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EDITOR'S NOTE

Law emanates out of the mores and is renowned by being backed by state force. Social life has a dynamics of its own, while law has no independent existence but is an offshoot of the changing society - deeply rooted in the processes of social development yet virtually immobilized to modify them. Law and society are not only interconnected but they are not really discrete entities at all. From the law and society perspective, law is everywhere not just in Supreme Court decisions or in Parliamentary statutes. Every step in our life is infused with law, from the moment we rise in the morning, from our certified mattresses (purchased under a ten year warranty) to our ride to office in the car pool and so on for the rest of the day. Law is integrated into the mundane machinery that makes social life possible.

However, the nature of laws expedition off the books and into action, the constraints of these agendas, and the apparatus of legal-meaning-making diverge by social settings and its corresponding social processes. At the end of the day, what really matters is to understand the gap between formal law and real law which come up as a result of racial, political or class biases, institutional dilemma or structural contradictions and discretionary power of law enforcement agencies. Hence law on the books is almost ambiguous and is exploited to construct legal meanings consistent with ideological, institutional, economic or practical schemes.

This volume of our Journal of Law and Society provides the link between various laws in India within the social, economic and cultural contours of the Indian society. The present volume addresses issues in regard to the miscellaneous magnitude of law and its relevance in addressing the complexities of present society: bio-piracy, biodiversity exploitation, compensation policy, extradition, medical confidentiality and Right to Information 0.Act, corporate governance, police public relationship, sexual harassment at workplace, female foeticide, live-in relationships - the scope is vast ranging from the environment to the very private domain.

The broader informative idea in law and society scholarships is that law, far from an autonomous entity residing somewhere above the fray of society coincides with the contours of our society and is an indissoluble part of the skirmish within the society. Our vision is for the journal to become an open platform for a constructive and critical dialogue between legal academics and other social science scholars.

Prof. (Dr.) N.K. Chakrabarti

EXPLAINING 2014 MANDATE IN INDIA

Surya Narayan Misra*

ABSTRACT

The mandate of 2014 hinted towards 'Good Governance'. The young and middle class voters were suffocated due to shuggish growth and policy paralyses. The entry of Modi and the rosy picture of 'Gujarat Model of Development' influenced this voting class. They hoped for growth, employment and development. Modi has aroused high expectations among them.

Keywords: Parliamentary Democracy Representatives Government, Coalition Politics, NDA, UPA, Electoral Campaign, Modi Magic, NAMO Effect, Good Governance, Congress System.

I

India went to the polls in 2014. Being the largest electoral democracy, the lovers of democracy all over the world watched the electoral process and the electoral campaign. The verdict which came out on 16th May, 2014 was clear and emphatic. Out of 814 million electorate there was a record turn out of over 66%. The result ended a thirty years politics of confusion and instability. After the unprecedented sympathy wave of 1984 due to cruel assassination of the then Prime Minister Indira Gandhi, no other election held in 1989, 1991, 1996, 1998, 1999, 2004 and 2009 provided a clear mandate and vote for one party to form government. The 2014 election will also be remembered for the fact that one non- congress party could secure a comfortable position to form government on its own. The mandate for many is for "Good Governance".

Indian elections are typically Indian in nature. Since 1952 the Indian National Congress was on one side and other non-congress parties on their own strength fought the elections. The absence of non-congress combination led to the birth of 'Congress System' in the word of Rajni Kothari.

The first three elections caused one party dominant era' and the first Post- Nehru era election held in 1967 created some hope among the opposition to wrest power from congress if there is an opposition combine. In 1971 the

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attempt misfired as congress under Indira Gandhi was strategically ahead of 'anti - Indira Campaign' of the so - called opposition combine. Indira and Congress lost me election of 1977 not because of the presence of a formidable opposition, but because of host of domestic issues, emergency and loss of freedom for masses.

Since 1971 issues appeared before the electorate on the eve of elections. The Western psephologists have located 'party identification', 'candidate orientation' and 'issue consciousness' as indicators of electoral behaviour in a democracy. India experienced 'party identification' during the formative years of our parliamentary democracy. But 1977 brought issues to the centre-stage and it was fight between 'order' and 'freedom' representing 'Congress' and non-congress opposition 'Janata Party'. The failure of non-congress government at the centre to deliver brought back India to power in 1980 and her assassination to Rajiv led Congress in 1984. Since 1989 all the election could not locate any of the variables to be strong enough to win elections.

Since 1989 the 'Coalition era' at the centre emerged. Of course, 1967 election caused its rise at the state level. The nature of the party system in India shaped the structure of coalition governments. The elections in India were not free from being controlled by either caste or region. In 1990 the polarization process got stabilized due to 'Mandal' and 'Mandir' related matters. The fall of V. P. Singh government was the beginning and the climax was reached through the desecration of 'Babar Masjid' in December, 1992. Ultimately two fronts - Secular and Communal fronts emerged of which congress and BJP were the lead parties. BJP decried being named as communal and it projected its 'Hindutira' agenda. The 1996 election exposed the nature of anti - BJP formation. This paved the way for 'National Democratic Alliance' under BJP and later 'United Progressive Alliance' under Congress. The NDA remained in power from 1998 to 2004 and the UPA I and UPA II consumed ten years from 2004. The 2014 election was held when UPA - II was facing anti - incumbency and NDA was capitalizing on failure of UPA and leadership of 'NAMO'.

II

We are living in an age of 'Representatives Democracy'. Elections are vital for such type of dispensation. "Elections are particularly conspicuous and revealing aspects of most contemporary political systems. They highlight

and dramatize a political system bringing its nature into sharp relief and providing in sights into other aspects of the system and the basic nature of actual functioning of the system as a whole. During an election a political system is on display". (PALMER : 1976)

Further, "elections are complex events involving individual and collective decision which directly affect and are affected by the total political and social process. They open up channels between the individual and his government. Elections are major agencies of political socialization and political particulation" (PALMER).

In a democracy elections provide the basis of people's choice and representation. They help people to crystallize their interest and give expression to them. Elections help to arrive at decisions about who shall govern and who shall have control over the government. Elections are substantive processes of political participation and they cause political mobilization of masses.

"It is through the process of elections the peripheral groups transcend their regional and caste identities and acquire over a time a certain communality of economic interests and political identification which help establish a political framework of conflict and negotiation among divergent interests within the society" (SHETH : 1975)

Elections have become normal features of political systems. They vary from one political system to another. "Elections are among the most ubiquitoces of contemporary political institutions and voting is the single act of political participation undertaken by a majority of adults in a majority of nations today" (CROSE AND MOSSAWIR : 1967)

Elections may be considered variously as devices for LEGITIMACY, IDENTIFICATION, INTEGRATION, COMMUNICATION, PARTICIPATION, SOCIALISATION AND MOBILISATION as well as for POLITICAL CHOICE AND POLITICAL CONTROL" (BUTLER :1961)

Elections help political parties to maintain their support bases and establish link between the society and the political system. The relationship between the electoral systems and the party systems are mutually interacting.

Elections play crucial role in the process of political development which refers to the increasing capacity of a political system to meet the increasing

demands made on it. Further elections introduce the important element of accountability into a political system and provide a means by which such accountability is achieved in greater or lesser degree.

Elections may be used or interpreted as a plebiscite, a referendum or a mandate. They are the means for choosing leaders, for determining who shall govern. They are also a means for influencing the elected government. They help to ensure the responsiveness of the leaders to the people as a whole.

Again, elections provide the means for the peaceful and orderly transfer or power, for dealing with vexing problem of succession, for the routinization of political change.

On elections celebrities like Duverger, Huntington, Myron Weiner, Sydney Verba and Milbrath had written voluminously and all of them agree with the role of election in political choice in all categories of political system. In this article I will deal with the prelude and the result of 2014 general elections in India.

III

The General elections of 2014 was the largest as well as longest election in the history of Indian democracy. It commenced from 7th April and casted up to 12th May being conducted in nine phases. The size of the electorate was over 81 crores which was more than 10 crores over the electorate size of 2009. The addition of new voters to the size of the electorate is more than the combined population of the United Kingdom and Poland. It is to be remembered that India adopted the universal suffrage in 1951 and in the first general election the size of the electorate was 17 crores. The voting percentage in that election was 45%. In 2009 the voting percentage was 59% of 71 crores of voters. In the 2014 election 66% of the total electorate recorded their choice.

The 2009 election was important due to several factors. In 2004 NDA (National Democratic Alliance) led by BJP failed to get appreciative nod from the electorate. It paved the way for the creation of a post - election anti - BJP combine called UPA (United Progressive Alliance). The Left Front was very active in this formation. In the UPA - I left played a crucial role. But it distanced from UPA on the issue of civil nuclear deal with the United

States. Thus the 2009 election experienced UPA being targeted by BJP led NDA and the left front. The result went in favour of congress led UPA.

TABLE - I SEAT AND VOTE SHARE OF MAJOR POLITICAL PARTIES IN LOKSAHBA (2009)

Party	Seat	Vote %
INC	206	28.55
BJP	116	18.80
NCP	09	2.64
RJD	04	1.27
SP	23	3.42
BSP	21	6.17
CPI	04	1.43
CPM	16	5.33
State Parties	146	25.02
Registered unrecognized	12	2.18
Independents	09	5.19

Source - Election Commission of India (Pocket Book)

In the election of 2009 despite left opposition the performance of Congress was good and it crossed 200 seat mark which had eluded it since 1989. BJP which secured 182 seats in 1999 was reduced to 145 in 2004 and its poll performance in 2009 was a shock to the party and its leadership. The Left Front could not restrict UPA to capture power with refurbished image.

The 2014 General Elections assumed particular importance due to several factors - (a) there was addition of 10 crore new voters and vast majority of them were young in age but longing for change and opportunities; (b) a stupendous task for the Election Commission to conduct such a gigantic poll with full technological assistance like EVM, EPIC and horizontal expansion of the poll dates for smooth conduct; (c) for the first time NOTA (none of the above) was introduced in the EVM which gave the voters the right to reject undesirable candidates and contestants with known/ proven criminal

background; (d) the rising expectations of the electorate that the election would usher in a new era of stability and eradication of twin challenges emerging out of poverty and corruption, and (e) this election also caused rising tension and worries among the masses that the post - poll scenario might get worse due to a fractured verdict.

During the coalition era both NDA and UPA shared power. The NDA formed government from 1998 to 2004 and the UPA which was a post - poll arrangement in 2004 remained in power till 2014 election was held. When the 2014 election dates were announced the party combinations in Lok Sabha were as follow - UPA - 262, NDA - 159, Third Front - 79, Fourth Front - 27 and others - 16.

The sign of change in the electoral scene were observed from July, 2013. The BJP pursued an aggressive election agenda by announcing Narendra Modi as its Prime Ministerial candidate to utter dismay of NDA partners particularly JD (v) and its Bihar CM Nitish Kumar. As against this, the INC which was going through an identity crisis with a proxy Prime Minister could not provide a smart rejoinder. Further both the Yadav's of UP and Bihar initiated their game plans for an alternative front but the Bihari Yadav wished to remain with its old ally. Attempts were also made to combine Kokata's Banerjee and Chennai's Jayalalitha with Bhubaneswar's Pattnaik having strong support base in their fort, Left was watchful.

Eversince Modi was declared as BJP's PM candidate, the hi - tech populist leader initiated his campaign through whirlwind tours to different parts of the country and projected a golden era under BJP through security, investment, trade development and inclusive growth. Both the centrist parties - INC and BJP echoed growth but the later urged for economic reform with growth and development.

The Modi - Magic was observed when all the opinion polls projected BJP with increasing seats from January, 2014 onwards. The electoral battle was further sensitized due to entry of latest wonder Kejriwal and AAP which targeted both INC and BJP and claimed support from people after their electoral success in the NCT election.

The longest period spanning from April to May had the briefest end with result coming on 16th May. All expectations were belied as everyone thought

of touch and finish for NDA or NDA falling short of 10 to 20 seats. The result itself was eye-brow raising rot because BJP making it on their own but by the performance of INC which sunk so low that even no opinion poll ever predicted. The table below provides an overall picture of the result.

TABLE - II 2014 LOKSABHA POLL AND MAJOR PARTIES

PARTIES	SEATS (secured)	% OF VOTES	% OF SEATS
BJP	282	31.0	51.9
INC	44	19.3	8.1
BSP	0	4.1	0
AITC	34	3.8	6.2
SP	05	3.4	0.9
AIADMK	37	3.3	6.8
CPU	09	3.3	1.7
BJD	20	1.7	3.6
Shivsena	18	1.9	3.3
TDP	16	2.5	2.9
Other	78	25.7	14.6

Source: Election Commission of India

The result of election experienced the rising Modi - magic and NAMO effect and Modi became the second Chief Minister after Deve Gowda to lead a non-Congress government after 'Janata Era' of 1970's. the centenary party INC was decimated beyond repair and even it lost its claim to be official opposition. The new combination provided NDA - 336, UPA - 60 and others 147 seats in Loksabha.

The mandate of 2014 hinted towards 'Good Governance'. The young and middle class voters were suffocated due to shuggish growth and policy paralyses. The entry of Modi and the rosy picture of 'Gujarat Model of Development' influenced this voting class. They hoped for growth, employment and development. Modi has aroused high expectations among them.

There is a dawn of new era. The NDA is not suffering from coalition compulsions like that of UPA - I and UPA - II. The absence of BSP and DMK in Loksabha and the skeletal presence of both the Yadavs are promising good and healthy debate. Three states (Odisha, Tamilnadu and West Bengal) which claimed 91 seats in the house are known for their anti - congress stand and a persuasive PM in Modi is likely to get their support if not opposition.

All said and done, the challenges before the new government are many. They are (a) The electorate is impatient and waiting for meaningful charge, (b) availability of inclusive and equitable opportunities, (c) the vast Indian eco - system of institutions and critical infrastructure is creaking and mired in stasis. (basic education, health, jobs, connectivity, modernisation of agriculture and investor's confidence) (d) challenges coming from endemic corruption and indecision.

All the above disturbing notes provide a daunting task before Modi government. But he seems to mean business and has given hints as a strategist. Before rising expectations become rising frustration it is hoped that, the political change in India will cause peoples' government replacing party government.

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NEW TYPE OF BIO-PIRACY AND MISAPPROPRIATION OF TRADITIONAL KNOWLEDGE ASSOCIATED WITH MEDICINAL PLANTS IN INDIA

Gangotri Chakraborty* and Partha Pratim Paul**

Abstract

Traditional knowledge in any form has unimaginable potentiality in any national economy. If properly utilised, it can change the whole face of Indian economy as it has huge treasure of it. But one of the impediments on its way is bio-piracy of Traditional Knowledge especially with Indian medicinal plants, where its commercialisation has been taking place without paying for its use to the original holders or to the society. It so has happened because traditional knowledge is not a recognised form of intellectual property and there is lacuna in the existing laws. As a result of unfair commercialisation, India has lost and would be losing huge amount of money. Patenting of medicinal property either by suppressing or derecognising the existing traditional knowledge is the known form of bio-piracy; but there is another type of bio-piracy in India. In this article, a type of commercialisation in India is pointed out as another form of bio-piracy, where neither the country nor the holder of knowledge gets a fair share out of the profits; but it was not attracted any notice so far from IPR perspective. New form of bio-piracy is occurring by the companies and trusts that manufacture and sell ayurvedic medicines. Here the medicinal values of the plants are not claimed as their inventions, but they commercially exploit it without paying anything. It implies that what can be done with patent, same thing is done without it; the consequences are same. Moreover this article also advocates for the enactment of a comprehensive law in India to protect traditional knowledge associated with medicinal plants.

Keywords: Traditional Knowledge of India, Medicinal Plants and Traditional Knowledge, Misappropriation of Traditional Knowledge, Society Oriented Intellectual Property, Bio-Piracy of Medicinal Plants, Bio-Piracy of Plant-Genetic Resources.

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I. Introduction

The treasure of thousands year-old knowledge of ancient India is a matter of pride for its citizens. Indians are fortunate to have been the holders of such a huge knowledge base in diverse fields of art, philosophy, language, literature, science, technology so on and so forth; these have become an integral part of rich cultural heritage of this country. This ancient knowledge has a huge potentiality to transform the whole of India's economy if explored and utilised properly if the country aspires to tap its traditional knowledge base (through further research and development) to generate sufficient fund for the all-round development. One such area is its traditional knowledge associated with medicinal properties of the plants, at every corner of this country. This traditional knowledge with a strong scientific base is unique in the world i.e. ayurveda, siddha, unani etc. The plants, more specifically its genetic resources not only can do wonders by curing small or serious types of illness, but also can guarantee as precautionary measure to prevent disease. Over the centuries India has successfully preserved the methods and means to ensure healthy lives in a unique way. A pertinent question is 'what is traditional knowledge'? Basically it is the age old knowledge of the indigenous community or tribal community, passed on to the present generations. But this understanding has some inherent limitations. In India, in most of the cases, the traditional knowledge is not identified with any small particular community-indigenous or tribal i.e. neem, turmeric, aloe vera, karela tulasi, brahmi etc.; the basic medicinal values of these plants are the knowledge of the whole society. Hence, it would be appropriate if traditional knowledge is accepted as the century old knowledge of indigenous communities and societies in general. Over here, Prof N.S.Gopalakrishnan's observation[1] (1998) is enlightening:

> (a). traditional knowledge can be generally described as information existing in the society which has been passed on by the previous generations. This includes *inter alia* the information regarding the product, its use, the manner of use and the method or manner of its manufacture. The peculiar characteristics of this knowledge base are the

[1] Prof. N. S. Gopalakrishnan, Impact of Patent System on Traditional Knowledge, Cochin Uni. L.Rev. 219, 220-221 (2008).

inability to identify in many cases the original creator of the information. In many cases the holder of the information in the previous occasion must have modified it to suit the then existing requirements. This knowledge can be conveniently classified into the following categories. (a). Information commonly known to the society with or without documentation and is in constant use by the people; (b).Information that is well documented and is available to the public for examination and use; (d). Information that is not documented or commonly known but known only to small groups of people and not revealed to others outside the group; (e) Information known only to individuals or members of the families and none else.

World Intellectual Property Organisation, a specialised agency of UNO has given a very broad definition of Traditional Knowledge (TK)[2] with a sharp focus on the nature of tradition which is as follows:

> What makes knowledge "traditional" is not its antiquity: much TK is not ancient or inert, but is a vital, dynamic part of the contemporary lives of many communities today. It is a form of knowledge which has a traditional link with a certain community: it is knowledge which is developed, sustained and passed on within a traditional community, and is passed between generations, sometimes through specific customary systems of knowledge transmission. A community might see TK as part of their cultural or spiritual identity. So it is the relationship with the community that makes it "traditional". TK is being created every day, and evolves as individuals and communities respond to the challenges posed by their social environment. This contemporary aspect is further justification for legal protection.

So, basing on this, traditional knowledge can be described as the knowledge which exclusively vests in a community or family or small groups or the society in general and includes the know-how, informations, innovations, applications, common practices and adaptations etc, which may be un-codified or informal or contained in codified or formal knowledge

[2] Intellectual Property And Traditional knowledge, WORLD INTELLECTUAL PROPERTY ORGANISATION-BOOKLET NO: 2 (June 19, 2014, 03:56 PM), http://wipo.int/export/sites/www/freepublications/en/tk/920/wipo_pub_920.pdf.

systems passed from the previous generation to the next generation, through the process of socialisation. The knowledge is also further developed from experience and research gained over the time, with a value addition to the existing knowledge. The present generations are the protector, preserver and trustees of this great knowledge and as such have different types of socio-legal-cultural and economic rights and obligations attached to it.

The quintessence of intellectual property is its ingenuity and innovativeness i.e. creativity of human nature and characteristics. It is the outcome of the inner passion of the human beings to invent and innovate with new ideas. The cognitive exercise of brain and imagination of mind with a quest to solve unresolved problems or with an endeavour to solve the problems in a better way is the driving force. This world has progressed immensely in different dimensions and has reached today's level due this; there shall not be any end of this endless effort in future also; there is going to be continuous creation of intellectual property from the interplay of mind and intelligence as long as human beings are in this world. Basically the intellectual property right is just the recognition of fact of this fundamental contribution to enhance the existing level of knowledge farther.

There are different types of intellectual property under the present legal frameworks. Invention is such a property if it fulfils the criteria of is novelty, non-obviousness or inventive step and utility or industrial application. There are different categories of rights over these properties i.e. intellectual property rights (IPR). Patent is one of such intellectual property rights over actual invention, when it fulfils the above-mentioned criteria. Traditional knowledge regarding the medicinal values of the plant-genetic resources is an invention emanating from intelligence and innovativeness. Though it fulfils all the criterion of intellectual property, but century old invention cannot fulfil the criterion of novelty and non-obviousness, to be qualified as invention for patent in today's WTO regime. From society oriented perspective, it does not fit in the present conventional individual-centric IPR legal framework. There should be a paradigm shift to understand and appreciate some new forms of IPR like traditional knowledge. Though it is a different issue altogether, but this deserves effective legal protection like other conventional types of IPR as it is also the result of so much of toil, hard work, study, research and experimentation, observation, trial, error, success and failure-

an intellectual and cognitive exercise of mind and brain of the people over centuries. The dictionary meaning of the term 'intellectual property' is worth mentioning here. The Oxford English Dictionary[3] (1991) defines it as "property which is the product of invention or creativity and which does not exist in a tangible, physical form". The New Shorter Oxford English Dictionary[4] (1993) defines it as "to descend from spirits and intellectual forms to sensible and material forms." With these definitions in mind, there is no justification in denying traditional knowledge from getting recognised as another type of intellectual property by WTO countries. Traditional knowledge associated with medicinal plants fulfils all the criteria of the aforesaid linguistic definitions. World Intellectual Property Organisation's (WIPO) concept of intellectual property (2008)[5] is also in the similar line which implies that intellectual property shall include rights relating to inventions in all fields of human endeavour (but under WTO-TRIPs regime is not an accepted):

> Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.

Hence, it would be wrong if traditional knowledge is left out of the purview of dynamic nature of intellectual property rights.

A serious concern is that there have been hundreds and thousands of instances of bio-piracy in the form of patents over the medicinal properties

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[3] The Oxford English Dictionary, Vol-VII, 1068 (2nd ed. 1991).

[4] The New Shorter Oxford English Dictionary On Historical Principles, Vol-I, 1387 (3rd ed. 1993).

[5] The Concept Of Intellectual Property, WIPO INTELLECTUAL PROPERTY HANDBOOK (May. 16, 2014, 08:33AM), http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo_pub_489.pdf.

associating with India's traditional knowledge. The patentees all over the world claimed that they themselves have invented the medicinal properties of the herbs or plants by way of excessive research which are novel and non-obvious in nature and there is no such existing knowledge or prior art in this area. Some of the examples were reported in Times of India[6] (2009):

Ginger is patented to treat obesity. However it is found that in a siddha preparation, extracts of ginger-root are used in a treatment for obesity. Citrus-peel extract is patented to treat skin disorders and injuries. It is recorded in Ayurvedic texts as a key ingredient to treat skin diseases. Phyllanthus-amarus is patented for the inhibition of the replication of a nucleosidic inhibitor resistant retrovirus and/or a non-nucleoside inhibitor-resistant retrovirus, wherein said retrovirus is an HIV. Indian traditional texts show the drug is used for immuno-supressive emaciating diseases. Brassica-rapa is patented to normalize bowel function or for the prevention of colonic cancer. Unani has prescribed it for the purpose ofstomach ailments." Researchers found that in Europe one company had patented an Indian creeping plant-Brahmi-Bacopa-monnieri for memory enhancer. Another patent was awarded for Aloe Vera for its use as a mouth ulcer treatment.

These are not the ends. There are patents on Kumari-(Aloe Barbadenis), Amaltas- (Cassia Fistula), Kala Jeera- (Cuminum Cyminum), Harad-(Terminalia Chebula), Aswagandha- (Withania Somnifera), Kali Marich-(Piper Nigrum), Erand- (Ricinus communis), Amla- (Phyllanthus Emblica), Jar Amla- (Phyllanthus Amarus), Anar-(Punica Granatum), Dudhi- (Euphoria Hirta), Karela- (Momordica Charantia), Rangoon-Ki-Bel, Shallaki-(Boswellia Serrato), Jangli Erand-, (Jatropha Curcus) Bhu Amla- (Hillanthus Niruri), Rangoon Creeper-(Quisqualis Indica), Arjun- (Terminalia Arjuna), Guruchi-(Tinospora Cordifolia), Chhotagokhuru- (Tribulus Terrestris), Ber- (Zizyphus Jujuba), Adrakha- (Zinziber Officinale), Latjira- (Achyranthes Aspera), Dhaya-(Woodfordia Floribunda), Neem- (Azadirachta Indica) etc." Guardian Newspaper reported[7] (2009):

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[6] India Protects Remedies from Foreign Patents, THE TIMES OF INDIA (New Delhi) February 27, 2009, at 01.

[7] India Moves to Protect Traditional Medicines from Foreign Patents, THE GUARDIAN (Feb. 22, 2009, 1:17 PM), http://www.guardian.co.uk/world/2009/feb/22/india-protect-traditional-medicines.

The scientists in Delhi noticed an alarming trend-the bio-prospecting of natural remedies by companies abroad. After trawling through the records of the global trademark offices, officials found 5,000 patents had been issued-at a cost of at least 150 million dollars for 'medical plants and traditional systems'. More than 2,000 of these belong to the Indian systems of medicine." It shows that there are open and clandestine attacks on traditional knowledge of India from different corners of the world. Commercialisation of these patents yields huge profits to the foreign multinational companies and others and traditional knowledge holders do not get their due share of the profits.

Apart from this conventional form of bio-piracy, there has been another form of its in India i.e. commercialisation of the traditional knowledge associated with medicinal plant-genetic resources of India without paying for their use or sharing the benefit. This type of wrong ad unfair use of traditional knowledge poses an actual and potential threat without any public or government's notice or attention so far over the years. Bio-piracy occurs in the sense that there is no payment for the commercialisation of society oriented intellectual property i.e. traditional knowledge. The holders of such knowledge do not get its due share and the whole profits are usurped by the others. This form of bio-piracy is rampant in all over India, but is not regarded as bio-piracy resulting in the gross violation of intellectual property rights. The bio-piracy occurs due to the production and marketing of ayurvedic medicines by various companies and trusts in India, by utilising traditional knowledge of medicinal plants. Some of them are Divya Pharmacy of Divya Yog Mandir Trust, Shree Baidyanath Ayurved Bhawan (P) Ltd, Dabur India Ltd, Himalaya Drug Company etc. The issue is that these companies and trust have huge annual turnovers and are earning immense profits from their business with traditional knowledge. They do this by using the active bio-chemical components of the genetic resources of the medicinal plants. They get information and lead from the centuries old traditional knowledge, utilise and subsequently commercialise them for profit making without paying for the use of society's intellectual property or without sharing the profits. Though they have not obtained patents because the patents cannot be granted for Traditional Knowledge in India, is not serving any fruitful purpose. To do the production and selling business they do not need patent at all. The

traditional knowledge which they are utilising, is either in TKDL or is in public use, not documented so far. But no law can prevent them from doing so without sharing benefits with the traditional knowledge holders or paying royalty to the country in the present set-up. This new type of bio-piracy (without patent) is encouraged, promoted, allowed or legalised in India. The point is that unless India's century old knowledge does not benefit deserving sections of the society, if few people usurp all the monetary benefits stemming from the application of knowledge, unless society can get its dues from the commercialisation of the knowledge, it is misappropriation and economic injustice to the society. Over here the society is deprived of getting its economic rights. The law should strive to ensure economic justice to the society; the legal framework should be flexible enough to balance society's economic interest or right with others. Otherwise role of IPR law would be losing its relevance in socio-legal-econo-political set up of a country. Where for paucity of fund, so many socio-ecomonic welfare measures are not initiated in India, but government is not exploiting the opportunity and allowing private bodies to earn huge amount of money and misappropriate huge sum from society's share.

Difficulty arises because present legal framework and the society do not treat the non-patent of commercialisation of Traditional Knowledge as unlawful commercialisation and violation of IPR. Difficulty arises because concept of bio-piracy does not cover this type of commercialisation of Indian traditional knowledge. Accepted concept of bio-piracy is patent-centric i.e. granting of patent by ignoring or suppressing existing traditional knowledge as prior art so as not to be treated novel and non-obvious. According to Dr. Vandana Shiva[8] (2001):

> Biopiracy refers to the use of intellectual property systems to legitimise the exclusive ownership and control over biological resources and biological products and processes that have been used over centuries in non-industrialized countries. Patent claims over biodiversity and indigenous knowledge that are based on the innovation, creativity and genius of the people of the Third World are acts of biopiracy. It refers to the collection, study and commercialization of biological and genetic

[8] Dr.Vandana Shiva, Patents: Myths And Reality, 49 (2001).

resources without the free and prior informed consent of source communities and countries, and the application of intellectual property rights on these resources in their favour.

The afore-said concept of bio-piracy has a limited scope; it does not include within its ambit some other forms of commercialization of society-oriented intellectual property (without having exclusive control and monopoly). Time has come to widen the concept of bio-piracy and to look beyond the conventional type of bio-piracy, so as to include 'non-payment of royalty or absence of benefit-sharing for the utilization of TK'; whether it is with patent or without patent does not matter.

II. Examples of Non-Patented Commercialisation of Traditional Knowledge of India

A.Ayurvedic Medicines of Divya Yog Mandir (Trust): There are several hundreds of ayurvedic medicines produced by Divya Pharmacy using different parts of medicinal plants. Some of the examples of these ayurvedic medicines are:

1.Divya Medohar Vati[9]: Useful in obesity and hyperlipemia: (1) First removes the disorders of digestive system and then reduces the extra fat and makes the body beautiful, compact, lustreful and active. (2) Especially useful in thyroid disorders (hypo and hyper thyroid), rheumatic arthritis, joint pains, pain in lumbar region and knee joints. (3) Digests the medas (fat) in the body and nourishes the successive tissue elements viz. Bone, bone-marrow and sukra (semen).

Sl. No.	Medicinal Plants Used
1.	Amla-Emblica officinalis
2.	Baheda- Terminalia belerica
3.	Harad-Terminalia chebula
4.	Kutki-Picrorhiza kurroa

[9] Vaidyaraj Acharya Balkrishan, Aushadh Darshan: A Reportorie Of Proven Miraculous Ayurvedic Remedies By Swami Ramdev, 15 (2005).

5.	Nishoth-Operculina turpethum
6.	Viavidang-Embelia ribes
7.	Harad chilka-Terminalia chebula
8.	Commiphora mukul
9.	Shilajee Asphaltum
10.	Babul gond- Acacia arabica

02. Divya Udara-Kalpachurna[10]:

Main Ingredients	Yasti-madhu (mulethi), Misreya (saunf), Svarnapatri (sanay), Revana-cini, Sata-patri (rose-flower), Haritaki (jangh harad), Misti (sugar-candy) etc.
Therapeutic Uses	(1). It is pitta-alleviating, mild purgative and non0evacing medicine.(2). Clears bowls and removes constipation, does not cause any type of burning or other complications in intestines(3) Stimulates digestion and digests 'ama' (undigested material caused by impaired digestion and metabolism).

03. Divya Kaya-Kalpa Kvatha[11]:

Main Ingredients	Seeds of Bakuchi (bavachi), Cakra-marda (panavad), Haridra (turmeric), Daru-haridra, bark of Khadira, seeds of karanja, bark of nimba, Manjistha, Amrta (giloy), Kirata-tiktata (chirayata), Kutaki, Candana, Deva-daru, Usba, Drona-puspi, etc
Therapeutic Uses	(1). Cures all types of skin diseases, eczema, kustha (obstinate skin diseases including leprocy), Slipada (filariasis).(2). Cleans bowels and helps in obesity.

[10] Id, at 4.
[11] Id, at 4.

04. Divya Gaisa-Hara Churna[12]:

Main Ingredients	Ajamoda (ajavayan), Marica (black pepper), extract of Lemon, Jiraka (cumin seed), Black salt, Jangha haritaki, Hingu etc.
Therapeutic Uses	(1). Digests food, so there is no occurance of gas, acidity etc., caused by indigestion.(2). Instantaneously cures feeling of heaviness of abdomen, flatulence, colic pain and anorexia after food.(3). This churna keeps away the gas from abdomen.

05. Divya Asmarihara Rasa[13]:

Main Ingredients	Yava-ksara, Muli ksara, Sveta-parpati, Hajarala, Yahuda etc.
Therapeutic Uses	(1).It dissolves deposited calculi and takes it out of the body; relieves complications as well as pains caused by it; removes oedema and pain of kidney; stops the tendency of stone formation. If used regularly for some time, patient gets relieved forever and no chance remains for stone-formation.(2).Cures the burning sensation in the urine and takes out deposited toxins from the body.

06. Divya Stri Rasayana Vati[14]:

Main Ingredients	Putranjivaka, Sveta candana, Kamala, Daaru-haridra, Vamsa-locana, Silajatu (mineral pitch), Satavari, seeds of Sivalingi, Parasa pipala, Madhu-yasti, Triphala, Ambara-dhana, Bijabanda (seeds of bala), Amalaka, Asoka, Mayura-piccha bhasma, Naga kesara, Asvagandha, deva-daru, Guggulu (pure) etc.

[12] Id, at 5.
[13] Id, at 2.
[14] Id, at 16.

Therapeutic Uses	(1).Cures all types of diseases of women viz., leucorrhoea, menorrhagia, irregularity in menstruation, pain in lower abdomen or lumber region.(2).Very useful in excessive bleeding during menstruation.(3).Useful in curing wrinkles on the face, dark circles below eyes, feeling of exhaustion in the body and laziness.

07. Divya Pidantaka Rasa[15]

Main Ingredients	Ajamoda (ajavayan), Nirgundi, Sobhanjana (sweet var), Asvagandha, Rasna, Musta, Maha-Vata-Vidhvamsana Rasa, Pravala pisti, Silajatu (Mineral pitch), Moti-pisti, Kupilu (pure), Hiraka bhasma, Dasa-mula, Amrta, Yograja guggulu, Mandura bhasma, Svarna-maksika bhasma etc.
Therapeutic Uses	Useful in Joint pain, Arthritis, Lumbar pain, Cervical spondylitis, Sciatica, gives immediate and permanent relief in all types of bodily pains.

08. Divya Shilajit Rasayan Vati:

Indication-Useful in Diabetes, Fatigue & General Debility: "Divya Shilajeet Rasayan Vati Produces positive effect on vatavahini nadi (nervous system), kidneys and channels which carry virya (semen). Divya Shilajeet Rasayan Vati vayu-alleviating, promoter of strength and the quantity of semen (spermatopoetic). It particularly useful in night fall swapnadosha, prameha (obstinate urinary disorders including diabetes) and leucorrhoea[16]."

Sl. No.	Medicinal Plants Used
1.	Ashvagandha- Withania somnifera
2.	Triphla Churn- Emblica officinalis, Terminalia bellirica, Terminalia chebula

[15] Id, at 8.

[16] HERBAL CURE INDIA, Divya Shilajit Rasayan Bati For Impotence (Aug. 21, 2011, 6:10 PM), http://www.herbalcureindia.com/swami-ramdev/divya-shilajeet-rasayan.htm.

3.	Bhoomiamla- Phyllantus urinaria
4.	Shilajit- Asphaltum

09. Divya Mukta Vati:

It is a unique ayurvedic solution for hypertension that cures high blood pressure, insomnia and anxiety within a person and this herbal medicine works effectively in treating all signs of hypertension such as anxiety, syndrome, sleeplessness, restless legs, etc. it has no side effects and highly effective herbal remedy for high blood pressure[17]."

Sl.No.	Medicinal Plant Used
01.	Bramhi-Centella asiatica
02.	Shankhpushpi-Convolvulus pluricaulis
03.	Ugrgandha-Acorus calamus
04.	Ganjvan-Onosoma bracteatum
05.	Jyotishmati-Celastrus paniculatus
06.	Ashwgandha-Withania somnifera
07.	Giloy-Tinospora cordifolia
08.	Praval pishti-Incinerated oxide of corraliumrubrum
09.	Mukta pishti-Mytilus margaratferus
10.	Jatamansi-Nardostachys jatamansi

(B). Ayurvedic Medicines of Dabur India Limited: Few ayurvedic medicines of Dabur India, are selected to show them as examples, though there are many Dabur products using the medicinal plants and utilising the public domain Indian traditional knowledge[18].

[17] HERBAL CURE INDIA, Divya Mukta Vati For High Blood Pressure (Aug. 20, 2011, 7:40 PM), http://www.herbalcureindia.com/swami-ramdev/divya-mukta-vati.html.

[18] DABUR, Products (Aug. 16, 2011,3:30 PM), http://www.dabur.com/products-Consumer%20Health%20(OTC).

Medicine	Composition	Indication
Dabur-Broncorid	ShireeshChaal (Albizzialebbeck); Kantakari(Solanumxanthocarpum); Gokshur(Tribulusterrestris); Yashtimadhu (Glycyrrhiza glabra); Karkatshringi (Pistacia integrima); Vasaka leaves (Adhatoda vasica)	As a prophylactic in Asthma management, Breathlessness & Cough associated with Bronchial Asthma, Allergic bronchitis, COPD
Dabur-Mensta	Ashok Chaal (Saraca indica); Dhataki Pushp (Woodfordia fruticosa); Nishoth (Ipomoea turpethum); Kalaunji (Nigella sativa); Ajwain (Tachyspermum ammi); Shunthi (Zingiber officinale); Amla (Emblica officinalis); Bahera (Terminalia belerica); Hareetaki (Terminalia chebula); Mustak (Cyprus rotundus); Safed Jeera (Cuminum cyminum); Vasaka (Adhatoda vasica); Pippali (Piper longum); Ghrit Kumari (Aloe vera); Daruharidra (Bereberis aristata); Chandan Red (Pterocarpus santalinus); Amrasthi (Mangifera indica); Hing (Ferula asafetida).	Relieves DysmenorrheaCorrects DUBStrong estrogenic like activityRestores Harmony of Womens'Health Recommended in Poly Cystic Ovary Syndrome (PCOS)
Dabur-Stresscom	Ashwagandha (Withania somnifera) root extract.	General Weakness; Chronic fatigue syndrome; Anxiety Neurosis; StressInsomnia; Restores Physical and Mental healt

Dabur Shilajit Gold	Ingredients: Shilajit, Swarna Bhasma (Gold), Kesar (Saffron), Kaunch Beej (Alkushi), Gokhshru, Ashwagandha, Lavanga, Safed Mushali, Jaiphal, Akarkara, Barahikand, Bedarikand, Yashada Bhasma, Dalchini, Karpur, Rajat Bhasma & Nutmeg oil.	General benefits: Shilajit: brings about balanced and harmonious health. It acts as a restorative tonic, slowing down wear and tear of body tissues, which in turn delays ageing. Shilajit increases the vigour & vitality. Gold: increases strength, improves vigour and vitality. Saffron: A nervine tonic; has anti-fatigue property. Alkushi: helpful in spermatorrhea. Ashwagandha: Rejuvenating properties. Safed Mushali: Well-known nutritive tonic
Dabur Chyaw-anprash	**Ingredients:** 1. Amla 2. Ashwagandha 3. Pippali 4. Keshar 5. Guduchi 6. Karkatsringi 7. Satavari 8. Vidarikand	**For stronger immunity-** Immunity is that mechanism by which body of human beings is protected from invasion of external bodies through its own physiological or artificial means. The immune system is the collection of organs and tissues involved in the adaptive defence of a body against foreign biological materials. It may be broken down into the adaptive immune system, composed of four lymphoid organs (thymus, lymph nodes, spleen and sub-mucosal lymphoid nodules) and the group matile cells that are involved in the body's defence against foreign bodies. Chayawanprash may also be used to refer to the totality of a body's defence systems, encompassing both the adaptive immune systems.

C.Ayurvedic Medicines of Himalaya Drug Company: Only ten ayurvedic medicines of Himalaya Company out of many are shown in the following[19]. The medicinal values of these below-mentioned plants are commonly known to the people as part of Indian traditional knowledge and people have also been using them in their day-to-day lives.

Name of Medicine	Name of Medicinal Plants	Indications
Himalaya amalaki	Amla-Emblica officinalis	1.Cough, cold, sore throat & other respiratory tract infections. 2.Premature aging. 3.Repeated episodes of respiratory infections, as an immunomodulat. 4.Dyspepsia & Hyperacidity 5.Skin disorders.
Himalaya arjuna	Arjuna-Terminalia arjuna	As an adjuvant in ischemic heart disease. Hypertriglyceridemia (High level of triglycerides in blood). Mild to moderate hypertension. As a preventive medicine in individuals susceptible for Ischemic Heart Disease.
Himalaya ashvagandha	Ashvagandha-Withania somnifera	1.General debility. 2.As a daily health supplement to cope with life's daily stress. 3.In the prevention and treatment of many stress related diseases like arteriosclerosis, premature aging, arthritis, diabetes, hypertension and malignancy. 4.As an aphrodisiac.

[19]HIMALAYA, Pharmaceuticals (Aug.17, 2011, 9:30 PM), http://www.himalayawellness.com/products/pharmaceuticals/index.htm.

Himalaya brahmi	Brahmi-Bacopa monnieri	1.Memory disturbances. 2.Behavioral disorders.
Himalaya haridra	Haridra-Curcuma longa	1.Allergic skin disorders 2.Allergic respiratory disorders (allergic rhinitis, allergic bronchitis, etc.)
Himalaya karela	Karela-Mucuna pruriens	Adjuvant in Diabetes Mellitus
Himalaya neem	Neem-Azadirachta indica	Skin disorders
Himalaya punarnava	Punarnava-Boerhavia diffusa	1.Urinary tract infections 2.Edema (swelling).
Himalaya tulasi	Tulasi-Ocimum sanctum Linn	1.Useful in dry or productive cough, cold and sore throat 2.Mild to moderate respiratory infections
Himalaya vasaka	Vasaka-Adhatoda zeylanica Medic	1.Productive cough 2.Bronchitis 3.Bronchial asthma

D.Ayurvedic Medicines of Shree Baidyanath Ayurved Bhawan (P) Ltd: Baidyanath Company has so many ayurvedic medicines commercialising Indian traditional knowledge. A few are enlisted for this research purpose[20].

[20] BAIDYANATH, Our Products (Feb.15, 2011, 8:46 AM), http://www.baidyanath.com/our_products_list.php?catid=25.

Sl. No.	Name of Ayurvedic Product	Active Ingredients	Therapeutic Uses
1.	Jwan ark	Carum ajmoda	Carminative and antispasmodic. Useful in colic, flatulence, dyspepsia.
2.	Arjuna ghrit	Terminalia arjuna and Ghrita	Cardiac tonic and astringent. Used in breathlessness and congestine cardiac failure.
3.	Ashok ghrit	Sarca indica, Caraway, Rice water, Rasot, bhringraj, Satava etc.	Anti inflammatory and uterine sedative used as astringent and gynecological diseases.
4.	Ashwagandhadi ghrit	Ashwagandha and Ghrita	Indicated in nervous debility, insomnia, general weakness and loss of libido.
5.	Brahmi ghrit	Brahmi, Banch, Kut, Shankhpushpi and Ghrita	Alternative diuretic and brain sedative, also useful in mania, epilepsy, insanity and mental disease.

III. Violation of Society Oriented Traditional Knowledge Leading to Bio-piracy

Those above mentioned ayurvedic medicines are not exhaustive, but only illustrative. Those instances are just tip of the ice-berg. There are over thousands and thousands of such ayurvedic medicines being manufactured and sold in the national and international markets by many big, medium and small companies or trusts. This way of utilisation and commercialisation is another form of misappropriation of traditional knowledge, breach of trusts, nothing less than bio-piracy and violation of customary intellectual property

rights. While checking the Traditional Knowledge Digital Library (TKDL)[21], it is found out that almost all the medicinal plants whether any of their parts is used or whole plant, by the above-mentioned companies and trust, it has a mention in all the ancient Indian texts. The digital documentation shows that there is written description of the traditional knowledge of the prior art regarding the medicinal values of plants.

Various companies or trusts, first of all, have not taken permission for using the traditional knowledge i.e. intellectual property from any national or provincial authority and any indigenous society so far; nor are paying for commercial use of society oriented intellectual property i.e. traditional knowledge. It has been possible because the Indian legal framework of IPR is not very strong and up to the mark; it is also because there is no comprehensive sui-generis law to protect traditional knowledge related plant-genetic resources, where the State taking the legal control of traditional knowledge and exploring various methods of commercialisation. Ignoring this type of biopiracy within the country, India has been attacking the incidents of biopiracy by other countries at the international level. This double-standard is weakening India's battle against bio-piracy. There has not been any protest or concern expressed against this wrong doing anywhere in the country. Though India has a very little system for TK protection in its patent laws, it has become a farce because without having obtained patent, companies and trusts are doing business on traditional knowledge and for utilising this, no benefit is going to the society or to the government. What they can do with patents i.e. commercialisation with monopoly in the market, they are doing the same thing without the patent but in competition with others. This has been possible because WTO-TRIPs[22] offer liberty to the member-countries to frame their own IPR laws subject to minimum common standard which is silent on traditional knowledge protection.

This clearly shows the absence of positive protection of traditional knowledge of medicinal plants in India. It has become everyone's property.

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[21] TKDL SEARCH, Traditional Knowledge Digital Library (June 22. 2014, 8:45 PM), http://www.tkdl.res.in/tkdl/langdefault/common/Global_Search.asp?GL=Eng.

[22] Agreement on Trade Related Aspects of Intellectual Property Rights: Patents, WORLD TRADE ORGANISATION (May 24. 2012, 11: 14 AM), http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

Anyone can do business likely to the companies or trusts, without paying any royalty or entering any benefit-sharing formula. Though Patent Law of India as stated in various clauses in section 3, proscribes patent on traditional knowledge directly or indirectly[23]:

> An invention which is frivolous or which claims anything obviously contrary to well established natural laws. The mere discovery of any new property or new use for a known substance or of the mere use of a known process, unless such known process results in a new product. A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance. Plants or 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. An invention, which in effect, is traditional knowledge; or which is an aggregation; or duplication of known properties of traditionally known component or components.

It implies that though an invention though fulfils the criterion, can still be rejected by any of the stated exceptions, but not a single provision does prohibit afore-said type of commercialisation of traditional knowledge without payment or benefit sharing.

IV. The Causes of Such Latent Lapses of Law

1.Non-exploration of the scope in Drugs and Cosmetics Act

The trusts or companies are manufacturing and selling the ayurvedic medicines under Drugs and Cosmetics Act[24] under sections 33EEC (c) and 33N (e). These sections are to regulate the import, manufacture, distribution and sale of drugs, but nothing to do with IPR as such. There is a prohibition of manufacture for the sale of ayurvedic, siddha and unani drugs. It states that manufacture for the sale or for distribution, any ayurvedic, siddha or unani drug, is not allowed except under and in according to the conditions of a licence issued for such purpose, prescribed by the authority. Moreover,

[23] The Patent Act, No. 39 of 1970, INDIA CODE (2014).
[24] The Drugs And Cosmetics Act, No. 23 of 1940, INDIA CODE (2014).

there is power of Central Government to prescribe the forms of licences for the manufacture or sale of Ayutvedic, Siddha or Unani drugs; there is condition subject to which such licences may be issued and the authority empowered to issue the same with the fees payable therefor; there is also provision for the cancellation or suspension of such licences where any provision or rules is contravened or any of the conditions subject to which they are issued is not complied with. With the exercise of such powers, the authority can ensure the payment of the royalty or benefit sharing formula with the holders. Nothing can prevent the authority to insert some other provisions to stop afore-said commercialisation but it has not been explored out by the authority. Though the governments are getting licence fees or other fees and different types of taxes from these companies and trusts, but it does not have any relation with the payments for the utilisation of traditional knowledge.

2.Application of Trademark Act[25]

Though there is no payment for the utilisation of intellectual property of society, but it would be wrong proposition that there is no IPR in the process of making or marketing of herbal medicines out of Indian traditional knowledge of medicinal plants. Suffice is to say that while manufacturing/ preparing/marketing the herbal medicines, the manufacturers can have trade-mark for their products. While getting respective trade-marks, whatever payments have to be deposited, they deposit that amount of money with government. But in any way neither the payment is for the commercialisation of traditional knowledge nor is it granted by or on behalf of or for the actual holders of such knowledge.

3.Non-Incorporation of WIPO Recommendations in National Laws

If the aim of the battle against bio-piracy is comprehensive protection of traditional knowledge, then just restriction over granting of patents in area of traditional knowledge is not sufficient; it should take within its sweep each and every type of commercialisation of knowledge without benefit-sharing and payment of royalty. It should include other ways of non-patent commercialisation without financial benefit to the holders of such knowledge.

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[25]The Trademarks Act, No. 47 of 1999, INDIA CODE (2014).

This approach finds flavour in WIPO's endeavour: "Protection of Traditional Knowledge: Policy Objectives: Revised Provisions for the Protection of Traditional Knowledge Policy Objectives and Core Principles" of WIPO[26] (2010), the specialised agency of UNO. The Policy Objectives are:

(i) Recognize the holistic nature of traditional knowledge, including its economic, intellectual importance; (ii) Promote respect for traditional knowledge systems; (iii) Promote conservation and preservation of traditional knowledge; (iv) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems; (v) Support traditional knowledge systems; (vi) Contribute to safeguarding traditional knowledge; (vii) Repress unfair and inequitable uses of traditional knowledge; (viii) Ensure prior informed consent and exchanges based on mutually agreed terms; (ix) Promote the fair and equitable sharing of benefits arising from the use of traditional knowledge; (x) Promote community development and legitimate trading activities. The Core Principles-General Principles are: (a) Responsiveness to the needs and expectations of traditional knowledge holders; (b) Recognition of rights; (c) Effectiveness and accessibility of protection; (d) Flexibility and comprehensiveness; (e) Equity and benefit-sharing; (f) Consistency with existing legal systems governing access to associated genetic resources; (g) Respect for and cooperation with other international and regional instruments and processes; (h) Respect for customary use and transmission of traditional knowledge. The Core Principles-Substantive Principles: 1.Protection against Misappropriation; 2. Fair and Equitable Benefit-sharing and Recognition of Knowledge Holders.

From these directives, the message becomes clear; it vindicates the dynamic nature of IPR protection; it also expects all countries including India to update its TK protection; the TK protection should be inclusive in nature and appreciative of diversified forms of intellectual property.

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[26]The Protection of Traditional Knowledge: Policy Objectives: Revised Provisions for the Protection of Traditional Knowledge Policy Objectives and Core Principles" of WIPO Recommendations of Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, Geneva, December 6 to 10, 2010 (June 15. 2011, 6:30 PM), http:// www.wipo.int/tk/en/tk/index.html.

4. Non-Application of Public Trust Doctrine at Policy Level

A new dimension to the protection of TK is application of 'Public Trust Doctrine'. According to Professor Sax as referred by Supreme Court[27] (1997):

> The doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The doctrine imposes some restrictions on the governments: Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.

The Supreme Court while explaining the doctrine further observed:

> Our legal system-based on English common law-includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use, cannot be converted into private ownership.

Environment Audit Report[28] (2010) finds that from about "70 per cent of the total geographical area of India are surveyed so far, 45, 000 are plants. Most of them have medicinal properties in them. But what matters most is the associated centuries old traditional knowledge with those medicinal

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[27]M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388 (India).

[28]Environment Audit Report, Report No. 17 of 2010-2011, Chapter-3, THEME: BIODIVERSITY(June.19.2014,4:17PM),http://www.indiawaterportal.org/sites/indiawaterportal.org/files/Environment%20Audit%20Report_CAG_2010-2011.pdf.

plants". As traditional knowledge is an integral and inalienable component of medicinal plant-generic resources of India, it comes under the ambit of 'public trust doctrine'. In this context Directive Principle of State Policy[29] of Constitution is very relevant; the said Article is as follows: "The State shall direct its policy towards securing-that the ownership and control of the material resources of the community are so distributed as best to subserve the common good." the genesis of 'public trust doctrine' in India is found here as it speaks for material resources having revenue generating capacity. The doctrine' is a dynamic concept and not limited only to natural resources but includes all material resources of the country i.e. traditional knowledge etc, where the governments are the trustees of the people. In Centre for Public Interest Litigation vs. Union of India[30] (2012) and in a recent Presidential Reference case[31] (2012), Supreme Court applied this doctrine in the matter of scientific and technological knowledge regarding 2G Spectrum i.e. those matters not falling under the domain of only natural resources. It would be quite logical to apply the doctrine in the area of traditional knowledge related to medicinal plants of India, where no individual is the legal owner of this intellectual property. As it is not to be patented as individual intellectual property-the logical corollary is that it belongs to the society from the IPR law perspective, where the society has stake-holders over all the profits.

5.Lacuna in Biological Diversity Act

Associated traditional knowledge of medicinal plants belongs to bio-diversity of the country. But the non-patented commercialisation of traditional knowledge is not prevented by Biological Diversity Act[32], with whatever protection might be in it. Object of the Act directs the fair and equitable sharing of the benefits arising out of the use of biological resources and its associated knowledge. Its section 3 is regarding 'regulation of access to biological diversity, where certain persons are not allowed to undertake biodiversity related activities without approval of National Bio-Diversity Authority which states that no person referred to in sub-section (2) shall,

[29]INDIA CONST. OF INDIA. Art. 39, cl. (b).
[30]Centre for Public Interest Litigation v. Union of India, (2012) 3 S.C.C. 1 (India).
[31]Natural Resources Allocation, In Re, (2012) 10 S.C.C. 352 (India).
[32]The Biological Diversity Act, No. 18 of 2002, INDIA CODE (2014).

without previous approval of NBDA, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization. The persons who shall be required to take the approval of the NBDA under ss. (1) are (a) a person who is not a citizen of India; (b) a citizen of India, who is a non-resident as defined in s. 2, cl.(30) of Income-Tax Act, 1961; (c) a body corporate, association or organization- (i) not incorporated or registered in India; or (ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management. This shows that there is no restriction on other Indian citizens and companies to have commercialisation of knowledge associated with biological diversity regarding medicinal plants without the approval of NBDA. Hence, when s. 18(1) directs NBDA to regulate activities, to issue guidelines for access to biological resources and ensure for fair and equitable benefit sharing, it has to be understood in a very limited way which does not cover non-patent commercialisation of TK. Another instance of limited protection is its s. 6. It states that no person shall apply for any IPR, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of NBDA. The NBDA may, while granting the approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights. This patent-centric approach even goes against the very object of the Act itself.

On the other hand, s. 21 is about equitable benefit sharing by NBDA: It shall while granting approvals under s. 19 or s. 20 ensure the terms and conditions subject to which approval is granted, secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers. This provision though can offer some protection, but neither it was explored nor utilised properly.

V. A Concluding Comment: Need for Sui-Generis Comprehensive Law

As the State is the holder, preserver, protector (not owner) of the natural resources including material resources i.e. traditional knowledge associated with medicinal plants, because of its sovereign power (except those knowledge which are identified with the tribal or village society). As a trustee of the people, although it is empowered to distribute and commercialise the same, the process or purpose of distribution and commercialisation must be guided by the constitutional principles and larger public good. It should not benefit a few individuals or companies subject to the condition that profit arising out of utilisation of society oriented IPR, should go to the society. In a nutshell, all these are occurring due to lack of a comprehensive policy and legal framework exclusively for the protection of traditional knowledge associated with plant-genetic resources. There is no special law in India to deal with traditional knowledge protection in this glocalised scenario-global challenge and non-fulfilment of national or local necessity. Whatever is there in different legal frameworks at the national and international levels, are very limited in application. It is strongly recommended that as early as possible, the country should have a sui-generis comprehensive law which not only proscribes patents, but also, apart from other measures, prevents all types of non-profit sharing commercialisation of TK. Thought these measures might not have international ramifications, but at least it is sine-qua-non to show that how best TK is protected in India and can be utilised for the welfare of the society.

'Public Trust Doctrine' can be the guiding principle for that model law. Equally important is the spirit of WIPO's revised guidelines for traditional knowledge protection in its endeavour to prevent any type of commercialisation. As WIPO recognises traditional knowledge as intellectual property, without any further delay, India should have a positive law in this regard, prohibiting each and every type of non-benefit sharing commercialisation. Indian legal framework should appreciate diversity and have inclusivity in its approach towards the ancient traditional knowledge as another type of intellectual property. Otherwise TK associated with medicinal plants protection in India would be futile exercise, self-deceiving and law would remain as not "what it ought to be". Most importantly, the country will be losing huge amount of money arising out of this wrongful

commercialisation of traditional knowledge. In the era of knowledge-based economy, recognition of newer form of IPR like traditional knowledge would usher in all the potentiality to change the fortune of common people in India; it could generate huge amount of fund to take up so many social welfare and social security measures for the common people; it could even encourage other TK enriched countries to have a better protection regime which would result in a new WTO-TRIPS regime sometime in near future; India's battle against bio-piracy would be stronger and the country can adopt a model IPR regime with its harmonious balance between both the society oriented and individual centric IPR or between statutory and customary IPR. Without prevention of this type of commercialisation of traditional knowledge, India has to remain answerless in the world forum if fingered at. Moreover, what is the use of it, if the knowledge on medicinal plants is not utilised for the betterment of the original holders? Or if is not used for the betterment of the society and the common people? Or it is not commercialised for the economic development of the country? It is recommended that until the country has its own sui-generic law to have a comprehensive protection of traditional knowledge associated with medicinal plants, Biological Diversity Act or Drugs and Cosmetics Act, be explored for the purpose to regulate non-patent commercialisation of TK.

The rigidity of present WTO legal framework creates hindrances to accommodate traditional knowledge as intellectual property. Problem at the international level is because WTO's overriding power over WIPO, with its non-recognition of traditional knowledge (only in fewer cases patent is not granted if there is prior documented description according to WTO way but traditional knowledge protection is not limited to that only because vast knowledge is in oral description) and WIPO's non-binding nature, whatever may be the aspirations of it. There is a conflict between two sets of international laws i.e. WTO-TRIPs and WIPO. Yet there is no mechanism to maintain a harmonious balance. Amendment of WTO-TRIPs to accommodate traditional knowledge protection is the need of the time and demand of the traditional knowledge enriched societies; this would pave the way for various countries to include traditional knowledge as intellectual property; otherwise a day will come when whole globalisation process would be halted.

All these incidences for not making an appropriate law to stop this new form of bio-piracy in India are also resulting in the denial and deprivation of the fundamental right to preserve own culture, tradition and heritage of the holders of the traditional knowledge associated with medicinal values of plant-genetic resources (who do not get their due share from the proceeds of commercialisation of TK) under Article 21, Constitution of India i.e. Right to Life. This constitutional dimension finds support from Supreme Court in Ramsharan Autyanuprasi judgment[33] (1989):

> Life in its expanded horizons includes all that gives meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Article 21 of the Constitution.

Hence, the right to protect and preserve traditional knowledge of medicinal plants i.e. proper utilisation and fair commercialisation for the benefit of each and everyone or to thwart any attempt to wrongfully gain from something where everybody has equal and equitable claim, comes within the purview of the expanded horizon of right to life and becomes an integral part of right to life of Indians and carries with same basic nature and characteristics of it. Unfortunately the violation of fundamental right is the consequence of State's inaction for not enacting a comprehensive law and for non-exploration of the indirect scope set out in various sets of existing laws.

[33] Ramsharan Autyanuprasi v. Union of India, A.I. R. 1989 S.C 549, 553 (India).

LIVE IN RELATIONSHIPS: A LEGAL QUAGMIRE

Dipa Dube*

ABSTRACT

The recent trend of live in relations has posed a problem for the legal regime. While traditional relationships such as marriage had the legal regimentation protecting parties thereto, live in relations have challenged the existing structure and fabric of society. The result of all this has been the vulnerability of women caught in such relationships and the inadequacy of law to afford adequate safeguards to them. The Domestic Violence Act 2005 as well as the decisions of a socially conscious judicial system have somewhat sought to curb the rising voices of discontentment, yet the contradictions and conflicts inherent therein have proved to to be ruinous. The present article visits the existing legal position vis-à-vis live in relationships in India.

Keywords: Marriage, Evidence, Maintenance, Domestic Violence, Children

I. Introduction

For ages, marriage has been the fulcrum of human relationships. It has been regarded by nations, religions and generations as the inviolable bond between individuals laying the foundation for the family, society and State. Law has accorded sanctity to the relationship in order to maintain the wellbeing and development of the society. Infact, the entire gamut of personal laws covering maintenance, inheritance, succession, guardianship etc. revolve around the notion of marriage and the intricate mix of relationships that it creates.

The passage of times has, however, witnessed newer and more popular forms of relationship matrix, challenging the institution of marriage. India has been not far from this changing scenario and several notions of same sex marriages, live- in etc. has come to the fore. Are the legal instruments capable to take care of the changing dimensions of marriage or has it created a controversy of sorts leaving the people and the society in a state of confusion. The present article aims to visit the law with regard to live in relationship in India as an alternative to marriage and the legal challenges that it has posed.

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II. Marriage and Live in relationship

Marriage is the union of two hearts.[1] Generally speaking, it is the union of a man and woman, for some legal purposes. In Ancient Hindu law, marriage was conceived as a sacramental union, implying a permanent union of opposite sexes which cannot be dissolved. In Christian world, it signified the voluntary union for life of one man and one woman, to the exclusion of all others, entered into some form recognized by the lex loci[2]. Lord Stowel has maintained that "A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation- that in a state of nature would be a marriage."[3] Muslim jurists regard the institution of marriage as partaking both the nature of ibadat (devotion) and muamalat(dealings among men).[4] Muslim marriage is a civil contract between man and woman upon the completion of which, by proposal and acceptance, all the rights and obligations which it creates arise immediately and simultaneously[5], It is a legal process for legalizing sexual intercourse, procreation and legitimation of children[6].

With the passage of time, the notion of marriage has undergone change in all the religions, for that matter, and what was perceived as an indissoluble union of man and woman has made way for contractual relationship. Grounds for dissolution of marriage have been recognized by the laws and a more individual centric liberalized approach has been arraigned. Inspite of the changing notions, however, it may be conceded that marriage has continued to find favour with individual and society, and the laws have accorded the necessary rights, duties and liabilities to the parties arising out of marriage.

Live in relationship has come over as a new 'avatar' of the age old concept of marriage. It has all the trappings of marriage, except for the fact that there

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[1] *Roopa Reddy* v. *Prabhakar Reddy* AIR 1994 Kant.12 at p.19.
[2] MamtaRao, Law relating to Women and Children(Eastern Book Co., Lucknow, 2005)p.177.
[3] *Lindo* v. *BelisArio* (1795)1 Hag Con 216 at p. 230.
[4] Abdur Rahim, 327.
[5] *Abdul Kadir* v. *Salima* (1886) 8 All 149.
[6] Id. n.2, pp.216-7.

is no legal bindingness between the parties. Thus, when two heterogeneous persons share an intimate relationship and start staying together, it takes the colour of a live in relationship. What demarcates marriage and live in relationship is the following: while in marriage there is, generally, a religious and cultural ceremony, live in involves no such ritualistic performance; marriage involves the coming together of families of the bride and the groom, live in remains limited to the individuals themselves; marital bond provides a societal recognition and approbation for the sharing of physical, emotional and mutual intimacy while live in does not have such societal acceptance; marriage has the concept of continuance, given the legality entailed therein, it cannot be struck off without due process of law, live in relationship does not have a time frame and there being no legality in the relationship, it suffers from 'no frills syndrome'; live in comes with innumerable strings as regards plight of the individual, mostly woman, if abandoned, status of the children born, inheritance of property etc,, while personal laws clarify most of the issues arising from marriage, whether of maintenance, children, inheritance and succession.

As stated by the Hon'ble court in *Alok Kumar* v. *State &Anr.*[7] -Live -in relationship is a walk-in and walk-out relationship. There are no strings attached to this relationship, neither this relationship creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time. Those, who do not want to enter into this kind of relationship of walk-in and walk-out, they enter into a relationship of marriage, where the bond between the parties has legal implications and obligations and cannot be broken by either party at will.

III. Live in Relationships- Anomalies and Concerns

Over 12 million unmarried partners live together in 6,008,007 households; the number of cohabiting unmarried partners increased tenfold between 1960 and 2000;the number of cohabiting unmarried partners increasedby 88%

[7] MANU/DE/2069/2010

between 1990 and 2007.[8] These are the statistics of United States which indicate a growing trend towards live-in relationships. India is not behind and the last decade has seen a rising number of live in relationships in the country, especially in the metropolises. The youth of the country has somewhat demonstrated a disliking towards the pinnings of law and legal system, and has preferred a more open and liberating lifestyle, embracing the concept of live in to further the sexual, emotional and social needs of life.

However, what has posed a major concern for the rising number of couples sharing the relationship is the legal standing of the relationship. Are the parties entitled to rights and liabilities, and are the children born out of the bond(so to say) recognized as legitimate and entitled to a share in the property of the parents. The concern is even greater for a country like India where economic capabilities of the parties may not be equal, in that the woman may be solely dependent on the man for her sustenance. In such a situation, the woman will be completely denuded of her rights and will be abandoned, to continue as a destitute, since the society is considerably conservative in its acceptance of 'such' a woman.

IV. Principle of Evidence: Presumption of Marriage

Section 114 of the Indian Evidence Act 1872 raises certain presumptions having regard 'to the common course of natural events, human conduct and public and private business'. A presumption is not is itself evidence but only makes a prima facie case for party in whose favour it exists[9]. The presumption permitted under the section is one of fact and rests on the discretion of the court. The latter is not bound to raise them but has to consider whether in the circumstances of the case, they should be raised.

Taking the presumption of common course of human conduct, it has been stated that where there is a long and continuous cohabitation between a man and a woman, the law presumes in favour of marriage and against concubinage, even in the absence of satisfactory direct evidence of marriage.

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[8] U.S. Census Bureau."American Community Survey: 2005-2007."; U.S. Census Bureau. "America's Families and Living Arrangements: 2000.";U.S. Census Bureau. "America's Families and Living Arrangements: 2007."Available at http://www.unmarried.org/statistics/Last visited on 24th June 2013.

[9] *Sodhi Transport Co.* v. State of UP AIR 1986 SC 1099.

Any person who disputes the marital status has to prove that fact.[10] The same has been stated in emphatic language in *Rajagopal Pillai* v. *PakkiamAmmal*.[11] "The marriage state being the chief foundation on which the superstructure of society rests, presumption of marriage arising from cohabitation is a very strong presumption. When a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved that they were living together by virtue of a legal marriage and not in concubinage".[12]

Given the above legal position, it becomes clear that living together of couples may have the sanction of law, provided the live-in was for a considerable length of time. A prolonged period of live-in accords legality to the relationship. However, it is only a matter of presumption and may give way in the face of more compelling evidence. The Supreme Court in the case of *Madan Mohan Singh* v. *Rajni Kant*[13] has stated that where a live in relationship continues for a long time, it can no longer be termed as a walk in and walk out relationship. It gives rise to a presumption of marriage. The Madhya Pradesh High Court has also recently held that[14]-If a woman is living with a man for a longer period as a husband and wife then, it is not necessary to prove their marriage beyond doubt and their marriage may be presumed because of longer 'live-in' relationship between them. What becomes clear is that it is the length of the relationship which gives it the colour of marriage. If the relationship is merely for days or months, no such presumption may be raised. What is meant by prolonged period remains a question, but it is clear that the same should be long enough to generate a societal acceptance of the relationship of the parties.

As outlined by the Supreme Court in *D.Velusamy*v.*D.Patchaiammal*[15],a 'relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married :-

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[10] *NeelawaSomnathTarapur* v. *DividionalController of KSRTC* AIR 2002 Kant.347; *SobhaHymavathi Devi* v. *SetiGangadharaSwamy* AIR 2005 SC 800.

[11] (1968) 2 Mad LJ 411

[12] *S.P.S. Balasubramanyan* v. *A. Padyachi* AIR 1992 SC 756.

[13] AIR 2010 SC 2933

[14] *RamkeshKachhiv.SubhdraBaiKachhi*II(2013)DMC628.

[15] AIR 2011 SC 479

(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 into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose, and/or as a servant, it would not be a relationship in the nature of marriage.

While a live-in may draw a presumption of marriage, the next question which comes is whether the necessary implications of marriage can be extended to such relationship. One of the key areas is that of maintenance. Is the partner of a live in entitled to claim maintenance against the other partner? In this context, it may be worthwhile to refer to the legal provisions on maintenance as find mention in the Code of Criminal Procedure 1973 and the judicial interpretations in that regard.

V. Maintenance of Live-in Partner:

Section 125 Code of Criminal Procedure, 1973 is a measure for social justice and specially enacted to protect women and children. The section gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves[16]. The term used in the section, for the purposes of awarding maintenance is 'wife'. It had been held since beginning that 'wife' means only a legitimate wife or legally wedded wife and therefore, in the absence of a valid marriage, a wife is not entitled to a claim of maintenance.[17]

Two views have been forwarded by the Supreme Court in this regard. In *Vimala (K)* v. *Veeraswamy (K)*[18] a three- Judge Bench of the Court held that Section 125 of the Code 1973 is meant to achieve a social purpose and the object is to prevent vagrancy and destitution. Explaining the meaning of the

[16] Ratanlal&Dhirajlal, The Code of Criminal Procedure, p. 150.
[17] *Savithramma*v. *Ramanarasimhaiah* (1963) 1 Cr LJ 131; *Bansidhar* v. *Chabi* AIR 1967 Pat. 277;
[18] (1991) 2 SCC 375

word 'wife' the Court held the object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term 'wife' in Section 125 of the Code of Criminal Procedure, includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is brought within the inclusive definition of the term 'wife' consistent with the objective. Thus, a woman living in relationship may also claim maintenance under Sec.125 Cr.P.C[19].

Subsequently, the apex court expressed the opinion that[20] however desirable it may be to take note of the plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of 'wife'. The Bench held that this inadequacy in law can be amended only by the Legislature. The development of society and the flow of social relations have, however, not been lost sight of. The Court has relaxed the subsequent view and wondered whether the protection of law in form of maintenance can be afforded to a live in partner (woman), especially in light of the provisions in Protection of Women against Domestic Violence (DV) Act 2005. As stated by the Court[21]- In light of the constant change in social attitudes and values, which have been incorporated into the forward-looking Act of 2005, the same needs to be considered with respect to Section 125 of Cr.P.C. and accordingly, a broad interpretation of the same should be taken. Our social context is fast changing, of which cognizance has to be taken by Courts in interpreting a statutory provision which has a pronounced social content like Section 125 of the Code of 1973.We think the larger Bench may consider also the provisions of the Protection of Women from Domestic Violence Act, 2005. If the monetary relief and compensation can be awarded in cases of live-in relationships under the Act of 2005, they should also be allowed in

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[19] AIR 2009 (NOC) 808 (Bom.); *C.* v. *Bapusaheb* 2012.Available at http://indiankanoon.org/doc/153483454/

[20] *SavitabenSomabhatBhatiya* v. *State of Gujarat and* others AIR 2005 SC 1809.

[21] *Chanmuniyav. Virendra Kumar Singh Kushwaha&Anr.* 7 (2011) 1 SCC 141

a proceeding under Section 125 of Cr.P.C. It seems to us that the same view is confirmed by Section 26 of the said Act of 2005.

VI. Maintenance under Domestic Violence Act:

The DV Act has been enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. It seeks to provide an effective protection to the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family.

Domestic Violence is a human rights issue. The Vienna Accord 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights violation. 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 498A IPC. The Civil Law, it was noticed, did not address this phenomenon in its entirety. Consequently, the 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.

Chapter IV is the heart and soul of the DV Act, which provides various reliefs to a woman who has or has been in domestic relationship with any adult male person and seeks one or more reliefs provided under the Act. The Magistrate, while entertaining an application from an aggrieved person under Section 12 of the DV Act, can grant various reliefs like grant of compensation, prohibition of further acts, right of residence etc. Under the act, aggrieved person means any woman who is or has been in a domestic relationship with the respondent.[22] The term "domestic relationship" has been defined to mean a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity,

[22] Section 2(a)

marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family[23]

Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

a) Consanguinity

b) Marriage

c) Through a relationship in the nature of marriage

d) Adoption

e) Family members living together as joint family

Live in relationships do come within the fore of the Domestic Violence Act 2005 being expressed in the form of "relationship in the nature of marriage." A close analysis of the entire relationship, that is all facets of the interpersonal relationship, including the intent of the parties however, have to be taken into account for the purpose. Some guidelines to interpret the provision have been laid down as under[24]:

1) Duration of period of relationship

   Section 2(f) of the DV Act has used the expression at any point of time, which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household

   The expression has been defined under Section 2(s) of the DV Act.

(3) Pooling of Resources and Financial Arrangements: Supporting each other, or any one of them, financially, sharing bank accounts, acquiring

[23] Section 2(f)
[24] *IndraSarma* v.*V.K. V.Sarma*AIR 2014 SC 309

immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship

Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

(6) Children

Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties

Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

A long standing relationship between two unmarried partners will get the protection of the law, but such relationship with a married man cannot be taken as a relationship in the nature of marriage, since the rule ofmonogamy[25]

[25] Hinduism and Christianity prescribes monogamy as the rule in marriages, while the same is not true for Islam.

prohibits having more than one spouse at the same time. The court has opined that "Long standing relationship as a concubine, though not a relationship in the nature of marriage, of course, may at times deserve protection because the women might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV act, which is restrictive and exhaustive".[26] The same tone finds reiteration in *D. Veluswamy case*[27] where the court held that -Not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned must be satisfied, and this has to be proved by evidence. If a man has a "keep" whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a relationship in the nature of marriage. No doubt the view would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression "relationship in the nature of marriage" and not "live-in relationship". Thus, where a woman claimed maintenance and in the absence of proof of second marriage, the court took account of Section 26 of the DV Act, 2005 thereby granting her maintenance, the Patna High Court refused to uphold the order in the absence of finding that the woman was in a 'relationship in the nature of marriage'[28].

VII. Children of Live in Relationship:

Section 125(1) Cr.P.C 1973 gives statutory recognition for right of maintenance of children, both legitimate and illegitimate, from their father. Since children have no role in their birth, illegitimate children are like any other children born to their parents and are entitled to maintenance. When the question arises as to whether such children can succeed to the estate of their deceased parents, there is no uniform statute in this country enabling them to inherit the property of their parents.[29] Under Hindu law, so far as

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[26] Ibid.
[27] *D. Velusamy*v. *D. Patchaiammal*2011 Cr.L.J. 320
[28] *Sardhanand Sharma* v.*State of Bihar &Anr*2013 Available at http://indiankanoon.org/doc/139710570/Last accessed on 31st August, 2014.
[29] *Jane Antony, Wife of Antony* v *V.M.Siyath* 2008 Available at http://indiankanoon.org/doc/419909/.Last accessed on 31st August, 2014.

children born out of such relationships are concerned, in view of the legal fiction contained in Section 16 of Hindu Marriage Act 1955, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents[30].

In *Rameshwari Devi*v. *State of Bihar &Ors.*[31], the Supreme Court dealt with a case wherein after the death of a Government employee, children born illegitimately to the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retire benefits along with children born out of a legal wedlock. This Court held that under Section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were entitled to share in the family pension, death-cum-retire benefits and gratuity.

In *JiniaKeotin&Ors.*v. *Kumar SitaramManjhi.*[32], this Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. The Court held that under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. It is a laudable and noble act of the legislature in enacting Section 16 to put an end to a great social evil. However, Section 16 of the Act is confined to succession or inheritance to the properties of parents

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[30] *Smt. P.E.K. KallianiAmma&Ors.*v. *K. Devi &Ors.* AIR 1996 SC 1963. The matter is however different for people belonging to other religions since the personal laws are different in such cases. "From the texts and the judicial pronouncements, one thing is manifestly clear that an illegitimate son is recognized but with many riders and his rights are discriminatory in nature."*Jane Antony, Wife Of Antony* v.*V.M.Siyath* 2008 Available at http://indiankanoon.org/doc/419909/Last accessed on 31st August, 2014.Also see, *Gaurav Jain* v. *Union of India* AIR 1997 SC 3021.

[31] AIR 2000 SC 735

[32] (2003) 1 SCC 730

only. This view has been approved and followed by this Court in *Neelamma and others v. Sarojamma and others.*[33]

The question of inheritance of coparcenery property by the illegitimate children, who are born out of the live-in-relationship, cannot arise. That has been the view as well as position of law as reaffirmed in the case of *Bhavartha Matha&Anr v. R. VijayaRenganathan&Ors.*[34] PeriaMariammal instituted a suit against the respondents claiming the share of her brother MuthuReddiar on the ground that he died unmarried and intestate and that Smt. Rengammal, the defendant in the suit was a legally wedded wife of one AlagarsamiReddiar, who was still alive and therefore, her claim that she had live-in-relationship with plaintiff's brother MuthuReddiar and had two children from him had to be ignored. The Court held that since it is evident from the record that MuthuReddiar did not partition his joint family properties and died issueless and intestate in 1974, therefore the question of inheritance of such property by the illegitimate children cannot arise. The position however underwent a shift with the decision of the court in *Revanasiddappa&Anr v.Mallikarjun&Ors*[35]. A two judge bench of the Supreme Court in interpreting Section 16(3) Hindu Marriage Act 1955 opined that "it interesting to note that the legislature has advisedly used the word "property" and has not qualified it with either self-acquired property or ancestral property. It has been kept broad and general." Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents. Underlining the need for a liberal interpretation of Section 16 (3), the court said that with changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in

[33] (2006) 9 SCC 612;*Rameshwari Devi*v. *State of Bihar* [(2000) 2 SCC 431;*Vidhyadhari.* v. *Sukhrana Bai &Ors.* [(2008) 2 SCC 238];*Sumitra Bai And Others* **v.** *Public At Large And Others*2014(2)RLW1669(Raj.)

[34] AIR 2010 SC 2685

[35] (2011)11SCC1

the shaping of which various social groups play a vital role. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. The Bench however referred the matter to the Chief Justice for posting it before a larger bench.

VIII. Concluding Thoughts

Live in relationships are the order of the day. It is increasingly being perceived as the more viable option by young Indians. However, the legal position with regard to such relationships still remain elusive. Are the women in such relationship to be accorded the status of 'wife'? Are they entitled for 'maintenance' from their live in partners, in cases of economic dependence? Is there freedom to abandon the partner at any time without any further obligation? Questions such as these and many more continue to surface from time to time. The situation becomes more intense and worrisome when it involves women trapped, knowingly or unknowingly, in the relationship. Her position continues to oscillate from legality to illegality- a wife to a concubine, leaving her at the mercy of law and society. It is important to steer clear the legal quagmire in the realm of live in relationships and accord legitimate, respectable and dignified rights and responsibilities to the parties thereto.

POLICE-PUBLIC RELATIONSHIP IN KOHIMA, NAGALAND : AN EXPLORATION BY THE POPULACE IN THE LIGHT OF COMMUNITY POLICING[1]

Arpita Mitra* & N. K. Chakrabarti**

ABSTRACT

The present study seeks to explore the nature of police-public relations in the district capital of Nagaland, a bordering state in the north east of India, unique for its geographical and distinct ethnic identity. Regular instances of extortion, smuggling, intrusion and insurgencies have put the police and the public at loggerheads. In this regard, community policing as an operational and organizational philosophy can attempt to promote healthy police-citizen relationship through problem solving. The study seeks to assess the perception of the people about the police-community relationship in Kohima, the capital of Nagaland by evaluating the sensitization and involvement of the people in the community development services of the police. The findings indicate that even though the people are apprehensive about policing and the use of coercion by the police, they are hopeful that people-friendly initiatives can improve police-public relationship. In this regard the common people are also ready to cooperate with the police to build secure and safe communities.

Keywords: Kohima, Community Policing, ICTs,

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I am immensely thankful to Indian Council of Social Science Research (ICSSR) for sponsoring the Research Project titled 'People's Perception of Police Public Relations in the District Capitals of the North Eastern States of India: A Study in Perspective of Community Policing'. No word of thanks is enough for my beloved students: Shashank, Dishari, Puja, Tanuka, Jaidip, Shatavisha and Ananya for helping me in processing the data.

Dr. Arpita Mitra

I. Introduction

In recent times, to win over the faith and the cooperation of the common people, the police in India are trying to give away the manacles of the label of being authoritative, repressive and politically-driven. The paradigmatic shift in the philosophy of policing is acting as a boost to encourage people-friendly police in the nation. Police is no longer considered to be a coercive force or organ of the state to maintain law and order but a service to the people along with the people at large.

The present study seeks to explore the nature of police public relations in Kohima, the district capital of Nagaland, a bordering state in the north east of India, unique for its geographical and distinct ethnic identity. The north-east remains unexplored in relation to relevant research on the day to day life of the people. The simplicity and the vulnerability of the people have been overlooked and exploited leading to constant interface between the people and the government or more particularly the police. Regular instances of extortion, smuggling, intrusion and insurgencies have put the police and the public at loggerheads. However, the fear and distrust of the people can be won over by motivating community involvement in all activities of the police. This can make the task of the police easier and ensure transparency and accountability. This is a humble attempt to bring to light the nature of police-public interface in Kohima, the capital of the state of Nagaland through a small sample survey.

II. Summary of relevant literature

Policing may be defined as those organized forms of order maintenance, peacekeeping or law enforcement, crime investigation and prevention and other forms of investigation and associated information brokering which may involve a conscious exercise of coercive power – undertaken by individuals and organizations, where such activities are viewed by them and by others as a central or key defining part of their purpose.[2] The community and the police must be considered as an organic entity, a mutually supportive partnership. Any community relations programme that involves the police as part of the

[2] Jones, T. & Newburn, T. 1997. *Private Security and Public Policing*. Oxford:Clarendon, p.18.

community, not apart from the community, is on solid ground. The community must involve itself with the police, and the police with the community. Neither the community at large nor the police can afford insulation, isolation, indifference or enmity any more than can a healthy functioning family.[3]

Community policing is not just a program but an operational and organizational philosophy designed to promote police citizen community based problem solving. Partnering with the community, the police seek to find effective long-term solutions to neighborhood crime problems. Police officers must be proactive and anticipate the social and law enforcement concerns of the community before they become problem areas. Community policing officers are viewed as intelligent agents of the criminal justice system who are able to intellectually and emotionally react to citizen concerns.[4] The basic idea of community policing is keeping close to the community. Here the police are the public and the public are the police. The chief duty of the police officer is to improve the quality of life of the people in the community. Community policing provides a new way for the police to provide decentralized and personalized police service that offers every law abiding citizen an opportunity to become active in the police process. Community policing stresses exploring new ways to protect and enhance the lives of those who are most vulnerable - juveniles, the elderly, minorities, the poor, the disabled. the homeless. Community policing (1) is a philosophy, not just an isolated program (2) involves a permanent commitment to the community including average citizens (3) broadens the mission of the police beyond crime control (4) provides full-service, personalized, and decentralized policing: (5) focuses in problem solving (6) enhances responsibility (7) uses both reactive and proactive policing; (8) must operate within existing resources. [5]

Community policing has also been impacted by the technological advances in computerization and crime prevention strategies. Three of the more

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[3] Germann, A.G. 1969. 'Community Policing: An Assessment'; *The Journal of Criminal Law, Criminology and Police Science*, v60(1); 89-96, p.93.
[4] Vito, G.F., Walsh, W.F.& Kunselman, J. 2005; "Community Policing: The Middle Manager's Perspective"; *Police Quarterly*; 8(4); Sage Publications; 490-511, p.492.
[5] Trojanowicz, R. & Bucqueroux, B.; 1990; *Community Policing: a Contemporary Perspective*. Cincinnati, OH:Anderson Publishing Co., pp.5-6.

significant advances include (1) **crime analysis**: there are three components of crime analysis- tactical crime analysis used to identify crime trends and patterns; strategic crime analysis, preparation of statistics and summaries designed to aid in long term operational planning; and administrative crime analysis, used to aid in administrative decision-making on social, economic, and geographic information. (2) **Computer-Aided Dispatching** enabled police officers to capture and retrieve many types of crime and operational data that had previously been unavailable or extremely time consuming to generate. It added global positioning information that enabled dispatchers to track movements of police cars in order to make better decisions in assigning calls for service. (3) **Crime mapping** are highly sophisticated graphics which enable investigators and crime analysts to obtain accurate and detailed maps of past, present, and potential crime areas within their jurisdictions.[6]

However there are identifiable and persistent constraints to the development of community policing: (a) the culture of policing is resistant to community policing; (b) Community policing requires emotional maturity more likely to be present in older officers; (c) The innovative management cop is receptive to a more expansive vision of the police role. Traditional management cop remains rooted in his earliest training experiences; (d) The responsibility to respond to limitation of resources; (e) The inertia of police unions who see community policing as a threat to police professionalism; (f) The two officer car engenders a sense of security and job enjoyment among those who are policing and it may also generate a sense of remoteness from the population being policed; (g) Command Accountability; (h) Reward structure as it is impossible to measure the amount of crime a certain police officer prevented; (i) Public expectations of police; (j) Failure to integrate steps for crime prevention; and (k) The ambiguity of community as police community reciprocity can be achieved when there is a genuine bonding of interests between the police and the served citizenry and among definable section of the public.[7]

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[6] Hunter, R.D.; Barker, T. and Mayhall P.M. 2008. *Police –Community relations and the Administration of Justice*; Seventh Edition. New Jersey: Pearson Prentice Hall, pp.246-247)

[7] Skolnick, J.H. and Bayley, D.H. 1988. 'Theme and Variation in Community Policing': *Crime and Justice* ; v10; 1-37, pp.18-28.

III. Aims of the study

The present study will seek to assess the perception of the people about the police-community relationship in Kohima, the capital of Nagaland. The study will also attempt to understand the level of awareness and sensitization of the citizens about the philosophy of community policing and their level of interest in participation in such programmes. The study seeks to evaluate whether the initiatives are successful in bridging the gap between the police and the public. Lastly, the study also seeks to explore the extent to which Information and Communication Technologies (ICTs) are being used by the public as well as the police to reach out to each other.

IV. Methodological Orientation

Universe of the study

The residents of Kohima, the capital of Nagaland are the universe of the study.

Area of Research

Kohima, the capital of Nagaland is the area of research. The town comprises 16 tribes of Nagaland out of which Angamis and Aos are the largest in number. Kohima is located at 25°40'N 94°07'E 25.67°N 94.12°E. It has an average elevation of 1261 metres (4137 feet). Kohima town is located on the top of a high ridge and the town serpentines all along the top of the surrounding mountain ranges as is typical of most Naga settlements.[8]

Sampling Procedure

In this exploratory research, non-probability sampling is used to collect relevant data. Non-probability sampling may be used effectively in studies that seek to explore ideas that are still underdeveloped.[9] Convenience sampling and snowball sampling have been employed to access the primary data.

Units of Observation and Sampling Size

The sample is of 50 residents of Kohima out of which 24 are male and 26 female.

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[8] *See_en.wikipedia.org/wiki/Kohima and www.kohima.nic.in visited on 5.10.14.*
[9] Baker, T.L. 1999. *Doing Social Research*; 3rd Edition. Singapore: McGraw Hill College, p.138.

Methods of Data Collection

Primary data is collected through direct face to face interview of the people. Interview schedule is employed to collect the relevant information. The interview schedule contains open-ended, closed-ended, matrix and contingency questions. **Secondary data** is collected by studying relevant websites Other relevant books, newspaper reports, journals and articles in magazines also yielded relevant data.

V. Findings of the Study

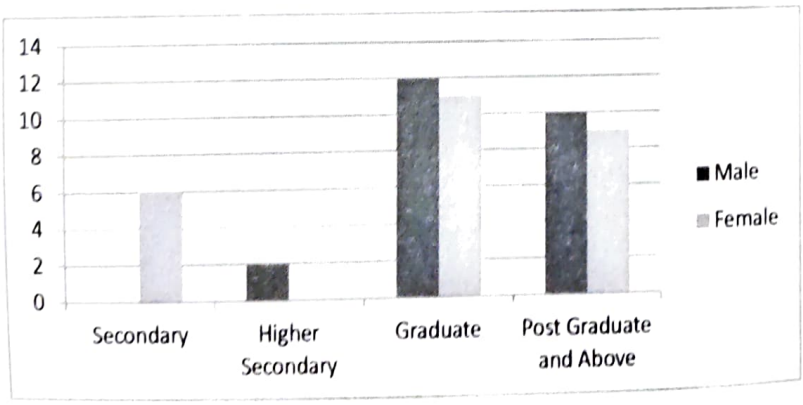
V.I. Age

Age in years	Frequency	Percentage
18-24	10	20%
25-31	16	32%
32-38	17	34%
39-45	5	10%
46-52	2	4%

N=50

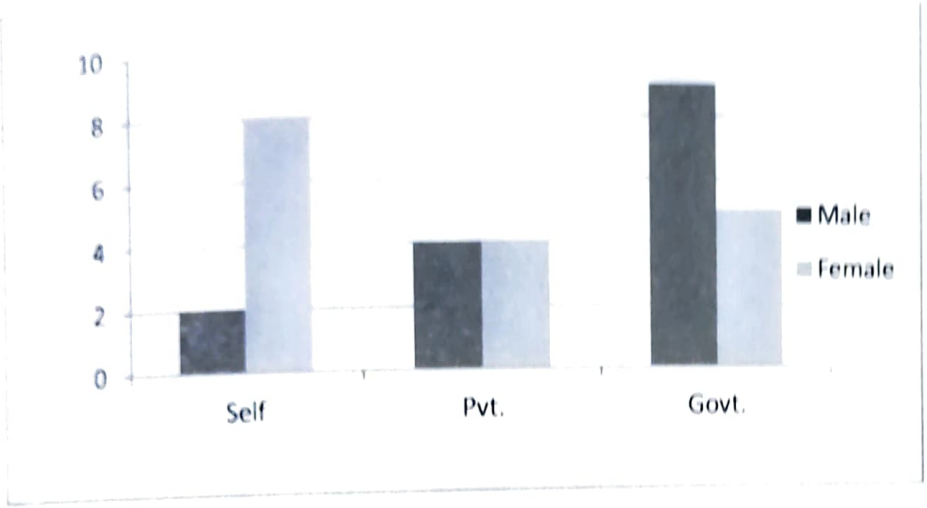
The sample was of 50 respondents out of which 24 (48%) were male and 26(52%) were female. 86% of the respondents were between 18-38 years of age. So it was a young sample, very energetic, optimistic and tech-savvy.

V.II. Educational Status



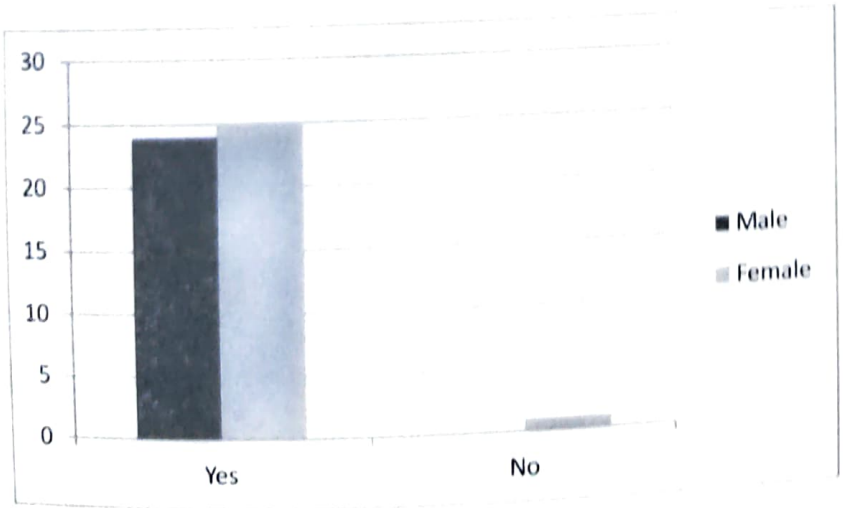
Out of 50 respondents 23(46%) were graduates, 19 were post graduates. This trend shows that education is prioritised in Kohima, as the opportunities for employment are less. It is an educated population who is aware of the problems that disturb the peace of the community. Moreover, all the male respondents had a minimum of higher secondary education. The number of graduates and post graduates are more among the males.

V. III. Employment Status



32 (64%) of the respondents were employed. 14 were employed in government jobs and 10 were self employed. 34 of the residents had two or more earning members in the family. The people irrespective of sex prefer to be financially independent. 32 of them were employed out of which 65% of them were female who were earning.

V.IV. Acquaintance in Police service

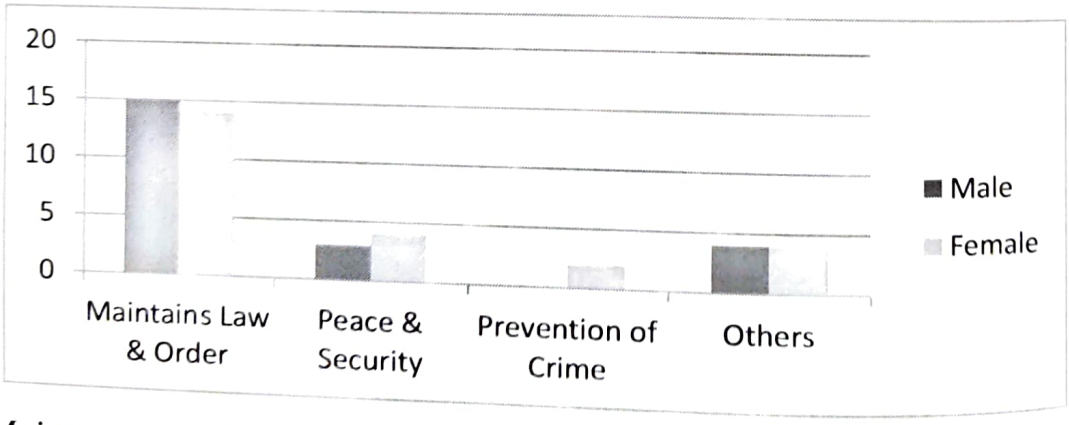


More than 90% of the respondents had acquaintances in the police force out of which 50% had friends in police service.

V.V. Opinion about the police

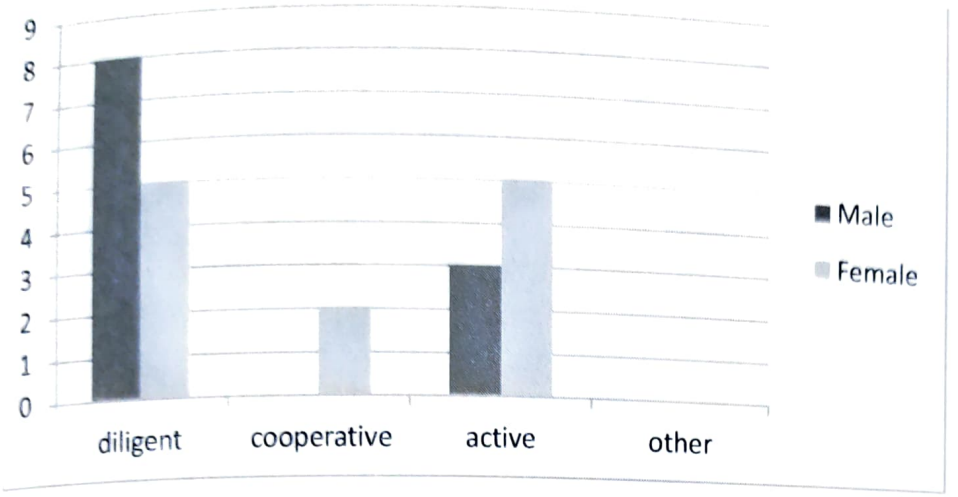
44% of the people believed that police is not good. 23 of them believed that police public relationship in the city is bad out of which 14 were female. 20 thought that police public relationship is good but 60% of them were male. However they were hopeful and 40% of them wished that good police public relationship can be developed through good understanding between the police and the populace.

V.VI. Nature of police work



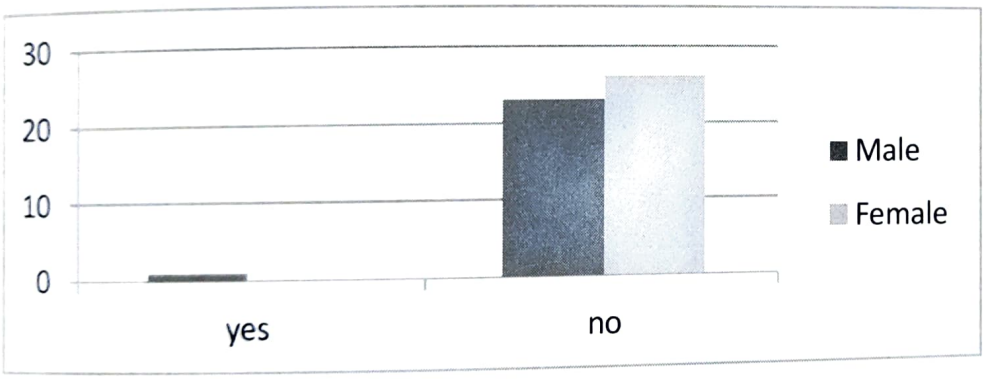
Maintenance of law and order is considered to be the primary task of the police.

V.VII. Satisfaction level with police work



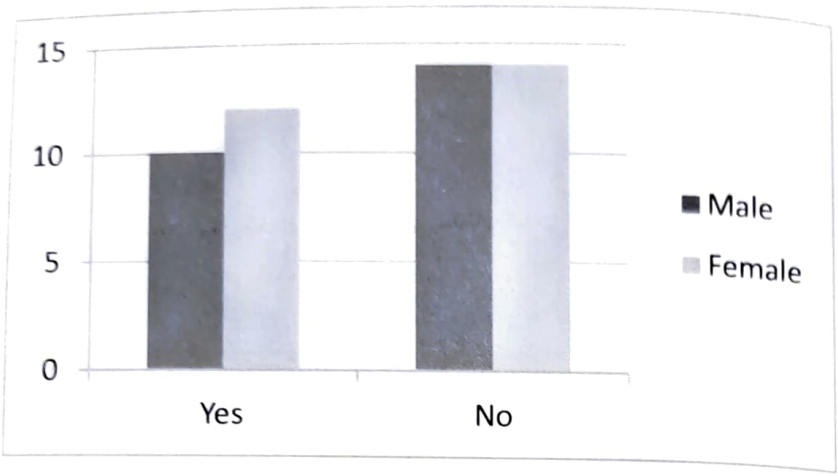
13 of the residents believed that police officers are diligent and dedicated towards their profession.8 of them however viewed the police to be active at work.

V.VIII. Awareness about community policing programmes



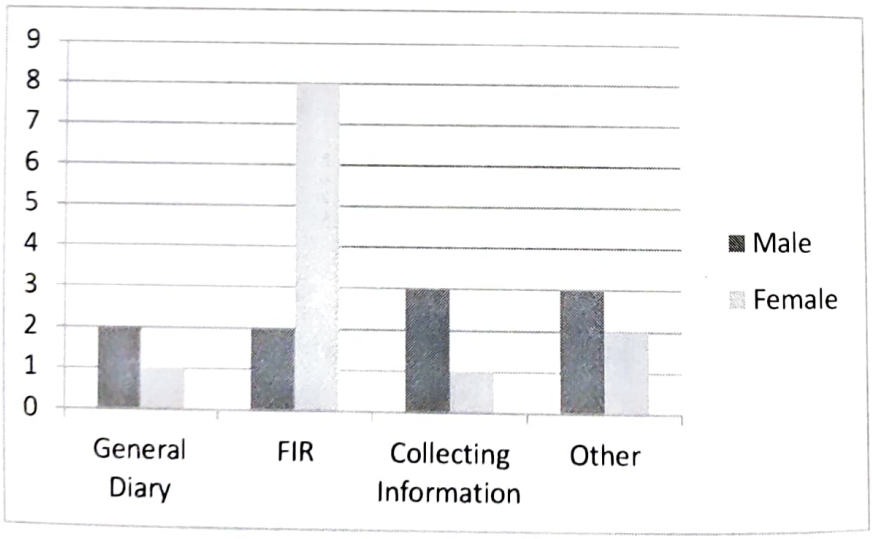
Even though the people are not aware about community policing programmes, 48 of the respondents believed that such programmes are required. 50% of them felt that such initiatives can strengthen the bond between the police and the people. 27 of the respondents stressed that the people are more likely to cooperate with the police in community service programmes.

V.IX. Visit to the police station



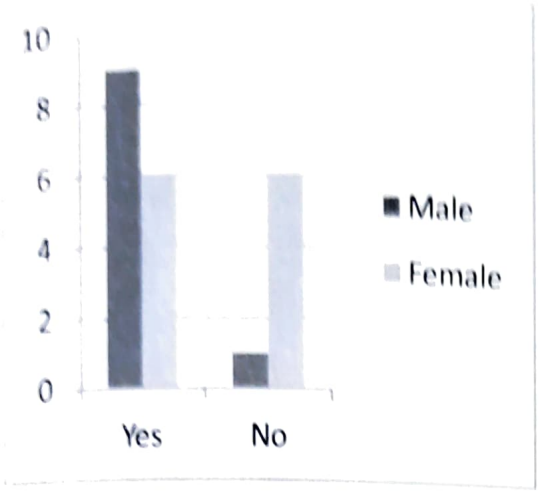
28 of the residents never visited the police station. Being a tribal community, the community sentiments are strong. Disputes are resolved at the community level and people do not drag complaints to the police station and prefer to settle it amongst themselves.

V.X. Reason for visit to the police station



10 of the residents visited the police station to lodge an FIR. This shows that people prefer to seek police help only if the dispute is serious and cannot be resolved at the community level. The community bonding being strong, dependence on police for conflict resolution is minimum.

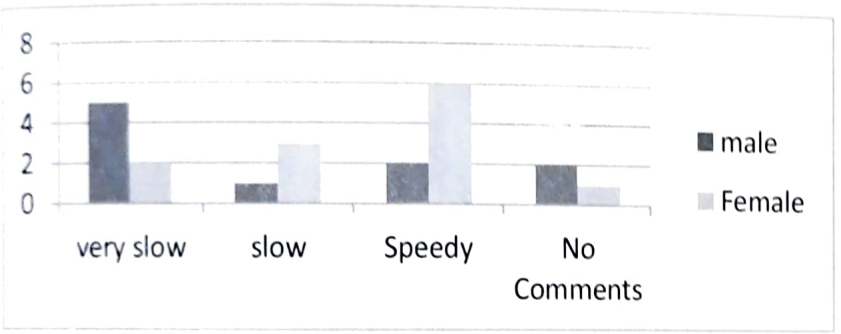
V.XI. Satisfaction level with nature of response



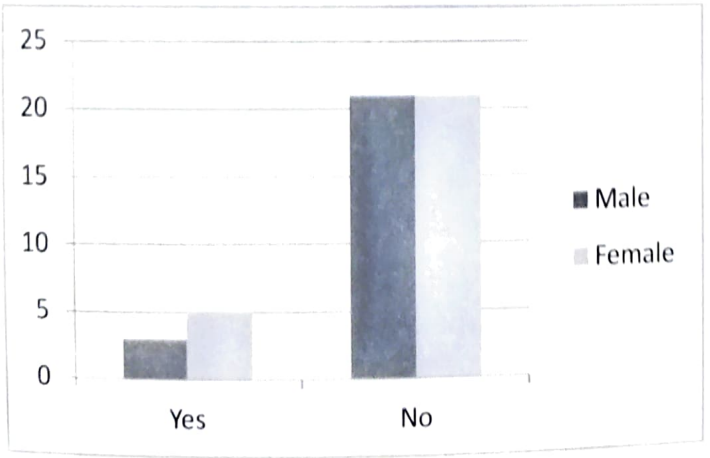
Satisfaction with police response is more among men than among women.

V.XII. Nature of response

However, the nature of response is speedier in regard to women's issues.



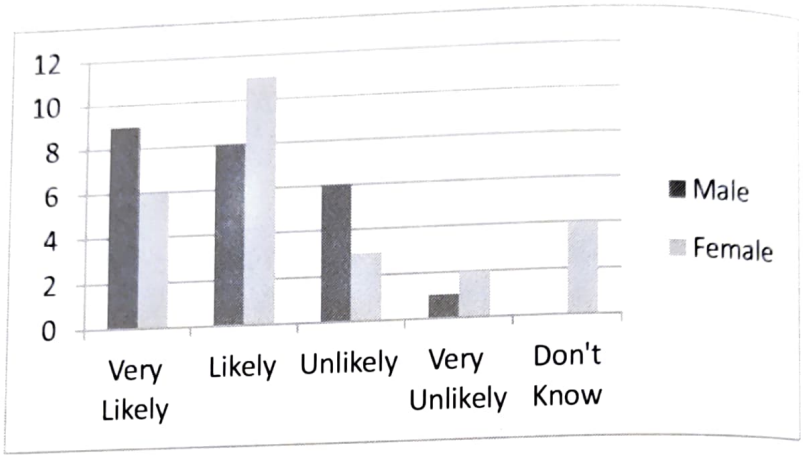
V.XIII. Whether complaint is ever lodged over telephone?



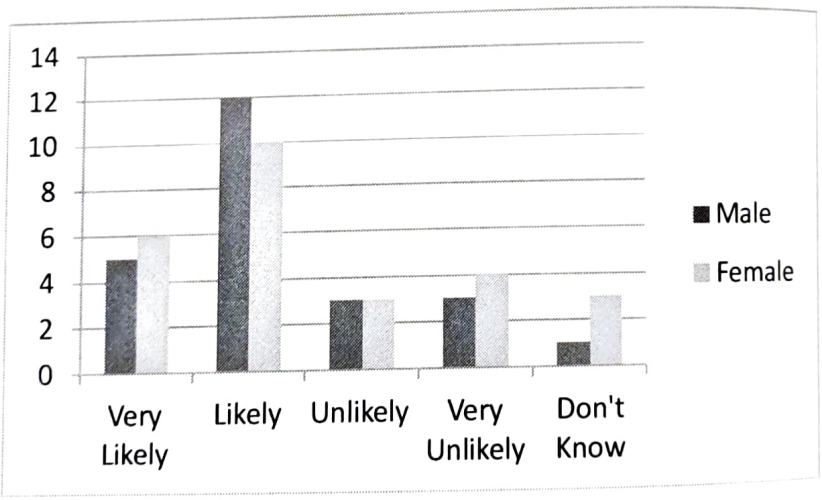
Most of the residents prefer to lodge complaints directly rather than over telephone. This shows that direct access is considered to be more effective.

V.XIV. A poor person is arrested on suspicion of theft and taken into custody. How likely is it that the police will inflict minor/severe physical harm on the suspect to admit the crime?

Minor harm

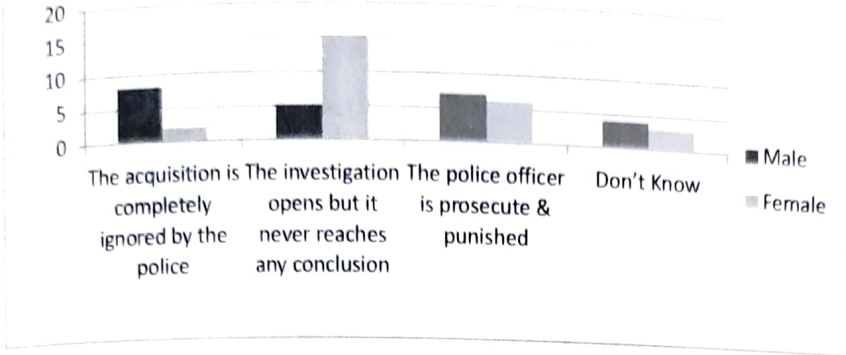


Severe harm



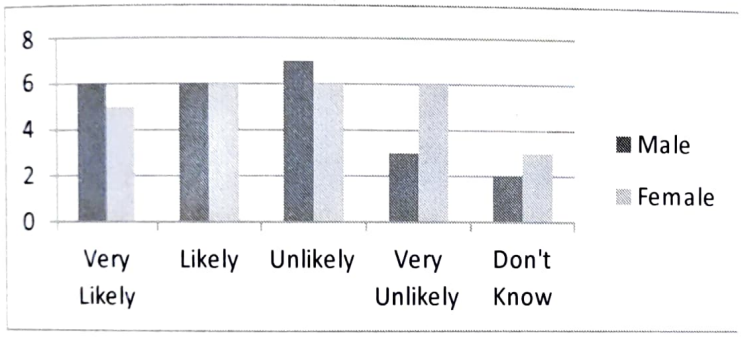
In both the instances it is observed that police is likely to inflict harm be it major or severe on a suspect to admit the crime. This is the cause for fear and apprehension of harm to be inflicted by the police may keep the people away from them. Police work should be people-friendly and any fear, anguish or distrust in the minds of the people can affect police public relationship severely.

V.XV. If a police officer inflicts severe physical injury on a suspect, and he/she files a formal complaint to the competent authority, which of the following outcomes is most likely?



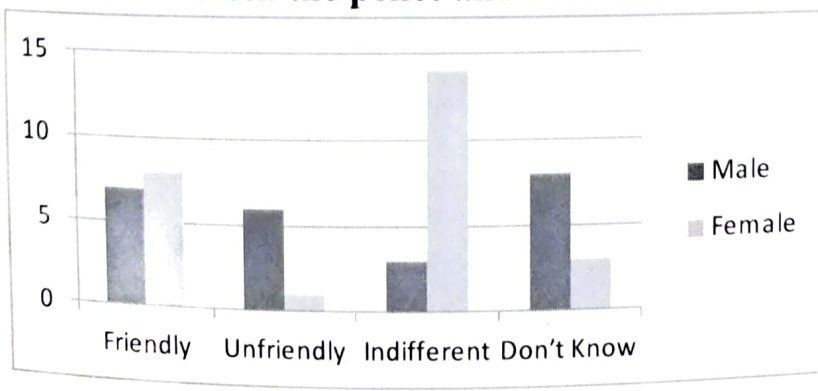
This shows the lack of trust on justice delivery system. Most of the common people believe that in most likelihood a suspect will never get justice if he/she complain about police torture.

V.XVI. If a police officer is exposed by a media reporter taking bribe, how likely is it that he/she will be punished?



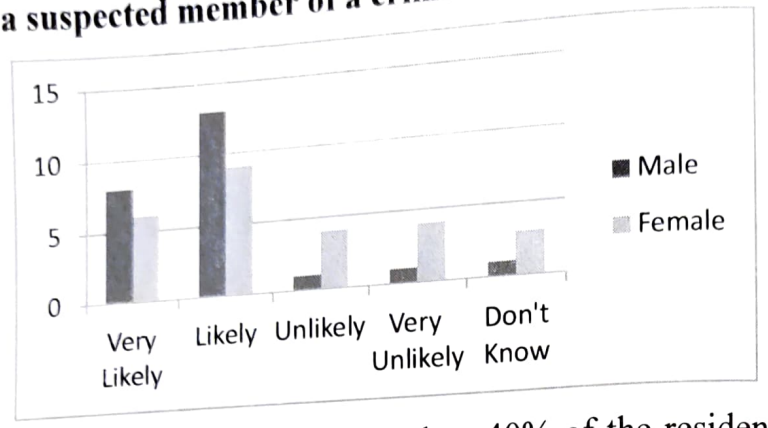
44% of the residents believed that it is unlikely that the police officer if caught red-handed will be punished. This brings to light the lack of faith of the people on the judiciary. This can cause disengagement, deviance and disregard towards law enforcement agencies.

V.XVII. Relation between the police and the media



More than 50% of the women feel that the police and the media are indifferent towards each other. The police has always complained about the media's role in distorting the reality to the people. In this regard, it is seen that only about 20% feel that the media and the police are friendly towards each other.

V.XVIII. How likely is it that the police will inflict severe physical harm on a suspected member of a criminal organization?



Here also it is seen that the more than 40% of the residents feel that police inflicts severe physical harm on the suspected member of a criminal organization. In this regard, it deserves mention that the police still is considered to repressive and authoritarian.

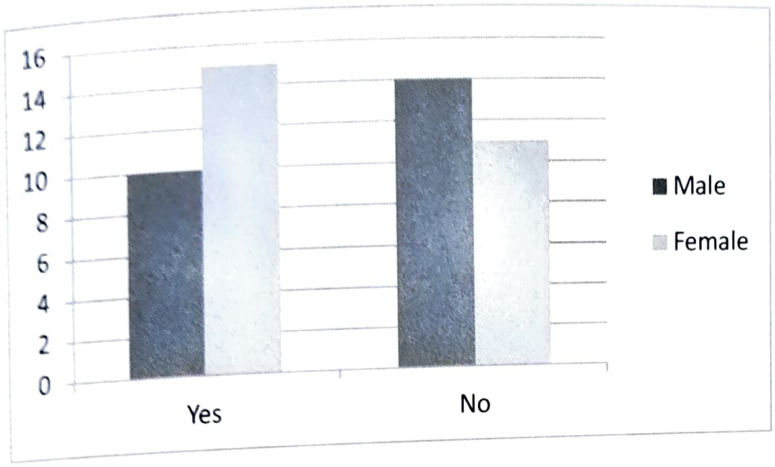
V.IX. Police involvement in community service

Type of Community Service	Response	
	Yes	No
Blood Donation	16	34
Sports	34	16
Helpline	27	23
Traffic Rule Awareness	29	21
Cyber Crime Awareness	10	40
Night Guard in neighbourhood	17	33
Everyday foot beat patrol	13	37
Community service during festivals	28	22
Committee for welfare	2	48
Education	2	48

N=50

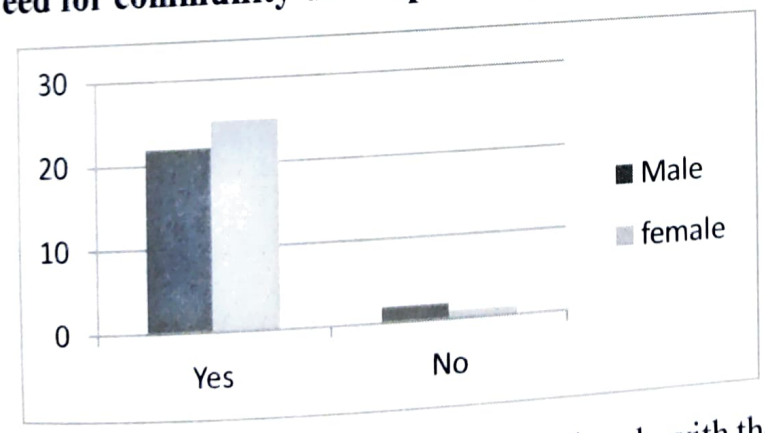
The table shows that most people opined that the police actively take part in community service in relation to sports, event management during festivities, and traffic rule awareness programmes. However more community policing initiatives are required to be taken by the police to bridge the gap between the police and the public. The NGOs should also collaborate with the police in different community policing initiatives.

V.XX. Whether family benefitted from the community service programs of the police?



Here the percentage of people who have benefitted from the community service initiatives of the police is 50. This shows that half of the residents are still not enjoying the benefits of the programmes and remains unaware and detached from the police.

V.XXI. Need for community development programmes

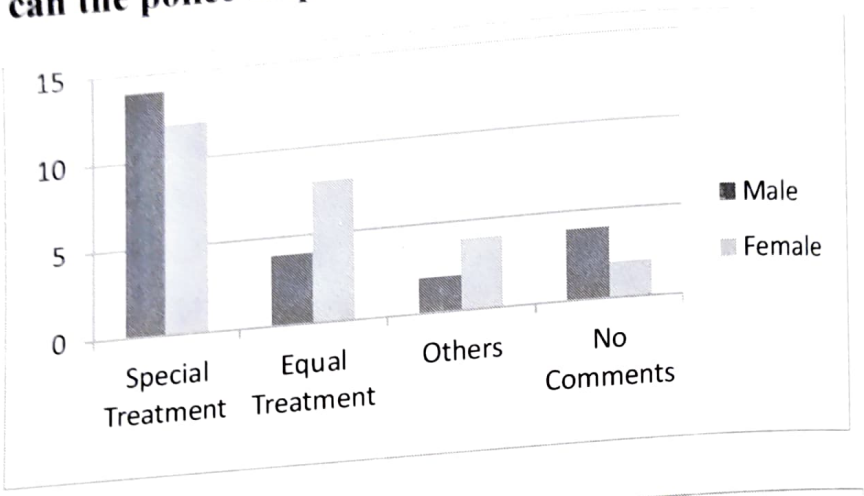


42 of the respondents were interested to join hands with the police in the community development programmes. Out of them 20 were interested in helping the police spread awareness about different social and environmental

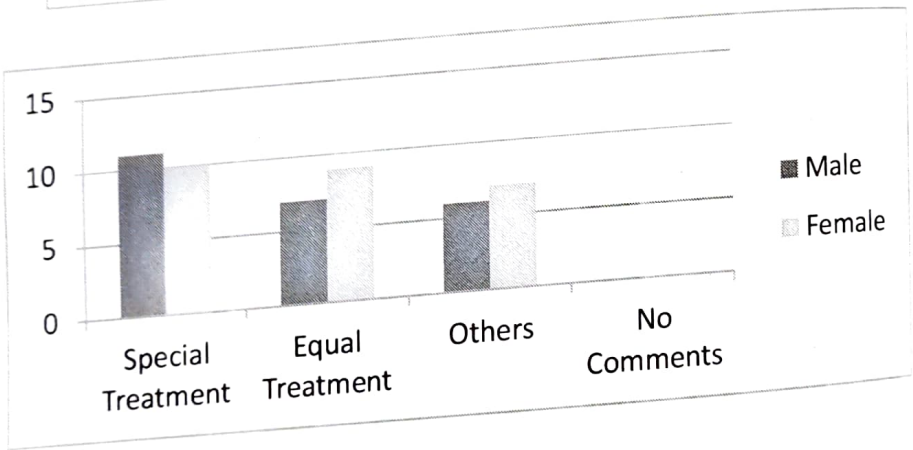
issues. The police should undertake programmes to spread awareness about cybercrime, environmental crimes and welfare activities like night schools for poor children, blood donation camps, helplines for women, children and the elderly. They can also seek the help of local NGOs and media to reach out to the people.

V.XXII. How can the police help:

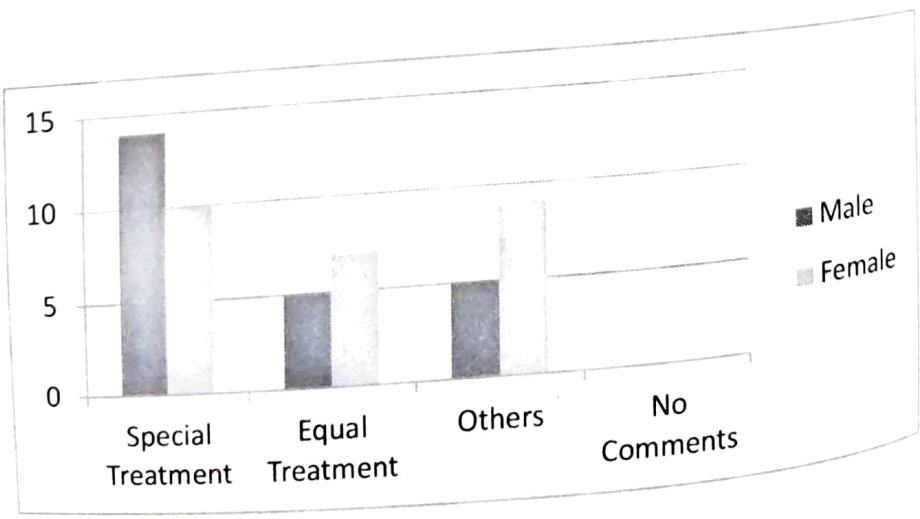
Women



Elderly

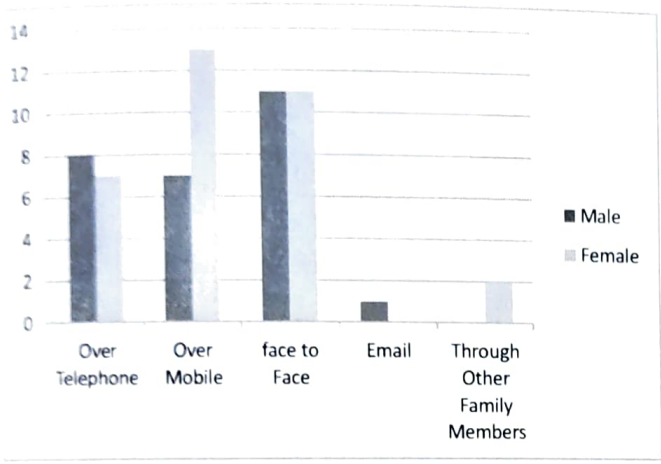


Children



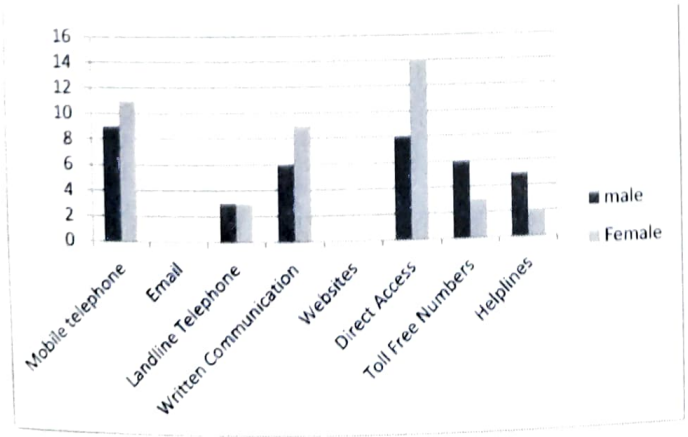
Most of the respondents are of the opinion that the police should provide special treatment for women, elderly and the children. The philosophy of community policing is rooted in providing cooperation towards the marginalised sections of the society be it women, children, elderly or the minorities. Helplines for the marginalised groups, special police stations for dealing with women's issues and special cells to check trafficking should come to force.

V.XXIII. Preferred medium of communication with the police



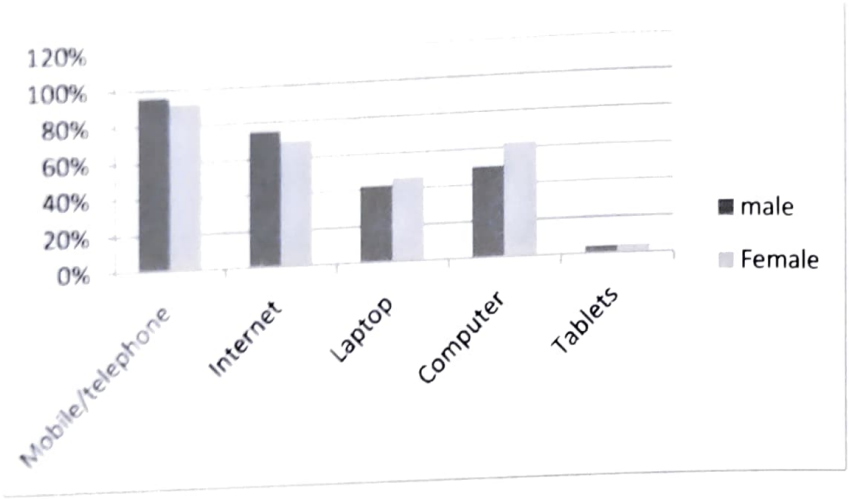
Mobile telephones and face to face interaction are the most preferred medium of communication between the police and the public. However women prefer the mobile telephones more to contact the police possibly because they feel uncomfortable visiting the police station and like to maintain physical anonymity.

V.XXIV. Most popular medium of communication between police and the people



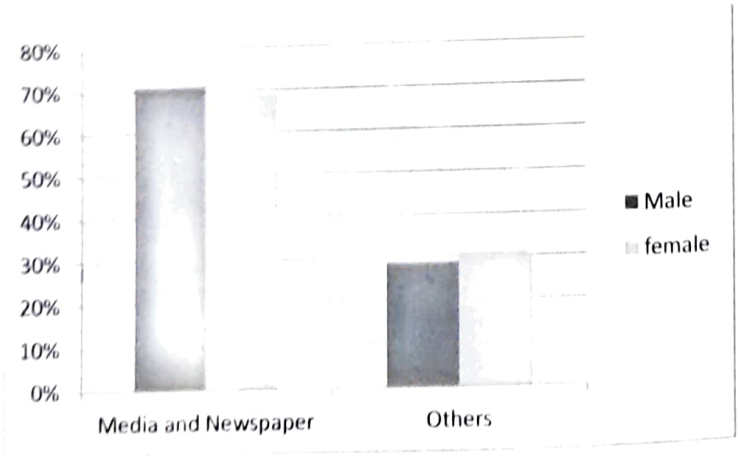
None of the respondents considered websites to be a popular medium of communication. Direct access and mobile telephones are considered to be the most popular medium of communication between the police and the public.

V.XXV. Which is the most commonly used Information and Communication Technologies (ICTs)?



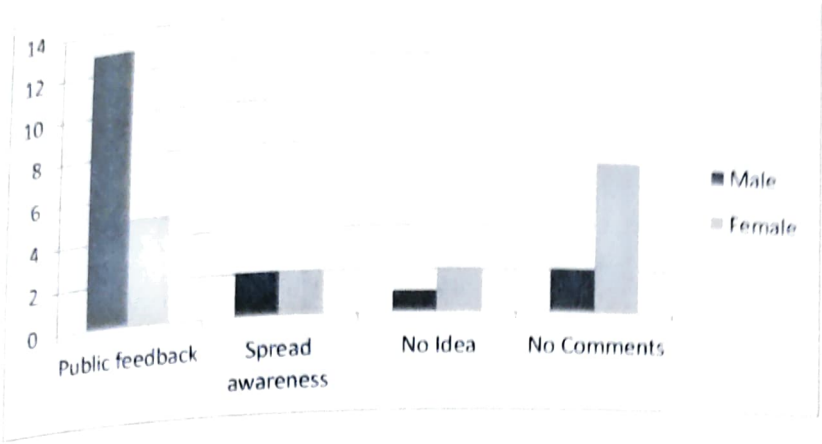
More than 80% of the respondents use mobile telephones. Internet is availed by about 70% of the respondents. The mobile telephone has become the most popular medium of communication and is used widely by the people.

V.XXVI. How can police publicise community policing programmes?



About 70% of the respondents feel that both electronic and print media can play a very positive role in publicising community policing initiatives and can reach a wide range of the population. Since internet is still not availed by many, newspaper, radio and television are accessed by people even in remote areas.

V.XXVII. Role of ICTs in police-public relationship



80% of the respondents believed that ICTs can help in publicising the community policing programmes. 50% of them stressed that ICTs can do it much quickly and reach out to a large section of the people both living in and outside the city.

70% of the respondents stressed that ICTs can play a very positive role in improving police public relationship. 18 of them feel that ICTs can yield people's feedback quickly.

VI. In lieu of a conclusion

The present study has attempted to explore police public relationship in Kohima, Nagaland. The following are the findings of the study:

1. Even though most of the respondents have acquaintances in police service, they are apprehensive about policing. There is a dearth in trust not only on the law enforcement agencies but also on the justice delivery system.
2. The people are educated and they are interested to participate in the community service initiatives of the police. However there is lack of awareness about the philosophy of community policing. Even though they believe that the police is known for maintenance of law and order, they want the police to take up community policing programs. The police take initiatives in sports, traffic awareness programs and event management during festivities. However the media and NGOs should also work in collaboration with the police to make such programs successful.

3. The people are also of the opinion that the police should ensure special treatment for women, elderly and children. They also agreed that the police try to provide speedy remedy to women's problems.

4. Most of the respondents found the police to be good and diligent. However they are also aware of the physical harm that the police can inflict on a suspect.

5. Direct Access and Mobile telephones are the most popular medium of communication between the police and the people.

6. Even though mobile telephones are widely used by the population, the people believe that electronic and print media can be effective in publicizing community policing. However they also agreed that ICTs can play a very positive role in improving police public relationship as they can yield feedback of the people speedily.

7. The capital requires community policing initiatives to reach out to the people. Awareness programs, sensitization of policemen, helplines, special police stations for women are the order of the day. These can make the police closer to the community and help build the trust between the police and the people.

In this regard, it deserves mention that even though it is a small sample survey, the study has brought to light the trends in the nature of the relationship between the police and the public in the hill capital of Nagaland. It furthers the interest for more detailed conclusive research in the area.

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GROWTH OF EXTRADITION UNDER INTERNATIONAL TREATY LAW REGIME

Ananya Chakraborty & Manoj Kumar Sinha***

ABSTRACT

The two world wars, the cold war and the rise of non-international armed conflicts, have pushed the international judicial bodies as well as the national courts to interpret and develop the extradition laws. With the rise of supra-national and international organizations, the traditional state to state extradition process has evolved to become state to international entity process, requiring more political will for the tribunals to exercise jurisdiction over reluctant indicted individuals.

Keywords: Extradition, Global Terrorism, 9/11 Attack, Regional Agreement, SAARC.

I. INTRODUCTION

Extradition laws under international law has developed from state practices, which eventually have led to recognizing of some basic principles, which are now widely adopted in the bi-lateral and multilateral treaties. In the last few decades we have witnessed some very important decisions being given by domestic as well as international courts[1], on extradition matters, which have encouraged the victims more and more to seek justice. The most important phase of its development is in the backdrop of existing terrorist threats or successful terrorist attacks. To meet the challenges of the threats posed by acts of terrorism, the comity of nations have also with the passage of time developed multi-lateral treaty system, which monitors the extradition

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[1] International Court of Justice (ICJ), Questions Relating to the Obligation to Prosecute or Extradite (Belgium *V.* Senegal), (Int'l Ct. Justice July 20, 2012), *available at*: [http://www.icj-cij.org/docket/files/144/17064.pdf] (Visited on January 3, 2014). ; Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); International Court of Justice (ICJ), Case Concerning Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Libyan Arab Jamahiriya V. United Kingdom), (Int'l Ct. Justice February 27, 1998), *available at:* [http://www.icj-cij.org/docket/files/89/7249.pdf] (Visited on January 3, 2014).; UK House Of Lords: In Re Pinochet 38 LL.M. 430 (1999).

issues as well. The article intends to lay out the major developments in the extradition laws with reference to terrorism in particular and the way the treaty laws have developed to keep up with the new challenges imposed by the threat of terrorist attacks.

II. EXTRADITION – GENERAL PRINCIPLES

The term "extradition", has its etymological roots in Latin and French language and is supposed to be in use since early nineteenth century in France. It is "apparently a coinage of Voltaire's, from Latin ex "out/former" + traditionem (nominative traditio) "a delivering up, handing over," noun of action from tradere "to hand over".[2] "Extradition" is defined as the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state on whose territory he happens for the time being to be[3], under legal perception, supported by extensive juristic writing[4].

Since the ancient time, concepts like respondent superior; vicarious liability; *noxae deditio*[5], a Roman private law principle found its way into international relations and influenced extradition laws. Based on the theory of 'natural duty' under international law, on the States to extradite or prosecute fugitives, led to the practice of extradition even in the absence of treaty obligation.[6] Before that the French in its treaties used terms like restituter and remettre, which meant to restore or send back.[7]

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[2] [http://www.etymonline.com] , (Visited on January 11, 2014)

[3] Parry, C, Grant, J, & Barker, J 2009, Parry & Grant Encyclopedic Dictionary of International Law, Oxford: Oxford University Press, eBook Academic Collection Trial, EBSCOhost, (viewed 11 January 2014).

[4] MALCOLM N. SHAW, INTERNATIONAL LAW 686 (6th ed. 2008). See. NICHOLLS,C. MONTGOMERY, THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE 3 (3rd ed. 2013).

[5] In ancient times family was considered the primary unit, i.e., *paterfamilias* and the subordinate members of the household. When wrongs were done by the subordinates, liability could be avoided by handing over the delinquent, i.e., the paterfamilias could either surrender (*noxae deditio*) or pay damages like ransom for keeping him. See a Manual of Roman Private Law by W. W. Buckland; See also penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Noxalis_Actio.html [Visited on May24, 2014]

[6] Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. Int'l & Comp. L. Rev. 53 (1981).

[7] *Id.* at 40.

We can further identify the general principles of extradition by referring to definitions given by the International Organizations as well as textual sources. In addition to UN Convention against Transnational Organized Crime[8] and the three Protocols on Trafficking in Persons, Smuggling of Migrants and Trafficking of Firearms - that supplement it, the United Nations has developed a common universal legal framework against terrorism which is comprised of the 18 universal legal instruments against terrorism along with the relevant United Nations Security Council Resolutions.[9] The UN Congresses on Crime Prevention and Criminal Justice[10] approved the Model Treaty on Extradition[11] on its Eight UN Congress on the Prevention of Crime and the Treatment of the Offenders.

The general principles of extradition laws can be identified from the provisions as found in the treaties[12], like:

a. Existence of an obligation to extradite

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[8] United Nations Convention against Transnational Organized Crime, Sep. 29, 2003, 2225 U.N.T.S 209.

[9] [http://www.unodc.org/unodc/en/terrorism/] ,(Visited on January 15, 2014)

[10] United Nations Congresses on Crime Prevention and Criminal Justice 1955-2010, United Nations Information Service, 2010, available at: [https://www.un.org/en/conf/crimecongress2010/pdf/55years_ebook.pdf/] (Visited on January 15, 2014).

[11] Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/RES/45/116 (Dec.14, 1990).

[12] Model Treaty on Extradition, Dec. 14, 1990;SAARC Regional Convention on the Suppression of Terrorism, Nov, 4 1987; See Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, Jan. 6, 2004; Convention On Offences And Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 704 U.N.T.S 220; Convention For The Suppression Of Unlawful Seizure Of Aircraft, Dec. 16, 1970, 860 U.N.T.S 106; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S 177; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S 124; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988,1589 U.N.T.S 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, on Mar. 10, 1988, 1678 U.N.T.S 222; International Convention against the Taking of Hostages, Dec. 17,1979, 1316 U.N.T.S 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S 168; International Convention for the Suppression of Terrorist Bombings, Dec. 15,1997, 2149 U.N.T.S 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S 197; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S 89.

b. The offences must fall in the category of extraditable offences or even known as 'principle of double criminality[13]';

c. Grounds of mandatory refusal and optional refusal

d. Rule of speciality.

All the above-mentioned principles have found their rightful place in multi-lateral, bi-lateral treaties as well as national legislations.

The principle of double-criminality is a simple requirement of the offence to be punished by the laws of both requesting and requested State, which is further subjected to a minimum period of imprisonment. The successful implementation depends on the municipal courts not giving restrictive interpretation to the enumerated offences in treaties. Framework Decision adopted by the Council of the European Union does away with the principle completely in relation to certain category of offenses.[14] Extradition matters in EU have been simplified by the introduction of the European Arrest Warrant.[15]

The development of human rights instruments[16], have resulted in more guarantees to individuals in the form of mandatory and optional grounds for refusing extradition requests. In the light of terrorism, however, the nations have maintained almost a uniform policy of de-politicizing the acts of terrorism, as defined in the Conventions, while imposing a duty to either prosecute or extradite[17]. The recent trends in extradition treaty practice has been to reduce the grounds of refusal, but still grounds like extradition of

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[13] Lech Gardocki, *Double Criminality in Extradition Law*, 27 Isr. L. Rev. 288-296 (1993).

[14] Council Framework Decision 2002/584, of the Council of European Union of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, art. 2, 2002 O.J. (L 190).

[15] Dionysios Spinellis, *Extradition-Recent Developments in European Criminal Law*, 8 Eur.J.L. Reform 251 (2006).

[16] Universal Declaration Of Human Rights UNGA Resolution 217 A (iii) Of 10 December 1948; International Covenant On Civil And Political Rights, 999 U.N.T.S 171; International Covenant On Economic, Social And Cultural Rights Of 16 December 1966, 993 U.N.T.S 3; Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment of 10 December 1984, 1465 U.N.T.S 85.

[17] SAARC Regional Convention on the Suppression of Terrorism, Nov. 4, 1987, Art.II; International Convention for the Suppression of Terrorist Bombings , *supra* note 12 at art. 11; International Convention for the Suppression of the Financing of Terrorism, *supra* note 12 at art. 14.

nationals, death penalty, extraterritoriality, extraordinary / ad-hoc tribunal, humanitarian exceptions, give the requested countries an opportunity to exercise their discretion, to decide on extradition matters.

Rule of specialty, is a widely recognized principle, which limits the power that the requesting State has over the person so surrendered. It requires that a person extradited to a requesting state is not to be detained, prosecuted or punished by the requesting state for any crime committed earlier to the extradition, apart from that for which extradition was granted.[18] This rule has been recognized in more than one international instrument[19].

III. EXTRADITION UNDER INTERNATIONAL LAW – IN THE BACKDROP OF GLOBAL TERRORISM

The term "terror" (Latin "*terrere*"—"to frighten") entered Western European language via French in the 14th century and thereafter used in English in 1528.[20] Under international humanitarian law, terrorism is understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack.[21] Terrorism covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect.[22] 'Terrorism' has been frequently qualified by terms like domestic, international, trans-national, referring to the way it is carried out and the ambit of the effects felt by it, without changing

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[18] Gavan Griffith QC & Claire Harris, *Recent Development in the Law of Extradition*, 2 MelbJIIntLaw 33, 49 (2005).

[19] London Scheme for Extradition within the Commonwealth (as amended in 2002), Art. 20; Rome Statute of the International Criminal Court (last amended 2010), Art.101; Council of the European Union, Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States, 002/584/JHA, Art. 13, 21, 27 and 28.

[20] Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law*
and Its Influence on Definitions in Domestic Legislation, 29 B.C. Int'l & Comp. L. Rev. 23, 27 (2006); Alex P. Schmid, The Problems of Defining Terrorism- Encyclopaedia of World Terrorism 12, (Martha Crenshaw & John Pimlott eds., 1997).

[21] Commentary on The Additional Protocols To The Geneva Conventions, P.526. [Available at: [http://www.icrc.org/eng/assets/files/other/irrc-865-queguiner.pdf]

[22] *Id.* at pg. 1411, para. 4538

the basic elements[23] of the act. Since at least the 1920s and 1930s many states have accepted terrorism as a transnational crisis requiring a way out initiated at international law.[24] Throughout history, the term 'terrorist' has been used by militant groups of different religious orientation, often blended with nationalist and socio-political ideological elements.[25]

In the light of United Nation adopted a resolution[26] it became a nexus between the global forces of terrorism and internationalized antiterrorist efforts.[27]

IV. DEVELOPMENT OF EXTRADITION LAW UNDER INTERNATIONAL LAW — PRIOR TO 9/11 ATTACK

The *Jus in Bello* branch of international law, had taken the initial steps on matters of extradition, by putting forth an indistinguishable mechanism for the prosecution of individuals indicted of having committed grave breaches of the Conventions.[28]

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[23] Terrorism is often, though not always, defined in terms of four characteristics: (1) the threat or use of violence; (2) a political objective; the desire to change the status quo; (3) the intention to spread fear by committing spectacular public acts; (4) the intentional targeting of civilians. [http://www.azdema.gov/museum/famousbattles/pdf/Terrorism%20Definitions%20072809.pdf] [Visited on June 6, 2014]

[24] Young, *supra* note 20, at 23.

[25] Terrorism Patterns of Internationalization 191(Jaideep Ssaikia & Ekaterina Stepanova eds., Sage Publications 2009). In 1998-2006, religious terrorists carried out 352 attacks internationally, as compared to 353 attacks by violent nationalists. Since the early 1990s, religious, mostly Islamist, terrorism has been far more deadly at the international level than any other type of terrorism, including nationalist terrorism.

[26] S/RES/1373 (2001) [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf]; see also Declaration on Measures to Eliminate International Terrorism **A/RES/49/60;** S/RES/1269 (1999) and Resolution 1386 (2001)

[27] Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating A Unified International Response*, 6 Ind. J. Global Legal Stud. 685, 688 (1999).

[28] Articles 49, 50, 129 and 146, respectively, of Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field, Geneva Convention For The Amelioration Of The Shipwrecked Members Of Armed Forces At Sea, Geneva Convention Relative To The Treatment Of Prisoners Of War, And Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War.U.N.T.S, vol. 75, Nos. 970-973; see also Article 85 of Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N.T.S, vol. 1125, No. 17512.

There were significant developments through regional treaties[29] as well. Prior to 9/11, there were a total of thirteen international conventions related to terrorism in particular[30] and they operate on a common model, establishing the basis of quasi-universal jurisdiction with an interlocking network of international obligations.[31] All the treaties comprises a definition of the offence in question and the automatic incorporation of such offences within all extradition agreements between states parties coupled with obligations on states parties to make these offences an offence in domestic law, to establish jurisdiction over this offence and, where the alleged offender is present in the territory, either to prosecute or to extradite to another state that will.[32]

The Security Council has since the early 1990s consistently dealt with issues of terrorism[33] and supplemented the efforts of other regional organizations[34]. The Council has not been hesitant in putting sanctions on

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[29] Treaty on International Penal Law, Jan 23 1889; Treaty on International Penal Law, Mar 18, 1940, contain an absolute obligation to extradite, subject to the conditions set forth in the respective treaties (see, respectively, art. 19 and art. 18); The Convention on Private International Law Havana, Feb 20, 1928, 1950 L.N.T.S 86; Convention on Extradition, Dec 26, 1933,3803 L.N.T.S 165; Inter-American Convention on Extradition, Feb 25, 198,1752U.N.T.S 191;The European Convention on Extradition, Dec 13, 1957, 359U.N.T.S; The General Convention on Judicial Cooperation Sep 12, 1961; Convention on Extradition, Aug 6 1994. ECOWAS Convention A/P1/8/94, reproduced in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, June 2007, p. 1085; London Scheme for Extradition within the Commonwealth.

[30] Upendra D. Acharya, *War on Terror or Terror Wars: The Problem In Defining Terrorism*, 37:4 Denv. J. Int'l L. & Pol'y 659 (2009); *supra* note 13.

[31] Shaw, *supra* note 4, at 1161.

[32] *See id.*

[33] [https://www.un.org/en/terrorism/securitycouncil.shtml] ,[Visited on June17, 2014]

[34] S C Res. 1044, U.N. Doc. S/RES/1044 (Jan.31, 1996). [It urged Sudan, to extradite, the terrorists who had attacked the President of the Arab Republic of Egypt, in Addis Ababa, Ethiopia, on 26 June 1995. It called upon the government of Sudan to comply with the requests of the Organization of African Unity, and undertake immediate action to extradite to Ethiopia on the basis of the 1964 Extradition Treaty between Ethiopia and the Sudan. See UN Security Council, Condemning assassination attempt against President Mubarak of Egypt and calling upon the Government of Sudan to comply with OAU requests Resolution 1044 (1996) Adopted by the Security Council at its 3627th meeting, on 31 January 1996, 31 January 1996, S/RES/1044 (1996), available at: [http://www.refworld.org/docid/3b00f15a44.htm] [Visited on 23 February, 2014]; See also S C Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) and S C Res. 748, U.N. Doc. S/RES/748 (Mar.31, 1992).

the non-complying states, in pursuance of its basic duty to maintain international peace and security.[35]

V. DEVELOPMENT OF EXTRADITION LAW UNDER INTERNATIONAL LAW — POST 9/11 ATTACK

The heinous attack on the twin towers of the New York world trade centre on 11th September 2001 killed some 3000 innocent people belonging to sixty different countries. The terrorist attacks in New York and Washington in 2001, 2004 in Madrid, and 2005 in London brought counter-terrorism within the ambit of policy making.[36] The terrorist attack on the World Trade Centre on September 11, 2001 led to the adoption of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States considered as the most important operational instrument in the European fight against terrorism for its impact on the reduction of the length of time of the extradition procedures and its extensive utilization by national authorities. Together with the legal mechanism, there has also been rise of less time consuming practices of taking fugitives into custody like, ad hoc agreement, secret abduction, and extraordinary rendition.[37] Such legal counter-terrorism mechanisms have been in existence since the early 1970s, but international efforts were further consolidated with the adoption of UN Counter-Terrorism Strategy[38].

VI. GROWTH OF EXTRADITION LAWS UNDER THE AEGIS OF UNITED NATIONS ORGANIZATIONS

The United Nations has currently adopted around seventeen universal instruments against terrorism, including the Protocols to some of the main treaties, identifying certain specific acts as acts of terrorism, including measures of extradition as well. The first effort was visible in the year 1972,

[35] S C Res. 1054, ¶ 3, U.N. Doc. S/RES/1054 (Apr.26, 1996).
[36] JAVIER ARGOMANIZ, THE EU AND COUNTER-TERRORISM: POLITICS, POLITY AND POLICIES AFTER 9/11 19 (2011).
[37] William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 868, 840-901 (2012).
[38] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy : resolution / adopted by the General Assembly*, 20 September 2006, A/RES/60/288, available at: [http://www.refworld.org/docid/468364e72.html] [Visited on March4 , 2014]

with the passage of General Assembly Resolution 3034 (XXVII)[39]. Thereafter the committee has been formed and been instrumental in bringing an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism (resolution 51/210).[40] Within these initiatives, the United Nations had spoken about extradition number of times as a legal tool to counter terrorism[41].

The 1963 Tokyo convention[42], the first successful initiative of the United Nations had some very basic provisions on extradition which are enshrined under the powers and duties of states[43]. However, the Convention does not create an obligation to grant extradition[44]. The subsequent treaties are better drafted and have been able to establish the basic obligation of the states to either prosecute or extradite. The 1970 Hague Convention[45], laid down elaborate extradition provisions and has been adopted in most of the subsequent treaties. Some of the essential features of this convention are as follows: obliging contracting states to make the offences as described in the convention to be punishable by "severe penalties"[46]; compelling the states to take positive steps to establish jurisdiction over such individuals, if not extraditing the person under Art 8, at the same time encouraging states to

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[39] G.A.Res 3034 (XXVII) [Refworld , [Available at : [http://www.un.org/documents/ga/docs/27/ares3034(xxvii).pdf] [Visited on June24 ,2014] ,[It called upon states to prevent international terrorism and even proposed the formation of an Ad Hoc committee on international terrorism to put concrete proposals for finding an effective solution to the problem.]

[40] G.A.Res 51/210, U.N.Doc.A/RES/51/210(Jan.16, 1997).

[41] Part II, Para 5 (b) and Para 6 of Declaration on Measures to Eliminate International Terrorism, Annexure of General Assembly A/RES/49/60, 84th plenary meeting, 9 December 1994; Para 5 of preamble, Para 5, 6, and 7 of Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexure of General Assembly A/RES 51/210, 16 January 1997; G.A.RES 60/288, ¶ 3,U.N.Doc.A/RES/60/288, (Sep.20, 2006).

[42] The Convention on Offences and Certain Other Acts Committed on Board Aircraft, *supra* note 12.

[43] *Id.*, Art. 12-15.

[44] *Id.*, Art. 16 (2)

[45] Convention For The Suppression Of Unlawful Seizure Of Aircraft, *supra* note 12.

[46] *Id.*, Art. 2

exercise criminal jurisdiction in accordance to its national law[47]; custody of persons can be only for reasonable period to enable any extradition proceeding[48]. Articles 7 and 8 have comprehensively covered the principle of *aut dedere aut judicare*, also popularly known as "Hague Formula" or "German Formula".[49] The Hague formula has made it obligatory on the part of the contracting parties, when refusing extradition requests, to submit the case their own authorities, who would decide in the same manner as in the case of any ordinary offence of a serious nature under the law of the state.[50] At the same time it also for the first time laid down the following rules which have been adopted in all the anti-terrorism conventions, like:

- Offences as specified in the convention to be deemed as included in the existing extradition treaties between the contracting states;
- The contracting parties being obliged to make these offences as extraditable offences in any future extradition treaties that may come into effect between them;
- When extradition is made subject to the existence of extradition treaty, which is absent, then the requested state may consider the respective treaty as the legal foundation for extradition in respect of the crimes;
- When extradition is not depending to the existence of extradition treaty, then the requested state must identify the crime as an extraditable crime, in accordance to the conditions offered by the law of the requested state;
- Both the requested and the requesting state, for the purpose of extradition, need to take into account the place where the act has been committed and also the territories which could exercise jurisdiction under the convention.[51]

It also initiated the process of reporting the results of any extradition or legal proceedings which may have been initiated to other international organizations, like the ICAO, under the present convention.[52]

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[47] *Id.*, Art. 4
[48] *Id.*, Art. 6
[49] After the Iraq War: The Future of the UN and International Law edited by Bernhard Vogel, Rudolf Dolzer, Matthias Herdegen, p.127 , Available at: [https://www.law.upenn.edu/live/news/4251-iraq-deja-vu-all-over-again—part-i#.U8gLgXKSxIE] [Visited on May23 ,2014]
[50] See Art. 7 of 1970 Hague convention,
[51] *Id.*, Art. 8
[52] *Id.*, Art. 11.

The same drafting pattern regarding extradition provisions are found in the 1971 Montreal Convention[53]; 1973 Diplomatic Agents Convention[54], 1979 Hostage Convention[55], 1980 nuclear materials convention[56], 1988 maritime safety convention[57], 1988 fixed platforms protocol[58], 1997 Bombings Convention[59].1999 Financing Convention[60] and 2005 Nuclear Terrorism Convention[61].

The 1979 Hostage Convention has been path-breaking in many ways, like it has considered the offence to be of such grave nature, impinging the duty on the state parties to either put on trial or hand over the person committing such offence while considering the offences under the said convention to be a manifestation of "international terrorism". This convention also for the first time guaranteed fair treatment of the accused person as well as stating the grounds of refusal, when the person can be discriminated on the grounds of his race, religion, nationality, ethnic origin or political opinion.[62] It even modified the existing extradition treaties between the State parties to the degree they are irreconcilable with respect to Hostage Convention, with respect to the offences in the said convention.[63] The Hostage Convention has expressly given primacy to International Humanitarian Law by stating that state parties are bound under the Geneva Conventions and Additional Protocol to prosecute or hand over the hostage taken, in which people are

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[53] The Convention for The Suppression of Unlawful Acts Against The Safety of Civil Aviation, *supra* note 12, Articles 5 (2), 6, 7 and 8.
[54] The Convention on The Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, *supra* note 12, Articles 3(2), 6, 7 and 8.
[55] International Convention against the Taking of Hostages, *supra* note 12, Articles 5, 8 (1), 9 (1) & (2), 10.
[56] *Id.*, Art. 9, 10, 11.
[57] Articles 6 (4), 7, 10, 11. the convention refers to the General Assembly Resolution 40/61 on international terrorism in the paragraphs 7 and 8 of the Preamble. This convention also mandates the state parties to pay due regard to the interests and responsibilities of the state party whose flag the ship was flying at the time of the commission of the offence, when there are more than one request for extradition from states, under article 11 (5).
[58] Article 1 applies the articles 5, 7, 10 to 16 of the Convention on Safety of Maritime Navigation, to the present Protocol.
[59] *Id.*, Art. 7 (2), 8, 9, 11, 12.
[60] *Id.*, Art. 10, 11, 13, 14 and 15.
[61] International Convention For The Suppression Of Acts Of Nuclear Terrorism, *supra* note 12, Articles 10(2), 11, 13, 15 and 16.
[62] *Id.*, Article 9.
[63] *Id.*, Article 9

fighting to realize their right of self-determination.[64] Post 1997, the International Convention on Suppression of Terrorist Bombing has created more comprehensive provisions on extradition. It mandates the state parties not to allow justifications motivated by political, ideological, philosophical, racial, religious, or of similar nature, while criminalizing the offences by their domestic legislations.[65] It also enables the state parties to surrender the person to discharge the obligation to extradite under the convention subject to the condition that the person would be serving his sentence in the requested country.[66] Bombing, Financing, and nuclear terrorism conventions have laid that none of the offences mentioned in the respective treaties are considered as political offence, but at the same implores states not to refuse extradition requests citing only the ground of political offence exception.[67]

All the above-mentioned multi-lateral treaties under the United Nations have focused on the duty of the State Parties to incorporate such offences as grave offences within their municipal law and thereby facilitate punishment of the persons committing or attempting to commit the offences. To fulfil this objective the treaties have laid down the duty on the state parties to extradite or prosecute. The farthest the treaties have gone is in guaranteeing protection to the individuals from being extradited in any country where they might be discriminated on grounds like race, religion, political opinion, or otherwise. The treaty laws have almost left the existing extradition treaties untouched, except where the offences in these treaties are considered to be included in the existing extradition treaties between the state parties. The state parties are further legally required to include such offences in future extradition treaties. However, these treaties fall short of consolidating the basic features of extradition, like rule of speciality; double criminality; etc. On the other hand, these anti-terrorism treaties have almost put an end to the age-old practice of refusing extradition citing grounds of political offence or related to political offence. So overall, extradition practices have remained untouched by the development of anti-terrorism laws.

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[64] *Id.*, Art. 12.
[65] *Id.*, Art. 5.
[66] *Id.*, Art. 8 (2)
[67] Bombing Convention and Art 14 of Terrorist Financing Convention *supra* note 12, Art 11.The Nuclear Terrorism Convention *supra* note 12, Art 15.

However, the United Nations did feel the need to consolidate extradition laws in one place which can take the shape of a separate treaty, and such efforts have so far only resulted in the 'Model Treaty on Extradition' [hereinafter referred as 'MT'] in 1990 as adopted by the General Assembly[68]. The model treaty has been further supplemented by General Assembly Resolution on international co-operation on criminal matters.[69] The model treaty has dealt with all the essential features of extradition practice, like the basic obligation of states to extradite[70]; the principle of double criminality[71]; mandatory and optional grounds of refusal[72]; procedural requirements[73]; simplified extradition procedure[74]; provisional arrest and subsequent procedures[75]; kinds of surrender[76]; rule of speciality[77].

VII. EXPANSION OF EXTRADITION LAWS UNDER THE REGIONAL ARRANGEMENTS

The regional organizations have also contributed to the development of extradition laws, with their regional treaties, arrangements as well as judicial decisions. The most significant development seems to have been made within the European Union [hereinafter referred as EU], by replacing extradition with European Arrest Warrant between the members.

EUROPEAN UNION

Title VI of the EU Treaty laid the basic framework on police and judicial co-operation in criminal matters, with the objective to provide citizens with a high level of safety within an area of freedom, security and justice, by

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[68] A/Res/45/116, 14th December, 1990.

[69] A/RES/52/88, 4 February 1998[http://www.refworld.org/pdfid/3b00f35213.pdf] it has been a culmination of the efforts of Intergovernmental Expert Group Meeting on Extradition, held at Siracusa, Italy, from 10 to 13 December 1996, to implement, in part, Economic and Social Council resolution 1995/27 of 24 July 1995 by reviewing the Model Treaty on Extradition under annexure of Resolution 45/116; International Association of Penal Law and the International Institute of Higher Studies in Criminal Sciences ; and the United Nations Interregional Crime and Justice Research Institute.

[70] *Id.*, Art.1.

[71] *Id.*, Art. 2.

[72] *Id.*, Art.3 and 4.

[73] *Id.*, Article 5;

[74] *Id.*, Article 6

[75] *Id.*, Art. 9 and 10.

[76] *Id.*, Art. 12 and 13.

[77] *Id.*, Art. 14.

focussing on preventing and combating crime, organised or otherwise, among which terrorism is mentioned[78], by closer co-operation through European Police Office and European Judicial Cooperation Unit[79]. The scope of judicial co-operation includes facilitating extradition between member countries; adopt least amount of rules to identify constituent fundamentals and penalties of illegal acts like terrorism; promote cooperation between Eurojust and the European Judicial Network for implementation of extradition requests.[80]

EU countries are mainly governed by the 1957 European Convention on Extradition[81], amended by the 1975 and 1978 Additional Protocols to the European Convention on Extradition[82]. These legally binding instruments are further supplemented with an exhaustive body of Recommendations by the committee of ministers to the member states. Collectively this body of law establishes the obligation of the member states to extradite[83]; principle of double criminality, where it also allows the members to follow the principle of reciprocity in respect of any offences excluded from the application of the convention[84]; allowing member states to refuse extradition citing political offence[85], where among other things, it has been expressly laid down that attempt to take or taking the life of any Head of the State or a member of his family will not be considered as a political offence[86]; obligations undertaken

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[78] Article 29 para 2 under Title VI of the EU Treaty; also see Para 11 of Preamble of European Union Treaty; Also See Article 2 Para 4 of Title I Common Provisions of the EU Treaty

[79] Articles 29, 30, 31 and 32 under Title VI of the EU Treaty.

[80] *Id.*

[81] European Convention on Extradition, Paris, opened for signature on 13 July 1957, ETS No. 24. The European Convention on Extradition was devised under the aegis of the Council of Europe, which is not a Community institution but an independent international organisation.

[82] Additional Protocol to the European Convention on Extradition, Strasbourg, 15 October 1975, ETS No. 86; and Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978, ETS No. 98.

[83] Article 1 of European Convention on Extradition, 1957; also see Article 2 of Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978, ETS No. 98, where the obligation to extradite prevails even when the offences are subject only to pecuniary sanctions.

[84] Article 2 of European Convention on Extradition, 1957.

[85] *Id.*, Article 3

[86] *Id.*, Article 3 (3)

under any other convention will prevail over this treaty, with respect to political offences[87]; perpetrators of offences like genocide, crimes under the four Geneva Conventions as well as any comparable violations of war are can't be refused to be extradited under the garb of political offence[88]; grounds to refuse extradition, like if the requested country is the place of commission of the offence[89], or on the person holding nationality of the state so requested[90], or proceedings pending in the requested state for the same offences[91], or lapse of time[92], or the requesting nation allowing capital punishment for the extraditable offence[93], or refusal on the grounds of applying the principle of non bis in idem[94]; or where when the person to be extradited has a judgement against him in absentia[95]; in situations where amnesty has been granted for an offence in the requested nation, and where it possesses the capability to put on trial under its own criminal legal system, by applying principles of active or passive personality jurisdiction[96]. The other important principles of extradition which have been exhaustively dealt by the extradition law are rule of speciality; procedure to be followed in situations of surrendering of the individual to a third state; provisional arrest; when there are conflicting requests; postponed or conditional surrender.[97] When we speak about primacy of treaties, the EU Convention on extradition clearly says that it shall prevail over the provisions of any other bi-lateral treaty between members, and such treaties can only supplement the provisions of the Convention.[98] The Convention at the same time allows the contracting parties to have an extradition system based on uniform laws, based on reciprocity to adjust their shared relations on the basis of that system.[99]

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[87] *Id*., Article 3 (4)
[88] *Id*., Article 1 of Additional Protocol to the European Convention on Extradition, Strasbourg, 15 October 1975,
[89] *Id*., Article 7.
[90] *Id*., Article 6
[91] *Id*., Article 8
[92] *Id*., Article 10
[93] *Id*., Article 11
[94] *Supra* note, 88, ETS No. 86, where more situations have been added where the principle of non bis in idem will not be applicable.
[95] Article 3 of Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978, ETS No. 98
[96] *Id*., Article 4
[97] Articles 14, 15, 16, 17, 19 of European Convention on Extradition, 1957, respectively.
[98] *Id*., Article 28
[99] *Id*., Article 28 (3)

It is worth noting that European Convention on Extradition [ECE] and its Additional Protocols unify the legislation of the contracting states as far as extradition is concerned, but they do not adopt any provision especially centred on the rights of the individual involved. Nevertheless, the provisions of the ECE have to be interpreted in the light of the European Convention on Human Rights [ECHR]. Article 5, paragraphs 1, 2 and 4.[100] Extradition is not, *per se*, among the matters covered by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)[101] and according to the Court it is not possible to complain of a violation of the provisions of a treaty on extradition or of a violation of the conditions under which extradition may be granted.[102] To this end, the Committee of Ministers has adopted a package of principles[103] to guide the members in the application of the ECE, which in fact endorses the multidimensional form of the right to defence. The rule of *aut dedere aut*

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[100] Extradition European standards Explanatory notes on the Council of Europe convention and protocols and minimum standards protecting persons subject to transnational criminal proceedings, p.97, December 2006 Printed at the Council of Europe.

[101] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950.

[102] Extradition European standards Explanatory notes on the Council of Europe convention and protocols and minimum standards protecting persons subject to transnational criminal proceedings, p.97, December 2006 Printed at the Council of Europe.

[103] Resolution (75) 12 of the Committee of Ministers to member states on the practical application of the European Convention on Extradition *(Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies);* Resolution (78) 43 of the Committee of Ministers to member states on reservations made to certain provisions of the European Convention on Extradition318 [This resolution replaces Resolution (78) 30 of 11 May 1978.] *(Adopted by the Committee of Ministers on 25 October 1978 at the 294th meeting of the Ministers' Deputies);* Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition *(Adopted by the Committee of Ministers on 27 June 1980 at the 321st meeting of the Ministers' Deputies;)* Recommendation No. R (80) 9 of the Committee of Ministers to member states concerning extradition to states not party to the European Convention on Human Rights *(Adopted by the Committee of Ministers on 27 June 1980 at the 321st meeting of the Ministers' Deputies;* Recommendation No. R (86) 13 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition in respect of detention pending extradition *(Adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies);* Recommendation No. R (96) 9 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition *(Adopted by the Committee of Ministers on 5 September 1996, at the 572nd meeting of the Ministers' Deputies)*

judicare is adequately represented in the ECE and in other instruments[104].

The article would now study extradition measures within EU in the backdrop of terrorism, which started featuring in the discussions only after 1970. From 1975 onwards meetings took place between the Home Affairs Ministers, which initially only led to the exchange of records on groups involved in terrorism.[105] The Maastricht Treaty on European Union [MTEU] of 1992 established the EU and supplemented by the Common Foreign and Security Policy [CFSP], known as the second pillar[106] and provisions on Justice and Home Affairs [JHA] known as third pillar[107]. Terrorism has been viewed widely by EU Member States as a criminal law or justice concern, dealt mostly within the JHA. However after 9/11, the EU's terrorism-related actions have permeated all its spheres of activities. Earlier the EU adopted the 1977 European Convention on the Suppression of Terrorism [ECST][108]

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[104] Article 6, European Convention on Extradition; Article 8 of European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No. 73. It provides for the initiation of proceedings against an individual who has committed a crime, according to the domestic law of the requesting state, in another contracting state, which would also have considered it an offence if it had been committed in its territory. It, therefore, favours proceedings in that state and not extradition. The requesting state bases its entitlement to proceed to the request on all forms of jurisdictions: territorial jurisdiction, when the offence has been committed in its own territory; the active personality principle, meaning that the offender, who acts outside the territory of the state, is a national of the state; passive personality, meaning the nationality link between the requesting state and the victim of the offence; and universal jurisdiction, which is based on the nature of the offence itself, whereby every state shares an equal concern.; Article 5 of Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 June 1998, ETS No. 172; Article 14 of Council of Europe Convention on the Prevention of Terrorism, Warsaw, 6 May 2005, CETS No. 196; Articles 6 and 7 of European convention on the suppression of terrorism; Article 31 of Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, CETS No. 197.

[105] This mechanism became known as the TREVI-group (TREVI stands for '*Terrorisme, Radicalisme, Extrémisme et Violence Internationale*'); see The European Union and 'September 11' Jan Wouters & Frederik Naert, Institute for International Law Working Paper No 40 - January 2003, pg 6.

[106] See Maastricht Treaty art. B and Title V (art. J-J.11), now EU TREATY art. 2 and Title V (art. 11- 28).

[107] See Maastricht Treaty art. B and Title VI (art. K-K.9) and especially art. K.1.9, now EU TREATY art. 2 and Title VI (art. 29-42).

[108] European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977 (entered into force on 4 August 1978), ETS 90 – Suppression of Terrorism, 27.I.1977

which was further amended in 2003 Protocol amending the ECST[109].

Post 9/11 the EU brought into effect the measures which were planned initially and they were not only focussing on terrorism related aspect, but generally strengthening judicial cooperation in criminal matters, which led to adoption of legal measures like Framework Decisions[110] and the commencement of Eurojust adding to Europol with joint-investigative teams. Some of the major developments have been like adopting the 2002 Council Framework Decision on Combating Terrorism[111]; 2002 European Arrest Warrant[112]; 2005 Council of Europe Convention on the Prevention of Terrorism [ECPT][113]. In order to combat terrorism, extradition was at the very outset recognised as an effective measure for suppressing terrorism[114], clearly demarcated certain acts inspired from the UN Conventions and otherwise which were not to be regarded as political offence[115]; no duty to extradite if the state so requested has considerable basis to believe that there would be discrimination on account of his political opinion, religion, nationality, or otherwise[116]; primary obligation to extradite or prosecute[117]; encourages mutual assistance in criminal matters[118]; the right to reserve the right to refuse extradition as mentioned under Article 1 can be done only after evaluating certain factors like collective danger to life and others[119];such reservation being made time-bound and on refusal being obliged to prosecute and on the delay of prosecution, the requesting state is enabled to communicate the fact to the secretary general and finally the conference would issue an

[109] Protocol amending the European Convention on the Suppression of Terrorism, adopted at Strasbourg on 15 May 2003, ETS No. 190 – Suppression of Terrorism (Amending Protocol), 15.V.2003

[110] Article 34 (2) (b) under Title VI of the EU Treaty. Framework decisions are binding on the member nations but at the same time it leaves to the national authorities to choose the form and method to achieve the result of the

[111] (2002/475/JHA) of 13 June 2002

[112] (2002/584/JHA) 13 June 2002

[113] Council of Europe Treaty Series – No. 196 Warsaw, 16.V.2005.

[114] Preamble of 1977 European Convention on the Suppression of Terrorism.

[115] Article 1 of 1977

[116] *Id.*, Article 5 of 1977

[117] *Id.*, Articles 6 (1) and 7 of 1977

[118] *Id.*, Article 8

[119] Article 16 of 1977 European Convention on the Suppression of Terrorism after 2003 Protocol amending the European Convention on the Suppression of Terrorism

opinion on the conformity of the refusal and further submit it to the Committee of Ministers for the purpose of issuing a declaration thereon[120]. The 2003 Protocol amending the European Convention on the Suppression of Terrorism made further important amendments to the 1977 convention, as it drew inspiration, from the GA Resolutions as well as the Guidelines on Human Rights and the fight against terrorism of 2002; included the UN Conventions till 1998; extended liability to the perpetrators, attempts, accomplice; situations when the convention can be treated as the basis of extradition; there being no obligation to extradite when the there are chances that the person may be subject to torture, death penalty, life imprisonment without the possibility of parole unless otherwise agreed between the parties.[121] The treaty on prevention of terrorism also imposes duty on the Parties with respect to extradition like, to extradite if not establishing jurisdiction over the individual in its territory; duty to investigate to ensure the persons presence for prosecution or extradition; general obligation extradite or prosecute; certain offences in the present document to be deemed as extraditable offences in the existing extradition treaties; the offences as under Articles 5 to 7 and 9 can't be regarded for the purpose of extradition or mutual legal assistance as a political offence; the procedure that needs to be followed when the Party citing reservation is unable to take any action to initiate prosecution; protections given to the individual to be protected from discriminatory regimes, torture, cruelty and other degrading treatment.[122]

There has been a multitude of extradition agreements such as the European Convention on Extradition of the Council of Europe, an international organisation that is separate from the European Union (EU).[123] In 1995, the council adopted a Convention relating to the simplified extradition procedure between Member States of the European Union (EU). It laid emphasis on judicial co-operation and on simplification of matters related to extradition. It further simplifies the mechanism of surrendering an individual

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[120] *Id.*

[121] Articles 1,3, 5,9 of 2003 Protocol amending the European Convention on the Suppression of Terrorism

[122] *Id.*, Articles 14 (3), 15, 17, 18, 19, 20, 21 of 2005

[123] [http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015a_en.htm][Visited on May25 ,2014]

under provisional arrest, as under Article 16 of the European convention on extradition.[124]

The other significant addition to the laws related to extradition was 1996 Convention on Extradition among the Members of EU[125], which has been replaced since 1 January 2004 by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [Official Journal L 190 of 18.7.2002], it can still be applied in the few cases where the European arrest warrant cannot be used.[126] It entered into force as between only twelve Member States on 29 June 2005.[127] However the 1995 and 1996 EU Extradition Treaties were ineffective as these were not ratified by all Member States and never entered into force, although they did apply between some Member States

Since 1st January 2004, there has been a paradigm shift in the European Union from the concept of mutual legal assistance to mutual recognition, after the adoption of the framework decision on the European arrest warrant and the surrender procedures between Member States. There was a strong belief among the European institutions that traditional extradition measures were too slow and cumbersome and it was also unable to cope up to the swell in trans-boundary crimes which followed the ending of inner border controls in the Schengen Area. The distinction between mutual legal assistance and mutual recognition is in procedures followed in recognizing and the basis to refuse.[128] In mutual recognition, the decision rendered by a judicial authority in a Member State is acknowledged and enforced by judicial authorities in other Member States, without probing into the merits of the pronouncement.[129] It is a system founded on mutual trust among Member States in their respective

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[124] Articles 4 to 11 and 12 (1) of Convention on Simplified Extradition Procedure between the Member States of the European Union (1995) (*Official Journal of the European Communities*, C 078, 30 March 1995)

[125] Convention relating to Extradition between the Member States of the European Union (1996) (*Official Journal of the European Communities*, C 313, 23 October 1996)

[126] [http://europa.eu/legislation_summaries/justice_freedom_security/judicial cooperation in criminal matters/l14015b_en.htm] ,[visited on June5,2014]

[127] *Id.*

[128] The Principle of Proportionality and the European Arrest Warrant, SARAH HAGGENMÜLLER, Oñati Socio-Legal Series, v. 3, n. 1 (2013) – Ultima Ratio, a principle at risk. European Perspectives, p.99

[129] *Id.*

criminal justice arrangement.[130] The EAW is the first instrument to implement the new principle of mutual recognition. Over a period of few decades the EU has shifted its emphasis from the traditional international legal instruments of cooperation to innovative supranational methods. The supranational method of cooperation functions on the engagement and readiness on the part of the both government and the organs and agencies which apply the respective law on a daily basis. The cooperation between EU Member States in criminal matters which is based on the shared values of democracy, liberty, respect for human rights, the rule of law and solidarity has made it possible to create a single area of justice in criminal matters.[131] The idea of the European Criminal Area assumes that every individual should have the same high level of confidence in protection of the law within every Member State, irrespective of nationality.[132] The essence of mutual trust constitutes a conviction that other Member States will comply with agreed-upon rules, this assumption being based on concrete, significant knowledge. The European Arrest Warrant is based on a high level of confidence between Member States.[133] In the preamble, it is expressly stated that the required high level of trust has already been achieved.[134] However, while the respective framework decision requires the proper control of each issued EAW in every situation, it does not always prevent mistakes due to automatism.[135] However, factors like differences in

[130] According to the Commission, this trust "is grounded, in particular, on the shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law." (European Comission 2001).

[131] The Normativity Of The Principle Of Mutual Trust Between Eu Member States Within The Emerging European Criminal Area, *Aleksandra Sulima,* Wroclaw Review Of Law, Administration & Economics, Vol 3:1, 2013, P.74.

[132] Id., p.75.

[133] Framework Decision of the Council 2002/584/EAW, section 10; also see Case C-123/08 *Criminal proceeding against Dominik Wolzenburg* [2009] ECR I-09621; also see Resolution of the Polish Supreme Court (2006) I KZP 21/06; also see Opinion of the Advocate General attached to case C-297/07 *Staatsanwaltschaft Regensburg v. Klaus Bourquain* [2008] ECR I-09425. He stated that though the principle of mutual trust is still novel in the whole concept of the European system of justice in criminal matters, it is however a foundation of the principle of mutual recognition, which undoubtedly constitutes the cornerstone of the emerging European Criminal Area.

[134] *Id.*

[135] Aleksandra Sulima, *The Normativity Of The Principle Of Mutual Trust Between EU Member States Within The Emerging European Criminal Area*, 3 Wroclaw Review of Law, Administration & Economics, 87(2013).; See M Ficher, *Mutual trust in European Criminal Law*, University of Edinburgh School of Law Working Paper Series (2009/10),

national legislations, the lack of the full conformity with the EU directive and the lack of consistency within all 28 Member States' solutions can lead to mistrust, to the undesired differentiation of the situations of EU citizens.[136]

The EU Framework Decision on the European Arrest Warrant Scheme has replaced the political and administrative phase of the process with a judicial mechanism, embedding the principle of mutual recognition, replacing the ECE.[137] It allows members to apply its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media. The framework preserves the obligation of the member states to respect fundamental rights and fundamental legal principles as ensured under Article 6 of the treaty of European Union. The scope of EAW is wide as it identifies thirty two kinds of offences, while including petty offences where the quantum of punishment is less as well as the principle of double criminality is still applicable.[138] Verdict on the execution of EAWs are subject, to a range of exceptions and regulations, like the judicial authority of the state where the individual is detained has to decide whether s/he will be surrendered or not.[139] The framework lists the grounds for compulsory (Art. 3) and optional (Art. 4) non-execution, as well as conditions that may be imposed in specific cases (Art. 6).

The executing State can reject implementing the warrant, if the crime concerned is statute-barred as per its own law and if it is enabled to exercise

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p.13 [the existence and extent of this trust is not finally determined and it depends on further action to be undertaken by the interested parties]

[136] *Id.*, p 87,89.

[137] See paragraph 11 of the preamble, Article 1(1) and (2) and Article 7 of the 2002 EAW.

[138] Art. 2 § 2 lists 32 offences for which double criminality may not be required if these offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. These crimes include *inter alia* terrorism, a number of offences which may relate to terrorist activities, such as kidnapping, illegal restraint and hostage-taking, illicit trafficking in nuclear or radioactive materials, laundering of the proceeds of crime, illicit trafficking in weapons, munitions and explosives, unlawful seizure of aircraft/ships and sabotage and a number of other offences, e.g. fraud, murder, racism, corruption, illicit trafficking in narcotic drugs and psychotropic substances and crimes within the jurisdiction of the International Criminal Court. This list may be extended in the future pursuant to art. 2 § 3.

[139] Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System Sergio Carrera, Elspeth Guild and Nicholas Hernanz No. 76/ March 2013, p 2; see Article 3[grounds for mandatory non-execution] , Article 4 [grounds for optional non-execution of the EAW]

jurisdiction over the said crime; if it while undertaking to execute itself the sentence or detention, that individual is a national or inhabitant of the executing State; rejection to implement may be allowed for crimes done in any proportion within the region of the executing Member State and for crimes done beyond the territory of the issuing Member State, the ones not liable to be punished by extraterritorially as per the law of the executing Member State.[140] The requested person possessing the nationality/ or even by being a resident of the executing State is not a ground for refusing execution and it may still in this case be made subject to the condition that any verdict which may be imposed be served in the executing State.[141] Constitutional amendments in Member States can enable ending of the nationality based exemption. Tax offences are no more retained as ground for refusal .The rule of speciality is preserved, subject to some exceptions and States have the option to state it will give up these principles on the basis of reciprocity unless in a particular case it is indicated otherwise.[142] Same is allowed for the tenet of non re-extradition.[143] Articles 17 and 23 regulate verdicts on the implementation of EAW; surrendering, subject to strict time limits. The executing member upon arresting must notify the accused, of the warrant, its substance; the right to advice; right to access interpreter; and, the right to be heard by the judicial authority, if the individual has not consented to being surrendered.[144]

VIII. SOUTH ASIA ASSOCIATION FOR REGIONAL CO-OPERATION

The SAARC members have been British colonies and thereafter members of the commonwealth, and thereby they have been party to the London Scheme for Extradition [LSE] within the Commonwealth[145], which was last amended in the year 2002. The LSE enumerates the fundamental principles of extradition like extraditable offence; dual criminality; rule of speciality; arrest warrants and provisional warrants; committal proceedings; allows parties to go for optional alternative committal proceedings; creates time-bound process

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[140] *Id.*, Article 4
[141] *Id.*, Article 5
[142] *Id.*, Article 2
[143] *Id.*, Article 28
[144] *Id.*, Article, 11 and 14.
[145] [http://www.oas.org/juridico/mla/en/jam/en_jam-scheme-ext.pdf] ,[visited on June5,2014]

for return or discharge of the fugitive under the executive authority; allows the individual to file *Habeas Corpus* proceedings and examination of the verdict of the judicial authority; empowers the competent executive authority to categories any offence as political in character and therefore exempted and such certification will be conclusive in nature and binding on the competent judicial authorities; protects individuals from death penalty, oppressive punishment; incorporates principle of *aut dedere aut judicare* to prevent state parties from becoming safe havens.[146]

The South Asian region has been also been a victim of acts of international terrorism for decades.[147] In spite of political tension existing in between the members of the SAARC, they have been able to find a common ground through the SAARC Charter. The SAARC members have been regulating extradition between them through bi-lateral treaties or arrangements. However, in the late 80's and post 9/11, the members have connected terrorism and extradition to suppress terrorism and punish individuals for committing terroristic acts.

The SAARC Regional Convention on Suppression of Terrorism[148] [hereafter referred as Convention] has recognized the importance of the principles as laid down in the UN Resolution 2625 (XXV)[149], which requires states to refrain from engaging in terrorist acts in another state. The primary objective of the Convention is to successfully prosecute and punish individuals through the tool of extradition. Majority of the provisions incorporate the fundamental principles of the law of extradition.[150] It looks forward to parties

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[146] Clauses 2, 20, 3, 4, 5, 6, 9, 10, 11, 12, 15, 16 of the London Scheme for Extradition within the Commonwealth, 2002.

[147] South Asia Fatalities 2005-2014[http://www.satp.org/satporgtp/southasia/datasheets/Fatalities.html]; South Asia Assessment 2014[http://www.satp.org/satporgtp/southasia/index.html] [Visited on May6 ,2014]

[148] South Asian Association for Regional Cooperation (SAARC), *Regional Convention on the Suppression of Terrorism, South Asian Association for Regional Cooperation*, 4 November 1987, available at: [http://www.refworld.org/docid/3dd8ab3a4.html] [Visited on June18, 2013].

[149] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), available at: [http://www.refworld.org/docid/3dda1f104.html] [Visited on March 20,2014]

[150] Articles 1, 2, 3, 4, 6 and 7 of SAARC Regional Convention On Suppression Of Terrorism, 1987.

to, subject to their domestic law, regard the offences as found in the UN Conventions, to which they are parties, and otherwise as mentioned in article 1 (d), (e) and (f) of the Convention, as terroristic and not to be regarded as political offence. It allows parties to extend the list of offences, which the parties don't want to be treated as political offence. The convention incorporates similar provisions as under the 'Hague Formula'[151]. The standard of aut dedere aut judicare is laid down in Article IV, when the person is within the boundary of the requested nation. It puts limit on the duty to extradite, if the nation assesses it to be of trivial nature, need of good faith.[152] The states are required to co-operate in exchange of information, intelligence, to the extent permitted by their national laws.

The Additional Protocol[153], is an effort to fulfill the objectives of United Nations Security Council Resolution 1373 of September 28, 2001, and also supplements the Convention by taking measures to strengthen co-operation to prevent and suppress financing of such acts as enumerated under Articles 3 and 4 on the lines of the 1999 Convention of financing terrorism. It implores the state parties to become parties to the international instrument in the annexure as updated, in accordance to their domestic legal requirements. It applies the same provision on extradition and mutual legal assistance of the Convention. The Protocol doesn't exempt a State from executing legal assistance and extradition request citing the fact that it involves economic offences. It also mandates the parties to take measures as consistent with national and international law to not grant refugee status to any person who has committed any offence as under Article 4 of the Protocol. It also protects individuals when they are vulnerable to discrimination on grounds like race, religion, political opinion, etc and States must in all situations act in accordance with principles of sovereign equality and territorial integrity. The efforts to suppress terrorism are further consolidated by the SAARC Convention on Mutual Assistance in Criminal Matters[154].

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[151] *Supra* note.168 and 169.
[152] Article VII
[153] Additional protocol to the SAARC Regional Convention On Suppression Of Terrorism [http://www.refworld.org/pdfid/49f6b7ad2.pdf]
[154] [http://www.saarcsec.org/userfiles/Various%20Publications, %20Agreements, MOUs, %20%20Conventions. %20Charters/PUBLICATIONS/Pdf/Convention %20on %20 MACM %2031%20July%202008. pdf] [Visited on May5,2014]

IX. CONCLUSION

The two world wars, the cold war and the rise of non-international armed conflicts, have pushed the international judicial bodies as well as the national courts to interpret and develop the extradition laws. With the rise of supra-national and international organizations, the traditional state to state extradition process has evolved to become state to international entity process, requiring more political will for the tribunals to exercise jurisdiction over reluctant indicted individuals.

The law with respect to extradition in the backdrop of terrorism has developed through a multitude of existing treaties, which obliges the member parties to either prosecute or extradite. However, it has been difficult to establish the same duty on the part of nations, in situations of dealing with individuals who have committed such terroristic acts during, armed conflict, in the light of establishing judicial forums to try such individuals and increasing number of impunity agreements as being entered by governments. There has also been rise of less time consuming practices of taking fugitives into custody like, ad hoc agreement, secret abduction, and extraordinary rendition.[155] It is worth noting that pursuant to constant efforts of the United Nations, the nations have come together in drafting a comprehensive convention against international terrorism, which is yet to be adopted by the nations in its present form. The draft convention intends to be applicable in situations which are not covered under any of the existing conventions on terrorism[156]. It mandates States to not grant refugee status to persons accused of committing offences as mentioned under Article 2. It seeks better co-ordination between the members in way exchanging information[157]; make legal entities liable in criminal, civil or administrative manner, including monetary sanctions for committing acts in breach of the convention[158]; obligation to extradite or prosecute[159]; guarantees enjoyment of all rights and fair treatment in the

[155] Magnuson, *supra* note 37, at 868.
[156] Art 3
[157] Art 9
[158] Art 10
[159] Art 12

requesting country[160]; request support in relation with inquiry or criminal or extradition measures; none of such crimes to be regarded as political offence, for the states to refuse extradition or mutual legal assistance requests[161]; allows the members to refuse such requests if there is any ground that the person will be targeted on the grounds of race, religion, political opinion or otherwise; incorporates the 'Hague formula'[162]. Unlike the European counterpart the international community has not been able to make a change from shared legal assistance to shared recognition.

States have made reservations or interpretative declarations in relation to above-identified treaties, which may severely affect the legal outcome of such instruments.[163] Such reservations are objected, on the basis of them being irreconcilable with the very purpose of the relevant convention.[164] Belgium entered reservation, whereby "in exceptional circumstances" it reserved "the right to refuse extradition or mutual legal assistance in respect of any [relevant] offence … which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives", faced objection suggesting that the reservation sought to limit its relevance of a significant stipulation which should ideally be enforced in all situation, referring to subjective criterion, injecting ambiguity into straight relations, leading Belgium to withdraw its reservation.[165]

The Regional organizations have also made development in framing extradition treaties within themselves, but not without criticism. The very idea of speeding up trials have also brought to the fore issues of disproportionate use of European arrest warrants, like, retrospective

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[160] Art 13
[161] Art 15
[162] Art 18
[163] Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (aut dedere aut judicare)" , United Nations A/CN.4/630, 18 June 2010 , p.61-63 ;available at: [http://legal.un.org/ilc/documentation/english/a_cn4_630.pdf]
[164] *Id.*, p.63. Objections by Moldova, Germany and Argentina to the reservation by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism, on their reservation that requests for extradition would be refused for persons granted to whom political asylum has been or for persons accused of political crimes or for their opinions.
[165] *Id.*

proportionality[166], prospective proportionality[167], varying application of proportionality tests[168], as confirmed by the European Commission's 2011 Evaluation Report of the EAW.[169] EAW doesn't insist on the need of a proportionality test to be applied by the issuing member, neither has it included a ground for refusal focusing on the seriousness of the crime.[170] The regularly used grounds for refusal include: the offence complained of under the EAW doesn't amount to a crime under the laws of the executing state; the criminal trial or punishment of the concerned individual being statute-barred; issued EAW being deficient and/or lacking proper evidence; EAW's being withdrawn by the executive judicial authority; the executing state undertakes to perform the custodial punishment or locking up of the concerned individual, residing in, or by virtue of being a national of or a resident in that state; and the concerned individual already being prosecuted in the executing state for the same crime.[171] A hindrance to proper functioning of EAW has been the problem of identifying the competent national judicial authorities to ensure adequate control over the freedom of judiciary and their verdicts on EAWs.[172] At the

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[166] In such cases, the executing state deems the sentence imposed by the issuing state to be disproportionate in relation to the offence and it might not recognize the act on which an EAW is based as worthy of criminal prosecution, whereas at the same time, the issuing state considers the same act to be punishable with a custodial sentence for a maximum period of at least three years. ; see *Sandru v Government of Romania*, 28 October 2009, [2009] EWHC 2879 (Admin), para. 15. ; the European Parliament, under the rapporteurship of British Liberal MEP Sarah Ludford, in legislative initiative report promised to look in to "issues of proportionality and observance of human rights." EU Arrest Warrant Needs Urgent Reform 08.07.13, By Libby Clarke [available at euobserver.com/justice/120783]

[167] In these situations the extradition and the associated human and financial costs are disproportionate to the offence.

[168] Poland, which has issued the most EAWs in the past years10, argue that due to the legality principle they are obliged to prosecute all offences, and therefore cannot make prosecution conditional on a proportionality test.

[169] Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System Sergio Carrera, Elspeth Guild and Nicholas Hernanz No. 76/ March 2013, p 21.

[170] The Principle of Proportionality and the European Arrest Warrant, SARAH HAGGENMÜLLER, Oñati Socio-Legal Series, v. 3, n. 1 (2013) – Ultima Ratio, a principle at risk. European Perspectives, p.101.

[171] Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System Sergio Carrera, Elspeth Guild and Nicholas Hernanz No. 76/ March 2013, p 11.

[172] See Assange v The Swedish Prosecution Authority (Rev 1) [2012] UKSC 22 (30 May 2012) ; *Piaggio (Germany)* (14 February 2007, Court of Cassation Sez 6 (Italy)) [Available at: [http://swarb.co.uk/piaggio-germany-14-feb-2007/]

same time one can't deny the positive changes also brought about by this mechanism, like fastening the procedure[173]; abolishing the principle of double criminality for 32 crimes; abolishing the political stage of extradition; making EU citizens accountable for their acts in courts across the EU; ensuring that member States and national courts abide by provisions of the European Convention on Human Rights. The overall success of the EAW is evidenced by the fact that till 2009 when 15,827 EAWs were issued in total and of those 4,431 was executed. out of Poland, Germany, and Romania and UK issues most.[174]

In comparison the SAARC members have been regulating extradition between them through bi-lateral treaties or arrangements. The SAARC members are yet to have bilateral extradition treaties among themselves because of lack of mutual trust and severe political differences. In the light of the subsequent terror attacks on the Indian soil, perpetrated by Pakistani nationality, as evidenced in the 13th December parliament attack or 26/11 attacks, and the inaction on behalf of the Pakistan government in surrendering or prosecuting such individuals, has evidently proved the futility of such SAARC arrangements. In the backdrop of the legal developments and State practices it can be conclusively said that the obligation to extradite or prosecute is yet to reach the status of customary international law.

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[173] The executing State has to return the individual to the State to the issuing Sate within a maximum period of 90 days of the arrest. If the individual gives consent to the surrender, the decision shall be taken within 10 days.

[174] See 'Report From The Commission To The European Parliament And The Council' On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States {SEC(2011) 430 final}, p.3
available at: [http://ec.europa.eu/justice/policies/criminal/extradition/docs/com_2011_175_en.pdf]; also [http://www.bbc.com/news/world-europe-23239493]

ACCESS AND BENEFIT SHARING REGIME: TOWARDS GENERATING VALUE FOR BIODIVERSITY EXPLOITATION

Parimita Dash*

ABSTRACT

The growing use of the use and exploitation of the biogenetic resources as a tool for economic development by huge revenue generation has exposed these biogenetic resources to a lot of threats in the form of bio piracy, unregulated access over such genetic resources, and the adverse effects of bio prospecting over these genetic resources. At the same time this growing options for commercial exploitation of biodiversity has attracted the intellectual property rights regime towards claiming exclusive right over the results of the research conducted on such biogenetic resources, which are considered to be subjected to sovereign regulation as per the general consensus achieved in this regard post United Nations Convention on Biological Diversity (CBD) formulations. These discussions have led to the emergence of two types of legal regime to regulate the trade in biogenetic resources and they are laws relating to "Access and Benefit Sharing" regime and the laws relating to Intellectual Property Right regime. While the developing countries and the countries rich in biological resources advocate for the incorporation of ABS regime within the IPR framework in order to reflect that IPRs must promote the issue of benefit sharing, the developed countries are of the opinion that the IPRs and the ABS regime must be independent to each other and hence ABS norms must be regulated as per the domestic procedural requirements to that effect and not under the existing domestic IPR framework.

Keywords: Biogenetic resource, Convention on Biological Diversity, TRIPS Agreement, Access and Benefit Sharing Regime, Intellectual Property Rights, Biological Diversity Act 2002.

I. Introduction:

With the rapid advancement of the technologies on various biological resources and the strong opportunities of these technologies getting exploited

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commercially and emerging as a very good source of revenue generation, of late has made countries across the globe take up research and development activities with utmost seriousness on Biodiversity. This very fact has shifted the world's attention towards the developing countries and the under developed countries as they are considered to be better rich in biological resources in comparison to their developed counterparts having advanced technological and infrastructural set ups. This gives birth to the concept of a *need based model*, which facilitates mutual development of the parties involved where each party caters to the needs of the other. The rationale behind "Access and Benefit Sharing Regime" can be justified on the basis of this a[1]bove stated *need based model*.

II. "Access and Benefit Sharing Regime": Conceptual Analysis

With Convention on Biological Diversity rejecting the idea of commons or idea of openness with respect to biodiversity exploitation, a general consensus has been achieved in treating all the components of biodiversity coming within the territorial limits of a country as a property of the concerned sovereign, hence subjecting it to national regulation. Creating this idea of property in biodiversity insists on its valuation, as property theories tend to be value based. Measured in value terms, the value of biodiversity being the older of the genetic material to be used by the prospector as a result of Bio-Prospecting can't be undermined. So it is essential for the developing countries, rich in biological resources or biodiversity to determine the value in this genetic material coming under the biodiversity in order to have a proper assessment of the bio-value of a biotechnology related to such genetic material.[2] This assessment helps such resource provider countries to place their terms strategically keeping the maximum possible revenue generation in consideration while negotiating with the country which is at the receiving end of such biological resource material.

The idea behind promoting "Access and Benefit Sharing" models/ mechanisms is to help the developing or under developed countries negotiate better and wiser with the developed countries aiming at the maximum

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[1] Srividhya Ragavan, "New Paradigms for Protection of Biodiversity", Journal of Intellectual Property Rights, Vol. 13, 2008, p. 18

[2] Convention on Biological diversity, Article 15.1

generation of benefit, more specifically on economic terms for the former where both mutually agree to facilitate their infrastructure for an experiment to be conducted on a component of the Biodiversity, which not only aims at promoting innovation in this area but also generating value for exploitation of such biological resource. Providing infrastructure in this connection is understood as the country/ party rich in biodiversity, also known as the provider country, providing the biological resource material to the other country/ party which in return extends its technological set up to the former in order to carry out the research on such biological resource material.

Access:

Article 15 of the Convention on Biological Diversity recognizes the sovereign rights over their natural resources which includes the biological resources which in turn includes the genetic resources and insists on establishing such 'access mechanisms' which will either be in the line of assisting or easing the procedure for obtaining the access over such resources. There have been many debates in favour of interpreting genetic resources to include the knowledge over such genetic resources. Though there has been no general consensus in accepting such a proposition by a majority of the states but CBD does not stop the individual state concerned to freely act on such proposition to subject both access on biogenetic resources and access on traditional practices over such biogenetic resources to the same provisions as devised to suit the local needs of the state within a domestic enforcement mechanism.

Hence states aim at establishing access regime whereby they can not only regulate the activities to be taken up by the outsiders on their natural resources and have control over the outward flow of the knowledge and information on such genetic resource materials but also can strengthen the inward flow of international investment and technology transfer in this area.

Benefit Sharing:

The concept of "benefit sharing' finds its roots within the Convention on Biological diversity as a part of the bargain forwarded by the access providing countries with the access receiving countries as a means of providing some recognition of the role and contribution of the indigenous people in developing biogenetic resources and taking care of the biodiversity. Benefit sharing can

be understood to be a process of distribution of any benefits/ funds/ profit obtained as a matter of allowing such access. The various modes by which such funds can be generated are the registration of IPRs by the Bio-Prospector over such innovation which is the resultant of facilitating access, transferring back the research results obtained from such access and later developing on such result to come up with some innovation and commercially exploiting it in the country of origin of the Bio-Prospector. The benefits in question can be either monetary which includes "up-front payments, payments of royalties or license fees or non-monetary to include sharing of research results, technology transfer, capacity building etc". In this regard strong enforcement of intellectual property rights can be discussed as a possible mode of securing "benefit sharing" as the joint ownership of IPRs over the final product obtained as a result of such facilitating access can be considered as both as a monetary and non monetary benefit which can be adequately shared by both the parties in order to secure benefit sharing efforts. In order to facilitate strong "benefit sharing" mechanisms it is very much necessary to analyze that "benefits do not result from a legal right actionable by an individual or a community but are dependent upon a legal relationship between state" and bio-prospecting party and hence the negotiating terms between these two parties to this effect has a key role to play in deciding the fate of the issue of benefit sharing in individual cases.

III. "Access and Benefit sharing" - Debates at various International Frameworks

Discussion on ABS in "Convention on Biological diversity" is considered as one of the early round of discussions on "Access and benefit sharing mechanism" as a concept which attracted attention from many fronts on this issue which generally includes from exploring opportunities to examining challenges associated with this concept. This portion of the paper will look in to the various debates on ABS as forwarded under many frameworks like CBD, Bonn Guidelines, Nagoya Protocol, ITPGRFA, and the negotiations relating to ABS at WTO and WIPO.

"Access and Benefit sharing" under "Convention on Biological diversity"

The three pillars on which the Convention on Biological diversity rests which are also known as the three basic objectives of CBD are:

i) Conservation of biological diversity
ii) Sustainable use of the components of biological diversity
iii) Fair and equitable sharing of benefits arising from the use of genetic resources.

CBD is considered as the first international treaty which links the access to genetic resources to equitable sharing of benefits related to those resources and hence trying to secure economic exploitation of the biological resources in turn creating avenues for revenue generation for such countries which are rich in biological resources.

The emergence on the concept of "access and benefit sharing" is basically a result of the lobby of the developing countries unhappy with the "open access" system in place with respect to the use of the various components of biodiversity and hence strongly advocating for treating biological resources and the traditional knowledge over such resources as the property of the sovereign state as they hold the lion's share of the global biological resources.

As a result of which CBD recognizes "sovereign rights of states over their natural resources and the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.[3] It also obliges each contracting parties to create conditions to facilitate access to genetic resources for environmentally sound uses where granting of such access shall be ***mutually agreed terms"***[4] and shall be subject to ***prior informed consent*** of the contracting party providing such resources.[5] CBD further provides obligation on contracting Parties to take proper steps to ensure fair and equitable sharing of the research results and the benefits received out of commercial exploitation of the genetic resources with the party providing access over such resources.[6]

"Access and Benefit sharing" under "Bonn Guidelines"

"Bonn Guidelines on 'Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising out of Their Utilization", was adopted

[3] Convention on Biological diversity, Article 15.4
[4] Convention on Biological diversity, Article 15.5
[5] Convention on Biological diversity, Article 15.7
[6] Secretariat of the Convention on Biological Diversity (2002).Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.

in the intergovernmental meeting at Bonn in 2001 by the parties of the "Convention on Biological diversity" as a tool for the countries to negotiate for an international regime on the "Access and Benefit Sharing" mechanism for the utilization of genetic resources within the broader framework of "Convention on Biological diversity" aiming towards fulfilling the execution of the various measures of "Convention on Biological Diversity" and in turn safeguarding not only the natural wealth of the globe but also to secure the rights and the interests of the community holding knowledge over those resources traditionally.

The Guidelines prescribe for providing assistance to Parties, Governments and other stakeholders in designing the overall strategies for securing access and benefit sharing to this effect and lending clarification on the various procedural requirements required to avail such access. These guidelines strives to provide a better insight to the mechanism of access and benefit sharing in order to equip countries to design legislative, administrative or policy measures on "access and benefit-sharing". "The Guidelines identify the steps in the access and benefit-sharing process, with an emphasis on the obligation for users to seek the prior informed consent of providers. They also identify the basic requirements for mutually agreed terms and define the main roles and responsibilities of users and providers and stress the importance of the involvement of all stakeholders".[7] "Although they are not legally binding, the fact that the Guidelines were adopted unanimously by some 180 countries gives them a clear and indisputable authority and provides welcome evidence of an international will to tackle difficult issues that require a balance and compromise on all sides for the common good".[8]

"Access and Benefit sharing" under "Nagoya Protocol"

As an attempt to provide clarity on the issue of both the provider country and user country's responsibilities with respect to facilitating access requirements and securing benefit sharing provisions respectively, the parties to the Convention on Biological diversity at its 10th meeting in the year 2010 in Nagoya, Japan, adopted the Nagoya Protocol on Access to genetic

[7] Id.

[8] "Nagoya Protocol on Access to Genetic Resources and the fair and equitable sharing of benefits arising from their utilization" to the Convention on Biological diversity 2010, Article 6.

resources and the fair and equitable sharing of benefits arising from their utilization which stands as a international agreement aiming at the sharing of the benefits at fair and equitable terms arising out of access over such genetic resources which may include the appropriate transfer of the related technologies keeping in view all rights over such resources and technologies and by appropriate funding and hence attempting in contributing towards conservation of biodiversity and sustainable use of its components.

The protocol prescribes for extensive provisions on access stating "the access on the genetic materials is to be provided based on the PIC (Prior Informed Consent) of the provider of genetic resources, and 'as appropriate' and 'in accordance with domestic law' on the PIC of indigenous / local communities where they have established right to grant access".[9] Similarly the Protocol also provides for fair and equitable benefit sharing between the parties where one is the country of origin of the genetic resources and the other is the country acquiring such genetic resources in "accordance with the Convention, where such sharing will be done on the basis of mutually agreed terms. Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources held by indigenous and local communities, in accordance with domestic legislation over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms".[10] Nagoya Protocol also is known for prescribing specific provision for 'access to traditional knowledge associated with genetic resources' which is independent of the provision which facilitates access on genetic resources as mentioned in Article 6 of the Protocol. "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that are held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and

[9] "Nagoya Protocol on Access to Genetic Resources and the fair and equitable sharing of benefits arising from their utilization" to the Convention on Biological diversity 2010, Article 5.

[10] "Nagoya Protocol on Access to Genetic Resources and the fair and equitable sharing of benefits arising from their utilization" to the Convention on Biological diversity 2010, Article 7.

local communities, and that mutually agreed terms have been established".[11]

"Access and Benefit Sharing" at WTO

The fundamental difference of approach as adopted by CBD and TRIPS with respect to the treatment of components biological diversity in order to protect and preserve the same has been a subject matter of contentious debate and discussion at the WTO. While the former recognizes a sovereign right over the biological resources and hence subjecting the same to national regulation through domestic legal frameworks within the state, the later insists on identifying individual right over such components of biological rights and extending exclusive intellectual property rights to individuals where such intellectual property right pertains to any innovation achieved as a matter of the access, later converted to a research on such genetic resource material, thereby advocating for the commercial/ economic exploitation of the genetic resources at an individual level rather than at the collective level unlike CBD.

Analyzing this inherent contradiction between CBD and TRIPS, members of WTO have adopted the following three different approaches provide a better understanding between CBD and TRIPS on the issues of biological resources:

i) ***The Incompatibility Approach:*** Due to a conflict between the individual/ private rights granted under the TRIPS Agreement and nation's sovereign right over their genetic resources as enumerated under CBD, member countries advocating this approach feel that both frameworks stand inconsistent to each other.

ii) ***The Neutral Approach:*** There are member countries at WTO going by the idea that both frameworks are not inherently incompatible but they may stand at a conflicting position against each other as far as their implementation is concerned.

iii) ***The Independent Approach:*** Member countries adhering to this idea believe that there is no incompatibility between both the frameworks as both stands independent to each other as they achieve to seek

[11] K Venkataraman, "Access and Benefit Sharing and the Biological Diversity Act of India: A Progress Report", Asian Biotechnology and Development Review, Vol. 10, 2008, p.71

different objectives and address different subject matters. Hence they feel that nations can implement both these frameworks in mutually supportive frameworks with national regulation.

"Access and Benefit Sharing" at WIPO

WIPO has facilitated in depth discussion on many occasions on the Intellectual Property aspects of Access and benefit sharing mechanism with the involvement of the Intergovernmental Committee (IGC) on Intellectual Property. Traditional Knowledge and Folklore. IGC provides avenues for promoting discussions on the following elements:

i) Assessing the relevance Intellectual Property instruments for extending protection to Traditional Knowledge and evaluating the best possible framework for protecting Traditional Knowledge.

ii) Debating on domestic as well as international frameworks for patents which will facilitate the disclosure of the true place of origin of the biological resources and the associated traditional knowledge along with the proof of the Prior informed consent and the mutually agreed terms as entered in to the access agreement by the parties.

iii) Figure out the components of the mutually consented subject matter which requires special and specific protection

IV. Promoting ABS Regime under Intellectual Property Rights Framework : Debate over *"Disclosure Norms"*

The discussion on incorporating and promoting ABS regime under the intellectual property rights framework finds its justification with the growing no of claims of patents and similar intellectual property rights on the biotechnology based inventions and highlighting the potential value of biological resources and associated traditional knowledge as a source material for biotechnology inventions. As the biological resources and the associated traditional knowledge owned by the indigenous people or the native people promotes the concept of intellectual property rights, IPR framework must not act as a setback in promoting the socio-economic development of those indigenous people and the conservation of such biological resources. This idea gives rise to a mutually co-existing scenario for both the IPR framework and the ABS framework as both depend upon each other. Hence IPR

framework though aiming at exclusive exploitation of the IPR protected subject matter, must promote norms for facilitating ABS mechanism which will result in the community development unlike serving individual exclusive interest which forms the basis of IPR protection. This inherent contradictions between the individual exclusive interest and the collective community interest with regard to the incorporation of ABS under IPR framework has paved the way for many debates across the world, where most of the developed countries are of the opinion that IPR framework and ABS framework must exist as two different frameworks independent of each other whereas the other group mostly of developing countries and countries rich in biological resources advocate that ABS framework promoting IPR regime must in turn be supported and promoted by the later.

In making the IPR regime ABS friendly, basically at almost all the major international forums like Conference of parties to CBD, TRIPS council of the WTO and the World Intellectual Property Organization (WIPO), debates as to the 'disclosure norms' in order to make IPR applications compatible to promote ABS have been taken up which can be summarized as follows:

i) Parties must take up appropriate actions and measures to facilitate the disclosure of the true place of origin of the biological resource and the associated traditional knowledge and practices owned by the indigenous people pertaining to such biological resources;

ii) 'Prior informed consent' and 'mutually agreed terms' disclosures in helping examination of the application relating to grant of Intellectual Property Right and re-examination of intellectual property rights where they are already granted;

iii) Stressing on the importance on accepting the oral evidence with respect to traditional practices as a part of prior art in the examination procedure for considering providing with an IPR, grant and management of IPRs.

iv) Every document claiming an IPR over a genetic resource or associated traditional knowledge shall specify the registration of the contract affording access to genetic resources and a copy thereof where the goods or services for which protection is sought have been manufactured from genetic resources or products thereof.

The above stated arguments reflect the stand of the developing countries and the countries rich in biological resources on the issue of the entire debate over the disclosure norms which is heavily objected by the developed countries apprehending a good deal of loss at their end in meeting up to the requirements in order to secure fair and equitable benefit sharing and this objection by the influential countries and the major deciding countries at TRIPS has been discouraging the required amendments to be brought in the existing domestic IPR legislations of various nations in order to promote ABS regime and make those legislations ABS friendly.

V. India's Stand towards "Access and Benefit Sharing" Regime

India has emerged as one of the strongest proponent for advocating the implementation of global, international, regional, and national frameworks comprising policies and programs protection, conservation and exploitation of the various components of biodiversity and environment in the light of trade transactions and securing intellectual property rights to that effect. India has heavily invested its resources in the key areas of biological diversity and the associated traditional knowledge. "With such a focus, India is Party to the World Heritage Convention (1972), Convention on International Trade in Endangered Species of Flora and Fauna (CITES) (1975), Ramsar Convention on Wetlands (1975), Convention on Biological Diversity (1992), Agenda 21 (1992), UN Framework Convention on Climate Changes (1992), UN Convention to Combat Desertification (1994), the Trade Related Intellectual Property Rights (WTO-TRIPs) 1994, Cartagena Protocol for Bio safety to CBD (2000), FAO International Treaty on Plant Genetic Resources for Food and Agriculture (FAO, 2001) and others."[12]

United Nations Convention on Biological Diversity (CBD) is the mostly accepted and the comprehensive framework among the existing options which addresses the issues of access to biological resources and benefit sharing with detailed links to issues related to traditional knowledge over such biological resources. Considering this India ratified the CBD and in pursuance of the "Conference of Parties (CoP) decisions of CBD", in order to comply with CBD provisions promulgated the Biological Diversity Act 2002 in

[12] Id.

Parliament of India. A corresponding set of rules were also drafted in the name of Biological Diversity Rules 2004 to have proper implementation of the provisions of the Biological Diversity Act 2002 and in order to secure active participation among the countries rich in biological resources in the new dimension of the economy associated with the exploitation of biological resources. India has been actively involved in promoting global debates on ABS at many forums like WTO, WIPO, TRIPS Council and also has been an active member of the "Like Minded Mega Biodiverse Countries (LMMC)"[13] which works towards establishing an international regime for Access and Benefit Sharing which must be 'legally binding' for effective implementation of CBD in a better way.

Facilitating ABS mechanism under Biological Diversity Act 2002:

India is considered a one of those mega biodiversity countries across the world. which is not only rich in biological resources but also equally rich in the traditional and indigenous knowledge over such biological resources, both coded and informal. In order to extend protection to such biological resources and the associated traditional knowledge, Biological Diversity Act 2002 places the utmost importance on the access to biological resources & associated traditional/ indigenous "knowledge by foreign nationals, institutions, companies etc. and fair and equitable sharing of benefits arising out of the use of these resources and associated knowledge by the country and its native people".

"Access" under Biological Diversity Act 2002:

The Biological Diversity Act 2002 provides for a three tier mechanism for implementing prescribed provisions for facilitating access and benefit sharing over biological resources. The National Biodiversity Authority (NBA) at the national level stands at the apex of this three tier mechanism, followed

[13] As per Rule 14 of the Biological Diversity Rules 2004, applicants seeking approval for obtaining access over biological resources found within India and the associated traditional knowledge are required to file an application in Form 1 filling up all the required details with a prescribed fee of Rs. 10,000/- before the NBA. Once the application gets approved by NBA, the applicant can have access over the biological resource in question by signing an agreement with NBA on mutually accepted terms and conditions pertaining to Access and Benefit Sharing.

by the State Biodiversity Board (SBB) at the state level and the Biodiversity Management Committee (BMC) at the block/ village level. The NBA deals with the matters relating to granting permission to foreign individuals, institutions or companies to have access over the biological resources available in India on complying with the prescribed procedure for obtaining such procedure as mentioned in Rule 14 of the Biological Diversity Rules 2004[14] under the Biological Diversity Act 2002.[15] The NBA also looks in to the matter of transfer of research results obtained from the experiments over such biological resources for which NBA had granted access under section 3 of the Biological Diversity Act. According to this procedure, no foreign individual, institution, company can transfer the research result pertaining to a biological resource, access over which has been obtained from the NBA, outside India without prior permission of NBA.[16] Similarly as far as applying for an intellectual property right is concerned pertaining to the research result as obtained after having an access over biological resource in India u/s-3 of the Biological Diversity Act 2002, prior permission has to be taken from the NBA complying due procedure as prescribed before filing application for claiming such intellectual property right.[17]The Biological Diversity Act 2002 also provides for granting permission to Indian citizens, companies, associations and other organizations on the basis of the "Prior Intimation" to the State Biodiversity Board (SBB) concerned with an exemption of "Prior Intimation" for local people and communities, including growers and cultivators of biodiversity, and 'vaids' & 'hakims' practicing indigenous medicinal practices with respect to such concerned biological resources.[18]

Determination of "Benefit Sharing" under the Biological Diversity Act 2002:

The Biological Diversity Act provides for the determination of benefit arising out of the use of the biological resources and associated traditional knowledge available within India to be shared between the provider party

[14] The Biological Diversity Act 2002, Section:3
[15] The Biological Diversity Act 2002, Section:4
[16] The Biological Diversity Act 2002, Section:6
[17] The Biological Diversity Act 2002, Scetion:7
[18] Supra N. 12, at p. 72.

(party providing access to such biological resources and associated traditional knowledge) and the receiver party (party obtaining such access under the biological Diversity Act) fairly and equitable and on the basis of 'mutually agreed terms' and 'prior informed consent' as prescribed in the United Nations Convention of Biological Diversity. Such determination of 'Benefit Sharing' is to be done by the appropriate authority (NBA) imposing proper terms and conditions in the access agreement in order to secure fair and equitable sharing of benefits where benefits may include the following:[19]

i) Transfer of technology obtained from research on biological resource or associated traditional knowledge;

ii) Granting joint ownership over IPRs to NBA, otherwise to individual benefit claimers where the determination of individual benefit claimers is possible;

iii) Setting up of Funds to add to the cause of such benefit claimers;

iv) Promoting capacity building for such native indigenous people;

v) Providing the money value as a matter of compensation or compensation in kind not amounting to monetary value;

vi) Establishing production, research and development units in that local territory which can generate some employment options for the local people and help them to have a better standard of living

Setting up of Biodiversity Funds at national, state & local level is provided under the "Biological Diversity Act 2002" where the benefits received in the monetary terms as a result of the implementation of the various access agreements will be deposited to be used for preservation of the biological resources and the overall development of the people and the area from where such biological resources have been taken. The mode, manner and the amount of the benefit which is to be shared will be decided on case to case basis on the mutually agreed terms incorporated in the access agreement mutually by the applicant and the authority/ local people or bodies including the indigenous community.

[19] Supra N. 12, at p. 72.

The National Biodiversity Authority is working on the project of developing an Access and Benefit Sharing Model with intended modification depending upon specific case time to time, which will be able to contribute substantially in establishing the international regime of access and benefit sharing (ABS) on biological resources and associated traditional knowledge.

VI. Conclusion

With the growing demand for the commercial exploitation of the various genetic resources and the associated traditional knowledge over it, and its potential for huge revenue generation has compelled the big pharmaceuticals companies and the developed courtiers to take the access norms and the related norms for benefit sharing with much seriousness. Also with the growing awareness related to the avenues for commercial exploitation of the biodiversity and in turn the possibility of revenue generation through various platforms among the developing countries or countries rich in biological resources, it is very difficult for the developed countries to demand low-cost access to biological resources and respect for IPR from the developing countries. Respecting local rights can be the first step to ensure respect for IPR. Hence the developing countries must aim at designing their own ABS regime according to their domestic needs, more specifically with in IPR framework in order to ensure the implementation of the three basic objectives with respect to Biodiversity protection i.e. conservation, sustainable use and fair and equitable benefit sharing and in turn strive for achieving an "international regime for Access and Benefit Sharing".

TRANSITIONING CORPORATE GOVERNANCE

Pratiti Nayak & P. K. Sarkar***

ABSTRACT

The publication of Jensen and Meckling's article (1976) for the first time provided the much needed prominence to the issue of Corporate Governance. Since then theoretical and empirical research on corporate governance has gained significance all around the world. The subject matter on corporate governance came to the limelight with the collapse of some high profile corporate like Enron, Tyco, Worldcom, etc. However the issue has always been of economic and financial importance to the developing countries. The disclosure failure at Satyam Computer services renewed the focus in India on the functioning of corporate boards. India with the legacy of the English Legal System, has one of the most efficient corporate governance regime but due to poor execution has affected its efficiency. This article aims at discussing the gradual process of evolution of the concept of corporate governance all over the world and in India.

Keywords: Governance, Corporate Governance, Disclosure, Transition.

I. Introduction

In the last two decades corporate governance has been the hotly debated issue in US and Europe. It would not be false to say that in India this issue came to the forefront in the recent times more so after the Satyam scandal. The issue of corporate governance becomes important due to the separation of so called ownership from management & control of a company. Due to this separation, corporate governance deals with the system by which the shareholders & other stakeholders will exercise their control over the functioning of the management. The discipline of corporate governance has developed as way of ensuring that, the investors other than promoters receive a fair return on their investment by protecting them against management expropriation or use of investment capital to finance poor projects[1] and the interests of the other stakeholders are properly looked after. Further the

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[1] Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FINANC, 737, 783 (1997).

concept of corporate governance is in a continuous transitioning phase. 'Transition' here refers to a movement, development, or evolution from one form, stage, or style to another. Thus we can see the phenomena of corporate governance under a continuous evolution and development from one form to another.

But before getting a deeper insight on the subject matter, it is necessary to understand what corporate governance is. The innumerable literary works on the subject suggest that there exists no universal definition of the term corporate governance. There are varied definitions of corporate governance which may be broadly categorized in two ways. One refers to the actual behavioural pattern of the companies in terms of performance, efficiency, growth, financial structure, treatment of shareholders & other stakeholders. The second deals with the normative framework of governance under which the corporate are required to operate[2]. In order to provide a fair understanding of the subject it is advisable to discuss the subject from different perspectives. A comprehensive definition of corporate governance suggests that it is "the complex set of constraints that shape ex post bargaining over the quasi rents generated by the firm"[3] which focuses on division of claims.

II. Understanding Corporate Governance

Corporate governance simply does not refer to a system of checks and balances; it is more about establishing a surpassing organisation with increased customer satisfaction and shareholder value. The primary need is to create a corporate culture of conscience and consciousness.[4] Corporate governance necessarily deals with haw the corporate firms are to be directed, controlled, managed and held accountable to the real owners of the company i.e., the shareholders of the company.

The term 'governance' means 'the activity of governing a country or controlling a company or an organisation; the way in which a country is

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[2] Lalita S Som, *Corporate Governance Codes in India*, Economic & Political Weekly, Sept. 30 – Oct. 6. 2006, at 4153, 4160.

[3] Luigi Zingales, Corporate Governance: The New Palgrave Dictionary Of Economics And The Law, 420 Macmillan, London (1998).

[4] J. P. Singh, *Improving the Quality of Corporate Governance in India*, Indian Journal Of Industrial Relations, Jul. 2007, at 113,123.

governed or a company or institution is controlled[5]. An economic, legal and institutional environment in which companies are allowed to grow, diversify, restructure and exit and do anything else needed for maximization of the shareholder value refers to an ideal corporate governance system. Corporate governance concerns itself with the laws, procedures, practices and implicit rules that determine company's capability to take informed managerial decisions vis-à-vis its claimants – in particular, its shareholders, creditors, consumers, the state and employees.

Kautilya's Arthashastra lays down fourfold duty of a king, i.e. Raksha, Vridhi, Palana, Yogakshema which can be equated in today's corporate world with risk management aspect, stakeholder value enhancement, compliance with law in letter and spirit and corporate social responsibility respectively[6]. Corporate governance refers to the system through which different corporate systems are monitored, managed and supervised in such a way that corporate reliability, reputation are not put at stake. The four pillars on which the edifice of corporate governance is founded upon are transparency, fairness in action, accountability and responsibility towards the stakeholders.[7]

University of Michigan professor Richard E. Nisbett observes that "organizations have certain structures that function under certain rules and procedures. But you need people to run them, and people are a part of society. Hence, organizations are social units, where social norms and structures, cultural practices, philosophies, and value systems influence them."[8]

III. Definition and Meaning

Adam Smith recognized the importance of corporate governance long before though he did not use the phrase. According to him, "The directors of the company being managers of other people's money than their own, it cannot be well expected that they should watch over it with the same anxious vigilance with which the partners in a private coparcenary frequently watched over him."

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[5] Dr. K.R.Chandratre & Dr. A.N.Navare, Corporate Governance – A Practical Handbook, 1, Bharat Law House, (1st ed. 2010).
[6] Icsi, Corporate Governance – Beyond Letters,1.12, (1st ed. 2011).
[7] *Supra* note 6, at 1.13.
[8] Richard E. Nisbett, *The Geography of Thought*, New York: Free Press, 2003, at 23,24.

Robert Ian (Bob) Tricker for the first time used the words corporate governance in his book in 1984 and explained it as "a system or process concerned with the way corporate entities are governed, as distinct from the way business within those companies are managed. Corporate Governance addresses the issues facing Board of directors, such as the interaction with top management and relationships with the owners and others interested in the affairs of the company." [9]

Nobel laureate Milton Friedman explains Corporate Governance as "the conduct of business in accordance with shareholder's desires, which generally is to make as much money as possible, while conforming to the basic rules of the society embodied in law and local customs."[10]

Cadbury Committee (UK), 1992 defines corporate governance as – "Corporate Governance is the system by which companies are directed and controlled. It encompasses the entire mechanics of the functioning of a company and attempts to put in place a system of checks and balances between the Shareholders, Directors, Employees, Auditor and the Management."[11]

Definition of Corporate Governance by *The Institute of Company Secretaries of India* is, "Corporate Governance is the application of best Management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for sustainable development of all stakeholders."[12]

"Corporate Governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance."[13]

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[9] *id.* at 1.3.
[10] *id.*
[11] *Supra* note 5, at 5.
[12] ICSI, *Souvenir for ICSI award for Excellence in Corporate Governance*, ICSI PUBLICATION, 15th Dec. 2001.
[13] OECD PRINCIPLES OF CORPORATE GOVERNANCE, 1999.

In a narrower perspective, the relationship between company's management, board of directors, shareholders, auditor's and other stakeholders refers to corporate governance. This relationship comprises of different rules & incentives, structure through which the objectives of the company is set, means of achieving the objectives and evaluating their performance. Therefore, transparency in disclosures, righteous action and answerability towards the stakeholders are the important features of corporate governance.

Though corporate governance mainly focuses on establishing and strengthening a long term relationship of trust between the company and the people who provide it with seed money, it would be wrong to say that the significance of corporate governance lies majorly in better access to capital. There has been an increased realization amongst the corporate world regarding the fact that with better corporate governance they can increase their operational value, improve strategic thinking with new ideas, have a rationalized management and monitor the risk faced, articulate the decision making process of the top management, assure the credibility and integrity of the financial reports and thereby gain a long term reputation among the stakeholders.

Taking a broader view of corporate governance, it leads us to the ways in which corporate entities function in a transparent and fair manner which is necessary for the overall confidence of the market, an efficient allocation of the capital, industrial growth and development which finally results in the overall growth and welfare of the country.

Keeping in view both the narrower and broader perspectives, it appears that the matter of central significance in corporate governance is that of transparency and disclosures. However there are two definitions which clearly depict the difference between these two perspectives. They are-

"Corporate governance is concerned with ways of bringing the interests of investors and manager into line and ensuring that firms are run for the benefit of investors."[14]

[14] F. Mayer, 'Corporate Governance, Competition, And Performance', In Enterprise And Community: New Directions In Corporate Governance, S.Deakin And A. Hughes (Eds), Blackwell Publishers: Oxford, (1997).

"Corporate governance includes 'the structures, processes, cultures and systems that endanger the successful operation of organizations."[15]

If we have a look at the financial perspective of corporate governance then the very objective of establishing a corporation is maximizing its shareholder value. Therefore shareholder primacy becomes the central notion in this perspective. By combining the understanding of corporate governance from all the different perspective, we may define it in a simple sense as a system comprising of different laws, rules, regulation, principles and procedures by which the companies are directed and governed.

IV. Global Landmarks in the Transition of Corporate Governance

A long time before the recent incidents regarding failures of successful corporate giants in the developed economies came into the limelight, the issue of corporate governance has been an important issue for the developing countries. Effective and successful corporate governance systems provide for development of strong financial systems, irrespective of whether they are largely bank-based or market-based, which, in turn, have an unmistakably positive effect on economic growth and poverty reduction.[16] The evidence of numerous frauds and scandals in the world corporate history led to the realization of the fact that the existing regulations were insufficient and strong external regulations was required. In the wake of such need, several changes have been brought out by governments in different aspects of corporate governance. All these efforts led to a significant transformation in the corporate world with the realization that investors and society considers the matter of corporate governance with utmost importance.

Corporate Governance is the buzzword in India as well as all over the world. It has gained tremendous importance in the recent past especially after the second half of 1996 for two main reasons; first the economic liberalization and deregulation of the industry and business; second, demand for new corporate ethos and stricter compliance with law of the land; and the

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[15] K. Keasey, S. Thompson & M. Wright, 'Introduction: The Corporate Governance Problem - Competing Diagnoses And Solutions,' In Corporate Governance: Economic, Management, And Financial Issues. Oxford University Press: Oxford, (1997).

[16] See Claessens, Corporate Governance And Development, Global Corporate Governance Forum, World Bank, Washington D.C., (2003).

need and demand for greater accountability of companies to their shareholders and customers.[17]

V. Development in USA

The importance of the need for corporate governance arose in the United States mostly after the Watergate scandal. It was found in the investigations that there existed a widespread practice of making political contributions and bribing of Government officials by several major corporate entities. Therefore, Government of USA enforced the Fraud and Corrupt Practices Act, 1977 containing specific provisions regarding establishment, maintenance and review of the internal control system of the companies.[18] To continue with it, in the year 1979, US Securities and Exchange Commission proposed mandatory internal financial control reports. In view of the series of high profile corporate collapses, most important being the Savings and Loan collapse, the Treadway Commission was set up in the year 1985, with the objective to detect the reasons of misrepresentation in the financial reports and to recommend measures to combat it.[19] The Treadway Report published in 1987 focused on the need to develop an effectively controlled environment, independent audit committees and an objective internal audit system.[20] It also placed the requirement for published reports on effectiveness of internal control, and the need to develop an integrated set of internal control criteria to enable companies to improve their control systems.[21]

The system of corporate governance as currently practiced in US involves equilibrium of interests, and what some may contend are certain inherent contradictions. "Shareholder democracy" refers to a phenomenon which has never been realized in a meaningful way as regards to the corporate world. Some believe that shareholder democracy should involve more meaningful powers, while others believe the form of democracy, but not in substance, is preferable.[22]

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[17] *Supra* note 5, at 1.
[18] Dr. C. L. Bansal, Corporate Governance- Law Practice & Procedures With Case Studies, 2, Taxmann Publication (P.) Limited, (1st ed. 2005).
[19] *id.*
[20] *id.*
[21] *id.*
[22] Breeden Committee Report On "Restoring Trust", August 2003.

VI. Development in UK

In the year 1972 the European Economic Community (EEC)[23] issued a series of draft directives on the harmonization of company law throughout the member states. The EEC Draft fifth directive proposed that unitary boards responsible for seeing that business was being run in the right direction to be replaced by the two-tier board form of governance being practiced in Germany and Holland. However the idea was not well received in Britain partly because it would replace the unitary board system which was seen by the directors as an efficient system of governance.[24]

In Britain the financial sector was marred by a series of corporate scandals in the 1980's. Amongst the several the Bank of Commerce and Credit (BCCI) scandal and the Barring's Bank were the landmarks apart from the Lloyd Insurance scandal. Hostile acquisition of Distillers by Guinness in 1986 and Polly Peck that collapsed in 1992 amongst allegations of false accounting and vanished assets.[25] The BCCI, world's seventh largest bank with 400 branches in 70 countries had to be closed down by the Bank of England in 1991 for proven cases of money-laundering, bribery, corruption, evasion of foreign exchange, etc.[26] These incidents led to the awareness and sensitivity of the public on the issue and indicated the absence of a proper structure and process at the top management level. Due to the corporate failures and lack of regulatory measures on the part of the concerned authorities to check them, the Committee of Sponsoring Organisations (COSO) was established. The Report of COSO in 1992 provided a framework of control which has been later endorsed in four subsequent UK Reports, namely Cadbury, Ruthman, Hampell and Turnbull.[27]

The corporate failures like Polly Peck, British and Commonwealth; Bank of Credit and Commerce International (BCCI), Robert Maxwell's Mirror

[23] Subsequently renamed as European Union.
[24] http://books.google.co.in/books?id=MamU3RJ1fqcC&printsec=frontcover&dq=Corporate+governance&hl=en&sa=X&ei=8vjYUqGYK8G4rAeIlpHDQCg&ved=0CC8Q6A EwAA#v= onepage& q=Corporate%20governance&f=false, visited on 18/1/14 at 3.00 pm.
[25] Kay,J. and Sulberston A, *Corporate Governance*, National Institute Economic Review, August 1995, at 84,97.
[26] *Supra* note 18, at 379.
[27] *id*, at 3.

Groups News International resulted out of poor governance practices. The Combined Code on Corporate Governance (The Hampel Report), 1998 which resulted in major changes in the area of corporate governance in United Kingdom, was a consolidation of publication of a series of reports. The last decade has witnessed a series of corporate governance committees that have analyzed the problems and crisis faced by the corporate sector and the markets. They have also sought to provide guidelines for corporate management. Studying the subject matter of the corporate codes and the reports produced by various committees highlighted the key practical problem and concerns driving the development of corporate governance over the last decade.[28]

VII. Corporate Governance Committees

The Corporate Codes arrived in the 1990's and they were known by the names of the individuals who headed them. Amongst all the committees the first was the Cadbury Committee[29] of UK in the year 1992, chaired by Sir Adrian Cadbury on 'The Financial Aspect of The Corporate Governance'. As per the Cadbury report – "Corporate Governance is the system by which companies are directed and controlled and Board of directors is responsible for governance of the companies." The shareholder's role is to appoint directors and the auditor's and to satisfy them that the corporate has an appropriate governance structure is in place. The board's duties involves setting the company's strategic aims, providing the leadership to put them into effect, guiding the management of the business and being accountable to shareholder on their stewardship. The board's action is subject to laws, regulations and the shareholders in general meeting.[30] The main objectives stated in the report was "to raise the standards of corporate governance and the level of confidence in financial reporting and auditing by setting out clearly what it sees as the respective responsibilities of those involved and what it believes is expected of them."[31] The committee submitted its report providing around 19 recommendations called the "Code of Best Practices" which

[28] A.C.Fernando, Corporate Governance, Principles, Policies And Practices, 77, Pearson, (2006).
[29] Cadbury Committee Report On The Financial Aspects Of Corporate Governance, Chaired By Sir Adrian Cadbury, 27 May 1992.
[30] *id* at para 2.5.
[31] *id.*

emphasized on importance of independent non-executive directors; the introduction of an independent audit committee; the division of responsibilities between the chairman and CEO of the board; the use of remuneration committee of a board to supervise executive rewards; the introduction of a nomination committee with independent directors to propose new board members and reporting publicly that the corporate governance code has been complied with or, if not, explaining why.[32] Some critics of the Cadbury Report criticized it on the ground of unnecessarily placing the importance on the role of non-executive directors and that it lacked as regards the legally enforceable sanctions are concerned.[33]

The next significant committee was the Paul Ruthman Committee which aimed at discussing the conflict raised by the Cadbury report. It made recommendations for restricting the reporting norms to internal financial controls for ensuring the effectiveness of the company.[34] Then came the Greenbury Committee[35], January 1994 which was set up under the chairmanship of Sir Richard Greenbury for identifying good practices by the Confederation of British Industry (CBI) in order to determine directors' remuneration and to prepare a code of such practices for use by public limited companies of United Kingdom.[36] The Greenbury Code of Best Practice provided for the division of corporate best practices into four sections: Remuneration Committee, Disclosures, Remuneration Policy and Service Contracts and Compensation.[37]

Hampel Committee[38] was one of the most significant committee on corporate governance. As per its report, "the importance of corporate governance is in its contribution both to business development and to

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[32] *Supra* note 30.

[33] http://books.google.co.in/books?id=MamU3RJ1fqcC &printsec=frontcover&dq=Corporate+governance& hl=en&sa=X &ei=8vjYUqGYK8G4rAeHpIDQCg&ved=0CC8Q6AEwAA#v=onepage&q= Corporate%20governance&f=false, visited on 18/1/14 at 3.00 pm.

[34] *Supra* note 18, at 3.

[35] Greenbury Committee Report On Investigating Board Members' Remuneration And Responsibilities, (1994).

[36] *id.*

[37] *id.*

[38] Hampel Committee Report On Corporate Governance, January 1998.

accountability. In the UK the latter has preoccupied much public debate over the past few years. Business prosperity cannot be commanded. People, teamwork, leadership, enterprise, experience and skills are what really produce prosperity. Good governance ensures that constituencies with a relevant interest in the company's business are fully taken into account. There is need for broad principles."[39] The committee worked further on the Cadbury report. And its recommendations mostly concerned with report by the auditors, report on internal control privately to the directors; directors should maintain and review all controls and the companies should timely review their need for internal audit function and control.[40]

It resulted in the introduction of the combined code which was a combination of the recommendation of earlier corporate governance reports, i.e. (Cadbury Committee and Greenbury Committee). This code is to be complied with by all listed companies in UK with a compulsory effect. The provisions deals with, the boards maintaining a sound system of internal control in order to protect the investment of its shareholders and assets of the company, the directors should conduct a review of the effectiveness of the internal control system and report to shareholders that they have done so.[41]

Various economic organisation like the World Bank and the Organisation for Economic Co-operation and Development also dealt with the issue of corporate governance. The issue of system complexity and emphasized on the transparency, disclosures, trust and responsibility principles was elaborately discussed in the World Bank Report on Corporate Governance. One of the first non-governmental organizations to work on the principles and practices that should govern corporate functioning was Organization for Economic Co-operation and Development (OECD). The OECD principles in summary included the elements of the rights of shareholders; equitable treatment of shareholders; role of stakeholders in corporate governance; Disclosure and Transparency and Responsibilities of the board.[42]

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[39] Indrajit Dube, Corporate Governance, 8, Lexis Nexis Butterworths Wadhwa, Nagpur, (2009).
[40] Hampel Committee On Corporate Governance, January 1998.
[41] UK Corporate Governance Code, 2010.
[42] Principles Of Corporate Governance: A Report By OECD Task Force On Corporate Governance, 1999.

Finally the Sarbanes-Oxley Act (SOX)[43], 2002 resulted in a sincere attempt in dealing with issues of corporate governance and to boost investor's confidence. The main objective of the Act is to improve the transparency, accuracy and reliability of corporate disclosures and thereby protect the investors of the companies.

VIII. Development of Corporate Governance in India

India has been undergoing changes at an increasing pace. The distinctions or differences between an inward-looking controlled economy and a globalizing one are sharp which would further get even sharper. This has led to an increasing awareness in the government that it should gradually shift its focus from the economic to the social sphere. The last decades of 20th century witnessed the opening up of the Indian Economy. The liberalization, privatization and globalization have resulted in the integration of the Indian economy with the world economy.[44]

The phenomenon of corporate governance gained importance in India during the post liberalization era. Confederation of Indian Industry(CII), the leading industry association in India voluntarily introduced the concept of corporate governance. By the year 2000, it had been incorporated as one of the mandatory clauses in the clause 49 of the listing agreement administered by the Stock Exchange Board of India (SEBI). It was followed by the Naresh Chandra Committee report which majorly stressed on independence of board and audit, and improvements in disclosures (financial as well as non-financial). Subsequently, two more committees were constituted under the leadership of Mr Narayan Murthy and Mr J J Irani, with the explicit aim of bringing in best practices from across the world to develop a well regulated environment that promotes entrepreneurship. In 2009, the Satyam fiasco shook the Indian industry, bringing into limelight the point that proper governance is indispensable to further growth and development. Since then efforts to create a framework have gained importance. The Ministry of Corporate Affairs (MCA) came out with guidelines in 2009. A lot of diverse ideas have been introduced in parts over these years, which were finally were synthesized

[43] Sarbanes Oxley Act, (2002).
[44] *Supra* note 5, at 3.

into law in the new Companies Act, 2013.[45] The Confederation of Indian Industry (CII) at its Annual Conference held in April 1997, focused on finding out the results of the practices of corporate governance being practised in the industry. This resulted in a report called the CII Code[46]which contained three important aspects of corporate Governance dealing with; *first* no uniform structure of corporate governance can be prepared for Indian companies by just importing from one or other country; *second* due to the integration of Indian industry with the world market the companies can no longer afford to ignore enhanced corporate practices and; *third* Corporate governance goes far beyond the company law and extends to various other aspects of quantity, quality and frequency of financial and managerial disclosure, the extent of fiduciary duties of the directors, maximizing the shareholder value, etc.[47]

Upon the acceptance of the CII Code, the second important initiative was the Kumar Mangalam Birla Committee[48]which described the concept of corporate governance instead of defining it. According to the Committee Report "Three key constituents of corporate governance were the Shareholders. the Board of Directors and the Management and it attempted to identify in respect of each of these constituents, their roles and responsibilities as also their rights in the context of good corporate governance. The pivotal role in any system of corporate governance is performed by the board of directors. It is accountable to the stakeholders and directs and controls the management. The responsibility of the management is to undertake the management of the company in term of the directions of the board, to put in place adequate control systems and to ensure their operation and to provide information to the board on a timely basis in a transparent manner to enable the board to monitor the accountability of management to it."[49]

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[45] Santosh Pande & Kshama V. Kaushik, *Corporate Governance in India: Tracing the Journey*, Journal Of Indian Institute Of Corporate Affairs, 2006, at 561.

[46] Report Of Confederation Of Indian Industry, Desirable Corporate Governance: A Code (Based On Recommendations Of The National Task Force On Corporate Governance Chaired By Shri Rahul Bajaj'), March 1998.

[47] *Supra* note 5, at 16.

[48] Report Of The SEBI Committee (Kumar Mangalam Birla) On Corporate Governance, May 1999.

[49] Report Of SEBI Kumar Mangalam Birla Committee On Corporate Governance, Para 2.7 And 2.8, Feb. 2000.

In August 2002, the Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs appointed The Naresh Chandra committee with an objective to examine various corporate governance issues. The Committee made its recommendations focusing on two key aspects of corporate governance: financial and non-financial disclosures: and independent auditing and board oversight of management.[50] The committee's firm belief is that "a good accounting system is a strong indication of the management commitment to governance.[51]

The Narayana Murthy committee[52] was the fourth initiative as regards corporate governance in India. Under the chairmanship of Mr. N. R. Narayana Murthy, SEBI established the committee to review Clause 49 and recommend measures for the improvement of the standards of corporate governance. Some of the major recommendations of the committee were regarding "audit committees, audit reports, independent directors, related party transactions, risk management, directorships and director compensation, codes of conduct and financial disclosures."[53]

SEBI asked companies incorporated in India having a certain specified capital size to implement Clause 49 of the Listing Agreement, a regulations which provides strength to the role of independent directors serving on the boards of corporate entities. On 26 August 2003, SEBI announced an amendment to the clause 49 of the Listing Agreement which every public company listed on Indian Stock Exchange is required to comply with. The amendments brought out changes with respect to the composition of Board of Directors as to independent directors, executive and non-executive directors, audit committee, whistleblower policy, subsidiary companies, disclosures and certifications.

IX. Conclusion with reference to recent developments in India

India, since the 1990's, has been taking major steps, towards strengthening the Indian Corporate Governance regime. Like many other developing

[50] Report Of SEBI Committee (Naresh Chandra) On Corporate Audit And Governance, Dec. 2002.
[51] *id.*
[52] Report Of SEBI Committee On Corporate Governance, 8 Feb. 2003.
[53] *id.*

countries it has also adopted the Anglo-American model of corporate governance. The driving force towards this shift has been a combination of global political-economy pressures and problems arising out of the previous Business House model of governance. The current corporate governance model practised in India provides for both voluntary as well as mandatory requirements like voluntary guidelines issued by the Ministry of Corporate Affairs and Clause 49 of the listing agreement for listed companies.

India has one of the most efficient and effective Corporate Governance regimes but its poor implementation together with socialistic policies of the pre-reform era has had its ill effects and resulted in corporate scandals like Harshad Mehta Case, Ketan Parekh Securities Scam and many more including recent one's like the 2G Spectrum Scam, Satyam Scandal including the ongoing Sahara case. In view of the situation of failures the Ministry of Corporate affairs and the parliament, taking into consideration the recommendations of the various corporate governance committee reports and the lacunas of the present regulations, passed the Companies Bill, 2012 and The Companies Act, 2013, came into force on 29 August 2013. The new Act is expected to facilitate business friendly corporate regulation, improve corporate governance norms, enhance accountability on the part of auditor, raise the level of transparency and protect the investors particularly small investors. Some of the salient features of the Companies Act, 2013 which would have a significant effect on the governance mechanisms in the Indian corporate world are:

a) Establishment of a vigil mechanism by every listed company or such class or classes of companies, as may be prescribed. (Sec 177: Audit Committee)

b) Constituting a Stakeholder Relationship Committee, with a non-executive director as a chairperson and such other members as may be decided by the board, by Companies with more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year. (Sec 178: Nomination and Remuneration Committee and Stakeholders Relationship Committee)

c) Restrictions on providing loans to directors (Sec 185: Loans to directors)

d) A company cannot, unless otherwise prescribed, make investments through more than two layers of investment companies. (Sec 186: Loans and investments by companies)

e) Prohibiting insider trading in the company. (Sec. 195: Prohibition on Insider Trading of Securities)

f) Filing of a certificate by the Company's Auditor with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed in Sec 133 for sanctioning a scheme of compromise or arrangement. (Sec 232: Merger and Amalgamation of Companies)

g) Provisions regarding mandatory Corporate Social Responsibility (Sec 135: Corporate Social Responsibility)

h) Establishing as many special courts as may be necessary by the central government to provide speedy trial of offences. (Sec 435: Establishment of special courts), etc.

Foreign Exchange Management Act,1999, Industrial (Development and Regulation) Act, 1951, Securities and Exchange Board of India Act, 1992 are some of the other regulations and laws apart from the Companies Act which also have an impact on the Indian Corporate Governance mechanism.

In view of the recent transitioning phase brought about by the regulatory changes in the governance norms through the new Companies Act, 2013 and the active role played by the SEBI in monitoring the implementation of the norms we can expect a brighter and successful future of the Indian Corporate Governance regime.

SURRENDER CUM COMPENSATION POLICY AND ITS RESULT IN WEST BENGAL (INDIA) WITH RELATION TO LEFT EXTREMISTS

Amrita Sarkar*

ABSTRACT

One of the most controversial policies that got implemented in the recent years is the Surrender Cum Compensation Policy in West Bengal (29.7.2010). How does one review that it is a good or harmful policy is a matter of time. After comparing the data sheet from 2010 onwards and the earlier years in South Asia Terrorism Portal, it was noticed that West Bengal has never seen any incident of Left extremist surrender. Though the data is provisional however, two months after the announcement of the policy we see incidents of left extremists surrendering. But all these people have long ago boycotted the government. So to understand these incidents of surrenders, certain theories of criminology, penology and victimology have been used in this article which would try to throw some light on the possible reasons behind such surrenders.

Keywords: Surrender, Compensation, Operation Green Hunt.

I. Road to Reformative Policies in Criminal Administrative System- An Introduction

"No one is born criminal but it is the circumstances that make him so; not because he wants to be a criminal but he is rather forced to lend into criminality"[1]

... Lombrosso and Tarde

If we go back to history, the sole object of the criminal justice system was to punish the criminals and dump them in prisons, giving them a life sentence or even death penalty to just get over with their existence. As the

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[1] Paranjape, N.V., Criminology and Penology, 11th Ed., Pg. 13, Central Law Publications, Allahabad, 2004

time passed by, modern criminologist figured out that dumping offenders inside the prison cells and infliction of barbaric punishments have sufficiently proved their futility than doing some general good to the society. 'In this regard, Prof. Gillin has rightly pointed out that it is not the humanity within the criminal but the criminality within the human being which needs to be curbed through effective administration of criminal justice.'[2] With this thought as the underlying conception to crime, modern criminologists have supported those penological methods which focus on reformative policies rather than just punitive action against the wrong doers. The criminal law has gradually liberalized the concept of punishment and has started advocating greater opportunities for rehabilitation of offenders. 'The basic assumption of this method is that environment or circumstances have a very vital role to play in the crime-causation.'[3] This does not mean to advocate the criminal behavior of the humans and letting them go scott free but to overcome the generalization that there are people who have strong reasons to resort to this deviant behavior. The other way to look at this issue can be a subjective outlook where each human being has its own bar of tolerance against crime and injustice which obviously differs from people to people.

Criminology as a subject has a very important role in such policy decisions. With the help of the principles of criminology, different aspects of crime are analyzed. This analysis helps in suggesting effective measures for the treatment of the criminals to bring about their re-socialization and rehabilitation in the community. In short, it focuses on the behaviour that violates the criminal law and seeks explanations for that behaviour. While studying criminology one should try to understand why that the legislature passes laws to criminalize only certain kinds of behaviors of mankind and is the bar of morality to decide which a deviant behavior is. On the other side of the picture, the criminologists ponder upon the fact as to why there are only few who commit crime whereas there are some who don't.

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[2] Ibid

[3] Positivists like Lombrosso and Tarde argued that man is not self-determining agent free to act as he desires. Every person as a biological creature tries to adjust himself to social environment.

II. What is Surrender cum Compensation Policy?

"The belief that police action and development can go hand in hand in Naxalite areas was a naïve theory."[4]

...P. Chidambaram, Home Minister, India

Government of India has introduced a scheme called 'Surrender cum Compensation Policy'[5]. Under this scheme the left wing extremists[6] who are fighting an ideological war with the government would be awarded a considerable amount of compensation if they consensually surrender to the government officials and admit their offences or crimes committed while they were comrades in that organization. 'This is an initiative as a part of the general policy to build consensus and evolve an acceptable and peaceful solution to stop the violence by the extremist groups, to usher in peace and development, especially in the disturbed regions.'[7] 'And, the aim behind the scheme is to wean away the misguided youth and hard-core militants from this movement where they later found themselves trapped. Simultaneously, it also seeks to ensure that the militants who have surrendered do not resort back being the militants again.'[8] There are similar schemes[9] formed separately for Naxals, Maoists affected areas and for the north east area, which is engulfed in the separatists' movement. The schemes have minor differences but the objectives of these schemes are broadly same. The scheme for the first time was being applied in the North East Area in 1998. Since then many amendments were brought keeping in mind the various changes in the situations.

'According to the new scheme that the West Bengal Government announced on 28th July, 2010, a surrendered Maoist would get a monthly stipend of Rs.2, 000 for a period of three years, while the state government

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[4] Mishra and Pandit, Insurgency as an Exucse for Mis-governence, pg. 133, Hachette, India, 2010

[5] Also known as Surrender cum Rehabilitation Policy

[6] Naxalites and Maoists

[7] Ministry of Home Affairs, Guidelines for surrender-cum-rehabilitation of Naxalites in the Naxal affected States , available at http://mha.nic.in/pdfs/surrrenderPolAendments070909.pdf (8th September, 2010)

[8] Ibid

[9] Schemes in North East, West Bengal, Jammu and Kashmir

would make a fixed deposit of Rs.1.5 lakh for three years for each. Once the fixed deposit matures, the entire money would be handed over to the rebel if he shows good conduct for three years in the prison. The state government would also give them loans for doing business before the maturity of the fixed deposit. The fixed deposit amount would be kept as the security. Moreover, the state government would also provide compensation amount to Maoists for surrendering weapons. For e.g., if they surrender a machine gun, they get Rs.25, 000. For an AK-47, they get Rs.15, 000. Rs.3, 000 will be given for surrendering a revolver or a landmine, etc.'[10]

However, in this project, not the scheme per se but the criminological, victimological and penological jurisprudence behind the scheme would be discussed and secondly, its effects on the left extremists' surrenders would be examined. For the purpose of this project the term 'left-wing extremist' would be used to denote the naxalites and maoists collectively.

III. Background of the Offenders who are covered under the scheme

"This is one rebellion which will test the resilience of the Indian state as never before. Precisely because it is a rebellion in which people are fighting to save their land, forests, water and minerals from being grabbed and they are convinced that they have an alternative vision."

... Gautam Navlakha[11] in *Days and night in the Maoists heartland*, Economic and Political Weekly, (2010)

'The most notable contribution in the field of criminology in relation to crime and economics structure has been done by William Aldrian Bonger (1876- 1940). He tried to define the occurrence of crime on the basis of the Marxist approach. He insisted upon the fact that a criminal is a creation of the 'capitalistic exchange' who gets provoked by the profit component. In such a system each member tries to get the maximum from others in lieu of the minimum from himself. According to Bonger, this influences the feelings

[10] Ibid

[11] He is a notable journalist who along with another scientist went to Dantewada area of Maoists region to take an interview of the leader. He had first hand experience on the issue. Days and night in the Maoists heartland, http://epw.in/epw/uploads/articles/14662.pdf

of the proletariat as well.[12] It is the cause of poverty in certain sections of the civilization that furnishes values which in turn determines success in life purely in terms of money. Thus, poverty, unemployment and neglect by the state (government) are unavoidably connected to the deviant behavior.

Now coming back to the left- extremists' problem, the Naxal crisis started from late 1970s movement when the naxalbari movement[13] commenced. Farmers' anger germinated from the fact that the police or the government officials failed to take action against the perpetrators as they are rich and they were more interested in serving the upper class rather than the poor and disadvantaged ones. After that, a lot of studies were done and a lot of debate arose regarding how their violence can be stopped. The communist government of West Bengal came into power by defeating congress since 1967 with the slogan that the oppressed class won't have to face the neglect of the past. This myth was broken in 2006 when the state government came under the sun with the explicit change in their economic policy, the policy which was the root cause of their success all these years would have to face a change due to globalisation. "Nirupam Sen, Minister for Commerce, Industries, Development and Planning, told Frontline: '*When agriculture is our base, industry is our future. It is a market-driven economy that is prevalent in our country, integrating the Indian economy with the world economy. We have to face the stark reality of the neoliberal economy, as West Bengal is not immune to it, as we have to function under the overall political and economic framework of the country.*'[14] And thus, their long struggle against the state started with the zeal that their land, water, minerals; forests which are their source of livelihood should not be snatched away from them. The policy of neo-liberalism triggered massive protest from the villagers' side. The three villages which became internationally famous as a symbol of class-struggle against State were: Singur, Nandigram and Lalgarh. In Singur, the

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[12] Siddiquie, Ahmad, Criminology Problems & Perspectives, Eastern Book Company, Lucknow, 2001

[13] One of the farmers got killed by the goons hired by the landlord under whom the deceased was working. The inaction of police for a long time angered the villagers and they burnt the police station and killed the police officers.

[14] Suhrid Sankar Chattopadhyay, No hiccups here, Frontline, Vol. 23, Issue- 7, available at http://www.hinduonnet.com/fline/fl2307/stories/20060421004902800.htm (15.9.2010)

land remains barren. Neither Tata nor the villagers got their share. Farmers started committing suicide[15] and also the famous Tapashi murder[16] took place which ultimately unmasked the brutality of the state, armed with full power and amenities to destroy the poor farmers' protest. Nandigram violence[17] on 14th march, 2007 took the state violence to a new level and finally, when the Lalgarh[18] was targeted, the revolutionaries as the left extremists would like them to be called, fired back to the state by putting barricades and thereby not allowing the state forces to enter the village.

The people whose lands were forcefully acquired or targeted to be acquired are mainly adivasis or poor farmers whose main livelihood depends on the land. They cannot represent themselves, so at the end of the day it is the revolutionaries who take it upon themselves to lead the people. They have been neglected for a long time and suddenly in the name of economic progress even their last bit is also getting snatched. To them, this is just unacceptable. In brief, these are the horrifying stories of the developmental violence in which state is seen to be a great contributor. Nonetheless, these people became a foe of the country.

So, from a criminologist's point of view, the solution to this problem does not lie in the arrest and encounter deaths of these state rebels, the problem is something else, hence a different solution is to be applied. The problem is their economic dependency of their land, forests, water, minerals, etc. and they are ready to be sacrificed for protecting them. So, the state should first solve the problem of economic dependency and development of these areas. And those who are trapped in the Maoists trap should at least be given a

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[15] Express India, Singur tense after farmer's death, available at http://www.expressindia.com/latest-news/Singur-tense-after-farmers-death/351994/ (15.9.2010)

[16] Tapasi Mallick a tribal girl of 16 yrs was raped and burnt alive (2007) by the CPM leaders who were running the influential Singur committee during the struggle period. There was CBI investigation and the accuseds were later on released on bail from the high court.

[17] Sen, Arup Kumar, Nandigram: A Tale of Developmental Violence, Economic and Political Weekly, available at http://epw.in/epw/uploads/articles/12648.pdf (15.9.2010)

[18] Harriss John, The Naxalite/Maoist Movement in India: A Review of Recent Literature, Indian institute of South Asian Studies (ISAS) Working Paper No. 109 available at http://www.humansecuritygateway.com/documents/ISAS_NaxaliteMaoistMovementIndia.pdf (15.9.2010)

...ashamed and start afresh.'[19] 'It has been found that the red army ... child soldiers called 'Bal Sangham' or 'Bal Dasta'.' In such cases ... evidence should be allowed so that no innocent lose their lives. Now, ... overcome dependency remedy is too late or would be slow in getting ... power and moreover, people have lost faith in these governmental ... becomes therefore, the remedy should be targeted on the decline of these ... army force.' This thought has been applied by the policy makers. ... surrender-cum-compensation policy was introduced after the state's ... to implement 'Operation Green Hunt'. The failure of this prior approach ... new government would be discussed in the next section.

Approach of the Government prior to Surrender-cum-Compensation Policy: Operation Green Hunt

In February 2009, Central government announced its plans for ...multaneous, co-ordinate counter-operations in all Left-wing extremism-hit ...s – Chhattisgarh, Orissa, Andhra Pradesh, Maharashtra, Jharkhand, Bihar, ...ar Pradesh, and West Bengal, to plug all possible escape routes of Naxalites. ...e name of the policy that was undertaken by the central government for ...e war in several states was termed as 'Operation Green Hunt'. 'It may be ...me or just sudden awaking of the state authorities to increase their intensity ...f attacks against the red army.'[20] 'The structure of this operation is two-...old. First, they would try to protect the roads so that they track the passage ...ays of the Maoists and secondly, the troops would nab the left extremists in ...e villages. It is this second step that created more controversy than ever. ...ey claimed that such information would be based on perfect intelligence ...eport and in this process utmost care would be taken to see that no innocents' ...ves are harmed.'[21] The operation green hunt was always in midst of debate.

...The Economic Times, Naxalites recruiting young children in their cadres, available at ... economictimes.indiatimes.com/news/politics/nation/Naxalites-recruiting-young-...dren-in-their-cadres articleshow/6324818.cms (16.9.2010)

...'Operation Green Hunt' invention of media, claims Chidamabaram - The Times of ...dia, available at http://timesofindia.indiatimes.com/india/Operation-Green-Hunt-...vention-of-media-claims-Chidamabaram/articleshow/5203770.cms#ixzz0zd4Xm4gM (5.9.2010); The Hindu, Chidambaram says no, but troops believe 'Green Hunt' exists available at http://beta.thehindu.com/news/national/article392906.ece (25.10.2010) However, the researcher could not find the term Operation Green Hunt in the Annual Reports from 2006-10

...Sethi, Aman, Green Hunt: the anatomy of an operation, The Hindu, February 6, 2010,

It was often asked that how can centre deploy force on such regions where the most possible outcome could be further increase of state hatred. 'And it was true: the data given by the police authorities were different from the data given by the NHRC.'[22] The left extremists in return also aggravated their attacks immediately as retaliation against the state forces and incidents like Dantewada[23] and several train accidents[24] took place. 'They planted landmines and blew up state properties like schools, Panchayat bhavans, goods carriage, anganwadi centres, culverts, railway stations, community and health centers, open firing at police officers, etc.'[25] More innocent civilians had lost their lives during this feud.

Finally, the Union Home Minister P. Chidambaram asserted that the Left extremism menace afflicting the country was far worse than expected, but added that the government is more than determined to root out the threat through various other counter-measures. It is the result of this determination to find an alternative counter measure that gave birth to the current surrender-cum-compensation policy in these states.

V. *Conclusion*

"We are not at war with them. They are our countrymen. Even if I get 72 hours of peace, I can talk to them..."[26]

...Union Home Minister, P. Chidambaram, Express India, February, 2010

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available at http://www.thehindu.com/opinion/op-ed/article101706.ece (15.9.2010)

[22] *Indian Express, Operation Green Hunt and its challenges, October, 2009, available at http://www.indianexpress.com/news/operation-green-hunt-and-its-challenges/526473/1 (15.9.2010)*

[23] Considered to be the biggest maoist attack which took place on 6th April, 2010, on the state force, killing 76 personnels.

[24] On May 28, 2010 at least 148 passengers were killed after suspected cadres of the CPI-Maoist triggered a blast on railway track causing derailment of 13 coaches of the Howrah-Kurla (Kolkata to Mumbai) Lokmanya Tilak Gyaneshwari Super Deluxe Express between Khemasoli and Sardiya stations near Jhargram in West Midnapore District of West Bengal. About 145 others were injured.

[25] South Asia Terrorism Portal, Institute for Conflict Management, Bomb blasts triggered by the CPI-Maoist- 2010 available at http://www.satp.org/satporgtp/countries/india/maoist/data_sheets/bombblast2010.htm (16.9.2010)

[26] NDTV, Halt violence and we'll talk to you: Chidambaram to Naxals, available at http://www.ndtv.com/news/india/halt_violence_and_well_talk_to_you_ chidambaram_to_naxals.php (26.10.2010)

The above remarks were made just a few months before the scheme was introduced. 'More than 600 civilians died in Maoist violence. A total of 317 members of the security forces and 217 rebels died in Maoist-related violence. The rebels have a presence in more than 223 of India's 600-odd districts across 20 states, according to the government. If we calculate more than 6,000 people have lost their lives in this 20 year old fight.'[27] After this lesson, a more pragmatic approach of reformation through compensation is regarded rather than just implementing punitive measures on these extremists. As we have seen that the result of the Union Home Minister's suggestion came very costly on the government.

Another thing to take notice of is that in criminology, Victim of circumstance is not recognized; it is only victim of crime who gets the compensation, rehabilitation and all sorts of state support. But this policy could be shown as a deviant to this thought as through this policy even the victims of circumstance are also recognized in our criminal justice system. The role played by criminologists regarding such policies is very important. They must make sure not to generalize and pick out a group to persecute. To overcome, this problem, detection of the correct problem and going into the roots of the problem should be the first stage. Secondly, they should find out whether there is a possibility to separate the criminal nature from the deviant being. If it is possible, then the government should find out whether reformative policies to be applied or not. It is this juncture where a lot of factors are involved. These factors could be economic reasons i.e., the policies could be expensive to implement. Whereas, if the objective of the policy is to deter others from doing the crime, then reformative policies like this could be difficult to implement. One has to see whether the reformative policies could at all be a useful tool to curb the issue. Crime is ever changing, mere persecution won't yield any result as in this case it is the development that is the key issue. From a criminologist point of view, those people who realize that fighting against the government is actually a crime and those who want to surrender and lead a normal life, they should definitely be regarded as the victims of circumstances and be dealt with much prudence. Thus, this scheme

[27]Subir Bhaumik, Maoist rebels set precondition for talks, BBC News, India, Calcutta available at http://news.bbc.co.uk/2/hi/8507525.stm (25.10.2010)

provides a just example to show that within a strict criminal administrative regime in a democratic country it's possible to bring penal measures as well as a compensatory measure for an offender who is acknowledged by the state as a criminal at the same time as victim of circumstance. It is a burden on the criminologists to see when to use the punitive methods and when to use the reformative and compensatory methods. And their methods have a huge role to play in this regard as mistake in applying the right method to the problem might end up in much bigger problem. As, in this case the anti-left extremists programmes harmed more than it was thought to be useful. Whereas, in case of surrender cum compensatory policy, the state West Bengal did not face any surrendered left extremists since 2005 but after the implementation of the policy, within a month there were 4 surrenders.'[28] Left extremists are now coming out from the jungles and surrendering themselves to the respective state governments. Moreover, one can weigh the loss that the warfare has costed over 20 years and the government's expenditure on the schemes. Government technically can now avoid costs of the lost governmental properties, cost of compensation to the civilians and the police officers' families, judicial costs and costs of the governmental forces who are employed in these red areas. 'In case of surrendered Left extremists, the Central Government has decided to give discretionary power to the State to decide on the treatment that they would like to mete out to them.'[29] General, it is easier to withdraw those cases which are still being investigated by police, but in case of trials, it is much more difficult to either dispose or to litigate on it. To see one side of the picture it is very difficult for some to forgive them for the heinous crimes that they have committed whereas to some section of people, it is considered as a very prudent decision on the part of the government because this produces a good number of reformed citizens who in turn can deter many from joining these extremists' camps and give information about their counter-parts. 'In 2012, Chief Minister Mamta Banerjee has announced an offer to give jobs to the surrendered red soldiers

[28] South Asia Terrorism Portal, Institute for Conflict Management, Arrests/ Surrender of Maoist Insurgents, 2010 available at http://www.satp.org/satporgtp/countries/india/maoist/data_sheets/arrsurrender.htm (16.9.2010)

[29] Times of India, Mamata Banerjee promises govt jobs to surrendered Maoists (Aug 9, 2012) available at http://timesofindia.indiatimes.com/india/Mamata-Banerjee-promises-govt-jobs-to-surrendered-Maoists/articleshow/15412056.cms (last visited on 12.7.2014)

and West Bengal became the first state who came out with such policy. Around 40 odd number of rebels have surrendered till date when Trinamool came to power. It was noted that during Communist rule, only eight had surrendered.'[30] 'The chief minister also announced setting up of two fast-track courts in Jhargram and gave an order to appoint two additional district judges.'[31]

if government shuns neglect choose development which all-inclusive which believes in equal sharing of access to benefit, then peace is possible. Because it is rightfully remarked by the current Chief Minister of West Bengal that "without peace there cannot be development"[32] and the author believes that without development there cannot be peace as well.

It's worth noticing how red army is surrendering, which impliedly means that the left extremists have also began to understand that fighting against state is futile after all war never builds it just destroys.

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[30] Times of India, Mamata Banerjee promises govt jobs to surrendered Maoists (Aug 9, 2012) available at http://timesofindia.indiatimes.com/india/Mamata-Banerjee-promises-govt-jobs-to-surrendered-Maoists/articleshow/15412056.cms (last visited on 12.7.2014)
[31] Ibid
[32] Ibid

MEDIATION IN INDIAN JUDICIAL SYSTEM

Divya Sheel Tripathi*

ABSTRACT

Mediation is a method of alternative dispute settlement. In the Indian context, it is still a budding field. Its relevance lies in its underlying principles of mutual cooperation and benefit that is achieved through the assistance of impartial, neutral third party mediators with expert communication skills. Civil, family, commercial and industrial disputes are not being quickly solved by the Indian judicial system, and so the government is encouraging each and every ADR method with the hope of disposing off as many cases providing early relief and saving money.

From a sociological and psychological viewpoint, mediation is people friendly and one of those machineries that creates a win-win situation. But the training of mediators and negotiators needs to be looked into more deeply.

The following article deals with the relevant laws, rules and regulations in the country in relation to mediation in India keeping in focus Sec 89 of CPC, 1908 and Sec 442 newly passed Companies Act of 2013. It includes a historical overview, proper explanation of the definition, types and stages of mediation followed by a careful study of the role of mediator with respect to the negotiation techniques, qualifications and disqualifications, qualities and code of conduct.

Keywords: Judicial System, India, ADR, Companies Act.

I. INTRODUCTION

Alternative Dispute Resolution is an effort to develop machinery that is capable of providing an alternative to the already available conventional methods of dispute resolutions. It offers to decide matters of litigants, whether in commercial causes, business causes or otherwise, who are unable to initiate any process of negotiation in order reach any settlement. Recently it has begun to gain ground as against court based litigation.

Alternative Dispute Resolution or ADR first started as a mission to discover solutions to the confounding crisis of the forever mounting burden on the courts. ADR was actually a shot at efficiency, created by the legislators

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and judiciary in order to accomplish the goal of realizing Complete Justice, as envisaged in the Constitution of India[1]. In India it was based upon Articles 14 and 21 of the Grund Norm which deal with "Equality before Law" and "Right to life and personal liberty" respectively (PART III). It even attempts to realize the Directive Principle of State Policy (PART IV) which relate to Free Legal Aid and Equal justice as given under Article 39-A of the Constitution. The particular acts which deal with ADR are the Legal Services Authorities Act. 1987and the Arbitration and Conciliation Act, 1996. Along with this. Section 89 of the Civil Procedure Code, 1908 has made it possible for ADR proceedings to take place in accordance with the Acts stated above. The Section deals with court- annexed or court-ordered ADRs and it has now made it obligatory for the Court to pass on the dispute after issues are framed for resolution with the agreement of the parties either by way of: Judicial settlement including settlement through Lok Adalat, Arbitration, Conciliation. or Mediation. In situations where the parties are unsuccessful to settle their disputes via any of these ADR methods, the suit would ultimately come back to proceed further in the Court in which it had been filed.[2] Order X Rules 1A. 1B and 1C provide for ADR mechanisms also in cases pending before the civil courts and has further authorized the High Courts to frame rules for the purpose. [3]

According to Rule 1A the disputing parties to the suit are provided with the option of dispute settlement outside the court. If the parties concur to this. the court fixes a date of appearance before any such person that both the parties may agree to. According to Rule 1-B the disputing parties have to appear before whatever forum that has been selected or opted by them. According to Rule 1C the Presiding Officer of the Forum can refer the matter again to the Court in a situation when he feels that he should not proceed with the matter in the interest of justice.[4]

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[1] IND. Const. Preamble.

[2] Suresh Soni, *Alternative Dispute Resolution in India*, GENERAL KNOWLEDGE TODAY (July. 2, 2014, 11:30 AM), http://www.gktoday.in/alternative-dispute-resolution/

[3] Niranjan J. Bhatt, *Legislative Initiative For Court Annexed Mediation In India*, MEDIATE.COM (July. 2, 2014, 12:10 PM), http://www.mediate.com/articles/bhattn.cfm

[4] Anil Malhotra and Ranjit Malhotra, *Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities And Necessities*, IAML, (July 2, 2014, 1:50 PM), https://www.iaml.org/cms_media/files/alternative_dispute_resolution_in_indian_family_law.pdf

Arbitration is the process of hearing and later determining a dispute between two parties by persons agreed to by them. The purpose of arbitration is to achieve impartial and fair dispute resolution by a neutral tribunal preventing unnecessary expense and delay. On the other hand, conciliation is a process of facilitating a harmonious settlement between the disputing parties. In contrast to arbitration there is no final determination of a dispute by an impartial tribunal. There may or may not be prior concurrence and it cannot be mandatorily forced upon a party that is opposed to conciliation. The proceedings dealing to Conciliation have been covered under sections 61 to 81 of Arbitration and Conciliation Act, 1996.

The 1987 Legal Services Authorities Act, brought about the creation of Lok Adalat System for resolution of disputes expeditiously and cheaply and also in the spirit of compromise by give and take formula.

Lok Adalats, in comparison to arbitration, mediation and conciliation have received more favorable attention after its re-introduction in the 1980's. In spirit, Lok Adalat can be suitably compared to settlement conferences traditionally carried out in the United States, except for that the neutrals in Lok Adalat are senior Bar members. The judges of these Lok Adalat chair in panels over a long drawn out schedule of cases which are set on a particular day and are typically heard in open court, where the parties and their attorneys are present. Usually, the judges of Lok Adalat are highly evaluative from the onset of every hearing. The attorneys on behalf of the parties that they are representing play a pro-active role to present and negotiate their dispute. Significantly, litigating parties can participate in Lok Adalat irrespective of a fee, thus making it available to poor parties that are not financially powerful. Speaking historically, Lok Adalat as an ADR has been used mainly in injury claims involving insurance companies and other personal injury cases. The disputing parties have been given the right to make a decision whether to present their dispute to Lok Adalat or not. Since Lok Adalats have resulted in speedy resolution of a quantifiable number of disputes and proved to be an affordable and effective alternative to trial in courts of law, it continues and

[5] Gregg Relyea, Niranjan J. Bhatt, *Comparing Mediation And Lok Adalat: Toward An Integrated Approach To Dispute Resolution In India*, MEDIATE.COM (July 2, 2014, 1:50 PM), http://www.mediate.com/articles/relyeaGbhattN1.cfm

ill hopefully continue to be regarded as an important dispute resolution tool for the Indian Public especially the Indian poor.[6]

II. HISTORIAL BEGINNINGS

As documented in Mulla's Hindu Law, ancient India started its hunt for rules and laws from the Vedic times roughly 4000 to 1000 years B.C. plus it is probable that certain Vedic hymns were created at a time before 4000 B.C. Early Aryans were unsophisticated and extremely vigorous people full of happiness for life and had behind them ages of civilized thought and existence. They chiefly invoked the unrecorded law of divine reason, prudence and wisdom, which as per them presided over earth and heaven. This was one of the first and foremost originating philosophies of the process of mediation - Reason, Prudence, Wisdom. This originating philosophy is still practiced in many western nations.

Practically speaking, mediation, as a method of dispute resolution, is not new or novel to the Indian society. Much before the British arrival, Panchayat system had deep roots in the rural areas of the country. Under this innovative system, certain people, the respected village elders helped in resolving various community disputes. Even today, this system of traditional mediation is popular in some villages. The resolution of disputes is so effective and widely accepted that Courts. In the case **Sitanna vs. Viranna**[7], the Privy Council confirmed the decision given by the Panchayat and the respected Sir John Wallis made an observation that the reference to a village panchayat is the time-honoured method of dispute resolution.[8] In addition to this, businessmen also resorted to mediation in pre-British India, by requesting senior, impartial and recognized businessmen, called Mahajans to assist in resolving disputes using informal procedures which combined arbitration and mediation.

It is also expedient to throw light upon another form of early dispute resolution, which is, to this day, used by tribes. Wise persons, known as

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[6] Dhananjay Mahapatra, *Lok adalats dispose of 35L cases in 8 hour,* THE TIMES OF INDIA (July 2, 2014, 3:10 PM), http://timesofindia.indiatimes.com/india/Lok-adalats-dispose-of-35L-cases-in-8-hours/articleshow/26279761.cms

[7] Sitanna vs. Viranna, AIR 1934 SC 105

[8] Sunil Singh, *Alternate Dispute Resolution in India*, XXX, IJTR. (July 3, 2014, 1:40 PM), http://www.ijtr.nic.in/webjournal/13.htm

panchas are called upon to resolve tribal issues and disputes. Firstly, the disputing tribal members decide to meet a pancha and put before him their grievances and attempt to work out a common settlement. If a settlement is reached, the matter ends there. But if not, the dispute is then submitted to a public forum, a forum that is attended by all interested tribal members. The pancha now considers the claims made, arguments presented and defenses given as well as the interests if the tribe meticulously, and makes an effort to settle the dispute. In case, all efforts to reach a settlement go down the drain, the pancha gives a final decision which binds both the parties concerned. The bases of such a binding decision are two-fold; namely the tribal law and the long-term interests of the tribe for the maintenance of prosperity and harmony. Proceedings are oral and not recorded. Even the outcome is not recorded.[9]

Thus it can be rightfully said that in spite of no specific common legal authorities or sanctions, mediation and similar procedures were commonly used in India and accepted as a method of dispute resolution before the Britishers came to the nation.

III. MEDIATION AS AN ADR METHOD IN INDIA

Black law online dictionary defines mediation as "the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute." In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations. Mediation is a procedural method of alternative dispute resolution. In mediation a impartial third person or party, called the mediator, helps two or more than two partied so that they may negotiate an agreement, with concrete and legal binding effects, on any matter of common interest; *lato sensu* is any activity in which an agreement on any particular matter is researched by an neutral third party, mostly a professional, in the common interest of the concerned parties.[10]

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[9] Anil Xavier, *Mediation: Its origin and growth in India,* 27,JOPLP. 275, 275-282 (2006).
[10] Sriram Panchu, *In dispute resolution, adjudication has its limits, mediation its place,* THE HINDU (July 3, 2014, 7:50 AM), http://www.thehindu.com/opinion/op-ed/in-dispute-resolution-adjudication-has-its-limits-mediation-its-place/article4686643.ece

Types of Mediation

1. Court- Referred Mediation- Court-Referred Mediation pertains to those cases that are pending in Court. The Court would submit them for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. Private Mediation - In the second type of mediation, competent and professional trained mediators put forward their services on a personal, fee-for-service basis to the court of law, to public members, to commercial sector members and even the government sector for resolution of disputes via mediation. Private mediation is capable of being used in association with disagreements pending in courts of law and also in pre-litigation disagreements.[11]

Types of Disputes resolved by Mediation

The types of disputes that can be referred for mediatory processes include Aviation, Boundary Disputes, Business Disputes, Railway Industry, Transport, Clinical & Medical Negligence, Banking and finance, Information Technology, Financial Services, Insurance & Reinsurance, Shareholder's Disputes, Securities & Shares, Environmental issues, Publishing, Television & Broadcasting Rights, Energy, Broker Liability, Libel & Defamation, Intellectual Property, Trade Mark and Copyright, Franchises, Distribution agreements, Corporate finance, Regulatory Disputes, Construction & Development, Personal Indemnity, Pollution Claims, Pensions, Passing-off Actions, Product Liability, Oil & Gas Contracts Partnership Disputes, Maritime & Shipping, Commercial agencies, Property & Real Estate, Employment, Competition, Landlord & Tenant, Personal Injury, Neighbour Disputes Nuisance and many more.[12]

Stages of Mediation

Mediation normally includes the following stages:-[13]

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[11] *Mediation Training Manual of India,* MEDIATION AND CONCILIATION PROJECT COMMITTEE (July 4, 2014, 9:30 AM), http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf

[12] *Commercial Mediation,* ASHURST LLP (July 4, 2014, 9:30 PM), file:///C:/Users/PC/Downloads/Downloads/9091716.pdf

[13] Id. 25-35

(1) A dispute or difference of positions between parties or a call for decision-making or problem-solving;

(2) The decision-making remains in the hands of the people/parties concerned and does not fall within the power of the impartial party

(3) There is willingness on part of the disputing parties to discuss the problem at hand. put forward their respective objects and interests and arrive through negotiation at a possible positive settlement

(4) the intention to achieve a conclusive result via facilitative help of a professional that is impartial, trained and neutral

Typically speaking, mediation has no formally necessary essentials but certain similar elements are usually found that can be summarized as follows:-

i. Every disputing part is given an opportunity to tell his or her side of the story;

ii. Mediator identifies the core issues in the problem;

iii. The clarification and detailed specification of the respective interests and objectives,

iv. There is a change of the subjective values of the respective parties into more objective ones for properly addressing the problem,

v. The identification of the options available to the parties;

vi. A detailed discussion analysis of the possible effects of the different solutions;

vii. The effective adjustment and refinement of the all the accessory aspects,

viii. Drafting the agreements into a final document

The particular nature of this activity allows the mediator to choose his or her own method; for the mediator methods as in the practice in other countries also, are not ordinarily governed by law. They may ultimately be very different from the stages enumerated above. Moreover, several matters do not necessarily need certain for the final agreement, whereas others expressly require a specifically determined form. A majority of States follow the principle of mediator's confidentiality. As compared to other means of

alternative dispute resolution mediation is stands out in respect of its simplicity, its flexibility, its economic benefits and lastly its informality.[14]

IV. ROLE OF THE MEDIATOR

A mediator's is to generate an atmosphere in which the parties at dispute in front of him are encouraged to smoothen the progress towards resolving the dispute in a wholly voluntary agreement or settlement. He has the power to invite the parties (two or more) to meet him jointly, or can ask each one of them to meet him independently with the purpose of unlocking the blocked channels of communication and discussion. He must evaluate the dispute from an overall perspective keeping in mind the business, professional or personal aspects.

Tools of Negotiation

A mediator is armed with particular tools of negotiation that are unavailable to a judge presiding in a court of law:

1. Position Based Bargaining

   Under position based bargaining, the mediator may constrict the dissimilarities between the concerned parties and their contradictory positions in law. This may possibly be done by enlightening them to the uncertainties of the judicial or legal process, and the prudence of clearing up their differences of opinion in a consensual mode.[15]

2. Interest Based Bargaining

   This specific type of bargaining tin can be exemplified by way of the mythical story of the two girls, each one of whom sought after an orange. The judge will think about the questions and thus take them into due consideration: who possessed it first? (property), who bought it? (contract), who requires it more? (equity). On the other hand the arbitrator will divide the disparity awarding half of the apple to each girl. But in

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[14] Sriram Panchu, *On the Mediation Process,* LAW COMMISSION OF INDIA (July 4, 2014, 11:20 AM), http://lawcommissionofindia.nic.in/adr_conf/sriram17.pdf

[15] Nishita Medha, *Alternative Dispute Resolution in India*, FOUNDATION FOR DEMOCRATIC REFORMS (July 4, 2014, 2:30 PM), http://www.fdrindia.org/publications/AlternativeDisputeResolution_PR.pdf

case of interest based bargaining, the mediator will question the girls why they both require the orange. If one of the girls needs juice and the other girl wants the peel, the two girls will themselves speedily concur to an allocation that meets the respective interests of both, with no unnecessary compromises on the part of either party.

3. Integrative Bargaining

In integrative bargaining the mediator might amalgamate the needs and interests of both the disputing parties to arrive at a harmonious solution. A good example, as seen in our daily lives, is a situation where two student of law needed the same book to prepare their respective essays for an essay competition. After much quarrel, an older student lastly tells them to write down the essay together, therefore increasing both their probability of winning the first place, and ensuring that both of them are able to take part in the competition.[16]

Equipped with these different and highly effective tools of negotiation, the mediator should have individual qualities that allow him to communicate comfortably with the parties.[17] The mediators are also not bound by the provisions of Code of Civil Procedure, 1908, or Evidence Act, 1872 but are to act in guidance of the universal principles of justice and fairness, having consideration to the respective obligations and rights of the parties, along with the various usages of trade (if any) and the conditions ad nature of the dispute at hand.[18]

Qualifications of Mediators

The apex court of the country **Salem Advocate Bar Association V Union of India**[19], gave approval to the Model Civil Procedure Mediation Rules that had been prepared by a Committee which was headed by Justice M.J.Rao, the then Chairman, Law Commission of India. These duly approved have already been adopted by a majority of the High Courts of the country along

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[16] Ibid.

[17] Brad Spangler, *Integrative or Interest-Based Bargaining*, BEYOND INTRACTABILITY (July 5, 2014, 7:50 PM), http://www.beyondintractability.org/essay/interest-based-bargaining

[18] (Draft)Mediation Rules. Rule 11 (2003).

[19] Salem Advocate Bar Association V Union of India, (2005) 6 SCC 344

with respective modifications suiting to needs of the State concerned. According to the Model Civil Procedure Mediation Rules the given persons are eligible and qualified to be enlisted in the panel of mediators[20]:—

(a) The Retired Judges of the Supreme Court of India;

(b) The Retired Judges of the High Court;

(c) The Retired District and Sessions Judges or the retired Judges of the City Civil Court or Courts of equivalent status;

(d) The Legal practitioners having a standing of at least fifteen years at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(e) The Experts or other professionals having a standing of fifteen years standing; or retired senior executives or retired senior bureaucrats;

(f) The institutions which are not only experts in mediation but also have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

Disqualifications

The disqualifications for being empanelled as a conciliator or a mediator are given down[21] :-

1. An individual who has been adjudged insolvent;
2. An individual against whom a criminal court has framed criminal charges involving moral turpitude and such charges are pending; or
3. An individual who has been charged and duly convicted by a criminal court for an offence which involves moral turpitude;
4. An individual against whom a competent authority has initiated disciplinary proceedings or an individual who has been punished in disciplinary proceedings;

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[20] (Draft)Mediation Rules. Rule 4 (2003).
[21] (Draft)Mediation Rules. Rule 5 (2003).

5. And also such other categories of individuals as the High Court may notify.

Code of Conduct and Ethics for Mediators

1. Encourage Self-determination
2. Act Impartial[22]
3. Discharge Duties to third parties
4. Prevention of any harm[23]
5. Ensure Informed Consent[24]
6. Promote Willingness and Voluntariness
7. Maintain Privacy: A mediator must not reveal any issue/matter that a party wants to be kept confidential except;

   a) A mediator has been specifically permitted to do so by the party concerned; or

   b) the law requires that the mediator should act in such a manner
8. Consciousness about professional role, boundaries and competence[25]

In the case of ***Moti Ram (D) Tr. LRs and Anr. Vs Ashok Kumar and Anr***[26], the Supreme Court held on 7 January 2011, that mediation proceedings were confidential in nature. It was also held that only an executed settlement agreement or alternatively a statement that the mediation proceedings were unsuccessful, should be provided to the court by the mediator.

Before this judgment, while parties had the freedom to enter into contractual agreements to uphold confidentiality of the proceeding of

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[22] *How does the mediator assist the parties?* INDIAN INSTITUTE OF ARBITRATION & (July 5, 2014, 6:30 PM),MEDIATION available at http://www.arbitrationindia.com/htm/faq.html

[23] Sriram Panchu, Opinion, IBLJ. 15,15-20 (2013-2014).

[24] Abhinav Chandrachud, *Alternative Dispute Resolution : Is It Always An Alternative?* (July 5, 2014, 7:10 PM), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=116c966f-2c9d-432e-be91-d5b1ea5fae50&txtsearch=Subject:%20Arbitration

[25] *Concept Of Confidentiality In Mediation Settlements Law*, UKESSAYS.COM (July 5, 2014, 8:40), http://www.ukessays.com/essays/law/concept-of-confidentiality-in-mediation-settlements-law-essay.php

[26] Moti Ram (D) Tr. LRs and Anr. vs Ashok Kumar and Anr, [2010] 14 (ADDL.) SCR 809

mediation, no legislation or any other statutory authority decisively provided that they were to be confidential. By the judgment, Supreme Court has specifically recognized that any proposals discussions and made during mediation proceedings are confidential. The judgment improved the popularity of mediation as an ADR method in India, chiefly amongst non-Indian parties.[27]

9. Commitment to Honesty and Integrity: Honest, on the part of a mediator implies, among several other things:-

A. The complete and just disclosure of his education, qualifications and previous experience;

B. The interest if any, whether it is direct or indirect in the final outcome of the disagreement;

C. The fees to be charged for mediation from the parties; and

D. All the other aspects of the mediation process that can have an effect on wither of the party's willingness to participate.

10. Prevent the clash of needs and interests[28]

This can be further illustrated by an example. In a cheque bouncing case ,a businessman refused to repay a debt of ' 5 lakhs saying he had no money and someone else had not yet paid him too. Through mediation it was revealed that he had some money; but wanted to pay his son's school fess with it. A settlement agreement was reached with him agreeing to pay ' 3 lakhs straightaway and pay the leftover amount after 6 months.[29]

Presently the apex court in a historic case has directed that all criminal courts should make a sincere effort to adopt mediation in order to settle matrimonial disputes, specially the cases of Section 498A (IPC) which covers harassment of a married woman by her husband or his family members.[30]

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[27] Alexander Oddy and others, Supreme *Court of India holds that mediation proceedings are confidential*, LEXOLOGY (July 5, 2014, 10:40 PM), http://www.lexology.com/library/detail.aspx?g=2f7baf8e-833a-455a-8614-ce8e888cb50b

[28] Supra note 21, 39-41

[29] *Stuck in Court? Try mediation*, CIVIL SOCIETY (July 6, 2014, 8:30 AM) http://www.civilsocietyonline.com/Archive/jun10/jun101.asp

[30] R. Balaji, Mediation must before divorce: SC, THE TELEGRAPH (July 6, 2014, 9:50 AM), http://www.telegraphindia.com/1130223/jsp/nation/story_16596332.jsp#.U8AP25SSxOg

V. ROLE OF MEDIATION IN BUSINESS AND COMMERCE

The branch of mediation also applies to the areas of business and commerce, and still this one is the biggest field of application, if we take into consideration the number of mediators involved in mediating activities and to the economical range of entire/total exchanged values. The mediator in commerce or in business assists the respective parties to attain the ultimate end of respectively selling/buying a thing at agreeable conditions (typically in the want of creating a synallagmatic contract[31]), bringing the distinct essentials of the treaty to a correspondingly balanced equilibrium in a manner that can be suitable described as harmonical. The third party or the mediator, ordinarily undertakes to find a positive agreement among/between, as the case may be, the disputing parties looking at the main agreement and even looking at the accessory agreements as well, thus finding a composition of each of the related aspects which may combine in the best manner possible, all the respective prerequisites and needs of his clients. The subfields include specific branches that are very well generally known: in insurances, in finance, in real estate, in ship-brokering as well as in some other particular markets, mediators generally have an own name and typically obey to singular laws. In general the mediator cannot carry out commerce in the type of goods in which he is an expert mediator.[32]

Mediation under Sec 442the Companies Act, 2013

The Companies Act of 2013 has provided for the creation of a Mediation and Conciliation Panel by the Central Government, which comprises of mediators with specific qualifications to which the National Company Law Tribunal or NCLT, National Company Law Appellate Tribunal or NCALT (its appellate body, as the name suggests) and the central government will refer cases under Sec 442 of the new Act. A time period of three months is provided for the conclusion of the mediation process. [33]

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[31] A contract in which each party to the contract is bound to provide something to the other party

[32] *Business and Commerce,* MCDONALD MEDIATION GROUP, LLC(July 6, 2014, 11:00 PM), https://www.mcdonaldmediationgroup.com/Business_and_Commerce.html

[33] Chitra Narayan, *Let's sort it out across the table*, THE HINDUBUSINESS LINE (July 6, 2014, 12:00 PM), http://www.thehindubusinessline.com/opinion/lets-sort-it-out-across-the-table/article5414876.ece

Under the Act, mediators are to make recommendations on the settlement of the case to the referring authority. The qualifications of mediators, procedures to be followed in the mediation process and fees for the mediation are to be set by rules. [34] In October 2013, the Central government published draft rules on this and is still the process of finalizing them.[35]

The Centre has projected the process of mediation as one that is meant to "attempt to facilitate voluntary resolution of the dispute(s) by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute(s), emphasising that it is the responsibility of the parties to take decision which affect them."[36]

Jurisdiction of NCLT, NCALT and Centre[37]

Under the 1956 Companies Act the jurisdiction that was exercised by the Company Law Board (CLB), the jurisdiction of the NCLT is considerably wider. Moreover in addition to the jurisdiction of the CLB, the NCLT will also hear all the company cases that are currently under the jurisdiction of the high courts and the Board for Industrial and Financial Reconstruction (BIFR), including cases relating to mergers, revival of sick companies, oppression, and class action proceedings, minority winding up of companies, and so on.

The Central government will also exercise powers under the new Companies Act in certain disputes — such as those that are related to the claims in summary proceedings for winding up, adoption of the name of a company, where the rights of parties involved are determined by the Government. Mediation will now play a significant role in all such proceedings.

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[34] Section 442, *Companies Act*, 2013 available at http://www.legalcrystal.com/acts/62851 (accessed on July 6, 2014)

[35] (Draft) Rules under the Companies Act. Chapter XXVIII (2013).

[36] (Draft) Mediation Rules. Rule 15 (2003).

[37] Smeeksha Bhola and Mrinalini Gupta, *India: Companies Bill, 2012 And The Constitution Of NCLT And NCLAT*, MONDAQ (July 6, 2014, 2:20 PM), *http://www.mondaq.com/india/x/219108/Corporate+Commercial+Law/Companies+Bill+2012+And+The+Constitution+Of+NCLT+And+NCLAT*

Moreover, referral to mediation can be done even at the appellate stage by the NCLAT,[38] which hears appeals from orders from the NCLT. The inclusion of mediation in the Companies Act, 2013 as a way to resolve cases which involve companies is significant as a policy measure.[39]

While dispute resolution via settlement has always been an alternative for parties, the impartial mediator plays an imperative role in bringing the parties to the negotiating table. Thus mediation can form the base for a continuing a commercial relationship on amicable terms.

VI. BENEFITS OF MEDIATION

Firstly, both the parties are jointly in charge of over the mediation process in terms of the scope, outcome. This means that they can decide the particular the terms of issues or reference can be expanded or limited for the duration of the course of the case proceedings. Not only they enjoy the right to make a decision whether to reconcile or not and the conditions of settlement.[40]

Secondly, as repeated time and again, mediation stands for three crucial advantages; its speediness, efficiency and economy.[41]

Thirdly, a mutually beneficial and satisfying settlement is focused upon while resolving a dispute.

Fourthly, mediation is confidential in it process. The parties meet behind closed door and negotiate the terms of settlement, devoid of watchful eyes of public and media.

Fifthly, it is important to keep in mind that the parties themselves sign the provisions of settlement, fulfilling their essential interests and needs, there surely will be observance.

Sixthly, it is a participative process. Each side gets the chance to demonstrate their case in their own words and to openly and directly take part in the negotiation.

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[38] Supra note 30

[39] 18 Companies Act. § 442 (2013).

[40] Abhinav Chandrachud, *Alternative Dispute Resolution : Is It Always An Alternative?* MANUPATRA (July 3, 2014, 3:00 PM), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=116c966f-2c9d-432e-be91-d5b1ea5fae50&txtsearch=Subject:%20Arbitration

[41] *Benefits of Mediation: High Success Rate, Low Cost*, FIRST MEDIATION CORPORATION (July 7, 2014, 4:00 PM), http://www.firstmediation.com/resources/?p=16

Seventhly, simply put simplicity and flexibly are its defining features. It is capable of being modified to go with the demands and difficulties of each case. A bendable schedule permits the parties to take on with their everyday activities with relative ease.[42]

Eighthly, promotion of finality is another benefit. The dispute is put to rest completely and lastingly, because there lays no scope for any revision or appeal and further litigation processes.

Ninthly, mediation is carried in an environment that is cordial, conducive and informal.[43]

Tenthly, medication facilitates effective and better communication between or among the parties which is vital for a meaningful and creative negotiation.

In the eleventh place, it is a fair process. The third party mediator is independent, neutral and impartial. Her makes certain that pre-existing imbalanced relationships (if they do exist) between the disputing parties, do not influence the ongoing process of negotiation.[44]

In the twelfth place, it helps to boost creativity in resolution of a dispute. The opposing parties have the power to accept non conventional and creative remedies which suit their long term and underlying needs and interests, at the cost of ignoring their liabilities or legal entitlements.

In the thirteenth place, it helps to improve / restore / maintain relationships between the two parties.

In the fourteenth place, it should be taken into consideration that it is voluntary Y and one party can even opt out of it at any phase if she/he has a feeling that mediation is not helping him. This very self-determining characteristic of mediation process guarantees obedience with the settlement that is reached.

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[42] Sarah Taylor, *What are Mediation and Arbitration?* ALLLAW.COM (July 7, 2014, 6:00 PM), http://www.alllaw.com/articles/legal/article9.asp

[43] Alva Orlando, *Advantages and Disadvantages of Dispute Resolution Processes*, (July 7, 2014, 7:00 PM), BLANEY McMURTRY LLP http://www.blaney.com/sites/default/files/other/adr_advantages.pdf

[44] *Advantages of alternative dispute resolution*, LEGAL SERVICES COMMISSION OF SOUTH AUSTRALIA (July 7, 2014, 10:00 PM), http://www.lawhandbook.sa.gov.au/ch27s10s01.php

In the fifteenth place and the last place, a settlement negotiated via mediation frequently leads to the reconciliation of connected or related cases/ issues between the parties.

VII. CONCLUSION

Court-annexed mediation commenced in India in the 1980s. Today several mediation centers have been established up by the high courts in Delhi, Chennai, Bangalore and other states. Cases that haven pending in courts for a long duration are referred to the mediation centre where certified and trained judge-mediators and lawyer-mediators make a strong effort to hit upon solutions between the parties. The various matters, where a settlement is arrived at, are then recorded in a compromise document. This is sent back to the concerned court for a final decree. It must be noted that after this no further appeal is possible to this decree.

Since justice is not granted speedily men convince themselves that justice does not exist in the first place. Keeping in mind the same idea, Chief Justice Bhagwati, in his inspiring speech on Law Day said, "I am pained to observe that the judicial system in the country is on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is creaking under the weight of errors." It is heartwarming to see that disagreement and disputes that have been pending for a number of years have frequently been settled within the short span of few days, in the able hands of advocate/judge-mediators.

Two cases can be explained here, both of which referred to mediation. A case filed by an internationally renowned sports personality against his sports association dragged on for 10 years, with him fighting vehemently for his membership rights, the stripping away of which brought him humiliation. His performance got affected to the years of the legal battle and finally in mediation informal apologies were rendered, the money claims plus counter claims were withdrawn and the sportsperson was restored with his rights leading to removals of all causes of grievance.

In another Family Court Case of Bangalore, a matrimonial dispute exhausted the two parties, both of which were unwilling to move from their positions. Counseling did not help at all and the children bore the brunt of the war. During mediation, resentments were discussed and resolved; an amicable parting of ways with visitation rights ensured and a 3 year war was settled in few days with minimum damage and delay.

Rise, growth and development of international trade law; which contains the suitable customs and rules for management of trade between countries; continental trading blocs, the dominance of the World Trade Organization and its conflicting anti-globalization movement, widespread use of the internet, among several other factors, appear to propose that legal complication is rising to an undesirable and intolerable point. There might be no noticeable or clear cut way to conclude which particular jurisdiction has primacy or preference over which other, and there may perhaps be considerable struggle to resolve a matter in any single place. For that reason, mediation possibly will come into more extensive use, reinstating formal judicial and legal processes hallowed by nation-states. A number of people, like the anti-globalization movement, consider that such official processes have rather painstakingly failed to give genuine protection and closure guarantees that are preconditions to uniform rule of law. Following a growing disrepute of the process, as well as a bigger notion of its major features and ultimate effects, mediation is in current times habitually projected as a structure of resolution of intercontinental or international disputes, along with attention to belligerent situations.

Positively speaking, the success rate of mediation on a worldwide scale is actually quite high; some of the commentators have made a mention of a whopping figure of 85% of cases that are brought to mediation. Success here means that all the contesting parties feel that their interest and needs have been taken into consideration and the resulting agreement serves them adequately. Quite often clash among people or organizations leads to a dreary adversarial combat with a win-lose outlook. In case if mediation, one can show that even conflicts can be resolved and justice rendered by healers and peacemakers.

Given the rising referrals from the courts and better public responsiveness, mediation in India is starting to make a huge impact. The measurable benefits of important dropping litigant expenses, limiting the overall pendency and reducing inconvenience as well as unlocking a brand new vista for legal practice is bound to make mediation, one of the most preferred methods of resolving disputes in India in the years to come. It is significant here to point out the noteworthy statement by Former American President John F. Kennedy in the respect of dispute resolution: "Let us never negotiate out of fear but let us never fear to negotiate."

the horrible rape and subsequent murder of Pratibha Srikanthamurthy in Bangalore five years ago. The Courts have convicted cab driver Shiva Kumar for the rape and cold blooded murder of this BPO employee.[1] There was also the case of a female photo – journalist being gang-raped in Mumbai, whilst carrying out her job for the lifestyle magazine that she was interning in.[2] There were also the incidents of the infamous Telhelka Editor, Mr. Tarun Tejpal being indicted by the courts for raping a member of his staff[3] as well as that of Justice A. K. Ganguly and his alleged sexual harassing of an intern that shocked the country.[4]

All of these incidents paint a picture of a country with many sexually voracious men who do not know how to respect a woman. It has led to a situation where women feel unsafe to work and to live. Even though there are measures now in place that give a forum to redress grievances against male tormentors, women are scared to either voice their fears and worries. They would rather remain silent, lest they be fired or the harassment becomes worse.

This abysmal situation gives rise to numerous questions: why aren't women protected? Are there no laws to protect them? Why aren't these laws being implemented? The answers, or lack thereof, reveal to us a case of extreme societal indifference towards women. They are the lowest on the societal totem pole. This essay aims at attempting to understand why women are continually put in such difficult situations.

II. THE PREVAILING LAWS FOR THE PROTECTION OF WOMEN:

a.) INTERNATIONAL INSTRUMENTS

International law categorically recognizes sexual harassment at work place as a form of discrimination and violence against women. There are

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[1] See http://archive.indianexpress.com/news/cab-driver-guilty-of-rape-murder-of-bangalore-bpo-employee-pratibha/693380/1 (Accessed on: 28 February 2014)

[2] Dean Nelson, Female Photo Journalist Gang – raped in Mumbai, (23 August 2013) http://www.telegraph.co.uk/news/worldnews/asia/india/10261073/Female-photojournalist-gang-raped-in-Mumbai.html

[3] See http://www.dnaindia.com/india/report-tehelka-editor-tarun-tejpal-charged-with-rape-victim-resigns-1922519 (Accessed on: 28 February 2014

[4] See http://www.dnaindia.com/india/report-law-intern-sexual-harassment-case-justice-ak-ganguly-kissed-my-arm-asked-me-to-share-a-room-alleges-victims-affidavit-1936027 (Accessed on: 28 February 2014)

various international instruments, which enshrine the right to safer working atmosphere at workplace and provided various approaches to tackle the instant issue.

Article 2 of the General Assembly resolution on Declaration on the Elimination of Violence against Women defines what constitutes sexual harassment at work, educational institutions and elsewhere. And Article 4 provided eliminative approach in the form of penal, civil and administrative sanctions[5]. Also, Article 7 to 16 of the Convention on the Elimination of All Forms of Discrimination against Women[6] (CEDAW) directs state parties to take appropriate measures to eliminate discriminations against women in all fields. The Beijing Platform for Action also recognizes women harassment workplace as a as a form of discrimination[7].

The International Labor Organization also recognizes that sexual harassment at workplace is a kind of discrimination and acts as an obstacle in for women to work safely[8]. Also in Africa, various protocols are in existence, which emphasizes on transparency in recruitment, promotions and dismissal of women. They also emphasizes on eliminations of sexual harassment of women at workplace[9].

In Europe, The Charter of Fundamental Rights of the European Union[10] enshrines the right to be free on the basis of sex, which could be extended to interpret to safe working environment at work place for women[11]. While in America, the Organization of American states treats the issues of sexual harassment as that of violence and not that of discrimination. It enshrines

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[5] G.A.Res.48/104, U.N Doc. A/RES/48/104 (Feb.23, 1994).

[6] G.A. Res. 68/138, U.N Doc. A/RES68/138 (Jan. 15, 2014).

[7] Un.org. 2014. Fourth World Conference on Women Beijing 1995. [online] Available at: http://www.un.org/womenwatch/daw/beijing/platform/ [Accessed: 28 Feb 2014].

[8] See, International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111, available at: http://www.refworld.org/docid/3ddb680f4.html [accessed 28 February 2014; International Labor Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169.]

[9] See, African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

[10] OJ L C 364/01.

[11] See generally, Prechal, S. and Burri, S. 2008. EU Rules on Gender Equality: How are they transposed into national law? [report]Luxembourg: European Commission.

that a women has right to be free from violence and have a safe environment[12].

B.) INDIAN LAW

Prior to the advent of Vishaka guidelines, wherein, the Supreme Court for the first time recognized and defined sexual harassment, women who encountered sexual harassment at workplace had to file a complaint of criminal assault under section 354 of I.PC, which deals with an assault which outrages women's modesty and also, under section 509 of I.P.C, which provides for punishment for word, gesture or acts which are intended to insult the modesty of a women, wherein, what constitutes an outrage of women's modesty was left to the subjective understanding of the police officer.

The Landmark Vishaka Case:

Even prior to the Vishaka case, there has been protection afforded by the Indian Courts.[13] However it is important to discuss the Vishaka case itself. A leading case of sexual harassment concerning a social worker (Sathin) in the State Women's Development Program in Rajasthan who was gang-raped as an act of revenge for her work campaigning against child marriage. Prior to the rape, the women employees had complained of sexual harassment to the State, but no action was taken. The State had no functional policy on sexual harassment and there was a failure of the part of authorities to pursue the case. Public interest litigation was filed by the Lawyer Collective and supported by a number of women's organisations following, which the Vishaka Guidelines emerged in 1997.[14]

Another important case is that of *MedhaHYPERLINK "http://www.legalcrystal.com/928867" HYPERLINK "http://www.legalcrystal.com/928867"KotwalHYPERLINK "http://www.legalcrystal.com/928867" HYPERLINK "http://www.legalcrystal.com/928867"Lele*HYPERLINK "http://www.legalcrystal.com/928867" vs. *HYPERLINK "http://www.legalcrystal.com/928867"Union of India*HYPERLINK "http://

[12] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994

[13] See *Rupan Deol Bajaj v. K. P. S. Gill*, 1995 SCC (6) 194; *Ms. Radha Bai v. Union Territory of Pondicherry*, 1995 SCC (4) 141

[14] *Vishaka vs. State of Rajasthan and Others*

www.legalcrystal.com/928867".[15] The Supreme Court observed that the Vishaka Guidelines were not properly implemented by various states and departments. The court emphasized on the fact that Vishaka guidelines shall be implemented in form, substance and spirit to bring gender equality through ensuring that the women can work with dignity, decency and with due respect.

With effect to which, the Parliament finally brought into force a far – reaching piece of legislation which deals with the protection of women against sexual harassment at workplace. The sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 was enacted with the objective of criminalization of sexual harassment at workplace.

The Act has en masse laid down what all constitutes sexual harassment. It has also, thoroughly and comprehensively defined who is an employer, employee, domestic worker and what can be constituted as a workplace, which is certainly a very extended to include even the time in cab.

The Act provided for an exclusive complain mechanism through constitution of Internal Complaints Committee at the work place and Local Complaints Committee at the district and block level, wherein a District Officer shall be responsible for facilitating and shall monitor the actions under the Act.

Though the Act is comprehensive but it fails to provide protection to male employees from the sexual harassment, fails to provide reference to the protection from victimization, fails to provide external representation within ICC, fails to provide protection from various other forms of protections, timelines may prove to be realistic in some cases, fails to look at the false or malicious complaints by the employer and also doesn't provide any monetary compensation.

The Act resulted into the addition of a new section in I.P.C through the 2013 amendment Act, in the form of section 354 A.

Current position:

- *Sawtanter Kumar V. Indian Express Limited and others*[16]

[15] (2013) 1 SCC 297
[16] 2014 Indlaw DEL 94

Sexual harassment allegation against a retired SC judge. The complaint was published and the facts of the complaints where made open to public by the newspaper and few TV news channels – there was no civil cases filed and also the cogent evidence to support the complaint were also not presented. Therefore it was held that, publicize done by the media was wrong and it affected the rights of privacy of the complainant.

- *Court on its own Motion* v *State of Jharkhand and others*[17]

Parliament is currently considering Protection women Bill, which is intended to protect female workers in most work places. **Provisions of that Bill are not sufficient to curb eve-teasing**. Before undertaking suitable legislation to curb eve teasing, it is necessary to take at least some urgent measures so that it can be curtailed to some extent.

- *Union of India* v. *Nisha Priya Bhatia*[18]

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.

The 2013 Act:

Under the 2013 Act, the following authorities are to be set up:
1.) Internal Complaints Committee at the work place[19]
2.) Local Complaints Committee at district and block levels[20]

Additionally a District Officer (District Collector or Deputy Collector) will facilitate and monitor activities under the Act. The Act makes it the duty of every employer to meet certain standards set out in the Act itself.[21] Section 26 of the Act lays down clear punishments for non – compliance of the Act. If the employer fails to comply, the punishment is a fine, which may extend to Rs. 50,000. If there is a second or subsequent conviction under this Act, the

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[17] 2014 Indlaw JHKD 23
[18] 2013 Indlaw DEL 2672
[19] Section 4 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013
[20] Section 6 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013
[21] Section 19 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act 2013 lays down the Duties of Employees as follows:
1. Provide a safe working environment at the workplace which shall include safety from

punishment can become twice the punishment prescribed or also a cancellation of his license or withdrawal of his registration.

III. THE POSITION OF WOMEN: A CASE OF SOCIETAL APATHY

The society being dominated by males, has led to perpetuation and encouragement of disrespectful behaviour towards women. There are numerous myths that need to be dealt with, regarding the psychology of inter – gender interactions. For example:

- Myth 1: It is believed that Women enjoy eve-teasing/sexual harassment, when in reality is actually quite humiliating, painful and scary.
- Myth 2: Women who are provocatively dressed are the victims of sexual attacks. This is the classic way of diverting attention from the crux of the problem: which is the societal lack of respect towards a woman. Women have the right to act, dress and move around freely without the threat of attack or harassment.
- Myth 3: Sexual harassment constitutes 'natural' male behaviour. No man is born knowing how to sexually harass another. It's learned. It is impregnated in them by the environment they are brought up in.
- Myth 4: If a woman keeps quiet, it means she is enjoying it. This myth is completely unfounded as silence does not always mean acceptance. Women more often than not refrain from speaking out, out of fear of retaliation from the harasser. No one likes being a victim or being victimized or worse, being branded a liar. Yes means yes and no means no.

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all the persons with whom a woman comes into contact at the workplace;
2. Display at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the ICC;
3. Organize workshops and awareness programmes;
4. Provide necessary facilities to the ICC for dealing with complaints and conducting inquiries;
5. Assist in securing the attendance of the respondent and witnesses before the ICC;
6. Make available such information to the ICC or LCC, as it may require;
7. Provide assistance to the woman if she so chooses to file a criminal complaint;
8. Initiate criminal action against the perpetrator;
9. Treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct; and
10. Monitor the timely submission of reports by the ICC.

These "myths" are created and perpetuated by both men and women, in order to justify the actions of men, thereby encouraging and legalizing disrespectful treatment towards women. If these kinds of inaccurate beliefs are allowed to continue, a woman has no chance of living a decent and normal life as the very environment she lives in will be hostile to her and indifferent to her needs, in which case no number of laws will succeed in ameliorating her position. If real change must happen, the change must begin in our minds, in our attitudes and our behaviour towards women. Laws must encourage this cleansing of society's attitude towards women.

IV. CONCLUSION: TAKING AFFIRMATIVE ACTION

In the last few decades, sexual harassment has become a topic of intense interest in the public and legal arenas. In spite of their contribution in the life of every human being, women still belong to a class or group of society, which is in a disadvantaged position on account of several social barriers and impediments.

The position of Indian women is no better compared to their counterparts in other parts of the world. On one hand she is held in high esteem by one and all, worshipped, considered as the embodiment of tolerance and virtue on the other hand she has been the victim of untold miseries, hardships and atrocities caused and perpetuated by the male dominated society. They have been the victims of tyranny at the hands of men who dominate the society. India's economy had opened up in the early 90's. One of the effects of this was increase in women workforce. Sexual harassment is one of the biggest problems now emerging in the corporate sector. One of the important reasons, inter alia, given for the acceptance and the commission of offence is economic independence. Now, as women try to fight economic disparity with men, a new form of crime emerges – sexual harassment at workplace. Women's participation in economic sector is crucial for their economic empowerment and their sustainability.[22] However, problems such as sexual harassment in the workplace discourage women to continue working.

[22] Sexual harassment in the workplace though an age-old problem has emerged as a serious concern in Asia and the Pacific recently. *See:* Action against Sexual Harassment at Work in Asia and the Pacific.NelienHaspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team.

It is important to note that despite the abysmal situation, many companies, especially in the BPO sector have begun to implement policies to protect women. For example in the TATA, Titan and Accenture and IBM rules of conduct there are explicit clauses that state the following:

"It is the legal duty of the employer to take appropriate affirmative action to combat sexual harassment at work. Further in order to curb forms of sexual harassment at workplace one must:

- Ensure a safe working environment free from Sexual Harassment for women;
- Prepare policies for the prevention and prohibition of Sexual Harassment;
- Maintain a proactive program to educate all members as to the definition of sexual harassment and procedures for redressal;
- Undertake workshops and training programs at regular intervals for sensitizing the members of the organisations;
- Prominently display notices in various places spreading awareness about the issue of "Sexual Harassment at the Workplace" and giving information for the redressal mechanism that has been put in place and encouraging women to file their grievances

It may take more time for the situation to improve, and for women to truly get the protection they deserve, but what this essay would like to highlight, in conclusion, is that their has been a societal awakening. People have become more sensitized to women's issues and needs, and more women are participating in every day life. Also in conclusion, it is important to note the role of every individual has, to promote and protect women in our society. They don't require special status. What they really require is to be treated with respect and dignity, in all aspects of life, and their struggle for the same, shouldn't be reduced to something as menial as being "a battle of the sexes". For it is far more than that; the woman's struggle, is a battle for survival and a fight for a good meaningful life.

IS MEDICAL CONFIDENTIALITY UNDER THE RIGHT TO INFORMATION ACT AN INFLEXIBLE AND ABSOLUTE OBLIGATION?

Paramita Banerjee*

ABSTRACT

The Right to Information Act, 2005 is widely seen as a watershed development in the Indian democracy. It empowers the citizens to secure access to a wide range of information that is under the control of public authorities in order to promote transparency and accountability in the system. The question here is whether it can be used to justify the breach of a patient's confidentiality, thereby violating the sanctity of one's private domain? The boundaries of private domains is generally refrained from being defiled by Medical Practitioners unless it is for compelling reasons, which have been prudently and vigilantly evaluated and deliberated upon. On the other hand, the Act prima facie seeks to disclose all that is of public interest enabling poaching into personal domains by third parties, thereby, derogating the significant values of preserving a patient's private documents. This paper intends to look at this divide or conflict running in the topic between secrecy and disclosure, seeks to analyze it through various case laws and strives to reach a suitable conclusion.

Keywords: privacy, fundamental right, Medical Ethics, protection of information

I. INTRODUCTION

Privacy is protection of individual autonomy and relationships between individual and society including governments, companies and other individuals. The literal meaning of privacy is freedom from intrusion by the public, especially in the form of a right. Alan Westin, one of the first and most widely respected scholars to explore the dilemmas of privacy in the information age, defines privacy as:

> *"Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about themselves is communicated to others."*

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The evolution of right to privacy in India can be traced back to the concept of privacy as a component of fundamental right, forming an integral part to the right of life, from the seven Judge Bench decision of Supreme Court in *Kharak Singh v. The State of U.P. & Ors*[1] where the majority read "right to privacy" as part of the right to life under Article 21 of the Constitution. However, even though the Constitution does not expressly declare it as a fundamental right but it is an essential ingredient of personal liberty.This decision was considered by Mathew, J. in his classic judgment in *Gobind v. State of Madhya Pradesh& Anr.*[2], in which the origin of "Right to Privacy" was traced and a number of American decisions, including *Munn v. Illinois*[3] and *Wolf v. Colorado*[4] and various Articles were taken into account. In *Malak Singh Etc v. State Of Punjab & Haryana & Ors*[5] the view taken earlier on the right of privacy was reiterated.The constitutional validity of the right to privacy again surfaced in the matter of *R.Rajagopal @ R.R. Gopal vs. State of Tamil Nadu*[6] where the Supreme Court held:

> *"The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters."*

Again in *Ram Jethmalani and Ors. v. Union of India*[7], the Supreme Court held that:

> *"Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."*

However, in *People's Union for Civil Liberties v. Union of India,*[8] Supreme Court held that the Right to Privacy itself has not been identified under the Constitution. As a concept it may be too broad and didactic to

[1] AIR 1963 SC 1295
[2] AIR 1975 SC 1378
[3] 94 U.S. 113 (1877)
[4] 338 U.S. 25 (1949)
[5] 1981 AIR 760
[6] AIR 1995 SC 264
[7] (2011) 8 SCC 1
[8] AIR 2003 SC 2363

attempt a judicial definition. However, it should be taken up on the facts and circumstances of every case. Hence, despite considering right to privacy as a Fundamental Right, guaranteed of the public authorities, to contain corruption, to hold Governments and their instrumentalities accountable to the governed and thereby develop the participatory under Article 21 of the Constitution of India, it is still not an absolute right. Hence, a law imposing reasonable restrictions upon it for compelling interests of the State must be held valid. Specific laws can, thus, override thisright to privacy where larger public interest is involved.

II. RIGHT TO PRIVACY v RIGHT TO INFORMATION: THE INHERENT CONFLICT

Privacy primarily concerns the individual and, therefore, relates to overlap with the concept of disclosure under the Right To Information Act. The most serious advocates of privacy must confess that there are serious problems in defining the scope of this particular right. Privacy interest in autonomy must also be placed in the context of other rights and values. Therefore, a clash between Right to Information and Right to Privacy is imperative because they seem to represent the two sides of the same coin and are, thus, irreconcilable.

The preamble of the Right To Information Act sets out that the citizens shall have the right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning governance. The Right to Information Act provides for a platform to demand information held by government bodies.It is derived from Article 9 of the *Universal Declaration Of Human Rights which talks about the right of Freedom of Expression to "seek and receive information". It is recognized as a worldwide human right.*The Right To Information is held to be "a requisite for the very exercise of democracy".[9] When transparency is mandated for institutions, both public and private, it creates accountability, builds public trust and creates informed individuals. Inter-American Court of Human Rights stated that:

> *"The State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject*

[9] *Report on Access to Information in the Hemisphere*, (Aug. 18, 2013), http://www.oas.org/en/iachr/expression/showarticle.asp?artID=229&lID=1.

to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately... access to State held information of public interest can permit participation in public administration through the social control that can be exercised through such access".[10]

Thus, the passing of the Right Information Act, 2005 is seen as giving an empowering tool in the hands of the citizens of India.[11] However, eight years post its implementation, loopholes have surfaced with the misuse of the fundamental aspects enshrined in it like provisions exempting disclosure of certain categories of information, which have not yet been defined to allow for a consistent pattern of decisions to follow. Among many problems that emerge with the Act, a major problem is defining the extent to which an individual has access to other people's medical information or records, which are deemed as private.Disclosure is generally allowed unless it falls under the ambit of Section 8 of the Right To Information Act, 2005 states that:

"information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;"

This brings us to a moot point as to what should be the general rule prevailing: secrecy or disclosure?

III. RIGHT TO INFORMATION: IN THE MEDICAL MILIEU

In the healthcare or medical context, the importance of maintaining a patient's privacy and confidentiality is ubiquitous. A strong reason behind it is that a patient must be able to share private information about his health problems and medical history without a tinge of hesitation. This information they would definitely not want to be made widely known because of the obvious reason that it may be embarrassing or may have negative practical consequences in their inter-personal relationships or in other walks of life. Proponents of utilitarianism argue that confidentiality must be guaranteed if patients are to speak freely and frankly to doctors, so that appropriate

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[10] *Marcel Claude Reyes et al v. Chile*

[11] Noopur Raval, *RTI and Third Party Information: What Constitutes the Private and Public?*, (Aug. 18, 2013), http://cis-india.org/internet-governance/blog/rti-and-third-party-info.

diagnosis can be given. Failure to guarantee confidentiality will lead to misdiagnosis and cause more harm than disclosure. Therefore, medical practitioners need to respect this confidentiality of information and not reveal it without the individual's permission. Keeping confidentiality forms a part of a doctors ethical, moral as well as professional duty .Also, the Medical Council of India's Code of Ethics Regulations protects patient confidentiality by stating that the physician:

"shall not disclose the secrets of a patient that have been learnt in the exercise of his/her profession except in a court of law under orders of the Presiding Judge; in circumstances where there is a serious and identified risk to a specific person and/or community; [or in case of] notifiable diseases."

In addition to the treating doctors, administrators and the public information officer of a healthcare institution fall under this and are also ethically required not to disclose health information and medical records of a patient.

Keeping this accepted rule in mind, information about a fiancée's health and the treatment that she had undergone at a psychiatric center was not revealed, claiming that a patient-doctor relationship was based on trust, which could not be breached.[12] It held that the Right to Information Act cannot be used as a "detective" to unearth the medical history of a person and that a person cannot use this Act to breach the doctor-patient bond of trust for one's own personal need. The appellant claimed the information as it affected his personal life. He did not dispute the claim of fiduciary relationship but felt that since it was important for him personally the information should be provided. It was observed in the order given that:

"A personal motive (however) is not enough to access information exchanged in trust. The applicant has to prove that such information would serve the larger public interest".

In a 2007 judgment, the Central Information Commission (CIC) specifically upheld that information regarding the purpose and results of medical testing was exempted from disclosure under the Right To Information

[12] Mr. Dipchand Chavanriya v. Mr. D.K.Chakravorty, Public Information Officer andInstitute of Human Behavior And Allied Science.

Act because it waspersonal information, the disclosure of which has no relationship to any public activity or interest and would cause unwarranted invasion of the privacy of the individual. Further, the CIC held that the information had been made available within the doctor-patient fiduciary relationship, and was also exempt from disclosure on that ground. The party, seeking the test results in this case, did not allege a public interest in the information, but a "genuine right to seek" it as the estranged parent of the patient. This CIC judgment therefore provides little guidance in deciding what would constitute a relevant and overriding public interest.[13]

In another case where an application was made seeking information regarding a DNA test allegedly done in respect of the appellant's son, who was in his wife's custody, it was held that confidentiality was required to be maintained. Further, the information sought was of a personal nature, which would cause unwarranted invasion of privacy of the individual and is exempted from disclosure under the Right to Information Act .This decision sought to throw light on this special relationship of trust:

> *"The relationship between a doctor and patient or a lawyer and client falls squarely within the definition of fiduciary relations. The RTI Act itself provides that the information available to a person in his fiduciary relationship is protected from disclosure. The disclosure of diagnostic information can only be supplied by the party concerned directly and not by the confidante..."*[14]

Physicians have always had a duty to keep their patient's confidences. In essence, the doctor's duty to maintain confidentiality means that a doctor may not disclose any medical information revealed by a patient or discovered by a doctor in connection with the treatment of a patient. Information disclosed to a doctor during the course of the patient-doctor relationship is confidential to the utmost degree because the purpose of a doctor's ethical duty to maintain patient confidentiality is to allow the patient to feel free to make a full and frank disclosure of information to the doctor with the knowledge that the

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[13] N N Mishra, Lisa Parker, V L Nimgaonkar and S N Deshpande, *Privacy and the Right to Information Act, 2005*, Indian Journal of Medical Ethics, Vol. V No 4 October-December 2008, http://www.issuesinmedicalethics.org/pdfs/164ar158.pdf 158-161 (1993).

[14] Shri Arjesh Kumar Madhok v. Centre for Fingerprinting & Diagnostics (CDFD), MoS&T.

doctor will protect the confidential nature of the information disclosed. Full disclosure enables the doctor to diagnose conditions properly and to treat the patient appropriately. In return for the patient's honesty, the doctor generally should not reveal confidential communications or information without the patient's express consent.

The General Medical Council and other professional bodies stipulate confidentiality as an ethical obligation, but also allow breaches of confidentiality in certain circumstances, for example in order to protect third parties from possible harm.[15] Because it is to be kept in mind that clinical confidentiality is primarily not for the protection of any one individual patient's right to privacy, but for the good of society as a whole because if doctors were not required to keep confidence people would be reluctant to provide them with personal information about their physical and mental health. However, this duty of confidence is not absolute.[16]

> *'In common with other professional men for instance a priest... the doctor is under a duty not to disclose [voluntarily], without the consent of his patient, information which he, the doctor, has gained in his professional capacity, save... in very exceptional circumstances... [for] example... the murderer still manic, who would be a menace to society.... The law will enforce that duty.'*[17]

Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances where public interest would override the duty of confidentiality, particularly if there is an immediate or future health risk to others.

In *Mr. X v Hospital Z*,[18] the news of the appellant being HIV positive was given out by the respondent hospital without the appellant's consent and as a result his marriage with one Miss A was called off. The Supreme Court ruled that in the event of a conflict between the appellants Fundamental Right to Privacy and Miss A's fundamental Right to be Informed about any threat

[15] C.Jones, *The Utilitarian Argument for Medical Confidentiality: A Pilot Study of Patients* (Aug 18, 2013), http://www.jstor.org/stable/27719117.
[16] Bridget Dolan, *Medical records: Disclosing confidential clinical information*(Aug 18, 2013), http://pb.rcpsych.org/content/28/2/53.full.
[17] Hunter v Mann [1974] QB 767
[18] AIR 1999 SC 495

to her life or health, in such an event the latters right to be informed will override the appellants Right to Privacy. The Supreme Court further stated that:

> *"Moreover, where there is a clash of two fundamental rights, namely the right to privacy which is part of the right to life and the right to live a healthy life which is a fundamental right guaranteed under Article 21 of the Constitution of India, the right which would advance the public morality or public interest would alone be enforced for the reason that moral considerations can not be kept at bay and the persons deciding the issues shall have to be sensitive in disclosure of such issues."*

Thus, the duty to maintain secrecy in every Doctor-Patient relationship is not absolute and such duty could be broken and secrets divulged where compelling public interest so requires. Sometimes, a doctor must determine whether his duty to society requires him to employ the knowledge, obtained through confidence as a doctor, to protect a healthy person against a communicable disease to which he is about to be exposed. In such instances, the doctor should act as he would wish another to act towards one of his own family in like circumstances.

In *Dr. Markandey Keshari v Northern Coalfields Ltd., Singrauli,*[19] clinical details in form of Bed Head Ticket and Medical Card of the appellant's daughter, late Usha Gupta, were being denied stating that providing Bed Head Ticket and Medical Card of Late Usha Gupta fell under the fiduciary information which is exempted under Section 8of the Right to Information Act. But the Central Information Commission held that it was her father who wanted information about his deceased daughter and it was in the larger interest involved that it should be given.

In *Surupsingh Hyra Naik v State of Maharashtra*[20] the petitioner, a member of the legislative assembly of the State of Maharashtra was imprisoned for a month for contempt proceedings imposed upon him by the Supreme Court. However, two days later he had to be shifted to Sir J.J. Hospital, Mumbai on account of suspected heart problems as well as low sugar and blood pressure for a period of 21 days. Such a stance was highly condemned

[19] Dr. Markandey Keshari v Northern Coalfields Ltd., Singrauli
[20] AIR 2007 Bom 121: (2007) 4 Mah LJ 573: (2007) 3 Bom CR 134

by public and his medical records were sought by social activists. The Bombay High Court ruled that the medical records of convicts or persons facing trial who are admitted to government-funded hospitals can be disclosed under the Right to Information Act, irrespective of regulations under the Indian Medical Council Act.

IV. ANALYSIS: TRACING THE PATH

Analyzing the trend with regards to medical records under the Right To Information Act, it becomes important to review and rethink the commonly accepted notions of privacy, especially when information gains such importance in our lives through fast expanding platforms. While one may think that information generated by oneself, pertaining to one's own life,generally and rightfully would belong to the private domain, but it is very important to realize the constantly looming hold of the State to any sort ofinformation. In such a situation, what one can claim as private data totally depends on how much common interest it garners.

Examining the various decisions given by people in authority regarding the providing of medical information to public, it is observed that there is a lack of a specific pattern in the Right To Information Act with respect to disclosure of medical records and is largely guided by the notion of public interest. Decision should vary on a case-to-case basis with a view towards the relative importance of various interests.Confidence is offered and accepted in medical practices, and is known to be an indispensible component enticing the patient to deliver unbiased, unfiltered and uncensored information. Consequently, it appears contradictory that first confidentiality is promised for sincerity of the patient but subsequently it is breached because it is too terrible to remain unpublished to the general public for their interest and safeguard. Hence, there is an inherent competition running between the privacy of an individual and the right to information of the citizens. It rests upon the guardians of private medical information, that is, the doctorsto decide the fate of the information: to keep it a secret or subject it to disclosure under the garb of public interest. In most common instances the former right has to be subordinated to the latter right as it serves the larger public interest. They should adopt appropriate public interest tests that allow for careful balancing of the two rights.

V. CONCLUSION

Thus, it is suggested that application of the Right To Information Act in specific cases requires balancing of these crucial rights when a request is made for information contained in medical records. A breach is defended on the grounds that harm announced in the confidence is severe and can only be averted by the confidant's disclosure. However, it is suggested that the notion of "public interest" employed in the Act should be interpreted conservatively when it is being balanced against the protection of information shared with an expectation of confidentiality within a fiduciary relationship because breaching will relentlessly harm the confider by adding constraints upon him .Since confidentiality is a necessary ingredient of medical practice, care should be taken to safeguard its interest. Hence, the reason accompanying the revelation of information should prima facie be evident. Moreover, breach of confidentiality should be permitted only after extensive analysis of the information and review and the disclosure should be the least invasive to the patient and the most limited in nature. In other words, it should be quantified where its extent being decided on the basis of the degree of harm involved. Only information drastically affecting or potentially endangering the general public or a specific person should be divulged because sediments of negative feelings like depression and deprivation may grope the patient concerned and may lead to psychological disorders and social repercussions like ostracization.Only information necessary to that purpose need be produced, and the doctor can usually determine the manner of compliance, so long as it is reasonable.

Therefore, medical confidentiality under the Right To Information Act is intransigent and not obligatory in nature. It is flexible and to a large extent depends upon the careful and prudent deliberation of the people in authority to come at a rational decision. However, it places the herculean task of deciding what information comes under the umbrella of public interests, upon the designated Public Information Officers demanding them to carefully weigh right to privacy and the right to information of the citizens and decide what would construe public interest and what would be its misuse.

FEMALE FETICIDE AND SEX-SELECTIVE ABORTION IN INDIA: ISSUES AND CHALLENGES

Adishree Mishra[1]

ABSTRACT

At the outset, the author seeks to explore the historical, social and cultural factors responsible for the prevalence of the practice of female foeticide in India. The author explores whether the Pre-Conception Pre-Natal Diagnostics Techniques Prevention (PCPNDT) Act has a cultural grounding similar to the practice of female foeticide itself. The central question identified by the author is whether, in reality, women have the scope to exercise their choice freely vis-à-vis aborting the foetus in their wombs. In this regard, the author seeks to answer the question as to what extent the role of the women's movement has been instrumental in demanding the framing and enforcement of the PCPNDT Act. Another important concern explored by the author is whether or not the Act is implemented properly. Finally, the author investigates the possibility of a link between the practice of female foeticide and gender cleansing and comes to the conclusion that it is justified to term female foeticide as 'gender cleansing' rather than a 'social evil' today.

Keywords: foeticide, ultrasonography, PCPNDT Act, Gender cleansing,

I. INTRODUCTION

Indian society, like most societies in the world, is patriarchal, meaning that it is a form of social organization in which a male is the family head and title is traced through the male line.[2] As per the ancient Hindu religious customs it is believed that a man can attain salvation only if he has a son to light his funeral pyre. In other words, if a man did not have a son, he would not be able to attain salvation in that lifetime. This age-old preference for sons can aptly be termed 'son-mania' and this has resulted in daughters being less desirable. Gender bias, deep-rooted prejudices and discrimination are etched deep in the minds of the Indian masses. Female foeticide is a practice that involves the detection of the sex of the unborn baby in the womb of the

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[2] Neera Desai & Maithreyi Krishnaraj, Manoranjan Mohanty, (ed)., "An Overview of the Status of Women in India" in *Class, Caste, Gender*, Sage Publications, New Delhi, 2004, at 299.

mother and the decision to abort it if the sex of the child is detected as a girl. This could be done at the behest of the mother, father, and/or both, and/or under family pressure. This detection of the sex of the baby is done through three methods viz. amniocentesis (normally performed after 15-17 weeks of pregnancy); chronic villus sampling (expensive and normally performed around the tenth week of pregnancy); and ultrasonography (the least expensive and normally performed around the twelfth week of pregnancy).[4] The consequences of widespread social and demographic expression of such well-entrenched biases are grave.[5] India is a pioneer in legalizing induced abortion. Under the two main laws, Medical Termination of Pregnancy (MTP) Act, 1971 and the Pre Natal Diagnostic Techniques (PNDT) Act, 1994, the Indian government has allowed abortion which may be carried out under the following circumstances: (a) if there is danger to the life of the mother in child birth (b) if the child is at risk of being born handicapped, or (c) if the woman has conceived the child as a result of rape.[6] Women are also allowed the right to abortion if they wish to do so in the interest of keeping the family small. PNDT Act only focuses on regulation and controls techniques of pre-natal sex determination not the access to abortion in any form, that is, the Act does not concern itself with selective abortion of female fetuses as such, but rather, with medical procedures to detect the sex of the foetus, which can lead to foeticide. However, it is often times seen that the decision of abortion is taken after the detection of the unborn child as a female. The latest Act related to sex-selective abortion in India is the Pre-Conception Pre-Natal Diagnostics Techniques (PCPNDT) Act. The problems associated with the provisions and implementation of these laws at the level of ground reality demands a behavioural change among the people of India as well as certain changes in substantive law.

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[3] Piyali Sarkar, "*The eliminated multitude: Female foeticide in India*", available online at <http://www.csrindia.org/Reports&Documents/Articles/Piyali.pdf> last visited on 24th November, 2010

[4] Sayeed Unisa, Sucharita Pujari, R. Usha, "Sex selective abortion in Haryana: Evidence from pregnancy history and antenatal care", 42(1), *Economic and Political Weekly*, at 60.

[5] "Sex determination tests: All round apathy", 38(39), *Economic and Political Weekly*, at 4072.

[6] Leele Visaria, "Deficit of girls in India: Can it be attributed to female selective abortion?" ; Sex-selective Abortion in India: Gender, Society and New Reproductive Technologies, 2007, at 70.

The essay is based on an examination and analysis of the socio-cultural factors behind the traditional ideas that encourage female foeticide, the legal aspects involved with abortion laws (with special reference given to PCPNDT Act), and preventive measures for sex-selective abortion in India. The older laws dealing with the issue of abortion will only be dealt with perfunctorily by the author. Also, in order to locate the article within the broader framework of rights and freedoms enshrined within the Constitution of India, 1950, it is important to clarify the difference between reproductive rights and reproductive freedom. As is often stated, liberty is not just a matter of having rights on paper, it requires being in a material position to exercise those rights; and this requires resources.[7] The eminent sociologist, Martha Nussbaum notes, "The State that is going to guarantee people rights effectively is going to have to recognize norms beyond the small menu of basic rights: it will have to take a stand about the redistribution of wealth and income, about employment, land rights, health, education."[8] While making this point, she alludes to the paternalistic nature of the Constitution of India with regards to, for e.g., discrimination on the basis of sex. The author acknowledges while the focus of this article is much narrower, a full-fledged solution regarding the abortion rights of women in India can only be reached after an in-depth examination and analysis of other economic and related rights.

II. Mindset behind the Elimination of the Female Foetus: 'Son Mania' and Daughter as a 'Burden'

It is well-known that over the ages as the importance of ancestor-worship increased, sons alone were regarded as eligible for offering oblations to the manes; daughters could not perform this very important religious duty.[9] It is, therefore, not very difficult to understand the reason why daughters became relatively unpopular subsequently. In *Brahmana* literature, there is one passage observing that while the son is the hope of the family, the daughter is a source of trouble to it.[10] Gender bias and discrimination against girls is deep-rooted

[7] Martha Nussbaum, "Women and Work–The capabilities Approach," available online at <http://www.littlemag.com/2000/martha2.htm>, last visited on 24th November, 2010
[8] *Ibid*
[9] A. S. Altekar, *The Position of Women in Hindu Civilization- Present times to present day*, Motilal Banarasidas Publishers Pvt. Ltd., 2005, at 4
[10] *Ibid* at 5

in our culture. Birth of a son is an occasion for rejoicing and celebration whereas a daughter's birth is considered a disappointment. In a way, a son's birth is a means of privileging the mother.[11] The proverbial blessing to a newlywed bride is "may you be the mother of a hundred sons." Moreover, the general belief of the Indian people is that '*santan*' means a son and not a daughter and, hence, one sees that in devotional songs the prayer for a childless woman is for a son, not for a child.[12] Most Indian women would be shattered to only have successive daughters.

Sons are preferred over daughters for a number of economic, social and religious reasons. The birth of a son is perceived as an opportunity for upward mobility while the birth of a daughter is believed to result in downward economic mobility of the household and the family. The gloom at a daughter's birth in most parts of India is symbolic of what awaits a family where a daughter is born. Parents expect sons—but not daughters—to provide financial support, security and emotional care, especially in their old age; sons add to family wealth and inherit the ancestral property while daughters drain it through dowries (this is the main socio-cultural factor which contributes to the stereotypical notion of women as a 'burden')[13]; sons continue the family lineage while daughters are married away to another household; sons perform important religious roles and defend or exercise the family's power while daughters have to be defended and protected, creating a perceived burden on the household.[14] A son's education and upbringing cost is evened out through the dowry he commands at his marriage but in case of a daughter, expenses in raising her have not only to be incurred but she also has to be paid dowry on top of it all. Getting the daughter 'married off' is considered to be one of the prime responsibilities of the parents. Exorbitant expenditure at the marriage of the daughter results in the family being caught in a vicious cycle of poverty. However, exceptions do exist i.e.

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[11] Tulsi Patel, "A son meaning space under the son", *Sex-selective Abortion in India: Gender, Society and New Reproductive Technologies,* 2007, at 149

[12] Kusum, "Mother dear: Do I have no right to be born?", 12(11), *Lawyers' Update*, at 6

[13] Piyali Sarkar, "*The eliminated multitude: Female foeticide in India*", available online at <http://www.csrindia.org/Reports&Documents/Articles/Piyali.pdf> last visited on 24th November, 2010

[14] Sayeed Unisa, Sucharita Pujari, R. Usha, "Sex selective abortion in Haryana: Evidence from pregnancy history and antenatal care", 42(1), *Economic and Political Weekly*, at 60

even families that are well-off and do not have to depend on dowry to augment their income are also opting for female foeticide.[15] The real reason seems to be the high status of families with several sons and the low status of families with no sons. In today's times, even globalization has an active role to play on the mindset of people towards their own children. Son preference is also propelled by the fact that usually it is the sons rather than the girls who go to work in Western countries to earn a greater income. In the eyes of the local community, a family with children abroad has a higher status and certainly a higher level of income than non-migrant families.[16]

Earlier, when science and technology was not very advanced nor was it that easily accessible by expecting parents all over the country, the baby girl was "put to sleep" soon after her birth. This practice was called as female infanticide. Today, the objective remains the same; only the method has changed. It has become possible for parents to be "kind" and eliminate female babies even before they are born.[17] If we go by the concept of "missing girls"[18] given by Amartya Sen, as per the 1991 census alone, 32.3 million girls are missing in India.[19] Every sixth female death in India is specifically due to gender discrimination and despite being biologically stronger than boys, 300,000 more girls die every year.[20] These figures compel one to ponder over the looming question as to whether the practice of female foeticide can be termed as anything less than the cruelest form of "gender cleansing", when viewed through the lens of crime against humankind.

As per the Genocide Convention, for a crime to be defined as genocide, any of the following five acts[21] should have been committed with the intent to destroy a group in whole or in part:

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[15] Ashish Bose, "Female foeticide: A civilizational collapse", *Sex-selective Abortion in India: Gender, Society and New Reproductive Technologies,* 2007, at 86

[16] *Ibid* at 87

[17] Kusum, "Mother dear: Do I have no right to be born?", 12(11), *Lawyers' Update*, at 6

[18] This concept of "missing girls" suggests that India has 10 percent fewer women than would be expected in demographic terms. These estimates are as per the UNDP Report as cited in *Judicial Colloquia on gender and law*, September- December, 2001, at 69

[19] *Judicial Colloquia on gender and law*, September- December, 2001, at 69

[20] *Ibid*

[21] Kalpana Kannabiran, "Gender Cleansing: Female foeticide or crime against humanity?", 2(3), *Combat law,* August-September, 2003, at 24

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to the members of the group;

(c) Deliberately inflicting conditions of life on the group that are calculated to bring about its physical destruction;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of that group to another group.

Female foeticide already matches, even surpasses the worst episodes of genocide in scale: 50 lakh female foetuses[22] a year are aborted after sex-determination tests, leading to a sharp decline in sex ratio.[23]

In the light of the Right to Life and Personal Liberty enshrined in Article 21 of the Constitution of India, female foeticide, by bringing about a physical destruction of an entire class of persons i.e. girl children, by actively preventing births of members of that particular class, is a direct infringement on the right to life, dignity and security of the person for surviving members of the class. The practice is nothing less destructive than a weapon of mass destruction. It also takes a toll on the mental and psychological well-being of the entire female population in the country by the creation of an atmosphere of sheer terror and brutality. It is in the naming that the problem lies and it is because of the naming that the problem persists. It is about time that people acknowledged the seriousness of the situation in real terms i.e. female foeticide is not a "social evil" but it is effectively tantamount to a form of "gender cleansing." In this case, the "cleansing" is not directed against a national, ethnic, racial or religious group, rather a class of persons i.e. persons belonging to the female gender. Gender cleansing can be defined as the extermination of an entire generation of women, and by extension, all future generations as well.[24] The government and the people of India must develop an aggressive attitude and combat the practice of female foeticide more fervently and not treat it leniently. People should become conscious of the fact that what is generally practiced under the garb of a "social evil" in reality is becoming a

[22] Even the official estimate of 20 lakh will suffice

[23] Kalpana Kannabiran, "Gender Cleansing: Female foeticide or crime against humanity?", 2(3), *Combat law*, August-September, 2003, at 24

[24] *Ibid*

method of "gender cleansing." Eventually this will affect the whole of the human population in India. Skewed sex ratios in various states of India, especially the northern states of Punjab, Haryana and parts of Uttar Pradesh, more so among the "upper class" people, show that the advent of technology in sex-determination, its availability and affordability rather than selective neglect of female children and the poor status of women are responsible for reinforcement and expression of deep-rooted biases against the girl child.[25] For instance, according to India's 2011 census, there are only 858 women to every 1,000 men in Baghpat district of Uttar Pradesh, compared to the national sex ratio of 940.[26]

Thus, more than anything else, it is the mindset of the people of India towards the girl child that needs to change from downright apathy to one of responsibility, egalitarianism and faith in the abilities of the promising child.

III. The PCPNDT Act: A Critical Appraisal in the Light of the Role of the Women's Movement in Demanding it

In India, the issue of abortion has been placed in the feminist agenda in a manner quite different from its positioning in the West.[27] Until recent times, India has lacked a strong feminist tradition to demand that laws affecting women's lives actually take into consideration women's interests.[28] Reproductive rights always were and are even today one of the most significant issues of different kinds and phases of women's movement; according to its claims, family planning with respect to the timing and number of children a woman wants to have, should finally be the woman's decision and not that of her husband alone, nor of other family members, religious authorities or the State.[29] However, in India given that deeply ingrained societal prejudices

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[25] "Sex determination tests: All round apathy", 38(39), *Economic and Political Weekly*, at 4072

[26] Nita Bhalla, '"Wife-sharing" haunts Indian villages as girls decline,' available online at <http://in.news.yahoo.com/wife-sharing-haunts-indian-villages-girls-decline-082705571.html>, last visited on 29th October, 2011

[27] Nivedita Menon, *Gender and Politics in India,* Oxford University Press, New Delhi, 1999, at 278

[28] Danaya Wright and Varsha Chitnis, "*The Legacy of Colonialism: Law and Women's Rights in India*," 64 Wash. & Lee L. Rev. 1315, 1348 (2007), <http://law.wlu.edu/deptimages/Law%20Review/64-4Chitnis&Wright.pdf>, last visited on 29th October, 2011

[29] Onora O'Neill, *Autonomy and Trust in Bioethics, Gifford Lectures 2001,* Cambridge University Press, Cambridge ; New York, 2002

continue to exist, women are yet to achieve true reproductive "choice" and, therefore, they do not look at abortion rights as a question of control over their sexuality to escape repeated pregnancies but see them as a chance to escape sex-selective abortions.[30] In India, the individual women may be more concerned with the repeated birth of girl children and as opposed to viewing abortion rights as a means to gain freedom from repeated pregnancies. This is how the debate for female control over their bodies differs mainly due to the difference in the cultural grounding of the "reproduction rights" in India and the West respectively. Moreover, sadly enough, abortion has been hailed as an answer to the population explosion in India.[31] In the context of such feminist engagement of people of India with the law, it bears noting that the eminent scholar, Ratna Kapur, believes that law's role needs to be reconceptualised as including one of "process."[32] She goes on to say that, "It may be the process of engaging with the law - of litigation, of law reform, of legal literacy – that will offer the most of feminist struggles, and may be able to most empower women."[33]

Abortion became an issue for Indian feminists for a very different reason as from the 1980's, amniocentesis has been used to determine the sex of foetuses in order to abort female foetuses and from then onwards the women's movement in India has regarded female foeticide as a very serious issue.[34] The widespread misuse of pre-natal diagnostic techniques for the purpose of sex-determination and subsequent abortion if the foetus was a girl became a cause of concern to various social and women's organizations. While our Constitution provides for gender equality and non-discrimination, and also prohibits practices derogatory to the dignity of women, and the Indian Penal Code, 1908, also penalizes sex-selective abortions, a specific statute to put a

[30] Mallika Kaur Sarkaria, Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion, 97 Calif. L. Rev. 905, 906 (2009)
[31] Madhu Kishwar, *Off the beaten track: Rethinking gender justice for Indian women,* Oxford University Press, New Delhi, 1999, at 79
[32] Bijayalaxmi Nanda, "Gender violence and Legal Frameworks in India: The Story of Sex Selection," available online at < http://www.ipc-undp.org/pressroom/files/ipc136.pdf>, last visited on 29th October, 2011
[33] *Ibid*
[34] Piyali Sarkar, "The eliminated multitude: Female foeticide in India", available online at <http://www.csrindia.org/Reports&Documents/Articles/Piyali.pdf> last visited on 24th November, 2010

statutory ban on sex-selective abortions was enacted by the Maharashtra government in 1988.[35] This Act had territorial as well as other constraints so was enacted a central law, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. This Act was the outcome of a unique movement that brought together women's groups and the pioneers of the health movement and encompassed a wide range of issues. This was also perhaps, the first legislation attempting to regulate and monitor technologies that were only just beginning to make a presence.[36]

Women's groups were dissatisfied with this Act and in August, 1994 sent it back for reconsideration to Parliament.[37] The PNDT Act came into force in January 1996. It largely banned the use of ultrasound machines to identify female foetuses and abort them. It was amended in 2003 to make it more stringent and to curb sex selection not only at the foetal stage but also at the early conception stage.[38] Punishment for violating the Act includes a 5-year jail term and a fine of Rs 1,00,000, besides the cancellation of the concerned doctor's registration and licence.[39] Now, the Act came to be called as Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act. The landmark case which was instrumental in plugging the loopholes in the PNDT Act through the amendment in 2003 was ***CEHAT (Centre for Enquiry into Health and Allied Themes) v. Union of India***[40]. The stated purpose of the legislation i.e. the implementation of the interim order is to prohibit the use of pre-natal diagnostic techniques for the determination of the sex of a foetus, which results in "female foeticide." This is described as "discriminatory against the female sex" and "affecting the dignity and status of women."[41]

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[35] Kusum, "Mother dear: Do I have no right to be born?", 12(11), *Lawyers' Update*, at 7

[36] "Sex determination tests: All round apathy", 38(39), *Economic and Political Weekly*, at 4072

[37] Nivedita Menon, *Gender and Politics in India*, Oxford University Press, New Delhi, 1999, at 279

[38] Durga Chandran, "Sting operation to find the missing girl child", available online at <http://www.infochangeindia.org/features292.jsp>, last visited on 10th December, 2010

[39] *Ibid*

[40] (2003) 8 SCC 398

[41] Talha A. Rehman, Ayesha T. Siddiqui, "Discrepancies in the laws on identifying foetal sex and terminating a pregnancy in India", available online at <http://www.ijme.in/153oa119.html>, last visited on 10th December, 2010.

Some of the problems that can easily be pointed out on a close analysis of the provisions of the PCPNDT Act are:

(a) Neither the objective nor the Preamble of the Act explicitly states the cultural and economic reasons for the framing and implementation of such an Act. Therefore, through it, law does not directly seek to challenge cultural stereotypes. Rather a more passive stand has been adopted. The effort has not even been made on paper, let alone addressing the issues of gender discrimination and female foeticide through policies that eventually aim to bring about behavioural and attitudinal change over the generations.

(b) Future techniques for sex determination as well as sex pre-selection should be brought within the ambit of the provisions.[42] The Act will lose its effectiveness if it does not make provisions to keep pace with the advancements in science and technology. This shows the superfluous nature of manner in which the State has chosen to show its concern over a matter of such gravity.

(c) It was suggested at the time of framing of the Act that all ultrasound machines and other equipment which can be used for sex determination tests should be registered. The Joint Committee had earlier considered this suggestion and rejected it as unfeasible because such equipment is used for various purposes other than pre-natal testing.[43] Some alternative method has to be devised in order to surpass this hurdle and ensure accountability in case of use of such medical equipment.

(d) Section 23(1) and (2) primarily address doctors, medical practitioners and ultrasound clinics, rather than pregnant women but Section 23(3) proposes to hold guilty any person who seeks to use the PCPNDT Act on a pregnant woman "including such woman unless she was compelled to undergo such diagnostic techniques." Hence, the Act in this respect is anti-woman and would create conditions that would limit its effectiveness. This is highly unjust as put simply, the clause effectively means the loss

[42] Nivedita Menon, *Gender and Politics in India,* Oxford University Press, New Delhi, 1999, at 279

[43] Report of Joint Committee, 1992, pp 20-21, as cited in Nivedita Menon, *Gender and Politics in India,* Oxford University Press, New Delhi, 1999, at 279

of any scope on the part of the expecting mother to exercise any kind of autonomy as far as decisions regarding her own reproductive rights are concerned. Indeed, the wordings of the provision imply that if it can be proved that she went for the medical tests of her own accord, without coercion, she will be punished.[44] In effect, this also means that in case the husband and relatives of the woman are able to prove that they are not guilty, the woman would automatically be presumed to be guilty. In this way, indirectly women lose their right to exercise their choice vis-à-vis aborting the foetus. Women are not in a position to decide their ideal family size or the number of sons or daughters they would like to have owing to this along with a number of other problems.[45]

(c) Apart from the above mentioned lacunae, the law loses some teeth because few complaints are entertained against medical practitioners, as more often than not the appropriate authorities themselves belong to the medical fraternity.[46]

Apart from these problems that persist at the substantive level of law-making, a number of problems also crop up at the level of implementation. In reality, the state governments have shown a lack of commitment on the issue. Earlier the Supreme Court had ordered the compulsory registration of all diagnostic centres across the country and mandatory record-keeping and inspection as well.[47] But these have not yielded desirable results. The power to appoint Committees in each State to seize medical equipment where they are being misused has been given and each State has subsequently set up authorities with the powers of the Civil Court to prosecute clinics and doctors in case they used them for sex determination. But the need for some person who has legally been vested with the power to "blow the whistle" in these clinics has not been addressed. Hence, fortunately or unfortunately, most affected people are still dependent on NGO's and Self-Help Groups (SHG's) to play a proactive role for this purpose.

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[44] Sreelatha Menon, "*Mothers sued, docs go free*", available online at <http://www.boloji.com/wfs5/wfs593.htm>, last visited on 10th December, 2010

[45] T. K. Rajalakshmi, "Miles to go", 24 (22), *Frontline*, at 92

[46] Durga Chandran, "*Sting operation to find the missing girl child*", available online at <http://www.infochangeindia.org/features292.jsp>, last visited on 10th December, 2010

[47] "Sex determination tests: All round apathy", 38(39), *Economic and Political Weekly*, at 4072

IV. Conclusion

The diagnostic technologies that are useful for detection of genetic disorders, chromosomal abnormalities, congenital malformations or birth defects, also make sex detection of the foetus easy. This information led to replacing the traditional forms of eliminating a female child through measures such as female infanticide by the pre-birth sex detection and subsequent elimination. Even when justice appears to be done i.e. when a conviction is secured, the very demonstration of such heinous violation of the "girl child" and the "woman", the practice of female foeticide itself re-enacts and reconfirms dominant patriarchal and misogynist values prevalent in society today. It is not only the poor, but even the middle classes and the rich in India that are biased against the girl child. Given the prevalent social context, is it really possible for a woman to decide about having an abortion, if she has to survive as a good daughter-in-law in the family? Let's assume her husband supports the birth of a female child. Even then she may prefer to have a male child in order to get respect from her in-laws' family, in order to save her marriage. If a woman doesn't have any say in this matter, a good case can be made that female foeticide is an act of violence against women. Fully understanding that an evil such as this cannot be addressed in isolation, it is necessary to closely examine all forms of related social malaise such as dowry, women's underemployment and exploitation in the society, education standards of the girl child as well as high-school dropouts amongst the girls, early marriages and the arranged marriage system.

While it may be argued that the State has in fact taken steps to stop this practice of female foeticide through the enactment of the PCPNDT Act, the ineffectiveness of the Act in real terms translates into State liability, not "apathy" since we are not speaking of individual crime but of mass extermination, for which the mechanism and urgency of redressing the issue cannot be a mild legislation like the PCPNDT Act alone. Full involvement of medical associations along with the proactive support of responsible citizens must be there to monitor the ban on female foeticide and change social attitudes. Otherwise, from the legal point of view, it is the courts which will have to repeatedly interfere in a matter that should be the concern of the executive.

CASE COMMENT

Lily Thomas v Union of India & others (Writ Petition (Civil) No. 490 of 2005) with Lok Prahari, through its General Secretary, S.N. Shukla v Union of India & others (Writ Petition (Civil) No. 231 of 2005)

Rituparna Nanda* & Subhrajeet Mahapatra**

I. INTRODUCTION:-

The basic structure of the Constitution of comprises of three main elements which are required of the governance of a State. The three elements are three sources of power and the making, origination and enforcement of laws is done by them. The three are the Legislature, the Judiciary and the Executive. The purpose of legislature is law-making which involves the determination of legislative policy and the conversion of that policy in to rule of conduct by way of enactment.

The case of Lily Thomas v. Union of India which was decided on 10th of July, 2013 created lot to hue and cry over its judgment since it affected the position of the members of both the House of Parliament as well the State Legislative Assembly and the State Legislative Council. Their membership was at stake due to their disqualification based on their conviction or sentence in reference to the subsections (1), (2) and (3) of the Representation of the People Act, 1951 which laid down the offences based on which a member is to be disqualified. This particular case not only raised question on the validity of the statutory provision but also the constitutional provision, in a circumstance where both are in conflict with each other. As we know, when there is any such conflict, it is the constitutional provision which will be upheld; else the goal of drafting a constitution will not be achieved.

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II. FACTS:-

The basic object of such a petition was to create awareness amongst the public about the constitutional principles and that, the Parliament and public services must be free of criminalization and corruption. The case is the result of a writ petition challenging the provision i.e., subsection (4) of S.8 of the Representation of the People Act, 1951. The Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for a person being member of either House of Parliament and State Legislative Assembly and Council[1].

III. ISSUES:-

1) Whether the Parliament had competence/legislative power to enact sub-section (4) of section 8 of the Representation of the People Act, 1951?

2) Whether sub-sections (1), (2) and (3) of Section 8 of the Representation of People Act, 1951 in parlance with the sub-section (4) i.e., whether they create any form of distinction between the persons to be chosen as members and the sitting members, or that they are at the same footing?

3) Whether the discretion of the President or the Governor play a severe role in the stay of disqualification of members under Article 103 (2) and 192 (2), respectively?

4) Whether the position of a sitting member being prey at the hands of a frivolous conviction is at stake or not? Or that, whether he can regain or restore his position or not after being proved not guilty of the offence?

5) Whether sub-section (4) of section 8 of the Representation of People Act, 1951, declared ultra-vires or not?

IV. ANALYSIS OF THE CASE:-

1. Supreme Court's endeavor to do justice in any case[2] reflected in the present case of criminalization of politics. Court's judgment to stride the ditch of mucky politics, by declaring S.8 (4) of Representation of People's Act, 1951 unconstitutional, was a progressive step to clear the ambiguity of

[1] Constituent Assembly Debates, Vol. VII, 140-1
[2] Art. 142, The Constitution of India, 1950

law in the sphere of position of convicted members of the Parliament as well as the State Legislature. As "Justice should not only be done but manifestly and undoubtedly be seen to be done"[3], by declaring the law that created unreasonable classification between legislators and non-legislators, the apex court gave a legitimate decision and discharged its obligation judiciously. As the legal system of the country is to be based on the principles of maxim *La principle de legalite*, which means government should be based on law and not on man.

2. Art. 102 of Indian Constitution lay down the provision for 'disqualification for membership' of a Member of Parliament. A person **shall be disqualified** for **being chosen as**, and **for being**, a member of either House of Parliament[4] if he is so disqualified by or under **any law** made by the Parliament[5] and similar provision of disqualification is laid down for members of the State Legislative Assembly.[6] The term "disqualified" means disqualified **for being chosen as, and for being, a member** of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.[7] As per S. 8(3) of Representation of People Act, a person convicted of any offence and sentenced to imprisonment for not less than two years **shall** be disqualified from date of such and such disqualification shall continue until six years have elapsed since his release. So, if a member of either house of Parliament and State Legislative Assembly becomes subject to any disqualification mentioned in clause (1) of Art. 102,[8] his seat shall **thereupon** become vacant.[9]

3. So, Art. 102(1) (e) and 190(1) (e) lays down the same set of disqualification for a member and a non-member of either of the houses of Parliament and State Legislative Assembly. Parliament, by virtue of above articles, enacted the Representation of People Act, 1951 as a part of 'any law'. But Parliament, by including S.8 (4) as a saving clause for sitting members of Parliament, created a different set of disqualification. As the

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[3] R Vs. Sussex Justices exparte Mc Carthy [1924] 1 KB 256
[4] Art. 102(1), Constitution of India, 1950
[5] Id., at Art. 102 (1)(e)
[6] Id., at Art. 191 (1)(e)
[7] § 7(b), Representation of People Act, 1951
[8] Supra note 3
[9] Art. 101(3) (a) and Art. 190 (3) (a), Constitution of India, 1950

impugned section provides that the sitting members of Parliament and State Legislative Assembly shall not be disqualified until three months have elapsed from the date or within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court[10], the convicted sitting member enjoys the privilege of membership and is not disqualified even if there is same set of disqualification for both members and non-members. So, S.8 (4) goes beyond the letter and spirit of the Constitution. S.8 (4) is also inconsistent with Art. 101 (3) (a) and 190 (3) (a) as seat of the sitting members does not get vacant after they are convicted. So, S.8 (4) of Representation of People Act exhibits a clear picture of conflict between the statutory provision and the Constitutional provision. Right to Equality, by virtue of Art. 14 of Indian Constitution, irrespective of any person, both are liable in same manner before the same forum for any act they have done.[11] The provision of S.8 (4) creates discrimination between a member and a non-member by treating them unequally as to their position in the house after conviction.

Conflict between Statute and Constitution

4. There can be a scenario where a provision of Constitution as well as the provision of legislature applies equally. So, the statutory provision is in conflict with the provisions of the Constitution. Statute is created by legislature and the legislature is the creation of Constitution itself and it has given the power of judicial review. It is the Constitution that shall prevail and the Statute which is ultra vires the constitution is void to such extent.[12] Constitution is supreme and all other laws emanates from it.[13]

5. In the present case, the statutory provision i.e., the Representation of People Act was enacted by the Parliament deriving their power under Art. 102 (1) (e) and 190 (1) (e) of Indian Constitution as a part of 'any other law' to lay down provisions for disqualification for membership on conviction of offence providing for imprisonment term of more than two years.[14] But the

[10] § 8(4), Representation of People Act, 1951
[11] See AV Dicey Rule of Law
[12] Per CJ Marshall Marbury v Madison 5 US 137 (1803)
[13] Id
[14] Supra note 8 at § 8(1) and 8(3)

provision of S. 8 (4)[15] of the impugned statute conflicts the above Constitutional provision for the fact that it lays down a different set of disqualification for a sitting member of the Parliament and State Legislative Assembly, by laying a provision that allows those members to retain their seat in the house even after getting convicted of an offence, it allows for a classification that the Constitutional provision in itself does not provide so.[16] How statutes can lay down a provision when the Constitution does not provide for any such provision. When the Statutory power is derived by the legislature from Constitution, the legislature in no way can go beyond the power entrusted to them. Moreover conviction under S. 8 of Representation of People Act and the sentence operate against the accused in all their rigour until set aside in appeal and a disqualification that attaches to the conviction and sentence applies as well.[17] So, it can be well argued that there is no legal basis for the provision of S. 8 (4) as on the date of conviction the member as well the non-member gets disqualified notwithstanding the fact that they have filed for an appeal in the appellate court for revision of the conviction order.[18]

6. The term disqualified as mentioned by the act also refers to both members and non-members of the houses.[19] But the provision of S.8 (4) makes an unreasonable classification when it immunes the sitting members of the Parliament and State Legislative Assembly from getting disqualified with immediate effect from the date of conviction. Even both the members and non-members are the same; they are made liable differently in the same forum. The researchers put forth the contention that, Art.14 and Art. 102 and 190 belong to particular law i.e., the Constitutional law. Art. 14 as well Art 102 and 190 are to be construed harmoniously, so as to make an enabling provision that would source the legislation to make law consistent with the letter and Spirit of Indian Constitution. In no way provisions of Art. 14 can prevail over the provisions of Art. 102 and 190 of the Constitution.

Constitutional Morality and Statute

7. "Legal system arises from the combination of primary and secondary

[15] Supra note 9
[16] Election Commission, India Vs. Saka Venkata Rao, AIR 1953 SC 210
[17] BR Kapur v State of TN and Another, (2001) 7 SCC 231
[18] K. Prabhakaran Vs. P. Jayaranjan, (2005) 1 SCC 754
[19] Supra note 6

rules."[20] "Primary rules are those which simply impose duties; secondary rules are the power-conferring rules, of which most important are those which confer power to make and unmake other rules in the system which can be recognized as Rules of Recognition."[21] "The rules (or norms) are derived from the same basic rules known as the grundnorms"[22] So, where there is a written constitution, the grundnorms will be that written Constitution ought to be obeyed.[23] Grundnorms i.e., the Constitution of India does not allow remedy to be sought from the court, how can the same remedy be sought under a sub-ordinate norm i.e., statutory provision[24] The Constitution is '*suprema lex*', the paramount law of land and there is no department or branch of Government above or beyond it.[25] It is the duty of the court to interpret the Constitution. It must perform the duty regardless of the fact that the answer would have a political effect.[26] Merely because the question has a political complexion that by itself is no ground why the court should not entertain the case if it raises an issue of Constitutional action.[27] The will of the people will prevail of the Constitution if it is in accordance the provision of the Constitution.[28] All the people and the three organs of the Government are bound by the provision of the Constitution which can be described as suprema lex or paramount law of land and nobody is above or beyond the Constitution.[29] When court has been ascribed with the power of interpreting the Constitution and it finds that manifestly there is an unauthorized exercise of power of the Constitution, it is the solemn duty of the court to intervene.[30]. Even though the enactment passed by the legislature i.e., the S.8 (4) represents will of people to protect the members of the Parliament and the State legislative Assembly from immediate conviction, this will is against the Constitutional morality. So, owing to the doctrine of *suprema lex*, it is the constitutional

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[20] Salmond on Jurisprudence 49 (PJ Fitzgerald ed., 12th ed., Universal Law Publishing Co. Pvt. Ltd ,New Delhi,2012)
[21] Id. See also Harts Analysis of Concept of Rules
[22] Kelsen's Pure Theory of Law, Supra note 21, at 48
[23] Id
[24] ADM Jabalpur Vs. Shivkant Shukla AIR 1976 SC 1207
[25] BR Kapur v State of TN and Another, (2001) 7 SCC 231
[26] BR Kapur Vs. State of TN and Another, (2001) 7 SCC 231
[27] Per J. Bhagabati State of Rajasthan Vs. Union of India and others 1973 (3) SCC 592
[28] Supra note 21
[29] Per J. Bhaghabati Minerva Mills Vs. Union of India 1980 (3) SCC 625
[30] Id

provision that will prevail over the statutory provisions. So, the provision of the legislature that conflicts with the provision of the Constitution is void owing to the doctrine of severability.[31] As S.8 (4) is in contravention with the provision of Constitution, it is liable to be declared ultra vires the Constitution and to be strucked down

8. "The Constitution should definitely lay down the disqualification of candidates."[32] If such qualification were laid down in the Constitution itself it would be difficult to alter them if circumstances required. The very object of the writ petition is declaring sub-section (4) of Section 8 of the Representation of the People Act, 1951 as ultra vires the Constitution.

Constitutional Validity of sub-section (4) of section.8 of Representation of People Act, 1951

9. The first contention is regarding the distinction made by the parliament, between the persons who are the sitting members of either house of the Parliament, or the state legislative assembly or legislative council and the persons who are chosen as the members of either house of Parliament, or the state assembly or legislative council. The basis of such distinction is sub-section (4) of Section 8 of the Representation of the People Act, 1951 which expressly is prejudice in nature.[33]. The power to enact such Act which gives such privilege to the sitting members compared to the non-members is not permissible. As per the Article.102 of the Constitution, chapter II which deals with the Parliament, part V which deals with the Executive, on disqualifications for membership, states that the disqualifications are for the person who shall be chosen or for being the member of either House of the parliament. The same provision is stated for membership of the legislative assembly or legislative council in Article.191 of the Constitution, chapter III which deals with the state legislature, part VI which deals with the states. So the Constitution itself lays down a paradigm which does not distinguish between the two categories of persons and lays down the fact that both stand at the same footing.

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[31] State of Bombay Vs. FN Baslara AIR 1951 SC 318
[32] Constitutional Assembly Debates Vol. VII, p. 141
[33] See supra note 10

Competency of Parliament to enact the provision stated in sub-section (4) of S.8

10. The above contention gives rise to another contention i.e., whether the Parliament had the power to enact such provision. The need for the sub-section (4) of Section.8 of the Act was not there since it was covered in the Articles 101(1) (e) and 191(1) (e) of the constitution. The power of Parliament to makes law on a particular subject-matter is inherited from the Constitution through Article 246(1) read with Entry 97 of List I of the Seventh Schedule of the Constitution and Article 248 of the Constriction. Article 246(1) provides that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule of the Constitution and under Entry 97 of List I of the Seventh Schedule of the Constitution, Parliament has exclusive power to make law with respect to any other matter not enumerated in List II or List III. Article 248 similarly provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II) of the Seventh Schedule of the Constitution. Therefore, Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law. "In short, the principle underlying Article 248, read with Entry 97 of List I, is that a written Constitution, which divides legislative power as between two legislatures in a federation, cannot intend that neither of such Legislatures shall go without power to legislate with respect of any subject simply because that subject has not been specifically mentioned nor can be reasonably comprehended by judicial interpretation to be included in any of the Entries in the Legislative Lists. To meet such a situation, a residuary power is provided, and in the Indian Constitution, this residuary power is vested in the Union Legislature. Once, therefore, it is found that a particular subject-matter has not been assigned to the competence of the State Legislature, "it leads to the irresistible inference that (the Union) Parliament would have legislative competence to deal with the subject-matter in question."[34]

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[34] Acharya Dr. Durga Das Basu, Commentary on the Constitution of India, Vol. VIII 8988 (8th ed., LexisNexis Butterworths Wadhwa, Nagpur, 2011)

[35] See Maxwell, Interpretation of Statutes, 11th ed., pp. 253-4

11. "When it is said that a penal statute must strictly construed it means that when the Legislature intends the infliction of suffering or an encroachment on natural liberty and rights, it must manifest its intention with reasonable clearness,[35] for a court will presume that the legislature does not intend what it has not clearly expressed. The question of construction thus raised is a question of exercise of power.[36]

Position of a member of Parliament/State Legislative Assembly/State Legislative Council after disqualification

12. The first thing that should be discussed is who can be called as a "member"? A person is a member once he becomes member of either House of the Parliament or the State Legislative Assembly or the State Legislative Council. If a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) and clause (2) of Article.102, his seat shall thereafter become vacant.[37]

V. CONCLUSION:-

13. Prior to this judgment in cases like K. Prabhakaran v. P. Jayarajan etc.[38] and many others such similar related cases that took off the issue of constitutional validity of sub-section (4) of section.8 of the Representation of People Act, the Supreme Court in its judgment held upheld the validity of the particular provision on the ground of Article.14 or on the ground of public policy implications. The Latin maxim *Ex debitio justiciae* states in the case of A. R. Antulay v. R. S. Nayak[39], which states that justice is the right which everyone is entitled to get and that, injustice should be done away with. Court's action is not meant to prejudice anyone and if any action of the court prejudices someone, it is the duty of the court to rectify such mistake.

14. In the present circumstance, by declaring subsection (4) of section.8 unconstitutional, the Supreme Court did away with the injustice done to the convicted non-members of the parliament. Just because by getting convicted, the sitting members would get disqualified and if the conviction is set aside

[36] H. M. Seervai, Constitutional Law of India, Vol. 1 174 (4th ed. reprint, Universal Law Publishing Co. Pvt. Ltd, New Delhi, 2011)
[37] A.101 (3) (a), The Constitution of India, 1950.
[38] (2005) 1 SCC 754.
[39] AIR (1988) SC 1531

in the appellate court. Though the conviction will be set aside retrospectively (if incase the guilt of the person convicted or sentenced is not proved), they will not get back their membership. Retrospective effect does not justify the validity of the constitutionality of the said provision which is in question.

15. The Researchers think that the Supreme Court rightly decided the present case considering the aspect of the said provision being ultra-vires to the Constitution of India. The conviction of the members in being decided by the court and whether the member is guilty or not is to be decided by the court of law[40]. The parliament is not the legitimate body or authority which is empowered with the power to decide whether the convicted person is guilty or not, since its purpose is legislation i.e., law making. The parliament has no power to retain a convicted person or to privilege such a person because doing so would be in contradiction to the statutory provision. The judiciary plays an important role in this regard since it has the reins of both i.e., the operation of the conviction as well as the operation of the articles 101 (3) (a) and 190 (3) (a). When it is stated that a conviction is stayed, it does not mean that the conviction is non-existent; it just means that the conviction is non-operative.[41] So, as per the researchers' opinion the existence of subsection (4) of section.8 is not of great help to the convicted members because even if this provision states that the disqualification shall not take effect but as per Article.101(1), such said person shall be convicted, and on the verge of conviction, he is disqualified. So, either the provision of Constitution needs to be amended or that the provision of the Representation of People Act, 1951 to be declared ultra-vires. There ought to be existence of harmonization between the Constitution and the statutory provisions being enacted keeping the Constitution in mind. There should not be conflict between the two. The decision of the Appellate court needs to be appreciated since this case is one of its kinds and the judgment of the court was in variation with the previous cases discussed in the light of subsection (4) of section.8.

16. Though the Researchers do consider that there were lacunae the said judgment. The court's decision as to perspective effect to judgment is acceptable to a certain extent because the intention behind this case to

[40]B. R. Kapur Vs. State of Tamil Nadu and Another, (2001) 7 SCC 231.
[41]Ravikant S. Patil v. Sarvabhaouma S. Bagali, (2007) 1 SCC

eradicate dirty politics and corruption from the society. Instead of not just declaring the subsection (4) of section.8 ultra-vires, the court could have also ruled down or penned down certain obligations upon of the sitting members like they ought not to participate in the session of both the House of parliament as well the Legislative Assembly and Legislative Council of the State, not allowing the convicted members for participating in the voting, etc., and not by stating that principles of Natural Justice[42]. It cannot be an excuse that the law-makers are innocuous about the presence of such laws and their provisions, especially when they are convicted of offences of criminal nature. This case would help to lift the veil of the tinted government.

17."Moreover, where the Court is prima facie satisfied about his involvement in the crime and consequently framed charges, out of electoral arena would be a reasonable restriction in greater public interests. There cannot be any grievance on this."[43] However, it may be provided that only those cases which were filed prior to six months before an election alone would lead to disqualification as proposed. It is also suggested that persons found guilty by a Commission of Enquiry should also stand disqualified from contesting elections."[44]

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[42]Harla Vs. State of Rajasthan, AIR (1951) SC 467.
[43] T.S. KRISHNA MURTHY, Proposed Electoral Reforms, (July 30, 2004) available at http://eci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf (last visited on February 1, 2014)
[44] Id

BOOK REVIEW

Title of the Book: *Integrated Clinical legal Education* by Shuvro Prosun Sarker, Anirban Chakraborty and Shounak Chatterjee , Universal Law Publishing co.,New Delhi,2014, .ISBN978-93-5035-441-1, Price-Rs.210/-

Reviewer: Prof. N.K. Chakrabarti

The Authors of the book *Integrated Clinical legal Education* articulate that the book is " an effort to trace through the historical backdrop of legal education , the efforts that were mandated to make in order to reform the system of legal education so that the Indian legal fraternity has a strong Bar and bench in the times to come." With that end in view the authors lay down clinical method of teaching pedagogy to be followed which would reform the system of legal education. The book examines various aspects of clinical legal education to improve method of teaching in law schools in India. It covers subject of clinical methods of teaching comprehensively and the topics are also discretely identified in a manner that allows the reader to use the book as reference tool to review a specific topic or address a single issue relating to clinical legal education in India.

The book is divided into 12 chapters and covers topics ranging from historical backdrop of legal education in india to model teaching manual for Indian clinical educators. Topics are arranged in a logical manner that allows the reader to build on the information as they proceed through the text. The starting point of the book is the journey of legal education in India through the establishment of the Government Law College in Bombay in the year of 1855 and subsequently discussed the current status of the legal education in India. The premise on which the authors tried to look into the problems of legal education stated in the conclusion of the chapter on 'Legal Education in India- Present Status in the following words: " There are problems that persists even at the present day which if properly not addressed shall affect legal education and in turn the quality of the bar and bench." The authors mentioned CDC of Bar Council of India to identify the problems. But these are not reflecting the problems in totality. It would have been better if the authors mentioned some other Reports in this regard.

The term 'clinical legal eucation' was first coined by Jerome Frank in 933 in United States in his article "Why not a Clinical Lawyer school?'(81 PA L Rev. 907, 19330 and since then has been the focus of attention for mprovement of legal education and for creating a synthesis between the law chools and the legal profession. The motto of clinical legal education is learning by doing. 'it is considered as an extremely beneficial tool of instruction for law students because it exposes the students to practical skills and values of the legal profession"(See ICLE p.42).The authors have rightly observed that clinical legal education expanded beyond the geographical borders of US and has subsequently attained a global reach.

The authors identified five different objectives of clinical programmes, namely:

I. Inclusion of poverty and development issues into the curriculum.

II. Promote the values to provide equal justice to the disadvantaged.

III. Confront the ethical issues by dealing real cases and to gain basic lawyering skills.

IV. Increase access to the legal profession from the disadvantaged class of people.

V. Expand the resources for legal representation for disadvantaged.

Clinical education is first and foremost a method of teaching. Among the principal features of that method are : students are confronted with problem situations of the sort that lawyers confront in practice; students dealing with the problems in role ; their interact with others in attempt to identify and solve the problems and most important critical review of students performance(71). The central tool for clinical teaching involved live-clients. The authors discussed four models of live-client clinics based on Supervision Theory. These models are categorized as:

(i). Live-client clinics involving solely representation of client in judicial, quasi judicial and administrative forums;

(ii). Live-client externship(field placement clinics)

(iii). Legal literacy or street law clinics involving live clients ; and

(iv). Public policy or law reform type clinic involving live clients.

These models differ in their character because the character of supervision and types of supervisors involved variation. However supervision remains essentials to each of these clinical models. The authors have prescribed all the above models for adoption in India and discussed the challenges for supervision of clinical programme in the backdrop of Law schools set up and curriculum. In the last chapter under the heading "model teaching Manual for Indian Clinical Educators" the authors discussed in details the place of clinical legal education in India and its adoption . The authors also mentioned some fundamental professional skills and values which are central to clinical legal education curriculum. The annexure at the end are very helpful to the students as well as teachers to implement the programme of clinical legal education in India.

After having read and considered the book , the key question is whether the authors have met the goal in writing this book . In my view the goal has been achieved. The work is not intended as critical review of clinical legal education in India . It is meant more as an expose of need and methods of clinical legal education and where appropriate used some examples in india.The authors keep the readers interested while imparting important information. The best way to sum up the book is to borrow the closing words from the Foreword written by Prof. Manoj Kumar Sinha, "This book will be great importance not only for the law students but also for the teachers who are entrusted with practical training courses at various law schools in india to trace the history, present status, future strategy and means and methods of clinical practice" Reinvigorated after reading this book I am eagerly awaiting adoption of clinical legal education in more and more law school and law colleges in India.

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