Commission of India in Report No-228, *Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations of Parties To A Surrogacy*, August 5, 2009, at P. 12.

20 O.P Rai, *The Constitution of India*, Orient Publishing Company, 2nded, 2014, P. 35.

21 SCC OnLine Mad 811 SCC.

22 2015 SCC OnLine Ker 71, decided on 06-01-2015.

least understand the positive sign (i.e. it is helpful for maintaining familial peace) of legalization of commercial surrogacy and try to change their conservative approach.

Legalizing commercial surrogacy will result in the widespread suppression and erosion of norms surrounding women's rights, with particular consequence for vulnerable female populations. The trade-off for a woman choosing to place a price tag on her womb is her right to dignified and safe employment, education, and sustainable economic mobility for her family—markers of true progress for women, and consequently, for children as well. Commercial surrogacy falls somewhere between indentured servitude and slavery. Attempts to paint mutually beneficial altruism as part of this disturbing picture are wantonly misleading. Some argue that a woman's choice to act as a surrogate is her "right." This is unconscionable, given that the supply side of surrogacy is women in severe financial need. Such warped logic would also condone contractual slavery as moral and therefore legally permissible.

There is a need of Strong Uniform International Law to control the trafficking related to Commercial Surrogacy in the entire world to protect the rights, life and privilege of women. The pending Assisted Reproductive Technologies (ART) Bill must be deliberated upon and passed immediately. Unmarried woman should not be allowed to become surrogate mother as well as egg donor. Special Act and Amendments is needed in the existing Immoral Trafficking Prevention Act (ITPA), 1956 and in the Indian Penal Code, 1860. All the surrogate mothers must be provided with compulsory life insurance policy, failing which the clinics or the genetic parents be punished accordingly.

Before signing of the surrogacy agreement, information regarding the reproduction process through surrogacy should be disclosed in full entirety by the Clinics and doctors responsible for the same. In case of any complications, the health of the surrogate mother be considered first.

The Government should motivate the couples to go for adoption. Only those couple be allowed for Commercial Surrogacy who are medically unfit and not those who already have a child of their own. The hospital authority in case of Commercial Surrogacy should not entertain an intermediary.

According to ART Bill woman can donate her eggs for not more than six times in her entire life and the interval between each donation should be three months. However, nothing is mentioned about the number of eggs that can be removed at a time.

General Awareness is to be spread with the help of the media regarding the risk of the process of human eggs donation.

A relative, friend or known person should be allowed to act as surrogate mother in order to check human trafficking. Thus Surrogacy currently seems to be a classic case of, unintentional, misplaced priorities. The tightening of visa norms and restriction on the 'type' of couples' eligible to undergo this process is said to be done in an attempt to safeguard the interests of the surrogate mother.

Further banning surrogacy for single foreign parent or married foreign couples will not resolve the matter. Unethical practices should not be allowed to be proliferated.

We cannot shut out thinking simply because of the problems. Solutions must be found and a law governing surrogacy in the waiting for the past 10 years must give birth to a statute. What we can do to promote inter-country adoptions must be allowed to be done in the matters of surrogacy as well. A 'secular' approach must come forth in matters of surrogacy as well. The Assisted Reproductive Technologies Regulation Bill, decade long law in the making has finally taken a shape. Incorporating suggestions for the National Commission of Women (NCW) the new draft bill allows single women – divorced or widowed also to rent wombs. This is a welcome step towards ensuring equality of reproductive rights; however it also puts a blanket ban on foreigners including the NRIs from hiring surrogates in India. The complexity involved in the implementation of laws cannot be overlooked. The beneficiaries need to understand that the laws are meant for their welfare and this ban on foreigners will be seen as denying a source of income to poor women. A legal framework is needed to safeguard biological and financial interest of the surrogate mothers and it must be ensured that unregulated surrogacy business does not flourish in the absence of proper monitoring, in the garb of altruistic surrogacy.

Your Children are not your children.
They are the sons and daughters of life's longing for itself. They come through you, but not from you.
And though they are with you, yet they belong not to you.

The Prophet

OSCILLATORY JUDICIAL ATTITUDE IN ARBITRATION: A NEVER ENDING SAGA

Dr. Kulpreet Kaur Bhullar*

1. Introduction

'Arbitration' is known to have been in existence from times immemorial. It can be found in the most primitive societies as well as in modern civilizations.[1] Of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest.[2] Arbitral process in its rudimentary sense is a process in which two traders in a dispute over the quality of the goods delivered would turn to third party whom they trust for the decision.[3] Arbitration cannot be exactly and precisely defined, but Article 2(a) of UNCITRAL[4] Model law[5] on International commercial arbitration provides that for the purpose of this Law: *"arbitration" means any arbitration whether or not administered by a permanent arbitral institution.*[6]

'Arbitration' is also sometimes described "as a technocratic mechanism of dispute settlement, with a particular set of rules and doctrines, and 'international commercial arbitration', being a product of the 20th century".[7] From this statement it can be inferred that arbitration or international commercial arbitration is a recent phenomenon, but this is not so, there is evidence that practice of referring matter to neutral persons or to the elders of the society was in existence from very ancient times.

Arbitration is used for resolving both domestic and international disputes. However, arbitration generally is considered as a process alternative to solving of dispute through courts, but at the same time it is a very well accepted fact that it still requires aid of judiciary/courts to work in an effective manner. Main objective of Arbitration and Conciliation Act 1996 was quick resolution of disputes. Provisions of the Act specify where the intervention by judiciary is required. But contrary to the Act, which

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* Assistant Professor of Law, Army Institute of Law, Mohali.

1 F.D. Emerson, "History of Arbitration Practice and Law", 19 *Clev. St.L. Rev.*, 155 (1970). Quoted in Ronald Davisdon, "Arbitration- Its Future-Its Prospects", *Arbitration* 50(2) 147, 147-155 (1984).

2 Ronald Davisdon, "*Arbitration- Its Future-Its Prospects*", *Arbitration* 50(2) 147,147-155 (1984) *http://login.westlawindia.com/maf/wlin/app/document?&src=rl&srguid=ia744cc63000001374a2407671f5101cf&docguid=IDF7C15213F6611E08157B439682AB9F6&hitguid=IDF7C15213F6611E08157B439682AB9F6&spos=78&epos=78&td=100&crumb-action=append&context=78&resolvein=true* (accessed on 14th Jan 2015 at 12.51 pm).

3 Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3 Sweet & Maxwell 2003.

4 United Nations General Assembly Resolution 2205 (XX1) of December 1966. It was established to harmonize law for free flow of International trade.

5 United Nations document A/40/17, Annex 1 A/61/17, adopted on June 21, 1985. It was adopted by UNCITRAL to be a Model law on which different countries could base their Domestic law relating to Arbitration.

6 Model Law, Art. 2(a).

7 Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neo-Liberalism", 41 *Harvard International L.J.* 419- 430 (2000).

says that intervention of judiciary in arbitration process should be minimal, the judiciary has encroached into the areas where its intervention was uncalled for. Certain decision rendered by the Apex Court in past couple of years casts doubts in regard to the role played by the Court in arbitral process. Supreme Court has not followed a pro-arbitration approach rather the approach is interventionist in nature. Consequently, the outcome is uncertainty and never ending tussle between the two in regard to their area of operation of. But positive side is that, courts in recent past have shown the positive trend and have rendered decisions which represents pro-arbitration attitude of the judiciary.

Attempt has been made by the author in this paper firstly, to analyze of the role of judiciary in interpreting various provisions of the Arbitration and Conciliation Act 1996 with the help of decided case laws.

Secondly to analyze the oscillatory tale of misunderstanding and misinterpretation of certain provisions of the 1996 Act.

Finally to bring forth the positive swing in the attitude of judiciary from the interventionist to pro arbitration approach.

2. Historical backdrop

India too has a rich tradition of arbitration.[8] In ancient India, the settlement of disputes by a person chosen by the disputants was quite common.[9] Disputes were decided by *kulas* (family or clan assemblies), *srenis* (guilds of men following the same occupation), *parishads* (assemblies of learned men who knew law), and *nyaya panchayats.*[10] Most commonly known and still practised in a few areas of rural India are the *panchayats.* These are groups of elders who were ordinarily elected according to their wealth, social standing and influence in the community in order to decide disputes between villagers. The binding authority behind the *panchayats'* decision was the fear of excommunication from the community and also from religious services, as *panchayats* were incomplete without religious preachers.[11] Since then the Indian arbitration system has changed drastically through a transformation from an easily available dispute resolution method towards a more complicated and rules-dictated system.[12] Arbitration as a mode of settlement was also prevalent during the time of the British India and they introduced numbers of acts and regulation in India containing the provisions on arbitration.

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8 Sarah E. Hilmer, "Did Arbitration Fail India or Did India Fail Arbitration?" *International Arbitration Law Review* 10(2) 33, 33-37 (2007). *http://login.westlawindia.com/maf/wlin/app/document?&src=rl&srguid=ia744cc63000001374a2407671f5101cf&docguid=ID3FB9960E23F11DB82CDC5F15F378944&hitguid=ID3FB9960E23F11DB82CDC5F15F378944&spos=51&epos=51&td=100&crumb-action=append&context=65&resolvein=true* (accessed on 14th Jan 2015 at 12.44pm).

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

But first comprehensive law relating to arbitration in India was the Indian Arbitration Act 1940[13] which repealed the 1899 Act and Section 89 of the Second Schedule of the Code of Civil Procedure 1908 which dealt with the law on the arbitration.[14] Arbitration Act 1940 however, dealt with only domestic arbitration.[15] The Act of 1940 reflected a rather court-structured and strictly court controlled arbitration.[16] It provided for court intervention at all stages of arbitral proceedings, before, during and after arbitration.[17] Under this Act there was wide spread intervention by the court. In order to set arbitral machinery into motion existence of arbitration agreement was required to be proved. In case need was felt for the extension of the time during the arbitral process, extension was possible only with the intervention of the court. Finally, before the award could be enforced, it was required to be made the rule of the court.[18] Court intervention at every stage was detrimental to the process of arbitration. This has been emphasized in the case of *Guru Nanak Foundation* v. *Rattan Singh & Sons*,[19] where Justice Desai and Justice Sen stated that the way in which the arbitral proceedings under the Arbitration Act 1940 are concluded and without an exception been challenged in courts had made "lawyers laugh and legal philosophers weep".[20] The lack of finality to the domestic and scanty place for the foreign settlement of disputes and foreign awards were such defects which impinged the whole economic activities of Indian entrepreneurial group and the government so

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13 The *Arbitration Act*, 1940 was adopted on 11th March by the Act No. 10 of 1940. This Act was passed to consolidate and amend the law relating to *Indian Arbitration Act*, 1899 and the second schedule of the *Code of Civil Procedure*, 1908. This amended Act was largely based on the *English Arbitration Act*, 1934 and came into force on 1 July 1940. The Act extended to whole of India except J&K.. The Act dealt with broadly three kinds arbitration: viz,. (1) arbitration without intervention of a court: (2) arbitration with intervention of a court where there is no suit pending and (3) arbitration in suits. Except as provided either by the 1940 Act or any other Act, it applied to all arbitrations, including statutory arbitrations.

14 P.C. Markanda, *Law Relating to Arbitration & Conciliation,* 16th edition Wadhwa Nagpur 2006.

15 Krishna Sarma, Momota Oinam, Angshuman Kaushik, "CDDRL (Centre on Democracy Development and Rule of Law) Working Papers Development and Practice of Arbitration in India–Has it Evolved as an Effective Legal Institution" 2 (2009). *http://iisdb.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf* (accessed on Feb 15th 2015 at 5.00 pm).

16 *Supra* note 8 at p. 35.

17 *Ibid.*

18 *Supra* note 15 at p. 3.

19 *Guru Nanak Foundation* v. *Rattan Singh & Sons* A.I.R. 1981 S.C. 2075. This case reflects the intervention of the court in the arbitral process particularly in regard to the appointment of the arbitrators. Dispute had arisen between Guru Nanak Foundation (petitioners) and Rattan Singh & Sons (respondents) in 1974 with regard to the construction of the building. The application was filed before the High Court for the appointment of the arbitrator which was appointed accordingly. However, the applicants moved an application to the court raising objections to the appointment of the arbitrator. Petition was dismissed by the High Court of Delhi but subsequently the special leave petition was filed and SC ordered for the appointment of new sole arbitrator in 1977. New arbitrator appointed wanted to hold the fresh proceedings and in order to stop this application was filed in the Supreme Court. SC gave directions to continue from the point where earlier arbitrator had left. Arbitrator gave his award in 1977.

20 *Ibid.*

much so that both felt that there must be something new to attract the foreign investors which is a backbone of the any developing economy.[21]

In order to rectify the defects in Arbitration Act 1940 in which there was *unnecessary court interference*, the new Act called **Arbitration and Conciliation Act, 1996** was enacted in order to cater to the changing needs of the Indian society. On January 25, 1996 the current Arbitration and Conciliation Act 1996[22] came into effect which was passed to take into account the social, economic and political changes that have taken place and to keep pace with the fast moving and technology driven world of today. The 1996 Act has made certain drastic changes as it has consolidated the law with regard to both domestic and international arbitration. The 1996 Act consolidates and amends the provisions of three Acts: (1) Arbitration Act 1940; (2) Arbitration (Protocol and Convention) Act 1937; (3) Foreign Awards (Recognition and Enforcement) Act 1961. Arbitration Act 1996 is divided into four parts and has 86 section and three schedules. The present Act, based as it is on the UNCITRAL Model Law, seeks to provide for an effective and expeditious mode of settlement of disputes between the parties, both for domestic as well as international arbitration.

In other words, the aim is speedy resolution of disputes and not to prolong proceedings indefinitely. It is for the arbitral tribunal to make sure that no party succeeds in creating stumbling blocks in the smooth execution of the arbitration proceedings.[23] So, the core purpose of the Act is to

(a) to have minimal supervisory role;

(b) challenging the award on limited grounds mentioned in the act;

(c) to resolve the disputes in speedy and effective manner.

Section 5[24] of the 1996 Act, state that intervention of judiciary in arbitration should be minimal. However, the eighteen years for which the 1996 Act in is existence it has been seen that judiciary has intervened in the arbitral process which reflects the parochial outlook of the judiciary.

3. Judicial Perspective

India is a developing country, and in the era of globalization, with ever increasing inflation, current monetary deficit, decreasing foreign investment, over burdened

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21 S.S. Mishra, *Law of Arbitration and Conciliation in India with (Alternative Dispute Resolution Mech*anism), 41st Edition Central Law Agency 2007.

22 The *Arbitration and Conciliation Act*, 1996 was adopted on 16th August 1996 by Act No. 26 of the 1996 of the Indian Parliament. It came into force on 22nd August 1996. This Act consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of the arbitral awards. It also defined the law relating to Conciliation and for the matters connected there with. It is divided in to four parts. Part I deals with the domestic arbitration and Part II deals with International Commercial arbitration. Part III deals with Conciliation as the process for resolving the disputes and part IV contains miscellaneous provisions.

23 *Electrical Mfg. Co. Ltd.* v. *N.T.P.C. Corp. Ltd.* 2006(1) RAJ 399 (Del *Ibid. http://indiankanoon.org/doc/1742510/* (accessed on Feb. 17th 2015 at 11.55pm).

24 The *Arbitration and Conciliation Act*, 1996, S. 5. Extent of judicial intervention.—notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

courts, it is very important that alternate dispute resolving processes like arbitration should be strengthened. Moreover in today's fast paced and technology driven world of 21st century, foreign parties and investors expect the dispute resolution mode to be quick and effective. Intervention by the national courts unnecessarily hampers the justice delivery system of the country and shatters the faith of the investors in the justice delivery system of the country. Courts and in particular the Supreme Court has the responsibility of interpreting the provisions of the act. Role is all the more important because of the binding nature of the decisions given by the apex court. If the apex court lays down certain dictum then it is only the higher bench which can decide otherwise.

There are few areas where help of judiciary is important to run the machinery of arbitration effectively.

Main areas where arbitration requires the aid of judiciary to stride properly are:

- appointment of the arbitrators
- interim measures
- setting aside of award
- issues of arbitrability

3.1 Appointment of an Arbitrator

Section 11 of the 1996 Act provides that where parties to the dispute are not able to choose the arbitrators, they can approach the Chief Justice of the High Court (in case of domestic arbitration) or the Chief Justice of the India (in case of international commercial arbitration) for the appointment of an arbitrator. So, the intention of the drafters of the Act was clear that where the arbitral process ran into trouble because of the disagreement between the parties over the appointment of the arbitrators they could approach the Chief justice of the High Court and of the CJI in case of the international commercial arbitration for such appointment. By incorporating such a provision intention of the legislature is save arbitration from falling into deep ditch. Main purpose of the legislature was to provide for a simple and alternative way of appointing an arbitrator where parties fail to agree. As envisaged by law makers, appointment of as arbitrator under the Act is administrative act and not judicial. If power is judicial then the court has broader scope and authority, and then has power decide the contentious issues such as the questions of the validity of the arbitration agreement, arbitrability of the issue in question, whether agreement is null and void etc. But this provision of the 1996 Act has generated lot of convolution and has created lot of confusion.

In *Konkan Railway* v. *Rani Consatructions*[25] the main question which the court was to decide was whether the power to appoint an arbitrator is judicial or administrative function. Five judge bench in this case delivered the judgment in which they laid down that appointment of an arbitrator by the court is an administrative function,

[25] *Konkan Railway* v. *Rani Consatructions* (2002) 2 SCC 388 (405), para 19.

pursuant to which there is no need for the court to go into the contentious issues. Section 16 of the Act has specifically given the power to the Arbitral tribunal to decide about the jurisdiction under *competence/competence*[26] clause and these issues rightly fall under the ambit of the powers given to arbitrators. Further, Court had laid down the real purpose of conferring power on the Chief justices of the High court and on that of Chief justice of India is to make sure that the appointment is made by the person who occupies the highest judicial office. Further, they will ensure that the person who is appointed as arbitrator is independent, impartial and can decide in most competent manner.[27]

This decision basically lays down the correct position, as one of the primary functions is to put the arbitral tribunal into existence and to resolve the dispute in expeditious manner. Consequently, if there exists any kind of debate in regard to the validity of the arbitration agreement then it should be left open for the tribunal to decide. This decision basically respected the principle of *competence/competence.*

However, few years later Supreme Court in case of *SBP and Co.* v. *Patel Engineering Ltd.*[28] changed its earlier stance and overruled its decision in *Konkan Railways.* In *SBP and Co.* v. *Patel Engineering Ltd* the Court lay down that appointment of an arbitrator by the court is judicial and not an administrative function. This decision broadened the scope of power given to court under section 11of the 1996 Act. Outcome of the decision is that the court can go into the question of validity of the arbitration agreement and arbitrability of the issues etc. Further, it restricted the power of the arbitral tribunal laid down in section 16 by stating that once the court has decided on the question of validity of the arbitration agreement tribunal cannot have second look at the same. As the decision of the appointing authority was judicial in nature, it meant that it can be appealed to the Supreme Court, which would lead to delay. Now if we analyze the situation it is obvious that decision of the Apex Court in this case has posed death knell to the concept of *competence/competence* and Apex Court held that the decision of the court was binding on the tribunal and it cannot deviate from it. This decision will have long lasting detrimental effect on the arbitral process and will lead to delay. Further, since arbitral tribunal has been given express powers under Section 16 of the 1996 Act Courts should not usurp this power.

This decision shows the narrow attitude of the judiciary towards the arbitral process and is a clear case of encroachment on the powers of the tribunal which are very clearly laid down in the statute.

National Insurance Co. Ltd. v. *Boghara Polyfab Pvt. Ltd.,*[29]clarified the role of the court and of the arbitral tribunal under section 16 in light of the decision given in the case of *SBP and Co.*

In this case the division bench of the Supreme Court delineated the situation in which the tribunal has the power to have look into the contentious issues such as validity of

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26 Power of the arbitral tribunal to decide about its own jurisdiction.

27 *Supra note* 25 at p. 405, para 19.

28 *SBP and Co.* v. *Patel Engineering* (2005) 8 SCC 618.

29 *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.* AIR 2009 SC 170.

the agreement, arbitrability and existence of the arbitration agreement etc and those cases in which the court will have power to decide.

When an arbitrator is to be appointed by the court it will go into the detail analysis of the questions about the existence and validity of the arbitration agreement but where the help of the court is not taken then these question lie in the ambit of the tribunal.

It is made very clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, then arbitral tribunal can settle on the following questions:

I. whether the party making the application has approached the correct High Court;

II. whether there is a arbitration agreement;

III. whether arbitration agreement is a valid agreement ;

IV. whether the claim is alive or a dead claim

V. whether the contract in which arbitration clause is incorporated is null and void

So, this decision confirms that appointment of an arbitrator by the Court is a judicial act and court has wide power in relation to an appointment of an arbitrator. However, correct approach could be that whenever the help of the court is solicited then they should establish the tribunal without delay and leave the contentious questions to be handled by tribunal, a power which is conferred on the tribunal by virtue of Section 16 of the 1996 Act. Otherwise there is no point in having arbitration as an alternative dispute resolution process if again by resorting to the court the parties have to face long delays. Court sometimes takes one to two years to appoint an arbitrator, a practice which is contrary to the arbitration as process for quick and speedy disposal of disputes in hand.

3.2 Arbitrability

Arbitrability, generally involves determining which types of dispute may be resolved by arbitration and which belong exclusively, to the domain of the courts.[30] The question can arise at different stages of the arbitration.[31] It can arise while determining the validity of the arbitration agreement; it can arise while challenging the award and at the enforcement stage when party can contend that award should not be enforced because subject matter is not capable of settlement through arbitration. In principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court.[32] General view that is prevalent in the countries that use arbitration for resolving conflicts is that certain disputes as not arbitrable. But countries have not specified in their national legislation what is not

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30 *Supra* note 3 at p. 139.

31 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd Edition Buttersworth, 1989, p. 149.

32 Red Fern, Martin Hunter, Nigel Balckaby and Constantine Partasides, *Redfern and Hunter on International Commercial Arbitration*, Oxford University Press, 2009, p. 4.

arbitrable. So, it is a matter of interpretation by the court and more of policy decision by a particular country. Both the New York Convention and the Model Law uses the phrase "capable of settlement by arbitration", which means that according to these conventions only those disputes which are capable of settlement through arbitration can lead to a valid award and hence enforcement. It is important to determine the issue of arbitrability, reason being that although the arbitral proceedings are private in nature, but it leads to public consequences, and there are certain issues which are best left to be decided by the national courts themselves. To give example, criminal matters, matters affecting the status of an individual or a corporate entity (such as bankruptcy or insolvency), matters dealing with the grant of intellectual property rights such as patents or trademarks, issues relating to the securities laws or antitrust and competition laws as well as issues of fraud and corruption, may not be arbitrable under the domestic laws of different countries.

Arbitration and Conciliation Act 1996 does not specifically lay down which matters are not arbitrable. However, it is to be pointed out that the significance of 'arbitrability' should not be exaggerated. Matters relating to *bribery and fruad* are generally considered not arbitrable. It is because the arbitral tribunal being private in nature does not have the power to take evidence as compared to the courts. But the trend is shifting and it is believed that arbitrator is just as capable deciding the dispute as is the court.

The Apex Court in the case of *N. Radhakrishnan* v. *Maestro Engineers & Ors*[33] had followed old school approach and was of the opinion that serious allegations of fraud would be decided by courts and not by the private arbitral tribunals. This case relates to Section 8[34] which deals with referring the parties to arbitration when there is valid arbitration agreement. This case revolves around the question of allegations of fraud, complicity and financial malpractices, which allegedly resulted in the unfair retirement of N. Radhakrishnan. The appellant (N. Radhakrishnan) filed a suit for referring the parties to arbitration pursuant to arbitration clause, but, court was of the opinion that allegations of fraud, financial malpractice and collusion were substantial allegations having criminal ramifications and arbitral tribunal being the creature of the contract is not equipped to deal with the allegations of fraud.

3.2.1 Endeavor to Set Right the Position

But in the case of *Swiss Timing Limited* v. *Organising Committee, Commonwealth Games 2010, Delhi*,[35] the Supreme Court of India, has held that the allegations of fraud can be determined by arbitration where an arbitration agreement exists between the parties. This decision by the Apex Court reinforces the pro-arbitration inclination in the issue relating to arbitrability of allegations of fraud in arbitrations which take

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33 *N. Radhakrishnan* v. *Maestro Engineers & Ors* (2010) 1 SCC 72.

34 The *Arbitration and Conciliation Act*, 1996, S. 8, empowers the court to refer a matter before it to arbitration, in the event that the matter falls within the scope of an arbitration agreement between the parties.

35 *Swiss Timing Limited* v. *Organising Committee, Commonwealth Games* 2010, Delhi (2014) 6 SCC 677.

place in India. In this case, a Swiss company,(petitioner) entered into agreement on March 11th 2010 with the respondent for providing timing, score, result systems and supporting services required to conduct the Commonwealth Games in India. After the games were over dispute arose between them in regard to the nonpayment of the dues for the services provided by Swiss Timing Limited. Petitioner moved an application for the appointment of an arbitrator which was resisted by the respondent on the ground that contract was obtained by fraud and hence it was *void abinitio*. However, the court ruled that matters relating to the allegations of fraud are arbitrable and if there is valid arbitration agreement then the matter should be decided by the arbitral tribunal itself. It also clarified that law as laid down in the *N. Radhakrishnan* was not the correct law. However, only problem in the present decision is that it was given by the single judge where as *N. Radhakrisnan* was the division bench judgment. It is required that approach laid down in Swiss Timing Ltd should be delivered by the larger bench for it to be effective.

This decision reflects the positive attitude of the judiciary where it is trying to free itself from the clutches of the old close-minded outlook. Swiss Timing Limited decision reflects that judiciary is working towards strengthening the arbitral process.

In a case of *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd,*[36] application was filed to refer the parties to arbitration in pursuance to the arbitration clause in the agreement. This was resisted by other party on the grounds of allegations of fraud by citing *N. Radhakrishnan.* But court said that *N Radhahkrishnan* case deals with the domestic arbitration. It referred the dispute involving the allegation of fraud to arbitration, which implies that such matters can be referred to arbitration. Court further specified that it will decide each case in light of its own facts and see whether the arbitration agreement is void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement can stand alone. In case it can do so then allegations of fraud is no bar for the arbitral proceedings to take place.

These decisions further reflect that Courts in India are shifting their stance and they are working to make alternative dispute resolution process effective by providing support where it is necessary.

3.3 Enforcement of the Awards

Arbitration is little different from the normal process of resolution of disputes with the help of courts, as the decision given by the court has to be carried out by the parties without any delay, but on the contrary, in arbitration, once the tribunal has rendered an award its function is over. Arbitral Tribunal has no role to play in the enforcement of the award as parties themselves give effect to the award rendered by the tribunal. Practice as witnessed over the past years suggests that sometimes parties give effect to the award on their own and sometimes the winning party has to carry enforcement proceedings.

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[36] *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite Singapore Pte.* Ltd., (2014) 11 SCC 639.

The natural expectation of the party, who has won, is to get the enforcement of the award as early as possible. This is a reasonable expectation.[37] Main reason for the same is that party who has opted for arbitration, wants to have the dispute settled with the help of biding decision, and not like other alternative modes of the resolution of disputes, which only suggest either compromise or a solution which parties might agree or might not agree to. Once this decision has been made in the form of an award, it is an implied term of every arbitration agreement that the parties will carry it out.[38] Most of the countries and even the institutional rules on arbitration provide that, as and when the award is given the losing party should give effect to it. For example, the United Nations Commission on International Trade (UNCITRAL)[39] Rules state that the award 'shall be final and binding on the parties' and that 'the parties undertake to carry out the award without delay'.[40] Further, the practice and the policy in international arena is to favour the enforcement of the awards.[41]

There are studies which show that in most of the cases the arbitral awards are carried out voluntarily, which means that winning party does not execute any enforcement proceedings in the national courts to give effect to the award.[42] However, the realistic picture about the enforcement of awards is not available because arbitration is a private process.

To initiate the enforcement, the winning party needs to locate the assets of the losing party. After ascertaining the assets, the winning party will apply to the concerned court for the enforcement of the award. If enforcing court is satisfied, that all the conditions for the enforcement are fulfilled it will allow the enforcement. However, the losing party can always resist enforcement. It has two ways of doing so. First it can challenge the award in the country in which it is made. Challenging the award in country of the origin is attacking the award at the source with the main purpose of getting it modified or set aside. Recognition and enforcement, by contrast, are

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37 *Supra* note 32 at p. 621.

38 *Ibid.*

39 *Supra* note 4.

40 UNCITRAL Arbitration Rules, Art 34(2). In the proposal which was given by UNCITRAL in 2008 for revising UNCITRAL Rules, the final and binding nature of the award is further underlined by the language added to Art 32(2) that 'insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or competent authority, save for their right to apply for setting aside an award, which may be waived only if the parties so agree', United Nations Commission on International Trade Law, Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, note by the secretariat, Forty-eighth session, NewYork,4–8 February 2008, A/CN.9/WG.II/WP.149, Art 32(2). cited in *Supra* note 3.

41 Julian D.M Lew, Loukas A Mistelis, Stefan M Kroll, "Comparative and International Commercial Arbitration", Wolter Kluwer/ Kluwer Law International, 2007, P. 688.

42 *Supra* note 7, Study by the School of International Arbitration and Queen Mary, University of London (sponsored by PricewaterhouseCoopers LLP), entitled 'International Arbitration: Corporate attitudes and practices 2008', at 8 and 10 which suggests that only in 11% of cases did participants need to proceed to enforce an award and, in those cases, in under 20% did enforcing parties encounter difficulties in enforcement.

concerned with giving effect to the award, either in the State in which it was made or in some other State or States.[43]

First thing that is necessary for the execution of the awards is to present the original award and the original arbitral agreement to the court in order to get the execution of the award.

Grounds for setting aside are mentioned in Section 34 under Part I, and for refusing enforcement under Section 48 of Part II. However, one ground which has constantly been used by the court to set aside the awards and to refuse enforcement is ground mentioned in Section 34 (2) (b) (ii) and Section 48 (2) (b) which is vague and whose content and scope cannot be ascertained is the ground of *'public policy'*. Consequently, the interpretation given to these provisions of the Act by the courts have given them a different meaning, practice which is not conducive to the expansion of the arbitration as a method of the settlement of the disputes.

Along with the ground of public policy which has been hovering on the heads of the disputant parties the Supreme Court in India has also interpreted that when the *proper law* of the contract is Indian law in spite of the fact that the place of arbitration is outside India, still the parties can ask for the Interim measures in India which is contrary to the established practice in international commercial arbitration that interim measures can be sought only at the place where it is made.

Brief perusal of the cases here will highlight and reflect upon the attitude of the Indian judiciary in regard to the enforcement of the awards.

3.3.1 Regressive Approach

In ***Bhatia International* v. *Bulk Trading S.A and Anoth.***[44] it was held that foreign awards are those where arbitration takes place in a Convention country; awards in arbitration proceedings which take place in a non-convention country are neither considered as foreign awards nor as domestic awards under the Act.[45] Dispute arose between the petitioners Bhatia international and the respondents Bulk trading. Arbitral clause provided that proper law of the contract was Indian law and seat of arbitration was London. Respondent filed a suit under Section 9[46] of Arbitration and

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43 *Supra* note 32 at p. 626.

44 *Bhatia International* v. *Bulk Trading S.A and Anoth.* AIR 2002 SC 1432: (2002) 4 SCC 105.

45 Ashwinie K. Bansal, *Arbitration: Procedure and Practice.* 1st ed., 2009, P. 751.

46 *Arbitration and Conciliation Act*, 1996, S. 9 provides that, a party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject- matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject- matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession

[Footnote No. 46 Contd.]

Conciliation Act, 1996 for interim relief. Appellant contended that this petition was not maintainable because relief under Part I can be sought when place of arbitration is India and not when the arbitrations take place outside India and in this case for interim relief, proper forum would be London which is the seat of the arbitration.

Apex Court erroneously decided that: (a) Part I which deals with domestic arbitration will apply to the arbitrations in which place of arbitration is not India; (b) Part I will mandatorily apply to arbitration held in India. In case of international commercial agreement Part I will be applicable, but where the parties have entered into an agreement to exclude the applicability of Part I it will not apply; (c) If Part I is applied only to the arbitration that is held in India it would also amount to accepting that legislature has left a lacunae in the law. As awards which are rendered in the territories which are parties to the New York Convention but have not been notified as reciprocating territories by the Government of India, would not be governed by Part II. This is because of the reciprocity reservation in the New York Convention according to which countries can reserve their position while ratifying NYC that they will enforce the awards given only in those countries that on the basis of reciprocity will enforce the awards given in their country. India has entered into reciprocity reservation. Further, according to Section 44 of the 1996 Act the award rendered in those countries which are not notified by the Government of India would not be regarded foreign awards and hence would not be covered by Part II of the 1996 Act. In such situation, then it will not be foreign award and neither will it be a domestic award. But, if Part I is made applicable to all the international commercial arbitrations then there is no lacunae in the Act and such interpretation would also not leave a party remediless. The judgment in *Bhatia* rejected the territoriality principal to differentiate between Part I and Part II of the Act. Court did not explain what is meant by the implied exclusion of the Part I of the Act.

Court in this case has interpreted the provision of the 1996 Act wrongly. Arbitration and Conciliation Act 1996 have clearly demarcated the ambit and the scope of Part I and Part II. In International Commercial Arbitration where parties are from different countries and law of the place of arbitration is outside India then Indian courts have no jurisdiction till the award is presented for enforcement. In enforcement proceedings if the award is in contravention of the provisions laid down in Section 48 of the 1996 Act then it can be refused enforcement otherwise it is a valid awards and should be enforced as if it is a decree of the Court.

Supreme Court in India after *Bhatia* have interpreted that even if the award is foreign award i.e., made outside India and proper law is Indian Law and the parties have not expressly excluded the application of part I, then it can be challenged in India even

[Footnote No. 46 Contd.]

of any part or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

when the place of arbitration is outside India. Interim relief could also be sought under Section 9 of the 1996 Act in such situation.

In *National Agricultural Coop. Mktg. Federation India Ltd.* v. *Gains Trading Ltd.*,[47] the arbitration clause in a contract for purchase of iron ore between the petitioner and the respondent provided for arbitration in Hong Kong in accordance with the provisions of their Act. When dispute arose between the parties, the petitioner applied to the Supreme Court for appointment of a sole arbitrator pursuant to Section 11 of the 1996 Act. The respondent resisted the petition on the ground that Part I of the Act would not apply to arbitration since the place of arbitration is outside India. R.V Raveendran, J. in allowing the petition, cited *Bhatia* judgment to negative the respondent's contention and further held that since the parties had chosen the Act to apply to the arbitral process, Section 11 of the Act could be invoked for appointment of an arbitrator by the Court.

In *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Ltd*[48] again Indian party and foreign party provided for arbitration in which proper law of the contract was that of England and Wales and place outside India for the settlement of the disputes. Petitioner applied for the appointment of the arbitrator pursuant to section 11 of the 1996 Act in Supreme Court. SC allowed the petition. This was again in spite of the fact the place of arbitration was outside India.

3.3.1.1 Public Policy

For the enforceability of an Arbitral award, both domestic and international, it is a precondition that the award must conform to the public policy of the country in which the enforcement is sought.[49] The Central government has defined the expression "public policy" as "principles in accordance with which action of men and commodities need to be regulated to achieve the good of the entire community or public."[50] The Apex Court in India has taken *wide* view of the public policy ground and refused enforcement when awards contravene even certain legal provisions. This is contrary to the position taken by other countries such as France and US which have specifically stated that in international commercial arbitration countries should not refuse the enforcement of the awards on the grounds of public policy by placing the international commercial awards on the same footing as the domestic awards. Countries should adopt narrow view of public policy rather than adopting wide view.

In *Renusagar Power Co. Ltd.* v. *General Electric Co.*,[51] the Apex Court held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interest of India; or (iii) against justice or morality. Court did

47 *National Agricultural Coop. Mktg. Federation India Ltd.* v. *Gains Trading Ltd.* (2007) 5 SCC 692.

48 *Indtel Technical Services (P) Ltd.* v. *W.S Atkins Ltd.* (2008) 10 SCC 308.

49 Ajit Mazumdar "IX Biennial International Conference on Critical Issues in International Commercial Arbitration", New Delhi 19 & 20 October 2007.

50 Legal glossary prepared by the Ministry of Law, Justice and Company Affairs Government of India, New Delhi (1983 ed.).

51 *Renusagar Power Co. Ltd.* v. *General Electric Co.*, AIR 1994 SC 860, (888) : 1994 supp (1) SCC 644.

not explain the meaning of these sub phrases but specifically stated that in regard to the international commercial arbitration narrow view is to be adopted. After *Renusagar* the line of the cases decided by the Apex Court reflect upon the close mindedness of the judiciary where the court has taken wide view and has refused the enforcement of the awards on the ground of public policy.

In the case of *ONGC Ltd.* v. *Saw Pipes Ltd*[52] main question before the court was whether violation of certain provisions of the Contract Act constituted a ground for the refusal of enforcement of the award. Court in this case stated that if the award violates certain provision of the Act, it is considered as patently illegal, and therefore, is liable to be set aside. As allowing the enforcement of the award which is patently illegal is against the public policy of the country. Consequently, it should be set aside under Section 34 of the Part I of the 1996 Act. So, along with fundamental policy of Indian law; or the interest of India; or against justice or morality; Apex Court in this case added the fourth ground of patently illegal.

This approach continued further, and in the case of *Venture Global Engineering* v. *Satyam Computer Services Ltd.*[53] in which Satyam approached the US for the enforcement of the award given in its favour. But application was made by Venture to stay the transfer of shares and to set aside the award made on foreign soil in India on the grounds of violation of certain provision of the Indian Acts. It was contended that it was contrary to public policy of India. Appeal was again allowed by Indian courts, following the same analogy as had been laid in Bhatia.

Same approach was followed in *Phulchand Exports Ltd.* v. *OOO Patriot*,[54] and court held that awards that are rendered in other countries are to be judged on the ground of *patent illegality* under the term *public policy of India* as was laid down in *Saw Pipes* which approach is to be followed while enforcing the international awards.

As a result, we can say that court expanded the scope of public policy thus laying down that instead of narrow approach Apex Court would follow wide view while refusing enforcement on account of the public policy. In these decisions even few violations of provisions Acts in India would result in the annulment of otherwise valid awards.

3.4 New Dawn

Approach followed by the Indian Court after *Bhatia* brought forth the narrow attitude adopted by the court giving rise to the feeling that India was a hostile jurisdiction to arbitration. But position changed after decision in the case of *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Service, Inc.*[55] In this case constitutional bench after long deliberations ruled out that decision of the court in *Bhatia International* and in *Venture Global* was incorrect. They further laid down that: (i) Part I is not applicable to the arbitrations seated outside India and this is irrespective of the fact whether

52 *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705.
53 *Venture Global Engineering* v. *Satyam Computer Services Ltd.* (2008) 4 SCC 190.
54 *Phulchand Exports Ltd.* v. *OOO Patriot*, (2011) 10 SCC 300.
55 *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Service, Inc.*, (2012) 9 SCC 552.

parties have chosen to expressly apply the Act or to exclude it. Justice Nijjer again laid down the territoriality principle as deep-seated in the 1996 Act; (ii) interim relief could be sought only in the country which is chosen by the parties as the place of the arbitration and are not available to parties under section 9 of the 1996 Act; (iii) international awards could not be challenged under section 34 of the 1996 Act on the ground that they offend the public policy of India; (iv) Part I and Part II are mutually exclusive ; (v) international awards can be set aside in the country where they had been made i.e. at the place of the arbitration. Under the New York Convention award can be annulled in 'the country where the awards was made' and 'in the country under the law of which it was made' which refers to the procedural law/curial law. It does not refer to the proper law of the contract and by choosing Indian law as the proper law the parties cannot challenge the award under section 34 of the 1996 Act; Lacunae if it exists are to be rectified by Legislature, court is not to intervene. This judgment is prospective in nature which means agreement concluded earlier will be governed according to old law.

Further, the court in *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*[56] has removed *patent illegality* from the ambit of the public policy and has held that enforcement of foreign award would be refused under Sec 48 (2) (b) only if such enforcement is contrary to (i) fundamental policy of India; or (ii) the interest of India; or (iii) justice or morality. Judicial mindset to pro enforcement has been now seems to be established in this landmark decision of the Apex Court in which it overruled the decision in *Phulchand.* The Apex Court has significantly curtailed the scope of public policy and has firmly laid down that awards where place of arbitration is outside India can be challenged in those jurisdictions and not in India. This is the correct approach which has been adopted and public policy in regard to domestic awards and international commercial awards should be kept and interpreted differently.

3.4.1 Oscillation between Regressive Approach and Progressive Approach

However in the case *ONGC* v. *Western GECO,*[57] Oil and Natural Gas Corporation contracted with the Respondent, Western GECO international limited for procuring U.S. origin Hydrophones for technical upgrade of a Seismic Survey Vessel. Due to regulatory measures post 9/11 in the United States, GECO intimated ONGC on 16th Oct 2001 that it would not be possible to provide for the desired U.S. origin Hydrophones as it was not successful in getting the license from the concerned authorities in US. Appellant at first did not agree for compatible options to the US origin Hydrophones, but when unable to decide on the whether to approach the US authorities for license, ultimately in the end agreed on 26th Nov 2001 for the Hydrophones of the Canadian origin. Due to ongoing circumstances the vessel which was to be equipped with Hydrophones was not returned to the ONGC on the stipulated date of 9th July 2001 but instead it was returned on 6th May 2002. ONGC deducted the amount as liquidated damages from the payment but GECO contended that it was not liable because of the force majeure clause. Deductions gave rise to

[56] *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*, (2013) (8) SCALE 489.
[57] *ONGC* v. *Western GECO International Ltd.*, (2014) SCC 263.

arbitration in present case. Tribunal decided that ONGC cannot deduct the said amount and such delay cannot be attributed to respondents. But appellants not happy with the award, challenged it under Section 34 of the Act. Bombay High Court held that award or pendent lite and future intrest shall be deducted. Respondents on other hand contended that there is no provision under Section 34 which allows the court to sit on appeal over the contents award which has been passed. Appellants challenged it under the ground that awards is against the Public policy of India and hence can be set aside by the court.

Public policy had been interpreted in earlier cases and in *ONGC* v. *Saw Pipes* to include as: something against the fundamental policy of Indian law; or the interest of India; or against justice or morality; and court in this case added the fourth ground of patently illegal. In *Western GECO* the court for the first time explained the phrase '*against the fundamental policy of India'* and laid down that it meant; duty to follow judicial approach which means the application of the judicial mind; secondly adhering to the principles of natural justice and thirdly to follow the Wednesbury's principle of reasonableness which meant the decision should not be so perverse or irrational that no reasonable person would have arrived at it. Court stated that if arbitrator failed to make the inference that it should have made or prima facie makes a wrong inference then adjudication made by tribunal is open to challenge. Court rejected the Western GECO contention of non interference and modified the quantum of damages as according to the Court arbitrator made wrong inference.

One positive outcome of the case was that Apex Court in this case explained for the first time what is meant by the term "*anything which is against the fundamental policy of India*" which indeed is a positive move, but at the same time took a step backward, as it also laid down that court has power to interfere with the merits of the award, practice, which is denounced in India and abroad and is antithesis to concept of the arbitration. This decision of the Apex Court will open the flood gates of challenges to the award on the merits, practice which is destructive and contrary to the system of administration of justice by using arbitration as an alternate dispute resolution forum. In this case court has not adopted the pro-arbitration approach and tried to intervene in the merits of awards which is not in consonance with the international practice in arbitration.

In *Associate Builders* v. *Delhi Development Authority*[58] court clarified the scope of public policy for setting aside the award and provided for the narrow interpretation for the same. In this case court explained the meaning of phrase *against justice and morality* and lay down that courts should follow the narrow grounds for setting aside award on the ground of public policy. Delhi Development Authority (respondents) awarded a contract to the Associate Builder (appellants) for a construction of 168 middle income group houses and 56 lower income group houses in Trilok Puri in the trans-Yamuna area. The contract was to be completed in period of nine months for INR 87, 66,678. However, instead the work could be completed only after 34 months. Arbitral award was passed in which the arbitrator gave the decision in favor

[58] *Associate Builders* v. *Delhi Development Authority,* 2014 (4) ABLR 307 (SC).

of the appellants and held that respondents were liable for the delay. Appeal was made for the setting aside the award under Section 34 of the Act before the single bench which was dismissed. Division bench of the Delhi High Court laid down that the award was incorrect. Appeal was made by the appellants in form of Special Leave Petition and the Supreme Court allowed the appeal and set aside the impugned judgment of the division bench of the Delhi High Court. Supreme Court refused to meddle with the arbitral award and criticized the division bench of the Delhi High Court by specifying that High Court of Delhi lost sight of the law laid down by the Supreme Court and challenge made to the award under the Act. Division bench has acted as court of appeal and taken into consideration the facts which were never placed before the Arbitral Tribunal. Apex Court stated that only grounds for setting aside or interfering with the award are laid down in Section 34. Court can interfere with the merits of the award on the ground of the public policy. Public policy includes *Fundamental policy of Indian Law* (a) which further consist of: (a) disregarding orders of superior courts; (b) Tribunal or court is not to act in an arbitrary, capricious or whimsical manner and has to follow the judicial approach; (c) Principles of natural justice to be followed; (d) decision should satisfy the Wednesbury's principle of reasonableness. Further, public policy also includes '*against the justice and morality'* and will include within its ambit following: (a) with regard to justice it means that award should not shock the conscience of the court; (b) morality: there is no universal definition of morality but both English and the Indian courts have restricted the scope of morality to "sexual immorality". In arbitration drawing the analogy it would mean that award should not be illegal. If it is illegal than it is a ground for setting aside the award but with the rider that if it shocks the conscience of the court. Supreme Court further held that '*Patent Illegality*' would include: (a) fraud or corruption; (b) contravention of substantive law; (c) error of law by the arbitrator; (d) Contravention of the Act itself; (e) where the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the Act and; (f) if arbitrators decision is not reasoned decision.

Apex Court clarified that arbitrator is a sole judge as far as the quality and quantity of the facts are concerned and award could not be set aside that there was little/ inferior evidence. Apex Court held that Division Bench should have kept in mind that it is not first appellate court and cannot interfere with the award on the basis of error of facts.

This decision of the Apex Court is an important step in the line with the pro-arbitration approach of the Supreme Court in the last few years. Court in this case gave detail account of the meaning of the word 'public policy' and clarified the extent to which the interference can be made by the court under Section 34 of the Act. In *Western GECO* court explained 'fundamental policy of India'. In this case the scope and meaning of 'morality and justice' was laid down. In *Western GECO* court allowed the interference of court on the merits of the award but in this case Apex Court clarified that only ground on which interference is allowed is mentioned in Section 34 and under the head of public policy narrow interpretation of the word is to be used. So, again the court gave the correct interpretation and gave effect to the objective of the 1996 Act, which is the minimal judicial intervention.

5. Conclusion

Perusal of the cases decided by the Apex Court gives impression that judiciary has moved from the parochial and narrow outlook to liberal attitude. Arbitration is one of the most effective dispute resolution processes which is used for resolving commercial disputes. Arbitral process to work well requires the help of judiciary or the national courts where it lands itself into trouble. Role of the courts should be complementary and supplementary to arbitration. Indian judiciary has shown the pro-arbitration approach while interpreting different provisions of the Act. Change which is coming though is slow but it is effective, as now courts somewhere have start believing that justice can be delivered out of the court as well. India in order to compete with the developed countries requires investment from the foreigner investor. One of the greatest fear of any investor is that in case dispute arises the forum which should decide the dispute should be neutral and should provide justice to the parties without any bias. Decision given earlier had brought India into the category of the countries which are hostile to arbitration. But recent shift in the attitude of the judiciary has brought India in line with other countries where party autonomy has been respected and court have stopped unnecessarily intervening in the process.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013: A STUDY

Dr. Ritu Salaria*

1. Introduction

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Sexual Harassment Act) was passed by the Parliament and came into force on 23rd April 2013. It was enacted to ensure a safe working environment for women. It provides for protection to women at their workplace from any form of sexual harassment and for redressal of any complaints they may have launched. The Act was formed on the basis of the guidelines laid down by the Supreme Court in its landmark judgment, *Vishakha* v. *State of Rajasthan*[1] (where sexual harassment was first defined) but is much wider in scope, bringing within its ambit the domestic worker as well.[2]

2. The *Vishakha case*: Guidelines regarding Sexual Harassment of Women at Work

Bhanwari Devi, an employee of a development program run by the state government of Rajasthan, fighting against child and multiple marriages in villages, tried to stop child marriage of Ramkaran Gujjar's infant daughter who was less than one year old. The marriage took place nevertheless, and Bhanwari earned the ire of the Gujjar family. Her interference infuriated Gujjar family, and on September 1992, five men including Ramkaran Gujjar, gang raped Bhanwari. Unable to get justice, women groups had filed a petition in the Supreme Court of India, under the name of, '*Vishakha*', asking the court to give certain directions regarding the sexual harassment that women face at the workplace.

This was the case, which bought sexual harassment at workplace into public glare. The petitioners wanted assistance in suitable methods for realization of the true concept of gender equality and to prevent sexual harassment of working women in all

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1 AIR 1997 SC 3011.

2 The Preamble of the Act: An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. Whereas sexual harassment results in violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under Article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment; and whereas the protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified on the 25th June, 1993 by the Government of India; and whereas it is expedient to make provisions for giving effect to the said Convention for protection of women against sexual harassment at workplace.

workplaces through judicial process and to fill the vacuum in existing legislation. The Supreme Court held that, "each incidence of sexual harassment of women at workplace results in violation of the fundamental rights," "gender equality" and the "right to life and liberty." It was a clear violation of the Articles 14, 15, 19 and 21 of the Constitution. Gender equality includes protection from sexual harassment and right to work with dignity, which is universally, recognized Human Right. The Supreme Court took assistance from the then Solicitor General of India to formulate certain guidelines and norms to help working women against sexual harassment. These guidelines were formulated since the then civil and penal laws in India did not adequately provide for specific protection of women from sexual harassment in workplace and that enactment of such legislation would take considerable time.[3]

Today after many years of the Supreme Court having given these guidelines but has there been an implementation to these? One of the major drawbacks being, that such laws and guidelines find their places only in law books and few journals. The common masses don't get to know about such judgments. The NCW study shows that 60% of working woman is still not aware of this. In number of cases it was found that the women who made complaints had to meet with an enquiry about their own conduct and no enquiry was made against the person against whom the complaint was made. Lodging complaints often results in isolation of the women, both by employer and by the colleagues. It results in increase and sometimes more violent harassment. In a sexual harassment case the response of the employer institution is of great resistance. The institution gangs up against the women who complaints and then shield the person against whom the complaint has been reported. There is always a hesitation to initiate action against him. Worst of all, the victim is usually pressured to take the complaint back, through threat. Witnesses also tend to show their back since they are threatened to remain quite.[4]

The main feature of both the guidelines and the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013 ("Act") is the placing of the responsibility of the prevention and redressal of sexual harassment on the employer/institution. Preventive steps, including the formulation of a policy prohibiting sexual harassment, the publication and circulation of the policy and the spreading of awareness, are to be taken by the employer. The employer is to establish a complaints committee to hear cases of sexual harassment. The complaints committee is to be adequately represented and headed by a woman. It has the power to recommend disciplinary action against the perpetrator and/or the payment of compensation to the complainant, both of which are to be enforced by the employer. The *Vishaka guidelines* and the Act attempt to safeguard the complainant from possible threats to her employment conditions by prohibiting any discrimination against her during the period of the trial. It also allows for the transfer of the

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3 Aakriti Shakdher, *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013 - A Welcome change in a world of unwelcome advances, available at *http://www.corporatelawreporter.com/2013/11/06* (last accessed on 7 February 2015).

4 *Ibid.*

complainant or the perpetrator during the period of the trial, at the request of the complainant.[5]

In 2012 the SC heard another PIL regarding non- implementation of "*Vishaka guidelines*". The case was *Medha Kotwal Lele* v. *Union of India*[6] in which the challenge was made to implement these guidelines. The case arises against a background of the long-running attempt to tackle the problem of sexual harassment of women at work in India, both through the courts and before the legislature.

In *Vishaka's* case the Court stated that a woman's Constitutional rights to life (with dignity), to equality and to practice any profession or carry out any occupation, demanded safeguards against sexual harassment in the workplace. In the absence of legislative safeguards, the Court, stated that an "affective alternative mechanism" was needed to prevent violations of these fundamental rights in the workplace. To that end, the Court established guidelines ("*Vishaka guidelines*") with regards to the prevention and redress of sexual harassment in the workplace. These set out a series of obligations on employers to prevent or deter acts of sexual harassment and to remedy occasions where such acts take place. The Court stated that the *Vishaka guidelines* were to be treated as a declaration of law and to apply until relevant protective legislation was enacted by the Parliament.[7]

Since then, the "*Protection of Women against Sexual Harassment at Workplace Bill* 2010", which seeks to provide the requisite protection, was passed by the Lok Sabha (the lower house of Parliament) in September 2012 and became an Act in 2013.

This case arose when Medha Kotwal Lele, coordinator of Aalochana, a centre for documentation and research on women and other women's rights groups, together with others, petitioned the Court highlighting a number of individual cases of sexual harassment and arguing that the *Vishaka guidelines* were not being effectively implemented. In particular, the petitioners argued that, despite the guidelines, women continued to be harassed in the workplace because the *Vishaka guidelines* were being breached in both substance and spirit by state functionaries who harass women workers via legal and extra legal means, making them suffer and by insulting their dignity.[8]

The Court was specifically required to consider whether individual state governments had made the changes to procedure and policy required by the *Vishaka guidelines* and a number of earlier orders of the Court.[9]

The Supreme Court examined the law relating to protection of women against sexual harassment in India and the International law.[10]

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5 *Ibid.*
6 Application Number: 2012 STPL (Web) 616 SC Jurisdiction.
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*

National laws:

- Article 141 Constitution of India
- The Vishaka guidelines
- Protection of Women against Sexual Harassment Bill 2010 (the Bill) –it was pending at the time of hearing of this PIL.
- Central Civil Service (conduct) Rules, 1964 (CCS Rules)
- Industrial Employment (Standing Orders) Rules 1946.

International laws:

- The Beijing Platform for Action

The Supreme Court recalled the Beijing Platform for Action, which states that:[11]

> "[V]iolence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms (...) in all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture".

It went on to reproach the fact that India's record on gender equality remains poor, stating:

> "[W]e have marched forward substantially in bringing gender parity in local self-governments but the representation of women in Parliament and the Legislative Assemblies is dismal as the women represent only 10-11 per cent of the total seats. India ranks 129 out of 147 countries in United Nations Gender Equality Index (...) Our Constitution framers believed in fairness and justice for women. They provided in the Constitution the States' commitment of gender parity and gender equality and guarantee against sexual harassment to women."

The Court stated that the *Vishaka guidelines* had to be implemented in form, substance and spirit in order to help bring gender parity by ensuring women can work with dignity, decency and due respect. It noted that the *Vishaka guidelines* require both employers and other responsible persons or institutions to observe them and to help prevent sexual harassment of women.[12]

The Court held that a number of states were falling short in this regard. It referred back to its earlier findings on 17 January 2006, that the *Vishaka guidelines* had not been properly implemented by various States and Departments in India and referred to the direction it provided on that occasion to help to achieve better coordination and implementation. The Court went on to note that some states appeared not to have implemented earlier Court decisions, which had required them to make their legislation compliant with the *Vishaka guidelines*. It noted that some states had only amended certain aspects of their legislations rather than carrying out all required amendments and others had taken even less action.[13]

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11 *Ibid.*
12 *Ibid.*
13 *Ibid.*

The Court reiterated that there is an obligation to prevent all forms of violence. It stated that "lip service, hollow statements and inert and inadequate laws with sloppy enforcement are not enough for true and genuine upliftment of our half most precious population – the women".[14]

Accordingly, it held that the *Vishaka guidelines* should not remain just symbolic but rather shall provide direction until the legislative enactment of the Bill. Hence, holding that a number of states had not done everything required to comply with the guidelines, the Court provided the following directions:[15]

- States governments must make the necessary amendments to their CCS Rules and Standing Orders within two months of the date of judgment.
- States governments must ensure there is an adequate number of Complaint Committees within each state to hear complaints and such Committees are headed up by a woman.
- State functionaries must put in place sufficient mechanisms to ensure effective implementation of the *Vishaka guidelines*.
- The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the *Vishaka guidelines*. Similarly, the Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the *Vishaka guidelines*.

  Finally, the Court stated that, in the event of non-compliance to the *Vishaka guidelines*, the Courts orders and/or directions above, aggrieved persons should approach the High Court of the State concerned.

Later, soon after this decision the Parliament passed the *Protection of Women against Sexual Harassment Act,* 2013.

3. Some limitations in *Vishaka Guidelines* and the 'Act' of 2013

One limitation of the *Vishaka's guidelines* and the Act is that they are applicable only to an organized office set-up and not to the unorganized sector where the employer-employee relationship is not fixed. The Act tries to amend this by making specific provision for the inclusion of the unorganized sector, through the setting up of a local complaints committee, which is to act as a redressal mechanism outside of the institution. This local committee is to look into complaints in places where the workplace has no internal complaints committee, in any unorganized sector, or in cases where the allegation of sexual harassment is against the employer. An inadequacy of the sexual harassment Act is the failure to provide for any initiatives arising from the workers, which has been addressed by the *Vishaka's guidelines* through the provision of 'workers' initiatives'. It gives employees the right to raise

[14] *Ibid.*
[15] *Ibid.*

issues of sexual harassment at workers meetings, employer-employee meetings and in other appropriate forum.[16]

4. Workers Still Outside the Purview of the Act

At the very outset, it may be noted that the current legal position of sexual harassment after the framing of the *Vishaka's guidelines* does not include any workers outside of an office setting. Thus, 90% of women in India, employed in the unorganized sector are outside the purview of the guidelines. Nevertheless, it is important to think about sexual harassment from the perspective of women in the unorganized sector because the Act on sexual harassment at the workplace affects them as well. Equally, it can be an effective tool to push the boundaries on the subject of sexual harassment and ask significant conceptual questions. In the case of a single employer and employee, this onus has no meaning whatsoever, making the entire provision irrelevant. In the Act though, this has been addressed to some extent, as a local committee will address issues relating to sexual harassment in the unorganized sector. However, this merely shifts the onus from the employer to the state. Workers still remain outside the purview.[17]

5. Lack of Formal Systems in the Unorganized Sectors

The lack of formal systems in the unorganized sector highlights yet another limitation of the *Vishaka's* guidelines relating to the absence of labour safeguards. Complaining about sexual harassment is a serious step for any working woman, as it invariably increases the chances of discrimination or termination of work during or after the trial. This is heightened in the case of women in the unorganized sector due to the informal nature of their employment. Also while labour laws provide safeguards, which protect an employee from termination or any other discrimination during the course of any dispute, these safeguards do not extend to cases of disputes relating to sexual harassment. Safeguards against discrimination after the dispute is adjudged are in general inadequate and abysmal with regard to cases involving sexual harassment. For women in the unorganized sector, this lack of safeguards regarding sexual harassment further adds to their already fragile position as workers. Yet another aspect that often comes into play is the supposed neutrality of the guidelines and thus the redressal boards, which do not take into consideration various sets of hierarchies within the workspace, be they of rank or post or other social hierarchies relating to caste or class at the workspace. The *Vishaka's* judgment makes no distinction in trial procedure or execution based on rank of the complainant and defender. The legal language around sexual harassment takes into account only differences based on gender and not any other.[18]

6. The implications of Caste and Class in Unorganized Sector are Different

The implications of caste and/or class in the organized and unorganized sectors are different. It is important, however, to keep in mind that the unorganized sector also encompasses certain professions that are deeply ingrained in the caste background of

16 *Supra* note 3.
17 *Ibid.*
18 *Ibid.*

the workers. Manual scavenging is one such example. A simplistic definition of sexual harassment, which does not accommodate related discrimination based on caste/class, formulated by the law, and espoused by activists and other stakeholders, curbs precisely this layered understanding, which might have otherwise led to more comprehensive legal interventions.[19]

7. Indian Penal Code 1860 Amended

Through the Criminal Law (Amendment) Act, 2013, Section 354 was added to the Indian Penal Code that stipulates what consists of a sexual harassment offence and what the penalties shall be for a man committing such an offence. Penalties range from one to three years imprisonment and/or a fine. Additionally, with sexual harassment being a crime, employers are obligated to report offences.[20]

8. Prohibited Conduct and Definition of Sexual Harassment

The Act uses a definition of sexual harassment which was laid down by the SC in *Vishaka's* case that Indian Constitution affirms the right of all citizens to be employed in any profession of their choosing or to practice their own trade or business. *Vishaka's* case established that actions resulting in a violation of one's rights to 'Gender Equality' and 'Life and Liberty' are in fact a violation of the victim's fundamental right under Article 19 (1) g. The case ruling establishes that sexual harassment violates a woman's rights in the workplace and is thus not just a matter of personal injury.

The Act has been introduced to curb sexual harassment at workplace – 'sexual harassment'[21] is defined as any advances to establish physical contact with a woman, a demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other form of physical, verbal or non-verbal conduct of sexual nature. The following circumstances amongst others constitute may also constitute as forms of sexual harassment, – implied or explicit promise of preferential/detrimental treatment at the workplace, implied or explicit threat about her present or future employment status, interference with her work and/or creating an intimidating or offensive or hostile work environment for her, and humiliating treatment likely to affect her healthorsafety.

The Act will ensure that women are protected against sexual harassment at all work places,[22] be it public or private, organised sector or even the unorganised sector, regardless of their age and status of employment. The act also covers students in schools and colleges, patients in hospital as well as a woman working in a dwelling place or a house.[23]

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19 *Ibid.*

20 Nishith Desai Associates, Veena Gopalakrishnan, Ajay Singh Solanki and Vikram Shroff, 'India's New Labour Law - Prevention of Sexual Harassment at the Workplace, *Lexology*, available at *http://www.lexology.com/library/detail* accessed on 12 January 2015.

21 Section 2(n) of the Act.

22 Section 2(o) of the Act.

23 Section 3 of the Act.

The Act creates a mechanism for redressal of complaints and safeguards against false or malicious charges. Under the act, employers who employ 10 employers or more and local authorities will have to set up grievance committees to investigate all complaints.[24] Employers who fail to comply will be punished with a fine that may extend to Rs. 50,000. If, however, they still fail to form a Committee, they can be held liable for a greater fine. Every employer with a business or enterprise having more than 10 workers will have to constitute a committee known as 'Internal Complaints Committee' (ICC) to look into all complaints of sexual harassment at the workplace. Further, in every district, a public official called the District Officer will constitute a committee known as the 'Local Complaints Committee' (LCC) to receive complaints against establishments where there is no Internal Complaints Committee or there being a complaint against the employer himself.[25] This committee would further handle all complaints of sexual harassment in the domestic sphere as well as those coming from the unorganised sector.

9. Key Obligations of the Employer

9.1 Constitution of the Internal Complaints Committee

Every employer, with more than 10 employees, shall constitute an 'Internal Complaints Committee' at the workplace and wherein the offices or administrative units of workplace are located at different places, he will, constitute a committee in all such offices and administrative units.

9.2 Membership of the Internal Complaints Committee

It will consist of the following members (to be nominated by the employer):

- A Presiding Officer who shall be a woman employed at a senior level at the workplace, unless there is no senior women employee at the office or any other administrative unit. In that case the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organisation.
- At least 2 members from amongst the employees either committed to cause of women or who have experience in social work or have legal knowledge.
- One member from a Non-Governmental organisation or association committed to the cause of women and familiar with the issues relating to sexual harassment. This member shall not be part of the employer's enterprise. Provided that one-half of the total members must be women.

The Presiding Officer and Members of the Internal Committee hold office for 3 years from the date of the nomination as specified by the employer. The member from the NGO or association shall be paid such fees or allowance, by the employer, as may be prescribed. The details of the complaints are confidential and if any member of the Committee, be it the Presiding Officer, discloses any details of the same to the media

[24] Section 4 of the Act.
[25] Section 5 of the Act.

or press or makes it public in any way, will be liable for immediate disqualification from the Committee. Further, if any member has been convicted or accused of any offence under any law, has been found guilty in any disciplinary proceeding/has a disciplinary proceeding pending against him as per any law or has abused his position in any manner, he/she shall be removed from the Committee. For all establishments having less than 10 workers, or for a complaint against her employer, the aggrieved woman will approach the Local Complaints Committee, which is a body to check instances of sexual harassment at the district level.

Every complaint must be given in writing to the Internal Complaint Committee within a period of 3 months, from the date of the incident. An extension of a period 3 months can be granted to the woman if she, due to certain circumstances, is unable to file the complaint or is prevented from doing so. If however, she is unable to lodge the complaint due to physical or mental incapacity or death; her legal heirs may do so.

9.3 Preparation of an Annual Report by the Employer

The act casts a duty on employers to include information pertaining to the number of cases filed and disposed of by them in their Annual Report. Organisations, which are not under a requirement to prepare an Annual Report, have to furnish this information directly to the Local Complaints Committee, which will prepare an Annual Report of its own to be forwarded to the appropriate government.

9.4 What is the Procedure Followed by the Complaint Committee to Resolve a Complaint?

The following are the guidelines that need to be followed by the members of the ICC:

- When the ICC receives a complaint, it must seek to resolve the issue by way of conciliation if the complainant so wishes. However, no monetary settlement can be the basis of the conciliation.[26] If there is a settlement, a report must be sent by Committee, to the employer to take action in accordance with the recommendations of the Committee.
- If however no conciliation can be met with, the ICC must start an inquiry[27] into the complaint. All inquiries must be completed within 90 days. However, in case of a domestic worker, the LCC must transfer the complaint to the police, within 7 days of the complaint, for registering the case under Section 509, or any other relevant section, of the Indian Penal Code, if according to them a prima facie case exists.
- For the purposes of making an inquiry, the ICC shall has similar powers as a civil court – it can summon and enforce attendance of any person, examine him on oath, order production of documents, etc.

[26] Section 10 of the Act.
[27] Section 11(3) of the Act.

- During the pendency of the inquiry interim relief may be granted to the aggrieved woman. The ICC may recommend the employer to[28]
  - Transfer the aggrieved woman or the respondent to any other workplace.
  - Grant leave to the aggrieved woman up to a period of 3 months.
  - Grant such other relief as may be prescribed.
- On completion of the inquiry, the committee must submit its recommendations to the employer, within 10 days. The employer must act on those recommendations within 60 days in accordance with the conclusions of the inquiry.

9.5 Actions that can be taken by the Employer after Inquiry

If the respondent is found not guilty, the inquiry will end. If, however, his guilt is proven, then the employer must:

- Deduct from the salary or wages of the person who has engaged in sexual harassment, an appropriate sum that can be paid to the aggrieved woman (or to her legal heirs).
- Take action for sexual harassment as misconduct in accordance with the service rules applicable to the respondent (in case of a government agency).[29] In case of private organizations, the employer can take such actions as may be prescribed – currently, no rules have been framed explaining the actions that the employer can take.

9.6 False and Malicious Complaints

What can be done if a woman has filed a false complaint of sexual harassment against a colleague, a senior or a junior employee? If the ICC or LCC is of the view that a malicious or false complaint has been made, it may recommend that a penalty be levied on the complainant in accordance with applicable service rules.[30] However, an inquiry must be made in order to establish malicious intent. Also, mere inability to substantiate a complaint will not attract action under this provision.

1.8.7 Consequences of Non-Compliance with the Act[31]

Employers who fail to comply will be punished with a fine that may extend to Rs. 50,000. If any employer who has been convicted earlier of an offence subsequently commits a repeat offence he will be liable for twice the punishment, which may have been imposed on a first conviction. Further, his license for carrying on business may even be cancelled.

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28 Section 12 of the Act.
29 Section 13 of the Act.
30 Section 14 of the Act.
31 Section 26 of the Act.

10. Viewing of Women Worker as a Victim

Finally, the sexual harassment law, like all other laws addressing women's issues, creates specific definitions of categories like 'sexual harassment', the 'harassed' and the 'harasser'. These categories imbibe within them certain values signatory of law around women. The most important of them is viewing of the woman worker as a victim. This leaves only one way that she may experience harassment and react to it. The board then becomes the embodiment of this hegemonic understanding. By virtue of having been made a victim alone, the woman has as always to prove her victimhood beyond doubt to get justice. Any signs of agency may tarnish this image of 'victimhood'. Conceptually then, this becomes problematic as establishing norms of victimhood are a prerequisite for 'justice'. Women in the unorganized sector, given the lack of formal institutions to protect them despite the lived reality of dealing with various issues, including sexual harassment, individually and on a daily basis, are forced to curb and hide their agency in order to present themselves before these boards as 'victims' of sexual harassment.

11. Law is Still Inadequate

It can be said that the battle is half won. A recent CII survey suggests that popular private companies like Infosys Technologies, TATA Consultancy Services, Coco-Cola, Walchand Capital and Technologies have already put place a policy of prevention of sexual harassment. Even the government has swung itself in action with the Act. But the present Act is also not perfect. The most important point is that the preventive aspect is not highlighted in the bill, as it was in the Vishakha judgment, since all workplaces must take responsibility for generating awareness about sexual harassment and making the workplaces must take responsibility for generating awareness about sexual harassment and making the workplaces safe for women.

12. Act is not 'Gender Neutral'

Manoj Mitta of The Times of India complained that Bill does not protect men, saying it "is based on the premise that only female employees needed to be safeguarded."[32] Nishith Desai Associates, a law group, wrote a detailed analysis that included concerns about the role of the employer in sexual harassment cases. They called out the fact that there is no stipulated liability for employers in cases of employee-to-employee harassment, something upheld in many other countries. They also viewed the provision that employers are obligated to address grievances in a timely manner at the workplace as problematic because of potentially uncooperative employees. Furthermore, the law requires a third-party non-governmental organisation to be involved, which could make employers less comfortable in reporting grievances, due to confidentiality concerns.[33]

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[32] Manoj Mitta, 'Indian Men Can Be Raped, Not Sexually Harassed, *Times of India*, 16th August 2012 available at *http://www.timesofindia.com* accessed on 14th January 2015.

[33] *Supra* note 10.

13. Conclusions

The Act is no doubt a positive step towards providing security against sexual harassment at work place but it will be a success only when it is implemented in full spirit. It should be made gender neutral also. It is observed that the compliance to this statute has so far been left to the vagaries of the employers and government has not taken any significant step to enforce the law so far. For example, 6 months after the law came into effect, the state in UP remained dreadful as women could not participate in the workforce due to sexual harassment.[34]

The law requires that all companies and employers who have more than 10 employees constitute an "Internal Complaints Committee" to which an aggrieved woman can take her complaint. This committee, which must be headed by a senior female employee, is supposed to try initially to get the complainant and accused to reach a settlement and only then launch an investigation in case if the mediation fails.

Critics object to this provision requiring conciliation before an inquiry. This is "yet another way in which the dignity of women is undermined," according to a report on women's safety by former Chief Justice J.S. Verma released earlier this year.

If harassment is proved, the law leaves it up to the internal committee to decide a monetary fine to be paid by the perpetrator, depending on there "the income and financial status". So, a low-level executive will likely pay a lower fine for harassment than a senior executive, says Albeena Shakil, a women's rights activist from New Delhi. The law also doesn't define the range of financial penalties.

Activists say the prescribed mechanism of filing complaints is too bureaucratic and could deter women from coming forward.

Worse, they say, is a provision in the law that calls for punishment for making a false complaint women with legitimate grievances may keep quiet, fearing that they will not be able to prove their allegations and may instead be hounded for making false claims, says Suneeta Dhar, director at Delhi based women's group Jagori.

Finally, activists note that while the new law starts by advocating prevention of sexual harassment, it dilutes the responsibility of the employer in preventing it. Since the fine for an offence has to be paid by the employee, it doesn't give companies much incentive to take active steps to create a harassment-free environment at work, say activists.

It is certain that many victims will shy away from the publicity, the procedures, the delay and the harshness in the criminal justice system, this alternative structure and process is welcome, but needs much alteration. Helping the victims to make informed choices about the different resolution avenues, providing trained conciliators, settlement options by way of monetary compensation, an inquisitorial approach by

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[34] Vikas Dhoot, 'Abnormally High Levels of Sexual Harassment for Women at Work Places in UP', *Times of India*, 4th April 2014 available at *http://articles.economictimes.indiatimes.com/2014-04-11/news/49058555_1_sexual-harassment-indian-women-male-harassment* (last accessed on 19th January 2015).

the Committee, naming the victim by use of words like complainant etc. and not using her actual name and in-camera trials are some areas of improvement. Apart from this, we need something else which the legislation cannot provide- the mindset to understand the fears, compulsions, and pressures on women victims. The legal concept and test of a "reasonable man" should give right of gender to that of a "reasonable woman" as well.

The loopholes in the particular provisions have been already identified in this research paper along with obsevations as to what could have been done more properly. The overall impression provided by the Act is that it is not well drafted, with sufficient reasonable foresight of the harsh effects of its implementation. These problematic provisions and unanswered questions present a conundrum for application of the Act, and remains to be clarified.

COMPETITION REGIME: A TOOL TO PROMOTE CONSUMER WELFARE

Dr. Arneet Kaur*

1. Introduction

> "The ultimate goal of any sound competition policy must be consumer welfare, which competition advances through lower prices, higher output and enhanced innovation"[1]
>
> *William J. Kolasky*

This is in all probability a reality as the main objective of competition policy in general is to ensure efficient allocation of resources in an economy, resulting in best possible choice of quality, lowest possible prices and adequate supplies to consumers. All these objectives of competition law primarily promote consumer welfare. Thus, maximizing consumer welfare becomes a predominant concern of any sound competition policy.

Both competition law and consumer protection law deal with distortions in the market place, which is supposed to be driven by the interaction between supply and demand. Antitrust offences, like, price fixing or exclusionary practices distort the supply side because they restrict supply and elevate prices. Consumer protection offences, like, deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is.[2] In other words, both set of offences can be analyzed in economics terms and appreciation of this nexus will help to resolve apprehensions in minds of some that competition jurisprudence and consumer protection jurisprudence have evolved along different paths.

Competition law, almost everywhere prohibits anti-competitive agreements, like, cartels which damage the competition in the market, cause loss to the economy and to consumers and the abuse of dominance, i.e., monopolization which allow the enterprise to behave independently of customers or competitors, thereby allowing it to exploit customers. Thus, the primary motive of competitive regime is consumer welfare.

Competition policy makes market work and protects consumers from deception. These are also the two important goals of consumer protection. Thus, the end

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1 William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "US And EU Competition Policy: Cartels, Mergers, and Beyond" (25 January 2002) as quoted in Adrash Ramanujan, "Competition Law and Consumer Protection: Two Wings of Consumer Welfare", *Company Law Journal,* 2008, Vol. 2, p. J-105.

2 Thomas B. Leary, "Competition Law and Consumer Protection Law: Two Wings of the Same House", retrieved from *www.ftc.gov/speeches/leary/041022learyarticle.pdf,* last visited on 18 January 2014.

objectives of both the policies are essentially the same. However, competition policy is more of a proactive policy that inter alia attempts to promote consumer interest in the market place whereas consumer protection policy puts forward mainly a reactive agenda to protect the interests of the consumers and provide access to redressal against abuses. Of course, consumer protection policy also has some proactive elements. In this regard, there is strong complementarity between the two policies in that consumer welfare is a common goal.[3]

The UN guidelines for consumer protection adopted by the UN General Assembly in 1985 as expanded in 1999 represent an international regulatory framework for governments to use for the development and strengthening of consumer protection policy and legislation, aimed at promoting consumer welfare. These guidelines have implicitly recognized eight consumer rights. Firstly, this paper will make a humble attempt to highlight how competition law and policy in general helps in the promotion of these basic consumer rights. Secondly, as regards Indian scenario, the Competition Act, 2002 through its various provisions and three main elements, i.e., prohibition of anti-competitive agreements, prohibition of abuse of dominant position and regulation of combinations promotes and protects consumer interests. Thus, in the above background, this paper will make an endeavour to analyse the promotion of consumer welfare through the Competition Act.

2. Competition Policy

Competition means rivalry in the marketplace, which is regulated by a set of policies and laws to achieve the goals of economic efficiency and consumer welfare, and to check on the concentration of economic power. Empirical studies have suggested that competition enhances productivity at industry level, generates more employment and lowers consumer prices. A pro-competitive policy environment has been found to be positively associated with long-term growth. Competition policy is intended to promote efficiency and to maximize consumer welfare. It also promotes creation of a business environment, which improves static and dynamic efficiencies, leads to efficient resource allocation and consumer welfare, and in which abuse of market power is prevented or curbed.[4]

Competition policy promotes efficient allocation and utilisation of resources, which are usually scarce in developing countries. This also means more output, lower prices and consumer welfare. A good competition policy and law lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship and growth of small and medium enterprises.

There are two approaches to development. The first one is concerned with fulfilling the minimum basic needs of the people, removing the sources of poverty and marginalisation, focusing on problems like unemployment, basic health services and so on. The second approach to development is concerned with latest technologies, exports,

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3 Competition Policy and Consumer Protection Policy", retrieved from *www.cuts_international.org /competition%20and%20consumer*s 3, last visited on 2nd February 2014.

4 "Consumer Protection and Competition Policy", retrieved from *http//planningcommission.nic.in/ plans/ planrel/f.veyr/11v1_ch11.pdf,* last visited on 18th January 2014.

industrialization, more competition to provide better choice and so on. Consumer protection policy is part of the strategy that emanates from the first approach, while competition policy is an integral part of the second approach though there are significant overlaps. However, it may be noted that the two approaches do not mean two alternatives, but rather two instruments that must be used simultaneously.

3. Competition Law Promoting Basic Consumer Rights

Before we embark on assessing the consumer welfare implications, it is important to understand the notion of consumer welfare. It means different things to different people. Those who are relatively rich and can afford all comforts of life are more concerned about their range of choice of goods and services. For those who find it difficult to make their both ends meet, the most important concern is not choice but access to goods and services. Broadly speaking, while the former aspect is more important in developed world, developing countries would be more concerned about the latter aspect in administering their competition and consumer protection policies. Such dimensions of consumer welfare need to be kept in view while examining the link between the two policies. From a developing country perspective, the role that the two policies play in promoting development and poverty reduction becomes the focal point in understanding the linkage between the two.[5]

One can have a fair understanding of the notions surrounding consumer welfare by looking at the United Nations Guidelines for Consumer Protection, adopted by the UN General Assembly in 1985 as expanded in 1999. These guidelines represent an international regulatory framework for governments to use, for the development and strengthening of consumer protection policy and legislation aimed at promoting consumer welfare.

The UN guidelines call upon governments to develop, strengthen and maintain a strong competition policy and provide for enhanced protection of consumers by enunciating various steps and measures around eight themes. These guidelines have implicitly recognized eight consumer rights which can be used as the touchstones for assessing the consumer welfare implications of competition policy and law and to see how they help or hinder the promotion of these rights.[6]

3.1 Right to Basic Needs

In India, this right is the most crucial because of the high levels of poverty and deprivation. Thus, getting the maximum number of goods or services out of a rupee is more important for those who have less money to spend, than those who have enough of it. By ensuring lower prices, competition can make basic needs more accessible to the poor. Moreover, the poor who are engaged in agriculture and such other trade, are often unable to get the right prices for their produce, due to anti-competitive practices of the buyers. Hence, if implemented properly, the Competition Act will make a significant contribution in this regard.

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5 *Supra* note 3.

6 Pradeep S. Mehta, "Competition Regime and Consumer Welfare", *Chartered Secretary,* July 2006, pp. 999-1005, at p. 1000.

3.2 Right to Safety

Though competition policy and law do not directly deal with safety issues, they can make a significant contribution to promoting safer products and services in markets. In a competitive market, sellers try to attract more customers, not only through cheaper prices but also through better quality, including more safety features wherever relevant. In a cartelised industry, there would be less innovation and less initiative in improving safety standards. A very important illustration of an anti-competitive practice thwarting safety innovation is the *Allied Tube case.*[7] In this case the US Supreme Court found that a subgroup of the standard setting organization effectively "captured" the whole group and harmed competition by excluding an innovative product. In this case, an association that published a code of standards, for electrical equipment, required the use of steel conduits in high rise buildings, but a new entrant into the market proposed to use plastic conduits. The new product was allegedly cheaper to install, more pliable and less suspectible to short circuit.

The incumbent steel conduit manufactures agreed to use the association's procedures to exclude the plastic product, from the code, by sending new members to the association's annual meeting, whose sole function was to vote against the new product. As a result, the potential entrant's ability to market the plastic conduit was significantly impaired and consumers were denied the benefit of a potentially significant product innovation.

3.3 Right to Choice

Competition Act prohibits the formation of monopolies and promotes competitions thus increasing the choices available to consumers.

3.4 Right to Redress

The competition authority, with adjudicative power, in any country provides an effective redressal system against competition abuses.

3.5 Right to Information

In economic theory, the existence of perfect information and its free flow among consumers is one of the basic requirements of perfect competition. The consumers without information on quality/quantity, potency, purity, standard and price of goods and services, would not be able to make the right decisions. If consumers cannot make the right decisions then the process of competition itself gets subverted. The right to information about the products and services in the market is an important component of many competition legislations around the world including our *MRTP Act* as it has provisions for unfair trade practices, including measures against misleading advertisements, which promote the right of information.[8]

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7 *Allied Tube and Conduit Co.* v. *Indian Head, inc*, 486 US 492 (1988).

8 *Supra* note 6, p. 1002.

3.6 Right to Consumer Education

Most of the competition legislations promote competition advocacy. It is indeed, fortunate that the new competition law provides for competition advocacy as one of its core areas of functioning. The Competition Commission of India (CCI) is entrusted with the task of awareness generation and conduct training programmes for all stakeholders. Awareness on competition issues, among the stakeholders, including consumers and consumer organisations is quite low while prevalence of anti-competitive practices is quite ubiquitous. Without proper education, these cannot be effectively tackled. It is heartening to note that the Commission is very much conscious of the need to create greater awareness throughout the country about the competition law and more specifically the provisions of the Competition Act, 2002. It is evident that the Commission has undertaken several initiatives in that direction by holding seminars jointly with trade and industry as also professional bodies so as to generate awareness about the subject. Therefore, it is interesting to note that the Commission is not going to be merely a regulating authority for enforcing competition law. Instead, Section 49 of the Act expects the Commission to play an equally significant role in the advocacy of competition law.[9]

3.7 Right to Representation

Many competition enactments around the world ensure consumer representation in the implementation of the Act. The CCI has formed an informal Advisory Committee where consumer organisations, such as CUTS, are represented. This need to be formalized to provide effective consumer representation

3.8 Right to Healthy Environment

Healthy competition promotes innovation. When firms engage in innovative ways of production/service provisions, it often leads to reduced resource consumption as they have to produce at lower costs to be able to compete. Reduced resource consumption would lead to environmental gains. The basic premise underlying competition policy, with regard to market oriented solutions and environmental self-regulation, is that environment goals will lead to the development of markets for new environmental activities. In that way, a climate of free competition will lead to efficient solutions for environmental problems. But these environmental gains will be threatened, if the operation of the market mechanism is hampered or frustrated through monopolization or restrictive practices of cartels. If the enterprises can avoid the pressure of competition, they will feel less of a need to make a positive contribution to the environment, due to their ability to shift the costs of their environmental pollution on to others.[10]

Thus these eight consumer rights are promoted directly or indirectly by any sound competition policy.

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9 S.D. Israni, "Competition Law in India-A Story of Work in Progress", *Chartered Secretary*, July 2006, pp. 1009-1011, at p. 1011.

10 *Supra* note 6, p. 1003.

4. Promotion of Consumer Welfare through the Competition Act, 2002

The Competition Act, 2002, was enacted in January 2003 after taking into consideration the recommendations of the Raghavan Committee and deliberations of the Standing Committee on Finance.[11] There has been an amendment in 2007 to bring the Act in compliance with the directions given by the Supreme Court in *Brahm Dutt* v. *Union of India.*[12] The amendment, however, has not modified the substance of the legislation anyway.[13] The successor to the MRTP Act, 1969, the Competition Act, 2002 provides in its preamble.

> 'An Act to provide, keeping in view 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 interest 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.'

Thus the preamble of the Competition Act clearly states that the aim of Competition Commission of India (CCI) is to promote free competition in India and to protect the interests of consumers. The Raghavan Committee on Competition Policy defined 'free competition' to mean total freedom to develop optimum size without any restriction. The limitation, if at all necessary, is not limitation of size but of competition power by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. The consumer interest is the ultimate *raison d'etre* of competition, low prices and higher quality. For the entrepreneurs, the objective is to assure fairness.[14] The object of the competition policy is as follows:

> 'Competition policy, in this context, thus becomes instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare.'[15]

The Competition Act, therefore, seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets in India; promote and sustain competition in markets; protect the interest of consumers; ensure freedom of trade carried on by other participants in markets.

Thus the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons are to eliminate practices having adverse effect 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 in the country. In other words, the Act

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11 Amitabh Kumar, "The Evolution of Competition Law in India", in Vinod Dhall (Ed.), *Competition Law Today: Concepts, Issues, and the Law in Practice*, Oxford University Press, 2007, pp. 479-498, p. 497.

12 AIR 2005 SC 730.

13 See, *The Competition (Amendment) Act*, 2007.

14 D.P. Mittal, *Competition Law and Practice,* Taxmann Publication (P.) Ltd., New Delhi, 2011, p. 35.

15 Para 1.2.0, "Report of High Level Committee on Competition Policy and Law" (The Raghavan Committee), in H.K. Saharay, *Textbook on Competition Law,* Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012, pp. 6-79, p. 7.

requires not only protection of free trade but also protection of consumer interest.[16] The objective of the Act is to protect the interests of the consumers. In order so to do, it seeks to promote and sustain competition and ensure fair competition and freedom of trade. The Competition Act, 2002 has following three elements:

1) Anti-competitive Agreements[17]
2) Abuse of Dominance[18]
3) Regulation of Combinations[19]

1) Anti Competitive Agreements

Section 3(i) 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. The term 'agreement' includes any arrangement or understanding or action in concert. The necessity to include any arrangement or understanding within the preview of an agreement has been aptly described by Lord Denning as follows:

> "People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do. Parliament as well is aware of this. So it included not only an 'agreement' properly so called, but any 'arrangement', however informal."[20]

As regards the concept of 'Appreciable Adverse Effect on Competition", the entire concept is made subjective that may vary from case to case. And, therefore, under Section 19(3) of the Act, it is provided that while determining whether an agreement has an appreciable adverse impact on competition or not, the CCI, the nodal agency incorporated under the administrative set up of the Act, has to look at the following factors: creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by means of production or distribution of goods.

Thus, the welfare of consumers has been given weightage in the ultimate analysis to prohibit an anti-competitive agreement. Following anti-competitive agreements are prohibited by our Competition Act.

a) Cartels

Anti-competitive agreements also include cartels which are defined in the OECD recommendation as 'an anti competitive agreement, anti competitive concerted

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16 *Supra* note 14, p. 36.
17 The *Competition Act*, 2002, S. 3.
18 The *Competition Act*, 2002, S. 4.
19 The *Competition Act*, 2002, Ss. 5 & 6.
20 G.R. Bhatia, "Combating Cartel in Markets-Issues and Challenges", *Chartered Secretary*, July 2006, pp. 1012-1015, at p. 1012.

practice or anti competitive arrangement by competitors to fix prices, make rigged bids, establish output restriction or quotas or share or divide market by allocating customers, suppliers, territories or lines of commerce.'[21] In case of cartels, competitors agree not to compete on price, product, customers etc, but agree to forgo competition and opt for collusion, the consumers and business houses lose the benefits of competition. Thus, cartels are inherently harmful. Cartels are cancers on the open market economy, which forms the vary basis of our community. By destroying the competition they cause serious harm to our economics and consumers. In Japan, it has been estimated that recent cartels raised prices on average by 16.5 percent.[22] In Sweden and Finland, competition authorities observed price decline of 20-25 percent following enforcement action against asphalt cartels.[23] Estimates in the United States suggest that some hard core cartels can result in price increases of upto 60 or 70 percent.[24] In India, too, cartels have been alleged in various sectors namely cement, steel, tyres, trucking etc and India is also believed to be a victim of overseas cartel in soda ash, bulk vitamins, petrol etc.[25] So all these tend to raise the price or reduce the choice of consumers. It is in these backdrops that cartels are considered as most serious competition infringements and supreme evil of anti trust.

b) Tying Agreement

Another anti-competitive agreement prohibited under Competition Act, 2002 is tying agreement. A tie-in arrangement includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.[26] A tying agreement may have various forms: such as tie-in sale, full-line forcing and quantity forcing. Tie-in sales make the purchase of one product conditional on the sale of another (tied) product. Under full line forcing, the retailer is required to stock full range of manufacturer's products. Under quantity forcing, the retailer is required to purchase a minimum quantity of certain product.[27] Such arrangements have the potential for foreclosing competition by hindering entry into market. The result of tying agreement is that consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase the good they actually want (the tying good). As a result low quality products achieve a higher market share than would otherwise be the case because the consumers are forced to buy an undesired good in order to purchase the good they want, resulting in economic harm to the competition in the "tied" market. This assures the producer a fixed and assured customer base. As a consequence they stop competing and deteriorate the quality of their products and raise the prices. Thus, a tied in agreement gives an undue advantage to a single producer who can misuse it to disadvantage of the consumers and the economy.

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21 "Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation", *OECD Journal of Competition Law and Policy*, June 2006, Vol. 8, No. 1, as quoted in Sanchit Aggarwal, "Competition Law and Protection of Consumer Interest", retrieved from: *www.cci.gov.in/images/media/sanchitnit260811.pdf,* last visited on 2 February 2014.

22 *Supra* note 20, p. 1013.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 The *Competition Act*, 2002. Explanation (a) to S. 3(4)

27 *Supra* note 14, p. 245.

2) Dominant Position

The word 'dominance' relates to a position of economic strength enjoyed by an enterprise in the relevant market which enables it to behave independently of customers or competitors, thereby allowing it to exploit customers and exclude competitors.[28] The Competition Act, 2002 prohibits abuse of dominant position under Section 4(1) of the Act as the abuse of its position by a dominating firm directly affects the consumer due to malpractices, like, predatory pricing and creation of barriers for the new entrants, thus eliminating competition. This leads to a situation of monopoly and oligopoly where the consumer gets vulnerable to be exploited.

3) Combination and Mergers

The Competition Act, 2002 does not define combination but states the conditions when a combination between persons and enterprises takes place. Section 5 of the Act refers to the acquisition of enterprises, by one or more persons or merger or amalgamation, in the manner set out therein, which would be a combination.

Combination of two firms can have an adverse affect on the market. If two major market players combine, they can start controlling the prices and eliminate the small industries easily. Ultimately it will be the consumers who will be affected. Say, for example, if Coca Cola and Pepsico the two big players in India in the soft drink industry combine then they will eliminate the competition in the market and thus control the prices of the goods harming the consumers and the economy of the country. Thus it is the duty of the Competition Commission of India to check such combinations.

Merger among small players to give competition to a large sized player is always considered pro-competitive and efficiency enhancing for such marginal players. But a merger between a large and a small player does raise competition concerns as it makes an already big player bigger and such merged entity is likely to have a tendency to abuse its dominance for increasing its profits by indulging in any of the anti-competitive practices, such as, imposing unfair or discriminatory conditions, limiting or restricting services to the selected few, denying market access to other players or to even enter into other product or services markets through their dominant position in one product or services market.

Thus, the CCI looks into matters relating to mergers and combinations which cross the prescribed thresholds under the Act and assure that there is no combination which hampers the competition in the market with a negative effect on the consumers and gives way to anti-competitive practices.

4.1 Specific Provisions of Competition Act, 2002 Promoting Consumer Welfare

Section 18 of the Competition Act, 2002 mentions that it is the duty of the CCI to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried

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[28] Vinod Dhall, "Key Concepts in Competition Law", in Vinod Dhall (Ed.), *Competition Law Today: Concepts, Issues, and the Law in Practice*, Oxford University Press, 2007, pp. 1-35, p. 11.

on by other participants, in markets in India. Thus here we can see that apart from promoting competition in the market it is also the duty of the Commission to protect the consumers from anti-competitive practices. An enquiry can be initiated by a consumer or a consumers association by giving information to the Commission accompanied by the required fees. Inquiry can also be initiated by any enterprise in the same manner. Further CCI can initiate inquiry on its own motion or on reference made to it by the Central or State Government or a statutory authority.[29]

Further to this, the CCI while inquiring whether a firm is misusing its dominant status shall under Section 16(4) give due regard to all or any of the factors like market share, size and resources of the enterprise and its competitors, comparison of economic powers of the enterprise and its competitors, dependence of consumers etc. Here as well we can see that there exists a consideration for consumers in determination of a firm's dominant position by CCI. The intent of the person is relevant to the analysis as to whether the conduct is exclusionary or predatory[30] and it has also been noticed that the conduct would be found predatory or exclusionary on the examination of the action of the undertaking concerned in the light of consumer interest, i.e., as to whether it has impaired competition in an unnecessary restrictive way. Thus, the competition law is designed as such to benefit the consumers along with economic growth, and the CCI as well has powers to determine anti-competitive practices, abuse of dominant position and mergers keeping the welfare of consumers in mind.

Moreover, under Section 19(1), the consumers or consumer associations are also given the right to complain against any anti-competitive practice in contravention of Sections 3(1) and 4(1) to the CCI. Further under Sections 19(3) and 19(4), due consideration is also given to the position of the consumers in determining whether a practice is anti-competitive or not. Under Section 19(3), the accrual of benefits to the consumers is seen to determine whether an agreement has an appreciable adverse impact on competition or not, Under Section 19(4) while inquiring whether an enterprise enjoys a dominant position or not, the Commission should have due regard to the factor of the dependence of consumers on the enterprise.

We can, thus, conclude that consumer protection is not just a mere consequence of competition, but in fact one of the aims of our Competition regime. Even Hon'ble Finance Minister of India in his high budget speech for 2009-2010 had said that:

> "The government has established CCI, an autonomous regulatory body to promote and sustain competition in market, protect interests of consumers and to prevent practices

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29 Section 19(1): The Commission may inquire into any alleged contravention of the provision contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) (receipt of any information, in such manner and) accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

30 *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corpn.* 472 US 585 (1985).

> having adverse effect on competition..... The benefits of competition should come to more sectors and their users and consumers. Now it is time for us to work on these aspects to eliminate supply bottle necks, enhance productivity, reduce costs and improve quality of goods and services supply to consumers."[31]

Moreover, recently, the Hon'ble Supreme Court of India in the case of *Competition Commission of India* v. *Steel Authority of India Ltd.*[32] observed:

> "The principal 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 interests 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 been reiterated by Hon'ble Supreme Court. Therefore, the function of the CCI is not only to supervise and sustain competition in the market but also to protect the interests of the consumers. Thus consumer protection is a vital element of Competition Law.

5. Difference in Approach

From a broad theoretical perspective, there is a profound difference between consumer law and competition law. Consumer law addresses market failures that are 'internal' to the consumer which affect the consumer's subjective ability to choose effectively among the available options and prevent the use of unfair terms, aggressive or misleading selling techniques and in general, unfair dealing. Competition law, on the other hand, ensures that the market place remains competitive so that a meaningful range of options remains open to consumers, unimpaired by restrictive practices such as price-fixing agreements; it addresses market failures that are 'external' to the consumer and lead to an objective inability of the market to provide sufficient options to the consumer.[33] Further differences can be found in the fact that competition law operates at the level of market structure by prohibiting any conduct that restricts, distorts or impedes competition and uses economic analysis to determine whether an agreement has anti-competitive effects and whether such effects are appreciable. Accordingly, competition law ensures consumer protection by "indirect" means, by encouraging firms to innovate by reducing slack, putting downward pressure on costs, and providing incentives for the efficient organization of production. Consumer law operates at the level of the relationship between individual traders and consumers and aims at making sure that the trader's conduct does not impair the consumer's ability to choose or does not

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31 Sanchit Aggarwal, "Competition Law and Protection of Consumer Interest", retrieved from *www.cci.gov.in/images/media/sanchitnit260811.pdf,* last visited on 2 February 2014.

32 (2010) 103 SCL 269 (SC).

33 Hemant Singh and Radha Naruka, "Competition Commission of India and Consumer Welfare: An Analysis", retrieved from *http:// papers.ssrn.com/sol3/delivery.cfm/SSRN_ID225226_code 1881024. pdf,* last visited on 20th October 2015.

bring an unfair advantage to the trader by introducing a direct form of control on individual transactions.[34]

The aim of both Acts might clash but there is difference in approach. This can be further evidenced through the fact that many cases[35] which were filed by the aggrieved consumers against the anti-competitive practices adopted by the suppliers were closed by the CCI as the alleged contravention of the Competition Act was not proved. In all these cases, the CCI declined to entertain and provide relief to the aggrieved consumer. The CCI held that it would not be expedient or justified for it to proceed further with the matter in above cases and such a proceeding may conceivably be maintainable before a consumer forum.

But the interesting aspect of the relation between competition law and consumer welfare is that the goal of competition law is to protect the freedom of individuals to compete rather than to promote consumer welfare directly. The consumer interest is protected indirectly by protecting the freedom of actors to compete in markets. The reason for this is that freedom to compete generally leads to competition, and competition leads to an efficient allocation of resources and thus to consumer welfare.

Thus, in spite of their different approaches, consumer protection law and competition law are commonly considered to be complementary tools to ensure consumer welfare.

6. Conclusion

To conclude, we can quote the wordings of Mario Monti, from European Competition Commission:

> "Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition leads to lower prices, a wider choice of goods and technological innovation, all in the interest of the consumer."[36]

Competition law is traditionally conceived as regulation of the marketplace to ensure that the private conduct does not suppress free trade and competition. It has as its goal the preservation of competition and to optimize consumer interest. On the other hand, consumer protection regulation denotes a body of law designed to protect a consumer's interests at the level of the individual transaction or provide individual relief while competition law minimizes market distortions and aims at wider body of consumers. The two fields share the same ultimate goal but their approach to achieve

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34 *Ibid.*

35 *Subhash Yadav* v. *Force Motor Ltd. & Ors* (Case No.32/2012, decided on 5 October 2012); *Prateek* v. *Uprass Vidyalay* (Case No.05/2010, decided on 13 May 2010); *Sanjeev Pandey* v. *Mahendra & Mahendra & Ors* (Case No.17/2012, decided on 3 May 2012); and *Smt. Geeta Chatterjee* v. *M/s Bongaon Gas Service* (Case No.192/2008, decided on 16 June 2010); retrieved from *http://www.cci.gov.in,* last visited on 20 October 2015.

36 See, Mario Monti, "The Future for Competition Policy in the European Union" (9 July 2001) as quoted in Adrash Ramanujan, "Competition Law and Consumer Protection: Two Wings of Consumer Welfare", *Company Law Journal,* 2008, Vol. 2, p. J-105.

that goal differs. However, there is a point of convergence as both the Competition Act and the Consumer Protection Act seeks to achieve protection of consumer interest in the ultimate analysis. But the consumers cannot be protected by mere implementation of competition policies. Both competition law and consumer protection policy should go hand in hand. Competition law makes sure that the honest players compete in the market and Consumer Protection Act ensures that those existing players do not harm the consumers. Competition law ensures healthy competition in the market and aims to eliminate all anti-competitive agreements, thus it indirectly benefits the consumers, whereas the Consumer Protection Act ensures that in the present market no player takes undue advantage of a consumer. The aim of both the Acts might clash but certainly there is difference of approach.

To sum up, there is strong complimentarity between competition and consumer protection law as they share the same ultimate goal i.e., to protect the consumers, but their approach differs. The CCI was established with the ultimate aim to protect the interest of consumers. But Competition Act alone cannot protect the interest of consumers. It needs the cooperation of consumer protection legislation which directly protects consumer rights. Both fields should go hand in hand. So hereunder, the researcher forwards few suggestions so that Competition Act can better achieve its goal of consumer welfare and for promoting co-operation between two fields:

6.1 Reference by CCI to Consumer Forum & Vice-Versa

The issue of reference by one agency to another is to be considered. As has been discussed earlier, the CCI has closed a number of cases, stating that the contravention of the provisions of Competition Act has not been established, and hence the informant may seek redressal in the appropriate forum. In case of consumer grievances, the Consumer Forums are the appropriate forums and the CCI, while closing such cases, can refer them to the Consumer Redressal Agencies. In the same way, a case involving a competition issue, filed before the Consumer Forum, can be referred by the Forum to the Competition Commission for a pertinent order. In this way, both the systems can co-ordinate and thus operate in a harmonized way, for better redressal.[37]

6.2 Power to Award Compensation to be given to CCI

After the amendment of Competition Act in 2007, the power to grant compensation to the aggrieved consumer was taken from CCI, stating that it is an expert body not a judicial party. It is suggested that CCI should be given the power to award the compensation to the aggrieved consumer along with penalizing the concerned transgressor. The CCI should be empowered to grant compensation otherwise the aggrieved consumer who has suffered losses by the anti-competitive conduct of the other party, has no remedy to claim compensation in the forum which has held the other party guilty. Thus, the Competition Act needs to be amended to give CCI the power to award compensation to consumer aggrieved by anti-competitive practices.

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[37] *Supra* note 33.

PATENTING OF BIOTECHNOLOGICAL INVENTIONS - RESOLVING THE CONFLICT BETWEEN ETHICS AND SOCIAL NEEDS

Dr. Jasmeet Gulati*

1. Introduction

Intellectual Property is a product of human intellect. The main motivation of its protection is to promote the progress of science and technology, arts, literature and other creative works and to encourage and reward creativity. Intellectual property plays an important role in the society specifically in the economic development of a state which further leads to growth in the broader perspective, of society at large. Nations give statutory expression to the economic rights of creators in their creation and to the rights of others in accessing those creations. The economic and technological development of a nation will come to a halt if no protection is given to the intellectual property rights. Intellectual Property Rights (IPRs) encourage innovation by protecting intellectual activity and granting their holder, the creator or innovator, the ability to exclude others from certain activities for a defined period of time.[1] Intellectual property law represents network of rights including positive entitlements[2] and negative rights,[3] in the form of copyrights, trademarks, designs, new plant varieties, patents, so on and so forth.

Patents are significant rudiments of intellectual property. Patent refers to a grant of privilege, property or authority made by the government or sovereign of the country to one or more individuals, such grants being made by the instrument 'Patent.'[4] It is recognized as a form of industrial or intellectual property. It is a right granted to a person who has manufactured a new and useful article or an improvement of a existing article or a new process of making an article. Patent provides legal protection for invention on disclosure of its complete specifications. It represents a *quid pro quo*. The *quid* to the patentee is the monopoly and the *quo* is for the disclosure of the invention which is new and not in prior art. Patents are rights granted for new inventions which are non-obvious and are industrially useful. It is aimed at providing both an economic return to the inventor and to foster further innovation through the disclosure of information about the inventive step. Patent law is a complex area aimed at providing some control mechanisms by the Government and also giving an inventor the monopoly right to exploit and market the fruits of his innovative technical or scientific invention- a new product or process, for a period of twenty

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1 Singh S.K. *Intellectual Property Laws* (2nd Edn.) Central Law Agency 2013 at p. 5.

2 By positive entitlements is meant the right to title of the intellectual property, the right to own the title after getting the intellectual property registered and the right to exploit the intellectual property and draw value from their work.

3 Negative right connotes the right to stop others from unauthorized use of that right.

4 Holyoak & Torremans *Intellectual Property Law* (6th Edn.) Oxford University Press at p. 56.

years[5] from the date of filing of patent application. A patent is an open letter issued by a State to 'protect the network of rights which confer protection ... on owners against competing ... interests' for a 20 year period.[6]

Patent law is important because it protects inventions which come about out of research and development in technology as well as science. And there have been raised issues many a times, when there is technological advancement, whether to grant patent for that development or not. This paper aims at highlighting the issue of patenting the biotechnological innovations, which offers a complex dilemma in so far as grant of patent monopoly is concerned.

2. Origins of Intellectual Property Law

The earliest known form of intellectual property law emerged in the United Kingdom during the Elizabethan era and was simply a system of favours by royals and peers. The system consisted of royal charters, letters granting monopoly to produce specified goods or to provide particular services. There was often no real basis for the award of these favours and they were seen more as privileges than rights. Perceiving this approach to be a disincentive to innovation and trade, the parliament instituted processes that led to a legal framework with statutes and regulated at common law. Modern intellectual property law has grown out of this and similar frameworks.

3. Purpose of Patent Law

The primary objective of the patent system is disclosure of technical advancement to foster social benefit by giving financial and social incentives to the inventor in return for such disclosure. The main justification for the patent law system is the creation of a social contract between society and the inventor, which allows the inventor to benefit from a time limited monopoly where he/she is shielded from competition and thus free to fully control the exploitation of the invention, excluding others from making, using or selling it. Society in return benefits from the inventor's disclosure of technical information, which promotes further innovation prompting research, development and improvement of existing products and services.[7] The patent system is in some jurisdictions prompted by mainly economical interests, the promotion of a competitive market place, whilst it in others is based on the fairness principle, facilitating and protecting an investor's natural rights in the invention and his/her rights for proper acknowledgement.[8]

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5 In India, a patent is protected for a period of twenty years.

6 L. Bentley & B. Sherman *Intellectual Property Law* (3rd Edn.) Oxford University Press, Oxford (2009) at p. 339.

7 Bagley A *Patents First, Ask Questions Later: Morality and Biotechnology in Patent Law* William and Mary Law Review (2003) 45(2) At *http://heinonline.org.ezproxy.liv.ac.uk/HOL/Page?handle=hein.journals/wmlr45&page=469&collection=journals.*

8 Machlup, F. 'An Economic Review of the Patent System' (1958) Study of the Subcommittee on Patents, Trademarks and Copyrights or the Committee on the Judiciary United States Senate (85th Congress 2nd Session) at *http://library.mises.org/books/Fritz%20Machlup/An%20Economic%20Review%20of%20the%20Patent%20System_Vol_3.pdf.*

4. Biotechnological Innovations

Biotechnology, if defined broadly includes any technique that uses living organisms or parts of organisms to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses. Biotechnology concerns living organisms, such as plants, animals and micro-organisms, as well as non-biological material. Biotechnology exploits biological materials, living or non-living, and is broadly classified as classical and modern biotechnology. The age-old fermentation process for producing alcohol, isolation of antibiotics from moulds or other micro-organisms are a few examples of classical biotechnology. Modern biotechnology started with gene splicing technology or genetic engineering which developed in the late seventies of the last century. By using genetic engineering, many useful things like human insulin, human growth factors, and monoclonal antibodies have been developed.[9] The biotechnological inventions therefore include products and/or processes of gene engineering technologies, methods of producing organisms, methods of mutation, processes for making monoclonal antibodies, etc. While on one hand, biotechnological inventions have resolved many problems and on the other hand, it has invoked many debates.

Biotechnology is one area where patent law has experienced a large degree of controversy, due to technological progress enabling new and increasingly intrusive research. Bio-patents granted on animate organisms and life forms[10] have particularly challenged the limitations on what can be considered a patentable subject matter. This field where patent applications for 'non-naturally occurring non-human multi-cellular living organisms' are created through genetic engineering and related processes[11] has forced a re-examination of the applicability and scope of the patent law system, ultimately raising questions as to whether the current patent system fulfils its intended function of stimulating innovation and economic growth. Bio-patents are proving to have profound ethical, societal, environmental and health impacts[12] that must be considered in order to determine the appropriate treatment.

5. Structure of Analysis – Patent Law for Biotechnological Inventions

5.1 Position under UK and European Law

Patent regulations are set out in the UK Patent Act[13] and the European Patent Convention (EPC).[14] Biotechnological patents have proven controversial as it

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9 Available at *http://www.academia.edu/4548562/Impact_of_TRIPs_Agreement_on_Life-forms_Living_Organisms.*

10 Jauhar, A. & Narnaulia, S., *'Patenting Life the American, European and Indian Way', Journal of Intellectual Property Rights,* p. 15. *http://nopr.niscair.res.in/bitstream/123456789/7199/1/JIPR%2015%281%29%2055-65.pdf.*

11 Miller K, D., 'A Patent on the Conscious: A Theoretical Perspective of the Law on Patentable Life Journal of Animal Law & Policy' (2009) 2 at *http://sjalp.stanford.edu/pdfs/Miller.pdf.*

12 Parthasarathy, S., 'Whose Knowledge? What Values? The comparative Politics of Patenting Life Forms in the United States and Europe' *Policy Science* (2011) at *http://www-personal.umich.edu/~shobita/files/Parthasarathy%20policy%20sciences%20preprint.pdf.*

13 *The UK Patents Act*, 1977 at *http://www.ipo.gov.uk/patentsact1977.pdf.*

14 *The European Patent Convention*, Rule 28 [2000] at *http://www.epo.org/law-practice/legaltexts/html/epc/2010/e/r28.html.*

challenges both ethical and moral perceptions in today's society. Due to this prevalent concern for ethical and social dimensions in this area of research, traditional patent law in the UK was supplemented by a number of bio-specific rules and regulations, most significantly the European Biotechnology Directive (the Directive).[15] These aim to specifically address the need for balancing ethical concerns with the desire to continuously promote innovation and stimulate investment. To be granted a biotechnology patent, an invention is assessed in accordance with relevant European patent law and will therefore need to be a patentable subject matter, novel, non-obvious, susceptible for industrial application and comply with internal patentability requirements.[16]

Due to its controversial and socio-political implications European Union has introduced secondary legislation concerning the patentability of inventions in this field. These rules are contained in the UK Act's Section 1(2), EPC's Article 53(a), which precludes patents of inventions that go against public order and morality, and the provisions in the EPC rule 23. Patents which are for (a) human cloning processes, (b) modification of the humans germ line genetic identity, (c) use of human embryos for commercial or industrial purposes or (d) any processes for modifying the genetic identity of animals if it is likely to cause suffering without significant benefits to either animal or man, are therefore excluded, but it is clearly established that inventions involving biological material may legitimately be the subject of patent application.[17] The controversial Relaxin case[18] for instance, illustrated that a patent could be granted on the basis of the invention being considered humanly engineered to an adequate level, despite parts of it originally simply existing in nature. The Directive also provides guidelines as to defining the border between moral and immoral inventions, by distinguishing between non-patentable raw data derived from the natural environment or the human body or genes and patentable inventions that result from a technical process. A multitude of tests for invention exists.

The Onco-mouse[19] balancing test, where the patenting of a genetically modified mouse that developed cancer was granted on the basis of it contributing to society if used in cancer research, is one very established principle where animal suffering or potential environmental effects are weighted up against the potential usefulness of the invention to society. Inventions which may unequivocally damage the environment or any humans or animals without any specific proven benefit, as well as inventions which might breach social order and/or peace, would however not be applicable for patent grants.

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15 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions [1998] at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0044:EN:HTML.*

16 L. Bentley, B. Sherman *Intellectual Property Law* (3rd edn.) Oxford University Press, 2001.

17 Intellectual Property Office *Examination Guidelines for Patent Applications relating to Biotechnological Inventions in the Intellectual Property Office* (2012) Crown Copyright at *http://www.ipo.gov.uk/biotech.pdf.*

18 Hormon Relaxin [1995] O.J. E.P.O. 388 (Opp. Div).

19 WIPO *Biotechnics and Patent Law: The Case of Onco-mouse* (2006) at *http://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html*>\.

5.2 Position under Indian Law

The Indian Patent Act, 1970 deals with the grant of patents in India. The said Act was enacted in consonance with the then technological innovations prevalent in the country. The Act was amended in March 1999 to meet India's obligations under the Agreement on TRIPs. India is under an obligation to bring suitable legislative changes so as to bring its Patent Law in conformity with TRIPs Agreement and other international conventions. Therefore India made necessary changes in 2002. Section 3[20] of the Patent Act which provided the list of non- patentable subject-matter was amended and Section 3(j) was inserted which reads as "*Plants and animals in whole or any part thereof other than micro-organisms but including seeds varieties and species and essentially biological processes for production or propagation of plants and animals*".

This further connotes that micro-organisms have been excluded from the list of exclusions under Section 3 of the Patent (Amendment) Act 2002.

Judicial Initiative in India—

In 2002, Hon'ble Calcutta High Court, in its decision in the case of *Dimminaco A.G.* v. *Controller of Patents and Designs* has allowed the claim for the grant of patent to genetically engineered organisms called infectious bursitis vaccine. This landmark judgment opened doors for grant of patents to inventions where the final product of claimed process is an invention and where the end product even if it contains living organism is a new article. The Court held that there was no statutory bar in the patent law to accept manner of manufacture as patentable even if the end product contains a living organism.[21] The judgment has opened new opportunities for obtaining patents in India on micro-organisms related inventions which were hitherto not granted.

6. Points of Controversy

A number of controversies around patents on life forms exist, with animal rights organisations, environmentalist activists, patient groups and others advocating the need to consider the broader implications of such patent grants. In particular, the following areas are being highlighted:

- *Patenting of life-forms;* the essential question raised here is whether patentability of life forms and living things violate human dignity and thus infringe on the principle that the human body cannot be used for exploitation or commercialization.[22] The difficulty here lies in defining the appropriate balance of what is and what is not patentable and whether animals and living creatures should be made to suffer in order to assist in research which might

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20 The *Indian Patent Act*, 1970, S. 3 provides the non-patentable subject matter under the Act.

21 The Court observed that one of the most common tests was the vendibility test. The said test could be satisfied if the invention resulted in the production of some vendible item.

22 Khor, M., 'Why Life Forms Should Not be Patented' at *http://www.twnside.org.sg/title/2103.htm.*

prove valuable for society. The approach by the Biotechnology Directive[23] distinguishes between the raw data derived from the human body/genes in the natural environment, considered non-patentable, and the patentable inventions resulting from a technological process (despite parts of it originating from the natural environment);

- *Bio piracy;* the primary benefit that the inventor receives from a patent grant is the exclusivity to commercially exploit the invention for the 20 year long protection period. Although this is part of the reward and incentive for the inventor to continue innovating, harmful side-effects of biotechnological patenting includes the development of fake, sub-standard medical drugs and creation of a large 'black-market' for such drugs, which may deteriorate the health of those who take it.[24] Pharmaceutical counterfeiting has as a consequence grown into a sophisticated enterprise, accounting for up to 10% of international trade. The IMPACT[25] enforcement effort from the World Health Organisation is one initiative aimed at reducing this harmful trend of online distribution of counterfeit medicines for birth-control, anti-tetanus serums, cancer treatment and others, which has initially had particular focus on Asia and Africa markets;
- *Environmental effects;* 'improvement' upon existing biological processes and objects has been realized in agriculture and environmental protection,[26] i.e. with a number of inventions focusing on the increase of soil productivity and enhancement of fruit and vegetables, which ultimately may challenge the understanding of the relationship between nature and human beings. Farmers and environmentalists have in turn highlighted the potential dangers of any gene manipulated crops and plants, warning that they might result in the depredation of the environment, limitations on bio-diversity, reduction of agricultural and genetic diversity, unknown environmental (and potentially health) effects as well as economic exploitation of small farmers with threats of potential monopoly control over food stocks and restriction on production.[27]

Moreover, the distinction between inventions and 'discoveries' already present in nature has been heavily debated, also in relation to the ability to

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23 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions [1998] at *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0044:EN:HTML.*

24 Nelson, M., Vizurragam, M. & Chang, D., *Counterfeit Pharmaceuticals: A Worldwide Problem* (2006) 96 (5) *Official Journal of the International Trademark Association* at *http://www.jonesday.com/files/Publication/d24f216c-fe4a-43c0-8fe102a13dc6f895/ Presentation/PublicationAttachment/19f78950-e2d5-41d6-a745-020f17d0ec17/The_Trademark_Reporter.pdf.*

25 IMPACT International Medical Products Anti-Counterfeiting Task Force (IMPACT) at *http://www.who.int/impact/about/en/.*

26 Jasanoff, S., 'Ordering Life: Law and the Normalization of Biotechnology' (2001) 17(62) at *http://live.belfercenter.org/files/life.pdf.*

27 Gitter, M.D., 'Led Astray by the Moral Compass: Incorporating Morality into European Union Biotechnology Patent Law' (2001) 19 (1) *Berkeley Journal of International Law* at *http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1197&context=bjil.*

specify living matter[28] in the detailed regard necessary to enable reproduction;

- *Access to important inventions for the developing world*: an abuse of patent monopoly might lead to 'artificial' price levels and construed costs being set by the inventor in order to re-cap his/her investment, which in turn could restrict access to much needed inventions to those less financially capable. The patenting of innovations for economical benefit has been most common in the developed world, resulting in high, unattainable prices[29] and access restrictions to vital medicine and technology to the developing world due to strong legal limitations and long periods of exclusivity. Moreover, research and development is arguably skewed towards inventions which are sought after amongst the financially stronger consumers, in order to secure that investment is recouped in a shorter time-frame. Alternative investments in working around patents and developing equally good substitutes have however also proven costly and difficult, especially in industries where one has very limited information spill-over effect benefits.

7. Conclusion

The area of biotechnology is booming, with innovative research, medicines, treatments and processes potentially being able to save millions of lives.[30] The commercialisation of an invention however, requires an effective coordination of multiple complementary users of an invention, for instance marketers, labourers and venture capitalists, the coordination of which might undoubtedly prove easier when the invention can be patented under a system of low administrative costs and reliance of clear factors for future exclusive exploitation.[31]

The complexities associated with bioethics are however many, in particular with regards to how biotechnological inventions, which are based on living organisms, are excluded or protected from intellectual property rights.

Patent law is however not restricted to a moral vacuum, resulting in opportunities brought by the continuous development of technology not only bringing about possibilities but also challenging currently accepted laws and morality perceptions. To truly be a consistent economic practice for a nation, a sound patent law policy should seek to balance the interests of promoting innovation whilst initially repressing innovation dissemination, so that the societal benefits exceed the social

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28 Kevles, J.D., 'Patenting Life: A Historical Overview of Law, Interests and Ethics' (2001), *Yale Law School, Legal Theory Workshop* at *http://www.sba.oakland.edu/faculty/lauer/MIS641b/Readings/patenting%20life.pdf.*

29 Meek, J. 'Attempt to Patent Life may Double Cost of Breast Cancer Checks' (2000), *Guardian Weekly* at *http://www.theguardian.com/science/2000/jan/17/genetics.cancer.*

30 WIPO Magazine *Bioethics and Patent Law: The Relaxin Case* (2006) at http://www.wipo.int/wipo_magazine/en/2006/02/article_0009.html.

31 Daily, E.J. & Kieff, F.S., 'Anything Under the Sun Made by Humans: Patent Law Doctrines as Endogenous Institutions for Commercializing Innovation' 62, *Emory Law Journal* at *http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2289340_code2085670.pdf?abstractid=2289340&mirid=1.*

costs. Although current patent law aims to provide provisions for dealing with new developments in biotechnology, controversy still remains as to not only the extent of scope that should be protected, but also the development of a socially responsible law which provides certainty and allows for scientific progress. The responsibility for balancing the need for progress for the greater good with potentially controversial and intrusive new inventions will ultimately fall on the patent examiners. With the biotechnological field of research rapidly developing, and bio-patent applications consistently ranking amongst the largest technical fields in terms of patent applications, the number of cases and guidelines should be expected to substantially grow.

In order to provide long-term and durable value to both inventors and society however, patent law for biotechnology needs to continue evolving to appropriately address fundamental societal and ethical questions. This is the only manner in which one can ensure that the patent system contributes to reinforcement of market competitiveness.[32] Furthermore, it is important to amend the present patent law to clarify and specify that biotechnological inventions are patentable but subject to morality issues which can further be addressed only on case to case basis, because what is immoral and unacceptable today may become moral and acceptable tomorrow. Morality is the concept which can be dealt with subjectivity. Therefore, sui generis system will not help to solve the issues relating to patenting of biotechnology, that's because the judiciary is allowing patenting of biotechnological inventions under the Patent law itself.

[32] Lenoir, N., *'Patentability of Life and Ethics'* (2003) 326, *C.R. Biologies* at *http://ac.elscdn.com.ezproxy.liv.ac.uk/S1631069103002142/1-s2.0-S1631069103002142-main.pdf?_tid=a2362762-1f0d-11e3-85a2-00000aab0f26&acdnat=1379363096_5c5572f76dd 24b997210 468a59ee6dab.*

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: SOLUTION OR MERE PAPER TIGER?

Neelam Batra*

The serious consequences of domestic abuse to both victims and their children demand the most accessible and effective protection that the legal system can afford. Without the individual solution to domestic abuse which the legal system can provide, children will continue to grow up in families where violence is the normal method of conflict resolution and physical abuse of women remains a guarantee of male authority. As long as the legal system fails to prosecute domestic assault or to provide significant alternative protections to domestic assault victims, the cultural acceptance of intra family violence will remain unchanged. Where the victims of domestic abuse can find no redress in available legal remedies, the possibility of more serious violence increases. The law itself as well as its administration must change to provide adequate protection.[1]

Domestic Violence is undoubtedly a human rights issue, which was not properly taken care of in this country even though the Vienna Accord, 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights issue. The UN Committee on Convention on Elimination of All Forms of Discrimination against Women in its general recommendations had also exhorted the member countries to take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India. Presently, when a woman is subjected to cruelty by husband or his relatives, it is an offence punishable under Section 498-A IPC. The civil law, it was noticed, did not address this phenomenon in its entirety. Consequently, Parliament, to provide more effective protection of rights of women guaranteed under the Constitution under Articles 14, 15 and 21, who are victims of violence of any kind occurring in the family, enacted the DV Act.[2] Most countries have taken steps to strengthen the power of the legal system to intervene in domestic conflicts. India is no exception in this regard, and has adopted comprehensive legislation known as the the Protection of Women from Domestic Violence from Women Act, 2005 to address the escalating problem of violent crimes against women. The Protection of Women from Domestic Violence Act, 2005 is not a usual law that seeks to punish an ordinary crime or correct an ordinary civil wrong. The Protection of Women from Domestic Violence Act, 2005 was visualized as a law of universal application to all religions, castes and classes. This Act is designed to deal integrally with various forms of violence within the family and to ensure the family's harmony and unity. Families include both married and unmarried couples, various relatives, and any person who is integrated into the

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1 'Domestic Violence Legislation For Missouri: A Proposal', available at *http://heinonline.org* (last accessed 20 October 2014).

2 *Indra Sarma* v.*V.K.V. Sarma* 2014(1) RCR (Criminal) 179.

family unit. Among the principles underlying the Law are the following: the family is recognized as the basic institution of society; all forms of violence within the family are considered destructive and shall be prevented, corrected, and punished by the public authorities; men and women have equal rights and opportunities; and the rights of children prevail over the rights of other persons. Further provisions of the Law deal with the following, among other things: protective measures that can be applied by a judge and non-compliance with these measures; procedures for requesting protective measures; assistance for the victims of mistreatment; prison sentences to which the perpetrators of family violence are subject; sexual violence between spouses; the law was to define domestic violence in the broadest possible terms to include physical, emotional, psychological, verbal and sexual violence. Under the Act word 'Domestic Violence' has a much wider interpretation. The categories of violence covered by the Act are broad. Domestic violence, defined in Section 3 includes actual or threatened Physical abuse, Sexual abuse, Verbal, Emotional, and Economic abuse.

This Act contains a wide variety of measures designed to fight domestic violence in India. An aggrieved person can claim the following reliefs under the Protection of Women from Domestic Violence Act, 2005:

I Protection Orders [3]

II Residence Orders[4]

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[3] The *Protection of Women from Domestic Violence Act*, 2005, s. 18 provides:
"The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from—
(a) committing any act of domestic violence;
(b) aiding or abetting in the commission of acts of domestic violence;
(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;
(g) committing any other act as specified in the protection order".

[4] The *Protection of Women from Domestic Violence Act*, 2005, s. 19 :
(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -
(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
(b) directing the respondent to remove himself from the shared household;
(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

[Footnote No. 4 Contd.]

III Orders for Monetary Reliefs[5]

IV Orders granting Temporary Custody of children.[6]

V Compensation Orders.[7]

By empowering Courts to grant these Orders, the Act has made an endeavor to build more equal relationships within the home. The Domestic Violence Act is not an exclusive remedy for the victim of familial violence. The remedies provided by the Act are explicitly meant to serve in addition to, not in place of, already existing remedies. The Act is specially designed to function in conjunction with other civil laws and criminal laws. The author is confined to evaluating the functioning of the judiciary. In the shortest period of time, the Protection of Women from Domestic Violence Act, 2005, has emerged as one of the most important and influential pieces of social reform legislation ever enacted by the Indian State. This paper on focuses on the judgments of the higher judiciary passed under the Act.

Applications under the Act are filed before the Magistrates' Courts from where appeals lie to Sessions Courts. Appeals from these Orders are also heard by the higher judiciary, i.e., the High Courts and the Supreme Court. This paper presents a

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[Footnote No. 4 Contd.]

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

5 The *Protection of Women from Domestic Violence Act*, 2005, s. 20 provides :

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force

6 The *Protection of Women from Domestic Violence Act*, 2005, s. 21 provides :

Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

7 The *Protection of Women from Domestic Violence Act*, 2005, s. 22 provides:

In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

qualitative analysis of these judgments. The Objective of the paper is to evaluate the extent to which women have been protected against violence within the domestic sphere under the Act with a specific focus on the role of the judiciary. The Judgments of Supreme Court and High Court have been gathered and analyzed. The judgments were identified through a review of the All India Reporter, Supreme Court Cases and Recent Criminal Reports.

Analysis of Judgments of the Higher Judiciary: High Courts and the Supreme Court

1. Introduction

The Constitution of India guarantees equal rights to women as individuals; women's access to justice has been severely curtailed in the name of private issues. Constant struggle of women's groups have led to several amendments to the existing laws and the introduction of new one.. Since its enforcement in 2006, the Protection of Women from Domestic Violence Act, 2005 has matured considerably through judicial interpretation. The interpretation and application of the provisions of the Act in most cases has helped to draw focus on the objectives of the law to protect women from domestic violence and destitution. This paper does not analyse all the judgments of the higher judiciary and focuses only on those judgments that settle issues that have not been settled previously by the higher judiciary. The main focus is on the judgments passed during the current monitoring period i.e from 2011 till now. The analysis reviews the judgments against the primary objectives of the law to ascertain whether they will have a positive impact on Orders passed by the lower courts. This paper attempts to understand the existing law on violence and their implementation through an analysis of some judgments of the higher judiciary of domestic violence. It highlights the ways in which the legal system in India constructs the issue of domestic violence. While Magistrates' Courts are empowered to entertain applications and pass orders under the Act, cases that go in appeal to the High Courts and to the Supreme Court, clarify and substantiate the law.

2. Substantive Rights

2.1 The Right to Reside

a) Husband prevented from entering matrimonial home in case of apprehension of domestic violence

It was held in *Sabita* v. *Mark*[8] that both the spouses are entitled to an equal right in the matrimonial home. This is upon the pre-condition that both live there peacefully, happily and lovingly. In this case alternate premises were available to the husband. Even in the absence of the alternate accommodation a violent husband cannot be allowed to enter upon the matrimonial home to cause more apprehension of domestic violence.

[8] 2013 (5) Mh. L. J. 289. Available at *www.scconline.com*

b) Woman's Right to Reside in Husband's Rented Premises

In *Kavita Dass* v. *NCT of Delhi & Anr.*,[9] the Delhi High Court dealt with a complex factual situation. The judgment clarify and reaffirm the wife's Right to Reside the Shared Household by virtue of her "marriage", irrespective of whether the property is rented or owned by the husband.

c) Right to claim Residence in a 'particular' Shared Household

The Delhi High Court in *Sunil Madan* v. *Rachna Madan & Anr*[10] was faced with the question of whether a woman could claim a Right to Reside in the Shared Household, where the husband was residing, despite the fact that she had been offered alternative residence by the husband. In the judgment delivered by M. L. Mehta J., the Court reflected on the facts and circumstances of the case and the purpose of providing the Right to Reside under the PWDVA and came to the conclusion that the reason for providing this right of residence to the wife is that she should not be left homeless by the actions of the husband. The High Court considered the husband's offer to arrange alternative accommodation of a two bedroom apartment in a similar locality to be just and reasonable.

d) Right to Residence in Property Belonging Exclusively to the In-Laws

In *S.R. Batra and Anr.* v. *Smt.Taruna Batra*[11] Held that wife is only entitled to claim a right to residence in a household, and a 'shared household' would only mean house belonging to or taken on rent by husband, or house which belongs to joint family of which husband is a member. Here, the house in question belonged to the mother-in-law of Smt. Taruna Batra and it did not belong to her husband Amit Batra. Hence, Smt. Taruna Batra could not claim any right to live in the said house.

In *Raj Kumari* v. *Preeti Satija & Anr.*[12] Manmohan Singh, J delivering the judgment observed that the duty to maintain the daughter-in-law falls on the parents-in-law only after the death of their son. In this case since the property belonged exclusively to the mother-in-law it was held to be neither a Shared Household nor a matrimonial home of the daughter-in-law, since she had never resided there on a regular basis and her husband also does not live there.

e) Mother entitled to claim residence in her son s house

In *R. Sarvanan* v. *Pavathal*,[13] respondent was 63 yrs old widow. It was held that mother is entitled to claim residence in her son's house. Respondent was not claiming any right over property.

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9 2012 IVAD (Delhi) 542 : (2012) 3 ILR 747 (Del).
10 I.A. No. 500/2011 in CS (OS) No. 85/2010, Decided On: 13.01.2012.
11 *Supra* note 2.
12 AIR 2014 Del 146 : 207 (2014) DLT 78.
13 2013(1) RCR 423.

2.1.1 Women in relationships in the nature of marriage

The analysis of Orders reveals that relief is now granted and denied based on the *D. Velusamy* v. *D. Patchaiammal*[14] judgment of the Supreme Court. In this case, the Supreme Court held that a relationship in the nature of marriage is akin to a common law marriage which, although not being formally married, requires that:

a. The couple must hold themselves out to society as being akin to spouses;
b. They must be of legal age to marry;
c. They must be otherwise qualified to enter legal marriage, including being unmarried; and
d. They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In *Indra Sarma* v. *V.K.V. Sarma.*[15] The Court was of the view that the Appellant, having been fully aware of the fact that the Respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in-relationships are not relationships in the nature of marriage. Appellant's and the Respondent's relationship was, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential characteristic of a marriage, but a relationship other than "in the nature of marriage" and the Appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" Under Section 2(f) of the DV Act.

3. Procedural Issues

3.1 Retrospective Operation of the PWDVA

The issue of the retrospective operation of the PWDVA came before the Supreme Court for the first time this year in *Lt. Col. V.D. Bhanot* v. *Savita Bhanot.*[16] In this case, the aggrieved woman left her matrimonial home in 2005 after having lived there with her husband since 1980. In 2006, after the PWDVA came into effect she filed for Protection, Maintenance and Residence Orders. The Sessions Court held that the woman's cause of action arose before the PWDVA came into force in 2006 as she left her matrimonial home in 2005. In a separate proceeding before the Delhi High Court in 2013, the Court determined that the matter could be decided under the PWDVA and this would not amount to a retrospective operation of the law. In looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005.

14 AIR 2011 SC 479.
15 2014 (1) RCR (Criminal) 179.
16 AIR 2012 SC 965.

In *Juveria Abdul Majid Patni* v. *Atif Iqbal Mansoori*[17] Apex Court held, an act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief under Section 20, child custody under Section 21, compensation under Section 22, and interim or ex parte order under Section 23 of the Domestic Violence Act, 2005.

It was held in *Poonam* v. *V.P. Sharma*[18] that if before passing of the Act of Domestic Violence, the relationship of husband and wife between the parties was dissolved vide a decree of divorce which the parties had obtained under an agreement by mutual consent, the provisions under the D.V. Act cannot be invoked as the domestic relationship is not in existence.

3.1.1. No Effective implementation without the Appointment of Protection Officers

In *Rajendra Dattatraya Anbhule* v. *State of Maharashtra*[19] the Court has repeatedly observed that there is a complete failure on the part of the State Government to appoint even a single Protection officer notwithstanding the solemn assurances given by the State Government to this Court during last few years and notwithstanding several orders passed by this Court. So it was found that the State of Maharashtra is insensitive in the matter of implementation of the very important enactment enacted for protecting women from domestic violence.

3.1.2 Female members can be made respondents under DV Act

In *Sandhya Manoj Wankhade* v. *Manoj Bhimkhade and others*[20] Held that Section 2(q) defines a respondent to mean any adult male person who is in a domestic relationship with aggrieved person. Proviso includes a relative of husband or male partner. Hence no restrictive meaning can be given to expression relative. Term respondent includes females also.

In *Kusum Lata Sharma* v. *State and Anr.*[21] It was held that as a matter of fact even those women who are sisters, widows, mothers, single woman or living with the abuser are entitled to legal protection under the proposed legislation. A mother who is being maltreated and harassed by her son would be an "aggrieved person". If the said harassment is caused through the female relative of the son i.e. his wife, the said female relative will fall within the ambit of the "respondent". This phenomenon of the daughters-in-law harassing their mothers-in-law especially who are dependent is not uncommon in the Indian society.

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17 (2014) 10 SCC 736.
18 2014 SCC OnLine Del 875. available at *www.scconline.com*
19 2015 SCC OnLine Bom 82. available at *www.scconline.com*
20 2011 (1) RCR (Criminal) 884 (SC).
21 2012 (1) RCR (Criminal) 924.

In *Kusum Narottam Harsora* v. *Union of India*[22] In this case Court is of the opinion that the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of DV Act, where they are co-respondent/s in a complaint against an adult male person, who is or has been in domestic relationship with the complainant and such co-respondent/s. It was also held that a complaint under the DV Act would not be maintainable against the daughter-in-law, daughters or sisters of the complainant, if no complaint is filed against an adult male member of the family.

3.1.3 The Aggrieved Woman has an Independent Right to File an Application under the Act

In *M. Jayamma* v. *The State of AP, rep. by its Public Prosecutor, High Court of AP. Hyderabad and another*,[23] The High Court observed that Section 12 of the PWDVA is clear that the woman, a Protection Officer or any other person on behalf of the woman may present an application to the Magistrate.

3.1.4 Domestic Incident Report of the Protection Officer is not Mandatory

This position was affirmed by the Delhi High Court in *Shambhu Prasad Singh* v. *Manjari*[24] in a judgment delivered by Mukta Gupta, J which notes that the proviso to Section 12(1) uses the word "any", i.e., "any domestic incident report having been received" indicating that the Domestic Incident Report has tobe considered in all cases where it is received. However it is not mandatory for the Court to wait for the said report before issuing notice.

3.1.5 Procedure to be Followed Before Passing of Interim Orders under PWDVA

In *Abizar N. Rangwala, Nuruddin Rangwala and Alifiya Rangwala* v. *Ms. Sakina*,[25] *the* Madras High Court dealt with the question of the sort of procedures to be followed by the Magistrate in passing interim orders under the PWDVA. The High Court accordingly held, "it is needless to say that the parties are entitled to put forth their defence and establish their case before the Court of law, for which, they are entitled to cross-examine the witnesses.

4. Conclusion and Recommendations

An analysis of judicial decisions shows that judiciary has adopted thoughtful and compassionate approach towards women who are victims of domestic violence. By highlighting the violence committed against women, by laying down guidelines for protecting the interest of women and by passing few landmark judgements, the judiciary has shown much zeal to maintain the dignity of women. Right to residence is a very important provision in the Domestic violence Act, 2005 for their

22 2014 SCC Online Bom. 1624, available at *www.scconline.com*
23 Criminal Petition No. 3873 of 2009, Decided On: 05.01.2012.
24 2012 (4) RCR (Criminal) 368 (Delhi).
25 Crl. O.P. No. 26916 of 2011 Decided On: 02.12.2011.

safety and security. The *Batra*[26] judgment by insulating property owned by in-laws from actions under the Act is denying women the Right to Reside in a majority of cases. The *Velusamy* [27]judgment by pigeonholing relationships in the nature of marriage within the understanding of the common law marriage is undermining the intent of the law to cover live-in relationships and offer women in these relationships the full protection of the law. Both decisions need the immediate attention of the Supreme Court and should be taken up for reversal.

Zero tolerance for all forms of domestic violence must be conveyed. It is also to be taken into consideration that large number of the cases is pending in the Courts. So there is a need to establish fast track Courts for the speedy disposal of the cases. There are States where no Protection Officers have been appointed by the governments in spite of various directions given by the Courts. State Government and Courts should recognize the role of Protection Officers in assisting decision making, granting effective relief and enforcing it. Quality legal aid services must be made available to assist women in filing the strongest possible case asking for the full protection of law. A better understanding of the "domestic relationship" and clear recognition that a relationship that has existed in the past is also a Domestic Relationship is necessary particularly in the case of divorced women and daughters. In the case of divorced women.

Domestic Violence against women cannot be completely eradicated by efforts through legislation and law enforcement agencies. There is a need of social awakening and change in the attitude of the masses, so that due respect and equal status can be given to the women. And it should not be forgotten that women are much stronger than men. They are biological stronger as they give birth to babies; can have multiple pregnancies. They can take more pains. They can take much more rough treatment. They are multi taskers. It is also being noted that women who are active litigants are considered to be the misusers of laws. And most of the times this violence is unseen by the people as still it is difficult for the women to break their silence as the actual perpetrators are the members of their own family.

Though Article14 of the Constitution provides everyone the right to equality but this concept of equality will be merely on papers unless efforts are being made by all members of the society. The need of the hour is to educate the people what qualities a woman brings into the family as a girl, as a woman, as a daughter, as a mother, as a sister, as a daughter-in-law. What a family gains by having a girl child, what beautiful features she brings to the family. Mass media can play an effective role here as in the present days it has reached every corner of the nation.

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26 *Supra* note 2.

27 *Supra* note 7.

REPATRIATION OF PRISONERS: LEGAL ISSUES AND DEVELOPMENTS IN INDIA

Dr. Upneet Lalli*

Dr. Praveen Kumari Singh**

1. Introduction

Around 11 million people were incarcerated in different countries in 2014. The world prison population rate has increased in the last decade by six percent from 136 per 100,000 of the world population to 144.[1] The prison population consists of different categories of persons, and is not just comprised of the nationals of a country. Globalization has made the movement of people across borders easier, and along with the increased migration has led to growing number of non-nationals[2] being held in prisons across the world. It is estimated globally that around almost half a million prisoners are non-nationals. Amongst the many reasons is the search for better opportunities which results in non-nationals illegally entering a country. Further, transnational crimes like drug trafficking, human trafficking and computer and cyber-crime are also on the rise. In some countries the proportion of non-nationals is much more than nationals, and is highest in UAE with 92.2%. Switzerland has 73%, while Greece has 60.4%foreigners in prisons, (World prison brief).[3] In fact in countries like Netherlands, the prisons have detainees and convicts from more than 100 countries.

Foreign prisoners face peculiar disadvantages. The language, culture, lack of knowledge of legal system, economic disadvantage and other differences creates barriers in access to justice and also pose challenges for stay inside prison, both for inmates and prison authorities. Psychologically adverse consequences are related to feelings of isolation, as there is difficulty in maintaining contact with the family which exacerbates the pains of imprisonment. Further, the increased distance from family, and other indirect consequences of imprisonment on prisoner's family viz, social stigma, loneliness, anxiety and emotional hardship are aggravated by the imprisonment of a family member abroad. Hence, there was felt a strong humanitarian need for the transfer of foreign prisoners to their own country.

The argument for encouraging the transfer of sentenced persons has a strong basis in international human rights law. Article 10, of the International Covenant on Civil and Political Rights,[4] specifies that the "essential aim" of a penitentiary system is the "reformation and social rehabilitation" of prisoners. The Standard Minimum Rules

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** Dy CPO Gaz, NR, New Delhi.

1 'Global Prison Trends', Penal Reform International: *www.penalreform.org/wp/2015/PRI* - Prison Global Trends Report (2015).

2 *Ibid.* Global Prison Trends (2015).

3 'World Prison Brief': *http://www.prisonstudies.org/info/worldbrief/wpb* (accessed on November, 2015).

4 International Covenant on Civil and Political Rights.

for the Treatment of Prisoners[5] echo this duty to facilitate the social rehabilitation of offenders. This is possible only in one's own country. Imprisonment in a foreign country, away from family and friends, may also be counterproductive as families may provide prisoners with social capital and support, which improve the likelihood of successful settlement and reintegration.[6]

2. International cooperation and Law Enforcement

Although transfer was once seen as an infringement of the sovereignty of a State, owing to the territoriality of criminal law and the exclusive right of the State to administer criminal justice, it may now be viewed as a more subtle expression of sovereignty as it involves relinquishing power in order to protect citizens, ensure public security and improve international cooperation.

There are many significant law enforcement benefits to the transfer of sentenced persons. If there is no prisoner transfer programme, the vast majority of foreign nationals in custody in a sentencing State will eventually be repatriated by means of deportation and the receiving countries have no information regarding the offence committed. It has no control over the timing and mode of the convicted person's arrival in their country, or also what the person will do. This is not beneficial to the sentencing State or the administering State. The administering State thus benefits by receiving detailed information about the offence of which the prisoner was convicted, the prisoner's prior record (if any) in the sentencing State and the prisoner's adjustment to life in prison. This sort of detailed information is not available when a prisoner is deported at the end of his or her sentence. This may be particularly important, for example, in the case of a sex offender or trafficker who may need to be placed under close supervision. The transfer of sentenced persons is seen to be an important means of cooperation to prevent and combat crime, which is the purpose of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. All three conventions refer to the possibility of concluding agreements to facilitate the transfer of persons convicted abroad of the offences covered by the Conventions to another State to complete their sentence.

3. Initiatives of the United Nations

The process of international transfer was given a considerable boost by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which met in 1975. The Sixth Congress adopted resolution[7] 13 on the transfer of prisoners, in which Member States were urged "to consider the establishment of procedures whereby such transfers of offenders may be effected, recognizing that any

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5 U.N. Standard Minimum Rules for Treatment of Prisoners (United Nation Organization, 1955).

6 Mills, A. & Codd, H (2008), "Prisoners' families and offender management: mobilizing social capital", *Probation Journal*, vol. 55, No. 1 (March 2008), pp. 11-12.

7 Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980: report prepared by the Secretariat (United Nations publication, Sales No. E. 81. IV. 4), chap. I, sect. B. 13.

such procedure can only be undertaken with the consent of both the sending and the receiving countries and either with the consent of the prisoner or in his interest". As a result, the Seventh Congress[8] adopted the Model Agreement,[9] together with the recommendations on the treatment of foreign prisoners.

The transfer of sentenced persons is also a factor in initiatives that the United Nations has taken to deal with international crimes such as genocide, crimes against humanity and war crimes. There are many bilateral and multilateral instruments that have been signed for transfer of foreign prisoners. Most prominent of the multilateral instruments has been the European Convention, which entered into force on 1 July 1985. The Convention has 64 States parties, including 18 from outside Europe.

4. Some principles and Requirements for Transfer of Prisoners

4.1 Consent of States

The transfer of prisoners is based on an agreement between States. It relates to a single case and is based on mutual trust between the States concerned.

4.2 Final Judgment

The first requirement for a sentenced person to be a candidate for transfer is that the judgment of conviction and sentence against him or her must be final. Paragraph 10 of the Model Agreement[10] of UN states: "a transfer shall be made only on the basis of a final and definitive sentence having executive force."

4.3 Term Remaining to be Served

Since transfer procedures take time to complete, hence it is practical to set a minimum period still to be served. If there are fewer than six months left to serve, this may not be sufficient time to carry out the transfer procedure. It may also be difficult to initiate a process of rehabilitation that would lead to the social reintegration of the prisoner in such a short period.

4.4 Dual Criminality

It requires that the offence for which the sanction is imposed in the sentencing State must also be an offence according to the legislation of the administering State. Exceptions to the principle of dual criminality include-terrorism, trafficking in persons.

5. Indian Position

In India the proportion of foreign prisoners has increased over the years. While in 2003 there were 2205 foreigners (0.67% of total prison population), the numbers

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8 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E. 86. IV. 1).

9 UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners Adopted by the Seventh Crime Congress, Milan, 26 August-6 September 1985, and endorsed by the General Assembly in resolution 40/32.

10 *Ibid.*

have increased in the last decade to 7165(1.73%) in 2013. The categories of non citizen prisoners include tourists, foreign students, employees, asylum seekers, illegal migrants. They feel socially and culturally isolated, and legally and linguistically handicapped.

Prior to 2004, there existed no legal provision in the Code of Criminal Procedure or any other law under which a foreigner convicted and imprisoned in Indian prisons could be transferred to the country of their origin to serve the remaining part of their sentence. Similarly, there was no legal provision for the transfer of prisoners of Indian origin convicted by a foreign country's court to serve their sentence in India. Humanitarian and practical concerns combined together, to pave the way for foreign convicted nationals to be transferred to their home countries and prisoners of Indian origin be brought to India to serve the remaining part of their sentence. These factors and global realities led to the enactment of the Repatriation of Prisoners Act, 2003[11] which was enacted by Parliament and which came into force with effect from 1.1.2004. It was felt that this would mitigate the hardship of foreign prisoners by enabling them to be near their families and in the milieu of own social environment which would help in the process of their social rehabilitation. Subsequently, the Repatriation of Prisoners Rules, 2004 were published in the Official Gazette on 9.8.2004.

Table 1: Showing details of foreign prisoners in Indian Prisons

Year	Convicts	Undertrials	Detenues	Others	Total	%age
2009	2042	2896	109	215	5262	1.39
2010	1715	2884	136	373	5108	1.38
2011	2020	3601	137	265	6023	1.61
2012	2483	3984	95	282	6844	1.77
2013	2353	4353	41	418	7165	1.73
2014	2495	3576	30	—	6101	1.46

Source: NCRB Prison Statistics, 2014

As per Prison Statistics, 2014,[12] the number of foreign convicts has increased while number of detenues has gone down. The maximum number of foreign undertrials and convicts are in West Bengal. Nearly 3469 Bangladeshi nationals are in prisons. Nigerians are also a growing segment of foreign nationals in Indian prisons.

6. Important Provisions of the RP Act

The Repatriation of Prisoners Act was enacted with the objective so as to facilitate the transfer of foreign national convicted in India to their home countries and convicted prisoners of Indian origin brought to India to serve the remaining part of their sentence nearer home which would facilitate in their social rehabilitation.

11 *The Repatriation of Prisoners Act*, 2003 and Rules, 2004.

12 Prison Statistics, 2014 of National Crime Records Bureau, New Delhi. Government of India.

7. Signing and Ratification of Agreement

The Repatriation of Prisoners Act, 2003 requires signing and ratification of the Agreement on Transfer of sentenced persons between the Government of India and the other interested country as per Section 3(2) of the Act. The nodal Ministry implementing the Act in India is Ministry of Home Affairs (MHA). A Model Treaty/agreement based on provisions of Repatriation of Prisoners Act, called standard draft was prepared by MHA in consultation with the Ministry of External Affairs and Ministry of Law. The Ministry of External Affairs circulates this model treaty/agreement to all interested countries through the Indian Missions abroad. This is important, especially in countries where large number of Indian nationals are working like in Arab Countries.

Based on the response of the interested county, the agreement is first negotiated by the team of officials from MHA, MEA and Ministry of Law in accordance with the Repatriation of Prisoners Act, 2003. Negotiated treaty gets initialed by head of delegation of both countries.

The draft agreed treaty is circulated as cabinet note and after receiving input from concerned ministries and approval of Minister of Home Affairs which is nodal Ministry is put up for cabinet approval. After cabinet approval the treaty becomes ready for signing and generally signed at the level of Home Minister or by any authority to whom signing power is delegated during high power delegation visit. Treaty is ratified with President's approval, and then gets notified in the official gazette. Through MEA it is conveyed to the respective country through exchange of instruments of Ratification. It is brought in the knowledge of Indian prisoners abroad through consular access by concerned Indian Embassy. All State Governments are also informed about the operationalisation of treaty and for bringing into the knowledge of foreigner prisoners of concerned country.

8. General Principles

A person sentenced in the territory of one Contracting State may be transferred to the territory of the other Contracting State in accordance with the provisions of this Agreement.

Transfer may be requested by any sentenced person who is a national/ citizen of the Receiving State or by any other person who is entitled to act on his behalf by making an application in the manner prescribed.

Subject to the provision of this Agreement, a request for transfer may also be made by the Sentencing State or the Receiving State subject to the condition that the consent of the sentenced person has been obtained before a request for transfer is made.

The enforcement of the sentence shall by governed by the law of the Receiving State. However, the Receiving State shall be bound by the legal nature and duration of the sentence as determined by the Sentencing State.

9. Conditions & Guidelines for Transfer

Some basic conditions for transfer are:- (i) The person is a national of the receiving State; (ii) The judgment is final and death penalty has not been imposed on the sentenced persons; (iii) No criminal proceeding are pending against the sentenced person in the Sentencing/Transferring State in which his/her presence is required; (iv) The sentenced person has not been convicted for an offence under the military law; (v) At the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve, barring some exceptional cases or is undergoing a sentence of life imprisonment; (vi) The acts or omission for which that person was sentenced in the Sentencing State are those which are punishable as a crime in the Receiving State, or would constitute a criminal offence if committed on its territory.

10. Procedure for Repatriation

The Repatriation of Prisoners Act and the Rules have the details of steps to be taken to transfer a sentenced person to the contracting State. Once the agreement becomes operational, certain steps are required to be taken to repatriate a prisoner from India to other countries or vice versa.

Sentenced person makes request to the Authorities of Sentencing State which as per agreement sends the request along with required details to the Receiving State for acceptance. If sentenced person is a national of Indian origin this request comes to Ministry of Home Affairs. MHA sends the received details based on the address provided and passport details to concerned State Government for verification of Nationality. Intelligence report from concerned agencies is also obtained and issue of sentence adaptability is decided in consultation with Ministry of Law. After obtaining all details and verification confirmation of nationality, case is put up for consideration of Home Minister who is appropriate competent authority for acceptance or rejection of the transfer request. Generally this is decided based upon the provisions in the treaty and the RP Act.

The acceptance or rejection is conveyed to the Sentencing State. If acceptance is conveyed then action begins to ensure repatriation. There is a proper Standard Operating Procedure (SOP) which is used to transfer a sentenced person.

11. Repatriation from other Country to India

The Central Government may accept the transfer of a sentenced person, who is a citizen of India, from a contracting State wherein he is undergoing any sentence of imprisonment subject to such terms and conditions as may be agreed to between India and that State.

The Contracting State will send the following information in respect of the sentenced person seeking transfer to India: (a) Request Application of the sentenced person, (b) Proof of his nationality, (c) A copy of the judgment and a copy of the relevant provisions of the law under which the sentence has been passed against the sentenced person, (d) The nature, duration and date of commencement of the sentence,

(e) Medical report or any other report regarding the antecedents and character of the sentenced person, where it is relevant for the disposal of his application or for deciding the nature of his confinement and, (f) Any other information which the Central Government may consider necessary.

12. Procedure for Physical Transfer of a foreigner prisoner imprisoned in Indian Jail

On receipt of a communication from the concerned Contracting State expressing its willingness to accept the transfer of the sentenced person and undertake to comply with the conditions specified in the warrant, if the Central Government is satisfied that the sentenced person should be transferred to the said State, it authorize an officer not below the rank of a Joint Secretary to a State Government, within the limits of whose jurisdiction the place of imprisonment of the prisoner is situated, to issue a warrant (as prescribed as Form 2 in the rule) on behalf of the Central Government directing the officer in charge of the prison therein to deliver the custody of the prisoner to the person authorized by the Contracting State to which the sentenced person is to be transferred, presenting such person a copy of the warrant together with all the records relating to the sentenced person and the personal effect taken from the sentenced person at the time of his admission in the prison.

Upon the presentation of a warrant, the officer in charge of the prison shall comply with the warrant and obtain thereon the signature of the person to whom delivery of the sentenced person, records and the personal effects relating to the sentenced to be removed from the prison is given.

After delivery of the sentenced person to the person authorized by the Contracting State, the officer in charge of the prison transferring the sentenced person shall forward a copy of the warrant to the court which committed the sentenced person to the prison, along with a statement that the sentenced person has been delivered to the person authorized by the Contracting State.

13. Procedure for Physical Transfer of an Indian prisoner imprisoned in Foreign Jail

If the Central Government accepts the request for a transfer, it shall authorize any officer not below the rank of a Joint Secretary to that Government to issue a warrant (Form 3 of Rule) to receive and hold the sentenced person, with respect to whom the warrant is issued, in custody and to detain the sentenced person in prison. The Central Government shall, in consultation with the State Government, determine the prison situated within the jurisdiction of such State Government where the sentenced person with respect to whom a warrant has been issued, shall be lodged and the officer who shall receive and hold him in custody.

14. Transfer of Prisoners without Bilateral or Multilateral Agreement

The issue of repatriation of a foreigner in exceptional circumstances can be considered by Central Government depending upon the level from which such request originates. Request from Head of a State or other high Functionaries in

respect of a foreigner prisoner can be considered if India has a close strategic partnership with the concerned Country. This is considered on the basis of strong recommendation by MEA on case to case basis on political consideration. This is exceptional as Section 2 (a) of the Repatriation of Prisoners Act, 2003 provides for transfer of a sentenced person to a State with whom India has signed an agreement/ treaty or otherwise. On Ministry of External Affairs suggestion this may be done on a reciprocal basis through an exchange of letters of Reciprocity. It includes the objective of the Agreement the supporting documents which are required to be produced before the transfer, an undertaking by the Foreign Government to administer the remaining part of the sentence of the prisoner and other such conditions. The Department of Legal Affairs has also stated that the Central Government is competent to enter into an arrangement with another country under section 2(a) of the Act. However, before letters are exchanged, approval of Cabinet will be required.

The Law Ministry has opined in such cases that under Section 2(a) of the Act, the Central Government is competent to enter into a treaty or like arrangement with another foreign country for transfer of prisoners from India to such country or place and vice-versa. As per the statutory stipulation, it has been further advised that the letters cannot be exchanged at the official level but such letters shall have to be exchanged for and on behalf of the Government of India. Hence approval of the Cabinet is required for the letters of exchange.

Repatriation of Mr. Christophe Delias from India to France was done through letters of exchange between the two countries. In 2014 one German Sentenced person was also transferred through instrument of reciprocity without treaty being in place.

15. Achievements So Far

Table 2: Indicates the Numbers of Prisoners repatriated from India to different countries and vices versa under the Agreement on Transfer of Sentenced Persons and as per provision of the Repatriation of Prisoners Act, 2003 (As on June, 2015)

Repatriated foreign prisoners belong to		**Indian prisoners repatriated from:-**	
Country	No. of foreign prisoners	Country	No. of Indian prisoners
UK	**6**	**UK**	**6**
France	**1**	**Mauritius**	**13**
Israel	**1**	**Sri Lanka**	**29**
Germany	**1**	**Total**	**48**
UAE	**1**		
Total	**10**		

(**Source:** MHA)

16. Status of the Agreement on Transfer of Sentenced Persons signed and operational with different countries

So far India has signed bilateral Agreements on Transfer of Sentenced Persons with the following (**25 countries**)- United Kingdom, Mauritius, Bulgaria, France, Egypt, Sri Lanka, Cambodia, South Korea, Saudi Arabia, Iran, Bangladesh, Brazil, Israel, Bosnia & Herzegovina, UAE, Italy, Turkey, Maldives, Thailand, Russian Federation, Kuwait, Viet Nam, Australia, Hong Kong and Qatar. Out of these, the Agreements that are operational after ratification by both sides are - United Kingdom, Mauritius, Bulgaria, France, Egypt, Sri Lanka, Cambodia, South Korea, Saudi Arabia, Iran, Bangladesh, Israel, UAE, Italy, Turkey, Maldives, Thailand, Russian Federation and Kuwait (**19 countries**). In addition India has also acceded to multilateral **convention Inter-American Convention on Serving Criminal Sentences Abroad (IAC)** - which is signed by the 34 Member States of the Organization of American States (OAS), but is also open to accession by non – OAS countries. It is a multilateral treaty, which lies under the framework of Organization of American States, which is a regional organization having 35 member States. The Convention so far, has been ratified/acceded by 15 members of OAS. In addition, non-OAS countries such as India, Saudi Arabia and Czech Republic, have acceded to Inter-American Convention on Serving Criminal Sentences Abroad. The total number of members of the Inter-American Convention on Serving Criminal Sentences Abroad is **18** (including India). In total India now has transfer arrangements for prisoners with 34 countries.

17. Some Cases

17.1 Bhim Singh Case

The Supreme Court in the long standing case of Bhim Singh vs. Union of India on 24 January, 2012,[13] ordered the immediate release and repatriation of Pakistani and Bangladeshi prisoners who were being held past their sentences due to procedural confusion over their exact diplomatic status. This was however, outside the ordinary legal process. The apex court said though India has a better track record of treating cases pertaining to foreign nationals than other countries, yet it needs to show some "urgency" in such cases as even the foreign nationals are entitled to the protection of Article 21 (personal liberty). The bench asked the government to bring in a suitable mechanism to ensure that such foreign nationals are not forced to remain in jails as courts are being frequently flooded with complaints about Pakistani nationals being incarcerated in jails despite having served their sentence.

Another highlighted case relates to the release and repatriation of Khalil Chisty, an 80-year-old Pakistani, who was serving his sentence in Rajasthan, India on murder charges. Interventions at the highest political level finally led to his release and being sent back to Pakistan.

[13] *Bhim Singh* v. *UOI* (2012) 13 SCC 471.

18. Legal Issues on Sentence Compatibility

a. Balance to serve—the part of the sentence the person has to serve once transferred is called the "balance to serve". While the time already served is clear, any remission gained from good behavior will vary from country to country. For instance, most prisoners convicted in the UK, are released on license at the halfway stage of their sentence. While repatriated prisoners serving determinate sentences are released at the halfway stage of their balance to serve, and not the halfway stage of their total sentence. So this depends on when they were transferred.

b. The adapted sentence must, as far as possible, correspond with the initial sentence. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum sentence prescribed by the law of the administering State. In practice, this means that, where the process of continued enforcement is followed, the powers of the administering State to change the initial sentence are quite limited. Conversion of the sentence refers to a process whereby the administering State, through a judicial or administrative procedure, imposes a new sentence based on the factual findings of the court in the sentencing State. The administering State is bound by these facts but imposes a new sentence within the terms of its national law. Such a sentence may be less severe than that imposed initially.

c. Court cases have been filed on sentence adaptability

In a case of Shri Prem Kishore Raj who had been under detention since 01.05.1996 for the possession of 371 gms of heroin in Mauritius and sentenced to 30 years of imprisonment initially on 18.12.1997 by a court in Mauritius under their law which was subsequently reduced to 23 years 5 months by the Mauritius Government on a mercy petition.

He was repatriated from Mauritius under the treaty, from Mauritius on 27.02.2008, and lodged in Thane Jail. He moved to the Bombay High Court through a writ petition and the Court directed on 15.02.2013 that he make a representation to the appropriate authority for the adaptation of his sentence to one prescribed under India law in accordance with Section 13 (6) of the Repatriation of Prisoner's Act 2003. In his representation to MHA, he mentioned the facts and stated that in his case this adaptation of sentence was not done as per Section 13 (6) of the RP Act. Whereas, the punishment under section 21(c) of the NDPS Act for a similar offence is a sentence ranging from 10 years to 20 years. Since the duration under Indian law corresponding to the sentence imposed by the court in Mauritius has the outer limit of 20 years only, his sentence would need to be adapted to twenty years and no fine can be imposed on him as only adaptation of sentence is being considered. His sentence of imprisonment was adapted for 20 years, in accordance with the NDPS Act.

19. Current Trends, Relevance and Challenges

Countries Covered—Initially many countries did not show interest in the treaty, and further many did not have the required legal provisions in domestic law. With more consciousness growing on human rights perspectives, while dealing with citizens or convicted foreigners, more countries are now showing willingness to enter into Bilateral Agreements. This should increase the scope of use of repatriation. At times, holding foreign prisoners can result in diplomatic face off as well, and it is important to have Repatriation treaty between our neighbouring countries as well.

a. **Lack of awareness**—Due to lack of knowledge among sentenced persons and their families and also among administrative and prison authorities, not many requests have been coming for the transfer of prisoners. There are provisions in the treaty binding concerned States to bring awareness about the treaty among jail authorities and sentenced persons. Ministry of Home Affairs apprises all State Governments/UTs whenever India enters into agreement with a new country and asks State Government to circulate it to all jail authorities. However, information about signing of treaties does not readily percolate down to the prisoners and families. Though, there has been some increase in knowledge about these provisions and more sentenced persons and their families are now coming forward with request for transfer.

   Increasing the use of existing transfer systems—To increase the use of existing prisoner transfer schemes, it is essential that the key people involved in the process are aware of them. It is therefore critical that prison personnel are trained and inform incoming foreign prisoners of the existence of prisoner transfer schemes and provide information on how they work. Similarly, to ensure nationals imprisoned abroad are aware of prisoner transfer agreements that are in place, consular services must be trained on the subject and protocols introduced to share this information with the prisons and prisoners in the State in which they operate. Legal aid providers must also be aware of issues relating to transfers in order to provide appropriate advice to prisoners and to ensure that informed consent is given.

   Lack of clarity on procedures—The States and the prison authorities are not clear about the procedures of repatriation. Procedural delays are hence common. The procedures need to be more robust having time frame for each step involved.

b. Anticipation of an increase in the number of Foreign Prisoners in Indian Prisons due to Globalization and other Factors. This number has already increased from 2205 in 2003 to 7165 in 2013. Challenge remains for of not allowing Consular Access, as there may be delay or lack of awareness.

c. States should make sentenced persons considering transfers aware of the terms of the transfer and any consequences of consenting to it. In addition to providing this information, States should also recommend that prisoners seek

independent legal advice. Moreover, procedures should be put in place to ensure that consent to transfers is given voluntarily. Procedures should ensure that a prisoner's consent to a transfer is both informed and voluntary.

20. Conclusion

There are many critical issues related to foreign prisoners and their repatriation and other contentious issues which will arise in the future. The present law is not clear on conditional and early release. It also does not cover probation decisions, unlike the EU agreements. The successful completion of the post-transfer phase depends on a continued flow of information between the administering State and the sentencing State. The transfer process can be expedited by simplifying and standardizing procedures. The use of standardized forms will provide a recognizable and uniform process. The systems for the international transfer of sentenced persons has evolved now to a tool for international cooperation in criminal justice matters.

FROM CORPORATE SOCIAL RESPONSIBILITY TO ACCOUNTABILITY IN SUSTAINABLE DEVELOPMENT: A CRITICAL ANALYSIS OF THE INTERNATIONAL SCENARIO WITH SPECIAL REFERENCE TO INDIA[1]

Dr. Jyoti Rattan*

1. Introduction

Brundtland Commission explained sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[2] Significantly, the corporations are business entities which are mainly concerned with the profit making. The moot question is what is and can corporations be made socially responsible for their actions especially with regard to sustainable development ?

It is important to note that the idea of CSR is neither new nor radical. J.M. Clark in 1916 stated that, "if men are responsible for their known results of their actions, business responsibilities must include known results of their dealings, whether these have been recognized by law or not."[3] To take United Kingdom's example, earlier in eighteen century, the concept of CSR was prevalent in business practice of certain successful companies. For example, Cadbury Chocolate makers in UK (Bournville) started their business in 1870s and in 1891 it managed it business systematically. In 1900 Bournville village was established to promote housing reform and green environment. Another example is Johnson and Johnson which published that "our final responsibility is our stakeholders" and announced that its primary stakeholders were its customers, employees and communities it operated in, indirectly mentioning that though profit making is direct interest but indirectly it has some interest in community thus showing the presence of the concept of CSR.[4] Subsequently, many corporations in different countries adopted CSR approach to business management.

Today, not only individuals but companies under CSR are also bound to play an important role in meeting the agenda of sustainable development which involves a balanced approach to economic progress, social progress and environmental stewardship. Let's briefly analyze what is CSR?

2. Corporate Social Responsibility (CSR)

Corporate Social Responsibility (CSR) is defined by different entities and jurists.

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1 Updated version of a paper accepted for publication in 2014 International Congress of IIAS, Ifrane, Morocco, 13 - 17 June 2014.

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2 Brundtland Commission's Report, 1987.

3 *Journal of Political Economy* as available at *http://www.csrquest.net/uploadfiles/1D.pdf* accessed on 14.04.2014.

4 *www.jnj.com* accessed on 12.04.2014.

Business Dictionary: CSR is company's sense of responsibility towards the community and environment (both ecological and social) in which it operates. Companies express this citizenship (1) through their waste and pollution reduction processes, (2) by contributing educational and social programs, and (3) by earning adequate returns on the employed resources.[5]

According to the United Nations Industrial Development Organisation (UNIDO)):[6] "Corporate social responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives (Triple-Bottom-Line Approach), while at the same time addressing the expectations of shareholders and stakeholders. In this sense it is important to draw a distinction between CSR, which can be a strategic business management concept, and charity, sponsorships or philanthropy. Even though the latter can also make a valuable contribution to poverty reduction, will directly enhance the reputation of a company and strengthen its brand, the concept of CSR clearly goes beyond that."

UNIDO apart from defining CSR also gave distinction between CSR and Charity and philanthropy. It stated that by charity the corporation reduces poverty i.e., helps in achieving MDG but CSR goes beyond that. Under CSR, corporation makes balance between economic, social and environment responsibilities and tries to address issues of stakeholders and shareholders.

2.1 Michael Hopkins' Definition of CSR[7]

1. Corporate Social Responsibility is concerned with treating the stakeholders of a company or institution ethically or in a responsible manner. 'Ethically or responsible' means treating key stakeholders in a manner deemed acceptable according to international norms.
2. Social includes economic and environmental responsibility. Stakeholders exist both within a firm and outside.
3. The wider aim of social responsibility is to create higher and higher standards of living, while preserving the profitability of the corporation or the integrity of the institution, for peoples both within and outside these entities.
4. CSR is a process to achieve sustainable development in societies.

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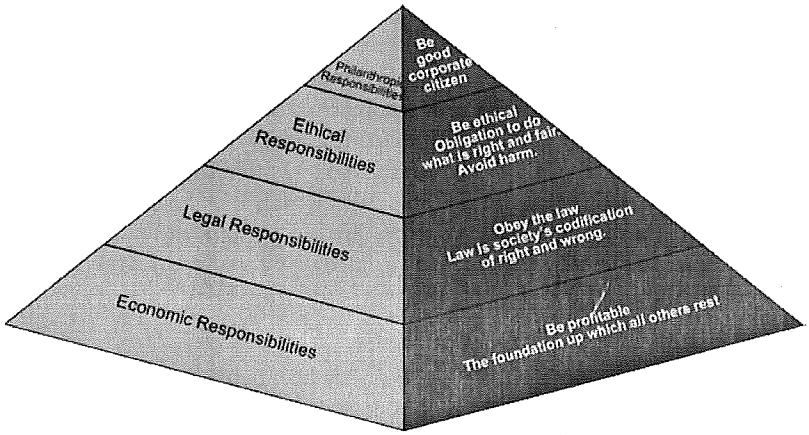
5 *http://www.businessdictionary.com/definition/corporate-social-responsibility.html Read more: http://www.businessdictionary.com/definition/corporate-social-responsibility.html#ixzz2qWOD2n mr* accessed on 02.01.2014.

6 *http://www.unido.org/what-we-do/trade/csr/what-is-csr.html#pp1[g1]/0/* accessed on 11.04.2014.

7 *Michael Hopkins (MHCi): A Planetary Bargain: Corporate Social Responsibility Comes of Age (Macmillan, UK, 1998) Updated by author July 2011* (point 4 based upon suggestion by Nadine Hawa, student in my class at University of Geneva) available at *http://mhcinternational.com/articles/definition-of-csr* accessed on 21.02.2014.

In *Michael Hopkins'* opinion, briefly, 'CSR is about treating all stakeholders responsibly or ethically.'

Carroll Definition:8 "The social responsibility of business encompasses the economic, legal, ethical and discretionary expectations that a society has of organizations at a given point in time." Carroll's definition is explained by CSR Pyramid:9



Carroll's CSR Pyramid

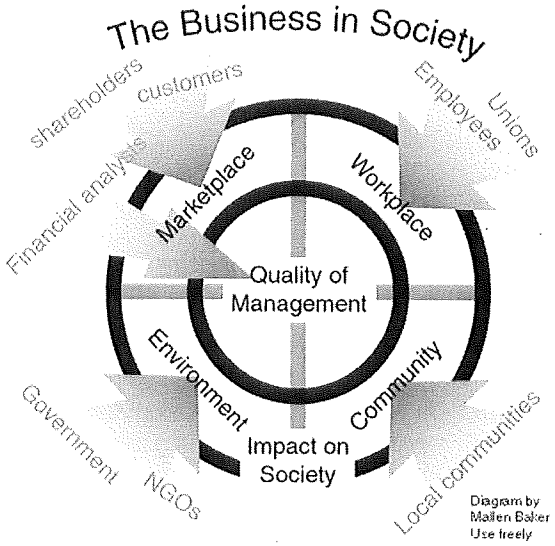
It is important to note that he argued that every company has economic responsibilities as without making a profit a company will cease to exist and CSR dies. Then he mentioned legal responsibilities but doesn't consider those countries where the law is ignored (corrupt Governments for instance) or has been modified to support cronyism. Every corporation must obey rules of the country where it is carrying its business. Ethical responsibilities come next, but is not so easy to define. The best way is 'do unto others as you would wish to be treated yourself'. Therefore, corporation must show same behaviour towards other as they expect from others. At the top of the pyramid is 'philanthropy' where every member of the corporation must act as a good corporate citizen.

EU Definition of CSR:[10] "A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."

According to this definition, CSR is a concept where a corporation on voluntary basis integrate social and environmental issues in their business activities.

8 *http://www.sagepub.in/upm-data/34698_Chapter1.pdf* (accessed on 01.02.2014).
9 *http://mhcinternational.com/articles/definition-of-csr* (accessed on 11.01.2014).
10 *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+V0//EN* (accessed on 21.02.2014).

Mallenbaker Definition: "CSR is about how companies manage the business processes to produce an overall positive impact on society"[11] Significantly, his definition is limited as he only considers the impact of corporations 'on' society. He has given following graph;[12]



He believes that 'Companies need to answer two aspects of their operations:

i. The quality of their management - both in terms of people and processes (the inner circle);

ii. The nature of and quantity of their impact on society in the various areas.

In his opinion, most look to the outer circle - what the company has actually done, good or bad, in terms of its products and services, in terms of its impact on the environment and on local communities, or in how it treats and develops its workforce. Out of the various stakeholders, it is financial analysts who are predominantly focused - as well as past financial performance - on quality of management as an indicator of likely future performance.'

He believe that traditionally in the United States, CSR has been defined much more in terms of a philanthropic model. Companies make profits, unhindered except by fulfilling their duty to pay taxes. Then they donate a certain share of the profits to charitable causes. It is seen as tainting the act for the company to receive any benefit from the giving.[13]

11 *http://mhcinternational.com/articles/definition-of-csr* (accessed on 01.02.2014).
12 *http://www.mallenbaker.net/csr/definition.php* (accessed on 11.02.2014).
13 *http://www.mallenbaker.net/csr/definition.php* (accessed on 01.02.2014).

The World Business Council for Sustainable Development (WBCSD):[14] "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[15]

This definition provides that CSR is corporation's commitment: to behave ethically, to contribute to economic development and to improve quality of life of employees, their family member, community and society at large.

From the above definitions, it is concluded that:

a. The CSR management of business by the corporation to address social and environmental issues.

b. CSR is mainly concerned with the well-being of all stakeholders and not just the company's shareholders.

c. Philanthropic activities are only a part of CSR, which ultimately help in reduction of poverty, i,e. helps in achieving first MDG.[16]

As CSR mainly concerns with wellbeing of every stakeholder therefore, it is pertinent to know the meaning of this expression. In common parlance any individual or group that can influence or is influenced by an organization's conduct is a stakeholder. However, R. Edward Freeman defined a stakeholder in an organization as any group or individual who can affect or is affected by the achievement of the organization's objectives.[17]

Let us take few examples that underline the importance of conducting business responsibly:[18]

1. In the movie Erin Brokovich (based on a true story) the stakeholder was the local community that was affected by the activities of the American West Coast energy giant Pacific Gas and Electric Company known as PG&E that was poisoning the town of Hinkley's water supply and affecting the health of an entire community. Brokovich fought to do justice to the stakeholders;

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14 The WBCSD is a coalition of 120 international companies united by a shared commitment to the environment and to the principles of economic growth and sustainable development. Its members are drawn from 30 countries and more than 20 major industrial sectors The WBCSD aims to be a catalyst for change towards sustainable development and to foster closer co-operation between business, government and other organizations concerned with the environment and sustainable development. It also serves as a forum where leading business people can exchange ideas and best practice in the field of sustainable development.

15 *http://oldwww.wbcsd.org/DocRoot/hbdf19Txhmk3kDxBQDWW/CSRmeeting.pdf* (accessed on 05.02.2014). Also see http://www.wbcsd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx.

16 *http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf* (accessed on 12.04.2014).

17 R. Edward Freeman, *Strategic Management: A Stakeholder Approach,* Pitman, 1984, p. 46.

18 *http://www.prlog.org/10018774-sustainable-development-corporate-social-responsibility.html* (accessed on 04.02.2014).

2. In the case of the ship breaking yard workers of Alang in Gujarat (India), the environmentalists and the media were the stakeholders who took up their cause and pressured the then French President Jacques Chirac to order decommissioned French warship Clemenceau carrying asbestos to take a U-turn.
3. *Bhopal Gas tragedy (India)* was an industrial catastrophe that occurred in 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh. Over 500,000 people were exposed to toxic substance in and around the areas located near the plant and roughly 2,259 died. The civil case was filed for a comprehensive cleanup of the contaminated site and the properties around the factory, and compensation and medical monitoring for those poisoned by Carbide's chemical waste which was ultimately granted to the victims and family members.[19]

3. CSR : International Scenario

Initially, CSR was a voluntary action, however, subsequently, United Nations took various initiatives and laid down certain International principles and guidelines in this regard. For example, MDG 8 "Develop a global partnership for development" and Target 18 "In cooperation with the private sector, make available the benefits of new technologies, especially information and communication" suggest that the benefits of new technologies, especially ICTs, should be made available to all in cooperation with the private sector. Not only MDGs but almost every multilaterally agreed document on environment and development adopted in the last 20 years directly acknowledges the importance of the private sector. For example, in 1972, the Declaration adopted in the UN Conference on Human Development recognized the role of business in sustainable development. The 1987 Brundtland Commission Report explicitly recognized the impact of international trade on the environment. Two other instruments which mentioned about corporate environmental accountability are UN draft Code of Conduct for Transnational Corporations,[20] whose negotiations collapsed in the early 1990s.[21]

In 1992 at the UN Conference on the Environment and Development, the UN Centre on Transnational Corporations again drew the attention in this regard and provided that the transnational corporations must be supportive of sustainable development. As a result, the concept of corporate social responsibility came into existence and various CSR initiatives grew rapidly.[22] The first instance of corporate responsibility was in Principle 16 of the 1992 Rio Declaration, providing the "polluter pays principle." Agenda 21 provided a framework for corporate social responsibility, acknowledging the importance for governments to encourage improved corporate environmental management.

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19 *http://bhopal.net/legal-issues-and-liabilities/* (accessed on 15.04.2014).

20 The draft Code of Conduct of Transnational Corporations, UN Doc. E/1990/94, 12 June 1990 ('UN Draft Code').

21 W. Sprote, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations' (1990) 33, *German Yearbook of International Law,* 331, at 339.

22 *http://sustainabilitytreaties.org/draft-treaties/corporate-social-responsibility/* (accessed on 17.04.2014).

Significantly, Article 14(1) of the Convention On Biological Diversity, 1992 requires Contracting Parties to ensure that proposed projects which are likely to have significant adverse effects on biodiversity are subject to Environmental Impact Assessment (EIA) with a view to avoid or minimise such effects. Article 14(2) requires the Conference of the Parties to the Convention on Biological Diversity (COP) to examine the issue of liability and redress, including restoration and compensation, for cross-border damage to biological diversity. Consequently, the 6th meeting of the COP adopted guidelines on environmental impact assessment and at the 7th meeting of the COP, the voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities were adopted.[23] In 2004, the Conference of the Parties, had urged Parties and other Governments that have not done so to contribute case-studies on current experiences in environmental impact assessment and strategic environmental assessment procedures that incorporate biodiversity-related issues as well as experiences in applying the guidelines contained in the annex to decision VI/7 A.[24]

Further, World Summit on Sustainable Development, 2002 and in the subsequent Johannesburg Plan of Implementation an agreement determined that the international community should "promote corporate responsibility and accountability and the exchange of best practices in the context of sustainable development."[25] Significantly, this includes actions at all levels to: encourage industry to improve social and environmental performance through voluntary initiatives; encourage dialogue between enterprises and the communities in which they operate and other stakeholders; encourage financial institutions to incorporate sustainable development considerations into their decision-making processes and develop workplace-based partnerships and programmes, including training and education programmes.[26]

In 2003, a sub-commission of experts prepared a the project "UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights".[27] However it was rejected by the Commission on Human Rights because main objective of this project was to formulate norms relating to social responsibility and company transparency with regard to human rights without identifying the difference between State and company obligations. The Commission, however, has not given up on the issue. In 2005 Professor John Ruggie was appointed as a Special Representative on the issue of human rights and transnational

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23 *http://uk.chm-cbd.net/default.aspx?page=7043* (accessed on 17.04.2014).

24 UNEP/CBD/COP/DEC/VII/7 13 April 2004 CBD COP 7 Decision VII/16F, 13 April 2004 available at *http://www.bing.com/search?q=+CBD+COP+7+Decision+VII%2F16F%2C+13+April+2004&form=MSNH64&mkt=en-in&rf=0&x=99&y=20* (accessed on 21.02.2014).

25 *http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf* accessed on 01.12.2013.

26 *Ibid.*

27 Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003 ('Commentary UN Norms').

corporations and other business enterprises by the UN Secretary-General, with a mandate to identify and clarify the norms relating to social responsibility and company transparency with regard to human rights. He submitted final report to the Human Rights Council in 2008 (the body which substituted the UN Commission) which set out three core principles: the State duty to protect against human rights abuses by business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. This framework clarifies certain legal concepts and defines the responsibilities of the different States and enterprises as regards human rights.[28]

Significantly, another important initiative in this regard was taken in 2007 by the UN-Secretary General with support from various UN bodies where he adopted *Towards Global Partnership*'[29] i.e., the partnership-focused principles of the UN Global Compact[30] where the ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from various international documents such as The Universal Declaration of Human Rights, 1948, The International Labour Organization's Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development, The United Nations Convention Against Corruption. The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption.[31] These principles are: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; Principle 2: make sure that they are not complicit in human rights abuses; Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; Principle 6: the elimination of discrimination in respect of employment and occupation; Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; Principle 9: encourage the development and diffusion of environmentally friendly technologies; and Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

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28 *http://www.reportingcsr.org/un-p-39.html* (accessed on 18.11.2014).

29 In time, the Global Compact received an intergovernmental endorsement through General Assembly resolutions 62/211 'Towards Global Partnership' (2007) para. 9 and 64/223 'Towards Global Partnership' (2009) para. 13. The question of the intergovernmentally agreed mandate of the Global Compact remains open, however. See the Joint Inspection Unit, United Nations Corporate Partnerships: The role and functioning of the Global Compact, UN Doc. JIU/REP/2010/9 (2010), para. 13-18 and recommendation 1; and 'A response from the Global Compact Office' 24 March 2011, at 2.

30 Available at *http://www.unglobalcompact.org/Portal/Default.asp*. See also 'United Nations Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles', at 58, found at *www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_ content/Public_Documents/gcguide.pdf* (accessed on 11.12.2013).

31 *http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.*

Accordingly in 2010 International Organization for Standardization[32] (ISO) released "ISO 26000: Guidance standard on social responsibility" which gives a boost to ongoing efforts by the UN Global Compact to establish widespread common understanding of corporate responsibility principles. It was the largest and most representative standard development process within ISO. For establishing these standards the working group worked for five years and brought together the concerted efforts of over 450 participating experts and 200 observers from 99 ISO member countries and 42 organizations in liaison.[33] While appreciating establishment of ISO 26000, the Director of Standards for AccountAbility, Kurt Ramin, stated, " The publication and launch of ISO 26000 is a welcome achievement. As a participant in the development of this standard from the very beginning, we are pleased to see ISO 26000 finally come to fruition and believe that its release represents an important step forward in providing organizations of all types with much needed guidance on a very broad range of issues associated with social responsibility."[34] Significantly, all UN Global Compact Principles are included ISO 26000 and both are connected by a fundamental belief that organizations should behave in a socially responsible way.[35] Regarding their connection a document has been published entitled *"An introduction to linkages between UN Global Compact principles and ISO 26000 core subjects."*[36]

Significantly, the corporate responsibility to respect human rights and sustainable development as set out in the Guiding Principles have been incorporated in various international instruments, such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Committee on World Food Security, and the revised Sustainability Framework of the International Finance Corporation.[37]

Other relevant instruments also include the intergovernmental approved OECD Guidelines, 2011 for Multinational Corporations,[38] and the Performance Standards of the World Bank's International Finance Corporation (IFC).[39] In May 2011, IFC (a member of the World Bank Group) updated its Sustainability Framework,

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32 It is an independent, non-governmental membership organization establised in 1946 and the world's largest developer of voluntary International Standards. Presently, it has 165 member countries with a Central Secretariat that is based in Geneva, Switzerland. Available at *http://www.iso.org/iso/home/about.htm*.

33 *http://www.accountability.org/images/content/4/1/419.pdf* (accessed on 18.11.2014).

34 *http://www.accountability.org/images/content/4/1/419.pdf* (accessed on 18.11.2014).

35 UN Global Compact and International Standard ISO 26000 Guidance on Social Responsibility *http://www.etnor.org/doc/Pacto_Mundial_ISO26000.pdf* (accessed on 17.11.2014).

36 Available at *tinyurl.com/UNGCISO26000.*

37 *http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-21_en.pdf* (accessed on 15.04.2014).

38 OECD, 'The OECD Guidelines for Multinational Enterprises' (OECD, 2011) ('OECD Guidelines').

39 IFC, Performance Standards on Social and Environmental Sustainability, adopted by the IFC Board on 21 February 2006 ('2006 IFC Performance Standards'). A revised version was adopted in 2011 and is discussed below: 2012 IFC Performance Standards, available at: *http://www.ifc.org/ifcext/policyreview.nsf/Content/2012-Edition#PerformanceStandards*. See IFC press release, 'IFC updates Environmental and Social Standards, strengthening commitment to sustainability and transparency' 12 May 2011. University of Edinburgh School of Law Research Paper 2012/06 Page 4 of 28.

strengthening its commitment to critical issues such as climate change, business and human rights, supply-chain management, and transparency.[40] As a result, a series of common standards emerged from these initiatives which include the environmental impact self-assessment, i.e., the ongoing assessment of the possible environmental impacts of private companies' activities. Accordingly, private companies are to elaborate environmental management systems (EMS) to assist in controlling direct and indirect impacts on the environment. The private companies are further expected to reasonably take active steps, including the suspension of certain activities, to prevent or minimise an environmental damage, particularly in case of likely transboundary environmental harm or environmental harm with serious human rights consequences.[41]

Despite the efforts at international level, various large companies do not apply these standards resulting into the negative impacts of bad corporate practices on the environment, the economy and society. Considering the role of corporate bodies in sustainable development, and the significant impacts of their activities on the environment and society, the global debate on enacting strict national law by the countries to fix the accountability of the corporations started and hence move from CSR to accountability became very significant.

4. Corporate Social Accountability (CSA)

One of the most significant developments in the field of CSR is the public expectations that the companies should not only make commitments to its stakeholders in its business operations but must also be held liable for not fulfilling those commitments. That means CSR does not involves commitments only but must develop a system to manage all activates of the company and to make it accountable for its action i.e., the corporate social responsibility is substituted by accountability which means a system where a company develops policies, indicators, targets and processes to manage the full range of activities. Accountability in general means ability of an entity to answer an external agency or group and, implies ensuring propriety, legality and safeguarding public interest in satisfaction of the expectations of the external agency or group. Social Accountability suggests accountability to the people; this is a core value in a democratic set-up.[42]

It is important to note that various operations for which a company is expected to be accountable have increased significantly in recent years to include not only company's own performance but also of its stakeholders i.e., the business partners and other actors in the company's value chain. Significantly, the concept of social accountability became more prevalent since the mid-1990s, still there are no standard formats to address the type of information companies choose to report, or how that

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40 *http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+news/news/environmental_social_standards_updates accessed* on 01.02.2014.

41 The OECD Guidelines for Multinational Enterprises (OECD, 2011), chapter VI, para 5; 2006 IFC Performance Standard 3, (cf. 2012 IFC Performance Standard 3); implicitly, Principle 10 of the Global Compact (Guide to the Global Compact at 64 available at *http://www.unglobalcompact.org/Portal/Default.asp.*; Commentary UN Norms, at (e)-(g).

42 *http://www.mainstreamweekly.net/article646.html* (accessed on 03.03.2014).

information is collected, analysed and presented. Today, corporate accountability includes various issues like business ethics, diversity, marketplace behaviour, governance, human rights and labour rights as well as more traditional areas of financial and environmental performance. And an increasing number of companies are reporting publicly on their social, environmental and ethical performance, both as a communication to stakeholders and as a management tool.

It is heartening to mention here that AccountAbility, a leading international organization has played commendable role in this regard which had focused on mainstreaming sustainability into business thinking and practice. Since 1995 it has been helping corporations, non-profits and governments embed ethical, environmental, social, and governance accountability into their organisational DNA. Accordingly it had developed a suite of sustainability standards known as the AA1000 series. These are principle-based standards to assist organizations in becoming more accountable, responsible and sustainable.

After publication of ISO 26000, AccountAbility announced that it would develop a guide outlining the relationship between both initiatives. AccountAbility has emphasized that ISO 26000 will have an important impact because it will create awareness of social responsibility issues among organizations in private, public and non-profit sectors, and also introduce organizations to other relevant tools and standards in this space. In this regard the Director of Standards for AccountAbility, Kurt Ramin opined that" ISO 26000 is very much in line with AccountAbility's family of sustainability standards and we expect that it will further support uptake of the AA1000 standards – especially as organizations seek practical tools to implement aspects of social responsibility".[43]

AccountAbility expects that its userfriendly guide will help organizations better understand the complementary elements and linkages between ISO 26000 and the AA1000 series which include:[44]

i. ISO 26000 highlights many of the same principles evident in the Account-Ability Principles Standard that many organizations are using to stimulate transformational change in areas of social responsibility and sustainability;

ii. ISO 26000 suggests the use of assurance processes to enhance the credibility of the information, which will naturally lead organizations towards the AA1000 Assurance Standard;

iii. ISO 26000 lists stakeholder engagement as a fundamental practice of social responsibility, while the AA1000 Stakeholder Engagement Standard provides an open source framework for organizations to improve the quality of the design, implementation and assessment of their stakeholder engagement practices.

Accordingly, the Accountability Resource Guide, 2011 was released by the accountAbility as tools for redressing human rights and environmental violations by

43 *http://www.accountability.org/images/content/4/1/419.pdf* (accessed on 18.11.2014).
44 *http://www.accountability.org/images/content/4/1/419.pdf* (accessed on 18.11.2014).

international financial institutions, export promotion agencies and private corporate actors.[45] Subsequently, it also released a report in New York, August, 8 2013 on materiality: "Redefining Materiality II: Why It Matters, Who's Involved and What it Means for Corporate Leaders and Boards" examining the growing importance of non-financial factors on corporate performance, disclosure, and valuation. The report describes the landscape of various global materiality initiatives and provides a framework for corporate leaders and boards to enhance the definition and management of non-financial materiality. Ted Grant, Head of Global Research and Development at AccountAbility opined that "The boundaries between corporations, the environment, and society continue to blur," "This blurring has made identifying and focusing on what is truly important to long-term company performance, impact, and sustainability even more critical as a governance and management discipline."[46]

Another organization which deserves special mention here is the Global Reporting Initiative (GRI) which is a multi-stakeholder network-based organization that produces the world's most widely used sustainability reporting framework. GRI's core goals include the mainstreaming of disclosure on environmental, social and governance performance. GRI actively participated in the ISO 26000 development process since its inception. According to GRI, its Sustainability Reporting Guidelines are ideally suited to provide the voluntary framework to enable organizations to report this performance. In order to support users wishing to implement ISO 26000 and the GRI G3 Guidelines, GRI has developed a linkage guidance document highlighting synergies between both initiatives. Organizations wanting to learn more about GRI can consult *The GRI sustainability reporting cycle: A handbook for small and not-so-small organizations* and

Let's Report! Step-by-step guidance to prepare a basic GRI sustainability report.[47] However, in this move from CSR to CSA a moot question is what are main differences between these two concepts?

5. Difference between corporate social responsibility (CSR) and corporate Social accountability (CSA);

Corporate social responsibility (CSR) and corporate social accountability (CSA) are sometimes confused or seen to be synonymous. Technically, these two expressions are different on following account:

i. Corporate social responsibility means responsibilities of corporations beyond generating profit for their shareholders. Such responsibilities include the negative duty to refrain from causing harm to the environment, individuals or communities, and sometimes also positive duties to protect society and the environment, for example protecting human rights of workers and communities affected by business activities. Such responsibilities are generally considered to extend not only to direct social and environmental

45 *http://www.accountabilitycounsel.org/resources/arg/* (accessed on 18.11.2014).
46 *http://www.accountability.org/about-us/news/announcements/redefining-materiality-ii.html*
47 *tinyurl.com/GRIpublications* (accessed on 18.11.2014).

impacts of business activity, but also to more indirect effects resulting from relationships with business partners, such as those involved in global production chains. However, the expression *corporate social accountability* mentions more confrontational or enforceable strategies of influencing corporate behaviour.

ii. Generally, the term corporate social responsibility indicates voluntary approaches, albeit those supported by market based incentives. Whereas, corporate social accountability implies that corporation is influenced by external pressure exerted by social and governmental actors. Such actors can adopt a range of strategies, including legal mechanisms to enforce social standards.[48]

6. Why shift from CSR to CSA which is increasingly relevant today?

A moot question is why in the knowledge society of 21st century shift from CSR to CSA is becoming increasingly relevant for corporations? Environmental organization like *Friends of the Earth,* the UK most influential national environmental campaigning organization, has observed that the corporate sector's responses to campaigns by civil society have failed to address the unprecedented social and environmental challenges faced by humanity in this century. In particular, it fails to challenge the growth of unregulated corporate power. Hence, this organization called for 'corporate accountability' that would legally bind companies to improve their environmental and social standards.[49]

However, some thinkers believe that this shift is increasingly relevant because of following five identifiable trends:[50] Growing Affluence; Ecological Sustainability; Globalisation; The Free Flow of Information; and Brands.

6.1 Growing Affluence

In a poor society, customers cannot afford to enforce strict regulations and penalize corporations for not fulfilling their obligations. However, in rich society, customers afford to choose and to buy the eco friendly products and also expect more from the companies that make those products. They encourage the corporations to produce and manufacture eco friendly cars and other products as they can afford to pay extra to protect the environment. They understand that non eco friendly cars and other products produce more pollutants and hence affect the environment more. Hence, corporations operating in rich societies, face a higher burden to prove that they are socially responsible. Whereas, corporations in the poor society are least concerned with CSR rather these are mainly concerned with their profit element. On the whole, affluence matters and increasing affluence on a global basis will continue to push

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48 *http://corporateaccountabilityresearch.net/files/2011/09/What-is-corporate-accountability.pdf* (accessed on 11.03.2014).

49 *http://www.foe.co.uk/sites/default/files/downloads/corporate_accountability1.pdf* (accessed on 16.02.2014).

50 'Strategic Corporate Social Responsibility' available at *http://www.sagepub.in/upm-data/34698_Chapter1.pdf.*

CSR up the agendas of corporations worldwide and where they fail to fulfill CSR they could be made accounatable.[51]

6.2 Ecological Sustainability

The economic activities of the corporations are constantly depleting the world's resources and causing dramatic changes by mixing harmful gasses in the Earth's atmosphere or by mixing pollutants in the oceans. Significantly, such depletion is increasing day by day and we are making such changes at very high speed. And such changes could be irreversible in the near future. Therefore, where corporations show indifferent behavior to their environmental responsibilities they must be criticized and penalized. In such cases either the court must impose fines as in the case of *Exxon Valdez*,[52] or there should be negative publicity as in case of Monsanto's genetically modified foods demonstration,[53] or there must be confrontations by activist groups like Friends of the Earth International.[54] For imposing penalty, there must be specific law mentioning the responsibility of the corporations toward environment, thus making them accountable in case of violation.

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51 *http://books.google.co.in/books?id=4si6VV5RGNcC&pg=PA94&lpg=PA94&dq=How+Growing+Affluence+affects+CSR&source=bl&ots=z7lOYUYB0y&sig=6BI8VIDFmsm009C-NPw16igU8TM&hl=en&sa=X&ei=ptVIU9W2B8eTrgf1ulGIBw&ved=0CD0Q6AEwAA#v=onepage&q=How%20Growing%20Affluence%20affects%20CSR&f=false* (accessed on 12.04.2014).

52 In *Exxon Valdez* case, an Alaskan jury had initially ruled Exxon should pay $5 billion in punitive damages for oil spilling, but in 2006 the 9th US Circuit Court cut the award of punitive damages in half. In 2008 the Supreme Court cut the amount of punitive damages again and ordered Exxon Mobil to pay just $500 million in punitive damages — one-tenth of the original jury's ruling. On March 24, 1989. En route from Valdez, Alaska, to Los Angeles, California, the tanker *Exxon Valdez* grounded on Bligh Reef in Alaska's Prince William Sound, rupturing its hull and spilling nearly 11 million gallons of crude oil into this remote, scenic and biologically productive body of water. The ship was traveling outside normal shipping lanes in an attempt to avoid an iceberg. The oil eventually affected over 1,100 miles of the Alaska coastline, making it the largest oil spill to occur in U.S. waters to date.The images that Americans saw on television and descriptions they heard on the radio that spring were of heavily oiled shorelines, dead and dying wildlife, and thousands of workers mobilized to clean beaches. These images reflected what many people felt was a severe environmental insult to a relatively pristine, ecologically important area that was home to many species of wildlife endangered elsewhere. In the weeks and months that followed, the oil spread over a wide area in Prince William Sound and beyond, resulting in an unprecedented response and cleanup—in fact, the largest oil spill cleanup ever mobilized. Many local, state, federal, and private agencies and groups took part in the effort. Even today, scientists continue to study the affected shorelines to understand how an ecosystem like Prince William Sound responds to, and recovers from, an incident like the *Exxon Valdez* oil spill.
See "Images From the Exxon Valdez Oil Spill," National Oceanic and Atmospheric Administration, March 7, 2001, *http://response.restoration.noaa.gov/photos/exxon/exxon.html and http://www.democracynow.org/2008/6/26/supreme_court_slashes_exxon_valdez_oil* (accessed on 19.02.2014).

53 Where more than 100 activists demonstrate at Monsanto's headquarters in Creve Coeur. Demonstrators contend that corporations like Monsanto and the American government are indiscriminately promoting genetically modified crops -known as GMOs - on world markets despite consumer concerns. For organic farmer Janet Morse of Putnam, Ill., claiming that genetic engineering of food crops raises more than economic concerns is untested, unproven and it could be unsafe. See "Farmers & Consumers Protest at Monsanto's Headquarters in St. Louis," Organic Consumers Association, August 19, 2000, *http://www.organic consumers.org/corp/monprotest.cfm*

54 The world's largest grassroots environmental network. We campaign on today's most urgent environmental and social issues. Thomas L. Friedman, "The Virtual Mosque," *New York Times,* June 17, 2009, p. A21.

6.3 Globalization

In the era of globalization, corporations are carrying on business in different countries. As a result they are having costumers all over the globe and every corporation must fulfill the demand and expectations of its customers. However, at the same time it must obey the norms and regulation of every country while conducting business there and also should remain active towards the social and cultural norms. Significantly, while globalization has increased the potential for efficiencies gained from production across borders, it has also increased the potential to be exposed to a global audience if a corporation's actions fail to meet the needs and expectations of the local community.[55]

6.4 The Free Flow of Information

As communication has become faster and cheaper therefore, it is quite easy to speak against the corporations not performing their corporate social responsibility. Various gadgets like pocket-size video cameras or pictures taken by mobile phones provide sufficient evidence necessary to make the corporations liable. Moreover, the Internet communication among activist groups helps them to spread their message and to coordinate to take collective action. Apart from this various networking sites like Facebook, Flickr, Twitter also enable them to have the opinions and support of others from all over the globe for any such wrongful action of the corporations. Significantly, Google is one company that is increasingly finding new methods to apply these new communication technologies in different ways such as to get a hotel, find a flight and buy a book. Similarly, Google may have a new site helping in fixing the corporate social responsibility of the corporations. And corporations are beginning to appreciate the ways in which these communication tools affect their operations and reputations consequently; the corporations which are not transparent and accountable to their stakeholders will suffer.

6.5 Brands

In twenty first century brands are very important and every one has gone crazy for them. Today, brand has become a focal point of corporate success and every corporation try to establish its popular brands in consumers' minds which increases the market value of the corporation and ultimately results in higher sales of its product and revenue. Significantly, consumers are always ready to pay a high price for a brand they know and trust. Also *Business Week's* annual brand survey demonstrates, brands are more valuable than ever, and corporations need to take ever greater steps to protect an investment or their reputation that is essential to their continued success.[56] Instead of loosing their reputation such corporations always prefer to fulfill their CSR and to remain accountable for any harm done to the sustainable development.

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55 *http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf* (accessed on 12.04.2014).

56 *http://www.businessweek.com/magazine/toc/06_32/B399606globalbrands.htm* (accessed on 11.04.2014).

7. Corporate Social Accountability: Efforts by various countries

It is important to note that sustainability reporting has become a common practice in a number of countries like the USA, Europe, Japan and Australia but it is still in emerging stage in Asia, Latin America, Africa and Russia.[57] "The Association of Chartered Certified Accountants (ACCA) working with CorporateRegister.com in their report, '*Towards transparency: progress on global sustainability reporting 2004*' estimated that 1,500-2,000 environmental and sustainability reports are published annually, across all industry sectors. North America and Western Europe were the most active reporting regions. In contrast, non-financial reporting of any kind remained practically unknown in the Caribbean and most of Latin America. In Asia Pacific there was a low incidence of corporate reporting outside Australasia and Japan – and across Africa and the Middle East, only South Africa was showing significant reporting activity."[58]

Significantly, the shift from CSR to CSA has urged the international community to stop relying upon voluntary corporate action as a method to corporate social responsibility, and to start regulation through law. Accordingly, sustainability reporting has also become compulsory. Efforts are made by various countries in this regard. Let's briefly analyse these efforts.

7.1 European Union

In 2005, in the European Union, Socialist and Green Members of Parliament (MEPs) have argued against a purely voluntary policy on CSR and urged the European Commission to impose binding rules.[59] Even at the Green Paper stage, the 'large consensus' for voluntary CSR did not include trade unions and civil society organisations who 'emphasised that voluntary initiatives are not sufficient to protect workers' and citizens' rights'.[60] John Ruggie, UN Special Representative for Business and Human Rights, argued 'compliance efforts cannot fully succeed unless we bring governments back into the equation'.[61]

On the whole, the argument is that only law can provide 'systematic impact'.[62] Interestingly, various European government bodies thought of moving towards stronger enforcement mechanisms. The EU, UK, Italy and other European countries are all moving forward to have law so as to fix the corporate social accountability of the companies operating in Europe. Non-government organizations are also concerned to globalize corporate accountability rules through the Organisation for Economic Co-operation Development (OECD).[63]

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57. *http://www.prlog.org/10018774-sustainable-development-corporate-social-responsibility.html* (accessed on 19.02.2014).
58. *http://www.prlog.org/10018774-sustainable-development-corporate-social-responsibility.html* (accessed on 18.02.2014).
59. *www.euractiv.com*, 14 July 2005 (accessed on 11.02.2014).
60. 'Communication from the Commission Concerning CSR', COM (2002) 347, p. 4.
61. Remarks at the forum on CSR, Bamberg, Germany, 14 June 2006.
62. Ruggie, Remarks at CSR forum, Bamberg Germany, 14 June 2006 (see n. 79).
63. *http://www.scu.edu/ethics/publications/submitted/hurst/comparitive_study.pdf* (accessed on 21.02.2014).

It is heartening to note that recently, the European Commission puts forward a new definition of CSR as 'the responsibility of enterprises for their impacts on society'. According to this definition, businesses need to have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations. The aim of that process must be to create shared value for their owners/shareholders and for their other stakeholders and society at large and to identify, guard against and mitigate the possible adverse effects of corporate activities.[64] On the basis of the new definition, the Commission puts forward a number of specific measures intended to enhance the impact of CSR policies still further, by means of action in the following eight areas: enhancing the visibility of CSR and disseminating good practices; improving and tracking levels of trust in business; improving self- and co-regulation processes; enhancing market reward for CSR; improving company disclosure of social and environmental information; further integrating CSR into education, training and research; emphasising the importance of national and sub-national CSR policies; and better aligning European and global approaches to CSR.[65]

The comparison between traditional definition and modern definition of CSR suggested by the Commission shows that earlier integration of social and environmental concerns in their business operations by the companies was on a voluntary basis whereas now such integration has been made compulsory resulting into accountability of the company.

7.2 US

In the US the Corporate Social Responsibility (CSR) team in the Bureau of Economic and Business Affairs leads the Department's engagement with U.S. businesses in the promotion of responsible and ethical business practices. The mission of the CSR office is to: Promote a holistic approach to CSR to complement the EB Bureau's mission of building economic security and fostering sustainable development at home and abroad.; Provide guidance and support for American companies engaging in socially responsible, forward-thinking corporate activities that complement U.S. foreign policy and the principles of the Secretary's Award for Corporate Excellence (ACE) program;[66] and Build on this synergy, working with multinational companies,

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64 *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+V0//EN* (accessed on 21.02.2014).

65 *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+V0//EN* (accessed on 18.02.2014).

66 The Secretary of State's Award for Corporate Excellence (ACE), is established by the State Department in 1999, recognizes the important role U.S. businesses play abroad as good corporate citizens. The Award sends a strong signal of the Department's commitment to further corporate social responsibility, innovation, exemplary practices, and democratic values worldwide. The ACE helps define America as a positive force in the world. It highlights our increasing outreach to the business community, our public-private partnerships, and our public diplomacy efforts. The ACE recognizes the contributions business makes to improving lives at home and abroad.
U.S. companies are nominated by Chiefs of Mission worldwide and the winners are chosen by the Principals' Award Selection Committee. Available at http://www.state.gov/e/eb/ace/ accessed on 12.04.2014.

civil society, labor groups, environmental advocates, and others to encourage the adoption of corporate policies that help companies "do well by doing good."[67]

It is important to note that EB's CSR team coordinates a cross-functional, intra-departmental, and interagency team to provide support and guidance on major areas of responsible corporate conduct, including: Good Corporate Citizenship; Contribution to the Growth and Development of the Local Economy; Innovation; Employment and Industrial Relations; Human Rights; Environmental Protection; Natural Resources Governance, including the Kimberley Process; Transparency; Anti-Corruption; Trade and Supply Chain Management; Intellectual Property and Women's Economic Empowerment.[68]

A study conducted in 2004 had shown that European-based corporations were ahead of their U.S. counterparts in implementing corporate social responsibility (CSR) and sustainability practices. "Fifty percent of the European companies analyzed had CSR embedded in their corporate strategy while only twenty percent of U.S. companies did. In addition, all of the European companies in the sample publish reports on how the company is responding to stakeholders' social and environmental concerns. Only half of the American companies sampled committed resources to publishing a CSR/sustainability report."[69]

7.3. UK

In UK, the UK Corporate Governance Code 2008[70] was not specifically concerned with corporate social responsibility (CSR), still there was some recognition that a company's duties extend beyond its shareholders.[71]However, recent UK Corporate Governance Code, 2012 generally refers to responsibly-grounded business decision-making that considers the broad impact of corporate actions on people, communities and the environment. Certain companies (big) are required to report on corporate responsibility issues in the enhanced *business review* or, for financial years ending on or after 30 September 2013, the strategic report, and many will also report externally on their corporate responsibility to a wider stakeholder group. This requires the big companies to prepare a strategic report in accordance with sections 414A to E of the Companies Act 2006(which is repealed from 1 October 2013).[72]

It is important to note that the most companies feel that complying with CSR guidelines has become a commercial necessity and hence, mention social and environmental issues in their annual reports. At the least, the growing number of

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67 *http://www.state.gov/e/eb/eppd/csr/* accessed on 12.04.2014.

68 *Ibid.*

69 *http://www.scu.edu/ethics/publications/submitted/hurst/comparitive_study.pdf* (accessed on 27.02.2014).

70 Was first issued in 1992. It operates on the principle of 'comply or explain'. It sets out good practice covering issues such as board composition and effectiveness, the role of board committees, risk management, remuneration and relatiohttp available at *http://uk.practicallaw.com/3-502-1005* ns with shareholders.

71 *http://www.frc.org.uk/corporate/ukcgcode.cfm* (accessed on 28.02.2014).

72 *http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx* (accessed on 10.03.2014).

'green' and ethical investment funds needs to find 'green' and ethical businesses to invest in. The charity Business in the Community claims a membership of over 850 of the UK's top companies "committed to improving their positive impact on society". It publishes a Corporate Responsibility Index, which measures the performance of companies in terms of how well they apply CSR values to their business. It is important to note that for bigger companies in particular, CSR is, not optional but is an integral part of good governance.[73]

7.4 India

In India, CSR was traditionally seen as a philanthropic activity. And hardly there was any any document related to this concept. Significantly, under the Company Act 1956, there was no provision relating to CSR hence, sustainability reporting was not mandatory. However, in the beginning of twenty first century, with global influences and with communities becoming more active and demanding in this regard the trend also changed in India and CSR became more strategic in nature and is linked with business than philanthropic. Consequently, subsidiaries of trans-national companies as well as local Indian companies have started reporting the activities they are undertaking in their official websites, annual reports, sustainability reports and even publishing CSR reports. [74]

It is important to note that some Indian companies such as Steel *Authority of* India *Ltd.* (SAIL), *Tata Chem and* Neyveli Lignite Corporation *Ltd.(NLC)* were the winners of the FICCI-SEDF CSR Awards function held on 7 May 2007. Tata Steel had ranked among the top 100 companies in Standard and Poor's 'The Global Reporters 2004 Survey of Corporate Sustainability Reporting'. The prominent CSR reporting standards are Account Ability's AA1000 standard, based on John Elkington's triple bottom line (3BL) reporting; Global Reporting Initiative's (GRI) Sustainability Reporting Guidelines; Social Accountability International's SA8000 standard and The ISO 14000 environmental management standard. In India companies like Tata group, Dr. Reddy's Laboratories, Ford India Limited, Paharpur Business Centre, Jubilant Organosys, ITC, etc are largely using GRI guidelines while reporting.[75]

Subsequently it was realized by the Ministry that While the Government undertakes extensive developmental initiatives through a series of sectoral programmes, the business sector also needs to take the responsibility of exhibiting socially responsible business practices that ensures the distribution of wealth and well-being of the communities inwhich the business operates. Accordingly, Corporate Social Responsibility Voluntary Guidelines 2009 were formulated.

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73 *http://www.out-law.com/page-8221* (accessed on 15.03.2014).

74 *http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf* (accessed on 12.04.2014).

75 *http://www.prlog.org/10018774-sustainable-development-corporate-social-responsibility.html* (accessed on 16.03.2014).

7.5 *Corporate Social Responsibility Voluntary Guidelines 2009*[76]

Each business entity should formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, which should be an integral part of overall business policy and aligned with its business goals. The policy should be framed with the participation of various level executives and should be approved by the Board. The CSR Policy should normally cover following core elements:

(a) *Care for all Stakeholders:* The companies should respect the interests of, and be responsive towards all stakeholders, including shareholders, employees, customers, suppliers, project affected people, society at large etc. and create value for all of them. They should develop mechanism to actively engage with all stakeholders, inform them of inherent risks and mitigate them where they occur.

(b) *Ethical functioning:* Their governance systems should be underpinned by Ethics, Transparency and Accountability. They should not engage in business practices that are abusive, unfair, corrupt or anti-competitive.

(c) *Respect for Workers' Rights and Welfare:* Companies should provide a workplace environment that is safe, hygienic and humane and which upholds the dignity of employees. They should provide all employees with access to training and development of necessary skills for career advancement, the freedom of association and the effective recognition of the right to collective bargaining of labour.

(d) *Respect for Human Rights*: Companies should respect human rights for all and avoid complicity with human rights abuses by them or by third party.

(e) *Respect for Environment:* Companies should take measures to check and prevent pollution; recycle, manage and reduce waste, should manage natural resources in a sustainable manner and ensure optimal use of resources like land and water, should proactively respond to the challenges of climate change by adopting cleaner production methods, promoting efficient use of energy and environment friendly technologies.

(f) *Activities for Social and Inclusive Development:* Depending upon their core competency and business interest, companies should undertake activities for economic and social development of communities and geographical areas, particularly in the vicinity of their operations. These could include: education, skill building for livelihood of people, health, cultural and social welfare etc., particularly targeting at disadvantaged sections of society.

7.6 *Companies Act, 2013*

A significant development in this context that already has taken place in India is a new Act which recently came into force on 30th August 2013, i.e., *Indian Companies Act, 2013*. This Act contain certain provisions relating to CSR.

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[76] *http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf* (accessed on 21.03.2014).

Salient Features of Indian Companies Act, 2013 on CSR:[77]

Section 135 of the Act provides that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year must spend 2 per cent of their average net profit over the previous three years on their Corporate Social Responsibility Policies Activities which are relating to:(*i*) Eradicating extreme hunger and poverty; (*ii*) Promotion of education; (*iii*) Promoting gender equality and empowering women;(*iv*) Reducing child mortality and improving maternal health; (*v*) Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (*vi*) Ensuring environmental sustainability; (*vii*) Employment enhancing vocational skills; (*viii*) Social Business Projects; and (*ix*) Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.[78]

Significantly, these activities cover MDGs and the Act encourages such companies shall constitute a Corporate Social Responsibility Committee consisting of three or more directors, out of which at least one director shall be an independent director. The Committee is responsible for formulating CSR Policy and recommending it to the Board. Significantly, the Committee is also responsible for developing and monitoring the activities and expenditure.[79]

Further, the Companies Board must approve the CRC Policy and oversee its implementation. It must also monitor the two per cent expenditure on eligible activities.[80] It is important to note that that the company must give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities. Moreover, the Board's report[81] shall disclose the composition of the Corporate Social Responsibility Committee and spending 2% on CSR activity. Further, where the company fails to spend such amount, the Board must in its report mention the reasons for not spending the amount.

Significantly, impact measures will incorporate existing tools such as the London Benchmarking Group (LBG) model, Social return on investments (SROI Network), Global impact investing network (GIIN), Accountability's – AA 1000 Standards from the Institute of Social and Ethical Accountability, the ISO 26000 social responsibility standard, as well as public consultation guidelines from the Government of India. Reporting guidelines included in Section 135 include a Securities and Exchange Board of India (SEBI) directive on Environmental and

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77 *http://mca.gov.in/Ministry/pdf/The_Companies_Bill_2012.pdf* (accessed on 13.01.2014). Also see *http://cconpo.icai.org/wp-content/uploads/2012/06/Salient-Features-of-Companies-Bill-2012-on-Corporate-Social-Responsibility.pdf* (accessed on 28.02.2014).

78 Schedule VII annexed to *the Companies Act*, 2013.

79 Section 135 of the *Companies Act*, 2013.

80 As specified in Schedule VII

81 Under section 134(3).

Social Corporate Governance (ESG) disclosure (if applicable), RBI guidelines on CSR, sustainable development and non-financial reporting.[82]

8. Conclusion and Suggestions

From the above discussion it is concluded that the concept of CSR is not new and in late nineteenth century when companies like Cadbury and Johnson & Johnson expanded their businesses, they show their responsibility towards stakeholders, community and environment. At the international level various efforts were made towards CSR and after Second World War, various initiatives were taken by the UN in this regard. For example UDHR, 1948, The Covenants of 1966 and other international instruments directly and indirectly laid emphasis on this concept and ultimately the UN Global Compact Principles were adopted. Subsequently came the concept of Environment impact Assessment (EIA). Significantly UN Global Compact Principles and ISO 26000 played commendable role in this shift from CSR to CSA.

Typically, CSR policies involve a commitment by corporations, usually expressed in their statements of business principles or corporate-specific codes of conduct, to enhanced concern for the environment, human rights, fairness to suppliers and customers, and opposition to bribery and corruption. The range of issues involved is constantly expanding, with matters such as the promotion of 'diversity' in the workforce, ethical policies on the supply chain, responsible marketing, especially with regard to marketing to children, and even demand for a responsible approach in the food business in relation to obesity, recently added to the agenda.[83] Significantly, "Companies have a lot of power in the community and in the national economy. They control a lot of assets, and may have billions in cash at their disposal for socially conscious investments and programs. Some companies may engage in "green washing", or feigning interest in corporate responsibility, but many large corporations are devoting real time and money to environmental sustainability programs, alternative energy/clean tech, and various social welfare initiatives to benefit employees, customers, and the community at large."[84]

Initially, CSR was a voluntary practice on the part of corporations and various corporations all over the globe formulated certain policies and guidelines in this regard. But the overall results were not as per expectations. A critical review of the situation shows that it was realized by the international community that the corporate bodies made big promises but were not quite serious towards their responsibility and without any check resulted into less or no adequate and effective action. Consequently, the concept of social accountability emerged and it was realized by the international community that for sustainable development, there is an urgent need to make private sector ready for social accountability also. Further, AccountAbility's – AA 1000 Standards tried to make this concept of accountability a reality.

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82 *http://www.triplepundit.com/2013/12/indian-government-commits-csr-companies-act/* (accessed on 15.04.2014).

83 *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369305* (accessed on 31.03.2014).

84 *http://www.investopedia.com/terms/c/corp-social-responsibility.asp* (accessed on 31.03.2014).

Consequently, now CSR is no more a voluntary practice but has been subjected to legal pressure and legal enforcement. Many countries have already enacted lawmaking corporations accountable for not fulfilling their CSR. In India too, shift from CSR to CSA is recent i.e., by the Company Act 2013 whereby the big companies are made accountable for not fulfilling their CSR. Significantly, the new guidelines on CSR and sustainable development mentions that "Since corporate social responsibility and sustainability are so closely entwined, it can be said that corporate social responsibility and sustainability is a company's commitment to its stakeholders to conduct business in an economically, socially and environmentally sustainable manner that is transparent and ethical."[85]

Therefore, based upon the study, the following suggestions are made:

1. There is an urgent need to make laws at international and national levels ensuring social accountability too. However, it is heartening to note that India has taken a lead in this matter and it is hoped that other countries would also follow soon.
2. Regulatory bodies must be set up to regulate and promote Corporate Social Accountability.
3. Left to itself the corporate sector my go slow, so strict implementation of the laws should be there, i.e., if the assured standards and policies by the corporate sector were not followed as intended, deterrent action should follow.

Since it is for overall societal benefit, public pressure should also be built for social accountability.

[85] *http://www.indiaenvironmentportal.org.in/files/file/HandbookonCSRinIndia.pdf* (accessed on 15.04.2014).

RIGHT TO PERSONAL AUTONOMY IS A FUNDAMENTAL RIGHT TO LIFE AND PERSONAL LIBERTY: AN ANALYSIS

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An individual's control over his or her personal information and personal decisions helps him to grow physically, psychologically, socially, intellectually, and spiritually. The personal autonomy enables an individual to enjoy his or her freedom of speech and expression, freedom of association, freedom to think, freedom to choose, freedom to remain silent, freedom to remain anonymous, right to family, etc. However, an individual's legitimate expectation to have personal autonomy over his or her body and mind gets hampered whenever it is restricted through unlawful or unreasonable means.

Despite the lawfulness of their personal decisions, individuals face social disapproval whenever they try to execute them. Exploratory personal decisions and lifestyles are being severely punished by certain laws and public opinion. Consequently, the individuals apprehend to take their very personal decisions (having no harmful effect over society) regarding their body, marriage, sexual orientation, religious matters, or any other personal matter. It is not doubtful that an individual's personal autonomous decisions are subject to State's power. But at the same time, the State is prohibited to impose unreasonable restrictions over the individual's personal autonomy. Moreover, the State is under the positive obligation to take requisite initiatives in order to protect the individuals' right to personal autonomy. However, recent incidences of honour killings, hate crimes, etc. have shown that the State has failed in its positive duty. It seems that in our society, the State is not in a strong position to implement civilized legal principles against the evil practices of many social taboos.

In 1965, the United States Supreme Court recognized an individual's personal autonomy in the case of *Griswold* v. *Connecticut*. In this case, the court allowed the use of contraceptives to married persons. Personal autonomy is a part of right to privacy. The constitutional right to privacy was described by Justice William O. Douglas as protecting a zone of privacy covering the social institution of marriage and the sexual relations of married persons. The constitutional right to privacy and personal autonomy have been used not only to guard rights to use and distribute

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contraceptives,[1] but also used as to protect right to abortion,[2] and to defend subsequent decisions concerning funding, father's rights, third party consent for minors, and protection of the fetus.[3] Furthermore, the right to privacy was used for allowing 'possession of obscene matter' in one's home.[4] The right to privacy has also been associated with cases on sterilization laws,[5] interracial marriage,[6] and attendance at public schools.[7]

The United States Supreme Court claimed in *Whalen* v. *Roe*,[8] that there are two different dimensions to privacy i.e. both control over information about oneself and control over one's ability to make certain important types of decisions. The Court define the right to privacy, embracing both an individual interest in avoiding disclosure of personal matters and an interest in independence in making certain kinds of important decisions.[9]

Analyzing United States' Supreme Courts' decisions, Henkin argued that:[10]

> [I]n *Griswold, Baird, Wade* and *Stanley*, the Court was not talking about my freedom from official intrusion into my home, my person, my papers, my telephone; about my right to be free from official surveillance or accosting, from questions by census-takers, officials, or congressional committees; from having to file, with governmental bodies, forms and returns containing information of varying 'privateness'; from being mentioned and publicized, or having data about me collected, by official bodies.

For Henkin, the Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation.[11]

Increasingly, Rubenfeld viewed that:[12]

> The right to privacy discussed here must not be confused with the expectation of privacy secured by the fourth amendment or with the right of privacy protected by tort law. In the latter two contexts, the concept of privacy is employed to govern the conduct of other individuals who intrude in various ways upon one's life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others to gain, disseminate, or use information about oneself. By

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1 *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

2 *Roe* v. *Wade*, 410 U.S. 113 (1973).

3 Judith Wagner DeCew, "The Scope of Privacy in Law and Ethics," Law and Philosophy, Vol. 5, No. 2 (Aug., 1986), 145-173 at 159, available at *http://www.jstor.org/stable/3504687* accessed on August 24, 2011, at 8:48 p.m. IST.

4 *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

5 *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

6 *Loving* v. *Virginia*, 388 U.S. 1 (1967).

7 *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

8 429 U.S. 589, 1977.

9 *Id.*, 598-600.

10 Louis Henkin, "Privacy and Autonomy," *Columbia Law Review*, Vol. 74, No. 8, 1410-1433, at 1424, (Dec., 1974), available at *http://www.jstor.org/stable/1121541* (accessed on August 24, 2011), at 8:48 p.m. IST.

11 *Ibid.*

12 Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review*, Vol. 102, No. 4, 737-807, at 740 (Feb., 1989), available at *http://www.jstor.org/stable/1341305* accessed on August 24, 2011.

> contrast, the right to privacy that concerns us attaches to the rightholder's own actions. It is not informational but substantive, immunizing certain conduct, such as using contraceptives, marrying someone of a different color, or aborting a pregnancy-from state proscription or penalty.

According to Rubenfeld, the right to privacy has everything to do with delineating limits of governmental power. Privacy doctrine always believes judiciary as an appropriate body to determine whether a law transgresses constitutional limits. The judiciary has always gone beyond the literal constitutional text to strike down legislation.[13]

Daniel J. Solove said that the Fourth Amendment of the United States Constitution provides for an architecture of power, a structure of protection that safeguards a range of different social practices of which privacy forms an integral dimension[14]

Again, many authors view that privacy protects not only the individual interests rather it also has social value. As Priscilla Regan wrote:

> I argue that privacy is not only of value to the individual, but also to society in general..... Privacy is a common value in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a public value in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. Privacy is rapidly becoming a collective value in that technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy.[15]

It means that privacy is not mere an individualistic right but also involves the elements which make significant contributions in the welfare of the society. Philosopher John Dewey astutely argued that individual rights need not be justified as the immutable possessions of individuals; instead, they are instrumental in light of the contribution they make to the welfare of the community.[16] Employing a similar insight, several scholars contend that privacy is "constitutive" of society. Constitutive privacy understands privacy harms as extending beyond the "mental pain and distress" caused to particular individuals; privacy harms affect the nature of society and impede individual activities that contribute to the greater social good.[17]

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13 *Id.*, at 737.

14 Daniel J. Solove, "Digital Dossiers and the Dissipation of Fourth Amendment Privacy," Southern California law Review [vol. 75:1083], 1083-1168, at 1122, (2002), available at *http://www-bcf.usc.edu/~usclrev/pdf/075502.pdf* (accessed on August 24, 2011).

15 Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, 213 (1995).

16 John Dewey, Liberalism and Civil Liberties, in 11 Later Works 372, 373 (Jo Ann Boydston ed., S. Ill. Univ. Press 1987) (1936). Cited in Daniel J. Solove, "A Taxonomy of Privacy," University of *Pennsylvania Law Review*, Vol. 154, No. 3 (Jan., 2006), pp. 477-564 at 488. Available at *http://www.jstor.org/stable/40041279* (accessed on August 28, 2012).

17 Daniel J. Solove, "A Taxonomy of Privacy," *University of Pennsylvania Law Review*, Vol. 154, No. 3 (Jan., 2006), pp. 477-564 at 488. Available at *http://www.jstor.org/stable/40041279* accessed on August 28, 2012).

Daniel J Solove explained:

> By understanding privacy as shaped by the norms of society, we can better see why privacy should not be understood solely as an individual right.... Instead, privacy protects the individual because of the benefits it confers on society.[18]

It is believed that privacy helps the citizens in realizing their moral autonomy which is a basic requirement of governance in a democracy. The literature reflects that the privacy not only has intrinsic and extrinsic value to individuals but also fosters individuals' social roles and relationships that contribute to a functioning society. Privacy norms help to regulate social relationships such as intimate relations, family relationships, professional relationships including those between a physician and a patient, a lawyer or accountant and a client, a teacher and a student, and so on. Thus privacy enhances social interaction on a variety of levels. A society without privacy, according to Solove, is a 'suffocating society'.[19]

An individual's rights over his personal autonomy like right to marry, reproductive rights, abortion, procreation through artificial insemination, right to privacy, etc. are basic essentials for achieving the Millennium Development Goals to promote Gender Equality. However, recent instances of Honour Killings questions whether there is any fundamental 'right to marry' in India? Where the State has failed to adopt a reasonable procedure in order to protect consent marriage, it amounts to violation of one's right to life and personal liberty. This inability on the part of the State gives us the message that tribal instincts are much stronger than the individuals' privacy rights. These unjustified and unreasonable notions intrude into one's personal matters. A person is not able to decide his own personal interests together with freedom to marry. The society becomes the sole qualifier and custodian of the marriages. Generally, the individuals accept the social dictas because the society controls their status, dignity, life, family and social relations, etc. In this kind of social totalitarianism, the rights regarding freedom to marry come under question. This scenario questions the basic edifice of marriage from legal as well as sacred perspective. In every sacred text 'marriage' has been considered as the meeting of two souls which conjointly make the path of spiritual journey.

Indeed, the Supreme Court in *Lata Singh* v. *State of Uttar Pradesh*,[20] recognized the right to marry as a fundamental component of right to life under Article 21 of the Indian Constitution. The court said that a major person can marry any person of his own choice in the free and democratic society. The court continued to say that if the parents are against the inter-caste marriage the maximum they can do is that they can cut off social relations with the son or daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste marriage. The court criticized such killings, as these are barbaric and

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18 Daniel J. Solove, *Understanding Privacy*, (2008). Quoted in DeCew, Judith, "Privacy", The Stanford Encyclopedia of Philosophy (Fall 2013 Edition), Edward N. Zalta (ed.), available at *http://plato.stanford.edu/archives/fall2013/entries/privacy/* (accessed on August 24, 2013).

19 *Ibid.*

20 AIR 2006 SC 2522.

shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment.

Furthermore, the Supreme Court of India in the case of *Arumugam Servai* v. *State of Tamil Nadu*,[21] said that the institutions who encourage honour killings or other atrocities on the boys and girls, belong to different castes or religions and wish to get married, are illegal. In order to stamp out such institutions ruthlessly, the Supreme Court directed the administrative and police officials to take effective steps to prevent such barbarous acts. It was further directed by the court that if any such incident happen and the administration showed its apathy, the State should suspend the District Magistrate/ Collector, SSP/SPs of the district and other concerned officials.[22]

Increasingly, in *Bhagwan Dass* v. *State (NCT of Delhi)*,[23] the Supreme Court held that the so called 'Honour Killings' fall within the ambit of 'rarest of rare cases', as these are barbaric and feudal practices. Therefore, the court held that the perpetrators of such killings deserve death punishment.

It is submitted that in the cases, where parents snap social relations with their offspring, who marry against their wishes, the ostracized couple feels sense of insecurity and psychologically harassed. It spreads hate crimes and not the harmony in the society.

Again, in *S. Khusboo* v. *Kanniammal*[24] also, the court recognized the Live-in relationship which is again a right of decisional privacy. The rigid attitude of the courts against the practices of honour-killings is an another step towards the protection of one's right to choose his or life partner.[25]

While people of color and women largely fought their battles for equal rights in the glare of public scrutiny, gay, lesbian, bisexual, and transgendered persons (GLBT) were hidden from public view for most of American history due to severe hostility and recrimination sex inhibited by the majority of Americans. The GLBT community became more visible after World War II, only to be met by purges and firings from government jobs and the military. In1953, President Dwight D. Eisenhower issued an executive order barring gay men and lesbians from holding any federal job.[26]

By 1989, having boldly exercised their freedom of assembly and freedom of association, the GLBT movement was changing minds and expanding equality. The struggle for equal rights for GLBT persons ran into deeply held values over the right of same-sex couples to marry. In 1996, Congress passed the Defense of Marriage Act restricting the federal definition of marriage to heterosexual couples. In 1999, the Vermont Supreme Court declared that the state must grant homosexual couples

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21 2011 STPL(Web) 403 SC 1. Available at *www.stpl-india.in* (accessed on March 12, 2013).

22 *Ibid.*

23 (2011) 6 SCC 396.

24 Decided on 30.04.2008, available at *http://indiankanoon.org/doc/761199/* (accessed on March 12, 2013).

25 See *Bhagwan Dass* v. *State (NCT of Delhi)*, (2011) 6 SCC 396.

26 Stephen F. Rohde, *Freedom of Assembly*, 54 (2005).

the same rights and protections that married heterosexuals enjoyed, and the Vermont Legislature authorized "civil unions" for same-sex couples. In 2003, Massachusetts's highest court ruled that homosexual couples have a constitutional right to marry. In June 2003 in Lawrence v. Texas, the U.S. Supreme Court overturned an antisodomy law and extended the right ofprivacy to consensual adult homosexual and heterosexual acts.[27]

However, in India, the Supreme Court's recent judgment has saddened the souls of lesbians, gays, bisexuals and transgenders. Earlier, the High Court of Delhi in *Naz Foundation* v. *Government of NCT of Delhi*[28] gave broader meaning to one's personal autonomy. This writ petition has been preferred by Naz Foundation, a Non Governmental Organisation (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as 'unnatural offences', to the extent the said provision criminalises consensual sexual acts between adults in private. The challenge is founded on the plea that Section 377 of the Indian Penal Code, 1860 (IPC), on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 & 21 of the Constitution of India. Limiting their plea, the petitioners submit that Section 377 of the Indian Penal Code, 1860 (IPC), should apply only to non-consensual penile non-vaginal sex and penile non- vaginal sex involving minors.[29]

In this case, the petitioner submitted that private, consensual, sexual relations or sexual preferences come within the domain of an individual's personal autonomy, and thus get protected under the fundamental right to life and personal liberty given under Article 21. Although it can be restricted as per according to procedure established by law, Section 377 of the Indian Penal Code 1860 unreasonably restricts an individual's such 'private space of having sexual preferences. Moreover, Section 377 of the Indian Penal Code, 1860 (IPC), curtails an individual's ability to make personal statement about one's sexual preferences, right of association, right to move freely, etc. Therefore, it was prayed that consensual sexual intercourse between two willing adult males (i.e. homosexuals) in privacy should be saved and excepted from the penal provision contained in Section 377 IPC.[30]

After hearing whole submission, the Delhi High Court declared that Section 377 of the Indian Penal Code, 1860 (IPC), insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 of the Indian Penal Code, 1860 (IPC), will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The court said that 'adult' means everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to

27 *Id.*, at 55.
28 2010 Cri.LJ 94 (Del.).
29 *Ibid.*
30 *Id.*, para 10.

amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report. And the court believed that such recommendation will remove a great deal of confusion. Secondly, the court also clarified that this judgment will not result in the re-opening of criminal cases involving Section 377 of the Indian Penal Code, 1860 (IPC), that have already attained finality.[31]

But the Hon'ble Supreme Court of India in the case of *Suresh Kumar Koushal* v. *NAZ Foundation and others*,[32] held that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable. However, the court said that the competent legislature is free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

In addition to the above said issues, woman's right to make reproductive choices is also comes within the ambit of one's personal autonomy. In *Suchita Srivastava and Another* v. *Chandigarh Administration*,[33] the Supreme Court held that a woman's right to make reproductive choices comes within the purview of 'personal liberty' under Article 21 of the Constitution of India. Considering a woman's right to privacy, dignity and bodily integrity, the court said that there should be no restriction on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.[34]

An individual's personal autonomy has also an habitat in Article 19(1)(a) and Article 19(1)(g) of the Indian Constitution i.e. freedom of speech and expression, and freedom of trade, profession, etc. respectively. While allowing dances in Bars, hotels, etc., the Hon'ble Supreme Court in its recent judgment of *State of Maharashtra* v. *Indian Hotel & Restaurants Association*[35] recognized the dancing girls' personal autonomy over their choices and decisions.

In *Aruna Ramchandra Shanbaug* v. *Union of India*,[36] decided on 7 March, 2011, the Supreme Court has legalized passive euthanasia and clarified that it would remain in force until the enactment of a relevant law by Parliament in this regard. Considering some foreign judgments, the Supreme Court held that Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support devices of a patient who is in permanent vegetative state and is incompetent to give any consent. The court also laid down a

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31 *Id.*, para 132.

32 Civil Appeal No.10972 Of 2013, decided on December 11, 2013, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.*

33 AIR 2010 SC 235.

34 *Id.*, at 242.

35 In the Supreme Court of India civil appellate jurisdiction, Civil Appeal No.5504 of 2013, decided on July 16, 2013. Available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=40565* (accessed on July 22, 2013).

36 Writ Petition (Criminal) No. 115 of 2009. Decided on 7 March, 2011, available at *http://indiankanoon.org/doc/235821/* (accessed on July 21, 2012).

proper procedure in this regard. It was mentioned that when such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed.[37] The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.[38] Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject.[39] The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient.[40] The High Court should give its decision assigning specific reasons in accordance with the principle of 'best interest of the patient'. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.[41]

Personal autonomy, therefore, is part of fundamental right to privacy. And it is essential that the State should protect it, otherwise it would lead to cause serious repercussions in the society. Privacy is experienced as 'room to grow in,' as freedom from interference, and as freedom to explore, to pursue experimental projects in science, art, work, play, and living.[42] If exploration and inventiveness in ways to live, play, and interact with others is not permitted or, if permitted, is not conceivable or tolerable to rigidly trained people or is deemed sinful and illegal by the uneducated but trained populace- there is every chance of increasing rates of suicide, alcoholism and drug addiction, and psychological, spiritual, and physical breakdown.[43]

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37 *Id.*, para 138.

38 *Id.*, para 139.

39 *Id.*, para 140.

40 *Id.*, para 141.

41 *Id.*, para 142.

42 Sidney M. Jourard, "Some Psychological Aspects of Privacy," *Law and Contemporary Problems*, Vol. 31, No. 2, Privacy (Spring, 1966), pp. 307-318 at 318. Available at *http://www.jstor.org/stable/1190673* (accessed on July 19, 2011).

43 *Id.*, at 318.

Therefore, it is suggested that schools and universities must aim at educating more people and at modifying general attitudes toward exploring ways to live. If the general population came to believe (through authentic education and social example) that private life is free, that its privacy is to be respected, and that variety, not uniformity, in ways to live is a value, then the expected catastrophes (like suicide, alcoholism, spiritual breakdown, etc.) may be avoided.[44]

It is submitted that the true education should be imparted among people, and should have the aim to inculcate the values of respecting each other's private lives among the members of our society. People's understanding about one's private life needs ethical orientation. Exploring ways of today's lifestyles have to be accepted in our social set up.

It has been argued that those who live exploratory private lives are creating new ways for man to live and be. Therefore, there is an urgent need for changing our present laws and customs so that these explorers-in-private may reveal more publicly the ways in which they have been able to live their lives meaningfully. But without legally guaranteed protection of private life, such experimentation in ways to live and to enrich the experience of leisure life are not likely to be forthcoming.[45]

Following are some suggestions for protecting 'decisional privacy' in our society:

- Education in schools and Universities should inculcate ethical values among people so that general attitude of respecting exploratory ways of one's private lives is made.
- Through education and government initiated social awareness programs, it is to be ensured that an individual could enjoy his or her 'freedom of choice' and other decisional privacy rights meaningfully.
- Since 'right to marry comes' within the purview of one's 'decisional privacy rights', it should be protected by the State. But such right becomes meaningless when an individual's decision to choose the spouse of his or her own choice, is severely criticized and punished by the public opinion. The barbaric practices of 'honour killings' have been interfering with the individuals' private matters of marriage since times immemorial. In order to prevent such incidences, fundamental things are to be done like empowerment of women (physically, socially, psychologically, and financially), stringent domestic violence laws, reformation in administrative and adjudicative processes, collaboration of active police and the government in dealing such offences, impartation of moral and ethical education, making women to realize that they are equal to men, stringent punishments for honour crimes, etc.
- It is the binding duty of the State to make adequate laws for the protection of gays' and lesbians' rights. The Constitution of India recognizes and protects the fundamental rights of gays and lesbians. Therefore, the State cannot

44 *Ibid.*
45 *Ibid.*

impose unreasonable restrictions on their fundamental rights of marrying each other. Antiquated laws like sodomy laws having no significance in the liberal society, have to be shunned out from our legal system.

- Similarly, the State should provide a protective atmosphere for the 'live-in relationship' couples. This new way of one's private life in the modern patterns of society should definitely be protected from every public criticism.
- It is suggested that 'attempt to commit suicide' should be decriminalized because it aggravates the pain of the accused person. At the same time, an informed patient should have right to die with human dignity. In cases where the patient is not under the conscious state of mind and cannot give his or her informed consent, State's direct involvement is required. The role of the NGOs and State is crucial in providing the Hospice and Palliative care to terminally ill patients.

Surrogacy is a right of personal autonomy. The courts have recognised its contractual and constitutional format. But in India, we do not have sufficient rules and regulations to tackle the critical issues like pathetic conditions of the surrogated mothers in the clinics, trafficking of the females for this purpose, rights of the child if he is abandoned, liabilities of parents, etc.

ENVIRONMENT SUSTAINABILITY, CORPORATE SOCIAL RESPONSIBILITY AND ROLE OF JUDICIARY

Dr. Shipra Gupta*

1. Introduction

Development comes through industrialization, which is concomitant with involvement of the corporate sector. This development costs us heavily leading to the degradation of environment. The process of development invariably involves exploitation of natural resources and consequently makes an impact on the ecology and environment. The overall economic growth, particularly through industrial endeavours, irrefutably leads to tapping of the natural wealth. This results in matters concerning environmental security besides economic issues, both at the local as well as at the global level. The ecological imbalance due to intervention with flora and fauna, water resources like lakes, rivers *etc.* and also regions rich in minerals, have all exposed us to the repercussions of the cumulative development activities. This unnatural intervention with nature poses a serious threat in the form of degradation of the local environment with much wider impact at the global level, resulting in depletion of natural resources, acid rain, 'global warming' and 'climate change'. It is a predicament for all the stakeholders like the government, corporate sector, and the general public to keep pace with the development process on the one hand and to work for the environmental sustainability on the other. The development should be such as it can be sustained by ecology. Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering the environment. As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated.[1]

2. International Initiatives towards Sustainable Development

Keeping in view the benefits of such developmental activities in multifarious forms, the development process nonetheless, cannot be stalled. It would rather be regressive for the economy of the country. As workable solutions to this serious problem, the experts worldwide have come up with a doctrine called 'Sustainable Development', *i.e.* there must be balance between development and ecology. The concept of sustainable development has over the years become multi-dimensional and encompasses within itself the concerns of economic growth, social & cultural growth, scientific growth and above all environmental protection. Environment sustainability is the most important of all for the sustenance of the humanity. Environment Sustainability is an integral part of fundamental rights conferred on citizens by the Constitution and cannot be allowed to be circumvented by environmental

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1 *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*, (2011) 7 SCC 338 at 367.

degradation. The impetus for environment sustainability has come from documents such as the Stockholm Declaration of 1972, the World Conservation Strategy, the World Charter for Nature of 1982 and the report of the World Commission on Environment and Development, our Common Future. The document Caring for the Earth is the chief successor to the World Conservation Strategy and defines 'Sustainability' as "a characteristic or state that can be maintained indefinitely" whilst "development" is defined as "increasing the capacity to meet human needs and improve the quality of human life. This seems to mean that "improving the quality of human life while living within the carrying capacity of supporting ecosystems."[2] The United Nations Commission on Environment and Development (World Commission on Economic Development [WCED], 1987) defined the "sustainable development" as follows:

> "Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

The First Principle of the Stockholm Declaration on the Human Environment of 1972, proclaimed a common conviction of States that man bears a "solemn responsibility to protect and improve the environment for present and future generations". The Fifth Principle of the said Declaration contemplated employment of non-renewable resources in such a manner as to guard against the danger of their future exhaustion and ensure that benefits thereof are shared by all mankind. It is inherent in this Principle that all the States are expected to adopt an integrated and coordinated approach to the development planning so as to ensure that development is compatible with the need to protect & improve the environment.[3]

3. Environment Sustainability and the Corporate Social Responsibility: Global Principles and Guidelines[4]

Due to global concern about the role of companies in adversely affecting the environment, comprehensive guidance pertaining to Corporate Social Responsibility (CSR) has been formulated in the form of several globally recognised guidelines, frameworks, principles and tools. Most of these guidelines relate to the larger concept of sustainability or business responsibility, in keeping with the fact that these concepts are closely aligned globally with the notion of CSR.

United Nations Global Compact[5] (UNGC) is world's largest corporate citizenship initiative with the objective to mainstream the adoption of sustainable and socially

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2 Professor Ben Boer, *Environmental Law, Faculty of Law, University of Sydney, New South Wales, Australia, in his article* "Implementing Sustainability" in *Karnataka Industrial Areas* v. *C. Kenchappa*, Appeal (civil) 7405 of 2000 available at *indiankanoon.org/doc/992326/* (accessed on 15 Feb. 15).

3 Hon'ble Mr Justice Y.K. Sabharwal, "Role of Judiciary in Striking the Right Balance: Evolving Paradigms of Jurisprudence", International Conference: Striking the Right Balance, Law and Sustainable Development in India's Energy Economy at 6-7 available at *http://www.supremecourtofindia.nic.in/speeches/speeches_2006/cii.pdf* (accessed on 10 Dec. 2014).

4 See Handbook on Corporate Social Responsibility at 9 & 10 available at *http://www.pwc.in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf* (available at 10 Dec. 2014).

responsible policies by businesses around the world. The UN Global Compact's environment principles are derived from the Rio Declaration on Environment and Development.

The three principles are:

- Business should support a precautionary approach to environmental challenges;
- Undertake initiatives to promote greater environmental responsibility, and;
- Encourage the development and diffusion of environment friendly technologies.[6]

Organisation for Economic Co-operation and Development[7] (OCED) Guidelines for multinational enterprises elaborate on the principles and standards for responsible business conduct for multinational corporations. Besides other areas these principles cover issues relating to the environment. They contain defined standards for socially and environmentally responsible corporate behaviour, and also provide procedures for resolving disputes between corporations and communities or individuals adversely impacted by business activities. The Global Compact Self Assessment Tool[8] is an easy-to-use guide designed for use by companies of all sizes and across sectors committed to upholding the social and environmental standards within their respective operations.

An important initiative in the form of National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business laid down by the Ministry of Corporate Affairs[9] in India, were developed through an extensive consultative process with the objective of providing a distinctive India-centric approach for Indian businesses to understand the nuances of responsible business, applicable to large and small businesses alike. These guidelines consist of nine principles. One of the principles relates to environmental stewardship.

4. Protection of Environment: Constitutional and Legislative Framework

After Stockholm Declaration 1972, India was one of the first countries in the world to enshrine environmental protection as a state goal in its Constitution. The Constitution imposes duty both on the citizens as well as the government to protect the environment by Articles 48A and 51-A (g) of the Constitution. A strong foundation has been laid down pertaining to environment, preservation of forests, wild life, rivers and lakes. Articles 48A reads as under :- "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country." The framers of the Constitution expressed concern and importance of

5 *www.unglobalcompact.org/.*

6 United Nations Global Compact available at *https://www.unglobalcompact.org/Issues/Environment/* (accessed on 14 Feb. 2015).

7 *http://oecdwatch.org/about-oecd/guidelines.*

8 *http://www.globalcompactselfassessment.org/aboutthistool.*

9 *http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf* (accessed on 10 Dec. 2015).

protection and improvement of forests, lakes, rivers and wild life for preserving the environment. According to the spirit of the Constitution, it is the bounden duty of all to protect our natural environment. Reference to Article 51-A (g) is also very important in this regard. We have various laws like the Environment (Protection) Act, 1988, the Water Act, *etc.* The legislature enacted laws like the Air (Prevention and Control of Pollution) Act, 1981, Water (Prevention and Control of Pollution) Act, 1974 and the Wildlife (Protection) Act, 1972, the Forest (Conservation) Act, 1980, the Indian Forest Act, 1927 and the Biological Diversity Act, 2002 and other legislations with the primary object of giving wide dimensions to the laws relating to protection and improvement of environment. Besides these legislative initiatives, Article 21 of the Constitution has been expanded to take within its ambit the right to a clean and decent environment by the Supreme Court of India through its judicial pronouncements.

5. Corporate Social Responsibility and Environment Sustainability

The risk of potential harm to the environment and human health resulting from development should be considered to be somewhat tilting the balance in favour of the environment and in the larger public interest. Right to a clean and decent environment has been held to be a fundamental right, coupled with an obligation on the part of the State and the citizens.

The initial antithetical positioning of the development and environmental protection has been countered by resorting to environment sustainability. In this regard the role of industry, in particular the private sector, has great significance. It has now acquired universal recognition that development and environment protection can be effectively made compatible by following certain sustainable strategies to avoid permanent damage to the environment. Sustainable strategies can be evolved by thoughtful use of natural resources, waste reduction, pollution prevention, integrated environmental systems management, determining environmental limits perception and attitudinal changes at social and cultural levels *etc.* The CSR approach is holistic and integrated with the core business strategy for addressing social and environmental impact of businesses.

The "Business Charter for Sustainable Development" launched in April 1991 by the ICC (International Chamber of Commerce) proclaimed three specific aims *viz.* providing common guidance on environmental management to all types of businesses and enterprises; stimulating companies to commit themselves to continued improvement in their environmental performance; and to demonstrate, amongst others, to Governments, that the business houses take their environmental responsibilities seriously so as to reduce the pressure on the former to over-legislate and to strengthen the voice of the business fraternity in debates on public policy. The Charter dealt with various issues concerning "Sustainable development" including corporate priority for conducting operations in environmentally sound manner; integrated management so as to show concerns about environment in all vocations; continuity of process of improvement by taking into account technical developments so as to apply the environmental criteria with legal regulations as the starting point; to assess environmental impacts in advance of commencement of new projects; to

develop, design & operate faculties and conduct activities taking into consideration the efficient use of energy in materials so as to minimize adverse environmental impact and waste generation; to foster openness to concerns about potential hazards by showing ever-readiness for compliance and audit *etc.*[10]

The CSR mandate incorporated under the Companies Act, 2013 endeavours to extend a helping hand to the government to ensure percolation of benefits of growth and development in an equitable manner by involving and fixing responsibility of the Corporate sector, as being an important stakeholder in the development process. Section 135 of the Companies Act, 2013 requires companies with a minimum net profit of five crore INR, to spend on CSR activities and has thus introduced the idea of CSR to the forefront. The inclusion of the CSR mandate under the Companies Act, 2013 is an attempt to supplement the government efforts of equitably delivering the benefits of growth and to engage the Corporate World with the country's development agenda.[11] The CSR provisions within the Act is applicable to companies with an annual turnover of 1,000 crore INR and more, or a net worth of 500 crore INR and more, or a net profit of five crore INR and more. The new rules, which will be applicable from the fiscal year 2014-15 onwards, also require companies to set-up a CSR committee consisting of their board members, including at least one independent director. The Act encourages companies to spend at least 2% of their average net profit in the previous three years on CSR activities. Schedule VII of the Act lists out a set of activities eligible under CSR which can be undertaken by a company and one of these activities is 'environmental sustainability'.

6. Role of Judiciary and Environment Sustainability

Various initiatives have been taken at the international level sensing the threat to the global environment. This global concern has been succinctly manifested by the judicial attitude in our country and it is due to the pro-active intervention of judiciary through detailed orders or directions and appointing committees to monitor the enforcement thereof that various significant steps have been taken to ensure environment sustainability providing as a reality check to the compliance of the international commitments. Indian Judiciary has taken lead in respect of environment protection issues by going beyond the conventional concept of *locus standi* and has encouraged such issues concerning the community as a whole to be raised for judicial redress through the mechanism of public interest litigation. The Supreme Court has rather galvanised other branches of the State to meet the challenge and has been instrumental in setting up an expert Court to deal with environment issues rendering expert advice on the issues concerning environmental pollution and ecological destruction.

The concept of sustainable development has evolved into a legal term that refers to process, principles & objectives as well as to a large body of International Agreements on Environment Economics and Civil & Political Rights. The Supreme

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[10] *Supra* note 3 at 19-20 available at *http://www.supremecourtofindia.nic.in/speeches/speeches_2006/cii.pdf* (accessed on 10 Dec. 2014).

[11] See Harpal Singh, Mentor and Chairman Emiritus, Fortis Healthcare Limited at *Supra* note 4 at 3.

Court of India in recent years has been adopting a holistic approach towards environmental matters.[12] To address air and water pollution the Supreme Court has stressed on the right to life as the premise.[13] Various directions and orders have been issued from time to time by the Supreme Court for the closure or relocation of industries and also that evacuated land be used for the needs of the community.[14] Through various significant judgements the courts have strictly dealt with unscientific and uncontrolled quarrying and mining,[15] issued orders for the maintenance of ecology around coastal areas,[16] have directed hazardous and heavy industries to be shifted[17] and have contributed positively in restraining tanneries from discharging effluents (Ganga Water Pollution Case).[18]

Following the international legal regime, the Supreme Court in Indian Council for Enviro-Legal Action v. Union of India,[19] applied the 'polluter pays' principle that demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. It was held that:

> ... [O]nce the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.

In *Vellore Citizens' Welfare Forum* v. *Union of India*,[20] the Supreme Court recognised the "Precautionary Principle" and "Polluter Pays Principle" to be "part of the law of the land" and also as the essential features of "Sustainable Development". The Court explained that the concept of "Precautionary Principle" in the context of the municipal law obliged the State to "anticipate, prevent and attack the causes of environmental degradation" and where there are threats of serious and irreversible damage, "lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation". The Court clarified that "onus of

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12 *Supra* note 3 at 2.

13 *V. Mathur* v. *Union of India*, (1996) 1 SCC 119.

14 *M.C. Mehta* v. *Union of India*, (1996) 4 SCC 351.

15 *Rural Litigation and Entitlement Kendra* v. *State of U.P*, AIR 1991 SC 2216.

16 *Indian Council for Enviro-Legal Action* v. *Union of India (Coastal Protection Case)*, (1996) 5 SCC 281.

17 *M.C.Mehta* v. *Union of India*, (1996) 4 SCC 750.

18 *M.C.Mehta* v. *Union of India*, AIR 1988 SC 1037.

19 (1996) 3 SCC 212.

20 (1996) 5 SCC 647. The Court also took note of the Brundtland Report and other international documents in addition to Articles 21, 47, 48-A and 51-A (g) of the Constitution of India besides the legislative mandate "to protect and improve the environment" as found in enactments like the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act) in this regard. See also *M.C. Mehta* v. *Kamal Nath,* (1997) 1 SCC 388; *S. Jagannath* v. *Union of India*, (1997) 2 SCC 87; *M.C. Mehta (Taj Trapezium Matter)* v. *Union of India*, (1997) 2 SCC 353; *M.C. Mehta (Calcutta Tanneries' Matter)* v. *Union of India*, (1997) 2 SCC 411; *M.C. Mehta (Badkhal and Surajkund Lakes Matter)* v. *Union of India* (1997) 3 SCC 715; *Bittu Sehgal* v. *Union of India*, (2001) 9 SCC 181 and *M.C. Mehta* v. *Union of India*, (2002) 4 SCC 356, the above views were reiterated in these cases also.

proof" always lies "on the actor or the developer/industrialist to show that his action is environmentally benign". It has applied the principle of "Polluter Pays" by interpreting it as the absolute liability for harm to environment extending not only to compensate the victims of pollution but also the cost of environmental degradation. Remediation of the damaged environment was held to be part of the process of "Sustainable Development" and as such the polluter was found liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

Recognising the natural resources as the assets of entire nation, the Court in *T.N. Godavarman Thirumulpad* v. *Union of India & Ors.*[21] affirmed that and forests are a vital component to sustain the life support system on the earth. Expressing concern over dwindling forests in India for a number of reasons, one of it being the need to use forest area for development activities including economic development, the Court pointed that in any nation development is also necessary but it has to be consistent with protection of environments and not at the cost of degradation of environments. Any programme, policy or vision for overall development has to evolve a systematic approach so as to balance economic development and environmental protection. Both have to go hand in hand. The Court rightly noted that in ultimate analysis, economic development at the cost of degradation of environments and depletion of forest cover would rather be counter- productive. Thus it calls for taking all precautionary measures when forest lands are sought to be directed for non forest use.

The Court dealt with a very important issue of requiring the user agency before diversion of forest land for non-forest purposes and consequential loss of benefits accruing from the forests, to compensate for the diversion in terms of making payment of Net Present Value (NPV) of such diverted land so as to utilize the amounts so received for getting back in long run the benefits which are lost by such diversion.

Referring to the serious depletion due to relentless pressures arising from ever-increasing demand for fuel wood, fodder and timber; inadequacy of protection measures; diversion of forest lands to non-forest uses without ensuring compensatory afforestation and essential environmental safeguards; and the tendency to look upon forests as revenue earning resource, the Supreme Court in *Lafarge Umiam Mining (P) Ltd.* v. *Union of India*[22] noted that there was a need to review the situation and to evolve, for the future, a strategy of forest conservation including preservation, maintenance, sustainable utilisation, restoration and enhancement of the natural environment. This need enunciated the National Forest Policy, 1988 with the principal aim to ensure environmental stability and maintenance of ecological balance.[23]

Construction of dams and reservoirs, mining and industrial development should be consistent with the need for conservation of trees and forests and the diversion of

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21 Writ Petition (civil) No. 202 of 1995 decided on 26/09/2005 available at *http://supremecourtofindia.nic.in/outtoday/WC2021995.pdf* (accessed on 14 Feb. 2015).

22 (2011) 7 SCC 338.

23 *Id.* at 346.

forest land for non-forest purpose should be subject to most careful examination by experts from the standpoint of social and environmental costs and benefits. Projects which involve such diversion should at least provide in their investment budget, funds for regeneration/compensatory afforestation. Beneficiaries who are allowed mining and quarrying in forest lands and in lands covered by trees should be required to revegetate the area in accordance with forestry practices.[24] As per the guidelines issued by this Court, the Central government was directed to appoint a National Regulator under Section 3 (3) of the Environment (Protection) Act, 1986 for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

This Court in *Narmada Bachao Andolan* v. *Union of India*[25] observed that environment has different facets and care of the environment is an ongoing process. In *Alaknanda Hydropower Co. Ltd.* v. *Anuj Joshi*,[26] the Court observed with utmost concern that safety and security of the people are of paramount importance when a hydroelectric project is being set up and it is vital to have in place all safety standards in which public can have full confidence to safeguard them against risks which they fear and to avoid serious long-term or irreversible environmental consequences.[27]

While taking note of the recent calamities which occurred at Uttarakhand on 16-6-2013 and, thereafter, due to cloudburst, Chorabari Lake burst due to unprecedented rain and consequent flooding of Alaknanda River, *etc.* the Court directed MoEF, the State of Uttarakhand and the Dam Safety Authority, *etc.* to probe their impact on the safety. The Court directed MoEF as well as the State of Uttarakhand not to grant any further environmental clearance or forest clearance for any hydroelectric power project in the state, until further orders. MoEF is directed to constitute an expert body consisting of representatives of the State Government, Wildlife Institute of India, Central Electricity Authority, Central Water Commission and other expert bodies to make detailed study as to whether such projects existing and under construction have contributed to the environmental degradation and also to assess the extent of impact on the recent tragedy of 2013.[28]

The contribution of judiciary for the protection and sustainability of the environment has been commendable. However, it is worth notice that the penalties stipulated by the environmental laws of India, like the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 are extremely negligible for companies, in terms of the strictures imposed. The permits and licenses required under the environmental laws must be compulsorily ensured to avoid any instance of environmental degradation by the activities of these corporations.

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24 *Id.* at 346-47.

25 (2000) 10 SCC 664.

26 (2014) 1 SCC 769 at 804.

27 The Report of the Joint Committee appointed by the Supreme Court noted that the project proponent, i.e. APHCL had deposited Rs. 22.03 crores and 206. 6 lakhs for soil conservation and afforestation programme respectively and had also rehabilitated houses/villagers which was required to be done as per recommendations of Geological Survey of India.

28 *Alaknanda Hydropower Co. Ltd.* v. *Anuj Joshi,* (2014) 1 SCC 769, at 809.

7. Conclusion

We cannot be oblivious of the experience of the recent past that brought to us the realization of the perceptible deadly effects of development on ecosystem, hence such initiatives towards environmental protection/sustainability become all the more significant. The entire world is facing a serious threat of environmental degradation due to indiscriminate development. Industrialization, burning of fossil fuels and massive deforestation are leading to degradation of environment. Today the atmospheric level of carbon dioxide, the principal source of global warming, is 26% higher than pre-industrial concentration. [29]

One of the major contributions of the Supreme Court towards environment sustainability has been its success in the creation of a national expert court to deal with the environment related issues- The National Green Tribunal, that came into existence in 2010 through persistent advocacy for the same in a number of significant judgements.[30] In tune with the international tenor various legislative developments have taken place in the form of plethora of green legislations due to constructive intervention of the Hon'ble Supreme Court. For the past many decades the Apex Court through its bold judgements has been actualising the international commitments by ensuring the implementation of existing laws and innovating newer strategies addressing various aspects of environment sustainability whilst simultaneously fixing accountability of the companies for any adverse impact on the environment with their activities.

According to Indian Institute of Corporate Affairs, a minimum of 6,000 Indian companies will be required to undertake CSR projects in order to comply with the provisions of the Companies Act, 2013[31] with many companies undertaking these initiatives for the first time. This combination of regulatory as well as societal pressure has meant that companies have to pursue their CSR activities more professionally. Corporate social responsibility refers to the role of companies in meeting the agenda of development in tandem with economic progress, social progress and environmental stewardship. It is high time that all stakeholders follow directions and guidelines issued by the judiciary to make this earth worth living by preserving and protecting the environment and also by using the natural resources conscientiously to prevent damage to the environment beyond repair.

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29 *Karnataka Industial Areas* v. *K.Kenchappa*, Supreme Court, Appeal (civil) 7405 of 2000.

30 See *M.C. Mehta* v. *Union of India*, 1986 (2) SCC 176 (at page 202), *Indian Council for Enviro-Legal Action* v. *Union of India*, 1996 (3) SCC 212 & *A.P. Pollution Control Board* v. *M.V. Nayudu*, 1999 (2) SCC 718.

31 *Supra* note 4 at 5.

NEW MEDIA ACTORS AND INTERNATIONAL LAW: A CRITICAL REVIEW

Dinesh Kumar Singh*

1. Introduction

Media appear to be increasingly globalised, as national television, press, etc. are subsumed in gigantic worldwide flows of information and ideas, symbolized by the internet, which offers social and political actors new opportunities for direct communication.[1]

This observation shows the changing nature of media and it has introduced a new approach of negotiating and communicating throughout the world. The Internet is no respecter of national borders; similarly the new media with the help of Internet and World Wide Web have global coverage. The private or non-state actors especially transnational corporations (TNCs) are also constantly attempting to change the nature of media from mass media to corporate media. The information and communication system generally covers: global or international communication; mass media; new social media and media technologies. New information technology such as Internet and the World Wide Web are understood as 'socio-technical' phenomena in the New Media. The term 'socio-technical', as David Bell pointed out, is used to make explicit the complex commingling of society and technology; such that an object like a computer has to be seen as the product of, and occupying space within, particular socio-technical assemblages.[2]

Cyberspace and cyber culture are among the terms used in context with the Internet and the World Wide Web. Considering function of media as information, entertainment and opinion – the new area of research in this discipline is to explore the nature and impact of web-based digital communication on media content and how they function in the world of cyberspace. Some important and relevant question about cyber media is: whether it is independent media that are part of a larger professional media system or corporate media as a subset of marketing and promotion in global capitalist system? Other question is to analysis whether cyber media are genuine agents of social change or as agents of control? Cyberspace is both a vast reservoir of useful information and a babbling brook of streaming consciousness.[3]

The new media provides users an alternative to become either passive or active consumers of information, but the information blitzkrieg might cause many

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1 Wilma De Jong, Martin Shaw, and Neil Stammers, "Introduction," in Wilma De Jong, Martin Shaw, and Neil Stammers (eds.) *Global Activism, Global Media* (London: Pluto press, 2005), pg. 1.

2 David Bell, "On the Net: Navigating the World Wide Web", in Glen Creeber and Royston Martin (eds), "Digital *Culture: Understanding New Media*" (Berkshire: Open University Press), p. 30.

3 Ralph D. Berenger, "Introduction: War in Cyberspace", *Journal of Computer-Mediated Communication*, 12 (2006), pp. 176–188.

casualties as destruction of understanding and cyberspace war. Cyber warfare, cyber conflict, cyber espionage, cyber crime, and cyber terrorism are the negative utilization of the new media or cyberspace. One popular example of negative utilization of cyberspace is, The digitalized cartoons[4]-controversy of Prophet Muhammad were widely distributed by Islamic activists over the internet, thus expending globally the reach of these drawing and eliciting violent protests in places that are densely populated by Muslims around the world. Arab and Muslim hackers mobilized to attack Danish and Dutch websites in 2006 during the prophet cartoon controversy. Another example, the website *http://eljehad.netfirms.com* was established to defend Muslim websites, particularly Palestinian websites against Israeli hackers. The founder and supervisor of the website, in promoting cyber jihad, writes:

> I built this website for my Muslim brothers around the world. It is a gift to everyone willing to devote himself for jihad and E-Jihad. It is a present to every decent Muslim who attention is only to use the internet to raise the religion and to fight the enemies of Allah...this website will guide you to the E-Jihad options.[5]

It can be seen that, for a different purpose and with different intention, a significant number of hackers and individual have committed different cyber offences – including criminal access, cyber terrorism, cyber conflict and cyber war. In this way from website hacking to cyber warfare, any tiny activity can disturb global peace and security. How the international agencies and law enforcing body will analyze and control the cyber crimes and solve the emerging problems in cyberspace. But it is proper time to define the issues related to cyberspace and to set up an international instrument for controlling illegal cyber activities by states and non-state actors.

2. Some Definitions

Cyber space is the domain where new media has developed but it, after land, sea, air and space, is also the fifth domain in which warfare can be conducted. United Nations (UN) defines cyber as "the global system of systems of Internetted computers, communications infrastructures, online conferencing entities, databases and information utilities generally known as the Net. This mostly means the Internet; but the term may also be used to refer to the specific, bounded electronic information environment of a corporation or of a military, government, or other organization.[6] Definition of Cyberspace has been given by different institution. US Department of Defense defines cyberspace as a "global domain within the information environment. It consists of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and

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4 In 2005 Danish political cartoon controversy that was believed to depict the Prophet Muhammad, a cultural taboo.

5 Aladldin Mansour Maghaireh, "Arbic Muslim Hackers: Who are they and what is their relationship with Islamic Jihadists and Terrorists", in K. Jaishankar and Natti Ronel (edi.) *Global Criminology: Crime and Victimization in a Globalized Era* (New York: Taylor and Francis Group, 2013), pg. 143.

6 *http://unterm.un.org/dgaacs/unterm.nsf/WebView/99B98BDBCBAB096185256E620052EFD3?OpenDocument*; 2014 (accessed 26/08/2014).

embedded processors and controllers."[7] The National Military Strategy for Cyberspace Operations defines 'cyberspace' as the "domain characterized by the use of electronics and the electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructures."[8]

The definition of Cyber Warfare is not easy task. Before going to cyber warfare it is reasonable to understand what war is. The definition of war can be traced from historical standards for military doctrine. The exhaustive work on war was documenting tactics during the Napoleonic War.[9] The document defined war as:

> War is nothing but a duel on an extensive scale. If we would conceive as a unit the countless number of duels which make up a war, we shall do so best by supposing to ourselves two wrestlers. Each strives by physical force to compel the other to submit to his will: his first object is to throw his adversary, and thus to render him incapable of further resistance. War therefore is an act of violence to compel our opponent to fulfil our will.

The question is: whether this definition is applicable on cyber war and what is happening on the Internet today? Can these historical concepts be applied to the virtual world? Cyber warfare refers to military activity that primarily makes use of computer systems and networks in order to attack those of the adversary.[10] Often cyber warfare is equated with computer network attacks (CNA).[11] The United Nation Security Council Resolution 1113 has defined cyber warfare as:

> Cyber warfare is the use of computers or digital means by a government or with explicit knowledge of or approval of that government against another state, or private property within another state including: (a) Intentional access, interception of data or damage to digital and digitally controlled infrastructure. (b) Production and distribution of devices which can be used to subvert domestic activity.[12]

In other words cyber warfare includes a wide range of activities that use information systems as weapons against an opposing force. Cyber warfare is therefore composed of activities with the purpose to disavow, damage or destroy the opponent's sources of information, and it includes both attack and defense activities. In cyber warfare, neither attackers nor defenders are physically present at the attacks, '... except in the

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7 US Department of Defense: Dictionary of Military and Associated Term (Joint Publication 1-02: 8 November 2010, as amended on 15 June 2014) pg. 64, *http://fas.org/irp/doddir/dod/jp1_02.pdf*, 2014 (accessed 26/08/2014).

8 Secretary of Defense, Department of Defence Publications: National Military Strategy for Cyberspace Operation (NMSCo 2006), *http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB424/docs/Cyber-023.pdf* pg. 3, (accessed 26/08/2014).

9 Steve Winterfeld and Jason Andress, "The Basics of Cyber Warfare: Understanding the Fundamentals of Cyber Warfare in Theory and Practice", (Waltham: Syngress, 2012), p. 17.

10 J Woltag, "Cyber Warfare" *Max Plank Encyclopaedia of Public International Law, 2011, www.mpepil.com* (accessed 6 September 2014.)

11 Computer Network Attacks (CNA) are defined as '... action taken through the use of computer networks to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or computers and computer networks themselves'. United States Department of Defence, 'Joint Publication 3-13: Information Operation' (13 February), p. 34.

12 UNSC Resolution on the definition of cyber warfare, S/RES/1113 (2011), *http://www.upeace.org/upmunc/2011/pdf/SC%20Cyberwarfare.pdf.*

form of anonymous invisible radio waves of electrons'.[13] Along with cyber war, cyber security can be challenged by three other major threats: espionage, crime, and cyber terrorism. With regard to global cyber security concern two crucial issues are necessary to emphasize: a politico-military stream focusing on cyber-warfare and an economic stream focusing on cyber-crime.

3. The Characteristics of New Media

The new media usually defined as anything digital that communicates to known and unknown audience in actual (synchronic) or delayed (asynchronic) time. Nearly all new media used or have the capabilities of using a variety of different media that produce or synthesize into a new type of communication media. Some argued that there is no such thing as new media. When telegraph messages sped the process of communicating from far-away places in the 19th century, it could have been regarded as a new media. The same could be said of commercial radio when it emerged early in the 20th century, and television as it became the dominant medium in the last half of that century. Ralph D. Berenger pointed out, "The adaptation of the internet for information, combining words, pictures sound and video is only the latest to fall under the rubric of a new media, while predecessors join the category of traditional or legacy media."[14]

What then is new about New Media? In the era of information and technology, the new media is a new ways of communication between people, between cultures and races, between human and machines, and between machines and machines. Terry Flew described some of the key qualities at the macro-scale of their articulation with major social changes: digitization and convergence; interactivity and networks; virtuality and globalization.[15] Lev Manovich identifies five characteristics: numerical representation; modularity (the principle of assembling larger units from smaller ones); automation; variability; transcoding (the relationship between computing and everyday cultures).[16] Ralph D. Berenger has also characterized the new media as: ''the characteristics of new media fall into several broad categories i.e. convergent, Ubiquitous (omnipresent), agenda-setting, credibility, interactivity and transferability.[17] Using Marshall McLuhan's definition of media as an "extension of man", new media includes all the various forms in which a human being can expand his senses and brains into the world. It extensively covers websites, audio and video content streaming on the internet and mobile devices, audio and video content on demand (VoD), chat rooms, blogs, email, social media such as facebook, MySpace, and Twitter; digital marketing by e-mail and text messages; virtual reality environments, video games; internet telephony, digital cameras; and mobile technologies such as smartphones using 3G and 4G technologies to access the internet. In nutshell new media is the convergence of telecommunications, computing

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13 United States Department of Defence, 'Joint Publication 3-13: Information Operation' (13 February), p. 34.

14 Ralph D. Berenger, "*Cyber Media go to War*", Milwaukee: Marquette Books, 2006, p. 26.

15 Terry Flew, "*New Media: An Introduction*", Oxford: Oxford University Press (2002), p. 28.

16 Lev Manovich "*The Language of New Media*", London: The MIT Press (2002), p. 49.

17 Ralph D. Berenger, "*Cyber media go to war*", Milwaukee: Marquette Books (2006), p. 26.

and traditional media and it includes any media production that is digitally distributed and interactive.

4. New Media in Cyber Regime

Generally the internet and new media are associated with positive development, as they represent technological progress. Technological progress indicates improvements of almost all aspects of life with the help of technology and reconstruct just and equitable distribution of wealth and power. The new media requires important political promises for democracy and promote human development across the world. But it does not mean new media will cure all social or political evils and it has no shortcomings. Hacking is the crucial problem before new media especially digital or internet media. Hacking, also referred as information warfare, uses information technology tools to attack enemy websites.[18] They use different techniques for different ends. These include Distributed Denial of Service (DDoS) attacks, and Domain Name Service (DNS) attacks. In the case of DDoS, websites are prevented from working because they are flooded by a very high number of page requests, usually by 'zombie' machines. In DNS attacks the domain name is severed from its numerical address, preventing users from accessing the site.

Two other profoundly problematic techno-political phenomena are encountered in online and other new media environments.[19] These include cyber-conflict and cyber-terrorism. In both cases two more malicious methods are used: the spread of worms and unauthorized intrusions. Worms may enable hackers to gain control of computer accounts, turning them into 'zombies' which operate without the owner's knowledge and approval. Unauthorized intrusions into computer system is the perhaps the most widespread form of hacking. Through their illicit action hackers can get access to top secret information or otherwise sabotage the system. These methods can work together as well as separately, and are quite effective weapons in cyber-war. The cyber conflicts may be defined as 'real-world conflicts that spill over to cyberspace', while cyber-terrorism is understood as 'politically motivated attacks against information systems that result in violence against non-combatant targets, and which are undertaken by sub-national groups or clandestine agent'. Both cyber-conflict and cyber terrorism may be considered problematic, because they involve violence and coercion on others.

With armed war, a hacking and cyber war is continuously going on between Israelis and Palestinians since long time. According to Gary Bunt (2003), one of the most well-known hacking incidents was related to Ariel Sharon, one of the Israel's most senior political leaders.[20] Sharon's election campaign website was hacked by the World's Fantabulous Defacers (WFD), who kept the original format of the site but changed the image and text. Sharon was described as a 'war criminal'; the photos are extremely graphic, including posting horrific photos of an injured Palestinian child,

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18 Eugenia Siapera, "*Understanding New Media*", London: SAGE Publishing (2012), p. 112.

19 *Ibid.* p. 111.

20 Gary R. Bunt, "Islam in the Digital Age: E-Jihad, Online Fatwas and Cyber Islamic Environments", London: Pluto Press (2003), p. 43.

and the statement 'Long Live Hizballah! Long Live Palestine! Long live Chechnya, Kashmir, Kosovo and Bosnia. In the ensuring cyber-war, visitors to the Hamas website were diverted to porn sites, alleged by Israeli hackers. Unity, a website which forms part of the British registered ummah.net domain sought to attack Israeli ISPs as part of a strategy which would disable Israeli government sites first, followed by financial sites, at the same time crippling Israeli ISP servers and disrupting e-commerce sites.

The use of new media in propaganda or rumors has sometimes more dangerous and disturbing consequences. In 2007 a video relating to death of a girl by stoned was circulated on the internet.[21] The girl, named 'Du'a Khalid Aswad' of Kurdish ethnic origin and Yazidi religion, was stoned because she had eloped with a Kurdish Muslim boy. This video was replaced in various Islamic and jihadist fora, which reframed it as a crime against Islam and because she had converted to Islam, she was killed. Subsequently calling for some sort of retaliation and revenge, several people with gun stopped a bus with factory workers returning to Bashika, abducting all men of Yazidi faith, and then executing them. The internet, in war or conflict situation, can be used in very effective way. It can be used to initiate events and control their outcome, as in the case of DDoS and DNS attacks; it can be used to regulate the flow of information. It can also be used to mobilize support, both in the form of new recruits as well as in the form of donation. From this point of view, the internet is indispensable in modern cyber-conflict. The use of the internet in cyber-conflict and cyber-terrorism provides a good example of the mutual shaping of technology and world politics. New technologies must therefore be seen as part and parcel of the current world order.

The aim of Hacking, cyber conflict or cyber terrorism is not only political but it also involves economic and cultural dimension. This shows its vulnerability to attacks motivated by financial gains. It is ranging from email scam to Trojans and other high-tech tools to defraud. When Google decided to enter China in 2006, it faces Chinese censorship of certain politically sensitive keywords and sites – at the same time Google local search engine in china was discontinuation due to cyber attacks that supposedly originated from within china.[22] The announcement led to heated debates about the divergent values and ethics of Chinese and American politics. From this point of view, political cyber-conflict and economic cyber-fraud provide for directly surveillance and control over cyberspace.

5. Legal Instruments for Cyber Warfare

The legal aspects of cyber warfare must be analyzed how the current laws, the foundation of which is the Law of Armed Conflict (LOAC), impact cyber warfare.

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21 Alexander Manu, "Disruptive Business: Desire Innovation and Re-design of Business" Burning: Gower Publishing Company, (2010), p.113.

22 Silvia Lindtner and Marcella Szablewicz, "China's many Internet: Participation and Digital Game play across a Changing Techonology Landscape", in David Kurt Herold, Peter Marolt (edt.), "*Online Society in China: Creating, Celebrating, and Instrumentalising the online carnival* New York: Routledge Publication (2011), p. 89.

The LOAC arises to prevent unnecessary destruction and suffering of human being. A part of public international law, LOAC regulates the conduct of armed hostilities. It also aims to protect civilians, prisoners of war, the wounded, sick, and shipwrecked. LOAC applies to international armed conflicts and in the conduct of military operations and related activities in armed conflict. How LOAC will apply to this new war fighting domain is a key question. The definition of 'attacks' in armed conflicts under Additional Protocol I is that they consist of 'acts of violence' and this can safely be assumed to be widely accepted as a norm of customary international law. How is the phrase 'act of violence' or 'use of force' to be interpreted in the context of hostilities carried on in the cyber domain.

There are the four conditions which need to taking into consideration: the *intention* behind the act, the intrinsic *nature* of the act itself, the *context* within which the act occurs and the *consequences* that flow from the act. With regard to Cyber War and the LOAC or international humanitarian law (IHL), International Committee of Red Cross (ICRC) has made some comment on the emergence of the cyber domain in warfare. The most important statement has been expressed in the following terms:

> In the ICRC's view, means and methods of warfare which resort to cyber technology are subject of IHL, just as any new weapon or delivery system has been so far when used in an armed conflict by or on behalf of a party to such conflict ... In sum, despite the newness of the technology, legal constrains apply to means and methods of warfare which resort to cyber technology.

In the UN General Assembly, ICRC clearly highlighted the importance of cyber warfare in international armed conflict:

> ...the ICRC draws the attention of States to the potential humanitarian consequence of cyber warfare, that is, the resort to computer network attacks during armed conflict situations. Such consequences may include disastrous scenarios such as air traffic control system being interfered with the causing airplanes to collide or crash, disruption of electricity or water supplies for civilian populations, or damage to chemical or nuclear facilities. The ICRC therefore recalls the obligation of all parties to conflicts to respect the rules of international humanitarian law if they resort to means and methods of cyber warfare, including the principles of distinction, proportionality and precaution [in attack].

In the ICRC Commentary cyber operation is primarily concerned to avoid the non-application of the protocol's rules regarding the protection of the civilian population from attacks in case of belligerent occupation of, or de facto control by an adverse party. A general obligation of 'constant care... to spare the civilian population, civilians and civilian objects' applies to all military operations. Such general obligation applies, in particular, to cyber attacks that merely delete, corrupt, or alter data without consequences in the analogue world.

The document directly related with cyber warfare is from the NATO Cooperative Cyber Defence Centre of Excellence known as '*The Tallinn Manual on the*

International Law Applicable to Cyber Warfare.[23]" It is the result of a 3-year effort to examine how extant international law norms apply to this "new" form of warfare. The Tallinn Manual consists of "rules" adopted unanimously by the International Group of Experts that are meant to reflect customary international law and highlights any differences of opinion among the Experts as to their interpretation in the cyber context.

6. Tallinn Manual on the International Law Applicable to Cyber Warfare

Following are the key conclusions from the manual which are necessary to analysis in context of new media.

Rule 5: ***States may not knowingly allow cyber infrastructure located in their territory to be used for acts that adversely affect other States.***[24]

This rule establishes a standard of behavior for State in relation to two categories of infrastructure. (i) Any cyber infrastructure (government or not in nature) located on their territories; and (ii) cyber infrastructure located elsewhere but over which the State in question has either *de jure* or *de facto* exclusive control. The principle of sovereign equality entails an obligation of all States to respect the territorial sovereignty of other States. In the *Nicaragua*[25] case, International Court of Justice (ICJ) held, 'between independent states, respect for territorial sovereignty is an essential foundation of international relations. In *Corfu Channel*[26] case the ICJ observed that a state may not 'allow knowingly its territory to be used for acts contrary to the rights of other states.' So a cyber operation, which comes under the category of use of force or armed attacks, cannot allow operating from the territory by a sovereign State.

Rule 6: ***A State bears international legal responsibility for a cyber operation attributable to it and which constitutes a breach of an international obligation.***[27]

States may be responsible for cyber operations directed against other States, even though those operations were not conducted by the security agencies. In particular, the State itself will be responsible under international law for any actions of individuals or groups who act under its direction. Draft Articles on Responsibility of States for Internationally Wrongful Acts[28] also indicated that State agency must be held responsible for the act of individual or non-state actors. This body of law has

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23 Prepared by the international group of experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Michael N. Schmitt (ed.), Cambridge University Press (2013).

24 *Ibid.* at Rule 5.

25 'Case Concerning Military and Paramilitary Activities in and Against Nicaragua' (Nicaragua *V.* United States of America), *ICJ Reports*, 1986, pp. 14, p. 128.

26 Corfu Channel '*United Kingdom of Great Britain and Northern Ireland* v. *Albania*' *ICJ Reports*, 1949, pp. 4, 35.

27 *Supra* note at 24, Rule 6.

28 The Draft was adopted by the commission at fifty-third session, in 2001 and submitted to the General Assembly. The text reproduced as it appears in the annex to General Assembly Resolution 56/83 of December (2001).

most recently and most comprehensively document on the international law of state responsibility. The use of force (including through cyber operations) by individual hackers and other non-state actors may be relevant under international humanitarian law and, in some cases, international criminal law, but is not prohibited by article 2(4) of the UN Charter.

Rule 10: ***A cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any State, or that is any other manner inconsistent with the purposes of the United Nations, is unlawful.***[29]

The prohibition on the use of force in international law applies fully to cyber operations. Though international law has no well-defined threshold for determining when a cyber operation is a use of force, the International Group of Experts agreed that any cyber operation that caused harm to individuals or damage to objects qualified as a use of force. The International Group of Experts also agreed that cyber operations that merely cause inconvenience or irritation do not qualify as uses of force.[30] It taking control of its national cyber systems or causing severe disruption to economy includes, transportation system or other critical infrastructure. International law does not prohibit propaganda, psychological operations, espionage, or mere economic pressure per se. Obviously, not every cyber operation by one State against another should amount to an armed conflict. But where should the line be drawn?

Rule 9: ***A State injured by an internationally wrongly act may resort to proportionate countermeasures, including cyber countermeasures against the responsible State***[31]

States may respond to unlawful cyber operations, if do not rise to the level of a use of force, with countermeasures. Where a computer network attack not amount to an armed attack (or a use of force) any countermeasures can be taken by the victim state. In the *Case Concerning the Gabcikovo- Nagymaros Project*,[32] ICJ set out a three-part test justifying proportionate countermeasures. First, the action must be taken in response to an internationally wrongful act of another state and be directed against that state. Second, the victim state must have called upon the offending state to discontinue its wrongful conduct or to make reparation for it. And finally, the effects of the countermeasure must be commensurate with the injury suffered, taking account of the right in question. The court also stated that the purpose of countermeasures must be to induce the wrongdoing state to comply with its obligations under international law, and that measures must therefore be reversible.

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29 *Supra* note at 24, Rule 10.

30 Kenneth Watkin, Andrew J. Norris, "*Non-international Armed Conflict in the Twenty-first Century*", Maryland: Military Bookshop (2012), pg. 132.

31 *Supra* note at 24, Rule 9.

32 'Case Concerning the Gabcikovo-Nagymaros Project' (Hungary/Slovakia), (1997) *ICJ Report* 7.

Rule 13: ***A state that is the target of a cyber operation that rises to the level of an armed attack may exercise its inherent right of self-defense. Whether a cyber operation constitutes an attack dependent on its scale and effects.***[33]

A State that is the victim of a cyber armed attack may respond by using force. In international law, an "armed attack" is a "grave" use of force. Any cyber operation that results in death or significant damage to property qualifies as an armed attack. The 'use of force' standard is employed to determine whether a state has violated Article 2(4) of the United Nation Charter and the related customary international law prohibition.

7. Criminal Responsibility of Commanders and Superior

Rule 24: ***(a) Commanders and other superiors are criminally responsible for ordering cyber operations that constitute war crimes. (b) Commanders are also criminally responsible if they known or, owing to the circumstances at the time, should have known their subordinates were committing, were about to commit, or had committed war crimes and falled to take all reasonable and available measures to prevent their commission or to punish those responsible.***[34]

During an armed conflict, commanders and other superiors may be criminally responsible for ordering cyber operations that constitute war crimes. Article I to IV of Geneva Convention mention that Party to the instrument must enact domestic legislation that provides 'effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' of the Convention.[35] In the context of cyber warfare, the Rule imposes criminal responsibility on any military commander or other superior (including civilians) who orders cyber operations amounting to a war crime.

Rule 29: ***Civilians are not prohibited from directly participating in cyber operations amounting to hostilities during an armed conflict, if they do so, they forfeit their protection from attacks and sometimes become legitimate targets.***[36]

Similar to customary international law, article 50 (1) of Additional Protocol I (1977) define civilians in negative terms as being all person who are neither members of the armed forces nor of a *levee en masse*. This approach is implicit in Geneva Conventions III and IV. Article 51 (1) also sets forth the general principle that the 'civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.' Cyber operation may be an integral part of a wider operation that constitutes an attack. International humanitarian law primarily addresses operations that qualify as an "attack. The majority agreed that whenever an attack on data results in the injury or death of individuals or damage or destruction of physical objects, those individuals or objects constitute the 'object of attack' and the

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33 *Supra* note at 24, Rule 13.

34 *Supra* note at 24, Rule 24.

35 The Geneva Convention (on Law of War), 1949, *http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf*, (accessed on 24/08/2014).

36 *Supra* note at 24, Rule 29.

operation therefore qualified as an attack. These experts also concluded that cyber operations directed against the civilian population or civilian objects are not prohibited by international humanitarian law when they merely cause disruption, irritation, and inconvenience. The law of armed conflict on attacks applies fully to such cyber operations.

Rule 29: ***The civilian population as such, as well as individual civilians, shall not be the object of cyber attack.***[37]

In the context of cyber warfare, the Rule imposes criminal responsibility on any military commander or other superior (including civilians) who orders cyber operations against a civilian amounting to a war crime if it injures the civilian or was likely to do so. A clear example is ordering cyber attacks to be conducted against civilians who are not directly participating in hostilities. It is unlawful to use cyber attacks to spread terror among the civilian population.[38]

Rule 70: ***Medical and Religious personnel, medical units, and medical transports must be respected and protected and in particular, may not be made the object of attack.***[39]

The special protections that medical and religious personnel, medical units, and medical transports have under international humanitarian law apply fully with respect to cyber operations directed against them. This rule is also applied to "objects indispensable to the survival of the civilian population" like medical supplies, food stores, and water treatment facilities. Rule 71 of this manual also contains a specific obligation to respect and protect computers, computer networks, and data 'that form an integral part of the operation or administration of medical units and transports. The protection ceases only when the computers, computer networks, and data are 'used to commit, outside their humanitarian function, act harmful to the enemy', but only after a warning has been given.

The rule applies in both international and non-international armed conflict as customary international law. (Similar rule are set forth in Article 19, 24, 25, 35 and 36 of Geneva Convention I, Article 22, 24, 25, 36 to 39 of Geneva Convention II, Article 18 to 22 of Geneva Convention IV).[40] Article 54(2) of Additional Protocol I expressly protects objects indispensible to the survival of the civilian population not only from attacks, destruction or removal, but also from being 'rendered useless.'[41]

There is currently no international consensus regarding the definition of a "cyber weapon." The interconnected nature of cyberspace poses significant challenges for applying some of the legal frameworks developed for specific physical domains. The Law of armed conflict and customary international law, however, provide a strong

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37 *Ibid.* Rule 29.

38 ICRC Additional Protocols Commentary (1977) noted that article 51 (2) is intended to prohibit acts of violence which spread terror among the civilian population. Such an operation would also constitute an unlawful attack against civilians and civilian objects.

39 *Supra* note at 24, Rule 70.

40 *Supra* note at 38, (Geneva Convention, 1949).

41 *Supra* note at 38, (Protocol I, Additional to Geneva Convention, 1949).

basis to apply such norms to cyberspace governing responsible state behavior. What would constitute an act of war in cyberspace and how the laws of war should be applied to military operations in cyberspace are critical issues. The phrase "act of war" is frequently used as shorthand to refer to an act that may permit a state to use force in self-defense, but more appropriately, it refers to an act that may lead to a state of ongoing hostilities or armed conflict. Contemporary international law addresses the concept of "act of war" in terms of a "threat or use of force," as that phrase is used in the United Nations (UN) Charter. Article 2(4) of the UN Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." International legal norms, such as those found in the UN Charter and the law of armed conflict, which apply to the physical domains (i.e., sea, air, land, and space), also apply to the cyberspace domain.

The United Nations (UN) has been also involved in the development of cyber security policy at the international level. In eighth *UN Congress on the Prevention of Crime and the Treatment of Offenders*[42] issued a series of recommendations concerning the adoption of investigative procedures, evidentiary rules, forfeiture, and international cooperation in cybercrime investigations. In 1995, the UN published its Manual on the Prevention and Control of Computer Related Crime. This document examines a wide range of issues related to crime and technology, including procedural law, substantive criminal law, data protection, security, privacy and international cooperation. In December 2000 and January 2002, the UNGA adopted Resolutions 55/63[43] and 56/121[44] on Combating the Criminal Misuse of Information Technologies. Resolution 55/63 recommends various measures addressed in comparable international anti-cybercrime initiatives, such as criminalization of illicit online activities, international cooperation in investigation and enforcement efforts, preservation and timely sharing of electronic data and evidence and confidentiality and integrity. It also provides that states should ensure that both law and practice serve to eliminate the protection for those who carry out cybercrime. Resolution 56/121 encourages the development of a global legal framework by noting the work of international and regional organizations in combating cybercrime. In 2004 a resolution was adopted by the UN General Assembly regarding the 'creation of a global culture of cyber security and the protection of critical informational infrastructures.'[45] Only a few states responded concerning these issues. Another most important step was a 2010 UN General Assembly resolution regarding the 'creation

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42 Eighth *UN Congress on the Prevention of Crime and the Treatment of Offenders* (1990), A/RES/45/121.

43 UNGA Resolution on Combating the Criminal Misuse of Information Technologies, A/RES/55/63 (2000), *https://www.itu.int/ITU-D/cyb/cybersecurity/docs/UN_resolution_55_63.pdf*, (accessed on 24/08/2014).

44 UNGA Resolution on Combating the Criminal Misuse of Information Technologies, A/RES/56/121 (2002), *https://www.itu.int/ITU-D/cyb/cybersecurity/docs/UN_resolution_56_121.pdf*, (accessed on 24/08/2014).

45 UNGA Resolution on Creation of a global culture of cyber security and the protection of critical information infrastructures, A/RES/58/199 (2004), *http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/199&Lang=E.*

of a global culture of cyber-security and taking stock of national efforts to protect critical information infrastructures'.[46]

8. Cyber Attack by Non State Actor

Non-state actors, logically, are those that take actions of a cyber nature, but are not directly part of a nation state. Non-state actors may include script kiddies, scammers, malware authors, hacktivists, blackhat hackers, patriotic hackers, criminal organizations, or any of a number of other individuals or groups. This is by no means an exhaustive list, but it does cover the main groups of such attackers. The issue of whether acts of non-State actors can constitute an armed attack is a controversial if it is not done on direction by a state. Traditionally Article 51 and the customary international law relating to self defense was characterized as applicable solely to armed attacks undertaken by one State against another. Violent acts by non-State actors fell within the law enforcement paradigm. The majority of the International Group of Experts agreed that 'non-State actors', such as cyber terrorists, are capable of conducting armed attacks, to which the Victim State could respond in self-defense.[47] The difficult case involves cyber operations by non-State actors against one State that are not conducted on behalf of another State.

The specialist nature of new technologies and the cyber utilization by military forces have resulted in increased civilianization of State armed forced; thus care must be taken in deciding what roles may be outsourced to civilian contractors without jeopardizing their legal protection under international conventions. Likewise, increasing number of non-State actors, including so called 'patriotic hackers' are becoming involved in conflicts. So it is necessary to examine the role of those participants who are involved in cyber operations whether as part of a State's armed forces or as civilians directly participating in the hostilities. For armed conflicts to which Additional Protocol I applies, those who conduct cyber attacks as part of the armed forces of a State, whether as part of the regular or irregular forces, will be considered combatants.[48] There are numbers of categories of participants in conflict for whom combatant or prisoner of war status is denied based on their activities or who raise particular issues for States based on their age. These issues are likewise raised in hostiles conducted through cyber operations.

8.1 Spies and Saboteurs

Sabotage and espionage are not prohibited under the laws of armed conflict; however the clandestine nature of both activities means that a combatant will lose their combatant immunity and prisoner of war status if captured. In the digital age, the

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46 UNGA Resolution on creation of a global culture of cyber-security and taking stock of national efforts to protect critical information infrastructures', A/RES/64/211 (2010), *http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/211.*

47 *Supra* note at 24, pg. 59.

48 Addition Protection I defines combatants as '...members of the armed forces of a party to the Party to the armed conflict (other than medical personnel or chaplains ...). Protocol I additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS3.

danger posed by spies and saboteurs to their opponents is not diminished by the lack of physical presence in the adversary's territory, which, in fact makes it harder for the victim to detected and distinguish such attackers. The Stuxnet virus, for example, alleged destroyed over one thousand centrifuges at the Natanz uranium enrichment facility without any need for physical presence.[49]

8.2 Hackers for Hires

There are numerous 'hackers for hire' involved in various roles in modern armed conflict – from individuals or groups with particular skill sets, to defence contractors engaged by governments, and criminal networks. In the age of high-technology militaries and private contractors there is a distinct between States' policy on the use of contractors (eg only for tasks which are not 'inherently govermental') and the reality that many contractors find themselves essencially performing military roles.

8.3 Child Soldiers

Although the international media sporadically comes up with stories of teenage hacker armies, most are the work of creative journalism. However there are groups of underage children and youth movements, who have been involved in patriotic hacking campaigns, some of which may receive at least tacit support from the State benefiting from their action. The law relating to child soldiers relate mainly to the recruitment of the children under the age of 15 or 18, depending on the legal regime, into the armed forces of the State or armed groups. Thus States need to ensure that their armed forces and any militia or volunteer forces do not recruit children to take part in cyber hostilities. The prohibition against the recruitment of child soldiers represents customary international law and entails individual criminal responsibility.

Under the additional protocols States also have an obligation to take 'all feasible measures' to ensure that children don't take a direct part in hostilities, or in the case of non-international armed conflict, do not participate either directly or indirectly in hostilities. Given the ease with which young hackers can now attacks, either through their own skills or by utilizing another's coding, consideration must be given to what measures States may be required to put in place to insure that minors do not participate by launching their own attacks on enemy forces.

8.4 Corporations

Many non-state actors rightly fit into the same category as any other cyber criminal. One possible exception in this group is the corporation. Generally most corporations follow the rules and regulations that bind such entities; but some media case, i.e. the Enron scandal, presenting an excellent example. Corporations are, in many cases, entities with access to a great deal of resources and should certainly not be discounted as a factor in a cyber conflict.

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[49] D Albright, P B CW DST.

The activities of corporations acting in cyber conflicts can be broken down into two primary areas: legal actions and illegal actions. Corporations carrying out acts in support of cyber war in a legal fashion will typically be doing so in the employ of a nation-state. In the United States, we can see many examples of corporations performing such roles on behalf of the U.S. government. Large defense contractors such as Northrop Grumman, General Dynamics, Lockheed Martin, TASC, and Raytheon provide expertise and resources to the government, enabling it to carry out the required cyber activities. Another set of companies that support these efforts are think tanks and Federally Funded Research and Development Centers (FFRDCs). In such situations, the cyber warfare activities of these corporations are allowed and legally blessed, and the corporations are well paid for their efforts.

9. 'Anonymous': A Specific Characteristic of Non-State Actor in Cyber Regime

The term 'Anonymous' is used for members of certain internet subcultures or refer to the actions of people in an environment where their actual identities are not' known. Anonymous broadly represents the any and all people as an unnamed collective using the internet or online actions in a coordinated manner, usually toward a loosely self-agreed goal. The anonymous collective has become increasingly associated with collaborative, international activism employing tactics such as hacktivism, protests, petitions, and lobbying. Commander X, "field commander" of the People's Liberation Front (PLF) an activist group founded in 1986, in an interview gave insight into the internal structure of Anonymous and he stated that Anonymous' organizational structure features "about two dozen [...] older leaders, who were once members of the Chaos Computer Club.[50] Not only is there evidence for an internal hierarchy but Anonymous also engages external liaisons in a very structured and organized way. The PLF's Commander X estimates that there are about 10,000 "Anons" worldwide who are willing to join in Anonymous' campaigns.

Other than the leaders, these actors appear on the screen and represent the whole idea of 'Anonymous', everybody could and can be Anon. Anon is everywhere, all the time, underestimated but crucial. The Anonymous slogans vary, but all stress that Anonymous represents the people: "Anonymous—We are Everywhere—We are Legion—We never forget—We never Forgive—Expect Us" or alternatively "We are Anti-Security, We Are the 99%". Perhaps it is most important anarchist ideals have found the furthermost articulation in the cyberspace. The slogan has become a new cyber-libertarian tool to stand up for freedom and against the power of capitalist plutocracy. Like other new social movements, Anonymous does not have a consistent membership outside of its core group (if there is one). Who participates in an attack depends on the target. Hypothetically, an individual Anon may take action once and never again.

[50] Paulo Shakarian, Jana Shakarian and Andrew Ruef (2013), Introduction to Cyber Warefare: A Multidisciplinary Approach, New York: Syngress Elsevier, p. 75.

Moreover, Anonymous has demonstrated that even with its limited capacity it can do significant damage to individuals and companies. When Aaror Barr, the corporate head of a security firm HB Gary, announced that his firm was investigating the identity of Anonymous participants, Anonymous retaliated. They hacked the HB Gary network (itself a significantly embarrassing development for a cyber security company) and took possession of internal e-mails that, in turn, suggested that HB Gary was enaged in some questionable business practices. As a result, Barr was forced to resign from his post-exactly the type of individual consequence that is sure to deter an effective counter-insurgence response.

Supporter of anonymous highly publicized their stands to protect the Internet- as an arena of true democracy, free speech and information and transparency. Hence, any institution, be it a government or a religious organisation, and any individual whose actions are perceived to counteract these ideals become a possible target mainly of DDoS attacks or Web site defacement. Politically aware Anons who see the Internet as a tool to change the world are probably interested in positive media coverage in order to recruit those in the audience who share their view. They are interested in being viewed as acting in ethical ways and do not condone the act by its goal: "any illegal act acted out by someone on the Internet is denounced by Anonymous...we're not terrorists. We're not bullies," an Anon from Sydney explains in an interview.

Wikileaks is now a brand name for the disclosure of government secrets. WikiLeaks faced enmity with the publication of U.S. government cables and lost hosting resources and funding pathways. When Julian Assange, cofounder and chief-editor of WikiLeaks, arrested in Great Britain, many company (i.e. Amazon, Mastercard, VISA, PayPal, and others) broke their financial relationship with WikiLeaks. Anonymous then declared to fully support the organization and its cofounder. Anonymous, then, began a series of distributed denial-of-service (DDoS) attacks on the websites of the major corporations who had taken an anti-WikiLeaks stand. The website of the Swedish prosecuting authority, (who was seeking Mr. Assange's extradition to Sweden to face criminal charges) was also hacked. Some of the coordination for the DDoS attacks was done through social media, such as Facebook or Twitter. Meanwhile, other supporters created hundreds of mirrors sites, replicating WikiLeaks content, so that it couldn't be effectively shut down.

The use of force by non-state actors may amount to a threat to international peace and security and require the Security Council to take or authorize measures of collective enforcement. Nevertheless, the prohibition of the actual resort to force by and among non-state actors is generally a matter of domestic criminal law and certainly is not the aim of Article 2(4) of the UN Charter.

10. Cyber Warfare: Some Critical Issue

The cyberspace creates new opportunity and new challenge before global system. In international law it presents a very fundamental question whether old laws of international law especially international humanitarian law applies to new cyber regime/warfare. Legal Adviser for the U.S. Department of State Harold Hongju Koh

answered some fundamental questions about cyber space and cyber warfare in a conference.[51] Following are extracts from his answers:

- *Do established principles of international law apply to cyberspace?*

  Answer: Yes, international law principles do apply in cyberspace.

- *Is cyberspace a law-free zone, where anything goes?*

  Answer: Definitely no. Cyberspace is not a "law-free" zone where anyone can conduct hostile activities without rules or restraint.

- *Do cyber activities ever constitute a use of force?*

  Answer: Yes. Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.

- *May a State ever respond to a computer network attack by exercising a right of national self-defense?*

  Answer: Yes. A State's national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof.

- *Do 'jus in bello' rules apply to computer network attacks?*

  Answer: Yes. In the context of an armed conflict, the law of armed conflict applies to regulate the use of cyber tools in hostilities, just as it does other tools. The principles of necessity and proportionality limit uses of force in self-defense and would regulate what may constitute a lawful response under the circumstances.

- *Must cyber attacks distinguish between military and nonmilitary objectives?*

  Answer: Yes. The jus in bello principle of distinction applies to computer network attacks undertaken in the context of an armed conflict.

- *Must attacks adhere to the principle of proportionality?*

  Answer: Yes. The jus in bello principle of proportionality applies to computer network attacks undertaken in the context of an armed conflict.

- *How should States assess their cyber weapons?*

  Answer: States should undertake a legal review of weapons, including those that employ a cyber capability.

- *In this analysis, what role does State sovereignty play?*

  Answer: States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict.

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51 The USCYBERCOM Inter-Agency Legal Conference, *http://www.state.gov/s/l/releases/remarks/197924.htm* (September 18, 2012).

- *Are States responsible when cyber acts are undertaken through proxies?*

  Answer: Yes. States are legally responsible for activities undertaken through "proxy actors," who act on the State's instructions or under its direction or control.

- *Is international humanitarian law the only body of international law that applies in cyberspace?*

  Answer: No. As important as international humanitarian law is, it is not the only international law that applies in cyberspace.

11. Conclusion

The United Nations, a crucial international organization, has taken extremely few steps towards the setting of an international standard regarding the regulation of computer attacks. Because Security Council is concerned with peace and security, it has been proposed that the Security Council should be the organ that decides when a perpetrated cyber attack constitutes a threat or breach of the international peace. There should be a binding international hard law which regulates the activity of State's as well as non-State actors in cyber warfare. The creation of a UN subsidiary body is necessary to investigate claimed acts of cyber warfare. Similar to INTERPOL there should be vigilance and policing body which can observe and investigate the activity of private actors such as cyber media agency, transnational corporation, cyber hackers and terrorist organization. The gap between developed and developing country is also seen in cyberspace. Maximum ownership and controlling agency are from the developed world so there should be a global forum which can raise cyber and new media issue which are concerned with developing country.

PROTECTION OF TRADEMARKS UNDER INTELLECTUAL PROPERTY RIGHTS

Harpreet Kaur*

1. Introduction

In the modern law of trade marks by Christopher Morcon, Butterworth

> *... The concept of distinguishing goods or services of the proprietor from those of others was to be found in the requirements for a mark to be registrable. Essentially, whatever the wording used, a trade mark or a service mark was an indication which enabled the goods or services from a particular sources to be identified and thus distinguished from goods or services from other sources. In adopting a definition of trade mark which simply describes the function in terms of capability of distinguishing the goods or services of one understanding from those of other undertaking the new law is really saying precisely the same thing.*[1]

The concept of trade mark dates back to ancient times. Even in the Harppan marks of trade with foreign countries. Such as Mesopotamia and Babylonia were found embossed on article. The law of trademarks was formalized with the process of registration which gave exclusivity to a trader right to deal in goods using a symbol or mark of some sort of distinguish his goods from similar goods sold by other traders. Even today the grant of a trade mark is an indicator of exclusivity in trade under that mark and this right cannot be transferred. Only a limited right of user can be granted via license.[2] A trade mark is a visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured or otherwise dealt in by a particular person as distinguished from similar goods manufactured or dealt in by other persons.[3] Trademarks are valuable assets of the traders and business as the identify themselves with the goodwill as reputation of the traders and businessmen. As the consumer become familiar with particular marks trademarks will work as indication of quality. However marks often are categorized according to the type of identification involved in the recent past the field of trademarks has witnessed considerable changes which are worth to be discussed.[4] A trade mark is a means of identification which enables traders to make their goods are services readily distinguishable from similar goods or services supplied by others the sign may consist of one or more pictures emblems colors or combinations of colors or the form or other special presentation of containers or packages for the product. The sign may consist also of combination of any of the said elements.[5]

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1 Deepak Gogia, *Intellectual Property Law*, Ashoka Law House, New Delhi, 2010, p. 327-28.

2 *Ibid.*

3 P. Narayanan, *Intellectual Property Law,* Eastern Law House, New Delhi, 2009, pp. 145-46.

4 Sreeninasulu N.S. (eds), *Intellectual Property Rights*, Regal Publication, New Delhi, 2007, p.159.

5 S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hyderabad, 2009, p. 166.

There had been considerable changes in the trading and commercial practices due to the globalization of trade and industry. To keep pace with the changing trends of investment flow and technology transfer at international level a comprehensive law was required therefore the trade Marks Act was passed in 1999 which came into force with effect from 15th Sept. 2003. This Act has repealed the trade and merchandise Marks Act 1958.[6]Sec 2(i)(zb)defines "Trade Mark" as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.[7] Trade Marks used for the goods or services in the course of business or trade identity themselves with the goodwill or reputation of the traders and businessmen earned by them in respect of the goods or services with which the trade marks is associated. For example, trade mark of a three pointed star in a cude/ring with the trade name "Mercedes Benz" is identifiable with the high priced luxury car with the world wide reputation.[8] Before the statue on the trade mark came into effect only the common law protection was available to a trade mark. If one's trade mark was mispresented by another trade the former could bring an action for decent against the latter at the common law courts later the equity court came into being. It used the action for passing off to protect a trader who had developed a reputation or goodwill through use of a particular sign or symbol.[9]

2. Object of Trademark law

The object of trade mark law is to deal with the precise nature of the rights which a person can acquire in respect of trade marks the mode of acquisition of such rights the method of transfer of those rights to others, the precise nature of infringement of such rights and the remedies available in respect thereof.[10] The law does not permit anyone to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. The reasons are two, firstly honesty and fair play are and ought to be, the basic policies in the world of business. Secondly when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has probability of diverting the customers and clients of someone else to himself and thereby causing an injury.[11] Object of Trade Mark Law

- The registration.
- Better protection to trade marks for goods or services.

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6 M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 146.

7 B.L.Wadehra, *Law Relating to Intellectual Property*, Universal Law Publishing Co. Ltd, Delhi, 2008.

8 Meenu Paul, *Intellectual Property Law*, Allahabad Law Agency, Faridabad, 2004, p. 261.

9 J.P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Agency, Allahabad, 2009, p. 204.

10 P. Narayanan, *Intellectual Property Law*, Eastern Law House, New Delhi, 2009, p. 148.

11 *Laxmikant V. Patel* v. *Chetanbhai Shah* AIR 2002 SC 275.

- The prevention of the use of fraudulent marks on goods and services.
- Protection of exclusive right of the proprietor of the trade mark over his trade mark.

Protection of the right of the proprietor of the trade mark to assign his trade mark or any interest in the trade mark to the other person for a consideration protection of the goodwill and reputation of the businessmen and traders.[12]

2.1 A good trade mark should have following ingredients

Trade mark must be a mark which includes a device brand heading label ticket name signature word numeral, shape of goods, packaging or combination of colors or any combination thereof.

I. The mark must be capable of being represented graphically.
II. It must be capable of distinguishing the goods or services of one person from those of others.
III. It must be used or proposed to be used in relation to goods or services.
IV. The use must be for the purpose of indicating a connection in the course of trade between the goods or services or some persons having the right either as proprietor or by way of permitted user to use the mark.[13]

When a person get his trade mark registered under law he acquires valuable rights by reason of such registration of his trade mark gives him the exclusive right to the use of the trade mark in connection with the goods in respect of which it is registered and of there is any invasion of this right by any other person using a mark which is same or deceptively similar to his trade mark he can protect his trade mark by an action of infringement in which he can abstain injunction damage or an account of point made by the other person.[14]A unique failure of trade mark is its perpetual life, though initially a trade mark is registered for 10 years but it can be periodically renewed and can be used for indefinite period unless it is removed from register or prohibited by court order. It is interesting to note that first trade mark registered in U.K. under No. 1 of 1876 consisting of red equilateral triangle in respect of alcoholic beverages is still force.[15] The trade marks Act 1999 which besides providing for registration of trade marks for goods also provides for registration of trade marks for services. It also fulfills India's obligation under TRIP by providing for the protection of well known marks furthermore, the trade marks till 2008 which was passed by the Lok Sabha on February 25, 2009 equips the Indian trade Marks law with the facility of electronic filing as well as the filing of applications for international registration of trade marks.[16]

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12 Meenu Paul, *Intellectual Property Law*, Allahabad Law Agency, Faridabad, 2004, p. 264-65.
13 B.L. Wadehra, *Law Relating to Intellectual Property*, Universal law Publishing Co. Pvt. Ltd., Delhi, 2011, p. 132.
14 S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hydrabad, 2009, p. 167.
15 M.K. Bhandari, *Law Relating to Intellectual Property Rights,* Central Law Publication, Allahabad, 2010, p. 151-52.
16 J.P. Mishra, *An Introduction to Intellectual Property Rights,* Central Law Agency, Allahabad, 2009, p. 206.

3. The Function of trademark law

It identifies the product and its origin for example the trade mark 'Brooke bond' identifies tea originating from the company manufacturing tea and marketing it under that mark. It guarantees its quality the quality of tea in the packs marked Brook bond tea would be similar but different from tea labeled with mark Taj Mahal. It advertises the product the trade mark represents the product. The trade mark 'Sony' is associated with electronic items. The trade mark Sony rings bell of particular quality of particular quality of particular class of goods. It thus advertises the product while distinguishing it from products of Sony's competition. It creates an image of the product in the minds of the public particularly of such goods. The mark 'M' which stands for the food items originating from the American fast food chain McDonalds creates an image and reputation for food items offered by it for sale in the market.[17]

The rights in trade mark beyond national boundaries were given by only to well known trade marks in the year 1925 under article 6 of the Paris Convention otherwise trademarks are national in character. Indian trade mark law always national as it was not member of Paris convention. India has now extended the right to well known trade marks prospectively from September 15, 2003 circumscribing their power to check operations of previously registered or used trade marks.[18]

4. Trade mark registry

An office known as trade Marks registry has been established under section 5(i) of the trade Marks Act 1999 to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent trade marks, maintenance of the register of trade marks the central Govt may define the territorial limits within which an office of the trade marks registry may exercise its functions the trade mars registry has as seal.[19] Trade mark may be registered or unregistered legal remedies against infringement are provided for both. The registration offers prima facie evidence of ownership of trade mark, whereas in case of non registration the user of trade mark has to establish the prior use and passing of. All trademarks are accepted for registration is entered in to register maintained by registrar. Under the repealed Act of 1958 the register was divided into part A and part B. but the new Act of 1999 has done away with this practice and only a single register is now maintained, it shall be lawful For registrar to keep the record wholly or particularly in computer floppies diskettes or in any other electronic from subject to such safeguards as may be prescribed. Every trade mark is not registerable for obtaining registration a trade mark has to fulfill the conditions lay down under the law.[20]

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17 B.L. Wadehra, *Law Relating to Intellectual Property,* Universal Law Publishing Co. Pvt. Ltd., Delhi, 2011, p. 132.

18 Prof. Ashwan Bansal, "Trends in trade Marks", *Journal Constitutional and Parliamentary Studies, Vol. 42,* 2008, p. 112.

19 S.K. Singh, *Intellectual Property Rights Laws*, Central Law Agency, Allahabad, 2009, p. 228.

20 M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2012, p. 175-177.

5. International Perspective on Trademark

5.1 Paris Convention

The Paris convention for the protection of industrial property signed at Paris on March 20, 1883. The convention declared that a trade mark could be registered in a foreign country even if it remained unregistered in its country of origin and each registered trade mark in a member nation shall be independent of marks registered in the other countries of the union.[21] The protection of Industrial property has as its object, patents, utility models, industrial design, trade mark service marks names competition industrial property shall be understood in the broadest sense and shall apply not only to industry and commence proper. But likewise to agricultural and extractive industries and to all manufactured or natural products for example wines, grain, tobacco leaf, fruit, cattle, minerals waters, beer, flower and flour.[22]The convention contains stronger substantive guarantees for trademarks than it does patents. First, the convention facilitates leveraging goodwill from one country through its well known marks provision: under Article 6, members must prohibit the use of, refuse to register, or cancel the registration of any symbol where is liable to create confusion with a mark that is create confusion with a mark that is well known in that country for use on identical or similar goods. Second, the convention facilitates use of the same mark in all regions. Article 10 requires members to provide effective protection against unfair competition.[23]

5.2 TRIPS Agreement

Article 15 to 21 of the TRIPS agreement deals with trade mark protection. Any sign or any combination of signs, capable of distinguishing the goods or service of one undertaking from those of other undertakings shall be capable of constituting a trade mark such signs in particular words including personal names, letters, numerals, figurative elements and combination of colors for registration as trade marks.[24] The trade mark law treaty shall apply to marks consisting of visible signs and only in member countries which accept for registration three dimensional marks. But it does not apply to hologram marks and to marks not consisting of visible signs in particular sound marks. India has not signed the trade Mark Law treaty also.[25] The most influential effort on the global scale regarding the protection of intellectual properties is undoubtedly the agreement on trade related aspects of intellectual property rights which were adopted at Morocco on April 15, 1994 came into force on January 1, 1995. TRIPs aim to establish supportive relationship between the world trade organization (WTO) and the world intellectual property organization (WIPO).[26]

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21 J.P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Agency, Allahabad, 2009, p. 204.

22 S.R. Myneni, *Law of Intellectual Property,* Asia Law Agency, Hyderabad, 2009, p.166.

23 M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 162.

24 B.L. Wadehra, *law relating to intellectual property*, Universal law publishing Co. Pvt. Ltd., Delhi, 2011, p. 161.

25 T. Ramappa, *Intellectual property rights law in India*, Asia Law House, Hyderabad, 2010, p. 85.

26 J.P. Mishra, *An introduction to intellectual property rights*, Central Law Agency, Allahabad, 2009, p. 210-11.

World Intellectual Property Organization (WIPO) it was established in 1967 succeeding the united international Bureau for the protection of intellectual property which was founded in 1893. It became a specialized agency of the U.N. in 1974. It aims to promote the protection of intellectual property throughout the world. A General Assembly the Conference and international Bureau or secretariat are the main organs of WIPO.[27] TRIPS explicitly incorporate the principle provisions of the Paris Convention, including its national treatment provisions, its priority rule and substantive protection. It adds a most favoured nation requirement elaborate on requirements for trade mark protection and extends the substantive rights a member state must confer. Prior to TRIPS, some countries had been giving local manufactured a best when they manufactured goods for foreign trademark holder by requiring the foreign trademark holder to display the local manufacturers although identification of the undertaking that produced the goods and services may be required member also enjoy a measure of flexibility. Article 17 permits 'limited' exception provided they take account of the legitimate interests of the owner of h trademark and of third parties.[28]

5.3 Madrid Agreement concerning the international registration of Marks 1979

The Madrid agreement concerning the international registration of Marks was made on April 14, 1891. The countries to which this agreement applies constitute a special with for the international registration of Marks. National of any of the contracting countries may, in all the other countries party to this agreement secure protection for their marks applicable to goods or services, registered in the country of origin.[29] With respect to the acquisition of rights to trademark, the Paris Convention relies on the same expensive state by state registration system that it uses for patents. The Madrid agreement for international registration of trademarks, which went into effect less than ten years after the conclusion of Paris Convention under the Madrid Agreement. Once protection is secured in a trademark holder's country, it can be extended to other member states by filing an international application with the international bureau at WIPO, specifying where protection is sought. Because the Madrid Agreement bases protection on securing registration in a traders home country. It presents problem for countries that make registration contingent on the use of the trademark in commerce. To enable the United States to join the Madrid Agreement a modified version of the agreement was created in 1989. Under the Madrid Protocol an application is sufficient to enter the system.[30] The WTO's agreement covers copyright and related rights, trademarks including service Marks; geographical indication including appellations of origin; industrial designs; patents Including the protection of new plant varieties; the layout design of integrated circuits And undisclosed information including trade secrets and test data.[31]

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27 S.K. Kapoor, *International law & Human Rights*, Central Law Agency, Allahabad, 2004, p. 596.

28 M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 162-63.

29 S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hyderabad, 2009, p. 179-80.

30 M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 162.

31 Harman Shergill suller, *Performance's Rights in India & United States*, Shree Ram Law House, Chandigarh, 2013, p. 62.

5.4 The Trade Mark Law Treaty (TLT)

The Trademark Law Treaty was adopted on October 27, 1994, at a Diplomatic Conference in Geneva. The purpose of the Trademark Law Treaty is to simplify and harmonize the administrative procedures in respect of national applications and the protection of marks. Individual countries may become party to the Treaty, as well as intergovernmental organizations which maintain an office for the registration of trademarks with effects in the territory of its member States, such as the European Union (EU) and the African Intellectual Property Organization (OAPI). The provisions of the Treaty are supplemented by the Regulations and Model International Forms. The Treaty does not deal with the substantive parts of trademark law covering the registration of marks. The Treaty entered into force on August 1, 1996.[32] This treaty was diplomatic conference in order to smoothen and harmonise the process of national registration of marks. The treaty is open to the individual countries as well as inter governmental organizations.

6. Judicial approach

The absolute and relative ground far refusal of registration have been the subject matter of judicial interpretation for clear and proper understanding of some important factors it is necessary to give some important factors it is necessary to give some illustration which have come out of various courts rulings. Example Already registered Trade Marks. TELCO, BARALGAN, HITACHI, MAF and trade mark to be registered but refused TI-ECO, BARAGAN, HITAISHI, NRF.[33] As mentioned earlier distinctiveness is the primary requirement of trade mark. In *Imperial Tabacco* v. *Registrar trade mark* the distinctiveness has been understood as some quality in trade mark which earmarks the goods so marked as distinct from those of after products such goods the burden is on the applicant to prove distinctiveness of the mark as its capability of being distinguished so as to claim monopoly of using the mark.[34]

In case of Infringement of Trademark, Subhash Chand Bansal v. *Khadim's and Anr.*, 2012 ix AD (Delhi) 448. Court held restrained from selling advertising or storing for sale of any boots, slippers and shoes etc. bearing impugned trademark or any other mark which was identical or deceptive similar to the mark of the plaintiff either on the product or on its packaging.[35]

Nobody can claim trademark with respect to generic word. In Cadila Health Care Ltd v. *Cadila Pharmaceuticals Ltd.*, (2001) 2 SCR 743, and *SBL Limited* v. *Himalaya Drug Company*, 1997 PTC (17) 540 (Del). Court came to the conclusion that 'meropenen' I the molecule which is used for treatment of bacterial infections and the term 'MERO' being on abbreviation of a generic term (Meropenem), was

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32 International Treaties and Conventions on Intellectual Property, *http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf* (accessed on 1st April, 2016).

33 Dr. M.K. Bhandari, *Law Relating to Intellectual Property Rights,* Central Law Publications, Allahabad, 2006, p. 138.

34 (AIR 1977 Cal. 413).

35 Khush Kalra, Landmark Judgements on Intellectual Property Rights, Central Law Publication, Allahabad, 2014, pp. 157-60.

publici Juris. It was held that the plaintiff in that case could not claim exclusive right to the use of 'MERO' as a constituent of any trademark.[36]

Registered trade mark is infringed by a person if he uses such registered trade mark as his trade name. Infosys Technologies Ltd v. *Adinath Infosys Pvt Ltd & ors.*, AIR 2012 Del 46. Court restrained defendant from using the expression 'INFOSYS' or any other expression which was identical or deceptive similar to the trademark INFOSYS'. As a pat of its corporate name or for proving any of the services in which the plaintiff company was engaged.[37]

Clinique Laboratories LLC and Anr. v. *Gufic Limited and Anr.*, (2009) 41 PTC 41 (Del).

Suit for infringement by a registered trade mark owner against a registered trade mark holder. However, under Section 124(5) of the Act, the court has the power to pass interlocutory order including orders granting interim injunction, keeping of account, appointment of receiver or attachment of any property. In this case, the court held that a suit for infringement of registered trade mark is maintainable against another registered proprietor of identical or similar trade mark. It was further held that in such suit, while staying the suit proceedings pending decision on rectification/cancellation petition, the court can pass interim injunction restraining the use of the registered trade mark by the defendant, subject to the condition that the court is prima facie convinced of invalidity of registration of the defendant's trade mark. In this case the court granted an interim injunction in favour of the plaintiff till the disposal of the cancellation petition by the competent authority.[38]

7. Conclusion

Trademarks are considered as a form of intellectual properly. Hence trademarks could be sold purchase, assigned and licensed in the lines of any other property. The very different feature of trademark is that it is a symbol of goodwill. So the transfer of trademarks require much care and caution that of the transfer of other properties it is a very valuable asset in the field of business since it involves goodwill reputation and the market. Here we can appreciate the importance of trademarks by remembering the words "this hard earned right is an important as money in the bank". Hence people are willing to invest large sum of money to acquire assign as license trademarks. The courts and the law in the interest of the business world as well as the consumer have always safeguard protection of trademarks. The reforming of the laws with respect to trademark to meet the challenges of the technological business world is very much required and the same has been guaranteed by the international agreement like the TRIPS agreement.[39]

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36 *Id.*, p.166-68.

37 *Id.*, p. 187-89.

38 *https://indiankanoon.org/docfragment/99626708/?formInput=clinique%20%20sortby%3A%20leastrecent* (Accessed on 1st April, 2016).

39 Sreeinvasulu N.S.(eds), Intellectual Property Rights, Regal Publication, New Delhi, 2007, p. 155-56.

POLITICAL PARTICIPATION AND REPRESENTATION OF WOMEN IN INDIA: TIME TO REASSESS ON THE 20TH ANNIVERSARY OF BEIJING DECLARATION AND PLATFORM FOR ACTION

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Mohammad Atif Khan**

1. Introduction

The participation and representation of women in political activities is one of the important determinants to analyze the efficacy and maturity of a democracy. Initially women got the right to vote through 19th Amendment to the United States Constitution which gradually developed worldwide in 20th century. The issue of representation of women has now been taken up at every level of political system whether national, regional or international. The Constitution of India in its Preamble promises to secure to all its citizens "Justice, social, economic and political" and "Equality of status and of opportunity". Articles 325 and 326 of the Constitution of India also guarantee equality for participation in political activities and right to vote respectively. Despite the constitutional mandate Indian women remain under represented in Parliament and State Assemblies.

At international level in 1995, Fourth World Conference on Women in Beijing was convened and Beijing Declaration and Platform for Action has been adopted at the 15th plenary meeting on September 15, 1995, remains the most overarching blueprint for advancing women's rights.[1] The Beijing Platform for Action (1995: para. 181) states that "Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account." At United Nations (UN) level also this equality for women has been shown by the statement of Executive Director, UN Women, Dr. Phumzile Mlambo who appealed to make the UN system 50-50 by 2030.[2]

In 2005, there were about forty instances worldwide in which constitutional or legislative change has resulted in a radical and effective gender rebalancing of political life.[3] Argentina, many other Latin American countries, France and United Kingdom etc. have taken initiatives to increase women's political participation through constitutional amendments or quota legislation to equal access for women

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1 Report on BEIJING + 20: PAST, PRESENT AND FUTURE, The Representation of Women and the United Nations system, available at *www.unwomen.org/.../the-representation-of-women-and-the-united-nation,* (accessed on 21/04/2015).

2 Let's make the UN system 50-50 by 2030: Step it Up for Gender Equality, available at *www.unwomen.org,* (accessed on 21/04/2015).

3 Yvonne Galligan, *Bringing Women In: Global Strategies For Gender Parity In Political Representation*, 6 U. Md. L.J. Race Religion Gender & Class 321 (2006).

and men to electoral office. Like other countries in the world, India has also taken initiatives for female participation in electoral competition which started long back in 20th century at the time of Swadeshi movement in Bengal (1905-08).

The national consensus around this demand resulted in the adoption of the 73rd and 74th amendments to the Constitution in 1993 that introduced 33% reservation for women in institutions of local governance.[4] India has witnessed the world's largest experiment in grassroots local democracy, triggered by the 73rd and 74th Amendments to the Indian Constitution, which created a third tier of governance - Panchayati Raj Institutions (Village Councils) and urban local bodies.[5] In 1995, the question regarding women participation and representation in Parliament has been raised again with the introduction of the Women's Reservation Bill. Till date, the Lok Sabha has not voted on the Bill. If the Bill were to be approved by the Lok Sabha it would then have to be passed by half of India's state legislatures and signed by the President.[6]

Despite all those initiatives the status of women's political participation is still not much satisfactory. Only 22% of all national parliamentarians were female as of January 2015, a slow increase from 11.3% in 1995.[7] As of January 2015, 10 women served as Head of State and 14 served as Head of Government.[8] Rwanda had the highest number of women parliamentarians worldwide. Women there have won 63.8% of seats in the lower house.[9] As of January 2015, India stands with 105th rank with 12% women parliamentarians in Lok Sabha and 12.8% in Rajya Sabha which shows that the political decision making in India is still male dominated. As we are approaching the 20th Anniversary of Beijing Declaration, therefore this is a high time to study the status of women's political participation and to think over what else is required to increase women's representation in India political system.

2. Evolution of Women's Participation in Political Activities

UN Women[10] Executive Director Phumzile Mlambo-Ngcuka, in her Opening remarks called for gender equality in parliaments by 2030 at the Inter-Parliamentary Union and UN Women CSW59[11] side event "Parliaments for Gender Equality:

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4 Praveen Rai, *Electoral Participation of Women in India: Key Determinants and Barriers*, Vol. XLVI No 3 Economic & Political Weekly 49, (2011).

5 Message by Anne F. Stenhammer, Regional Programme Director, UN Women South Asia Sub-Regional Office, Opportunities and Challenges of Women's Political Participation in India, 2012, at iii.

6 National Women's Reservation Bill: The story so far, The Hindu, March 7, 2015.

7 Inter-Parliamentary Union and UN Women, "Women in Politics: 2015". Available on *http://www.unwomen.org*, (accessed on 21/04/2015).

8 *Ibid.*

9 *Ibid.*

10 In July 2010, the United Nations General Assembly created UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women. In doing so, UN Member States took an historic step in accelerating the Organization's goals on gender equality and the empowerment of women. - See more at: http://www.unwomen.org/en/about-us/about-un-women.

11 59th session of the Commission on the Status of Women (CSW). The Commission on the Status of Women (CSW) is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. A functional commission of the Economic and Social Council (ECOSOC), it was established by Council resolution 11(II) of 21 June 1946. See more at: *http://www.unwomen.org/en/csw*.

Priorities for Beijing+20 and beyond" honoring Parliamentary Day, held on 11 March, 2015 in New York.[12] Today international organizations and working groups are talking about the gender equality in parliaments but it is not the result of a one day struggle for women's political participation and representation. By the end of 19th century women did not have the right to cast vote in any electoral competitions. But finally the day came in 1893, when with the signing of the Electoral Bill by Governor Lord Glasgow, New Zealand becomes the first country in the world to grant national voting rights to women.[13]

Women worldwide gradually gained the right to vote throughout the Twentieth Century, and today, with some notable exceptions, all women over the age of eighteen years in democratic states are enfranchised.[14] United States also witnessed the women suffragists' parade in New York City in 1917, carrying placards with signatures of more than a million women. Therefore, United States also granted the right to vote to women with the historic 19th US Constitutional Amendment, 1920 and Great Britain had also given full voting rights to women in 1928. The right to vote was generally accompanied by women's right to stand for parliament, and for many of the early suffragists, winning the vote was deemed to secure women's equal political presence with men.[15]

3. Indian Position before Independence

Women empowerment in India can be traced back in 19th century reform movement when reformers like Raja Ram Mohan Roy had started campaigning against caste, child marriage, women's education, abolition of sati and widow remarriage etc. The early twentieth century saw the intensification of the national movement in India.[16] Female participation in electoral competition in India had been started long back in 20th century at the time of Swadeshi movement in Bengal (1905-08).

The firm insistence of organized women that they be treated as equals of men on the franchise issue emerged not from the perceptions of the needs of the women in India, but as the result of the influence of certain British women, in the case of the first demand for the franchise, 1917, and as a response to the nationalist movement, in the case of the second demand for franchise, 1927-33.[17] The rise and rapid growth of political agitation for self-government in the country made the women of India conscious of their exclusion by the British law from any share in the Government of their land.[18] At the very same time India also witnessed the establishment of the

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12 See more at: *http://www.unwomen.org/en/news/stories/2015/3/un-women-executive-director-calls-for-gender-equality-in-parliaments-by-2030*, (accessed on 23/04/2015).

13 *http://www.history.com/this-day-in-history/new-zealand-first-in-womens-vote*, (accessed on 21/04/2015).

14 Galligan, *Supra* note 5, at 319.

15 *Id.* at 320.

16 Vina Mazumdar, *Women's Participation in Political Life*, Meeting of Experts (Category VI), UNESCO at Lisbon, Portugal, 13-16 December, 1983, at 1.

17 Geraldine Forbes, *"Votes for Women: The Demand for Women's Franchise"*, 1917-1937, in *Symbols of Power: Studies in the Political Status of Women in India* (Vina Majumdar et al. ed., 1979).

18 Aruna Asaf Ali, *Women's Suffrage in India*, in OUR CAUSE 351 (Nehru Shyam Kumari, et al. ed., 1941).

women organizations like Women's Indian Association (WIA), formed by Annie Besant, Dorothy Jinarajadasa and Margaret Cousins in 1917, the National Council of Women in India (NCWI) in 1926 and the All India Women's Conference (AIWC) in 1927.

Although Mahatma Gandhi played a strong role in women's political participation and accepted the legal equality for women from the beginning.[19] But initially Mahatma Gandhi viewed that women should participate in freedom struggle but their role should only be as supportive to men. Women refuted him on this issue and participated very effectively in in Non-Cooperation Movement of 1921 and Civil Disobedience Movement 1930. They not only organized themselves in groups and participated in nonviolence agitations but also faced the police firing and cane charge sometimes. After this Mahatma Gandhi admitted that "women have far more important role to play in the winning of freedom".[20]

Thus the movement for female suffrage in India in the early 20th century was initiated and replicated on the model in Great Britain and the work of British women reformers living in India.[21] Therefore limited suffrage rights were given to women in India in different provinces based on education and property qualification as granted in Britain. A strong supporter of women's rights, Sarojini Naidu worked with the Congress and the Muslim League, was instrumental in the passage of a resolution to support women's franchise and became the first Indian woman to become the elected President of the Indian National Congress.[22] The Government of India Act, 1935 had removed some of the qualifications regarding women suffrage but it was not successful to grant equal political status to Indian women. The Government of India Act, 1935 provided a wider section of women suffrage rights but it was still limited and encumbered by qualifications like literacy, property ownership or marriage to propertied men. The Act enfranchised one woman for every five men enfranchised.[23] While the basic issue of women's participation in politics was thus settled but the extent of their political role continued to be an open question.[24] However, women took advantage of the seats reserved for them in the elections held in 1937, as 80 women won the elections to become legislators.[25] Indian women had finally been granted the full suffrage right after independence in 1947 with the adoption of the Constitution of India but this did not reserve seats for women in legislature which was granted in the waning days of the colonial era.

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19 M.K. Gandhi, *Young India*, February 20, 1916, Collected Works Vol. XIV, Government of India 1965.

20 M.K. Gandhi, *Young India*, December 15, 1921, Statement to the Press, April 6, Collected Works, Vol. 43.

21 Rai, *Supra* note 6, at 49.

22 Saroj Choudhary, *Political Participation and Representation of Women in Indian Politics,* Vol. 01 Issue 04, *International Journal of Behavioral Social and Movement Sciences,* 205, (2012).

23 Rai, *Supra* note 6, at 49.

24 Mazumdar, *Supra* note 18, at 2.

25 Rai, *Supra* note 6, at 49.

3.1 Post-Independence Indian Scenario

Crook and Manor (1999, 7) define political participation as "citizens' active engagement with public institutions" including voting, campaigning, and pressuring either individually or through a group.[26] The 1950 Constitution grants universal adult suffrage for all Indian citizens aged 21years[27] and older.[28] But this equal right of suffrage in Indian context is subject to different psychological, cultural and political constraints. I would discuss these constraints in the later part of this article. At this stage, I only say that women participation is a motivational force for the entire women community. Burrell, (1994) suggested that the visible presence of women in public life raises the aspirations of other women, the "girls can do anything" effect.[29]

Even just after the independence the women representation was not satisfactory. According to the statistical report on general elections, 1951 to the first Lok Sabha, political parties allotted only few seats to women, where they could win only 22 seats and occupy 4.4% of the seats in the lower house of Parliament.

The Gandhian ideology of self-governance or Swaraj based on an economy of self-reliance and self-sufficiency of villages, adopted village as the basic unit of administration.[30] But the idea was not much celebrated at practical ground except the mention of organization of village panchayats under Article 40 of the Constitution of India as a directive principle of state policy.[31] Community Development and Panchayati Raj were launched in 1952 seeking to harness people's power and channelize their participation for social reconstruction and following this, in 1959, with the submission of the Balwantrai Mehta Committee Report, it was provided for a three-tier system of grassroots institutions from the village to the district levels.[32] Generally, the panchayati raj (local government) is divided into three structures-village level, block level (group of villages), and district level-although adherence to this structure varies by state.[33]

In 1971 on a request from United Nations to prepare a report on women's status, the Government of India (GOI) constituted a national level Committee to review the

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26 Richard C. Crook and James Manor, *Democracy and Decentralization in South Asia and West Africa: Participation, Accountability and Performance.* New York: Cambridge University Press, 1999.

27 In 1988, the voting age was lowered to 18 years with The *Constitution (Sixty-first Amendment) Act*, 1988.

28 David Butler et al., *India Decides: Elections* 1952-1991, New Delhi 1992.

29 B. C. Burrell, *A Woman's Place is in the House: Campaigning for Congress in the Feminist Era*, University of Michigan Press, at p. 173.

30 Sujata D. Hazarika, *Democracy and Leadership: The Gendered Voice in Politics*, Vol. 57, No. 3 Sociological Bulletin 361 (2008).

31 Article 40 of the Constitution of India - The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of selfgovernment.

32 Hazarika, *Supra* note 32, at 362.

33 Suzanneg Leason, *Female Political Participation and Health in India*, Vol. 573 Annals of the American Academy of Political and Social Science 111, (2001).

status of women in India since independence.[34] The demand for greater representation of women in political institutions in India was taken up in a systematic way by the Committee on the Status of Women in India (CSWI) which published its report in 1976 which suggested that female representation in political institutions especially at the grass-roots level needed to be increased through a policy of reservation of seats for women.[35] In order to correct the under representation of females in the state and national legislatures, the National Committee on the Status of Women in India (NCSWI, 1975) recommended the formation of panchayats at the village level with their own resources and autonomy from the other village-level governments.[36] In 1988, the National Perspective Plan for Women also suggested that a 30% quota for women be introduced at all levels of elective bodies. Women's groups and gender politics strictly insisted that reservation be restricted to the panchayat level to encourage grass-roots participation of women in electoral politics.[37]

India has witnessed the world's largest experiment in grassroots local democracy, triggered by the 73rd and 74th Amendments to the Indian Constitution in 1992, which mandated the reservation of a minimum of one-third of seats for women (both as members and as chairpersons) within all of India's locally elected Governance bodies commonly referred to as *Panchayati Raj* Institutions (PRIs) and urban local bodies.[38]

3.2 Women in Panchayati Raj Institutions

The right to vote was generally accompanied by women's right to stand for parliament, and for many of the early suffragists, winning the vote was deemed to secure women's equal political presence with men, but over time, electoral results did not bear out this optimistic expectation of gender equality in political life, and throughout the Twentieth Century and into the Twenty-First Century, parliamentary representation has been male-dominated.[39] Despite the constitutional promulgation, women in the Indian subcontinent continue to be grossly under-represented in the legislatures, both at the national and the state levels.[40] Many of the advances in the parliamentary presence of women have been made since the 1970s when equal political representation was an element of campaigns for gender equality in many countries.[41]

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34 Sadhna Arya, *The National Commission For Women: A Study In Performance*. Report available on *www.cwds.ac.in/OCPaper/NCWreport.pdf*, (accessed on 25/04/2015).

35 Kameshwar Choudhary et al., Globalisation, Governance Reforms and Development in India 483, (2007).

36 *Status of Women in India: A Synopsis of the Report of the National Committee on the Status of Women (1971-74)*, New Delhi: Indian Council on Social Science Research.

37 Rai, *Supra* note 6, at 49.

38 Report on "*Opportunities and Challenges of Women's Political Participation in India a Synthesis of Research Findings from Select Districts in India*", ICRW – UN Women Joint Publication, 2012, at 1.

39 Galligan, *Supra* note 5, at 320.

40 Rai, *Supra* note 6, at 47.

41 Galligan, *Supra* note 5, at 320.

Article 40 of the Constitution of India which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as unit's self-government.[42] In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of *Panchayati Raj* Institutions to impart certainty, continuity and strength to them.[43]

As the world's largest democracy, and one that has taken important steps including *Panchayati Raj* Institution (PRI) to open opportunities for marginalized groups, including women, to lead, India is an important case study for global policy dialogues around good governance.[44] Government of India had appointed various Committees on Panchayati Raj since Balwant Rai Mehta established in 1957 to Dr. L.M. Singhvi Committee in 1986 but it was formalized in 1992 by the 73rdamendment to the Indian Constitution. In India, the Constitution (73rd Amendment) Act, enacted in 1992, mandated the reservation of a minimum of one-third of seats for women (both as members and as chairpersons)[45] within all of India's locally elected governance bodies commonly referred to as Panchayati Raj Institutions (PRIs).[46] The Act came into force as the Constitution (73rd Amendment) Act, 1992 on April 24, 1993. This 73rdAmendment added Part IX titled "The Panchayats" and Eleventh Schedule in the Constitution of India.

According to Annual Report 2014-15 published by Ministry of Panchayati Raj Government of India:[47]

> *Panchayats are local governments mandated in the Constitution of India. As per the Constitution, three tiers of Panchayats (Gram Panchayat, Block Panchayat and ZillaPanchayat) are to be constituted, through elections every five years, except in States with population less than 20 lakhs, where Panchayats at two tiers may be created. The Constitution recognizes the Gram Sabha, i.e. all the electors in a village Panchayat.*

There are 2.51 lakh Panchayats in the country, which include 2.39 lakhs Gram Panchayats, 6405 block Panchayats and 589 district Panchayats, or ZillaParishads.[48] According to the Annual Report 2014-15 published by Ministry of Panchayati Raj

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42 Statement of objects and reasons appended to the Constitution (Seventy-second Amendment) Bill, 1991 which was enacted as the *Constitution (Seventy-third Amendment) Act*, 1992.

43 *Id.*

44 Message by Sarah Degnan Kambou, President, International Center for Research on Women, in "*Opportunities and Challenges of Women's Political Participation in India: A Synthesis of Research Findings from Select Districts in India.*" at iv.

45 The Constitution of India, Article 243D.

46 ICRW – UN Women Joint Publication on "*Opportunities and Challenges of Women's Political Participation in India: A Synthesis of Research Findings from Select Districts in India*" (2012), at ix.

47 Available at *http://panchayat.gov.in*, (accessed on 23/06/2015).

48 Annual Report 2014-15 published by Ministry of Panchayati Raj Government of India, available at *http://panchayat.gov.in*, (accessed on 23/06/2015).

Government of India the position of women representation in *Panchayati Raj* Institution is as follows:

Table: Women Representation in *Panchayati Raj* Institution (PRI)

Sl. No.	Panchayats	Total No. of Elected Representatives (in lakhs)	% of Elected Women
1.	Gram Panchayat	27.32	43.81
2.	Block Panchayat	1.68	40.03
3.	ZillaPanchayat	0.16	43.19
	Total	29.16	

Source: Annual Report 2014-15 published by Ministry of Panchayati Raj Government of India.

In a joint publication of ICRW[49] – UN Women Joint Publication 2012, Anne F. Stenhammer[50] stated "since 1995, three rounds of elections have been held; and as one-third of seats (proposed to be increased to 50 per cent) are reserved for women, more than 1.5 million women have been elected to office in each round and It is evident therefore that first generation issues of framing the 'rules of the game' and creating an understanding about them have been addressed. Seats reserved for women are rotated for assurance that each seat has an equal chance of being reserved.[51] The following states have made legal provision for 50% reservation for women among members and Sarpanch: Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Kerala, Maharashtra, Orissa, Rajasthan, Tripura and Uttarakhand. After the establishment of women's reservations, political participation went from 4-5% to 25-40% among women, and gave millions of women the opportunity to serve as leaders in local government.[52]

3.3 Women Representation in local self-government in urban India

The World is urbanizing and is projected to grow to two-thirds of total population by 2050 from its present 54 per cent.[53] In an urbanizing world women constituting half the population have a very limited role in urban governance-policy and decision-making as they are not adequately and appropriately represented in the

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49 The International Centre for Research on Women (ICRW) is a global research institute with headquarters in Washington D.C., and regional offices in Nairobi, Kenya, and New Delhi, India. ICRW is comprised of social scientists, economists, public health specialists and demographers, all of whom are experts in gender relations.

50 Regional Programme Director, UN Women South Asia Sub-Regional Office New Delhi.

51 R. Vijayakumari and K. Gangadhara Rao, *Women's Political Participation in India*, Volume 3, Issue 8GJRA 2, (2014).

52 Kaul, Shashi, ShradhaSahni "*Study on the Participation of Women in Panchayati Raj Insitution*" 3 (1) Studies on Home and Community Science 29–38, (2009).

53 United Nations, Department of Economic and Social Affairs, World Urbanization Prospects-Highlights, New York, at 1, 2014.

urban local bodies.[54] The 74th Constitution Amendment Act, 1992 for the first time provided one-third representation to women in urban local self-government institutions.[55]

In many Indian States local bodies had become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions.[56] As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.[57] Having regard to these inadequacies Government of India has enacted 74th Amendment (1992) to the Constitution of India which have provided for reservation of one-third seats in the local bodies of Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.[58] This is a revolutionary piece of legislation by which Constitution of India was amended to incorporate Part IX A titled "The Municipalities" and Twelfth Schedule in the Constitution of India on urban local bodies.[59]

Urban local bodies, to be known as Municipal Corporations, Municipal Councils and Nagar Panchayat depending on the population shall be constituted through universal adult franchise in each notified urban area of the country.[60] The Constitution (74th Amendment) Act, 1992 provided not less than one-third of total number of seats in each urban local body shall be reserved for women.[61] This enactment is an important achievement in empowering women and over one million rural women could join village panchayats and participate in local self governance.[62] Vina Mazumdar a feminist author rightly observed that it is time for India to try out some new experiments in achieving real democracy.[63] Based on the experience gained over two decades, the Government of India proposed 50 per cent reservation for women in rural and urban local bodies.[64]

With the success of women's involvement in urban affairs after 74th the Constitution Amendment Act or as a matter of political strategy, it was decided to increase women representation to 50 per cent in local bodies and the Constitution (112thAmendment)

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54 D. Ravindra Prasad, *Women Empowerment in Urban Governance in India*, vol. Lx, no. 3Indian Journal of Public Administration 427, (2014).

55 *Ibid.*

56 Statement of objects and reasons appended to the Constitution (Seventy-third Amendment) Bill, 1991 which was enacted as the *Constitution (Seventy-fourth Amendment) Act*, 1992.

57 *Ibid.*

58 *India's Report On the Implementation of Beijing Declaration and Platform for Action in Context of the Twentieth Anniversary of the Fourth World Conference on Women and the Adoption of the Beijing Declaration and Platform for Action* 65 (2015).

59 The Constitution (Seventy - Fourth Amendment) Act, 1992 Background, Ministry of Urban Development, Government of India. Available on *http://moud.gov.in/constiution.* (accessed on 19/06/2015).

60 *Ibid.*

61 S. Sree Kumar, *Representation of Women in Legislature: A Sociological Perspective in the Indian Context*, Vol. 67, No. 3, *The Indian Journal of Political Science,* 620, (2006).

62 *Ibid.*

63 Vina Majumdar, "*Historical Soundings*" Seminar Vol. 457, (1977), at 19.

64 Prasad, *Supra* note 56, at 430.

Bill was introduced in the Lok Sabha on November 24, 2009.[65] The Bill seeks to amend the Article 243 T of the Constitution of India to enhance the quantum of reservation for women from one-third to one-half of the total seats in urban local bodies and this is also applicable to chairpersons.[66] Several International organizations champion the cause of equal representation to women in policy and decision-making bodies at national and local levels, but the progress has been slow.[67] Thus although 73rd and 74th amendment ensures political voice to women, autonomy or independent decision making is still a far cry.[68]

4. Actions to be taken under the Beijing Declaration and Platform for Action, 1995

Twenty years after, the Beijing Declaration and Platform for Action was adopted by 189 Member States meeting in China, its stature and significance as a roadmap for the achievement of gender equality remains undiminished.[69] This pivotal document continues to guide the global struggle against constraints and obstacles to the empowerment of women around the world.[70] The Beijing Declaration and Platform for Action of 1995 is a visionary agenda for the empowerment of women.[71] This landmark text was the outcome of the Fourth World Conference on Women, held in Beijing, China, in September 1995.[72] An unprecedented 17,000 participants and 30,000 activists streamed into Beijing for the opening of the Fourth World Conference on Women in September 1995.[73] After two weeks of political debate, exchange of information on good practice and lessons learned, and sharing of experiences, representatives of 189 Governments agreed to commitments that were unprecedented in scope.[74]

As we approach the twentieth anniversary of the adoption of the Beijing Declaration and Platform for Action, there is a new sense of real urgency, a recognition that we are at a turning point for women's rights, a recognition that realizing gender equality, the empowerment of women and the human rights of women and girls must be a pressing and central task.[75] While we are talking about the political participation of

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65 Lok Sabha Secretariate, Standing Committee on Urban Development, the Constitution (One Hundred and Twelfth Amendment) Bill, 2009, New Delhi, 2010.

66 *Ibid.*

67 Federation of Canadian Municipalities, Promoting Women's Leadership in Local Government: Local Government Associations Help Women Meet the Challenge, Ottawa.

68 Sujata D. Hazarika, Political Participation of Women and the Dilectics of 73rd Ammendment, Vol. 67, No. 2, *The Indian Journal of Political Science,* 258, (2006).

69 Foreword by Ban Ki-Moon Secretary-General United Nations, in *Beijing Declaration and Platform for Action.*

70 *Ibid.*

71 Policy paper on *Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome*, at 3. See more at: *http://www.unwomen.org/en/digital-library/publications/2015/01/beijing-declaration*, (accessed on 26/06/2015).

72 *Ibid.*

73 *http://www.un.org/en/documents/udhrhttp://beijing20.unwomen.org/en/about*, (accessed on 26/06/2015).

74 *Supra* note 73.

75 *Supra* note 73, at 4.

women at world level, it is necessary to mention that Beijing Declaration and Platform for Action already required few initiatives taken by different governments, political parties and United Nations. The Universal Declaration of Human Rights (UDHR) provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.[76] Therefore, this right mandates the equal right of women political participation also.

Actions to be taken to ensure women's equal access to and full participation in power structures and decision-making according to the Beijing Declaration and Platform for Action are as follows:[77]

i. Governments should commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions.

ii. Take measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non elective public positions in the same proportion and at the same levels as men.

iii. Protect and promote the equal rights of women and men to engage in political activities and to freedom of association, including membership in political parties and trade unions.

iv. Monitor and evaluate progress in the representation of women through the regular collection, analysis and dissemination of quantitative and qualitative data on women and men at all levels in various decision-making.

v. Aim at gender balance in the lists of national candidates nominated for election or appointment to United Nations bodies, specialized agencies and other autonomous organizations of the United Nations system, particularly for posts at the senior level.

There are several actions required to be taken to ensure women's equal access to and full participation in power structures and decision-making by the political parties are as follows:[78]

i. Consider examining party structures and procedures to remove all barriers that directly or indirectly discriminate against the participation of women.

ii. Consider developing initiatives that allow women to participate fully in all internal policy-making structures and appointive and electoral nominating processes.

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[76] Article 21 of the Universal Declaration of Human Rights (UDHR), available on *http://www.un.org/en/documents/udhr*.

[77] *Supra* note 73, at 122.

[78] *Id.* at 123.

iii. Consider incorporating gender issues in their political agenda, taking measures to ensure that women can participate in the leadership of political parties on an equal basis with men.

Apart from abovementioned actions, there are several other actions required by national bodies, the private sector, trade unions, employers' organizations, research and academic institutions, sub regional and regional bodies and nongovernmental and international organizations and the United Nations which are direct to ensure women's equal access to and full participation in power structures and decision-making.

4.1 Initiatives taken by the Government of India to Ensure Women's Equal Political Participation

As a follow up action to the commitments made by India during the Fourth World Conference on Women held in Beijing during September 1995, Government of India has taken several initiatives since 1995. Few of them have been discussed below:

A. Establishment of Ministry of Women and Child Development, 2006

For the empowerment of women government has set up a Ministry as "Ministry of Women and Child Development" in 2006. The Ministry has four autonomous organizations working under its aegis viz. Ministry is directed to ensure that women are empowered both economically and socially and thus become equal partners in national development along with men.[79]

i. National Institute of Public Cooperation and Child Development (NIPCCD)
ii. Central Adoption Resource Agency (CARA)
iii. Central Social Welfare Board (CSWB)
iv. Rashtriya Mahila Kosh (RMK)

B. Programme and Schematic Intervention

Government of India has been implementing number of schemes and programme for creating an enabling environment for women, which may create a positive environment for their political participation. Support to Training & Employment programme for Women (STEP) scheme aims to ensure sustainable employment and income generation for marginalized and asset less rural and urban women, *Ujjawala* scheme is implemented for prevention of Trafficking and Commercial Sexual Exploitation and *Swadhar* scheme is catering to the needs of women in distress.[80]

C. National Policy for the Empowerment of Women, 2001

As a follow up action to the commitments made by India during Beijing during September 1995, a National Policy for the Empowerment of Women was drafted

[79] *Supra* note 60, at 2. See more at: *www.unwomen.org/~/media/.../sections/.../india_review_beijing20.pdf.*
[80] *Id.* at 4.

after nation-wide consultations to enhance the status of women.[81] National Policy for the Empowerment of Women 2001 passed by the Government has as its goal bringing about advancement, development and empowerment of women in all spheres of life which also includes the equal political participation of India women with men. This policy mandates de jure and de facto enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil. It also ensures the changing societal attitudes and community practices by active participation and involvement of both men and women.[82]

D. Establishment of the High Level Committee on Status of Women (HLC), 2012

The Government of India had set up a high level committee in 2012 on the status of women to undertake comprehensive study to understand the status of women since 1989 as well as to evolve appropriate policy intervention based on a contemporary assessment of women's needs.[83] The HLC will prepare a report on the current socio-economic, political and legal status of women in India. The report will also bring out the interconnectedness of these aspects in terms of their impact on women and recommend measures for holistic empowerment of women.[84] The HLC will also examine the change in women's political status with respect to their participation in panchayats, states legislature and parliament, the nature and extent of participation, challenges and impact of change in women's political status on their social-economic empowerment.[85]

E. The key strategies for women's agency in the Twelfth Five Year Plan (2012-17)

The commitment of the Government towards gender equality continues and the report of the Working Group on Women's Agency and Empowerment (XII FYP) states that empowerment of women is a socio-political ideal, encompassing notions of dignity and equality, envisioned in relation to the wider framework of women's rights.[86] The key strategies for women's agency in the Twelfth Plan have been identified as: (i) Economic Empowerment; (ii) Social and Physical Infrastructure; (iii) Enabling Legislations; (iv) Women's Participation in Governance; (v) Inclusiveness of all categories of vulnerable women, (vi) Engendering National Policies/ Programmes; (vii) Mainstreaming Gender through Gender Budgeting.[87]

F. Aajeevika a National Rural Livelihoods Mission (NRLM)

National Rural Livelihoods Mission (NRLM), one of the world's largest poverty eradication programs seeks to organize 80-100 million rural women into Self Help Groups (SHGs), over a period of 10 years and continuously nurture and support them

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81 *Id.* at 6.
82 *Ibid.*
83 *Id.* at 7.
84 *Ibid.*
85 *Id.* at 8.
86 *Id.* at 22.
87 *planningcommission.gov.in/plans/planrel/12thplan,* (accessed on 07/07/2015).

through their federation till they attain significant increase in income and improve their quality of life and come out of abject poverty.[1] NRLM would mobilize at least one woman member from all poor households in the country into the Self Help Group (SHG) network fold over the next ten years.[2] NRLM ensures that the members have the requisite skills to manage the institutions. It provides capacity building/training in repeated doses on various issues such as group dynamics, leadership, bookkeeping, decision-making in the group, planning, resource utilization, etc.[3]

5. Present Status of Women's Political Participation in India

There is only 22 per cent of all national parliamentarians were female as of January 2015, a slow increase from 11.3 per cent in 1995.[4] As of January 2015, 10 women served as Head of State and 14 served as Head of Government.[5] There is a wide variations remain in the average percentages of women parliamentarians in each region, across all chambers (single, lower and upper houses).[6] As of January 2015, these were: Nordic countries, 41.5 per cent; Americas, 26.3 per cent; Europe excluding Nordic countries, 23.8 per cent; sub-Saharan Africa, 22.2 per cent; Asia, 18.5 per cent, the Middle East and North Africa, 16.1 per cent; and the Pacific, 15.7 per cent.[7] Globally, there are 38 States in which women account for less than 10 per cent of parliamentarians in single or lower houses, as of January 2015, including 5 chambers with no women at all.[8] Rwanda had the highest number of women parliamentarians worldwide women have won 63.8 per cent of seats in the lower house.[9] India has been placed on 105th position with 66 women members in 16th Lok Sabha, 2014[10] and 31 women members in Rajya Sabha, as on April 21, 2015.[11]

The marginalization of women in electoral politics is deeply embedded in the party system and the imbalanced gender power relations in the main political dispensations in India.[12] They continue to be discriminated against not only in terms of seat allotments to contest elections but also within the rank and file of major political parties.[13] There is an analysis of the women representation from the first Lok Sabha (1952) to sixteenth Lok Sabha (2014) as follows:

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1 *http://aajeevika.gov.in/*, (accessed on 07/07/2015).
2 *Supra* note 60, at 64. See more at: *www.unwomen.org/~/media/.../sections/.../india_review_beijing20.pdf.*
3 *Ibid.*
4 *Supra* note 9.
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *http://164.100.47.132/LssNew/Members/women.aspx*, (accessed on 21/04/2015).
11 *http://164.100.47.5/Newmembers/women.aspx*, (accessed on 21/04/2015).
12 Praveen Rai, *Election 2014: Imbalanced participation of women*, available on *http://blogs.reuters.com/india-expertzone/2014/06/13/election-2014*, (accessed on 23/04/2015).
13 *Ibid.*

Table: Women Representation in Lok Sabha (1952-2014)

Lok Sabha	Total no. of seats (Elections Held)	No. of Women Members who won	Percentage
First (1952)	489	22	4.4
Second (1957)	494	27	5.4
Third (1962)	494	34	6.7
Fourth (1967)	523	31	5.9
Fifth (1971)	521	22	4.2
Sixth (1977)	544	19	3.4
Seventh (1980)	544	28	5.1
Eighth (1984)	544	44	8.1
Ninth (1989)	529	28	5.3
Tenth (1991)	509	36	7.0
Eleventh (1996)	541	40*	7.4
Twelfth (1998)	545	44*	8.0
Thirteenth (1999)	543	48*	8.8
Fourteenth (2004)	543	45*	8.1
Fifteenth (2009)	543	59	10.9
Sixteenth (2014)	543	61	11.2

Note: * Including one nominated member

Source: Election Commission of India

In 1952, women constituted 4.4 percent of Lok Sabha members, and now account for around 11.2 percent, but it is still below the world average of 22 percent. Both national and regional parties are following the policy of exclusion of women in allotting seats. Women make up 49% of India's population, but hardly get any attention during the elections.[14] As from interviews to live coverage, its men who occupy Centre stage.[15] But in the 2014 General Elections for 16th Lok Sabha things were a little different. Different political parties tried to show their concern as they have mentioned some promises in their manifestos.

When Aam Aadmi Party (AAP) has promised to address women's safety, BJP & Congress have sworn to expedite a legislature that guarantees 33% reservation for

14 *Indian Politics: Women Candidates in 2014 Lok Sabha Elections*, http://mybigredbag.com/indian-politics-women-candidates-in-2014, accessed on 21/04/2015.

15 *Ibid.*

women in the Lok Sabha.[16] But if we analyze the seat allotment to women candidate in 2014 General Elections, we can easily find out the difference between the promises made by these political parties and the true implementation of those promises. BJP allotted only 37 seats to women candidate which is even lower than the Congress of 57 seats. However, an analysis of the success rate of women candidates as compared to men reveals that it has been higher in the last three general elections. In 2014, the success rate of women was 9 percent as compared to men at 6 percent.[17]

Although, women are still under represented in Indian Legislative system and marginalized in all political parties, but their enthusiasm as voters should be appreciated. In the case of India, we find that women exercise their right to vote in large numbers, although participation as candidates and as officeholders is much lower.[18] Their participation in the electoral process as voters has steadily increased from 46.6 percent in 1962 to around 65.7 percent this year and the difference in voter turnout among men and women, as wide as 16.7 percent in 1962, has narrowed to 1.5 percent in 2014.[19]

5.1 Reason for Low Political Representation of Women

The Indian female marginalization from electoral participation stems mainly from political party competition, as national political parties and regional parties in the states discriminate not only in terms of seat allotments in the electoral fray, but also in the party rank and file and chain of command.[20] Political parties also discriminating women in allotting the seats due to the wrong perception that they lack the winning ability. As we have seen in 2014 General Election, the success rate of women was 9 percent as compared to men at 6 percent. Therefore, it has been proved a myth regarding the wining ability of women.

Another reason for low political representation of women is education, as they are uneducated and more dependent on men. Although Government of India had taken certain initiatives regarding educational betterment of women after Fourth World Conference on Women held in Beijing during September 1995 but according to 15th official census in India which was calculated in the year 2011, the literacy rate of Indian women is still 65.46 per cent.[21] This is the reason why many scholars have used the word proxy or token for the women who are vested only with the formal power while the real power still resided with the male members of their family.[22]

Traditions prevailing in rural India are also a reason for lower political representation is India. Even today in rural India, women are not frequent to talk in the society due

16 *Ibid.*
17 Rai, *Supra* note 101.
18 Leason, *Supra* note 35, at 106.
19 *Ibid.*
20 Rai, *Supra* note 6, at 47.
21 http://www.census2011.co.in/literacy.php, accessed on 09/07/2015.
22 Pragya Rai, *Political Representation and Empowerment: Women in Local Government Institutions in Bihar, India*, Stockholm University, Department of Political Science, Stockholm, Sweden, at 25.

to their traditions.[23] In such a situation it is only a *pipe dream that they will ask for the equal political participation.* A patriarchal society in India is also responsible for low political representation. Although, the 73rd and 74th Amendments (1992) to the Constitution of India have provided for reservation of one-third seats in the local bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels. But when it comes to attained the meeting in those Panchayats, women candidates are not getting enough due to their household activities. This is also known as Psychological or Ideological obstacles.

Economic dependency is another strong factor for the low political representation in India. After the Beijing declaration during September 1995, Government of India had tried a lot in this regard and initiated many policies and programme to make Indian women economically self-dependent. For example Government of India has recently announced the Jan Dhan Yojana, which aims at eradicating financial untouchability by providing bank accounts to the poor. The account holders will be provided zero-balance account with an accidental insurance cover of Rs. 1 lakh. Under the scheme priority will be given to women.[24] Few other initiatives had been taken by Indian Government as Bharatiya Mahila Bank Ltd is the first of its kind in the Banking Industry in India formed with a vision of economic empowerment for women. The Bank was inaugurated on 19 November 2013.[25] These reasons are not exhaustive but only inclusive with many other reasons for low political participation of women in India. And a further research is a need of the hour to identify those reasons responsible for women lower participation and representation in Indian political system and decision making.

6. Conclusion

> *"I would boycott that legislature which will not have a proper share of women members"*[26]
>
> —*Mahatma Gandhi*

Abovementioned statement of Mahatma Gandhi is sufficient to understand the importance of equal political representation of women in Indian Legislature. Equal treatment to women has been enshrined in the Constitution of India but it would become effective only when it starts from the grassroots level. Mahatma Gandhi also reiterated this mechanism of self-governance at village level. In this regard the 73rd and 74th Amendments (1992) to the Constitution of India have provided for reservation of one-third seats in Panchayats and Municipalities for women. It was a historic step for the empowerment of India women through the strong political participation which also laid down a strong foundation for their participation in decision making at the local levels. Further, the Central Government has also proposed to increase the percentage of reservation of seats for women in PRIs from

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23 *Ibid.* at 44.

24 *Supra* note 60, at 62. See more at: *www.unwomen.org/~/media/.../sections/.../india_review_beijing20.pdf.*

25 *Id.*

26 *http://www.mkgandhi.org/articles/women1.html*, (accessed on 09/07/2015).

one-third to one-half. However, several states such as Andhra Pradesh, Bihar, Chhattisgarh, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, and Tripura have already amended their respective Acts to provide 50% reservation for women. But the picture is totally different when it comes to the Indian Parliament, where we have only 11.2 per cent representation of women which much lower than the world average of 22 per cent as of January 2015.

The battle for greater representation to women in Lok Sabha and State Assemblies was routinely punctuated by frayed tempers and war of words which sometimes got physical, as different governments since 1996 tried to get the Women's Reservation Bill passed in Parliament without success.[27] The Bill also lapsed each time the House was dissolved and was re-introduced by the Government of the day. Pursuant to this the UPA-I government introduced a bill the Constitution (108th Amendment) Bill, 2008, commonly known as the Women's Reservation Bill, seeks to reserve one-third of all seats for women in the Lok Sabha and the state legislative assemblies. It was the historic moment in Indian political system when Rajya Sabha passed this bill in March 2010. But unfortunately this bill had lapsed following the dissolution of the 15th Lok Sabha.

Recently in April 2015, Law Minister Mr. D V Sadananda Gowda informed the 16th Lok Sabha that it has been the endeavor of the government to provide for reservation of one-third seats for women in Lok Sabha and state assemblies but the issue involved needs careful consideration on the basis of consensus among all political parties before a bill for amendment in Constitution.[28] This is very unfortunate that we are approaching the 20th Anniversary of Beijing Declaration where we had committed to improve women's political participation in India but again political parties are playing their game to avoid such an important bill. Therefore, this is the need of the hour that all political parties should come up together at least for this issue which is important for the empowerment of women as well as empowerment of the country.

27 *Women's Reservation Bill: The story so far*, The Hindu, March 7, 2015, See more at *http://www.thehindu.com/news/national/womens-reservation-bill-the-story-so-far*, (accessed on 09/07/2015).

28 *http://zeenews.india.com/news/india/women-reservation-bill-will-be-tabled-in-parliament-after-careful-consideration-govt*, (accessed on 09/07/2015).

FORM IV

(See Rule 8 of the *Registration of News Papers (Central) Rules*, 1956 under the *Press and Registration of Books Act*, 1867)

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I, Professor (Dr.) G I S Sandhu hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
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