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JOURNAL OF THE CAMPUS LAW CENTRE

VOLUME 1: 2013

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From the Desk of Professor-In-Charge

I take great pleasure in presenting the first volume of, much needed, The Journal of Campus Law Centre (JCLC) to the distinguished readers.

The mantle of Professor-In-Chargeship was placed on my shoulders on 14 May, 2013. In the first week of my headship of Campus Law Centre, two co-incidents happened. First, Anju Sinha, my learned colleague had made me realize that CLC has not published any research journal so far. Second, Ajitesh Kir, the then Student Union President presented me a copy of the inaugural issue of Campus Law Centre Student Law Review (CLCSLR), a student-edition- publication. Both these incidents fuelled a desire in me to bring out our own Law Journal at the faculty level. In my first Staff Council meeting on 22 May, 2013, a Committee –Campus Law Centre Journal Committee- was constituted to bring into existence the Law Journal. The Convener of the Committee did not take any interest in this endeavor and had to be relieved. The members of the Committee did a wonderful job in fulfilling the requirements for obtaining the ISSN etc.. With the active cooperation of the well-wishers of CLC, on June 11, 2013, JCLC got approved by National Institute of Science Communication and Information Resources (NISCARE), Council of Scientific and Industrial Research,New Delhi, and was assigned ISSN 2321-4716.

I take pride in stating that Campus Law Centre a dynamic leader in the field of legal education has been producing many Supreme Court and High Court Judges, distinguished jurists, vice-chancellors, leading advocates, cabinet ministers and legal luminaries. Shri Kapil Sibal, Minister of Law and Justice; Justices Vikramajit Sen and Arjan Sikri, Judges, Supreme Court of India, 31 sitting Judges of Delhi High Court, Shri Mohan Parasaran, Solicitor General of India, Shri Jagdev, Member Bar Council of Delhi and former Member Bar Council of India, Shri Gopal Subramanium, Senior Advocate and Shri Sidharth Luthra, Additional Solicitor General of India are some of the glittering stars of the Campus Law Centre.

CLC with its glorious past of 90 years is maturing like an old wine which now needs a new bottle. The CLC's present building which was constructed 50 years back in 1963 for 250 students is crumbling under its own weight of more than 2000 students. Instead of expanding the premises of CLC, another law centre with more than 2500 students, has been housed in its premises adding additional burden on it. CLC is in an urgent need of infrastructural development both in terms of space as well as state of art facilities. We are quite hopeful that CLC will get both in near future.

Professor Ranbir Singh, Vice-Chancellor, National Law University, Delhi while launching the official website of Campus Law Centre- www.clc.du.ac.in- on 24 July, 2013 emphasized the need for quality research for the growth of legal institution. Legal research, he said, is a necessary concomitant of law teaching as well as for the professional growth of a law teacher. We whole heartedly believe in his statement. The slogan-Publish or Perish – holds good not only for teachers of foreign universities but also for Indian universities including Delhi University. It hardly needs to be mentioned that the Journal will go a long way in encouraging and providing a platform to the faculty and others for expressing their views, new ideas and research undertaken by them.

I would like to thank the authors whose writings have been included in this Volume. Professor K.N. Chandrasekharan Pillai, a well-known authority on criminal law, has analysed the approaches of the judiciary with regard to investigation. He highlights that the approach towards conducting of investigation has been undergoing a change and now it is generally accepted that free and fair investigation has to be ensured by the Courts in as much as it is a part and parcel of fundamental rights. Professor N.K. Chakraborti, on the other hand, presents an empirical study of legal process relating to crimes against women from the victim's point of view and argues that in relation to offences against women the victim is a 'forgotten woman' in the criminal justice system.

Varun Chhachhar in his excellent article on Right to Information, rightly maintains, that file notings are an integral part of a file and if section 4 of the Right to Information Act is followed in the letter and spirit, citizens may not have to file RTI applications. I am also thankful to Dr. Eqbal Hussain, Dr. Jeet Singh Mann and other authors for their wonderful contribution on the subject of domestic violence, domestic workers, Nagoya Protocol, Lokpal, Companies Bill, 2013 etc.

Professor Rajiv Khanna, my esteemed teacher and colleague, retired, a few months back, after a long distinguished career as a teacher, and academic administrator. We extend our best wishes for his long and active life. His brief profile has been presented by Dr. Gunjan Gupta which appears in this volume.

Recently two former Professors of CLC left for heavenly abode. Professor Lotika Sarkar, an outstanding feminist and first woman lecturer as well as the first Professor-In-Charge of CLC passed away in February, 2013. Before this, in January, 2013, Professor Mata Din, a popular teacher and able administrator, who got constructed the Auditorium for CLC during his tenure as Professor-In-Charge, died . This Volume contains a Commemorative Section in memory of these two great Professors. We are grateful to Dr. Usha Ramanathan for permitting us to publish her article on Professor Lotika Sarkar.

The Editorial Committee of the Journal has done commendable work in producing JCLC. Dr. Gunjan Gupta, has graciously consented to be the Editor of JCLC and has contributed for the Journal to the best of her abilities. Anju Sinha has persistently and meticulously worked spending long hours in editing and correcting various drafts of JCLC. Harleen Kaur has done the painstaking work of shaping the Journal, communicating with law publishers informing them about the Journal and sending requests for books to be reviewed. I also appreciate the efforts of Dr. Poonam Verma and Mizum Nyodu who took all pains in checking the footnotes, spellings and other work of proof reading for publishing this Journal. I am grateful to Professor

Ashwani Kumar Bansal, Head and Dean, Faculty of Law, University of Delhi for his moral support in bringing out this Volume. This has been a maiden attempt of CLC to publish the Journal. I am sure that it will meet the aspiration of its readers and will inspire the intellect of the members of the legal fraternity.

I thank the proprietor of New Images Printers, the university printers for doing the satisfactory and professional job in the publication of the first volume of JCLC with a quality print, finest paper and elegant cover and design. Mr. Rahul Khanna deserves especial appreciation for bringing out the Volume in time.

Campus Law Centre
University of Delhi
Delhi
23 September, 2013

Professor (Dr.) Usha Tandon
Professor-in-Charge

EDITORIAL

The debut edition of the Journal of Campus Law Centre is going to adorn the shelves of all lawmen including eminent lawyers and distinguished jurists.

The speciality of this volume lies not only in the factum of creative contents of this compilation but more so for the reason of such contributions being made by thorough scholars and researchers. The horizons of this work are as wide as it starts from crime against women and matrimonial law to right to information, legal aid and gram nayayalya act and so on. The Volume also contain Notes, Addresses, Book Reviews and Commoratives by distinguished legal experts.

It would not be out of place here to mention that we as a team have done minimal scissor-cuts wherever necessary and injected least possible insertions so as to maintain originality of the write-ups and at the same time we have at our level the best to keep the flow of each of the write-ups and this compendium as a whole.

At this juncture, when I am having this first hand exposure for being a witness to this new milestone in arena of legal journalism, I pray to the invisible yet inevitable god to bless this sincere effort so that we feel encouraged to do even better while bringing successive editions.

I place on record my gratitude to Professor Usha Tandon for giving me this opportunity to edit and write this prologue. I feel irresistible to acknowledge the contributions made by all the members of editorial committee –Harleen Kaur, Anju Sinha, Poonam Verma and Mizum Nyodu-who spent long and tedious hours in editing the Journal.

Dr. Gunjan Gupta

NOTES AND ADDRESSES

INVESTIGATION VIS-A-VIS JUDICIARY – NEW TRENDS

*K. N. Chandrasekharan Pillai**

Friedman in his "Law in a Changing Society" stated that 'state of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society.[1] This is very true of the developments in the Indian Criminal Justice System. Many a concept came to be reviewed, revised and reformulated during the last decades. The inauguration of the Indian Constitution has indeed induced the system to augment this change. Further, the efforts of the Supreme Court to look at the concepts in the constitutional context made the changes imperative. This becomes evident when we examine the views/ approaches of courts with reference to several issues. In this note it is proposed to look at the approaches of the judiciary with regard to investigation over a period of time.

As early as in 1945 the Privy Council had ruled that investigation is the prerogative of the police and the judiciary does not have any right to interfere with it.[2] This position is being reiterated quite often by our courts[3]. However, a perusal of later decisions signifies that the experience of our courts with the investigating agency, the police has made them to assign a significant role to the court for ensuring free and fair investigation. This happened gradually as is evident from the case law.

Following its decisions the Supreme Court asserted its position in *Babu Bhai* v. *State of Gujarat* [4] thus:

"Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in tainted and biased manner. Where non- interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation".[5]

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* Professor of Law, Former Director, India, Law Institute, New Delhi.

1 Quoted in *Shailesh Jasvantbhai* v. *State of Gujarat*, (2006) 2 SCC 359, Also see (2012) 8 SCC 734

2 *Emperor* v. *Nazir Ahmad*, AIR 1945 P.C. 18

3 *State Of Bihar And Anr v. J.A.C. Saldanha And Ors*, (1980) 1 SCC 554

4 (2011) 1 SCC (Cri) 336. Also see *Nirmal Singh Kahlon* v. *State of Punjab* (2009) 1 SCC 441

5 (2011) 1 SCC (Cri) 336 at 351

The significant position of the court in the context of conduct of investigation came to be stated by the Supreme Court again in *Samaj Parivartana Samudaya & Ors.*v. *State of Karnataka*[6] thus:

"Significantly, it requires to be noticed that when the court is to ensure fair and proper investigation in an adversarial system of criminal administration, the jurisdiction of the Court is of a much higher degree than it is in an inquisitorial system. It is clearly contemplated under the Indian Criminal Jurisprudence that an investigation should be fair, in accordance with law and should not be tainted. But, at the same time, the Court has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offenders escaping the punitive course of law. It is the inherent duty of the Court and any lapse in this regard would tantamount to error of jurisdiction."[7]

With regard to the impact of mistakes committed by the Investigating Officer on the outcome of cases and the attitude the trial court should adopt, the Supreme Court in *State Of Karnataka* v. *K. Yarappa Reddy*[8] said:

"The Court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case."

The callous way the police and the courts handled the complaint of a lady in an investigation into a case involving death of a person made the Supreme Court to respond thus:

"In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her complaint properly investigated. The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution."[9]

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[6] (2012) 7 SCC 407

[7] *Id.* at 428

[8] 1999 (8) SCC 715. Reiterated in *Alagarsamy & Ors* v. *State By Deputy Superintendent of Police*, (2011) 1 SCC (Cri) 560; AIR 2010 SC 849

[9] *Azija Begum* v. *State of Maharashtra*, (2012) 3 SCC 126

In this context the decision rendered by Justice S. Nagamuthu of the Madras High Court in *Katturaja, Vettum Perumal @ Krishnan* v. *State represented by the Deputy Superintendent of Police*[10] ordering further investigation by a new team assumes importance for the students of criminal procedure who are interested in relating the developments in criminal justice system with the changing values in society.

Briefly it was a case involving murder of a man, his wife and two children. Two persons accused of the offence came to be awarded death penalty though the investigating police admitted that there was no sufficient evidence. It is a sad commentary of the callous attitude and practices of our police in the administration of criminal justice. No investigating police officer was present in the court during trial. The Court records its concerns thus:

"However, the Superintendent of Police told the Court that when the trial before the lower Court was in progress, he had an occasion to go through the records and he himself was not satisfied with the investigation as there were a lot of flaws committed by the Investigators. He further stated that at that stage, since the trial was in progress, he was not in a position to take further steps for further investigation."[11]

The Court was disappointed by the officer who registered the case. Though there were four deaths, she registered the case only for one count and she had no explanation to offer. Though there was mention of bloodstained finger prints, no finger print was lifted for investigation. Nor was there any mention in evidence about the help received from sniffer dog. The Investigating Officer stated that in his secret investigation he found that the accused mentioned in FIR were not involved and therefore he omitted them from the case.[12] In fact there is no provision enabling the Investigating Officer to do secret investigation. He had not informed about his secret work to the court either. These circumstances made the court to conclude:

"We regret to state that, we are totally dissatisfied with the investigation. Prima facie, we are of the view that with the materials available on record by way of

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[10] Cri App (MD) No. 19 of 2013

[11] *Id* at para 6

[12] See *Dharam Pal* v. *State of Haryana*, (2013) 3 KHC 221 (SC) holding that the magistrate has powers to summon accused mentioned in FIR but not included in the police challan, generally called charge sheet. If the magistrate is of opinion that they are triable by the Court of Sessions, he can commit them to that court for trial though the police did not find them involved in the case. This again is an instance where the upper judiciary recognises the power of the Magistrate vis-a-vis investigation.

evidence, it will be too difficult for this Court to come to a definite conclusion that these two accused are the assailants."[13]

The Investigating Officer was not aware of the fact that the new accused were the assailants till the completion of inquests.

The court relied on various decisions and asserted that the present proceeding was continuation of the trial that took place in the trial court it being a refered trial. The court also after examining *Popular Muthiah* v. *State represented by Inspector of Police*[14] issued instructions for further investigation. The court does seem to be influenced by the observations in *Popular Muthiah* v. *State represented by Inspector of Police* which run as follows:

We have noticed herein before that the jurisdiction of the learned Magistrate in the matter of issuance of process or taking of cognizance depends upon existence of conditions precedent therefor. The Magistrate has jurisdiction in the event a final form is filed (i) to accept the final form; (ii) in the event a protest petition is filed to treat the same as a complaint petition and if a prima facie case is made out, to issue processes; (iii) to take cognizance of the offences against a person, although a final form has been filed by the police, in the event he comes to the opinion that sufficient materials exist in the case diary itself therefor; and (iv) to direct re- investigation into the matter.[15]

In this context it may be worth noting that the Supreme Court in *Dayal Singh* v. *State of Uttaranchal*[16], *Gajoov. State of Uttarakhand*[17] has already indicated that the court is empowered to proceed against defaulters in police or medical departments who do not actively cooperate with trial.

Thus the approach towards conducting of investigation has been undergoing a change and now it is generally accepted that free and fair investigation has to be ensured by the court inasmuch as it is part and parcel of constitutional rights enshrined in Art.20, 21 and 14 of the Indian Constitution.

It is generally agreed that the constitutional courts viz High Courts and the Supreme Court have power to order investigation a second time after the first

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[13] *Supra* n. 10 at para 16
[14] (2006) 7 SCC 296
[15] *Id* at para 54
[16] (2012) 8 SCC 263
[17] (2012) 9 SCC 532

investigation has failed.[18] The question as to the nature of subsequent investigation has been answered in some decisions as further investigation or fresh investigation or reinvestigation.

It is interesting to note that Justice Nagamuthu considers the new investigation as 'further investigation' and following the observations in *Popular Muthiah*[19] he locates the power of trial court to order further investigation under s.173(8). The view that the new investigation would be a continuation of the trial obviates the necessity to vacate the conviction and sentence registered by the trial court. The court found authority for this proposition from the Supreme Court decision in *Hasanbhai Valibhai Qureshi* v. *State of Gujarat*[20]. The court observed:

"From the above judgment, there can be no difficulty to firmly conclude that, at any stage, before the final conclusion of the trial, the trial court has got the power to order for further investigation, when the court is satisfied that the investigation was flawed."[21]

It is unfortunate that the newly found accused who were not mentioned in the FIR came to be awarded death penalty on the basis of evidence which was insufficient even according to the police. Had the High Court not been vigilant, injustice must have been done in this case. The High Court could have pulled up the police and the lower judiciary for having presented such a case for its consideration.

Be that as it may, the decision in *Katturaja* reflects the acceptance of the judiciary that it has to make at least sporadic forays into the territory of investigation as the present times call for such a step.

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[18] See *Vipul Shital Prakash Agarwal* v. *State of Gujarat*, (2013) 1 SCC 197. In this case, a CBI investigation was initiated on direction of the Supreme Court after the charge sheet from the first investigation by the state police was submitted. Here also the second investigation was considered as continuation of the first investigation giving the impression that the second one is further investigation rather than a fresh one or a reinvestigation. The plea for default bail under s.167)2) CrPC on the basis of delay in submission of inquiry report was however declined.

[19] *Supra* n. 14

[20] (2004) 5 SCC 347

[21] *Id.* at para 29

WELFARE MEASURES FOR ADVOCATES

*Jagdev**

If this was a discussion in any Western country, I could have safely assumed that the august gathering belongs to one of the most lucrative and glamorous professions. But, here, in india, knowing the historical role that lawyers have played-be it the independence struggle or social reformation, the Indian Bar of more than 13 lakh lawyers has brilliant professionals who are here not necessarily for money, but also for other reasons such as prestige, job satisfaction, freedom and independence of profession and even service to the people.

Secondly, the culture of lawyers has taken root here only after the Britishers. Before that, disputes were traditionally settled by the Panchayat or the king itself and nobody ever needed a lawyers. The status of the profession in pre-independence era has no comparison with its present status both social and economic. Today, Advocacy has become a source of livelihood for a majority of lawyers. Which is why, welfare of such a strong and varied community is of even greater importance.

Why do we need these welfare measures at all?

This is to promote entry of greater caliber and merited individuals who join the profession as independent practitioners for its intellectual height rather than just the money that a MNC can offer. After all, the saying that, a lawyer is known by his pleadings and not by the commercial advertisements worth of any brand, has stood the test of time for years.

You may wonder why we need so many independent practitioners? Reason is that the common litigant may not be able to afford the luxury of hiring a MNC. Furhter all newly enrolled young lawyers may not have the resources to be hired by MNCs or leading law firms.

Hence we need such welfare measures that encourage new entrants and also dissuade them from fleecing innocent litigants.

For any organization, including the Bar Councils, to survive or thrive on its own, without governmental support is very difficult. Hence to effectively face the challenges that are posed by the modern times, the Bar looks towards the Government for necessary support such as:

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* Member, Bar Council of Delhi and former Member, Bar Council of India.

**Addren delivered at the Golden Jubilee celebration of Bar Council of India at Vigyan Bhavan, New Delhi on May, 4, 2013.

1 Grants for lawyer's welfare

2. Stipend @ Rs. 5000 per month for three months

3. Monetary help to spouse/children of deceased lawyer (minimum ten lakhs)

4. 50% of the cost imposed by the Courts should be deposited in the Welfare Fund of thr Bar Council

5. Senior Advocates should donate 10% of their income to the Welfare Fund. This donation should be exempted from income tax.

6. All Discrict Courts should be upgrated so as to provide for more chambers to Advocates

7. Legal Aid Fund should be routed through the Bars, to ensure that every advocate does two legal aid cases free of cost per month

8. As being done in many States, the Government should allot more plots for housing needs of lawyers, as very often landlords are wary of keeping lawyers as tenants.

Thank you very much for your kind and patient hearing.

ARTICLES

CRIME AGAINST WOMEN: AN EMPERICAL STUDY OF LEGAL PROCESS IN WEST BENGAL

*N.K. Chakrabarti**

I

Introduction

A survey of statistics of crime against women shows that every year the number of crimes against women is spiraling higher and higher. Though the graph of crime against women is galloping at a very fast pace, but the authorities instead of doing anything concrete keep passing the responsibility from one authority to another. Violence against women is now a burning problem in India and this demands justice to women as victims of crime.There is a pattern of offences against women that's deep and horrific and incessantly overlooked. Occasionally a case in metro city get a lot of attention in media, while the abundance of cases of violence against women in this country are overlooked on the question of how the victims were languishing for justice in the trial Court. This study is an humble attempt to look into the legal process in the administration of criminal justice system in India and to examine how far our procedural laws are really responsive to women as victim of crime. To base the premiseof the paper the author thinks it appropriate to quoteJustice Krishna Iyer *in Krishnalal Vs. State of Haryana*[1] where he observed " A socially sensitized judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections written into it."

II

Research Design

The present study focuses on the actual facts situations and real life experiences in matters of legal process of about 100 cases in West Bengal[2]. With that end researcher has studied about 100 cases in details and also shared experiences in many cases relating to different types of crime against women from different

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1 AIR 1980 SC 926

2 The data was collected by the author as Project Director in Access to Justice by Poor and Disadvantaged People in West Bengal sponsored by UNDP through the Ministry of Law and Justice, Govt. of India coordinated by National Judicial Academy, Bhopal

criminal courts of West Bengal. The cases were selected in the period between 2000 and 2010. Few of those cases have been selected herein under different headings as illustrative blow up. *Summary of case records written in verbatim from the case records as far as practicable.* These are:

i.) Cases where women are sufferer of domestic violence and cruelty on the ground of dowry etc.
ii.) Cases where women are victim of rape.
iii.) Cases relating to dowry death.
iv.) Cases where women are victim of eve teasing, molestation and outraging of modesty

i.) *Cases where victim/women are sufferer of domestic violence and cruelty on the ground of dowry and other causes.*

The introduction of section 498A into the Indian Penal Code has opened a floodgate of complaints by women alleging cruelty and harassment at the hands of their husbands and in laws. The purpose of the section is to punish cruelty, which would include not only harassment for dowry but also any willful conduct which would be likely to cause grave injury or danger to life, limb or health (both mental and physical). Let us look into the court process of few such cases:

CASE NO. 1

Before the Court of Sub Divisional Judicial Magistrate at Alipore.

State –Vs.– 1) Tapan Chakraborty, 2) Mangli Chakraborty, 3) Gopal Chakraborty, 4) Lakshman Paswan.[3]

Date of Incidents – Since Marriage

Facts – Smt. Sheela Chakraboriy, wife of Tapan Chakraborty of S-63/2/1 Lichhubagan, P.S Metiabaruz was married with Tapan Chakroborty in the month of Jaistha (May – June) of 1993. Father-in-law, Mother-in-law and Brother-in-law used to live in Maniktala. The complainant with her husband used to stay in the house of her husband's sister. All the materials and gift relating to marriage, which was given by her father was in the house of Mangli, (husband's sister). Husband often used to stay out of the house due to service obligation. Sister-in-law, her husband Gopal Chakraborty and her father-in-law Lakshman Paswan used lo torture complainant both physically and mentally. Gopal Chakraborty tried to sexually assault her. On resistance,

[3] Metiabaruz P. S. Case No.: 148(6) dt. 02/06/94, u/s 498A I.P.C BGR 6078 of 94/TR 173 of 04

he used to complain to her husband on false allegation. The complainant left for her parent's house, where her parents tried to compromise. Then her husband took her to his village under Thakurpukur P S. for 5/6 days. Then he again took her to her parent's house. After that her husband never came back, He took away 6 gold bangles, one finger-ring,watch and Rs.5000/- which are the 'streedhan' Properties of complainant.

Date of First Information Report- 02/06/1994

Date of filing of Charge Sheet - C.S. no. 94 dated 05/06/1994 filed on andaccepted 25/07/1994

Legal process and Decision:

Framing of Charges - u/s 498A IPC on 04/03/2004.

Trial started and taking evidence of Prosecution Witness - All 4 accused persons were on Court Bail up to 10.6.02. As case record, was misplaced and case record was not up to date, accused were on CB. Copy was not ready up to 12/01/2004. On 12/01/2004 copy was ready summon issued upon all accused for taking copy on 04/03/2004. Defacto Complainant filed *an* affidavit for discharge of the Accused on 24/03/2004. Charge sheet had been submitted, under section 498 A I.P.C. Copy received, Courtgranted bail to the accused. As accused person no. 4 died, case against him stood abated. It was submitted that the husband and wife wereliving together. Case was taken to SDJM's personal file for trial and 07/04/2004 was fixed for appearance. On 09/09/2004 all the accused, Pleaded innocence and prayed justice. The complainant filed affidavit forcompromise, but section 498A is non-compoundable Offence. P.W. No – 1 Sheela Chakraborty was examined on 9, 9.04.

Period of taking evidence of Defence Witness - No D.W. After examination of accused S. 313 Cr.P.C. On 09/09/2004 accused Tapan Chakraborty, Goal Chakraborty and Mangli Chakraborty were acquitted

Adjournment Details – Adjournment due to non preparation of copies by the prosecution in the Court from 19/09/1997 up to I2/01/2004, On 04/03/2004 charge was framed and 07/04/2004 was fixed for appearance of accused. From 07/04/2004 to 28/07/2004. Case was adjourned on the Prayer of the accused person.

Hearing u/s 313 Cr. P.C – On 09/09/2004, above mentioned accused persons were examined u/s 313 Cr. P.C.

Delivery of Judgment - Accused are acquitted, u/s 248 (1) Cr.P.C. on 09/09/2004 after hearing of argument of" both sides.

CASE NO. 2

Before the Court of Sub-Divisional Judicial Magistrate at Alipore

State –Vs.–Amit Sanyal[4]

Date of Incidents - Since marriage till 02/08/2001

Facts - The Complainant Natasa Sanyal got married to AmitSanyal of 49/B, Golpark Housing Society, Govindapur Road, Lake Gardens, Kolkata 700045 on 27/11/2005 Sri Amit Sanyal habituated in drinking alcohol and used to abuse Complainant physically and verbally. All marital relations used to inflict physical and mental torture on the claim of Dowry. Hence, this case was filed.

Date of First Information Report – 04/08/2001.

Date of filing of Charge Sheet - Charge Sheet No: 36 of 2002 dated 28/02/2002 u/s 498A IPC was filed citing *5* witnesses.

Legal process and Decision:

Framing of Charges - Charge framed u/s 498A IPC on 16/02/2004 fixing trial on 24/03/2004. Sole accused on Bail was present. No prosecution witness was present inspite of service of summons. The accused was acquitted u/s 248 (1) Cr.P.C.

Trial started and taking evidence of Prosecution Witness- Trial was fixed on 24/03/2004. The P.Ws, were settled to be at Lucknow. Marriage dissolved before the District Judge at Alipore being Mat Suit No: 1229 of 2002 u/s 13B of the Hindu Marriage Act. No P.W. Case u/s 498A IPC is non compoundable. Hence accused was acquitted.

Period of taking evidence of Defence Witness - No Defence Witness(D.W.)

Adjournment Details - On 05/08/2001 the accused was arrested. Bail prayer was rejected. On 09/08/2001 no report received from Investigating Officer. Case Diary produced. Interim Bail granted. On 23/08/2001 interim Bail was confirmed on 01/03/2002. On 15/05/2002 case could not be heard inspite of presence of the accused. Case was transferred to Sri. P.K. Roy

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[4] Lake P.S. Case No.: 221(8)01, u/s: 498A I.P.C. C.G.R. No.: 2537 of 2001, T.R. No.. 83 of 2001

for disposal. 11/12/2002 was fixed for consideration of Charge. Nothing could be heard on that date because of the Lawyers' cease work. On 22/04/2003, 21/06/2003 none present on behalf of Prosecution On, 16/02/2004 P.O. was transferred. On 24/03/2004 case was fixed for examination of P.Ws (Prosecution Witness) and D.Ws, if any. Sole accused on Bail was present. No P.W.

Hearing u/s 313 Cr.P.C - No P.W, Hence, no examination u/s 313 Cr. P.C,

Delivery of Judgment - On 24/03/2004 accused was acquitted as case was not proved by PWs and accused persons were released and discharged from Bail Bond.

CASE NO. 3

State of West Bengal –Vs.–Shyamal Mondal.[5]

Complainant: Smt. Soma Mondal, wife of Sri Shyamal Mondal of Pratap Nagar, Nabadwip, Nadia.

Date of occurrence: Tuesday, the 8th day of December, 2001.

Place of occurrence: Barrackpore Station platform No. 2 in down Krishnanagar local train.

Date of First Information Report: 11/12/2001 at 13:30 hours

Facts: victim Soma Mondal was married with accused Shyamal Mondal and after marriage accused and his father used to inflict various types of torture upon the complainant. Several amicable talks were held but as it yielded no result. Complainant was compelled to live at her father's house most of the time and in last month she had returned to her father's house. On 07/12/2001 accused came to her father's house to bring her back and as such victim on 08/12/2001 started for her matrimonial house. When they reached Krishna nagar by a bus her husband started to abuse him with filthy languages. At that time hot altercations among themselves started and many people gathered on Krishna nagar railway platform. In order to go to Titagarh with the help of some people she boarded in a Sealdah local where she found that accused has also boarded. At about 5:00 pm when the train reached Barrackpore station accused in order to kill her had pushed her from train on the platform when she sustained grievous injuries and she was treated at Barrackpore B.N. Bose Hospital.

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[5] Dum Dum G.R.P.S Case No. 87/2001 dt.11/12/2001

Legal process:

Date of arrest: Accused Shyamal Mondal was arrested on 12/12/2001 and he was released on bail on 15/03/2002 as charge sheet had not been filed within statutory period.

Date of charge sheet: Charge sheet Under Section 498A/506/307 IPC has been submitted on 06/09/2002 against Shyamal Mondal.

Date of commitment: 07/08/2002

Trial: Trial could not be started till 06/09/2006 as police has failed to execute warrant of arrest.

CASE NO. 4

State of West Bengal –Vs.–1) Sambhu Mahato, 2) Karuna Mahato, 3) Archana Mahato, 4) Gour Mahato, 5) Santona Mahato, 6) Ranjan Das & 7) Durga Sarkar.[6]

De-facto Complainant: Manaranjan Mahato.

Date of lodging FIR: 07/02/2002.

Facts: daughter of defacto complainant namely Ranju Manju Mahanto was married with accused Sambhu Mahanto 10 years back. After the birth of a child, accused No. 1 Sambhu at the instigation of other accused persons used to create pressure upon complainant's daughter for bringing Rs.20,000/- (Rupees Twenty Thousand) from her parents. As victim had failed to bring the same from her parents, accused persons used to assault her both physically and mentally. Meanwhile victim conceived for the second time but due to torture, abortion caused and victim could not bear the incident and she became blind. Accused persons had driven her on 1st Jaistha 1409 B.S. and then accused Shambhu had married illegally with another lady namely Durga Sarkar.

Date of arrest: Police had arrested accused Sambhu Sarkar on 05/07/2002 and other accused persons surrendered on 22/07/2002.

Date of submission of charge sheet: 27/08/2002

Legal process:

Date of service of copy Under Section 207 Cr. P.C.: Since copy was not ready. Ten dates were adjourned namely 27/11/2002, 27/02/2003, 08/07/2003, 09/12/

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[6] Banshihari P. S. Case No.: 52/02 dt.04/07/2002u/s: 498A/34 I.P.C.

2003, 13/04/2004, 17/05/2004, 20/07/2004, 17/09/2004, 17/11/2004, 14/12/2004 ultimately copy was served on 24/12/2004.

Date of framing charge: 27/10/2005

Judgment: PW. 1, defacto complainant, PW. 2, victim and PW. 3, did not corroborate prosecution case and as such accused persons were acquitted on 22/03/2006 from charge Under Section 498(A)/34 IPC.

CASE NO. 5[7]

Name of Complaint:

Archana Singh, W/O - Rajendra Singh D/O - Paresh Nath Singh, Residing at 4 No. Bankola Colliery, P.S - Andal P.O - Ukhra District - Burdwan

Accused:

1. Rajendra Singh
2. Sushila Singh
3. Birendra Singh
4. Smt. Sahil Singh
5. Nagendra Singh
6. Rabindra Singh

Residing at: Village - Dakhintala, P.O + P.S (Police Station) - Mou, District - Mou, Uttar Pradesh.

Facts: Complainant and accused No.1 was legally married according to Hindu rites and customs on 20/01/2000. It was a love marriage. At the time of marriage the father of the complainant paid Rs.50,000 cash amount and 5 bhories of gold ornaments and other gifts as dowry. After few days of the marriage the complainant was tortured physically and mentally by in laws as it was a love marriage. Consequently she was pressurized to bring Rs.1,50,000 from her paternal house. Complainant's father paid Rs.10,000 to the complainant No. 1 to prevent the torture upon his daughter. Thereafter a female child was born out of the wedlock and thereafter she was abetted to commit suicide, and since then the complainant retuned to her paternal home and filed this complainant.

Case filed on 21/03/2005.

On 21/03/2005 case filed and transferred to 2nd J. M for disposal.

[7] Andal P.S. Case u/s: 498A/406/34, I.P.C., G.R. No.: 94/05, T.R. No.: 12/05

On 22/03/2005 Sri S. Dutta, 2nd J.M, received record from Ld. Sub Divisional Judicial Magistrate, Durgapur.

On 08/04/2005 complainant files hazira with one witness. After Solemn Affirmation u/s 200 Cr.P.C. prima facie case established. Requisites at once. Requisites filed, and it was issued.

On 20/05/2005 Complainant filed hazira. Envelop containing requisites returned. One petition filed by Ld. Lawyer who prays for representation u/s 205 Cr. P.C. on behalf of all accused persons with an under taking to file vakalatnama on next date.

Considering the circumstances, warrant of arrest issued against all the accused persons.

21/05/2005 complainant filed hazira. Requisites were issued.

13/05/2005 complainant files hazira. No execution report of warrant of arrest.

10/08/2005 Complainant is present but she filed incomplete requisites, Prayer for submitting fresh requisites was allowed as last chance.

30/11/2005 complainant files hazira. Warrant of Arrest issued through Superintendent of Police of Mou P.S. through registered post with acknowledgement due.

01/03/2006 No S/R received. No steps taken by both the parties. Show cause to complainant.

20/03/2006 Show cause filed on behalf of complainant. Prayer was heard, considered and allowed.

20/04/2006 complainant is present, and show cause filed on her behalf on 20/ 03/2006 was accepted.

11/05/2006 No execution report in respect of warrant of arrest.

21/09/2006 No execution report in respect of warrant of arrest.

26/09/2006 Record is put up by petition. Accused No.1 and No. 2 surrendered before court and prayed for bail.

Interim bail of Rs.500 with one surety granted.

26/10/2006 Complainant is present and prays for confirmation of interim bail. No execution report of warrant of arrest against other accused.

26/11/2006 Complainant is present. Out of 7 accused 2 are present 4 surrendered by petition and prayed for bail. Accused persons were enlarged on interim bail of Rs.500/- with registered surety.

22/03/2007 Complainant filed hazira. 6 accused on interim bail was absent by petition and prayed for confirmation of interim bail. Interim bail extended.

26/03/2007 Warrant of proclamation and arrest not issued against Sushila Singh.

22/06/2007 Warrant of Proclamation and Arrest not issued against Sushila Singh.

12/09/2007 Complainant takes no steps. Show cause to Complainant No execution report of warrant of proclamation and arrest.

15/11/2007 fixed for execution report of warrant of arrest. Complainant took no steps. No step by accused also. Adjourned to 26/11/2007 for show cause.

26/11/20007 no steps taken by complainant. Last chance to file show cause. Fixed 26/03/08 for show cause otherwise case shall be dismissed.

26/03/2008 no steps taken by either side, due to cessation of work in the court.

ii.) *Cases where women are victim of rape*

The rape and gruesome murder of a young women on a bus in New Delhi on December 16th 2012 was treated as exceptional incident. But the growing incidence of rape is a global phenomena[8] But the prosecution of rapists and the conviction rate of rape cases definitely raised the issue of effectiveness of our procedural laws. Following cases we will examine the efficacy of our Criminal Procedure Code and Evidence Act in reality.

CASE NO. 1

State of West Bengal –Vs.– Ajoy Mitra[9]

Place: Inside a hotel room at 109, Ultadanga Main Road, Kolkata – 700067 name and address of defacto complainant: Ruspa Kamal (original name with held) aged about 15 years, daughter of Subarna Kamal of 109, Ultadanga Main Road, Kolkata – 700067.

Facts: Complainant Puspa Kamal was a worker of the accused person's eating house at 109, Ultadanga Main Road and serving that hotel since five years. She

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[8] Rebeca Solnit "*A Rape a Minute, A Thousand Corpses a Year* "in G:FOCUS visited on 2/0502013

[9] Section 01 Case No.: 165 dt. 14/06/1996 u/s: 376 I.P.C. date and hour when incident reported: on 14/06/1996 at 15:10 hours G.R. No.: 1329/96, T. R. No.: 66/2000

used to sleep in that hotel. In the month of January, 1996, while the complainant was sleeping in the hotel at that time, accused raped her. The victim did not make any complaint as she was assured by the accused that he will marry her. After that the accused raped her almost every day in the hotel. In the process, the victim became pregnant by the accused and she insisted to marry her, but the accused Ajoy Mitra driven the victim from his hotel. Thereafter the victim girl came to the police station and lodged the complainant.

Date of charge sheet: After completing investigation C.S. was submitted on 17/05/1998 against the accused Ajoy Mitra under Section 376 IPC.

Legal process: Accused was arrested on 17/06/1996 and was released on bail on 01/08/1996. In the charge sheet 13 persons including victim have been cited as witness. Neither blood nor semen could be detected in Ex – A.B.C.D. but semen could be detected in Ex – F but group of semen could not be determined as quantum was not sufficient for determination.

Case was committed to the court of session on 14/07/2000. As accused was absconded, so W/A against him was issued by Trial Court on 12/06/2001 W/A could not be executed by police since 28/04/2006 and for which trial could not be started.

CASE NO. 2

State of West Bengal –Vs.– Badrud Jamal @ Jamal Doctor[10]

First Information Report lodged on: 02/10/2004

Date of occurrence: 01/10/2004.

Name of Complaint: Anowara Bibi (mother of victim).

Fact: on 01/10/2004 (Friday) all the members of her family went to mosque and victim Of ruza (original name withheld) was doing domestic works alone in the house. Taking advantage of such a situation, accused illegally trespassed at the house of victim and victim was not suspicious as accused used to come to their house. Accused asked Afruja to go in a room which she complied. Accused suddenly caught hold of her forcibly committed rape upon victim who is only aged about 14 years. One Kulsun Bibi who happens to be the sister-in-law of complainant Anwar Bibi, had noticed the incident and she reported it to her neighbour and accused in the meantime had fled away from the place of occurrence by riding a bicycle.

[10] Kushmandi P. S. Case No.: 68/04 dt. 02/10/2004, u/s: 448/376 I.P.C., S. C. No.: 339/04, S. T. No.: 01/05

Date of surrender: Accused voluntarily surrendered before the court on 19/10/2004 and he was taken into custody after rejecting his bail prayer. Anticipatory bail prayer of accused was rejected earlier on 18/10/2004 in Misc. case No. 396/04.

During investigation statements of victim and eye witness Kulchun Bibi were recorded under Section 164 Cr. P.C.

Date of filing charge sheet: Investigating officer after completion of investigation has submitted charge sheet against accused Badrud Jamal under Section 448/376 IPC on 03/11/2004.

Date of serving copy to accused person Under Section 207 Cr. P.C.: 04/12/2004

Date of Commitment: 18/12/2004

Date of framing charge: Charge framed against accused person under section 376/448 IPC on 04/01/2005.

Forensic report: Victim stated that immediately after occurrence she had washed her wearing apparels as per advice of family member and as such forensic report shows that no semen could be detected in either Salwar or Kamiz and neither spermatozoa nor gonococcus could be detected in vaginal swab of victim.

Legal process: During trial defacto complainant Anwara Khatoon was examined as PW1, victim as PW 2, Shyamal Kr. Ghosh as PW 3, Mazina Begam (neibour of victim) as PW 4, brother of victim Asrafas Haque as PW 5, Ayasa Begum as PW 8, Massure Bewa as PW 9, Narul Hag as PW 10, S.I. Biswanath Halder as PW.11 and I.O. Jayanta Dutta as PW. 12.

Examination Under Section 313 Cr. P.C.: Accused was examined Under Section 313 Cr. P.C. and he answered that he is innocent.

On the same date argument also heard and accused was acquitted Under Section 235(1) Cr. P.C. as most of the witnesses turned hostile and on dock they did not support their statement as made by them before I.O. Under Section 161 Cr. P.C. or Under Section 164 Cr. P.C. before Magistrate.

CASE NO. 3

In the Court of Ld. Assistant Sessions Judge, 2nd Court, Hooghly

State of West Bengal – vs. – Rajen Das.[11]

Name of the Complainant: Smt. Kamala Roy (W/o Late Ramrup Roy), Padripara, P.O. & P.S. Chandannagore, Hooghly.

[11] Chandannagore P.S., District – Hooghly, Case No.: 122 of 2004 dt. 31/05/1996 u/s: 376 I.P.C. S.T. No.: 41 of 2004

Name of the Accused persons: Rajen Das @ Rajmohan Das, S/o Late Priyanath Das, Halderpara, P.S. Chandannagore, District – Hooghly.

Fact of the Case: On 31/05/1996 in between 20:00 hrs. to 20:30 hrs one aged man Rajmohan Das @ Rajen Das committed rape upon an aged widow lady named Kamala Roy in her house in absence of her son. The accused forcefully took off the victim's sari and tore off her under garments and forcefully raped her by way of direct penetration. The victim raised a hue and cry and a local boy named Shyamal Biswas came to her rescue Shyamal caught Rajen red handed and gathered a crowd where Rajen confessed his guilt and offered a sum of Rs.50,000/- to the victim as compensation in lieu of which the victim should suppress the whole incident. But victim refused to do so and lodged a complaint with the Chandannagore P.S. on the basis of which a Case was initiated and the accd was forwarded before the Court of Law for legal recourse.

25/08/2004	:	This date was fixed after commitment for appearance of the accd.
30/09/2004	:	This date was fixed far appearance of the accused and framing of charges. The charge was framed and a schedule of consecutive dates were fixed for trial.
03/01/2005	:	Examination of prosecution Witness (PWs) No. 1 & 2
04/01/2005	:	Examination of prosecution Witness (PWs) No. 3 & 4
05/01/2005	:	Examination of prosecution Witness (PWs) No. 5 to 7.
06/01/2005	:	Examination of prosecution Witness (PWs) No 8 & 9. As some vital PWs. were yet to be examined the P P. prayed for time. Time prayer allowed and next dates were fixed.
24/01/2005	:	Examination of the rest PWs.
25/01/2005	:	Examination of the rest PWs. were completed and next date was fixed for examination of the Accused u/s 313 Cr.P C. and hearing of arguments.
27/01/2005	:	The Accused was examined u/s 313 Cr.P.C and after hearing of arguments on that date Judgement was pronounced. Due to lack of proper evidence the Court acquitted the Accused person.

iii.) ***Cases relating to dowry death***

In India, dowry is an inseparable part of marriage. Like a contagious disease, this evil custom spread all over the country and has became a nightmare for millions of women in India. In every 102 minutes there is one dowry death, in every 33 minutes a woman becomes the victim of the cruelty of her in laws; almost invariably because of insufficient dowry[12].

CASE NO. 1

In the Court of Additional Session judge, 1st Track Court, Chandannagore, Hooghly

State of west Bengal –Vs.– Haradhan Adhikary & Others[13]

Name of the complainant: Elder brother of the victim Krishna Adhikary (nee Goswami)

Name of the accused Persons:

i) Haradhan Adhikary (Husband)
ii) Bijoy Krishna Adhikary (Father-in-law)
iii) Satyabala Adhikary (Mother-in-law)
iv) Chaina Adhikary (Sister-in-law)
v) Jasoda Adhikary (Sister-in-law)

Facts of the case: Accused Haradhan Adhikary was married to Krishna Adhikary (nee Goswami) on 11/05/1993. At the time of marriage the accused demanded gold ornaments and cash. The elder brother of Krishna paid Rs.10,000/- as dowry. The accused tortured the Victim for more Dowry and gave her an ultimatum that if remaining Dowry be not paid then they shall Kill her by burning. On 21/07/1993 Bijoy Krishna reported that Krishyna was ill and on 22/07/1993 the police of Gangipara Police Station told that Krishna was admitted to Hospital with severe burn Injuries. On 23/07/1993 Krishna was transferred to SSKM Hospital and at 6:00 am the Victim succumbed to death. The death was due to burn injuries.

07/11/2000 : Commitment before the District & Sessions Judge Hooghly

10/11/00 : Transferred to 1st Additional District & Sessions judge Hooghly

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[12] Dr. Manik Chakraborty: "Violence against Woman and Law" in Gender Justice (2004) edited by Dr. N.K. Chakraborty and Mrs. S. Chakraborty published by R. Cambray & Co. Page 102.

[13] Tarakeshwar P. S. Case No.: 87 of 1993 dt. 23/07/1993 u/s: 498A/304B, G.R. No.: 541 of 1993, S.C. No.: 315 of 2000, S.T. No.: 317 of 2004.

16/06/04	:	In between this period either the accused were not present or the Court was on leave or was lying vacant, for which the case was delayed.
12/07/04	:	The Case was transferred to 1st Fast Track Court, Chandannagore Hooghly.
13/08/04	:	For framing of charges by the court. Charge was framed and schedule was fixed for trial.
10/09/04	:	PWs. were examined
13/09/04	:	Witnesses were not present
14/09/04	:	Witnesses were not present
15/09/04	:	Witnesses were not present .
16/09/04	:	Witnesses were not present
18/09/04	:	As witnesses were not present, P.P. prayed for time.
24/09/04	:	Some PWs. were examined
08/10/04	:	One of the PWs was examined
02/12/04	:	As witnesses were not present P.P. prayed for time.
09/12/04	:	For examination of remaining witness and the accused to be examined u/s 313 Cr. P.C. As witnesses were not present the Court closed the evidence and accused persons were examined u/s 313 cr. P.C.
20/12/04	:	Argument was heard in full on behalf of both the sides
23/12/04	:	Judgment was pronounced. The accused persons were found not guilty for the offence and were acquitted u/s 235 Cr. P.C.

CASE NO. 2

In the Court of Additional Sessions Judge, 1st Fast Track Court, Chandannagore, Hooghly

State of West Bengal –Vs.– Srikant Prasad Gupta and Others[14]

Name of the Complainant: Father of the victim girl Renu Gupta (nee Shaw)

[14] Bhadreswar P. S. Case No. 190 dt. 24/07/1999 u/s: 498A/34/304B I.P.C., S.C. No.: 141 of 2001S.T. No.: 7 of 2004

Name of the accused persons:

i) Srikanta Prasad Gupta
ii) Kavita Devi
iii) Onkarnath Gupta
iv) Anil Gupta
v) Pratima Gupta

Fact of the Case: On 24/07/1999 at about 14:05 hrs de-facto-complainant filed a written complaint before Officer - in - Charge, Bhadreshwar Police Station stating that Renu Gupta (Nee Shaw) aged about 18 years was his daughter and she was married to one Omkar Nath Gupta 1½ years back according to Hindu Rites and customs. All others accused are the in-laws of Renu who tortured her both physically and mentally. She informed this to her father de-facto-complainant but he and other family members advised her to adjust with them. On 24/07/1999 the local people informed that Renu was admitted to Chandannagore Government Hospital. Reaching the Hospital it is found that she got severe burn injuries on her person. Renu told that on 23/07/39 at about 11:00 p.m. all the accused persons first assaulted her and thereafter set fire on her person Renu was transferred to S.S.K.M. Hospital for better treatment but she succumbed to death on 17/08/1999.

28/08/2004	:	This date was fixed for framing of charges against the accused persons. The P.P.-in-charge framed the charges against the accused persons and a schedule of consecutive dates were fixed for trial
10/09/2004	:	Prosecution Witness (PWs) No. 1 to 4 was examined and cross examined
13/09/2004	:	Prosecution Witness (PWs) No. 5 to 9 was examined and cross examined
14/09/2004	:	Prosecution Witness (PWs) No. 10 to 13 was examined and cross examined
15/09/2004	:	Prosecution Witness (PWs) No. 14 to 16 was examined and cross examined. No PWs were examined as some vital PWs were absent. The P.P. prayed for time and it was granted.
24/09/2004	:	This date was fixed for examination and cross examination of the remaining PWs. But only one PW was present and he was examined. Another date was fixed.

08/10/2004	:	This date was fixed for examination and cross examination of the remaining PWs. But no PW was present another date was fixed.
02/12/2004	:	This date was fixed for examination and cross examination of the remaining PWs. and examination of accused persons by the Court u/s 313 Cr. P.C. but the P.P. prayed for time and the prayer was allowed as last chance.
09/12/2004	:	This date was fixed for examination and cross examination of the remaining PWs. and examination of accused persons by the Court u/s 313 Cr.P.C. as last chance. But neither P.P. nor the witnesses turned up. The Court fixed a date for the above purpose as a special last chance.
17/12/2004	:	This date was fixed for examination and cross examination of the remaining PWs. and examination of accused persons by the Court u/s 313 Cr. P.C. as special last chance. But no witnesses turned up. The Court fixed the next date for hearing of argument of both sides.
20/12/2004	:	Argument was heard in part and another date was fixed for further argument.
07/01/2005	:	This date was fixed for hearing of further argument but as the Court was busy with administrative work another date was fixed for hearing of further argument and judgment.
18/01/2005	:	This date was fixed for hearing of further argument and pronouncement of Judgment. Argument was heard and the Judgment was pronounced. The accused persons were acquitted.

iv.) ***Cases where women are victim of eve-teasing molestation and outraging of modesty.***

In spite of relevant sections of IPC, incidents of sexual harassment of women specially at public place and cases of eve-teasing have registered a sharp increase. Most of such incidents are not reported because of the negative attitude of the police and the difficulties encountered in proving the crime. Simple form of eve-teasing and molestation are covered by section 294 and 509 IPC as there is no specific Act on eve teasing. However graver forms of eve-teasing

and molestation which are accompanied by gestures indicating the threat or use of force are confined by section 354 of the IPC, as acts of such kind lead to the outraging the modesty of women.

Study of available cases show that victims are reluctant to face the dock on the fear of humiliation, social stigma, future marriage etc and such criminals go unpunished.

CASE NO. 1

State –Vs.– Sarfaraz Ahmed[15]

Date of occurrence: 09/06/2002

Name of de-facto complainant: Susmita Banerjee.

Facts: On 09/06/2002 at about 2:15 pm., defacto complainant Susmita Banerjee while proceeded for St. Paules Cathedral Church for a bus at the bus stop, accused Sarfaraz Ahmed asked, "Do you want to go disco to night"? complainant without giving any reply boarded one bus at route No. 3C/1 and at that time accused Sarfaraz boarded a taxi and after chasing the bus he reached near Tata Centre, and from Tata Centre stoppage he also boarded in the same bus and when the bus reached terminus and complainant got down from bus, accused had followed her and abused her with filthy languages in an indecent manner in order to insult her modesty.

Arrest: After receiving complain, accused was arrested on 10/06/2002 and as the offence is bailable, he was released on bail on the same day of Rs.400/- with one surety.

Date of charge sheet: Charge sheet was submitted on 14/12/2002 and cognizance was taken on 05/12/2002.

Date of servicing copies to the accused: 17/02/2003

Legal process:

i) Case was adjourned on 17/03/2002, 20/05/2003, 10/07/2003, 04/09/2003, 29/10/2003, 16/12/2003 on the ground of absence of accused.
ii) Plea taken on 16/02/2004 when accused pleaded not guilty and claimed to be tried.
iii) Accused was examined Under Section 313 Cr. P.C. on 21/02/2004.

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[15] Before Metropolitan Magistrate, 11th Court, Kolkata. Hastings P. S. dt. 9/6/2003, G.R. No.: 1322/02

iv) Judgment was delivered on 23/02/2004

Judgment: On the basis of evidence adduced by prosecution witnesses, accused is found guilty for the offence punishable Under Section 509 IPC and he is convicted accordingly under Section 255(2) Cr. P.C. and sentenced to pay fine of 200/- i/d S.I. for 10 days.

CASE NO. 2

State of West Bengal –Vs.– Sekhar Kumar Dutta[16]

Date of occurrence: 01/09/1997

Name of de-facto complainant: Smt. Tanima Roy Chowdhury, an employee of Pomptex (Philips Service Centre) at 46 Bagbazar Street, Kolkata – 700003.

Fact: Complainant Smt. Tanima Roy Chowdhury and accused Sekhar Kumar Dutta, both were employees of Pomptex Philips Service Centre at Bagbazar. Accused during office hours used to disturb defacto complainant in various ways. On 01/09/1997 taking advantage of her loneliness he touched her body and pushed her and also abused her in most filthy languages.

Date of filing charge sheet: After completion of investigation charge sheet was submitted against accused Shekhar Kumar Dutta Under Section 354 IPC.

Date of arrest: Accused was arrested on 30/09/1997 and as offence is bailable, he was released on bail of Rs.1500/- with two sureties on the same date.

Legal process: Cognizance Under Section 354 IPC was taken by Court on 20/09/1998.

Service of copies: The remarkable feature of this case is that it took several years to serve copy of police report and other documents to the accused Under Section 207 Cr.P.C. Meantime victim of the case namely Tonima Roy Chowdhury died.

Dates of adjournment for service of copy: 18/06/1998, 18/09/1998, 12/11/1998, 11/01/1999, 12/03/1999, 03/05/1999, 15/06/1999, 04/08/1999, 22/11/1999, 12/02/2000, 05/04/2000, 04/07/2000, 03/11/2000, 14/12/2000, 17/03/2001, 07/07/2001, 21/09/2001, 11/01/2002, 21/02/2002, 06/05/2002, 06/07/2002, 08/07/2002, 04/09/2002, 08/10/2002, 19/12/2002, 10/03/2003, 07/05/2003.

Examination of accused under Section 313 Cr. P.C.: While accused was examined on 29/03/2004 Under Section 313 Cr. P.C., he pleaded that he is innocent.

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[16] Before Metropolitan Magistrate, 11th Court, Kolkata Shyampukur P. S. u/s: 354 I.P.C., G.R. No.: 1452/97

Date of delivery of judgment: 30/03/2004

Judgment: Accused was found not guilty and charge framed against him was found groundless for want of sufficient evidence.

CASE NO. 3

In the Court of the Additional District and Sessions Judge, F.T.C, Gangarampur at Buniadpur.

State of West Bengal –Vs.– 1) Nirmal Barman, 2) HorenSarkar, 3)Sudev Barman, 4) MithunSarkar, 5) SadhanaSarkar& 6) Smt. Fulkuri Barman.[17]

Date of framing charge: charge Under Section 342/354/307/34 IPC framed on 21/06/2004.

Fact: Prosecution case has been unfolded from the court complaint dated 10/04/2002 lodged by Smt. Minati Barman, treated by FIR Under Section 156(3) Cr. P.C. is that she as well as all the accused persons reside at the same locality Belghoria, Police Station Banshihari. When Smt. Barman was on her way to collect drinking water from a nearby tube well at 6:00pm. on 04/04/2002 accused Nirmal and Haren used filthy and abusive languages against her and started quarrelling. At that time other accused persons had joined with aforesaid two accused persons and accused Sadhana and Fulkuri had pulled her down by catching her hair locks and thereafter accused persons had taken her to nearby room and locked the door from outside. Ten minutes thereafter two female accused persons namely Sadhana and Fulkuri entered the room and had forcibly rubbed chili in the private parts of Minati barman. Minati then lost her sense. Thereafter she was treated at Roshidpur block primary health center.

G.D.E: At 6:50 pm. on 04/04/2002 matter was informed to police being general diary entry No. 30 dated 04/04/2002.

Date of submission of C.S.: After completion of investigation charge sheet No. 64/03 dated 30/12/2003 was submitted by I.O. forwarded by C.I. Gangarampur circle on 03/01/2004.

Court process: Prosecution examined nine witnesses i.e. the de-facto complainant, the neighbours, van puller, husband of the de-facto complainant, doctor, I.O. and some of the aforesaid witness became hostile. PW.6 i.e. lawyer who drafted the complainant was not named as withness in charge sheet, but court by invoking power under section 311 Cr. P.C. had brought him as witness.

[17] Banshihari P. S. Case No. 65/03 dt. 13/12/2003 u/s: 342/354/324/307/34 I.P.C., S. C. No.: 180/2004, S. T. No.: 52/2004

From the evidence of PWS it reveals that there was a land dispute between the parties over creating a passage on the purchase land of victim Minati. PW 2 and 3 i.e. Dipali and Chhabi who are neighbours were eyewitnesses of the incident.

Judgment: Judgment delivered on 11/10/2004. Charge under section 323/342/354/34 IPC against accused Sadhana and Fulkuri and charge under section 342/34 IPC against Nirmal, Haren Mithun and Sudev has been proved and charge under section 307 IPC is not proved against any accused person.

Sentencing part: Convict Sadhana and Fulkuri were sentenced to suffer S.I. for one year and to pay fine of Rs.500/- i/d to S.I. (simple imprisonment) for one month more under section 323/34 IPC. They are also being sentenced to S.I. for one year and to pay fine of Rs.500/- each i/d S.I. for another one month for committing offence under section 342/34 IPC. They are also being sentenced to S.I. for one year and to pay fine of Rs.500/- i/d S.I. for another one month for committing offence Under Section 354/34 IPC and all the sentences will run concurrently. Convict NirmalHaren, Mithun, Sudev are sentenced to suffer S.I. for one year and to pay fine of Rs.700/- i/d S.I. for one month more for committing the offence under section 342/34 IPC. Fine amount, if realized, 75% thereof will be paid to the prosecution Minati Barman by way of compensation under section 357 Cr. P.C.

III

Findings and Suggestions

The aforesaid case studies as well as observations of the author reveals following important aspects of aberrations and defects in our legal process relating to offences against women.

1. The cases on cruelty by husband or relatives of husband against women show that generally such offences are committed due to attitudinal or adjustment problems between wife and husband and in laws. Most of the cases, during trial either compromised on payment of lump sum amount, which wife has to accept under compulsion to avoid hassles of providing legal proof or after months of court battles she has to restore matrimonial relationship under compulsion as she has remote chances of getting remedies from Court.

2. The cases on offences of Rape reveal how the justice is being denied to the victim due to delay for using the time consuming method for the preparation of copies. Though no woman is supposed

to make complain at the cost of her chastity but in many cases it is found that during trail she has to conceal truth before the court under various pressure and compulsions, which ultimately resulted acquittal of the accused The inference drawn from studied cases is that in exceptional cases, when such type of crime is contested, the attitude of the court is not very encouraging and mostly it is the guilty person who comes out victorious after an arduous legal battle, mainly on the basis of observation of the court that victim was a consenting party.

3. Study of cases relating to Dowry death reveals that trial of such cases has been delayed many occasions as court was lying vacant. In few cases where such heinous crime is contested, the accused persons are acquitted. One of the reasons is because though at the time of marriage preparation of list of gifts is mandatory and is to be signed by both the families but generally it is not adhered to. Relation between dowry claim and death of victim could not be connected properly which ultimately leads to the conclusion by the court that death was caused for some other reason and not for dowry demand.

4. The cases relating to eve–teasing, molestation and outraging of modesty. reveals that there are instances of unusual number of adjourn ments (33) for service of copy to the accused and it required almost five years. This reveals the inherent lacunas in our criminal justice procedure resulting accuital of the accused

5. It is found under the present system, if one of the accused evades appearance in court, the proceedings get adjourned till his presence is secured. Until then victim's witnesses are coming to the court without actually any progress in the case being made or achieved. The court issues non- bailable warrant against the absent accused. If the police is unable to execute the warrant and returned the same to the court, the court has to declare him as proclaimed offender and follow the procedure as laid down in sections 82 to 88 of the Cr. P.C. In this respect procedural law has not been suitably amended making it easy for the court to split up the case against the absent accused and proceed with the case with available accused by giving separate case number.

6. Section 173(2)(ii) of Cr. P.C. specifically provides that investigating agency while submitting police report on completion of investigation,

shall also communicate the action taken by him to the person by whom the information relating to the commission of the offence was first given. In spite of that police reports, be it in the form of charge-sheet or otherwise, are not being informed to the FIR maker by the police at the time of submission of report before court and as such court has to take the responsibility to inform FIR maker or victim about police action taken after conclusion of investigation.

7. Warrants are not executed in time and investigation report not submitted within reasonable time. The police shows their reluctance in making arrangement for prompt medical examination of the victim, seized of wearing apparel and other articles including weapon used, and in apprehending accused persons etc. for some reason or other.

8. In Court serious cases relating to crime against women are being adjourned without just cause and long dates are given to frustrate the victims. The release of persons, charged with heinous crime, on bail and anticipatory bail has a very demoralizing effect on the victim

9. Researcher found that the Magistrates /Judges fix sometimes more than a dozen cases for trial knowing fully well that hardly 4 to 5 cases can be taken up for evidence in the present court management. Invariably some cases which includes crime against women also got adjourned. In the present practice it is an unpredictable to the victim and her lawyer who do not know definitely as to whether her case would be taken up for hearing on the given date.

10. Under Section 301 Cr. P.C Public Prosecutor may avail himself of the service of counsel retained by a victim but the management of the prosecution always remain with him. Lawyer engaged by victim has to act only under the direction of the public prosecutor. He can only submit written argument and that too with the permission of the court and therefore victim's privately engaged lawyer has no independent status of his own. Researcher has noticed during case study that many criminals go unpunished because the Public Prosecutor has not cross examined the important witnesses in planned manner. Management of prosecution has not been reformed for effective participation of victim in the criminal justice process so that quality of the management of the prosecution can be improved.

IV

A Critique on Legal Process in Trial Courts

As the criminal justice procedure is time consuming so many victims expressed their unwillingness to start the criminal case. Cases are usually adjourned on some reason or other. There are various factors which slow down court procedure and in turn discourages the victim seeking the criminal prosecution. The Supreme Court in number of cases pointed out the lacunas and indifferent attitude of the trial court judges towards women as victims of crime; such as *Dinesh @ Buddha vs. State of Rajasthan*[18] (Prohibition of mentioning names of rape victims in the Court Judgment)) *Sakshi vs. Union of India*[19] (Guidelines for dealing with cases ofsexual/child abuse)) *ShriBodhisattwa Gautam v. Miss Subhra Chakraborty*[20], (*Rape* amounts to violation of the Fundamental Right guaranteed to a woman under Article 21 of the Constitution); *Delhi Domestic Working Women's Forum v. Union of India*[21], (Direction in handling rape victims);) *State of Himachal Pradesh v. Raghubir Singh*[22], (Sole testimony of the prosecutrix in a rape case); *Zahira Habibulla H. Sheikh and Anr.Vs. State of Gujarat and Ors*[23]., (protection of witness and fair trial); *Visakha v. State of Rajasthan*[24] (guidelines for prevention and redressal for sexual harassment at work place); *State of Punjab Vs. Gurmit Singh & Ors*[25] (In-camera trial in rape cases); *Sheba Abidi Vs. State & Anr*[26] (regarding examination of victim in rape cases); *and many other cases.*

In the last case, women domestic servants subjected to indecent physical assault by army personnel in train. A writ petition filed by women's forum to expose pathetic plight of such victims. The Court gave certain directions to deal with such victims. It also called upon the National Commission for Women to engage itself in drafting scheme providing relief to victims of such cases. It also urged the Union of India to take necessary steps. Accordinglyour Parliament passed the Criminal Procedure Code 1973 The law relating to restitution of victim of crime is basically contained in Section 357 of the Cr. P.C, but this provision leaves it entirely to the discretion of the court and unfortunately courts have seldom invoked this power due to ignorance of the object of it. In this context law commission of India observed that the courts are "not particularly liberal" in utilizing this[27] and also commented

18. *AIR 2006 SC 1267*
19. *AIR 2004 SC 3566*
20. *AIR 1996 SC 922*
21. *(1995) 1 SCC 14*
22. *(1993) 2 SCC 622*
23. (2004) 4 SCC 158
24. AIR 1997 SC 3011
25. (1996) 2 SCC 384
26. 113 (2004) DTL 125
27. Law Commission of India 41st Report

that it is regrettable that our courts do not exercise their statutory power as freely and liberally as they could be desired[28].

> "The defects in the present system are : Firstly, complaints are handled roughly and are not even such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself."

V

Concluding Remark

The morass into which the criminal justice delivery system has presently fallen into is not on account of the failure of the law but on account of the failure of the men both in the executive and in the judiciary who wielded the law. From this study one thing is apparent that the victims of offencse against women is a "forgotten woman" in the criminal justice system. The trend shows a rapid increase of incidences of offences against women on the one hand and a growing backlog on investigations, prosecutions and trials and declining rate of conviction on the other. The obvious consequence is that more and more criminals are going unpunished. If this trend is allowed to go unchecked, it will further erode credibility of the criminal justice systems, reduce people's faith and confidence in it's efficacy and further encourage a tendency on their part to take law in their own hands. To do justice to victims of crime in general and women as victims of crime in particular we have to change our social, legal as well as infrastructure of justice delivery system. Moreover to check the increasing trends of violence against women, it is necessary to create a wide atmosphere of resistance and protective measures in which women at all levels are increasingly stand up to fight the violence and seek well established victim justice support system to live with dignity and honour.

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28. Law Commission of India 42nd Report.

VALIDITY OF MARRIAGE UNDER INTERNATIONAL PRIVATE LAW WITH SPECIAL REFERENCE TO 1978 HAGUE MARRIAGE CONVENTION: TOWARDS UNIFICATION OF THE RULES OF INTERNATIONAL PRIVATE LAW

*Usha Tandon**

I

Introduction

In this era of globalization and liberalization, the transnational migration of people is on the rise. With the increasing number of foreign marriages and divorces, a significant rise in matrimonial disputes is taking place[1]. Advances in the field of information and technology especially the internet, have brought to the fore new problems as far as celebration of foreign marriages is concerned. As a result of these developments, it is not unusual to come across cases where husband and wife reside in different countries, possess domicile in a third country and their children reside in a fourth country.

The legal problems relating to the international dimensions of marriage and divorce are also on the rise. There have always been a large number of Indians living abroad, and that trend continues especially with a large number of people working in the Gulf. Recently a substantial number of Indians have settled in the West and are prospering in places like the United States, the Canada, the Australia, the Federal Republic of Germany, the France and the United Kingdom. The lure for setting in foreign jurisdictions attracts a sizable Indian population, but the problems created by such migration largely remain unresolved.[2]

There are cases, where a citizen of this country marries here, and either, one or other or both migrate to foreign countries. Marriages between parties, at least one of whom, is an Indian national, are being solemnized here or abroad. There are instances where parties having married here have been either domiciled or resident in different foreign countries. The problems in the field of marriage and divorce have been confronted by Indian courts many a times.

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1 See generally *Y. Narsimha Rao* v *Y. Venkata Lakshmi*, (1991) 2 SCR 821

2 Law Commission of India, *Need for Family Law Legislations for Non Residents Indians*, Report no. 219, 10, (March 2009)

It is true that each country has its own culture, which regulates inter-personal relationship in the field of family law. Nevertheless, there is a need for the unification and codification of rules of conflict of laws relating to matrimonial matters so as to discourage forum shopping and thereby prevent limping marriages. Requirements of rule of law and gender justice on the one hand, and the need to protect the basic human rights of parties to a marriage on the other, also demand internationally accepted norms to deal with inter personal and inter national disputes. This paper attempts to analyse the Hague Convention that seeks to harmonise the different marriage laws, known as the "Convention on the Celebration and Recognition of the Validity of Marriages", that was concluded at The Hague on 14 March 1978. However the paper starts with the common issues in NRI marriages affecting the women in India.

II

NRI Marriages and Status of Women

The problems of Indian women trapped in fraudulent marriages with overseas Indians are being increasingly reported and coming before the courts of law. Following are some of the typical instances of such problems[3]:

i Woman married to NRI who was abandoned even before being taken by her husband to the foreign country of his residence-after a short honeymoon he had gone back, promising to soon send her ticket that never came. In *Neeraj Saraph* v *Jayant Saraph*[4], the wife who got married to a software engineer employed in the United States was still trying to get her visa to join her husband who had gone back after the marriage, when she received the petition for annulment of marriage filed by her NRI husband in the US court. In many instances the woman would already have been pregnant when he left and so both she and the child (who was born later) were abandoned. The husband never called or wrote and never came back gain. The in-laws who could still be in India would either plead helplessness or flatly refuse to help.

ii Women who went to her husband's home in the other country only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill treated by him in several other ways. She was therefore either forced to flee or was forcibly sent back. It could also be that she was not allowed to bring back her children along. In many

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[3] National Commission for Women, *The Nowhere Brides: Report on Problems Relating to NRI Marriages*, 3-4 (2011)

[4] (1994) 6 SCC 461

cases, the children were abducted or forcibly taken away from the woman. In *Venkat Perumal* v *State of AP*[5], the wife had alleged that she was subjected to harassment, humiliation and torture during her short stay at Madras as well as US and when she refused to accept the request of her husband to terminate her pregnancy, she was dropped penniless by her husband at Dallas Airport in the US and she returned back to India with the help of her aunt and on account of the humiliation and agony she suffered miscarriage at Hyderabad.

iii Woman who was herself or whose parents were held to ransom for payment of huge sums of money as dowry, both before and after the marriage, her continued stay and safety in her husband's country of residence depending on that.

iv Woman who reached the foreign country of her husband and waited at the international airport there only to find that her husband would not turn up at all.

v Woman who was abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the legal permission to stay on in that country. In *Harmeeta Singh* v *Rajat Taneja*[6], the wife was deserted by her husband within 6 months of marriage as she was compelled to leave the matrimonial home within 3 months of joining her husband in the US.

vi Woman who learnt on reaching the country of her NRI husband's residence that he was already married in the other country to another woman, whom he continued to live with her. He may have married her due to pressure from his parents and to please them or sometimes even to use her like a domestic help. In *Dhanwanti Joshi* v *Mdhav Unde*[7], the NRI husband was already married to another woman and during the subsistence of the earlier marriage had married the second wife-Dhanwanti Joshi.

vii Woman who later learnt that her NRI husband had given false information on any or all of the following: his job, immigration status, earning, property, marital status and other material particulars to lure her into the marriage.

viii Woman whose husband , taking advantage of more lenient divorce grounds in other legal systems, obtained ex-parte decree of divorce in the foreign country through fraudulent representations and/or behind her back, without

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5 II (1998) DMC 523
6 102 (2003 DLT 822
7 (1998) 1 SCC 112

her knowledge, after she was sent back or forced to go back to India or even while she was still there. In *Veena Kalia* v *Jatinder N. Kalia*[8], the NRI husband obtained ex-parte divorce decree in Canada on the ground not available to him in India[9].

ix Woman who was denied maintenance in India on the ground that the marriage had already been dissolved by the Court in another country or due to due to conflict of jurisdiction. In *Dipak Bannerjee* v *Sudipta Banerjee*[10], the husband questioned the jurisdiction of Indian courts to entertain and try proceedings initiated by the wife under section 125 for maintenance, contending that no court in India had jurisdiction in international cases to try such proceeding as he claimed to be citizen of United States of America.

x Woman who approached the Court, either in India or in the other country, for maintenance or divorce but repeatedly encountered technical legal obstacles related to jurisdictions of Courts, services of notices or orders or enforcement of orders or learnt of the husband commencing simultaneous retaliatory legal proceeding in the other country to make her legal action.[11]

xi Woman who sought to use criminal law to punish her husband and in-laws for dowry demands and/or , or matrimonial cruelty and found that the trial court could not proceed as the husband would not come to India and submit to the trial or respond in any way to summons or even warrant of arrest.

xii Woman who was coaxed to travel to the foreign country of the man's residence and get married in that country, who later discovered that Indian courts have even more limited jurisdiction in such cases etc. In *Indira Sonti* v *Suryanarayan Murty Sonti*[12], the wife travelled all to wait to and got married in USA to an NRI living there, but was deserted by him. After coming back to India she filed a suit for maintenance in Indian court under the Hindu adoptions and maintenance Act. In this case however she was fortunate to have the decision in her favour with respect to the jurisdiction of the court.

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[8] AIR 1996 Del. 54

[9] See also *Y. NarasimhaRao* v *Venkata Lakshmi* (1991) 2 SCR 821, *Maganbhai* v *Maniben*; AIR 1985 Guj. 187 and *Anubha* v *VikasAggarwal* 100 (2002) DLT 682

[10] AIR 1987 Cal 491

[11] See *JagirKaur* v *Jaswant Singh* AIR 1963 SC 1521; *Marggarate Pulparampli* v *Dr. ChakoPulparmpali* AIR 1970 Ker 1

[12] 94 (2001) DLT 572

III

Rules of International Private Law Relating to Validity of Marriage

The rules of international private law relating to solemnization of foreign marriages and recognition of such marriages differ from one legal system to another. Apart from differences among States in respect to the concept of marriage, there is also a wide difference as to the circumstances leading to the validity of a marriage. While countries like the United Kingdom and India categorise invalid marriage as either void or voidable, some countries do not subscribe to this categorisation. Some others have a third category of 'non-existent marriages'. Besides, there are quite significant differences in the nullity laws of countries. The effects of a decree of nullity also differ from country to country. While in some countries a decree of nullity has retrospective effect, in others it has prospective operation under certain circumstances[13]. With this difference of approaches to the nature and scope of the grounds for nullity of marriage the question arises as to which choice of law rules should apply in the case of transnational marriages. The other related question is: which law should determine whether a marriage is void or voidable? Should it be the law of domicile, nationality, habitual residence or *lex loci celebrationis*?

(i) *Formal Validity*

The rules of international private law of many countries recognise that the *lex loci celebrationis* should determine the formalities for the validity of marriage[14]. However ,there is disagreement on the issue as to whether the law of *lex loci* should be its internal law alone or it should be to the whole of the country of celebration[15]. In English private international law, leaving aside the few exceptions, the rule of *lex loci celebrationis* is a must[16] See J.D. Mc Clean, *Recognition of Family Judgment in the Commonwealth*, (1983)

On the Continent of Europe the test is facultative, namely, the requirement is that the marriage should be formally valid either by the *lex loci celebrationis* or by the personal law of the parties, which is noteworthy. Under French law a marriage which is solemnized outside France should be formally valid either as per the law of the place where it is celebrated or as per the personal law of the parties. The same is the case with the German law[17]. Countries like Greece

[13] Irish Law Reform Commission, *Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decree and the Hague Convention on the Celebration and Recognition of the validity of Marriage*, 1978, 19 (LRC 20-1985).
[14] See Skyes, 'The Formal Validity of Marriage', *ICLQ*, (2) 78 (1953)
[15] M de Costa, 'The Formalities of Marriage in the Conflict of Laws' *ICLQ*,(7) 217(1958)
[16] See J.D. McClean, Recognition of Family Judgment in the Commonwealth, (1983)
[17] See E. Cohen ed., *Manual of German Law*, vol.2 (1971).

and Malta lay down the rule that compliance with personal law is obligatory, if parties belong to the Orthodox Church in the former case and to Roman Catholic Church in the latter[18]. In the East European countries the principle of *locus regitactum*is the governing norm. In these countries, it is well established principle of conflict of laws that a marriage to be formally valid must be in accord with the *lex loci celebrationis.*

(ii) ***Material Validity***

With respect to the material or essential validity of marriage number of rules been evolved and applied from time to time in different countries. Among those, the first and foremost is the rule of *lex loci celebrationis* which was a governing law in England for many years till the decision of House of Lords in *Brook v. Brook*[19]. It still continues to apply as the choice of law principle in the United States, and in most Latin American countries. In the United Kingdom and in some Commonwealth countries the 'dual domicile test' regulates the matrimonial relationship for the last many years. According to this rule, a marriage is valid when each of the parties has the capacity to marry, according to the law of his or her respective domicile.

Civil law countries apply the nationality test for determining the capacity of the parties to marry[20]. There is yet another concept, namely, the 'intended matrimonial home', the chief protagonist of which is G.C. Cheshire[21]. According to this theory, validity of a marriage is to be determined on the basis of the law of the land where the parties want to set up their matrimonial home. Of the several objections to this concept the most serious is uncertainty surrounding the intention of the parties to the marriage with respect to their matrimonial home. The parties may have no firm intention as to their future matrimonial home. The 'habitual residence 'is yet another test which commands increasing international acceptance and which has been the chief contribution of the Hague Convention and is adhered to in many countries determining the essential validity of a marriage. It ensures the application of the system of law of that country with which the parties to the marriage have closest and continuing connection.

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[18] I. Szaszy, *Private International Law in European People's Democracies*, 11 (1964).
[19] (1861) 9 HL Cas 193
[20] See M Trimann, J Zekoll, *Introduction to German Law*, 2005.
[21] P.M. Peter & JJ Fawcett, *Cheshire and North'sPrivate International Law,*721-722,1999.

IV

Indian Private International Law Relating to Marriage

In India, the law of marriage is essentially a personal law. In other words, the governing law of a marriage in India is not the Indian law or the State law but the law of the religious community to which the parties belong without any bearing as to domicile or nationality. The majority community, the Hindus, have their own family law, so is the biggest minority community, the Muslims. Other religious minorities like the Christians, the Parsis, the Jews, too, have their own separate personal law based on religion As a matter of history, the erstwhile Portuguese Civil Code applies to all persons in Goa, Daman and Diu and there are special rules applied to persons in Pondicherry. Special laws have been enacted to protect the traditional customs and usages of certain tribal people in the North East. Ordinarily inter-communal and inter-religious marriages seldom take place in India and as such, there is no possibility of conflict arising between the laws of various communities. However, there is the possibility of the conflict arising indirectly in respect of inter-communal laws. In such a case when one of the spouses to a marriage converts to another religion, the conflict arises between the application of pre-conversion law and post-conversion law.

There is the Special Marriage Act, 1954[22] under which 'civil' marriage' can be performed between any two persons. If the parties to the marriage choose to marry under the Special Marriage Act, its validity is determined on the basis of the said Act even if the parties are domiciled elsewhere. There is still another statute the Foreign Marriage Act, 1969[23] which allows the marriage in a foreign country, between parties, one of whom at least is a citizen of India. Section 11 of the Act has a bearing on the choice of law rules. It lays down that the Marriage Officer will refuse to solemnize the marriage if *lex loci celebrationis* prohibits such a marriage, or if the solemnization of marriage is inconsistent with international law or the comity of nations. Section 23 lays down provisions for the recognition of marriages solemnized under the laws of other countries.

The rules of international private law as applied in this country are not codified and are scattered in different enactments such as the Code of Civil Procedure[24], The Special Marriage Act, The Foreign Marriage Act, The Indian Divorce Act[25], The Indian Succession Act[26], et cetera. Besides, some rules have been evolved

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[22] Act No. 43 of 1954
[23] Act No. 33 of 1969
[24] Act No 05 of 1908
[25] Act No. 04 of 1869
[26] Act No 39 of 1925

by the Indian courts over the years but their over all approach to the matrimonial disputes with foreign elements has been deeply influenced by the English rules of conflict of laws, whether they be the common law rules or the statutory rules. In some cases, Indian courts have endeavored to develop rules relating to the recognition of foreign judgments in matrimonial causes by adopting innovative interpretations of the statute laws. Marriage between a non resident Indian and an Indian girl is one such problematic area.

The Supreme Court of India in the case of *Y. Narsimha Rao v Y. Venkata Lakshmi*,[27] has ruled that 'the jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married'. One could endorse the view of the Supreme Court that any relief in matrimonial disputes could only be on the basis of the matrimonial law under which the parties were married. It seems, erroneous however, that the issue of exercise should be based on the matrimonial law under which the parties were married. Another proposition set out by the Supreme Court in *Smt. Neeraja Seraphv. Sh. Jayant Seraph*[28], namely 'no marriage between a non resident Indian and an Indian woman which has taken place in India may be annulled by a foreign court' does not seem to accord with the rules of conflict of laws.[29]

To deal with a large number of foreign decrees in matrimonial causes, India like other countries, is in need of a well developed body of international private law rules in respect of the solemnization and recognition of marriages, recognition of foreign decrees of divorce, nullity of a marriage, legitimacy and custody of children et cetera. The Hague Conventions have already laid down certain common principles which are basic to a marriage. But India has not so far, chosen to accede the convention.

V

Harmonisation and Unification of International Private Law

We have seen that the internal laws of different countries differ widely from each other. The difference is not only in respect of the internal law of countries, but also in respect of rules of conflict of laws, due to which conflicting decisions have emerged in various countries on the same issue/s

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[27] *Supra* n. 1

[28] Supra n 4

[29] V.C. Govindraj, "Private International Law", in V.C Govindraj and C. Jayraj (ed), *Non Residents Indians and Private International Law*, 9, 2008

There are two models for the unification of private international law: (i) unification of the internal laws of the countries of the world and (ii) unification of the rules of private international law. On account of basic ideological differences among the countries of the world, it is not possible to achieve unification of all private laws. Therefore, the unification of the rules of private international law gains grounds[30]. Before 1951, the main effort was directed to the unification of rules of private international law of the Countries on the continent of Europe, since most of them follow the civil law system[31]. On the other hand, nothing could be done towards the unification of the rules of private international law of the countries of Commonwealth and the States of United States and the continental countries on account of fundamental differences between the common law and civil law system. After 1951, however, some serious attempts have been made at the unification of rules of private international law of all countries of the world. In 1951, a permanent bureau of Hague Conference was constituted. This has been done under a Charter which has been accepted by many countries. Assistance secretaries belonging to different countries have been set up at The Hague. Its main functions are: to keep in contact with official and unofficial bodies, such as the International Law Association, which are engaged in the task of unification of the rules of private international law and to prepare proposals for the unification for private international law for the consideration of members. The Bureau works under the general direction of the Standing Governmental Commission of the Netherlands which was established by a Royal Decree in 1897 with the object of promoting codification of private international law. The Bureau has done some commendable work in the area of the unification of the rules of family law.

VI

Unification of International Private Law Rules as Respects Celebration And Recognition of Marriages

(i) *Pre 1978 Conventions*

The Hague Convention of 1902 (on marriage) and 1905 (on the effects of marriage) represented the first attempt to codify the conflict of law rules relating to marriage and related issues. They had come into force for a small number of Continental European Countries. But they could not serve the general interests of the States parties to the Hague Conference. Revision of these Conventions was discussed during the Vth, VIIth and VIIIth sessions of the Hague Conference. A proposal was made in 1960 during

[30] P Stone, *European Union Private International Law: Harmonisation of Laws,* 5 (2006)
[31] *Ibid.*

the IXth session to return to the issues relating to the personal status. As a result of subsequent discussions in the Xth, XIth and XIIth sessions in 1964, 1968 and 1972 respectively, marriage was approved as a subject of a new Convention. The decision to prepare a new Convention on marriage was dictated to by a number of considerations, namely, evolution in the conception of marriage, the broadening of the membership of the Hague Conference to include States of differing legal systems, the ineffectiveness of the early Conventions and the realization that they would attract no further signatures[32].

(ii) *Hague Convention on Celebration and Recognition of the Validity of Marriages, 1978*

The Hague Convention[33] consists of Four Chapters: Celebration of Marriages[34]; Recognition of the Validity of Marriages[35]; General Clauses[36] and Final Clauses[37]. The first two main chapters of the Convention have a different character from the point of view of States wishing to join the Convention[38]. Chapter II forms the essential core of the Convention and is obligatory, i.e., it is not possible to accept the Convention and exclude Chapter II. On the contrary, Chapter I dealing with celebration of marriages is optional[39]. A Contracting State may reserve the right to exclude the application of Chapter I[40]. For those States willing to accept Chapter I, the Convention provides[41] that the formal requirements for marriages shall be governed by the law of the State of celebration (*lex loci celebrations*). An obligation to celebrate is created only in case where both spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there[42]. It should be noted that Chapter I lays down some

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[32] *Ibid.*

[33] Hereinafter referred as Convention. Full text available on http://www.hcch.net/upload/conventions/txt26en.pdf (last visited on 27.06.2013)

[34] Convention on Celebration and Recognition of the Validity of Marriages, 14 March, 1978, Articles 1-6

[35] *Ibid.*, Articles 7-15

[36] *Ibid.*, Articles 16-23

[37] *Ibid.*, Articles 24-31

[38] See W.L.M. Reese, 'The Hague Convention on Celebration and Recognition of Validity of Marriages', 20 *Virginia J of International Law*, 25, 1979.

[39] A. Malmstrom, *Explanatory Report* on 1978 Hague Convention, available at www.hcch.net/upload/expl26.pdf. (last visited on 25.6.13.).

[40] *Supra* n. 34, Article 16

[41] *Ibid.*, Article 2

[42] *Ibid.*, Article 3(1)

choice of law rules for the celebration of a marriage between parties having connection with more than one State. This Chapter lays down what appears to be choice of rules for the celebration of a marriage though they are far from being complete set of rules. Their form is strongly influences by the principle underlying in the chapter and indeed the Convention as a whole. The question that Chapter I seeks to answer is whether the authorities in a Contracting State are obliged to celebrate a marriage between the parties with connections with more than one state. In the process Chapter I lays down some choice of law rules though not a complete code.[43]

Thus, the Convention does not make it compulsory[44] to celebrate a marriage according to the substantive provisions of a foreign law and a State is still free to refuse to celebrate in case of non-compliance with the law of the State of celebration. It has the effect to exclude application, for purposes of celebration, of the prohibitions of the personal law of one party where the marriage to be celebrated is in the jurisdiction of the party by virtue of nationality or habitual residence[45]. Even here, by virtue of Article 6, a Contracting State may reserve the right , by way of derogation from Article 3, sub-para 1, not to apply its internal law to the substantive requirements of a marriage in respect of a future spouse who neither is a national of that State nor habitually resides there. For instance, if Germany were to make a reservation under Article 6, it would not be obliged to celebrate the marriage of a German national to a Spanish national habitually resident in Spain who did not meet the requirements of German law. If one of the future spouses is connected with the state of celebration either through nationality or through habitual residence, this connecting factor makes the law of that state applicable to both of the future spouses. This reference to a single law avoids nationally a whole series of complications which may arise from the application of a separate law to each of the future spouse to question about substantive requirements for marriage[46].

The Convention further provides[47] that a marriage shall be celebrated where each of the future spouses meets the substantive requirements of internal law designated by the choice of law rules of the State of celebration. The effect of this provision is that a marriage shall be celebrated in for example , England between the 15 years old both of whom are 'domiciled in a country where the

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[43] See Law Commission and Scottish Law Commission , Com. No 165; Scot Law Com. No. 105, *Private International Law: Choice of Law Rules in Marriage*, Part II, paras 2.1-2.11, (1987)

[44] *Supra* n 34, Article 3 (1)

[45] See H.P.Glenn, 'Comment: The Conflict of Laws- the 1976 Hague Convention on Marriage and Matrimonial Property Regimes', *Can. Bar. Rev*, 55 (1977) 586

[46] Malmstrom Report, *supra* n. 38

[47] *Supra* n 34, Article 3 (2)

age of marriage is 14, notwithstanding the fact that the minimum age of marriage is 16. This is because, the choice of law rules of the state of celebration, England refer the question of capacity to the law of the domicile[48].

The State of celebration may require, under Article 4, the future spouses to furnish necessary evidence as to the content of any foreign law which is applicable in preceding articles[49]. This is a wholesome provision as its purpose is to enable the State of celebration to require the future spouses to furnish evidence of their personal laws. For instance, if the people whose personal law is that of the India seeks to marry in United States of America, this article would enable the USA to require to seek furnish evidence of the law in India . The application of a foreign law declared applicable by Chapter 1 of the Convention may be refused if such application is manifestly incompatible with the public policy ("*ordrepublic*") of the State of celebration[50]. According to Irish Law Commission[51] the implications of Article 5 read with Article 3 (1) are that if Ireland.

The basic feature of the Convention is to be found in Chapter II which deals with the recognition of the validity of marriages. If the State in which recognition is sought insists on compliance with the substantive requirements under the law of the domicile of the parties or under the *lexpatriae*, it may pose problems for the recognition of the validity of marriage. This problem is sought to be solved by the Hague Convention by adopting the *lex loci celebrationis*. It must, however, be noted that the rule of recognition of a foreign marriage celebration deals *only* with the case in which the marriage is valid by the *lex loci celebrationis*. It provides no rules for recognition of the validity of marriages which are invalid under that law. Such recognition rule will depend on the choice of law rules of the forum i.e. the well established general rules of private international law of the recognizing State. Such rules may be favorable to the recognition of a marriage. Article 13 clearly envisages that the Convention shall not prevent the application in a contracting State of rules more favorable to the recognition of a foreign marriage. But such basic rules of private international law recognizing State may be unfavorable to the validity of the marriage. The Convention provides no mechanism to save the marriage, regardless of the particular ground of invalidity[52]. Against this background when one looks at Chapter II, it becomes evident that it is applicable to the recognition in a

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48 Law Commission and Scottish Law Commission, *supra* 42

49 *Supra* n 34, Articles 1-3

50 *Ibid.*, Article 5

51 Irish Law Reform Commission, *supra* n 13

52 H.P Glen, *supra* n. 44

contracting State of the validity of marriages entered in any other state and not merely in other Contracting States.[53]

The quintessential aspect of Chapter II is to be found in Article 9. The said Article provides that, subject to the provisions of Chapter II, a marriage validity entered into under the law of the State of celebration shall be considered as such in all Contracting States. This also applies to a marriage which subsequently becomes valid under that law. It further prescribes[54] that a marriage celebrated by diplomatic agent or consular official in accordance with this law shall be considered valid in all Contracting States, provided that the celebration is not prohibited by the state of celebration. While Article 9 requires a Contracting party to recognize the validity of a foreign marriage which is valid under the law of the State of celebration, Article 11sets out the grounds on which a Contracting State may refuse to recognize the marriage. These grounds are as under: where one of the spouses was already married; or the spouses were related to one another by blood or by adoption in the direct line or as brother and sister; or one of the spouses had not attained the minimum age for marriage nor had obtained the necessary dispensation; or one of the spouses did not have the mental capacity to consent; or one of the spouses did not freely consent to the marriage. The grounds of non-recognition set forth in Article 11 may not necessarily be exhaustive, but illustrative. Otherwise it may not cover marriages which are invalid by reason of affinity or marriages invalid for consanguinity relations in the direct line. Homosexual marriages and potentially polygamous marriages are also not covered under Article 11. These grounds of nullity which may be recognized under the domestic laws of a Contracting State but not mentioned in Article 11 may be dealt with under Article 14 which provides that a Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy (*ordre public*).

The Convention also with incidental and preliminary questions[55] by stating that the rules of this chapter shall apply even where the recognition of the validity of marriage is to be dealt with as an incidental question in the context of another question. Article 8 excludes certain marriages like proxy marriages, posthumous marriages, informal marriages, marriages celebrated by military authorities or aboard ships or aircraft from the applicability of Chapter II. These marriages necessarily are to be governed by the existing private international law rules of the Recognising State.

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[53] B.C. Nirmal, "Hague Conventions on the Recognition of Validity of Marriages, Decrees of Divorce and Decisions Relating to Maintenance Obligations", in V.C Govindraj (ed), *supra* n 29 at 54.

[54] *Supra* n 34, Article 9 (2)

[55] *Ibid.*, Article 12

The ratification of a Convention upon a subject matter such as celebration of marriage and recognition of the validity of marriage presents peculiar difficulties for non-unified systems, particularly for Federal States. Article 27 attempts to meet the difficulties by permitting a Contracting State which has two or more territorial units in which different systems of law apply, in relation to marriage, to declare at the time of signature, ratification, acceptance, approval or accession, that the Convention shall apply to all its territorial units or only to one or more of them. Thus, a Contracting State has power to restrict the application of the Convention to one or more of its legal systems. States that have plurality of legal systems of territorial application are also dealt with by the Convention[56]. It provides that where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of the State of celebration shall be construed as referring to the law of the territorial unit in which the marriage is or was celebrated. It further provides that where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of that State in connection with the recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit in which recognition is sought.

Article 20 deals exclusively with the application of the Convention to States which apply different personal laws, normally religious laws, to different categories of persons. It provides that where a State has, in relation to marriage two or more systems of law applicable to different categories of persons, any reference to law of that State shall be construed as referring to the systems of law designated by the rules in force in that State. The said Article has special significance to countries, like India, where there is a plurality of legal systems based on religion.

VII

Conclusion

In the Third Asia Pacific Regional Conference of the Hague Conference on Private International Law,[57] participants from various countries[58] including India and members of the Permanent Bureau of the Hague Conference on Private

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[56] *Ibid.*, Articles 17 and 18

[57] HCCH, *International Cooperation through Hague Conventions in the Asia Pacific*, Hong Kong, China 24-26 September 2008, available at http://www.hcch.net/upload/concl_aprc08e.pdf (last visited on 12.07.2013)

[58] Australia, Bangladesh, Bhutan, Cambodia, China, Cook Islands, Fiji, India, Indonesia, Japan, Republic of Korea, Lao PDR, Malaysia, Nepal, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Samoa, Singapore, Sri Lanka, Thailand, Timor-Leste, Tonga and Vietnam

International Law (the Hague Conference) met in Hong Kong, China, to discuss the relevance, implementation and operation of the Conventions of the Hague Conference (the Conventions) within the Asia Pacific Region in the areas of family relations. The Conference invited the States to consider the benefits *inter alia* of 1978 Hague Convention on Marriage in providing certainty and clarity in respect of these important matters of personal status[59]. The Law Commission of India[60] has also emphasized the need to examine the relevance and adaptability of 1978 Hague Marriage Convention and has indicated that India should sign it. The National Commission for Women asked the Indian government to sign the international convention of Hague on laws of marriage as well as safety of women to help protect NRI brides[61].

Overseas Indian Affairs Minister Vayalar Ravi, in a press conference on the eve of the *Pravasi Bharatiya Divas* (the global conference for overseas Indians) stated that, steps are also being taken by the ministry to ensure that Indian women getting married to NRIs are not exploited or abused. Mr Ravi said India was likely to join the Hague Conference on private international law, to protect the interests of Indian women.[62]

Although Irish law reforms Commission recommended against the ratification of Hague Marriage Convention, Professor B.C. Nirmal opines that India should not feel fettered by these approaches and precedents. According to him our approach to the recognition of the validity of foreign marriage is very liberal and moves closer to the US approach based on the *lex loci celebrations*. He suggests that India should gradually move towards the position adopted in the Hague Convention.[63]

According to Article 24 of the 1978 Hague Marriage Convention, the Convention shall be open for signature by the States which were members of the Hague Conference on Private International Law at the time of its Thirteenth Session. Currently only three States viz., Australia[64], Luxembourg, and the Netherlands have ratified the Convention. Another three States namely Egypt, Finland, and

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[59] *Supra* n 57, para 27

[60] *Supra* n. 2 at 19, para 3.5

[61] http://zeenews.india.com/news/nation/new-asks-govt-to-sign-international-convention-of-hague_594306.html (last visited on 20.7.2013)

[62] http://conflictoflaws.net/2007/india-to-join-hague-conference-to-protect-a-married-womans-rights/ (last visited on 25.6.2013)

[63] B.C. Nirmal, *supra* n 53 at 123

[64] See G.E. Fisher, 'The Australian Adoption of the Hague Conventionon Celebration and Recognition of the Validity of Marriage', *Queensland Institute of Technoligy Law Journal*, Vol. 2. 17 (1986).

Portugal have signed it[65]. In order to give statutory recognition to chapter II of the Convention, in 1985 the Australia has amended the (Australian) Marriage Act, 1961. One of the reasons that the Convention may have so few Contracting States is that states have long observed the principle of comity which has been defined in the United States as the "recognition that one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience and to the rights of its own citizens who are under the protection of its laws. As India is not a member of the Hague Conference on Private International Law at the time of its Thirteenth Session, the Convention is not open to it for signature, ratification, acceptance or approval, but if it wished to become a party, it can do so by depositing an instrument of accession with the Ministry of Foreign Affairs of the Netherlands.

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[65] Hague Conference on Private International Law. "Status Table."http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=88, visited on 22.7.2013

RIGHT TO INFORMATION AND FILE NOTINGS-AN APPRAISAL

*Varun Chhachhar**

I.

Introduction

After almost 60 years since the coming into force of the Constitution of India a national law providing for the right to information was passed by both Houses of Parliament on 12 May and 13 May 2005. The Bill with 146 amendments was adopted by voice vote. This law satisfies a long standing demand of the people raised through various peoples' movements, and gives content and meaning of the right to information recognized since 1973 by the Supreme Court as a concomitant of the fundamental right to freedom of speech and expression guaranteed under art 19(1)(a).[1] It is undoubtedly the most significant event in the life of Indian democracy. In a democracy, the people are the sovereign. They appoint governments as well as dismiss them. The Constitution of India speaks in the flame of 'We the people of India'.[2] The two major institutions of governance, namely Parliament and the state legislatures have representatives of the people elected through free and fair elections.[3] Every adult of more than 18 years of age is entitled to vote,[4] and no person is to be ineligible to vote on grounds of religion, race, caste or sex.[5] These representative bodies, unless earlier dissolved, have tenure of five years.[6] If a legislature is dissolved prematurely, fresh elections are held. The legislatures and the governments are supposed to be responsible to the people. The questions which arise are:- i) whether such responsibility can be reinforced; (b) how will the people judge whether the legislatures or the governments have acted in their interest; and (c) whether the governments have fulfilled the promises, which they made in their election manifestoes. In the legislature, the opposition must act as a watchdog on behalf of the people. However, if it acts partisan in the interest of a political party rather than the people, then the question is who will check the same. No democracy can be meaningful where civil society cannot audit the performance of the elected Representatives, the bureaucrats and the other functionaries who act on behalf of the state. In order to be able to audit the performance of the Government, the people have to be well informed of its policies, actions and failures. An informed citizenry is a condition precedent to democracy.

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1 *Bennett Coleman* v *India* AIR 1973 SC 106

2 Constitution of India, 1950, Preamble.

3 *Ibid*, Arts 79, .80,168 and 170.

4 *Ibid*, Art 326.

5 *Ibid*, Art 325.

6 *Ibid*, Art 83, Art 172.

Parliamentary system of government essentially pre-supposes an active legislature, which controls the executive. Over the years, however, the executive in the parliamentary government has become more powerful reducing the space for legislative control. Even in England, which is the home of parliamentary democracy, supremacy has passed from Parliament to the executive. Government bills leaving less time and chance for a private member's bill to receive attention monopolies Parliament's time. Therefore, the United Kingdom installed further checks on the executive. New inputs such as the Parliamentary counterpart of the Scandinavian Ombudsman became necessary to reinforce legislative supremacy.[7] The United Kingdom has also adopted a law for giving the right to information to people.[8] These steps were taken because the traditional safeguards of parliamentary democracy including judicial review proved to be inadequate. In India, the people are less empowered than those in England because of illiteracy and poverty. However, the Indians are acquiring political education through their participation in the elections. The right to vote which the Constitution gives to every person above the age of 18 years, and which has been exercised in elections held for electing representatives in Parliament and the state legislatures during the last sixty three years, has doubtless created political awareness among the people. The right to vote has, therefore, proved to be an instrument of political empowerment.

It is the poor, the minorities, and the disadvantaged sections including women who have stakes in the successful functioning of the democracy. In some, the Patricians monopolized the knowledge of the laws, and the Plebeians suffered from ignorance. There was a bitter struggle for access to knowledge of the law, which resulted in the first codification of the law in Rome called the 'Twelve Tables'[9]. In England, Jeremy Bentham's crusade for codification of the laws and his dislike of the Blackstone in legal philosophy and criticism of the theory of natural law arose out of his belief that uncertainty and unpredictability of the laws were products of evil.[10] In India, the caste system monopolized access to knowledge in the higher castes. BR Ambedkar, the chief architect of the Indian Constitution, who had suffered the miseries of having been born in a most marginalized caste, awakened the suffering people against such tyrannical system and demanded access to knowledge for all. The White racist regime in South Africa and the Whites in the United States also kept the Blacks away from knowledge. Women were kept away from education and therefore from

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7 Parliamentary Commissioner Act, 1967.

8 Freedom of Information Act 2005

9 WW Buckland, *" A Manual of Roman Private Law "*, 1-2, 1928.

10 Jeremy Bentham, *"The Theory of Legislation"*, 29, 1931.

knowledge for a long time. Knowledge was synonymous with power, and the power includes liberty. Equal access to knowledge has been an important issue in the struggle for social and economic equality.

Until the end of the Second World War, struggle for access to knowledge has been universal. In the present times 'knowledge' has become the most valuable resource. It is the possession of knowledge that makes a society or a nation advanced, strong and secure. Terrorism, the enemy of humanity, also thrives on ignorance and secrecy. "Cyber technology "has facilitated access to knowledge. The human rights movements all over the world have benefited from such increased access to knowledge. Greater consciousness of human rights has arrived because of the accessibility of knowledge. An explanation was sought in the instance of ill-treatment of Iraqi prisoners by the head of the state. The Gujarat communal carnage could not have been publicized if the media had not disseminated the information about it. Knowledge, source of which is information, acts as a great deterrent against tyranny, corruption and misappropriation of resources. Technology has already reduced the area of darkness, but technology ultimately acts the way human beings operate it. In order to take advantage of the technology, people ought to be made morally sensitive. The technology of sex determination is being used to abort female foetus due to obsession with male child preference. This needs to be combated by making the use of such technology illegal and also by informing the people of the possible future hazards of such an imbalanced sex ratio. Only a strong programme of women's empowerment will help achieve this. This means again information about women's rights and the need to have a balanced "sex" ratio for the survival of the humanity. Despotism and oppression thrive on secrecy and lack of information. Terrorism thrives on secrecy and hate. Both need to be combated through information.

II

Secrecy in Government during Colonial Rule

The colonial government kept itself at a distance from the people. It thrived on the culture of secrecy, and distrust of the people. Such culture also produced distrust of the government among the people. The culture of secrecy continued even after independence and even after India became a republic. It has continued for last fifty-five years. It is unfortunately true that the governments of independent India functioned in the same milieu as that of the colonial government until recently. Secrecy has been the rule and transparency an exception. However, when the State became a welfare state, powers of the administration were bound to increase. A welfare state

is always a much-governed state. When the powers; and functions of the state increase, it is the executive branch of the state, which expands and acquires powers, which are discretionary.[11] This perpetuates mysticism, if the authorities wielding power are not accountable to the people, the state can very easily become despotic, and its actions acquire unpredictability making people dependent on the whims of the authorities. The traditional methods of control of the government are bound to prove inadequate to cope with such increased powers. Although actions of the authorities are subject to judicial review and although the courts have extended the scope of judicial review, judicial review has its own limitations. Judicial review is sporadic and formal. Abuse of power can be very subtle and may escape judicial scrutiny. It is difficult to prove that an action is mala fide.[12] Corruption and abuse of power are the inevitable fall-outs of such an unaccountable system of governance. The right to information when vested in the people can act as a deterrent against corruption and abuse of power.

The right to information is a means to empower the people. Information is the source of knowledge. A democratic government is supposed to rule by consent of the people. It may use coercion, but only exceptionally. Its success depends upon voluntary acceptance of its authority by the people. In other words, the state must enjoy legitimacy. Legitimacy means that the governance is perceived to be just and fair, and acting in the interest of the people. Legitimacy of a government depends upon its transparency. A transparent government is bound to be accountable. Transparency means that the people must know who takes decisions, how decisions are taken, and how they are enforced. While no modern government can function without being vested with discretionary powers, such discretionary powers must be de-mystified by letting people know how they are exercised. Lesser the secrecy, greater will be the faith in the government. Distrust of the government is harmful to democracy. Governance must become participatory. People must get an opportunity to ventilate their grievances, and also to suggest alternatives to policies and methods of achieving them. The right to information of the people is a condition precedent to accountable and participatory governance.

III

Constitutional Perspective on Right to Information

The Constitution of India confers fundamental rights on individuals such as the right to equality;[13] the right not to be discriminated on grounds only of

[11] SP Sathe, *"Administrative Law"*, 133, seventh edn., 2004.
[12] *Id* at page 385.
[13] *Supra note 2,* Art 14.

religion, race, caste, sex etc.;[14] the right to equal opportunities of public employment;[15] the right not to be discriminated on the grounds only of religion race caste, sex or descent in respect of employment under the state;[16] the right to six freedoms such as the freedom of speech and expression, the freedom of assembly, the freedom of association, the freedom of movement, the freedom to reside and settle in any part of the territory of India, and the freedom to practice any profession or to carry on any trade business or occupation;[17] the right not to be punished by a retroactive law; [18] the right not to be punished for the same offence more than once[19] the right not to be compelled to give evidence against oneself;[20] the right not to be deprived of life and personal liberty except according to procedure established by law;[21] the rights of a person detained under the law of preventive detention;[22] the right not to be subjected to forced labour;[23] the right of children below the age of 14 years not to be made to work in hazardous employment;[24] the right to freedom of religion;[25] the rights of religious denominations;[26] the right not to be made to pay tax for the promotion of any particular religion;[27] the right not to be compelled to attend religious instruction in an educational institution;[28] the right to have a distinct language and culture and to conserve the same;[29] the right not to be denied admission to any educational institution on the grounds such as religion, race, caste, language or any of them;[30] the rights of the religious and linguistic minorities;[31] and the right to move the Supreme Court for the enforcement of the fundamental rights.[32]

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[14] *Supra note 2,* Art 15 (1) and (2), Art 16(2).
[15] *Ibid*, Art 16(1).
[16] *Ibid*, Art 16(2).
[17] *Ibid*, Art 19(1). Originally there were seven freedoms, but the freedom contained in cl (f) to acquire, hold and dispose of property was deleted by Sec 2(a)(ii) the Constitution (Forty-fourth Amendment) Act 1978.
[18] *Ibid,* Art 20(1).
[19] *Ibid*, Art 20(2).
[20] *Ibid*, Art 20(3).
[21] *Ibid,* Art 21, Art 22(1) and (2).
[22] *Ibid*, Art 22 (4), (5), (6) and (7).
[23] *Ibid*, Art 23.
[24] *Ibid*, Art 24.
[25] *Ibid*, Art 25.
[26] *Ibid*, Art 26.
[27] *Ibid*, Art 27.
[28] *Ibid*, Art 28.
[29] *Ibid*, Art 29(1).
[30] *Ibid*, Art 29(2).
[31] *Ibid*, Art 30
[32] *Ibid*, Art.32

The Constitution also lays down guidelines for the social and economic transformation envisioned therein. The provisions known as the Directive Principles of State Policy are 'nevertheless fundamental in the governance of the country' though they are 'not to be enforceable by any court'.[33]A directive principle enjoins upon the state to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.[34] The state has to, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals, but also amongst groups of people, residing in different areas or engaged in different vocations.[35] The question, which, however, arises, is if these directive principles were not to be realized through judicial process, what would be the sanction behind them and how would they be saved from being a mere string of platitude. Dr B.R Ambedkar, the chairman of the drafting committee and the law minister in the interim government, while defending these directive principles and rejecting the view that they would be mere decorative pieces in the Constitution said in the Constituent assembly:[36]

"*Who should be in power is left to be determined by the people, as it must be., if the system is to satisfy the tests of democracy. But whosoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect those instruments of instruction, which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time*".

This presupposed a vigilant citizenry. The ultimate sovereign in any democracy are the people. Unless people monitor and audit the work of their representatives, democracy is meaningless. The Constitution makers obviously expected that the people would have the final say in the making of the policies and actions of their government. A vigilant civil society is a condition precedent of democracy. The Constitution (Forty-second Amendment) Act 1976 inserted into the Constitution Article 51-A which states the fundamental duties. These duties are to be internalized by every citizen of India. Among these duties, the following pre-suppose an informed body of citizens:

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[33] *Supra note 2*, Art 37.
[34] *Ibid*, Art 38(1).
[35] *Ibid*, Art 38(2)
[36] Constituent Assembly Debates,41, vol 7, November 4, 1948.

(i) to promote harmony and the spirit of common brotherhood amongst all the people of India transgressing religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women;[37]

(ii) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;[38]

(iii) to develop the scientific temper, humanism and the spirit of inquiry and reform;[39] and

(iv) if she is a parent or a guardian, to provide opportunities for education to her child, or, as the case may be, ward, between the age of six and fourteen years.[40]

The inclusion of the fundamental duties in the Constitution shows the importance of the civil society and its duty to promote rationality, scientific outlook, humanism and spirit of inquiry. Such a civil society must comprise a well-informed citizenry.

IV

Judiciary and Right to Information

The common did not have any legal right to know about the public policies and expenditures. It was quite ironical that people who voted the persons responsible for policy formation to power and contributed towards the financing of huge costs of public activities were denied access to the relevant information. This culture of secrecy resulted in prolific growth of corruption. In face of non-accountability of the public authorities and lack of openness in the functioning of government, abuse of power and unscrupulous diversion of the public money was the order of the day. Under such conditions, public and various NGOs demanded greater access to the information held by public authorities. The government acceded to their demand by enacting Right to Information Act, 2005. The strongest exposition in this regard came from Justice K. K. Mathew in State of U.P. v. Raj Narain,[41] who emphasized that in "government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by the public functionaries." The facts of this

[37] *Supra note 2*, Art 51A (e).
[38] *Ibid*, Art 51A (g).
[39] *Ibid*, Art 51A (h).
[40] *Ibid*, Art 51A (Y).
[41] AIR 1975 SC 885.

case were that Raj Narain who challenged the validity of Mrs. Gandhi's election required disclosure Blue Books which contained the tour program and security measures taken for the Prime Minister. Though the disclosure was not allowed, Mathew, J. held that the people of country were entitled to know the particulars of every public transaction in all its hearing.

The major breakthrough was attained in S. P. Gupta v. Union of India,[42] when the apex court imparted constitutional status to RTI. Supreme Court further in a historic decision provided the voter's right to know the antecedents of the candidates[43]. Scope of Article 19 (1) (a) was widened and it was affirmed that the right to know of the candidate contesting election to a House of Parliament or a state legislature or a panchayat or a municipal corporation is a precondition to the exercise of a citizen's right to vote. Thus people have a constitutional right to know the antecedents of the candidates contesting election for a post which is utmost importance in democracy. Later Government brought an ordinance followed by an Act to nullify effects of the judgment. The Act was declared unconstitutional by the Supreme Court[44]. An important observation was made by the court that "the fundamental rights enshrined in the Constitution.... have no fixed contents." "From time to time, this court has filled in the skeleton with soul and blood and made it vibrant." Freedom of speech and expression and its relation with Right to Information has been vividly described by the apex court[45] in the following words:

"*The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self – fulfilment. It enables people to contribute to debates on moral and social issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy.*"

Another issue that made its appearance, mainly thanks to the report of the Administrative Reforms Commission, was the effort to exempt so called "frivolous and vexatious" applications. The first report of the Second Administrative Reforms Commission (ARC), presented in June 2006, had the unfortunate recommendation that the Right to Information Act should be amended to provide for exclusion of any application that is "frivolous or vexatious".

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[42] AIR 1982 SC 149.

[43] *Union of India* v. *Association for Democratic Reforms*, AIR 2002 SC 2112.

[44] *People's Union of Civil Liberties* v. *Union of India*, (2002) 5 SCC 399.

[45] *Secretary, Ministry of I & B, Government of India* v. *Cricket Association of Bengal*, (1995) 2 SCC 161.

Meanwhile, a threat from a new quarter, the judiciary, emerged. In 2007, an Right to Information application was filed with the Supreme Court (SC) asking, among other things, whether SC judges and High Court (HC) judges are submitting information about their assets to their respective Chief Justices?.[46] This information was denied even though the Central Information Commission subsequently upheld the appeal. The main issue was whether the office of the Chief Justice of India (CJI) was under the purview of the RTI Act. The matter was then appealed to by the Supreme Court Registry before the High Court of Delhi, where a single judge ruled that the CJI was covered under the RTI Act[47]. A fresh appeal was filed by the Supreme Court in front of a full bench of the Delhi High Court which has also, since, ruled against the Supreme Court[48].

Interestingly, the real issue was no longer the assets of the Supreme Court judges. In fact, perhaps at least partly in response to public pressure and perception, judges of the Supreme Court and various High Courts (including Delhi) had already put the list of their assets on the web. The dispute seemed to be about more sensitive issues, arising out of recent controversies about the basis on which HC judges were recommended for elevation to the Supreme Court.[49] Newspaper reports suggested that some members of the higher judiciary were concerned that if the office of the Chief Justice of India was declared to be a public authority then the basis on which individual judges were recommended or ignored for elevation would also have to be made public.

Therefore, even as the Supreme Court prepared to listen to an appeal from itself to itself, great pressure was exerted on the government to save them the embarrassment of either ruling in their own favour, or ruling against themselves. This the government could do if it amended the Right to Information Act and excluded the office of the Chief Justice of India (and presumably other such "high constitutional offices") from the purview of the Right to Information Act. Even while the appeal against the single judge order to the full bench of the Delhi High Court was pending, the then CJI wrote a long letter to the Prime Minister, trying to make a case for the exclusion of the CJI from the scope of the Right to Information Act. Among other things, he contended that "Pursuant

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[46] The Supreme Court of India, and all the High Courts, had resolved that all judges would declare their (and their spouse/dependent's) assets to the respective Chief Justice, and update it every time there was a substantial acquisition. This was seen as a means of promoting probity and institutional accountability.

[47] *Judgment of the High Court of Delhi dated 2 September, 2009, W.P. (C) 288/2009.*

[48] *Judgment of the High Court of Delhi dated 12 January 2010, LPA No. 50-1/2009.*

[49] The current system in India gives exclusive power to a Collegium of Supreme Court judges, headed by the Chief Justice and comprising four senior most judges, to decide on whom to elevate (*Re Presidential Reference no.1 of 1998*) AIR 1999 SC 1.

to the decision of the Delhi High Court and in view of the wide definition of information under section 2(f) of the Right to Information Act 2005, several confidential and sensitive matters which are exclusively in the custody of the Chief Justice of India may have to be disclosed to the applicant-citizens exercising their right for such information under the Right to Information Act. Undoubtedly, this would prejudicially affect the working and functioning of the Supreme Court as this would make serious inroad into the independence of the judiciary.....In this scenario, I earnestly and sincerely feel that Section 8 of the Right to Information Act needs to be suitably amended by inserting another clause to the effect that any information, disclosure of which would prejudicially affect the independence of the judiciary should be exempted from disclosure.....". However, there seems to have been no further effort at amending the Right to Information Act. The Supreme Court has also not yet started hearing its appeal to itself[50]. Therefore, as of now (September 2010), that is where the matter rests.

V

File Notings and Right to Information

> The passage of the Indian Right to Information Act 2005 has been almost universally hailed as a landmark piece of legislation that can change the relationship of the citizen with the State. It was considered one of the most progressive Right to Information laws in the world, with several provisions worthy of emulation. With widespread use, it had begun to be seen by citizens groups as a ray of hope to fight corruption, inefficiency, and the arbitrary use of power, in an otherwise dark scenario. What is a government file, why this furore about not wanting to share filesnotings? To most lay persons the government file is a musty compilation of important papers. Almost all of India, even the illiterate knows it. Anyone who has had anything to do with "babus", knows the diabolical significance and power the file holds to control many people's destiny. The government file has two parts to it. The right side has the papers under consideration, (PUCs) and the left side has the "notings", the process through which opinions are written down, added to, and approved or disapproved[51].

Right to Information Act 2005 defines 'Information' as "any material in any form, including records, documents, memos, e-mails, opinions, advices, press

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[50] Subash Chandra Aggrawal, "*My Experience from RTI and Judiciary*" available on http://cic.gov.in/CIC-Articles/RTI-Judiciary-SC-Agrawal.pdf. visited on 4th May, 2013.

[51] Nikhil Dey and Aruna Roy, "*To Note the Noting: People Chasing the Paper Trail*", The Hindu,, July 23, 2006.

releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force".[52] Though the Act makes no express provision on 'file noting', the Right to Information regulator, Central Information Commission, ruled in January 2006 that , " a citizen has a right to seek information contained in file notings and no file (or information) would be complete without note-sheets having file noting". In short 'file notings' are considered as integral part of 'information' and, as the CIC stated, "file-notings are not, as a matter of law, exempt from disclosure". [53]

In a landmark precedence-setting judgment, Gujarat's Chief Information Commissioner CIC) R. N. Das has ruled that "file-notings" are part of "information "under the Right to Information (RTI) Act, 2005, directing the Urban Development Department(UDD) here to let public have access to the notings. The verdict was given by the Commissioner while disposing of a petition of former bureaucrat Premshankar Bhatt, who had appealed to the Information Commission after he was denied information sought over the setting up of an elected local body for Gandhinagar city.[54]

The underlying rationale why file noting is an important piece of Information and should be disclosed is because it allows people to know about the way decisions are taken and that the ladder of decision-making is adhered to. And that only those people authorized to make decision are taking the decisions. It is important to understand 'file noting':

(a) Because it indicates the movement of the file and who have had access to it;

(b) The chronology of the decision making process;

(c) The rationale behind decision finally arrived at;

(d) Revelation of file notings means that government is bound to keep closely to the rules of business and the criteria set down;

(e) It leads to rules based governance rather than patronage and discretion based governance;

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[52] Right to Information Act, 2005, Section 2 (f).

[53] *Satyapal* v. *CPIO, TCIL*, Appeal No. ICPB/A-1/CIC/2006, available on http://cic.gov.in/CIC-Orders/CIC_Order_Dtd_310106.htm. Page no 1.visited on 4th May, 2013.

[54] Bashir Pathan and Abhishek Kapoor, "*Says Notings Are Integral Part of File, So They Come Under Definition of Information*", Express India , November 1, 2006.

(f) It means that there is less room for the exercise of discretion without justifications;

(g) Exception would have to be justified in the public eye;

(h) File notings are the anatomy of governance. it is X-ray through which the malafied of governance can be examined.

If the file notings are to be exempted it should serve public interest, it should not be allowed a blanket because it's an important cabinet paper but rather by virtue of its content. If the content is such that it serves the public interest then it should be given exemption under the present law. After the CIC decision, the Union Cabinet on 20th July, 2006 has announced the decision to amend the law to exclude notings on the files by officials from the ambit of this law so that the CIC decision can become ineffective. This decision could severely restrict the scope and relevance of Right to Information Act 2005. File noting is everything in the process of decision making, and if that is blocked, it drop iron curtains on public records, which RTI aims to make available to people in general. File Notings were not exempted from the purview of the Right to Information Act 2005[55]. The government finally decided not to go with Amendments.

In the context of the Government Servant performing official function and making notes on the file about the performance or conduct of another officer, such noting cannot be said to be given to the government pursuant to a "fiduciary relationship", with the government within the meaning of section 8 (1) (e) of Right to Information Act, 2005. Section 8 (1) (e) is , at best , a round to deny information to a third party on the ground that information sought concerning a government servant , which information is available with the government pursuant to the fiduciary relationship, that such person , has with the government as an employee. It will be no ground for government of India to deny an employee against whom the disciplinary proceeding are held to withhold the information available in the government files about such employee on the ground that such information has been given to it by some other government official who made the noting in fiduciary relationship.[56] This decision given by the Hon'ble High Court of Delhi is an eye opener for the conception of 'file noting'. In case of Information to which applicant has any right to get information regarding correspondence / notings relating to appointment of judges objected by P.M.O., the matter was referred to Chief Justice of India for being placed before an

[55] Supra note 52, Section 8 does not includes 'File Noting' as an exempted item.

[56] *Union of India* v.*R.S. Khan*, AIR 2011 Del 50.

appropriate Bench.[57] This matter of noting is an important development in the field of Right to Information Act because the outcome of this judgment would decide whether noting by collegium in matter of appointment of judge would fall within the ambit of Right to Information Act 2005 if it is, then Right to Information is an important instrument in the administration of justice

US Supreme Court Justice, Louis Brandeis famously said "sunshine is the best disinfectant". Right to Information laws or "sunshine" laws, by opening up government decision-making to public scrutiny, bring a much needed dose of sunshine to the otherwise opaque dealings of governments. The last decade has seen an explosion of information laws around the world as governments and civil society recognise the value of providing citizens with access to information. Amendments to the Right to Information Act have been on the government's agenda for quite some time. As early as 2006, civil society groups and leading RTI activists rallied against government attempts to amend the law. Round one went to civil society and to the Right to Information Act, as the "Save the Right to Information Campaign" caught the attention of the media and successfully stalled the Union Government from pushing through the amendments. The outcome of round two still hangs in the balance. But surely, we can all agree that what we really need is more sunshine not more darkness. I feel 'file noting' is part and parcel of government machinery because every note sheet prepared by government functionary talks about policy formulation. If it is for public, by public and from public then it should be made open to all, for the purpose of transparency, accountability and administration of justice.

VI

Conclusion

In the system of functioning of public authorities, a file is opened for every subject matter dealt with by the public authorities. While the main file would contain all the material connected with the subject matter, which is generally known as note sheet and decisions are mostly recorded on the note sheets. These recording are generally known "file noting". Therefore no file is complete without note sheet having "file notings". In other words note sheets containing "file notings" are an integral part of a file. Hence when a decision is reached by the public authority, significance of file noting is utmost. This is the only mechanism by which any responsibility can be ascertained for the purpose of accountability and transparency. It is quite unfortunate that public authority have ignored the positive aspect

[57] *CPIO, Supreme Court of India* v. *Subhash Chandra Aggrawal*, (2011) 1 SCC 496.

of transparency and public accountability for removing the practical aberration in administrative systems. If they toned up their grievance redressal system, aggrieved person may not resort to Right to Information Act. If Section 4 of the Right to Information Act[58] is followed in the letter and spirit, citizens may not have to submit RTI applications. In ultimate analysis, controversies regarding RTI Act basically arise from the basic reluctance of public authorities to be transparent and accountable. There is a need for sustained publicity to the "success stories "of benefit derived by the citizen aggrieved by public authorities. Decision of Central Information Commission and State Information Commissions may also provide practical instances of the need for RTI. Existing system of redressing public grievance was unable to resolve the problem faced by the aggrieved persons and therefore RTI has been able to help the aggrieved citizens. It is a social responsibility of press and media to give publicity to such success stories and educate their readers of the advantages of using Right to Information to resolve their problem with the government. Media can also help in building sustained public pressure against dilution of Right to Information Act 2005.

I think Right to Information is a wonderful instrument of transparency and accountability and file noting is concomitant to it. If the 'file notings' are kept out of the reach of the citizens, then how would people know, how that decisions was reached. It will mean that the information provided to the citizens by the government will be heavily 'censored' and will not contain the details of various remarks and opinion by the concerned machinery. Right to information is an effective tool in the administration of justice subject to condition that people are aware of this fundamental law- Right to know.

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[58] *Supra note 52* , Section 4 relates to proactive disclosure of information and covers all types of public authorities.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: AN APPRAISAL

*Eqbal Hussain**

I

Introduction

Since the time immemorial, domestic violence unfortunately has been an intrinsic part of the society we are living. The contributing factors could be the desire to gain control over another family member, the desire to exploit someone for personal benefits, the flare to be in a commanding position all the time showcasing one's supremacy so on and so forth. On various occasions, psychological problems and social influence also add to the vehemence.[1] The term used to describe this exploding problem of violence within our home is domestic violence. This violence is towards someone who we are in a relationship with, be a wife, husband, son, daughter, father, grandparent or any other family member. It can be a male's or female's atrocities towards another male or a female. Anyone can be a victim and a victimizer.[2] Although the home has traditionally been perceived as a safe haven, and marriage as the most vulnerable of our institution; the reality for women is that they are at a far greater risk of being assaulted in their own homes by a 'loved one' than they are of being assaulted on the streets but a stranger.[3] Domestic violence is an abuse which manifests itself when a spouse or a family member violates another physically or psychologically. The term domestic violence is normally used for violence between husband and wife but also encompasses live-in relationships and other members of the families who live together. Domestic violence is synonymous with domestic abuse. Domestic violence is common all over the world in all cultures, classes and ages. Violence can take place between men and women, people of same sex of people of different ages. Domestic violence can occur in many forms and take many dimensions. It can be physical, sexual, social, psychological or financial.[4]

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1 Ankur, Kumar *" Domestic Violence in India: Causes, Consequences and Remedies"* available at http:/www.youthkiawaaz.com/2010/02domestic-violence-in-india-causes-consequences-and-remedies-2/ , visited on 20.9.2010

2 *Ibid*

3 M. Schelong Katharine, *"Domestic Violence and the State: Responses to and Rationales for Spousal Battering:, Marital Rape and Stalking"*, Marquette Law Review, vol 78-79,(194)-cf., Prof.(Dr.) Manjula Batra, *"Protection of Women from Domestic Violence Act, 2005: A New Hope for Victims of Domestic Violence"*, 28, Nyaya Kiran, vol.1.(July-Sept), 2007

4 Ritika Banerjee, *"Domestic Violence Act- Sociological Perspective"*, Available at http://jurisonline.in/2010/03/domestic-violence-act-sociological-perspective/ visited on 21.9.2010

Domestic violence is an extremely complex and vicious form of violence, committed most often within the four walls of the family house and within a particular deep rooted power dynamic[5] and socio-economic structure, which do not allow even the acknowledgement or recognition of the violence. Domestic violence or family violence is a global problem affecting families of all classes and cultures.

The response to the phenomenon of domestic violence is a typical combination of effort between law enforcement agencies, social service agencies, the courts and correction/probation agencies. The role of all these has progressed over last few decades, and brought their activities in public view. Domestic violence is now being viewed as a public health problem of epidemic proportion all over the world and many public, private and governmental agencies are seen making huge effort to control it in India. There are several organizations all over the world- government and non-government – actively working to fight the problems generated by domestic violence to the human community.[6]

Crime against women:- a survey report

A recent study has concluded that violence against women is the fastest- growing crime in India. According to a latest report prepared by India's National Crime Records Bureau (NCRB), a crime is recorded against women in every three minutes in India. Every 60 minutes, two women are raped in this country. Every six hours, a young married woman is found beaten, burnt or driven to suicide.[7] According to the report of 2007 of NCRB, the incidence of all cognizable crimes under the India Penal Code rose by under 5%over previous year, dowry deaths registered an increase by 15%, cruelty by husband and relatives 14%, Kidnapping and abduction of female 13%, importation of girls12% and sexual harassment by 11%. Rape and molestation cases grew by a more modest 6-7%, but even that was higher than the average rate.[8]

Despite the increasing cases of crime against women, they would appear to be not in the priority list of the investigating agencies. The NCRB data shows that investigation starts within the same year in only one out of 10 sexual harassment cases and only two out of 10 cases of molestation or cruelty by

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[5] Preeti Misra, "*Domestic Violence Against Women-Legal Control and Judicial Response*" 43, (2006).-cf. Sheeba S. Dhar, " *Domestic Violence Against Women: A Conceptual Analysis*", 118, The Academic Law Review, vol.XXXI, no.1&2 (2007)

[6] *Supra note 1*

[7] *Ibid*

[8] Atul Thakur, *"Crime Against Women Rising Fastest, and Investigation Slowest"*, Times of India, Delhi, January 2 , 2010

husbands and relatives. Similarly, only three out of 10 rapes and dowry deaths are investigated within the same year.[9]

The National Family Health Survey-III, carried out in 29 states during 2005-06, has found that a substantial proportion of married women have been physically or sexually abused by their husbands at some time in their lives.[10] With 37% women reporting abuse in India, the survey found Bihar to be the most violent, with the abuse rate against married women being as high as 59%. Strangely, 63% of these incidents were reported from urban families rather than the state's most backward villages. It was revealed that women with no education were much more likely, (at 47%) than other women to have suffered spouse violence. While 63% of the women who faced spousal violence were illiterate in Bihar, the number stood at 54% in Assam, 53% in Tamil Nadu, 51% in Madhya Pradesh and 50.4% in Rajasthan.[11] A United Nation Population Fund report had revealed that around two-thirds of married women in India were victims of domestic violence. One incident of violence translates into women losing seven working days in the country. The report said that 70% of married women in India between the age of 15 and 49 were victims of beating, rape or coerced sex.[12]

In another five-year study conducted between 2002 and 2007 on 1,805 victims who came to Delhi Police's Crime Against Women Cell for help has revealed that the victim of domestic violence often endure abuse for an average 4.2 years before seeking help. About 22% of the victims said, their husbands seemed to have planned the violence. About 74% said, their husbands were apologetic the next day, swearing they would never do so again- a promise they never kept. In an overwhelming number of cases, the violence took place at night- between 10.30 p.m. and 12.30 a.m. Another 36% of the women victims had suicidal thoughts; of which more than half made an unsuccessful attempt to end their lives. Those felt like committing suicide but did not attempt to do so confess that the future of their children, especially their daughters, prevented them taking the step. In nearly 19% cases, husbands tried to prove that the wives were mentally ill, mentally challenged or depressed.[13]

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[9] *Ibid*

[10] Kountey Sinha , *37% Married Women Abused in India,* Times of India, Delhi, March 11, 2007

[11] *Ibid*

[12] *Ibid*

[13] Avijit Ghosh, "*Men Apologetic in 74% of Cases*",Times of India, Delhi, October 22, 2007.

II

Domestic Violence against Women

(i) *Meaning*

The term 'domestic' refers to 'the home' or 'family' and term 'domestic violence' signifies the violence that takes place within the family. Black's Law Dictionary[14] defines domestic violence as violence between members of a household, usually spouses, an assault or other violent act committed by one member of household against another. Thus, violence that takes place within the house and is perpetrated by some members of family against others in the family is known as domestic violence.[15]

Lexicon meaning of 'violence' connotes to any physical force or any damage or injury to person or property. Sociological definition of violence implies the illegal use of force or threats of use of such force by the patriarchal social order and their agents against women in general for perpetrating the goals of that group for subjugating women physically, socially and psychologically.[16] Thus, the chief features of violence, which may be traced out from various definitions of violence are:

a) Excessive, unrestrained and unjustifiable use of force;
b) Outrage, profanation or rape;
c) Causing physical injury;
d) Causing mental injury;
e) Illegal employment of methods of physical coercion for personal or group ends;
f) Exploitation;
g) Violation of human rights of life, liberty, equality and dignity.[17]

(ii) *Rights of women- A Constitutional Perspective*

The preamble of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'Act,2005') envisages its objective, it provides for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the

[14] Black's Law Dictionary, 1564 (8th ed,) 2004.

[15] Justice P.S. Narayan. "Domestic *Violence on Women- Causes and Remedies* ", 3 SCJ 33(2007) cf Sheeba S. Dhar, "Domestic *Violence Against Women: A Conceptual Analysis"*, 118, The Academic Law Review, vol.XXXI, no.1&2 (2007).

[16] *Supra note* 5

[17] Sheeba S Dhar, "Domestic *Violence Against Women: A Conceptual Analysis*", 117, The Academic Law Review, vol.XXXI, no.1&2 (2007).

family and for the matters connected therewith or incidental thereto. Thus it requires making reference to the rights of women as guaranteed under the Constitution of India. Part-III of the Constitution, under fundamental rights, provides for certain rights to all the people of India equally, but the following are some the important Articles which contain special protection to women:

a) Article15- Prohibits of discrimination on the grounds of religion, race, caste, sex or place of birth. The Article further provides that "Nothing in this Article shall prevent the state from making any special provision for women and children."[18]

b) Article 16- Equality of opportunity in matters of public employment.

c) Article 23- Prohibition of traffic in human being and beggar and other forms of forced labour

Hence, the Act, 2005, in the context of the Constitutional rights provides the following protections to women, namely:-

a) Protection from discrimination on the ground of sex;
b) Protection in public employment; and
c) Protection against trafficking and forced labour[19]

Contravention of any of the above constitutional rights in the context of the Act amounts to violation of the provisions of the Act within the meaning thereof. It also amounts to domestic violence attracting the respondent to criminal liability.[20]

(iii) *Causes for the Domestic Violence against Women in India*

One of the reasons of domestic violence is the orthodox and idiotic mindset of the society that women are physically and emotionally weaker than the males. The reports of violence against women are much larger in number than against men. The possible reasons are many and are diversified over the length and breadth of the country. The most common causes for women stalking and battering includes dissatisfaction with the dowry and exploiting women for more of it, arguing with the partner, refusing to have sex with him, neglecting children, going out of home without telling the partner, not cooking properly or

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[18] Constitution of India,1950, Article 15(3), Also see: *Vishakha* v. *State of Rajasthan*, AIR 1997 SC 3011, in which The Apex Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14,15 and 23 (equality and dignity) of the Constitution Of India .

[19], Dr. N. Maheshwara Swamy , "*The Protection of Women from Domestic Violence Act, 2005: Whether more Effective or Less Defective", 3,* A Critical Study, 2007 (1) Kar.L.J

[20] *Ibid.*

on time, indulging in extra marital affairs, not looking after in-laws etc. In some cases infertility in females also leads to their assault by the family members. The greed for dowry, desire for a male child and alcoholism of the spouse are major factors of domestic violence against women in rural areas. In urban areas there are many more factors which lead to differences in the beginning and later take the shape of domestic violence. These includes – more income of a working woman than her partner, her absence in the house till late night, abusing and neglecting in-laws, being more forward socially etc. Working women are quite often subjected to assaults and coercion sex by employees of the organization. At times, it could be voluntary for a better pay and designation in the office.[21]

Patriarchal theory holds that patriarchal social order and family structure lead to subordination of women and contribute to a historical pattern of systematic violence directed against females in family. Traditionally the basis of social differentiation was biological as women had to undergo the process of child bearing and rearing and men were predisposed for earning livelihood for the family. They were assigned the role of father and husband and treated as heads of household under patriarchal system. This, in turn, made them centres of power, resource, property etc., where women were restricted to the husband and children through the institution of marriage and family. The dependence on men resulted in unequal distribution of power relation in family. Under such a patriarchal system the variety of role-relationships like that of wife, daughter-in-law, sister-in-law etc., the people endowed with different sets of characteristics (personality structure and social background) leads to tensions and role conflict in the family set up which in turn leads to violence being thrown out on women.[22]

III

Violence against Women as Human Right Violation: An International Community Response

The Convention on the Elimination of All Forms of Discrimination against Women, 1979, the Vienna Accord of 1994, the Beijing Declaration and Platform for Action of 1995, are some of the important international responses for protection of women from violence and discrimination. In fact, the United Nation Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) had recommended as early as in 1989 that the state which is party to the said Convention should provide for the protection of women

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[21] *Supra note. 1*

[22] *Supra note. 17 at p.129*

against violence of any kind especially that occurring in the family.[23] However, violence against women as human right violation changes perception of violence against women from private matter to one of public concern. The 1980's saw the major transformation in the articulation of women's grievances. The diverse machinery set up at the international level for the promotion of human rights became available to women's right activists. This access to international institutions is an important development in the search for equality.[24] A revolution has taken place in the last two decades. Women's rights have been catapulted on to the human rights agenda with a speed and determination that has rarely been matched in international law.

CEDAW's General Recommendation No.19

In the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which came into force in 1980, explicit prohibition of violence against women is singularly absent. The third UN World Conference on Women in Nairobi in July 1985, which was called to mark the end of the UN decade for Women, concentrated on themes of equality, development and peace. The Nairobi Forward-Looking strategies agreed to by the member states at the conference do mention violence against women, but as a side issue to discrimination and development. As a result of this formulation, there were a number of ad hoc initiatives in the UN system. By 1990, violence against women was on the international agenda, but as a narrowly constructed issue of women's rights and crime prevention rather than issue of human rights in broad sense. In 1991, both the Un Economic and Social Council and the Commission on the Status of Women decided that the problem of violence against women was important enough to warrant the development of further international measures.[25] Therefore, CEDAW has been ratified by 174 states and is recognized as one of the six major international human rights treaties. The CEDAW committee has attempted to retroactively fill in the gap through " creative interpretation" of the CEDAW, by incorporating gender based violence within CEDAW's general ban on gender based discrimination by adopting General Recommendation No.19

General Recommendation No, 19 notes that: "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination... These rights and freedom includes:

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[23] *Supra note. 21 at p.1*

[24] Radhika Coomaraswamy, *"Reinventing International Law: Women's Rights As Human Rights In The International Community"*, (1997) cf. Dr. Ratna Bharamgoudar, , *" Violence Against Women As Human Rights Violation"*- The International Norm Creation , 271, 3 BLJ, 2010 (3).

[25] *Id, at p. 272*

a) The right of life;
b) The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
d) The right to liberty and security of person;
e) The right to equal protection of the law;
f) The right to equality in the family;
g) The right to the highest standard attainable of physical and mental health;
h) The right to just and favourable conditions of work.[26]

The major turning point, however, was the Vienna Conference on Human Rights in 1993. The Conference promulgated the Vienna Declaration and Programme of Action, which "expressly recognized that the human rights of women are an inalienable integral and indivisible part of universal human rights. In mainstreaming women's right, the Vienna Declaration stressed the equal status of women's rights. It also declared that "gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person and must be eliminated.[27]

Special Rapporteur on violence against women, 1994 where UN Commission on human rights established a post of UN Special Rapporteur on violence against women, its causes and consequences, who was charged with examining, reporting on and making recommendations concerning the specific ways in which women's rights- including the right to life free from violence -are violated.[28]

However, the United Nation fourth world conference on women in Beijing, 1995 gave the world community the opportunity to reaffirm, support and strengthen women's right as an integral part of the international human rights paradigm, The Beijing Declaration clarifies the interrelatedness of all violence and discrimination against women by developing a holistic and multidisciplinary approach to the challenging task of promoting families, communities and states that are free of violence against women... Equality, partnership between women and men and respect for human dignity must permeate all stages of the socialization process.[29]

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[26] *Supra note 24.*
[27] *Ibid*
[28] *Ibid*
[29] *Ibid.*

IV

Legal Protection to Women: - An Indian Scenario

The passing of the Protection of Women from Domestic Violence Act, 2005 is an important marker in the history of the women's movement, which has confronted the problem of domestic violence for well over decades. This enactment sets the movement from malaise that has long plagued it of attributing all categories of violence suffered by women within their families to 'dowry' and widening the scope of the term 'domestic violence'.

(i) *Position prior to the enactment of Act, 2005*

The oppression, borne by Indian women, was intolerable until the 19th century. During this time, the British and the great Indian social reformers set the stage for vast improvements in every aspect of the lives of these oppressed women. Some of the custom and practices, which were banned, are the practice of sati, female infanticide, child marriage and prohibition on widows to remarry. After the adoption of the Constitution in 1950, the government of India enacted many laws to safeguard the interest of women. But, ironically, her status in the matrimonial home deteriorated as there has been no just and effective legal remedy to guarantee her physical safety, her mental stability, her financial and economic welfare and custody of children.[30] A shortcoming of our domestic violence law is that it does not contemplates the possibility of daughter-in-law mistreating their old-in-laws or other vulnerable members of the husbands' family. Domestic violence has come to be seen as uni-dimensional issue, because the majority of the cases that are reported and reach the courts happen to be from wives complaining against husbands.[31] The criminalization of domestic violence in India was brought only in the early 1980s after a consistent campaign by feminist groups and women organizations across the country. The fierce demand for criminalization of dowry death and domestic violence resulted in the enactment of section 498A in the India Penal Code (IPC) in 1983, section 304B in 1986 and corresponding provisions (s.113B) in the India Evidence Act, 1872. Section 498A of IPC deals with the offence of cruelty while section 304B deals with the dowry death.[32] For the first time, an attempt was made to bring the issue of domestic violence out of the private domain of the family and into the public

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[30] Ms Jesastin, "*Protection of Women against Domestic Violence*, 52, Nyaya Kiran, vol.1. (April-June, 2007).

[31] Madhu Purnima Kishwar, "*Laws Against Domestic Violence: Under Sued and Abused?*"- cf., Vishruta Kaul "*The Protection of Women from Domestic Violence Act, 2005: An Appraisal*", 45, Nyaya Kiran, vol. 1, issue 2 (July-sep., 2007).

[32] Manjula Batra, "*Protection of Women from Domestic Violence Act, 2005: A new hope for victims of Domestic Violence*", 30, NyayaK iran, vol.1. (July-Sept), 2007.

domain. Despite these measures, the law made for the protection of women has been ineffective, e.g. Section 498A has, in large number of cases, been misused. Several reports are filed allegedly, to intimate.[33]

(ii) *The Protection of Women from Domestic Violence Act, 2005*

This law was enacted by keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law, which is intended to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. However, the feminist groups unequivocally and unanimously hail the implementation of the Act while men think of being ransacked of all of their rights. The likelihood of it being misused is so immensely incalculable that it has given wakeful nights to men and has left his fate to the whims and fancies of their counterparts.[34]

Primarily the Act meant to provide protection to the wife or female live-in partner from violence at the hands of the husband or male live-in-partner or his relatives, the law also extends its protection to women who are widows or mothers.

Salient features of the Act

1. The Act seeks to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or a relationship in the nature of marriage, or adoption; in addition relationship with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with abuser are entitled to get legal protection under the Act.
2. The definition of 'Domestic Violence' has been kept so wide and comprehensive to cover every likely form of abuses. It categorizes the abuse into four categories namely;
    a) Physical Abuse: means to cause bodily pain, harm, danger to limb or life or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.

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[33] Vishruta Kaul, *"The Protection of Women from Domestic Violence Act, 2005: An Appraisal"*, 46, Nyaya Kiran, vol. 1, issue Kaul, 2 (July-sep., 2007).

[34] *"Protection of Women from Domestic Violence Act, 2006- Was it Worth the Effort?"*-available at http://www.legalserviceindia.com/article/1150-Protection-of-women-from-Domestic-Violence-Act.html visited on May 9, 2013.

b) Sexual Abuse: includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women.

c) Verbal Abuse: Includes insult, ridicule, humiliation, name calling specially with regard to not having a child or male child, repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

d) Economic Abuse: like not providing money for maintenance, food, clothing, medicine, restriction on use/ access of household assets, deprivation of economic or financial resources, alienation of assets, forcibly taking away salary, not allowing to carry up employment, disposing ' Stridhan' etc.[35]

3. The Act provides for the women's right to reside in the matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court.

4. The relief envisaged under the Act is that of power of the court to pass protection orders that prevent the abuser from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the abused, attempting to communicate with the abused, isolating any assets used by both the parties and causing violence to the abused, her relatives and others who provide her assistance from the domestic violence.

5. The Act provides for appointment of Protection Officers and NGOs to provide assistance to the women with respect to medical examination, legal aid, safe shelter, etc.

6. The Act provides for breach of protection order or interim protection order by the respondent as a cognizable and non-bailable offence punishable with imprisonment for term which may extend to one year or with fine which may extend to twenty thousand rupees or with both. Similarly, non-compliance or discharge of duties by the Protection Officer is also sought to be made an offence under the Act with similar punishment.[36]

However, a well framed definition of the term 'Domestic Violence' has been provided in section (3) of the Act, 2005 as any act, omission or commission or conduct of the respondent[37] shall constitute domestic violence in case it-

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[35] Rajesh Kumar Goel, *"Domestic Violence Act, 2005: Recognition to Women's Plight* ",20, Nyaya Kiran, vol.1, issue 2, (July-Sep, 2007).

[36] *Supra note. 4*

[37] The Protection of Women from Domestic Violence Act, 2005,S.2, clause (q) defines

a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person[38] or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or (b); or

d) Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

The relief sought under the Act

The Act enables the person who is a victim of domestic violence or a protection officer or any other person on behalf of the victim to obtain the following order/ orders under the Act;

a) Protection Order[39]: The Act makes it possible for the aggrieved person to insist that a court while granting bail to the respondent impose conditions that would protect her from violence. However, there may be situation when the victim is unable to move to the court in which case a petition may be filed by her or a non-government organization or a protection officer. The court can pass a protection order prohibiting the respondent from committing any act of domestic violence. The order may also prevent

'respondent' as "means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act. And clause (f) defines 'domestic relationship' as " means a relationship between two persons who live, or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family member living together as a joint family.
And clause (s) defines ' shared household' as "means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

[38] *Ibid*, S.2, clause (a) Aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent

[39] *Ibid*, Section 18.

the respondent from causing violence to the dependent, other relatives any person giving assistance from domestic violence to the aggrieved person.

b) Residence Order[40] : The court, under the Act, is entitled to pass an order with the object of:

i. Helping the aggrieved person to remain in the house;
ii. Preventing from being removed from the house;
iii. Prohibiting the respondent from entering the house, where the woman feels unsafe with the male because of violence;
iv. Restraining the respondent from alienating the house, e.g. Sale;
v. Restraining the respondent in finding an alternative for the aggrieved person if it is harmful or injurious for her to live with the respondent in the shared household;
vi. Restraining the respondent from giving up his right or claim in the house.

c) Monetary Relief Order[41]: The court is entitled to pass a monetary relief order against the respondent providing monetary relief to the aggrieve person and her children for the expenses and losses incurred on account of domestic violence. It may include:

i. Loss of earning;
ii. Medical expenses;
iii. Loss caused due to destruction, damage or removal of property from control of aggrieved person;
iv. Maintenance for the aggrieved person and children, if any.

d) Temporary Custody Order[42] : Whenever there is discord in marital relationship or domestic violence committed against the woman a constant fear lurks in her mind that she would not be allowed to see her children or that her children would be separated from her. The Act takes care of her emotional needs towards her children and gives her the right to ask for a temporary custody of order for her children.[43]

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[40] *Supra note 37*, Section 19.
[41] *Ibid*, Section 20.
[42] *Ibid*, Section 21.
[43] *Supra note* 32 at p. 35

Duties of Police

As soon as the complaint is received, the police shall inform the aggrieved person[44]:

a. of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more such other orders under the Act;
b. of the availability of services of service Provider;
c. of the availability of services of the Protection Officer;
d. of her rights to free legal services under the Legal service Authorities Act, 1987;
e. Of her right to file a complaint under section 498A of IPC, wherever relevant.
f. If the aggrieved person doesn't want to initiate criminal proceedings, then the police shall make a daily Diary and enter to this effect that complaint wants to pursue civil remedy;
g. make domestic Incident Report in the prescribe form and forward it to the Magistrate for passing appropriate protection order;
h. forward the victim to hospital for proper medical aid, if necessary

Penal Provision:

1. When the case of Domestic Violence is reported for the first time, there is no penal provision against the offender/ abuser, yet there lies the civil remedy in the form of protection or relief order passed by the court;

2. If there is violation or breach of protection order of the court by the respondent, then it is cognizable and non-bailable offence for which imprisonment up to one year or fine up to Rs. 20,000/- or both can be imposed.[45]

   The Supreme Court has interpreted the constitutional provisions on the fundamental rights and directive principles of the State policy to compel the state to respect human rights. The Court has given direction to the state and its administrators for the implementation of these rights. It has appointed monitoring and expert committees, or has taken the help of the National Human Rights Commission to make these rights a reality. Creating a socio-economic and political order that respects human rights is today the goal of development. Realizing that family violence is a major denial of human rights, the first step is towards its prevention.[46]

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[44] *Supra note* 37, Section 5
[45] *Supra note* 35 at p 22
[46] Justice Sujata Manohar, "*Family Violence and Human Rights* " cf., Swati Shirwadkar (ed), "*Family Violence in India*",477, Rawat Publication (2009) New Delhi.

IV

Conclusion

Nearly 8,000 aggrieved women, have filed complaints since the law came into force in October, 2006 till November, 2007 [47] After the enactment of this Act, Delhi recorded 3,534 cases between October 2006 to August 2008, while Kerala had 3,287 cases and Maharashtra 2,751. In Andhra Pradesh, 1,625 cases were recorded between July 2007 and October 2008.[48] While there is an increasing awareness of the legislation, there are several obstacles in its implementation. Inadequate budgetary allocation is a challenge with only 13 states including Assam, Delhi, Haryana, Madhya Pradesh and Maharashtra, having allocated specific budgets for the implementation of the law. The Act was conceived as a civil law whereas section 498A of the Indian Penal Code falls under criminal law. The new law is more inclusive; it creates space for settlement of disputes and looks to providing relief to the aggrieved rather than just focusing on convicting the guilt. The law upholds the rights of women to reside in a shared household and to counselling and protection. It looks at physical, economic, mental and sexual aspect of violence. It includes not just married women but those in live-in-relationships as well as daughters and widows who are victims of domestic violence. Women who are in a live-in-relationship can get relief under the Act. A city court of Delhi said, "a women, even if she is not a lawfully married wife but has only been having a live-in-relationship is entitled to protection under this Act as the relationship is a domestic relationship" The court further said "The protection to women under this Act is separately available, apart from the remedies available under any other law and pendency of the proceedings under other laws is no bar to filing a petition under the Act and granting relief under it".[49] However, an effort to minimize state intervention in implementation of the Act, the Ministry of Women and Child Development (MWCD) has now mooted a proposal to encourage NGOs to provide assistance and shelter to victims. As of now the Act expects the state to appoint protection officers who coordinate between courts, police and support services for enabling women's access to justice. The programme envisages a Domestic Violence Intake Centre established by an NGO which is housed within the court premises and works in collaboration with police, prosecutors, NGOs and the court. The

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[47] "*Staying Alive*", The Times of India, November 2, 2007-New Delhi.

[48] "*Delhi Records Most Cases Under DV Act*" The Times of India, November 15, 2008-New Delhi.

[49] "*Marriage Not Must For Relief Under Domestic Violence Act* ", The Times of India, October 22, 200-New Delhi.

victim can approach a Domestic Violence Intake Centre or a police station. The victim is assisted in getting an ex-parte temporary protection order within two hours which is valid for 14 days. During this period the victim is provided with shelter, transport, legal assistance, custody of children depending on her needs.[50]

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[50] "*India to Adopt US Model in Tackling Domestic Violence*", The Times of India, June 17, 2010, New Delhi.

THE NAGOYA PROTOCOL ON ABS: BENEFIT SHARING PERSPECTIVES

Prabha S. Nair[*]

I

Introduction

Sustainable development is commonly understood as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs[1]. It upholds the concept of intergenerational equity that could be achieved through poverty eradication, sustainable livelihoods, change in unsustainable patterns of production and consumption and sustainable management of natural resource bases[2] by means of local, national and global operations. Biodiversity forms one of the larger and basic natural resource of the earth and its sustainable use and management has positive implications on the socio-economic and livelihood dimensions of the world population, especially in developing countries which are generally resource rich. Acknowledging the importance of biodiversity in achieving sustainable development, the international community had enforced the Convention on Biological Diversity in 1992. The CBD stands for conservation of biodiversity, sustainable use of its components and fair and equitable sharing of benefits arising from the commercial utilization of genetic resources[3]. Thus the CBD promotes sustainable development through conservation and sustainable use of biodiversity and its tools for the purpose is facilitation of access to genetic resources for commercial utilization and fair and equitable sharing of the resultant benefits including transfer of technology[4]. The issue of access to genetic resources and consequential benefit sharing is haunting the international community for nearly five decades owing to a wide range of issues, the most pertinent among them being the issue of misappropriation of genetic resources, without the consent of its stakeholders and also without rewarding them, commonly termed as biopiracy. The CBD was specifically aimed to fix this misappropriation issue. This process of the CBD is highly linked to the concept of sustainable development as benefit sharing with the custodians of genetic

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1 Report of the World Commission on Environment and Development, 1987

2 See "*Sustainable Development in India: Perspectives* "available at http://envfor.nic.in/divisions/ic/wssd/doc4/consul_book_persp.pdf visited 24th April, 2013.

3 The Convention on Biological Diversity, 1992 Article 1

4 *Ibid*

resources ensures them livelihood through the use of their own resources and it will act as a compensation to the use of the resources they conserve through the continuing efforts of various generations. Even though the CBD got implemented in 1992, it did not prove itself to be effective in ensuring its major objective of fair and equitable benefit sharing. But recognising the importance of CBD in ensuring sustainable development, the World Summit on Sustainable Development in 2002 mandated in its plan of action that an international regime for fair and equitable benefit sharing is to be negotiated within the framework of the CBD[5]. Thus, in 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (The Nagoya Protocol), 2010 has been appended to the CBD to operationalize the benefit sharing objective of the CBD. In this backdrop, the paper would first analyse why the CBD has failed in ensuring benefit sharing and trace out the developments till the conclusion of the Nagoya Protocol. Next the paper will analyse the benefit sharing regime of the Protocol from a sustainable development perspective and find out how far the protocol has succeeded in its goal. The paper ends with some suggestions for improving the protocol to effectively secure benefit sharing and thereby promoting sustainable development.

II

Benefit Sharing Provisions under the CBD Prior to the Nagoya Protocol

The benefit sharing obligation under the CBD operates on the contractual framework of access to genetic resources conditional to the prior informed consent (PIC) and mutually agreed terms (MAT) with the concerned provider in the country of origin[6]. The Contracting Parties of the CBD have also the flexibility to provide access to genetic resources only or to extend the same to the traditional knowledge (TK) associated with such resources. To achieve the purpose, Parties are mandated to make appropriate legislative, administrative or policy measures[7]. Interestingly the CBD provides no guidelines as to how such a contractual framework is to be operated. Later in 2002, the Bonn Guidelines on Access to Genetic Resources and Benefit Sharing was adopted which detailed the measures to be taken by the providing country while providing access and ensuring benefit sharing[8]. Thus both the CBD as well as the Bonn

5 World Summit on Sustainable Development, 2002, Para 44(o).

6 The Convention on Biological Diversity, 1992, Article 15. Article 2 of CBD defines country of origin as the country where the resources are found in-situ.

7 *Supra note 6,*, Article 16 & 19

8 The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization, 2002, Para 16, 18 & 42

Guidelines vested the obligation to administer the whole process of access and benefit sharing upon the concerned domestic legislation in the providing countries which are mostly developing but diversity rich. But most of these developing and least developed countries suffered from lack of proper insight into the administration of international contractual obligations and poor negotiation strategies and their domestic ABS legislations are also handicapped in many respects[9]. Usually, the person/entity seeking access to a country's resources would come from a foreign jurisdiction and research would be mostly carried out in the foreign jurisdiction where the technology is available. In such cases, the providing country loses total control of the genetic material accessed by the other and enforcement of contractual obligations in foreign jurisdictions are costly, time consuming and unpredictable.

The greatest difficulty in the whole question of enforcement of contractual obligation relates to contractual clauses on obtaining of Intellectual Property Rights (IPRs) over the research results. Use of genetic resources and associated TK generates maximum benefits when use is for research and development that results in patenting and subsequent commercialization of inventions. This is because the grant of patent confers a monopoly right on the patent owner to exclusively make, use and sell the product. This exclusive monopoly in the event of commercialization enables the patentee to derive huge returns in respect of his invention. So the benefits arising from patenting could be channelized to the owners of the GRs and TK involved in the invention. Thus obtaining a share of the benefits of patenting and subsequent commercialization of inventions using GRs and associated TK assumes much significance in the ABS process and also to sustainable development. If we look at the instruments governing IPR that are crucial to genetic resources and associated TK, the TRIPS Agreement and the UPOV Convention are of profound importance. The TRIPS is an umbrella convention that lays down the minimum international standards of IPR protection to be offered in national legislations. TRIPS for the first time mandated patent protection for inventions based on biological materials. Genetic resources and associated TK constitute the raw materials for research and development to bring out new biotechnological inventions resulting in grant of patents. Hence grant of patents gets linked with the access and benefit sharing process of the CBD. The UPOV Convention stands for protection of new varieties of plants where breeding of such varieties is done on plant genetic resources which are the subject matter of the CBD too. So the possibility of ensuring benefit sharing conforming to the principle of PIC assumes much significance in the context of

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[9] MS Suneetha and Balakrishna Pisupati, "*Benefit Sharing in ABS: Options and Elaborations*",8-24, UNU-IAS Report, 2009.

its relationship with IPR. The parties may enter into a contract based on the term that IPRs may not be obtained over the research result or if obtained will be jointly owned by the provider as well as recipient of the genetic resources or that due share of benefits from IPRs to be given to the provider of the genetic resources. But if the recipient of the genetic resources defaults in relation to this obligation, virtually nothing can be done by the providing country to enforce the term of the contract. As far as the benefit sharing obligation under the CBD is concerned there is a total vacuum in the TRIPS agreement and the UPOV. So a patent granted on an invention utilizing the genetic resources of a provider country cannot be invalidated on the ground of non-fulfilment of contractual obligations and the patentee can enjoy his monopoly rights without any obligation under the patent law to share the benefits. If the providing country opts for enforcement of the contract in the foreign jurisdiction of the recipient, the ground of public policy under the Vienna Convention on Enforcement of Foreign Judgments can operate as a safety measure in foreign courts against enforcement of the contract since the public policy of a country may be to promote patenting in the field of biotechnology. Thus even after the conclusion of CBD as well as the Bonn Guidelines, the major objective i.e., benefit sharing remained unsuccessful.

Politically, the need for an international regime on access and benefit sharing (ABS) could be traced back from the concern raised by G-77/China during COP II that adequate attention is not devoted to equitable benefit sharing, PIC and capacity building[10]. Accordingly, it became a separate agenda in 1998 and COP 4 established a regionally balanced Panel of Experts for ABS[11]. The work of this expert group, together with that of the Ad-hoc Open-ended Working group on ABS and a multiplicity of other actors, culminated as the Bonn Guidelines on ABS. It aims to assist Parties and stakeholders in the implementation of the CBD by providing guidelines to establish administrative, legislative or policy measures on ABS[12]. During the negotiation of the Bonn Guidelines regarding benefit sharing, the negotiators as well as the Parties were of the opinion that the diverse nature of the benefit sharing arrangements would hamper the possibility of a strict international protocol[13]. But during the final negotiation of the Bonn Guidelines, developing countries started having an impression that the Guidelines did not sufficiently address the user obligations in relation to access

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10 Stephen Tully, "*The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing*", *RECIEL* 12 (1) 2003 p.85

11 *Ibid*

12 *Supra* note 8, Para. 1.

13 W. Bradnee Chambers, "*WSSD and an International Regime on Access and Benefit Sharing: Is a Protocol the Appropriate Legal Instrument?* "310-320, *RECIEL* 12 (3) 2003.

and that continued misappropriation had been prevailing in the whole process of ABS[14]. It was augmented by the reported instances of the so-called biopiracy.[15] This resulted in the formation of a group called "Like-Minded Mega Diverse Countries" consisting of Bolivia, Brazil, China, Columbia, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela, at the Cancun Declaration of February 2002 as a mechanism to promote a common agenda relating to conservation and sustainable use of biodiversity[16]. During the World Summit on Sustainable Development in September 2002, they called for a negotiation within the framework of the CBD for an international regime to promote and safeguard the fair and equitable sharing of benefits arising from the utilization of GRs which was later endorsed by the UN General Assembly[17]. Based upon this mandate, in February 2004, the Conference of Parties (COP) of the CBD had entrusted the task of negotiations with the Open-Ended Working Group on ABS who developed the Bonn Guidelines[18]. It was asked to consider the process, nature, scope, elements and modalities of an international regime. In their second meeting in December 2003 in Montreal, the Working Group prepared recommendations on the terms of reference for negotiation of an international regime and submitted the same to the seventh meeting of the COP in February 2004[19]. The COP in its decision VII/19D mandated the Ad-hoc Open Ended Working Group to elaborate and negotiate an international regime on ABS in collaboration with the Ad-hoc Open Ended Inter-sessional Working Group on Article 8(j) and different other actors involved, and with the aim to adopt an instrument/instruments to effectively implement Article 15, Article 8(j) and the three objectives of CBD. The terms of reference for negotiation of the international regime was also agreed upon by the COP[20]. The Working Group started its negotiations in the third and fourth meetings and recommendations were forwarded to COP VIII wherein it was

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14 Hamdallah Zedan, '*Biodiversity and Access to Genetic Resources*', WIPO Seminar on Intellectual Property and Development, Geneva, Switzerland, May 2-3, 2005 available at http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05 visited on 24th April, 2013.

15 *Ibid*

16 *Ibid*

17 *Supra note 14*, "Plan *of Implementation of the World Summit on Sustainable Development, 2002*", Paragraph 44(o) (available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf) contains this mandate visited on 24th April, 2013.

18 See Decision VII/19 D of the Conference of Parties to the Convention on Biological Diversity (hereinafter COP Decision) held in 2004

19 For recommendations, see Report of the Ad-hoc Open-ended Working Group on ABS on the Work of Its Second Meeting, UNEP/CBD/COP/7/6 dated 10 December 2003

20 Terms of reference available in annex to Decision VII/19 D, Report of the Seventh Meeting of the Conference of Parties to the Convention on Biological Diversity, UNEP/CBD/COP/7/21 dated 13 April 2004 pp.298-303

directed to continue its work and finalise the regime before COP X[21]. In COP IX, it was directed to convene three meetings before the COP X and established three distinct groups of technical and legal experts[22] to assist the working group by providing legal and technical advice. In the seventh meeting, the Ad-hoc Open-ended Working Group addressed the objective, scope, compliance, fair and equitable benefit sharing and access and entered into negotiations on operational text of these issues. In its eighth meeting the working group addressed the components of the international regime related to TK associated with GRs, capacity building, compliance, fair and equitable benefit sharing and access wherein the Parties agreed on a single negotiating text incorporating all the elements of an international regime. The meeting also met with progress on the nature of the international regime. In the ninth meeting of the Working Group in March 2010, a draft protocol was tabled by the co-chairs of the Working Group and accepted by the Parties as a basis for further negotiations. Since the text did not get finalised in that meeting, they resumed the ninth meeting in July 2010. An Interregional Negotiating Group (ING) was convened at this Ninth meeting to continue negotiations and there was significant progress in reaching a common understanding on core issues. But this meeting also failed to finalise the text for adoption by the 10th COP. This made the ING to again convene its meeting during 18-21 September 2010 where substantial progress was made towards an improved understanding on the key elements of the international regime on ABS, especially on the concept of utilization, benefit sharing and access[23]. Finally, the international regime was finalised and adopted during the COP 10 held at Nagoya, Japan during 18-29, October 2010.

III

A Brief Sketch of the Nagoya Protocol System

The explicit objective of the Nagoya Protocol is the fair and equitable sharing of the benefit arising from the utilization of GRs, by appropriate access to GRs,

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21 See COP Decision VIII/4, 2006

22 See COP Decision IX/12 Para 11 in Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting, Bonn, 19-30 May , 2008, UNEP/CBD/COP/9/29, dated 9 October 2008. Expert Groups on (i) Compliance, (ii) Concepts, Terms, Working Definitions and Sectoral Approach and (iii) Traditional Knowledge Associated with Genetic Resources. Annex II contains the terms of reference of the Groups.

23 Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Annex to the Meeting of Interregional Negotiating Group, UNEP/CBD/WG-ABS/9/ING/1 September 21, 2010 .

appropriate transfer of relevant technologies and appropriate funding[24]. The scope of the Nagoya Protocol is confined to GRs covered under Article 15 of CBD, associated TK and the benefits arising from their utilization[25]. It was reiterated by the COP 10 that HGR are not included within the framework of the Nagoya Protocol. As regards benefit sharing, the Nagoya Protocol mandates that each CP shall take legislative, administrative or policy measures as appropriate to ensure fair and equitable benefit sharing with the country of origin or the country that has acquired the GRs in accordance with the CBD[26]. As far as the GRs held by indigenous communities are concerned, the benefits arising from utilization are to be shared with them fairly and equitably based on MAT and the CP have to implement appropriate measures to this effect[27]. Similar obligation is created in respect of TK associated with GRs held by indigenous and local communities[28]. In the context of access, it is mandated that benefit sharing should be with the country of origin or the country that has acquired the GRs in accordance with the CBD[29] conditional to PIC. In the case of GRs held by communities, appropriate measures to obtain PIC or approval and involvement of such communities should be implemented[30]. Measures to ensure PIC should (a) have legal certainty, clarity and transparency regarding domestic ABS requirements,(b) be fair and non-arbitrary rules and procedures, (c) provide clear and transparent written decision by a competent national authority within a reasonable period of time in a cost-effective manner, (d) ensure the issuance of an access permit or its equivalent at the time of access as evidence of PIC and MAT and notify the ABS Clearing House accordingly, (e) where applicable, set out the criteria/procedures for obtaining PIC or approval and involvement of local and indigenous communities, and (f) establish clear rules and procedures for requiring and establishing MAT, setting out in writing a dispute settlement clause, terms on benefit sharing including IPR, terms on subsequent third party use, if any, and terms on changes of intent, where applicable[31]. Concerning access to TK associated with GRs held by local and indigenous communities, the Parties are bound to take appropriate measures to ensure PIC and MAT from them[32]. Thus, it is the duty of the country providing

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24 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 2010, Article 1

25 *Ibid,* Article 3

26 *Ibid,* Article 5.1&3

27 *Ibid,* Article 5.2

28 *Ibid,* Article 5.5

29 *Ibid,* Article 6.1

30 *Ibid,* Article 6.2

31 *Ibid,* Article 6.3

32 *Ibid,* Article 7

GRs or the country of origin to ensure that all conditions regarding PIC and MAT are complied with in their domestic jurisdiction. Parties are mandated to provide simplified measures of access for non-commercial research purposes, taking into account the possibility of change in the intent of research[33]. Special consideration should be given to cases of present or imminent emergencies threatening or damaging human, animal or plant health and to PGRFA[34]. Where it is difficult to obtain PIC or where the resources and associated TK occur in transboundary situations, the CPs have to consider the need for and modalities of a multilateral benefit sharing mechanism to address the issue of benefit sharing[35]. Transboundary cooperation is called for in instances where the same GRs are found in *in-situ*, within the territory of more than one party, or where the same TK is shared by one or more indigenous and local communities in several Parties, with the involvement of the communities concerned[36]. There should be a national focal point on ABS in each country providing information on procedures for obtaining PIC and establishing MAT including benefit sharing when access is sought to GRs and associated TK, and information on competent national authorities, relevant indigenous and local communities and relevant stakeholders[37]. The national focal point shall liaison with the Secretariat of the CBD as regards its functions and competent national authorities should be established for the grant of access, issue of written evidence as to the fulfilment of access requirements and to advice on applicable procedures and requirements for obtaining PIC and MAT[38]. An ABS Clearing House is established under the Nagoya Protocol as a means for sharing of information related to ABS relevant to the implementation of the obligations[39]. CPs have to make available to the ABS Clearing House the information relating to legislative, administrative and policy measures on ABS, information on the national focal point and competent national authorities, and permits and other equivalents issued as the evidence of complying with the requirements of PIC and MAT[40].The modalities of operation of the ABS Clearing House will be decided upon by the Parties to the Nagoya Protocol in its first meeting[41].

In order to ensure compliance with the PIC and MAT requirements under the domestic ABS legislation, the Nagoya Protocol stipulates that all CPs shall take

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33 *Supra note 24*,. Article 8.a
34 *Ibid,* Article 8.b & c
35 *Ibid,* Article 10
36 *Ibid,* Article 11
37 *Ibid,* Article 13.1
38 *Ibid, Article* 13. 2, 3 & 4
39 *Ibid,* Article 14.1
40 *Ibid,* Article 14.2
41 *Ibid,* Article 14.4

appropriate, effective and proportionate administrative, legislative or policy measures to affirm that GRs utilized within its jurisdiction have been accessed after fulfilling the ABS requirements of the providing Country[42]. Accordingly, measures to address situations of non-compliance should be adopted and Parties are asked to cooperate in cases of alleged violation of domestic ABS requirements[43]. Similar obligation is imposed in respect of compliance with the ABS requirements as regards access to TK held by indigenous and local communities[44]. The Nagoya Protocol also provides that to support compliance, measures to monitor and enhance transparency about the utilization of GRs should be established. Such measures shall include designation of one or more check points that would collect or receive relevant information related to PIC, source of GRs, establishment of MAT and about utilization of GRs. Users have to be required to provide such information to the designated check points and measures should be taken to address situations of non-compliance[45]. Such information should be communicated to the relevant national authorities, the party providing PIC and to the ABS Clearing House without prejudice to the protection of confidential information[46]. Check points must be effective and should have functions relevant to utilization of GRs or to collection of relevant information at any stage of research, development, innovation, pre-commercialization or commercialization[47]. An access permit or its equivalent issued at the time of access as the evidence to grant PIC and establishment of MAT and made available to the Clearing House should serve as an internationally recognised certificate of compliance that is to be furnished with the check points[48]. Such international certificate of compliance should contain the minimum information regarding the issuing authority, date of issuance, the provider, the unique identifier of the certificate, the person to whom PIC is granted, subject matter or the GR covered by the certificate, confirmation that MAT are established, confirmation that PIC is obtained and should specify commercial and/or non-commercial use[49]. Parties are asked to encourage providers and users to include provisions in the MAT to cover dispute resolution stipulating

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42 *Ibid,* Article 15.1

43 *Ibid,* Article 15.2&3

44 *Ibid,* Article 16

45 *Ibid,* Article 17.1(a) (i)&(ii)

46 *Ibid,* Article 17.1(a) (iii)

47 *Ibid,* Article 17.1(a) (iv)

48 *Ibid,* Article 17.2 & 3

49 *Ibid,* Article 17.4 For a detailed discussion on certificate of compliance, see Miriam Dross and Franziska Wolf, "*New elements of the International Regime on Access and Benefit Sharing of Genetic Resources – The Role of Certificate of Origin*", *BfN - Skripten* 127, 2005 available at www.dnl-online.de visited on 26th April, 2013.

jurisdiction, applicable law and options for alternative dispute resolution[50]. The CPs are obliged to ensure that an opportunity to seek recourse is available under their legal system in cases of disputes arising from MAT, based on the principle of access to justice and the utilization of mechanisms relating to mutual recognition and enforcement of foreign judgements and arbitral awards[51].

IV

Access and Benefit Sharing under the Nagoya Protocol

(i) *Scope and Coverage of the Protocol*

Access and benefit sharing provisions of the Nagoya Protocol falls in line with the CBD on some aspects and sometimes it goes beyond the CBD obligations and the similarities and the differences do have their own role to play in the context of sustainable development. In the CBD, it could be seen that the provisions of the Convention directly talk about access to genetic resources only, though the Bonn Guidelines elaborate that pursuant to Article 8(j) of CBD, traditional knowledge associated with genetic resources can also be included in the access framework. Thus, under the CBD as well as the Bonn Guidelines, the Member States could decide whether or not to include traditional knowledge within the access framework. Interestingly, the Nagoya Protocol in Article 3 provides that the Protocol shall apply to genetic resources within the scope of Article 15 of the CBD, the benefits arising from the utilization of such resources, traditional knowledge associated with genetic resources within the scope of the CBD and to the benefits arising from the utilization of such knowledge. The "utilization of genetic resources" is defined in the Protocol as to "conduct research and development on the genetic and/or biochemical composition of genetic material including through the application of biotechnology as defined in Article 2 of the Convention".[52] Biotechnology under the Protocol means "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use[53]". Derivative is in turn defined as "a naturally occurring biochemical compound resulting from the biochemical expression or metabolism of biological resources or genetic resources, even if it does not contain functional units of heredity[54]". In short, the subject matter of the Protocol system could cover genetic resources, their derivatives, and genetic resource associated traditional knowledge with

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50 *Ibid,* Article 18.1
51 *Ibid,* Article 18. 2, 3 & 4
52 *Ibid,* Article 2(c)
53 *Ibid,* Article 2(d)
54 *Ibid,* Article 2(e)

the express exclusion of human genetic resources[55]. The contribution of the protocol in relation to sustainable development in this aspect is that it has directly recognised the importance of traditional knowledge over genetic resources and the holders of traditional knowledge can legally claim share of the benefits arising from the utilization of their traditional knowledge. In short, the Protocol has made traditional knowledge holders directly involved in the process of access and benefit sharing

The Protocol extends to all genetic resources covered by Article 15 of the CBD, associated TK and to the benefits arising from the utilization thereof[56] meaning to cover the genetic resources that belong to the country of origin or the country that has acquired the resources in accordance with the CBD. In this regard the reiteration of the COP X while adopting the Protocol is worth recalling that "...the international regime is constituted by the CBD, the Protocol on Access to Genetic Resources and the fair and Equitable Sharing of Benefits Arising from Their Utilization as well as complementary instruments, including the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Bonn Guidelines...." If we look at the multilateral system of benefit sharing created by the ITPGRFA, it covers only the Annex I resources which implies that the ITPGRFA has created an ABS system only for the Annex-I resources. So naturally, the other PGR not covered by the ITPGRFA will be covered by the CBD system for the purpose of access. In addition to this, the Annex I resources will also be covered by the Protocol, if they are used beyond the purposes of the Treaty. The implication for sustainable development in this regard is that whenever the contributions of farmers in relation to Annex –I resources are used for purposes other than those specified by the ITPGRFA, the Nagoya Protocol could establish benefit sharing obligations under the CBD and that the farmers could be rewarded.

(ii) ***Ownership Rights of Communities under the Protocol***

Article 6.1 of the Protocol provides that for access to genetic resources, PIC is to be taken from the providing country that is the country of origin or the country that has acquired the resources in accordance with the CBD. Article 6.2 adds that if the local and indigenous communities have established rights to grant access to the resources, PIC from them or their approval and involvement is needed for the process of access. Access to TK associated with genetic resources is dealt under a separate head providing that when such knowledge is held by local and indigenous communities, PIC shall be

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[55] COP Decision X/1(2010) Section I para. 5

[56] *Supra note* 24, Article 3

obtained from them[57]. Thus, the Protocol elaborates three instances where PIC is needed. First, it reiterates the State ownership over the resources in the exercise of sovereign rights. Second, it recognises the rights of the communities over the resources and mandates PIC from them in such circumstances. Thirdly, the Protocol has separated the knowledge over the resources and provides that PIC should be taken from the communities holding such knowledge while accessing them. Thus, the protocol is showing a clear departure from the flexible situation of the CBD to decide the ownership issue internally. It gives a specific mandate to the Member States to recognise the rights of the communities over the resources as well as TK by making PIC from them a mandatory requirement for access. Or we could say that the Protocol is directing the State to vest the ownership of the resources as well as TK with the communities when they have specific claims/ rights over them. Thus the communities are also forming part of the access framework and their participation can also be ensured. The Protocol has succeeded in establishing the rights of the communities and has gone positively much beyond the general provisions of the CBD

Coming to the beneficiaries under the Protocol, the benefits arising from the utilization of genetic resources, subsequent application and commercialization shall be shared upon MAT with the providing country that is the country of origin or a country that has acquired the resources in accordance with the CBD[58]. As far as genetic resources held by the communities are concerned, benefits arising from utilization shall be shared with them upon MAT[59]. As regards the utilization of TK associated with genetic resources, there must be fair and equitable benefit sharing with the communities holding the TK[60]. As discussed earlier, by specifying that as regards TK held by communities, PIC and benefit sharing is solely with the communities, the Protocol creates an impression that the rest of the TK forms part of the public domain with nobody ascertaining ownership over the same. In effect, a large part of the TK associated with genetic resources is left out of the ABS regime created by the CBD as well as the Protocol. The Protocol talks about the possibility of establishing a global multilateral benefit sharing mechanism to address benefit sharing in the context of utilization of genetic resources and TK that occur in transboundary situations or where it is not possible to obtain PIC[61]. The benefits shared through this

57 *Supra note 24,* Article 7
58 *Ibid,* Article 5.1
59 *Ibid,* Article 5.2
60 *Ibid,* Article 5.5
61 *Ibid,* Article 10

mechanism are to be used to support the conservation of biological diversity and sustainable use of its components globally[62]. It is noteworthy that a multilateral benefit sharing mechanism may be pivotal when it is difficult to ascertain the ownership rights. But when the country of origin of TK could be ascertained, the benefits should naturally go to it which has to decide internally how to distribute the benefits. Since the modalities of the proposed mechanism are not considered yet, it is not clear whether the country of origin could assert its rights in such cases. Considering the language of the Protocol that such benefits should be used to conserve and support global biodiversity, the assertion of the rights of the country of origin is normally not possible. Thus, in this regard, the Protocol fails in ensuring due benefits to the real conservators of biodiversity and it also dilutes the rights of the country of origin. A positive impact is that it has gone a step forward in theoretically ensuring the rights of the local and indigenous communities over the resources and TK they hold by mandating PIC from and benefit sharing with them. As far as misappropriation of TK is concerned, the Protocol is not only a failure; it even creates disastrous effects by leaving a vacuum in its text.

V

Obligations of Member States under the Protocol during Access

Since access to genetic resources and associated TK mandates PIC from the State or the communities as the case may be, the Protocol elaborates the obligations imposed on Member States at the access point as well as during and after utilization by the user. Analysis of these obligations would be significant as the CBD is placing only the minimum requirement that access shall be upon PIC from the Party providing the resources unless otherwise determined by that Party[63]. So under the CBD, the State has the choice whether or not to regulate access to its resources and the mode of regulation too is within the scope of its choice. The Protocol also provides that access to genetic resources for their utilization shall be subject to PIC of the country of origin unless otherwise determined by that Party[64]. If a Party requires PIC for access to its resources, it has to take appropriate legislative, administrative or policy measures with legal certainty, clarity and transparency[65] and the rules and procedures for access should be fair

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62 *Ibid.*

63 The Convention on Biological Diversity, 1992, Article 15.5

64 *Supra note 24,* Article 6.1

65 *Ibid,* Article 6.3(a)

and non-arbitrary[66]. This is imposing more targeted specific obligations than the CBD.

When PIC constitutes a requirement for access as per the domestic law, such countries have the obligation to supply information as to how to apply for PIC[67]. When access to genetic resources requires PIC from the local and indigenous communities, the country has to set out the criteria or processes for obtaining PIC or the approval and involvement of such communities[68]. For access to TK held by communities, the providing country has to take measures to ensure that PIC or approval and involvement of such communities is secured prior to the access[69]. In the CBD and the practice of the majority of the nations was to put the burden to ensure PIC from the communities on the shoulders of the person seeking access. In contra, the Protocol is creating an express mandate upon the providers to provide mechanism ensuring PIC from the communities. Thus it is a CBD plus obligation as far as the providing countries are concerned and the Protocol language reverses the burden from the applicant to the provider country. The Protocol again specifies that the providing countries have to establish clear rules and procedures for requiring and establishing MAT and such terms should be in writing spelling out a dispute settlement clause, terms on benefit sharing including IPR, subsequent third party use if any and terms on change of intent where applicable[70]. The first part of this obligation viz. to establish rules and procedures for requiring and establishing MAT has also reversed the obligation that was previously on the applicant towards the providing country. Likewise, it is also expressly provided that the providing country has to put its decision regarding access, in writing and such decision shall be clear, transparent, cost-effective and within a reasonable period of time[71]. The specific stipulation to issue an access permit or its equivalent as the evidence of the decision to grant PIC and of the establishment of MAT and communication of the same to the ABS Clearing House Mechanism[72] also goes beyond the CBD.

Article 13 of the Protocol is a very interesting provision that talks about the establishment of national focal points and competent national authorities. It provides that each Party shall designate a national focal point on ABS

66 *Supra note 24*, Article 6.3(b)
67 *Ibid*, Article 6.3(c)
68 *Ibid*, Article 6.3(f)
69 *Ibid*, Article 7
70 *Ibid*, Article 6.3 (g)
71 *Ibid*, Article 6.3(d)
72 *Ibid*, Article 6.3 (e)

and the same is assigned with the duty to make available the information on procedures for obtaining PIC and establishing MAT including benefit sharing for applicants seeking access to genetic resources; information on procedures for obtaining PIC or approval and involvement of local and indigenous communities (ILCs) and MAT including benefit sharing for applicants seeking access to TK associated with genetic resources; and information on competent national authorities, relevant ILCs and relevant stakeholders[73]. It is also responsible for liaisoning with the Secretariat of the CBD[74]. What is interesting is that the provision spells out obligations relating to the providers of the resources and associated TK and not the users. Though the obligation is cast on all Members of the Protocol, as far as a user country is concerned, its national focal point has no role to provide information on the uses and the users within its jurisdiction. Similarly, there should be one or more competent national authorities established by the Member countries to be responsible for granting access or issuing written evidence that access requirements have been met[75]. The competent national authority is also responsible to advise on applicable procedures and requirements for ensuring PIC and MAT[76]. The competent national authority and the national focal point could also be a single entity[77]. As we have observed earlier, the obligation of the competent national authority is in similar line with that of the national focal point i.e. to regulate access and the national authority in the user country has no corresponding obligations in relation to the users in its domestic jurisdiction.

VI

Obligations of User Countries during Access

As far as a user country is concerned, the obligations in respect of the ABS process come in the form of compliance measures in the Protocol. The adopted text of the Protocol provides that each Party is bound to take appropriate, effective and proportionate measures to provide that the genetic resources utilized within its jurisdiction are accessed in accordance with PIC and that MAT have been established as required by the domestic ABS legislation or regulatory requirements of the other Party[78]. It is also provided that Parties are bound to take appropriate, effective and proportionate measures to address

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73 *Supra note 24*, Article 131
74 *Ibid.*
75 *Ibid*, Article 13.2
76 *Ibid.*
77 *Ibid*, Article 13.3
78 *Ibid*, Article 15.1

situations of non-compliance with such measures adopted[79]. Parties are also asked to cooperate as far as possible and as appropriate when there is violation of domestic ABS legislation or regulatory requirements[80]. Very similar wordings are used in the context of compliance with domestic ABS legislation or regulatory requirements for TK associated with genetic resources[81]. But to answer the question how far these provisions impose positive obligations on the user countries, we could see that it is reaching nowhere expected. First, it does not mention what are the effective, appropriate and proportionate measures to ensure compliance with the domestic ABS laws of the providing country. One can even think how to determine the effectiveness, appropriateness and proportion of such measures. It is noteworthy that the Protocol talks about compliance with the regulatory measures / ABS legislation of the other Party and not specifies that it is the country of origin. Is it an attempt to foresee and legitimise cases where access was obtained from a country other than the country of origin? Thus is it making clear that the user country has no duty to ensure that its users have obtained the resources from the country of origin, but its job is to validate and enforce only the prevailing contract whosoever be the other Party? If it is the case, who will listen to the country of origin? Let us listen to Nijar who says:

> "...the laws or regulatory requirements that must be adhered to must be that of the '*other Party*'. This last qualifier departs from the language elsewhere in the Protocol (for example in Article 4.1), based on Article 15.3 of the CBD, that the resources accessed must be those that are provided by the countries of origin of such resources or the Parties that have acquired the resources in accordance with the CBD. The language in the Protocol condones the legitimacy of access from countries that are not such countries. Hence if resources have been accessed illegally from a country of origin X, by another country Y, and a user accesses these from country Y in accordance with the ABS provisions of country Y, the user country does not have to ensure compliance with the ABS requirements of the country of origin X. This legitimizes biopiracy."[82]

The Protocol envisages monitoring obligation to effectively implement compliance measures. The most important means provided for monitoring is the designation of one or more check points that would collect or receive, as appropriate, relevant information relating to PIC, source of the genetic

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79 *Supra note 24,* Article 15.2

80 *Ibid,* Article 15.3

81 *Ibid,* Article 16

82 Gurdial Singh Nijar, "*The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: An Analysis*", 24-25, *CEBLAW brief,* January, 2011 .

resources, the establishment of MAT and the utilization of genetic resources[83]. Users would be required to provide information to such check points depending upon the particular characteristics of each check point and effective, appropriate and proportionate measures should be implemented to address situations of non-compliance[84]. Such information will be provided to relevant national authorities, to the party providing PIC and to the ABS Clearing House as appropriate and without prejudice to the protection of confidential information[85]. Check points have to be effective with functions relevant to the implementation of this obligation and should be relevant to the utilization of genetic resources, or to the collection of relevant information at any stage of research, development, innovation, pre-commercialization or commercialization[86]. The design of check points looks very tactical. The function of the check points as we could read from the Protocol is to receive information relevant to access as submitted by the users. It is not clear from the language of the Protocol what is meant by functions of a check point relevant to implementation of the present provision. It is assumed from the wording "the information collected by the check point has to be communicated to the relevant national authorities, to the ABS clearing House and the Party providing PIC" that the information is to be passed to the national authority of the user country. As regards the communication of such information, the language of the Protocol is not strict; it provides that the information will be made available as *appropriate* and without prejudice to the protection of confidential information. So it is not a mandatory obligation as far as the check points are concerned. The confidentiality is also determined by the Parties.

It is to be noted that the information a user is required to provide to the check point is *inter alia* regarding the source of the genetic resources used and not the country of origin. Another notable matter is the absence of any reference to TK associated with genetic resources. The Protocol is also quiet on the different aspects of the check points like its nature, role and functions. The reference that checks points should be relevant to the utilization of genetic resources or to the collection of relevant information at any stage of research, development, pre-commercialization or

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83 *Supra note 24*, Article 17.1(a)(i)

84 *Ibid*, Article 17.1(a)(ii) Also see Evanson Cheg Kamau *et.al*, "*The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is new and What Are the Implications for Provider and User Countries and the Scientific Community?*", 256-257, 6/3 *Law Environment and Development Journal*, 2010.

85 *Ibid*, Article 17.1(a)(iii)

86 *Ibid*, Article 17.1(a)(iv)

commercialization is rather unconvincing. What is the effect of such an institution which has roles in the above specified stages? It is a clear departure from the stand taken by the Protocol as far as the obligations of the provider countries at the access point are concerned. There the functions of the competent national authority as well as the national focal points are clearly defined with less space for choice of the providers. In sharp contrast to this, the compliance measures are featured by ultimate freedom of the user countries in determining the check points and their functions. The country can decide at what stage a check point has to operate, what would be the relevant information it has to receive, whether it is to be communicated to the relevant authorities including the provider and the ABS Clearing House and the mechanism to deal with issues of non-compliance. In short, the negotiations had ended up with detailed obligations on the developing countries regarding clear and transparent procedures for access while there is complete uncertainty and vagueness regarding the obligations of the user countries to ensure compliance.

Another new proposition to ensure compliance is the monitoring mechanism through the issue of an internationally recognised certificate of compliance. It is a permit or equivalent issued at the time of access by the providing country as the evidence of the decision to grant PIC and of the establishment of MAT and to be notified to the ABS Clearing House[87]. The minimum information such a certificate has to carry, when not confidential, relate to the issuing authority, the provider, date of issuance, unique identifier of the certificate, the person or entity to whom PIC was granted, subject matter or genetic resources covered by the certificate, confirmation that MAT is established, confirmation that PIC is obtained and commercial and/or non-commercial use[88]. It is surprising that the Protocol reserves the countries the right to disclose the above crucial details on the ground of confidentiality. The concept as proposed by the Protocol is preposterous mainly because one can genuinely doubt the international recognition conferred on a certificate issued by a national authority. Not only that, what will happen to the "internationally recognised" status of the certificate of compliance when its validity is challenged by another country. It is to be noted that even though the Protocol insists that PIC and MAT must be from the country of origin[89], its later provisions on compliance do not repeat the similar concern. The compliance and monitoring provisions tactfully omits any reference to country of origin. If a certificate of

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87 *Supra note 24*, Article 17.2, 17.3 and 6. 3(e)

88 *Ibid,* Article 17.4

89 *Ibid,* Article 6

compliance is issued by country X and its validity is challenged by country Y claiming to be the country of origin, this compliance mechanism fails. Yet another serious flaw is that the certificate of compliance talks only about genetic resources and not associated TK. Thus there is no obligation to pass any information regarding the TK used at the checkpoints, and the certificate of compliance too will not carry any information regarding the same. If we look at the mode of operation of the compliance and monitoring system of the Protocol, it is that the users have to submit the certificate of compliance or the permit issued to them at the check points in whose jurisdiction, utilization of GRs occur. But when it is not done, the mechanism to deal with such instances does not form part of the Protocol. Thus its deterrent effect is very minimal. The only positive outcome is that the developing countries have succeeded in imposing an obligation on the user countries to cross-check the compliance of ABS legislations in their jurisdiction which might be implemented in a minimum to zero level.

VII

Intellectual Property Rights and the Nagoya protocol

The most disparaging aspect of the Protocol is its silence with respect to issues related to IPRs. The issue was not at all discussed during the negotiations as the developed countries were of the opinion that CBD is not the best forum to address the issue. But as a legal instrument to ensure benefit sharing that could arise from all possible aspects the CBD permits, it is bound to at least open up a way for carrying out a discussion in that line. The omission in this regard has rendered the Protocol toothless. The result is that still there is no means to render a patent invalid on the ground of non-compliance with the domestic ABS legislation for PIC and benefit sharing. Thus the game ends where it had begun. It is pathetic that even at the verge of two decades after the adoption of the CBD, we are still in the vicious circle of misappropriation and nothing is there in place to condone the same. When IPR intercepts, the benefit sharing obligation under the CBD as well as the Protocol shatters and awaits the mercy of the user. Looking from this angle, seldom does the Protocol contribute to sustainable development.

VIII

Conclusion

Even though the Protocol is the result of eight years prolonged negotiation, it is a fact that the progress of the Protocol towards furthering the CBD objectives is very minimal and on many areas, it has not moved much

beyond the CBD. Ironically, the developing countries had ended up with more obligations to implement to make their access legislation more transparent and certain. As far as the user obligations are concerned, the protocol uses vague propositions and provide unclear obligations. Uncertainty is the chief attribute of the Protocol. In the context of the benefit sharing objective of the CBD, the Protocol is unable to carry it forward, especially in light of the absence of provisions linking it with the TRIPS. To ensure sustainable development through benefit sharing, the Protocol needs to be amended incorporating the following changes.

- Article 5 (benefit sharing clause) should be amended by adding a new paragraph to the effect that in the case of TK widely spread in the country of origin without identifiable owners, there should be PIC and benefit sharing with the State. Here PIC is not mandated from people/communities taking into account of the difficulty in identifying the owner. Patent office should be made a mandatory check point under the Protocol.
- Check points including the patent office should be furnished with information relating to the country of origin as opposed to the present mandate regarding source. This disclosure of the country of origin should be made a mandatory requirement.
- The check points should also be furnished with details relating to the TK associated with genetic resource accessed by the user.
- There should be sanctions for fraudulent or non-disclosure of the required information at the designated check points. Such sanctions should range from injunction preventing further use of the resources in the domestic jurisdiction of the user country and such sanctions should depend on the nature of the check points. At the patent office, the mandatory check point, the sanction should be non-processing of the application till the required information is provided. If at a later stage, the information furnished found to be fraudulent, the patent granted should be revoked.
- Finally, the Protocol should be amended to include a provision to the effect that if the requirements of PIC and MAT are not complied, there should be civil, criminal or administrative sanctions and including revocation of IPRs granted.

EMPLOYMENT PROTECTION AND CONDITIONS OF DOMESTIC WORKERS: A CRITICAL APPRAISAL

*Jeet Singh Mann**

I

Introduction

On 31st July 2013, under the banner of National Platform of Domestic Workers (NPDW), thousands of domestic workers from more than 10 states and Union Territories came together at JantarMantar to demand enactment of a comprehensive legislation on protections of domestic workers. With exploitation of domestic workers at the hands of placement agencies, and trafficking of girls from states such as Jharkhand, the demand for a regulation of domestic work and its recognition as an occupation with dignity has gained credence.[1] Workers and Activists are demanding a legislation that deals comprehensively with areas like working conditions and lack of social protection; the demands include a tripartite board that would serve as the instrument for implementation of the said Act, and would undertake registration of workers and their social security contributions, regulation of conditions of work, social protection, registration of employers and collection of their contribution for social security, and monitoring of payment of minimum wages. [2]

Working conditions of domestic workers employed outside India is also not good. To depict the deplorable working conditions of domestic workers in foreign countries, let me narrate an anecdote of a real report of a domestic worker. One old woman, aged around 40 years, illiterate domestic worker, who came to the UK in 2005, passed between three middle class families for many years in the UK. She was beaten, raped and kept as a slave, without any benefits and protections of a domestic worker under labour legislations and international instruments on the issues. The said worker was required to work, 17 hours per day, throughout week without any weekly holiday. She had been threatened and

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1 Diana Ningthoujam "Housework: A thankless job and in need of protection" The Hindu, (New Delhi) dated July 16, 2013; available at the link http://www.thehindu.com/news/cities/Delhi/domestic-work-remains-deeply-rooted-in-bias-says-study/article4917714.ece accessed on 10 August 2013

2 Times News Network (TNN), reportedin The Times of India; "Domestic workers protest in capital" Aug 1, 2013, news article is available at the link: http://articles.timesofindia.indiatimes.com/2013-08-01/delhi/409606941 domestic-workers-npdw-national-policy; viewed on 10 August 2013

attacked on numerous occasions. Employer confiscated her passport. The said domestic worker, with the help of domestic police, was rescued, from the powerful and well connected abusers, by the Migrant Workers Charity and Human Rights' Group.[3] It is surprising to mention that the gross violation of human rights has been carried out by so called well informed and educated strata of society. This real story depicts the ground realties of terms and conditions of employment of millions of domestic workers across the world.

According to the global estimation created by the International LabourOrganisation, (hereinafter ILO) at least 52.6 million women and men have been occupied, as their main profession, in domestic works. Women domestic workers across the world, in order to provide a living for themselves and their families, are driven to domestic work in view of limited options available to them. "Female workers comprise the overwhelming majority of domestic workers, which constitutes nearly 43.6 million workers of the total work force in the globe or 83 per cent of the total domestic work force"[4]. About 25% of domestic workers are below the age of 14 years[5]. It is true that domestic work is an important source of earning livelihood for women. But it is deplorable to notice that the wages paid to domestic workers contributes to 7.5 per cent of wages of all female workforces worldwide.[6]

India is a country of origin, transit and a destination for domestic workers. India receives domestic workers from its neighbouring countries. India also sends domestic workers to countries in the Middle East and west Asia, UK, USA and some regions of Europe. Employment of underage (below 18 years) domestic workers is an increasing problem in India. Around 12.6 million underage domestic workers are said to have been employed in India.[7]

It has been observed that domestic work continues to be undervalued and indiscernible. This is due to the fact that domestic workers come from the down trodden strata of society. "Domestic workers are particularly vulnerable

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3 The Indo-Asian News Service (IANS) *"Indian woman raped, enslaved in Britain for years"*Times of India, April 21, 2013; http://timesofindia.indiatimes.com/nri/other-news/Indian-woman-raped-enslaved-in-Britain-for-years/articleshow/19650224.cms accessed on 24 April 2013.

4 International LabourOrganisation: *Global and regional estimates on domestic workers, Domestic Work Policy Brief No. 4* (Geneva, 2011) and Domestic workers across the world (Global and regional statistics and the extent of protection), January 2013, the ILO, Geneva

5 National Domestic Workers Alliance, Center for Urban Economic Development, University of Illinois at Chicago *: Home Economics The Invisible and Unregulated World of Domestic Work*, Data is available at ttp://www.domesticworkers.org/pdfs/HomeEconomicsEnglish.pdf accessed on 4 Jan 2013

6 *Ibid*

7 *Supra note 3,*

to prejudice in respect of terms and conditions of employment and to other abuses of human rights"[8] Preamble of the Domestic Workers Convention, 2011, see also other related Conventions and recommendations of the ILO as under:

a) Conventions: C097 Migration for Employment Convention (Revised), 1949 .

Due to the lack of a strong legislative enactment, exploitation of domestic workers in various ways, starting from low wages to ill-treatment and sexual harassment by employers, remains unchecked. Main difficulties of domestic workers hover around long working hours, denial of weekly holidays, unpaid and underpaid, irregular payments, sexual abuse, harassment, lack of bargaining capacity, and job insecurity.

The ILO as well as the UN, to ensure compliance with protections to workers, has come out with some declarations in form of Conventions and recommendations. But the ground reality is quite different from the legislative commitments. There is a wide gap which is deliberately created by employing countries, between preaching and practicing of international standards on domestic workers. Hippocratic behavior of nations is one of the main contributing factors for not improving the conditions of domestic workers. Domestic workers have been exploited, for the sake of economical development and other social, economical and political reasons, by majority of countries. This research paper would examine the nature and scope of important Conventions, formulated by the ILO and the UN, pertaining to domestic workers and statutory protections under domestic laws in India. Researcher would also examine the problems of domestic workers and make endeavours to come out with some viable solutions, to make better living and working environment of domestic workers, of those problems.

II

Domestic Workers and their problems

The term domestic worker has been defined by a variety of Conventions of the ILO and UN for the purposes of providing protections to such workforce. A domestic worker is someone who carries out household work in a private household in return for remuneration. Convention No. 189 and Recommendation No. 201 of the ILO aim at safeguarding workers performing domestic work

[8] Preamble of the Domestic Workers Convention, 2011, see also other related conventions and recommendations of the ILO as under:
a) Conventions: C-97 Migration for Employment Convention (Revised), 1949 b) Conventions: C156 Workers with Family Responsibilities Convention, 1981 c) Rec Supplemented: R201 Domestic Workers Recommendation, 2011 d) Recommendations:R198 Employment Relationship Recommendation, 2006

within an employment relationship. These instruments call for legal protection of all domestic workers, irrespective of status of employer whether they are employed by private individuals and householders or enterprises or other organizations. These instruments cover part, both, time and full-time workers, whether employed under live-in or live-out arrangements.[9]

Domestic workers can be categorized into two classes such as live-in residential domestic workers and non-residential domestic workers. Domestic workers, who very often reside in household for which they work, are called live-in domestic workers. Such workers depend up on their employers for basic requirements such as food, clothing and shelter. In some cases, domestic workers have been found sleeping in kitchen or small rooms, such as a box room, sometimes sited in the basement or on roof. A number of specific issues arise in respect to live-in arrangements, including the need to ensure decent living conditions, fair working time arrangements, freedom of movement and communication. The physical proximity of domestic workers to household members poses a heightened risk of abuse and harassment.[10]

It is seen that problems of domestic workers, whether employed in India or outside India, hang around prolonged working hours, deplorable working conditions, irregular wages, sexual harassment, discrimination, and lack of right to freedom of association. On most of occasions, domestic workers are compelled to routinely work 12-20 hours without any provision of weekly holiday. Social security protections, in case of any contingencies such as sickness, disablement, death, and maternity benefits, are beyond scope of imagination of these workers. Domestic workers, outside India, are particularly vulnerable to mistreatment, with threats of expatriation, discriminatory labour laws, language barriers, withholding of documents by employers, and voracious employment agencies.

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[9] ILO Publication; *Effective Protection For Domestic Workers: A Guide To Designing Labour Laws,* International Labour Office, Geneva, 2012; According to the Report of Domestic workers across the world (Legal protection for domestic workers) January 2013, the ILO, Geneva: "only 10 per cent of all domestic workers (or 5.3 million) are covered by general labour legislation to the same extent as other workers. By contrast, more than one-quarter - 29.9 per cent, or some 15.7 million domestic workers - are completely excluded from the scope of national labour legislation. Between these extremes, intermediate regimes exist. Exclusions and partial coverage result in weaker protection for domestic workers in a number of important areas. The report focuses on three aspects, namely: (1) working time regulation; (2) minimum wage coverage and in-kind payments; and (3) maternity protection. Based upon statistical data on the number of domestic workers and on information on provisions in national legislation, the report provides new global and regional coverage estimates for each of these aspects".

[10] *Ibid*

III

Employment Protections to Domestic Workers under International Instruments

The ILO and UN have played a crucial role in protecting and promoting interests of workers. Recognition and protection of rights for domestic workers is an essential step in breaking domestic work away from the informal economy with its perpetuation of exploitation and inadequate working conditions.[11] The ILO, in a conference held in 2011 decides to bring domestic workers worldwide under the dominion of labour standards. The ILO has also marked June 16 as International Domestic Workers Day.

(i) *Convention on Migrant Workers (Supplementary Provisions) Convention No 143, 1975*

The preamble of the convention takes cognizance of the existence of illicit and clandestine trafficking in labour which calls for further standards specifically aimed at eliminating these abuses[12]. Social security is desirable in order to promote equality of opportunity and treatment[13] of migrant workers equal to that of nationals. The Convention ensures that a member must respect the basic human rights of all migrant workers including domestic workers[14]. Employing nation is bound to ensure protection of workers from any exploitation through legislation or agreements[15]. This Convention does not prevent members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application.[16]

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11 The Core Labour standards Provides the following rights to workers all over the world: The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No.98); the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105); the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child LabourConvention, 1999, (No. 182). the Wage-Fixing Machinery Convention, 1928 (No. 26), and the Minimum Wage Fixing Convention, 1970 (No. 131); the Protection of Wages Convention, 1949 (No. 95); the Maternity Protection Convention, 2000 (No. 183); the Workers with Family Responsibilities Convention, 1981 (No. 156);the Termination of Employment Convention, 1982 (No. 158);the Private Employment Agencies Convention, 1997 (No. 181);the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). Available at the ILO Labour standards web page at http://www.ilo.org/global/standards/lang—en/index.htm.

12 Convention of Migration Workers (Supplementary Provisions) Convention No. 143, 1975) Part-I

13 *Ibid,* Part-II

14 *Ibid,* Article 1

15 *Ibid,* Part-III, Article 15

16 *Ibid*

It is seen that the ILO's Convention No. 97 has been ratified by 47 member nations out of 185, which does not include the USA, China, UEA, Singapore, Thailand and India. The UK has ratified the Convention with exclusion of ANNEX I and III. Convention No 143 has been ratified by 23 member nations which do not represent leading industrialist countries. Despite the fact that some countries have ratified these Conventions, the conditions of domestic workers have not improved much, which is evident from reported instance on ill-treatment of domestic workers. Some countries that have ratified are also unwilling to extend any protection to such workers due to trade reasons and protest by local people.

(ii) *The United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990*

This Convention was adopted at the 45th session of the General Assembly of the United Nations[17]. It is important to note that the said Convention of the UN provides similar kinds of protections to migrant domestic workers which have been listed under various Conventions of the ILO on the issue[18]. The Convention provides for certain rights under Part III[19], which is applicable to both documented and undocumented workers, and rights under Part IV that are available to regular workers.

The Convention also provides for protection against the dehumanization of migrant workers and members of their families who have been evicted of their human rights. Protections against horrible living and working conditions and physical abuse including sexual abuse must continue to be part of right to life of migrant workers and their family members.[20] The Convention also stipulates some protections against cruel, inhuman or degrading treatment[21] as well as slavery or servitude and forced or compulsory labour by the migrant workers and family members[22].

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17 Resolution 45/158 of 18 December 1990, the said Convention was brought into force with effect from 1st July 2003.

18 Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No. 151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105)

19 The Convention on Migrant workers does not create new human rights, but ensures the complaisance of various human rights which are available under the Universal Declaration of Human Rights 1948, and other Conventions and treaties adopted by the member nations.

20 Domestic Workers Convention No. 189, 2011 Article 9, Rule 4

21 *Ibid,* Article 10

22 *Ibid,* Article 11

It is important to mention that some fundamental articles such as 25, 27, and 28, provide for equality with the nationals of the host country in respect of remuneration and conditions of work such as overtime, hours of work, weekly rest, and holidays with pay, safety, and health, termination of work contract, minimum age, and restrictions on home work[23]. Further the Convention also guarantees the equality with nationals in case of social security protections[24] and medical care in case of sickness[25].

It is unfortunate that most of the developed and developing nations like as the USA, the UK, Australia, Hong Kong, Spain, Canada, India, China and Singapore have not ratified the Convention till date. According to the United Nations source[26] only 31 countries have ratified the provisions of Conventions and have also provided for such protections to migrant workers under their municipal laws. There are municipal laws to protect workers of any origin, but there are problems of enforcement. As a result of which migrant workers are not treated well by employers and enforcement machineries.

(iii) *ILO Domestic Workers Convention, 2011*[27]

The International Labour Conference, a core body of the ILO, adopted the Domestic Workers Convention No. 189 and its supplementing Recommendation No. 201 in June 2011. This is the first time that the ILO has formulated international labour standards dedicated to this particular group of workers. Minimum age of domestic worker shall be decided according to provisions of the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182).[28]

The Convention has provided various protections to domestic workers in the form of freedom of association, recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour and elimination of discrimination in respect of employment and occupation.[29] Moreover, the Convention imposes an obligation upon member states for ensuring fair terms of employment as well as decent working conditions and respect for

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[23] *Supra note 20*, Article 25
[24] *Ibid*, Article 27
[25] *Ibid*, Article 28
[26] UNHR: Data is available at http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain/opendocpdf.pdf?reldoc=y&docid= 4c0f59122 accessed on 4 Jan 2013
[27] 100th Session on of the ILC, 16 June 2011
[28] *Supra note 20*, Article 4
[29] *Ibid*, Article 3

their privacy.[30] Domestic workers are entitled to keep in their possession their travel and identity documents.[31]

The Convention also ensures equal treatment between domestic workers and other workers in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements. Domestic workers shall be paid directly in cash at regular intervals, at least once a month.[32] According to the Convention municipal laws must provide for adjudicatory mechanism, with a simple process and the power to impose penalty, for redressal of grievances of domestic workers[33] This Convention does not affect more favourable provisions applicable to domestic workers under other international labour Conventions.[34]

Brazil has ratified the Convention by amending its Constitution to implement a new legislation covering around six and a half million domestic workers and other workers. The constitutional amendment provides for some fundamental human rights for domestic workers, which includes right to overtime pay, a maximum eight hour working day and 44 hour working week, and compensation in case of death and other contingencies related to employment. Some of the changes have also been brought into force with effect from 2nd April 2013.[35]

It is pertinent to specify that the said Convention has been enforced by some member nations, namely, Italy[36] Mauritius, Philippines, Bolivia,[37] Thailand[38]and Uruguay.[39] It is noticed that none of the countries form Middle East Asia, the

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30 *Supra note 20,* Article 6
31 *Ibid,* Article 9
32 *Ibid,* Article 12
33 *Ibid,* Article 16 and 17
34 *Ibid,* Article 19
35 ILO News "Momentum grows for domestic workers legislation in Brazil" info available at the http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_208727/lang—en/index.htm, accessed on 24 April 2013
36 Italy is the 4th ILO Member State and the first EU member State to ratify this instrument on 22 January 2013, which seeks to improve the working and living conditions of tens of millions of domestic workers worldwide . Accessed from the ILO on 24 April 2013
37 Bolivia is the fifth ILO Member State and the second Latin American Member State to ratify this instrument on 18 April 2013. Accessed from the ILO on 24 April 2013
38 On 9 November 2012, a new Ministerial Regulation No. 14 (B.E. 2555) entered into force improving workplace rights for domestic workers in the Kingdom of Thailand. Issued under the Labour Protection Act B.E. 2541 (1998), the Regulation applies to employers employing workers to perform domestic work which does not involve business operations.. It aligns several aspects of the legislation with the Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201). Information on ratification of the Convention 189 accessed from the ILO web site.
39 Mauritius, 13 Sep 2012, Convention in force, Philippines, 05 Sep 2012 , Convention in force, Uruguay, 14 Jun 2012, Convention in force, info is available at the ILO web site, visited on 11 March 2013.

UK, USA, India, China, and Singapore, has ratified the said Convention, resulting to disregarding protections of domestic workers from all kinds of exploitations.

IV

Protections to Domestic Workers under Municipal Laws in India

It is noticed that there is no specific legislation for protection of domestic workers in India. Domestic workers are unorganised, unregulated and unprotected by major labour legislations. It is equally important to mention that majority of domestic workers do not posses any formal education and skills. They represent vulnerable part of our society. Surprisingly it is seen that most of the domestic workers are not entitled to minimum rates of wages, which has been considered as a fundamental right under Article 23 of the Constitution. Few State Governments have included domestic work in scheduled employment for the purposes of fixation of minimum wages for domestic workers under the Minimum Wages Act, 1948.

However, various labour laws, like the Employees Compensation Act, 1923, the Equal Remuneration Act, 1976 and Inter-State Migrant Workmen Act, 1979, etc, are directly or indirectly applicable to this work force. The Central Government has enacted the Unorganised Workers Social Security Act, 2008 for providing social security and welfare to domestic workers.[40] But the same Act of 2008, a contributory scheme with functional limitations, has been confined to very limited area of some 50 districts in the country.

Some initiatives have been introduced by the National Commission for Women (NCW), Government of India for prevention of exploitation of domestic workers in India. The NCW has drafted a specific bill titled *"Domestic Workers Welfare and Social Security Act, 2010"* (hereinafter the Draft). The proposed Draft provides for better working conditions, paid weekly holidays, protection against harassment, social security protections and other welfare related measures for domestic workers. Let us analyse some basic feathers of the Draft.

(i) *Draft on Domestic Workers Welfare and Social Security by the National Commission for Women*

According to the Draft, domestic work in India falls under the purview of State jurisdiction, but the Central Government should legislate. The Draft has empowered State Governments to administer the scheme in their respective state through State and District Boards. This Draft aimed at to protect and

[40] News Release by the Ministry of Labour Government of India, available at http://pib.nic.in/newsite/erelease.aspx?relid=87387 a accessed on 12 March, 2013

ensures the protection of workers from exploitation at the hands of employers and placement agencies. The Draft would apply to the whole of India except the State of Jammu and Kashmir. The Draft does not take cognisance of domestic workers who have immigrated for employment to any other country. Employment of minors (below 18 Years) is forbidden under any law for the time being in force as a domestic worker or for any such incidental or ancillary work.

The Central Advisory Committee, State Board and District Boards have been assigned with the responsibility of regulating the proposed scheme under the Draft. The District Board (hereinafter the Board) is empowered to grant relief in case of accidents, and provide financial assistance for the education of children, medical assistance and maternity benefits to domestic workers. The Draft also stipulates setting up of a Domestic Workers Welfare Fund for payment of specified benefits. The Board has been empowered to arbitrate, through conciliation, disputes pertaining to domestic workers. The Board has to implement the schemes or any welfare measures framed by the Central Advisory Committee in consultation with State Boards.

As per the stipulation of the Draft, every domestic worker may register himself as a beneficiary under the scheme with the Board. Any worker, who has attained 18 years of age, but not over 65 years and has been occupied in any domestic work for not less than 90 days during the preceding 12 months, shall be eligible for registering themselves as beneficiary.

The Board has been assigned the responsibility of regulating the scheme at district levels. The Board issues identity card to every beneficiary with his photograph on it along with a passbook to enable them to open bank accounts. The Board is under obligation to maintain records containing all details of employment of beneficiaries in the district. The Draft also provides for some penalties, cognizable by criminal courts, for violation of the provisions.

It is equally important to mention that the Draft provides discretionary powers to State Governments whether to constitute state boards and district boards for the purposes of enforcing the scheme. Therefore a State Government cannot be compelled to constitute any state board or district boards. If a State Government does not constitute any state committee and district board then the whole purpose of creation of such scheme would be lost. The Draft does not provide for the rates of any contributions and benefits in case of social security and other welfare measures to the beneficiaries. In case of violation any provisions of the Draft, the Board is not competent to take cognizance of such default, but the issue may be referred to a criminal court for imposition of any penalty. Finally the effectiveness of the specific legislation is dependent upon the

effectiveness and alertness of it implementation machineries such as the state committee and district boards.

Who dares and comes forward, in case of violation of any employment rights provided under the Draft, to file complaint against his employer. It is seen that there is no employment protection available to workers if they raise any grievance against their employers. It is recommended that the Draft is required to be modified to provide some security of employment during the currency of disputes/ grievances before the appropriate administrative authority. One month notice or one month salary in lieu of notice shall be given to a domestic worker in case of termination of service by employer.

V

Migrant Domestic Worker's Protection under the Social Security Agreements

A Social Security Agreement (hereinafter SSA) can be expressed as a bilateral mechanism to guard the social security interests of workers working in another country. "Being a reciprocal arrangement, it generally provides for equality of treatment and avoidance of double coverage. Generally an SSA applies to employees sent on posting in another country, provided they are complying under the social security system of the home country. It also provides for stipulation of payment of pensionery benefits, directly without any reduction, to the beneficiary choosing to reside in the territory of the home country and also to a beneficiary choosing to reside in the territory of a third country. Further the period of service rendered by an employee in a foreign country is counted for determining the eligibility for benefits, but the quantum of payment is limited to the length of service, on pro-rata basis."[41] Explained by the EPFO, Ministry of Labour and Employment at it web site:www.epfindia.org a accessed on 12 March, 2013

It is pertinent to mention that the Draft is not applicable to domestic workers employed outside India. International matters on the issue are regulated by the agreements based on the instruments of the UN and ILO. The ILO Convention No 97 and 143 and the UN Convention of 1990 on protection to migrant workers and their families members have suggested that member nations may enter into any agreements with recruiting states for the provisions of such social security protections, recruitments, placement, etc.

India has created eight SSAs with Belgium, Germany, Switzerland, Denmark, Luxembourg, France, South Korea and the Netherlands for the purpose of social

[41] Explain by the EPFO, Ministry of Labour and Employment at its web site : www.epfindia.org accessed on 12 March, 2013.

security protections to Indian workers employed in those countries.[42]. "These agreements desire at achieving equality on the principles of reciprocity and are planned to benefit the employees and employers of the parties to the agreements. Most of these agreements provide for benefits of old age or survivors' benefits and permanent total disability pension. It is important to mention that SSA with Netherlands covers additional social security protections benefits in the form of maternity benefits, unemployment benefits, and children allowances. In consonance with these SSAs, India has inserted appropriate amendments under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

It is very difficult to discover the effectiveness of these SSAs and as to whether the parties to these SSAs have been able to provide any protections to workers in their respective countries or not? This is a matter of further research. It is also observed that India has not signed any SSA with the countries, such as the East Asian countries such the UEA, Kuwait, Oman, South Arabia, and western nations such as the USA, UK, and Canada, where majority of migrant workers are employed. The following data, maintained by the ILO, is vindicate of the fact that most of migrant workers including domestic workers have been employed in those countries which do not encompass any agreement for protections of such workers with India.

Indian Migrant Worker[43]

Countries	**2003**	**2004**	**2005**	**2006**	**2007**
Kuwait	54434	52064	39124	47449	48467
Malaysia	26898	31464	71041	36500	30916
Oman	36816	33275	40931	67992	95462
Saudi Arabia	121431	123522	99879	134059	195437
United Arab Emirates	143804	175262	194412	254774	312695

Countries	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
United Kingdom	15527	38955	42797	20526	38443	47705	17169

Countries	**2000**	**2001**	**2005**	**2006**
USA	17150	16001	46221	56850

It is also pertinent to mention that the scope of most of SSAs, to which India is one of the signatories, is very limited to old age pension or survivor's pension

[42] Information are maintained by the EPFO at it web site http://epfindia.nic.in/IntWorkersNew/IntWorkersNew.html a accessed on 12 March, 2013

[43] International Labour Migration Statistics provided by the ILO at http://laborsta.ilo.org/STP/guest accessed on 12 March 2013

and permanent total disability insurance only. Social security protections such as minimum rate of wages, employment injury, maternity benefits, and other welfare measures like housing facilities, recreational facilities, medical facilities, and working conditions, are beyond the scope of these SSAs. It is felt that the jurisdiction and amplitude of the SSAs are required to be enhanced to cover Indian migrant workers against any exploitation at the hands of employers in employment nations.

VI

Challenges for Domestic Workers in Globalisation

Domestic workers are recognised as servants and maids of employers, which is not dignified and have also led to feelings of lack of self-confidence and inferiority. This has further led to indignity inflicted upon them and their work.

It is important to unearth that terms and conditions of employments of domestic workers are drafted in such a way which enhances the scope of exploitation by employers.

Undocumented domestic workers face even more significant challenges than the documented work force. Undocumented domestic workers lack in strong bargaining capacity, resulting in exploitation at the hands of employer, for better wages or working conditions, and live in fear that their irregular status will be exposed. Consequently, undocumented domestic workers receive lower wages and encounter worse working conditions. Undocumented domestic workers also face more severe financial hardships than other workers.

Conditions of skilled workers are quite better as compare to manual workers such as domestic workers. This is due to the fact that there is a wide gap between demand and supply of unskilled workers. Bargaining capacity of manual workers, against their employers, is not sound low as compare to skilled workers. Let us examine some of the challenges faced by domestic workers.

(i) *No Respect for Human Rights of Domestic Workers*

It has also been noticed that living and working conditions of domestic workers are pathetic all over the world. Sometimes, these workers, usually, are not treated like human beings by employers. Like an ordinary human being, a domestic worker is entitled to all the human rights under international instruments[44], which provide for various human rights including equality, live

[44] The Universal Declaration of Human Rights, 1948, Convention on the Elimination of All Forms of Racial Discrimination 1965, Covenant on Civil and Political Rights, 1966, Covenant on Economic, Social and Cultural Rights, 1966, Convention Concerning Decent Work for

with dignity, social security, right to freedom of expression, associations, and profession, protections against exploitations, health and safety protections of workers, and labour welfare measures. It is noticed that most of the fundamental human rights are confined to statute books only. Practical applications of these international instruments and municipal laws negate the existence of some vital human rights to workers.

Let us examine one particular instance of gross violation of human rights of a domestic worker at the hands of employers. One female migrant domestic worker, who was engaged in Middle West Asia, had been repeated raped by the son of the employer, dared to complain about this instance to the employer. No Action was taken by the employer. She was not in a position to lodge a complaint before police. She was compelled by the circumstances to kill the employer, his wife and his son. Later she was beheaded for committing murder and her dead body was not handed to any person for the final rites, because of some law prohibiting final rites of a murderer[45]

Nobody can deny the fact that domestic workers are not treated at par with native workers in respect of remuneration, social security protections, and workers welfare. Minimum rate of wages, paid to native workers, which has been considered as a fundamental right by the ILO, is not paid to migrant domestic workers. Remuneration for the services rendered is paid at irregular intervals. Housing facilities are not provided by majority of employers and workers are compelled to stay in unhygienic conditions. Domestic workers are also not in a position to complain against such violation, due to lack of job security and volatility of the employment.

(ii) *Sexual harassments of domestic workers*

Migrant domestic workers, whether employed in India or outside India, due to intimacy and isolation of the workplace, are vulnerable to many forms of exploitation. Domestic workers, in particular live in female workers, may be even more vulnerable owing to a number of constraints, including lack of awareness of their rights, lack of support, gender discrimination and employer-tied immigration status. The most severe forms of abuse faced by domestic workers include sexual, psychological and physical abuse, including violence,

Domestic Workers, 2011 and Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 1985.

[45] A document produced by the UN titled "stories of women migrant workers": Page no 1 of the report available at the web site http://www.unwomen-eseasia.org/projects/migrant/02stories.pdf a accessed on 12 March, 2013

food deprivation and confinement. Convention No. 189 explicitly calls for the effective protection of domestic workers against such conducts[46]. But where is the implementation and seriousness about the Convention amongst member nations.

It is also observed that few countries have provided for protections against sexual harassment at workplace. In New York State, the 2010 Domestic Workers Bill of Rights[47] recognizing the rights protection deficits for these workers, introduced protection from sexual harassment and harassment based on gender, race, national origin and Religion. In Singapore, the Employment of Foreign Manpower (Work Passes) Regulations[48] emphasize the compliance of conditions of employment to be complied with by employers of foreign domestic workers.

In some countries in South East Asia such as Kuwait, Qatar, Oman, Saudi Arabia, the UAE and Yemen, there is a scarcity of protecting laws for domestic workers. "Migrant domestic workers are often subjected to cruel verbal and physical ill-treatment. They face racial prejudice in the country where they work. Particularly in the Middle East, migrant workers are forced to follow very restrictive cultural norms such as the purdah system, restrictions on movement outside place of employment"[49].

It is surprisingly true that the Indian Protection against Sexual Harassment at Work Place Act 2010 has excluded domestic workers from it ambit of protections. This is due to the fact that there are problems of creation of enforcement mechanism for domestic workers. It is recommended that the District Board created under the Draft, can be given power to take cognizance of sexual harassment case and file prosecution proceedings before criminal court

(iii) *Pathetic Living, Working conditions and remuneration:*

It is a matter of grave concern that the living conditions of migrant workers are more pathetic as compare to documented migrant workers.[50] Spanish news

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46 Recommendation No. 201 provides guidance on Action that might be taken, including in terms of legislation and its enforcement (Paras 7, 21 and 24).

47 S 296-B. "Unlawful discriminatory practices relating to domestic workers,Domestic Workers Bill of Rights, dated 31 August 2010".

48 Regulations 10. The employer shall not ill-treat the foreign employee, and shall not cause or knowingly permit the foreign employee to be ill-treated by any other person. A foreign employee is ill-treated if (a) the foreign employee is subjected to physical or sexual abuse, or to criminal intimidation;"

49 Report By Bhartiya Majdoor Sangh, India, *Decent Work For Domestic Workers,* Available At Http://Www.Bms.Org.In/Encyc/2012/7/23/Decent-Work-For-Domestic-Workers accessed on 31 March 2013

50 A video of conditions of constructions workers in East Asian countries: http://www.youtube.com/watch?v=6NmxUDXP4LI and http://www.youtube.com/watch?v=rGENsBHqphk&NR=1&feature=endscreen accessed on 31 March 2013

media has summarized the living and working conditions of undocumented African migrant workers in a town of Spain in the following expressions:

"Migrant workers from Africa living in shacks made of old boxes and plastic sheeting, without sanitation or access to drinking water. Wages are routinely less than half the legal minimum wage. Workers without papers being told they will be reported to the police if they complain. Allegations of segregation enforced by police harassment when African workers stray outside the hothouse areas into tourist areas."[51]

Domestic workers are highly exploited and deprived of just and humane living standards. Workers are not even paid minimum rates wages, on the ground they are not covered under the domestic minimum wages law in India. "The working hours of domestic workers can go up to 12 to 20 hours a day. Wage, leave facilities, medical benefits and rest time depend totally on whim and fancies of employers. Domestic workers have always been victims of suspicion. If anything is missing in the house, they are the first to be accused with threats, physical violence, police conviction and even dismissal. Domestic workers have little control over their working conditions. Employment is usually arranged without the benefit of a formal contract"[52].

Atrocities against domestic migrant workers do not end here. There is a long list of such instances. Domestic workers in the Middle East, without any recognition of any human right, have been treated like animals[53]. Let me narrate an anecdote of a real story on the issue reported in media. In Saudi Arabia, one employer and his wife skewered the body of a migrant domestic worker with at least 24 nails and needles.

(iv) ***Lack of Social security protections and welfare measures:***

According to one investigation report of the Channel 4 of the UK "Domestic Migrant workers work up to twenty hours a day for little pays in the UK. Around fifteen thousand migrant workers are living as slaves in Britain, being

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[51] Ibid

[52] *Report of ILO on Domestic workers 2010 vindicates the observations of the researcher, info available at http://www.ilo.org/travail/areasofwork/wages-and-income/lang—en/index.htm, accessed on 24 April 2013*

[53] Report Published by the Economist on Sep 2nd 2010, available at the web site: http://www.economist.com/node/16953469 20 July 20, 2012 see also a video on the same issue at http://article.wn.com/view/2012/07/04/Kuwait_unsafe_for_migrant_women_workers/ accessed on July 20, 2012 53a News article titled "Maids in the Middle East: Little better than slavery" published on Sep 2nd 2010 in the 'Economist' available at http://www.economist.com/node/16953469 accessed on 20 July 2012.

abused sexually, physically and psychologically by employers."[54] The investigation report has narrated the real story of a domestic worker in Britain. The story goes like this: "Miss Patience was a domestic worker from West Africa, whose former employer was a solicitor. She used to work 120 hours a week for little money during the stay of three years with him. She was treated like a slave. A neighbor helped her to escape from the wrongful confinement by her employer."[55]

A domestic migrant worker is retained in service till the time he is fit to serve. The moment he becomes disabled due to employment injury or otherwise he is thrown out of employment without payment of any compensation. There is no social security protection in form compensation in case of employment injury to worker, death compensation to dependants' maternity benefits, and pensioners' benefits, available to domestic worker. Welfare measures such as good housing facilities and recreational Activities for domestic workers are distant dreams[56].

(v) ***Lack of bargaining capacity and challenges arising out of grievances:***

Nature of employment of domestic workers and prevailing social, economical and political conditions restriain domestic workers to form any trade union or association of workers. Due to lack of association their bargianing capacity for better terms and conditions of employment is also reduced. A strong workers associaltion can cetaiinly minimise exploitation of workers. It is evident from the instance of Myanamr migrant workers employed in Thailnd, who formed a workers association in Thailand, than compelled their employers to improve their working conditions, and increase the rate of wages. This success was made possible due to collective efforts of declaring a two-day wildcat strike.[57]

Another reason for exploitation is lack of communication skills of domestic workers outside India. Domestic worker may not be well versed with the language of the employment country. It would be very difficult for such person

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54 Channel 4's Report by AMELIA HILL MONDAY dated 30 AUGUST 2010 available at the http://www.guardian.co.uk/uk/2010/aug/30/migrant-workers-modern-day-slavery Last visited on 20 July 2012

55 *Ibid*

56 A video depicting deplorable housing facilities of migrant workers : http://www.youtube.com/watch?v=Y8_m_CmnUW4 accessed on July 26, 2012

57 http://asiapacific.anu.edu.au/newmandala/2012/05/11/anatomy-of-a-burmese-migrant-strike/ accessed on 26 July 2012 see also article written by the Anatomy of a Burmese migrant strike by Stephen Campbell Guest Contributor http://asiapacific.anu.edu.au/newmandala/author/stephen-campbell/Anatomy of a Burmese migrant strike http://asiapacific.anu.edu.au/newmandala/2012/05/11/anatomy-of-a-burmese-migrant-strike/, published on 11 May 2012, *New Mandala, News Media, Australia, data is available at http://asiapacific.anu.edu.au/newmandala/2012/05/11/anatomy-of-a-burmese-migrant-strike/accessed on 26 July 2012

to approach, in case of any grievances, any state agency against his employer. Even if they know the process for filing their grievances, they would be restrained to file any complaint against their employers for the simple reason of loosing employment. Therefore workers are compelled by the circumstances to bear all kinds of exploitation without murmuring a single word against their employers.

VII

Final thoughts : Concluding remarks

"Domestic workers are employed for household chores like cooking, cleaning (dusting, sweeping and mopping the house), washing (clothes and/or utensils), ironing marketing, running errands, childcare, care of the aged or disabled, etc"[58]. However, domestic work may also include gardening, chauffeuring or providing security services, tasks more often performed by men. Generally domestic workers are employed on part time or full time basis without any formal or expressed agreement of employment.

Majority of nations, who employ migrant workers in personal service and other employments related to manual work/skilled/semi skilled, are of the view that if migrant workers are provided with benefits at par with native workers than it would lead to increase in cost of production and consequently affect the competitiveness of that commodities and services in the market at national and international level. It is observed that entrepreneurs want profits at any cost, with minimum operational cost in form of cheap labour from the developing countries, which is not capable of claiming any benefits at par with workers of employing nations.

It has been noticed that the whole world is conscious of the fact about the pathetic and deplorable conditions of domestic workers, but nobody is willing to protect and promote the interests of such workers in their respective countries. The ILO, the UN and other international and national agencies have been trying to ensure implementation of various international instruments under the domestic laws. This has yielded unsatisfactory results, which is evident from the rate of ratifications of international instruments and instance of exploitation of domestic workers.

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[58] The National Domestic Workers' Movement, *Child Domestic Workers,* available at the http://ndwm.org/?page_id=239 accessed on 31 March 2013 e. Abolition of Forced LabourConvention, 1957 (No. 105) f. Discrimination (Employment and Occupation) Convention, 1958 (No. 111) g. Minimum Age Convention, 1973 (No. 138) h. Worst Forms of Child Labour Convention, 1999 (No. 182)"

(i) *Inclusion of migrant workers Convention in Core Labour Standards:*

In order to minimize, grievances of migrant workers including domestic workers, all the related Conventions of the ILO should be included within the ambit of core labour standards of the ILO. Core labour standards contain eight fundamental labour standards to protect workers all over the world. Member nations have recognised the importance and seriousness of core labour standards and this is the only justification for high rates of ratification of these standards.[59]

It is evident from the fact that only 47 members out of 185 members have ratified Convention no. 97 and 143 of the ILO. It is noticed that in case of core labour standards, majority of member states have ratified most of the core labour standards and municipal laws have been enacted/amended accordingly. It is also recommended that member nations should ratify all Conventions pertaining to protections to migrant workers by incorporating these protections in municipal laws.

(ii) *Enhancement of the Scope of SSA for Domestic workers*

India should also enter into more SSAs, to provide protection against discrimination in case of wages, social security protections, welfare measures, and working conditions of domestic workers, with counties where Indian migrant workers are working. Such agreements should not be confined to statute books but must be implemented in letter and true spirit. Sincere commitment to the compliances of social security agreements can certainly reduce the chances of exploitation of such work force.

It suggested that India should establish and revise memorandum of understandings, multilateral or bilateral agreements including prohibition of holding of documents of domestic workers by recruitment agency or employer, to protect migrant domestic workers' rights.

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[59] Rate of ratification of core labour standards is quite high as compare to Conventions on migrant workers; see valuable information on ILO's web site at http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:0::NO:' accessed on 31 March 2013.
There are eight core labour standard:
a. "Forced Labour Convention, 1930 (No. 29)
b. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
c. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
d. Equal Remuneration Convention, 1951 (No. 100)
e. Abolition of Forced Labour Convention, 1957 (No. 105)
f. Discrimination (Employment and Occupation) Convention, 1958 (No. III)
g. Minimum Age Convention, 1973 (No. 138)
h. Worst Forms of Child Labour Convention, 1999 (No. 182)"

(iii) ***Unity is the strength of domestic workers***

It is well known that unity is the strength. Therefore it strongly recommended that domestic workers, to protect and promote their interests, should form some association or try to espouse their causes through already established trade unions, which can only be possible when such endeaovours are supported by government. Formulation of association will certainly enhance their bargaining capacity and protect them from any kind of exploitation. It is very evident from the Indonesian experiment which is discussed earlier in this research paper[60].

(iv) ***Effective implementation of the existing law:***

India has enacted hundreds of labour legislations to provide protections to workers on social security, labour welfare, minimum wages, bonus, safety and other retirement benefits. Majority of those labour legislations have failed to secure and ensure effective and efficient enforcement of labour laws especially laws related to unorganised sector which also includes domestic workers. Enforcement mechanism under the proposed Draft such as inspectors should be made personally accountable for failure to protect the interests of domestic works. Domestic workers should also be permitted to claim damages from such officers.

(v) ***Sensitization of domestic workers about their rights***

Protections related to domestic workers can be categorised into four parts as working conditions, remunerations, social security protections, and welfare measures which must be provided by the employer to all domestic workers, whether inside or outside India, without any discrimination with migrant workers. Workers cannot claim these protections unless they are informed about such rights. Sensitization of migrant workers about their rights and the liabilities of employer and capability of enforcing their human rights in case of violation should be given top priority in the campaign of protecting domestic workers.

(vi) ***Need of the Hour: A Special legislation for Domestic workers***

The NCW has framed one model Draft for protection of domestic workers against any kinds of exploitation including human trafficking for domestic works at the hands of employer and recruiting agencies. In order to protect domestic workers in India, there is a dire need to implement a special legislative enactment with some modifications as suggested by the researcher. It is also recommended that State Governments, having jurisdiction over the subject matter, under the

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[60] Refer to Supra Note 48

proposed draft shall, not may, constitute district and state boards for effective compliance of the proposed scheme for domestic workers.

It is suggested that there must be a written agreement of employment between employer and domestic worker and that agreement must also be approved by the Board, which will ensure the fairness of the agreement. Such agreement must include in its terms and conditions of employment, fair wages including overtime pay and regular pay rates, access to affordable medical care, secure retirement income, paid leave, and a safe and healthy working environment. It is strongly believed that the subsistence of human with dignity is more precious rather than any kind of profits or gains at the cost of human beings.

THE PRIME MINISTER, MEMBERS OF PARLIAMENT AND THE LOKPAL: A CONCEPTUALANAYSIS

*Lalit Mohan Gautam**

I

Introduction

Sardar Vallabhbhai Patel, who was then, Deputy Prime Minister of India, said in the Constituent Assembly , "Both these committees (Provincial and Union Constitutional Committee) met and they came to the conclusion that, it would suit the conditions of this country better to adopt the Parliamentary system, the British type of Constitution, with which we are familiar,"[1] This was true. After all they were not writing a clean slate. India's educated classes were familiar with this system and its leading politicians were also attuned to this form of government. Many of them had acquired experience as ministers and Parliamentarians. Therefore in order to understand the intricacies of the office of the Prime-Minister, the concept of responsible government and limits to Powers, Privileges and immunities of the members of Indian Parliament, one would necessarily be compelled to look for guidance from the English Constitution and it precedents.

Prof. Laski attributed it to the two wars which centralized power and in which the Prime Minister in Britain became a, 'dictator by consent.' 'An English Prime-Minister,' wrote an acute political observer, "with his majority secure in Parliament, can do what the German Emperor and the American President and all the Chairmen of the committees in the United States Congress can not do; for he can alter the laws, he can impose taxation or repeal it, and he can direct all the forces of the state."[2] Is he the official head of state as Hitler is? Sir Ivor Jennings has rebutted this cynical view in these words. "It cannot be said that this is dictatorship. At worst it is dictatorship for a term of years certain; but dictators who at short intervals have to beg the people for votes freely cast are the servants of the public, and not it's masters. There are many instances when cabinet despite it's majority in the house of the people had to give up a line of policy or sacrifice particular ministers in response to public opinion."[3]

But academics are a very persistent lot. After second world war when hysteria of war was over, they coined another phrase, 'Presidentialising the system,' a

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1 Constituent Assembly Debates, Vol. IV, p. 578.

2 Dr. B.B. Majumdar, *'Rise and Development of the English Constitutioin'*, p. 315, 1978.

3 Sir, Ivor Jennings, *Parliament,* Second Edition, 518 (ii) Id at p. 323 (Note 2).

term quite often used to describe the ever growing power of the Prime Minister. Britain, now has quasi-presidential government was a thesis first advanced by John Mackintosh in the first edition of 'British Cabinet' and popularized by Crossman notably in his introduction to Bagehot's, 'The English Constitution'.[4] The gist of the argument was that the Prime Minister has become the focal point of public attention and government power. He was effectively irremovable. He hired and fired ministers, dominated cabinet by determining it's agenda and formulating it's decisions, created and dissolved committees and chose their Chairmen.

II

Position of Prime Minister

The framers of Indian Constitution were aware of these developments in Britain. They nevertheless realized and appreciated the Central and inviolable position of Prime-Minister in the working of the Westminster model. That is precisely why they knowingly incorporated all the powers and prerogatives of the British Prime Minister in the Indian Constitution. Can such an important office be brought within the ambit of an Ombudsman? This question can satisfactorily be answered by directing a three fold inquiry into the scheme enshrined in the Indian Constitution. (i) The position of Prime Minister vis-à-vis the two branches of government namely, Executive and Legislature (ii) His non- removability (iii) His claim to popular mandate.

(i) By virtue of Article 77(1) of the Indian Constitution, "All executive actions of the government of India shall be expressed to be taken in the name of President." This article is qualified by an earlier provision i.e. Article 74(1) which stipulates, "There shall be a council of Ministers with Prime Minister at the head to aid and advise the President who shall, in exercise of his functions, act in accordance with such advice." A combined reading of these two provisions makes it abundantly clear that President of India is only a signing authority, a rubber stamp. The real executive power vests in the Prime-Minister. In other words he is the chief executive. Simultaneously he leads both the houses of legislatures to do their business. Thus two branches of governance namely, Executive and Legislature converge in him. The separation of powers principle does not apply with full force in parliamentary form of government. Prime Minister's position is unique in the sense that he simultaneously leads two co-ordinate branches of governance. But a heavy duty is cast upon him. He has to delicately maintain

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[4] Walter Bagehot, *The English Constitution, 1964, Introduction.*

the equilibrium between Executive and legislature. This is precisely why a Constitutional expert has called the office of Prime- Minister, "The pivot of whole system of Govternment." Disturb this pivot institutionally and the whole system would collapse like a pack of cards. By bringing this delicate and high post of Prime-Minister under the purview of a Lokpal (who may be a person of impeccable credentials), we would be introducing an alien element into the time tested Westminster model of government, complete with it's well thought out and time-tested system of checks and balances.

(ii) The second facet which distinguishes the high office of the Prime-Minister is his near impossible removability. A prime-minister resigns only when he looses majority in the house of people (Lok Sabha). Except this there are two other possibilities when he can demit office. First, he can voluntarily resign on grounds of ill health etc. and second when party (coalition) in power replaces him by another leader. There is no other contingency in which a Prime-minister can be made to vacate office. Article 75 (2) of Indian Constitution provides, "the ministers shall hold office during the pleasure of the President." The Prime-Minister is not mentioned. D.D. Basu in his commentary on Constitutional law has posed a theoretical question as to what would happen when a prime minister who has lost confidence of Lok-Sabha refuses to resign. He himself answers it by saying that the President can dismiss him under Article 75 (2). What if a Prime-minister becomes insane? Neither general rules of law nor time tested conventions evolve through such theoretical propositions. Laws and political conventions are made by ordinary men having some self respect and honour. No honourable man will continue in office after loosing majority in the Lok-Sabha. This position of non-removability of Prime-minister does not save him from a censure or reprimand. He is punished in case he abuses power or when he is generally perceived to have received bribe money. It is done by the ultimate sovereign, 'The Electorate' at the time of Elections. In this context we should not forget the bitter verdicts of 1977 and 1989. By bringing the Prime-Minister under the jurisdiction of nominated/ selected body of Lokpal; we would be extinguishing this extraordinary power and authority of the people of India to punish the politicians in general and Prime Minister in particular for their deeds of misdemeanor.

(iii) The Prime-Minister is no longer the chief among equals, but really superior to his colleagues. His prestige has increased with the increase in the size of electorate, which now really votes for the selection of the Prime-minister. The voters in general election make up their mind first as to who should be the Prime-Minister and then cast votes in favour of the party likely to form

> the government. Sir Ivor Jennings narrates it in these colourful words, "In truth what the democratic system does is to harness a man's ambitions; if they lie in the right direction, to the National dog-cart: The horse will go of his own volition because he wants to get somewhere, and perforce the cart will follow; by choosing the right horse the nation will arrive at it's chosen destination. The horse chooses the destination, but the Nation chooses the horse; and it is here a dictatorship differs; the horse can always be changed in mid-stream if necessary."[5]

The Nation chooses the horse. There are no two opinions that in the first three general elections the people of India had elected Jawahar Lal ji to lead the country. Likewise popular mandate chose Mrs. Indira Gandhi as Prime-Minister in the years 1971 and 1980 respectively. In 1984, Sh. Rajiv Gandhi was voted to power on a sympathy wave. During 1991 and 1999, when parties did not throw up their Prime-ministerial candidates in the run off, the people of India gave hung houses. After a defeat on a confidence motion by one vote, the slogan, 'this time Atal Bihari' appealed to the electorates and he was duly elected to the post of Prime Minister. In 2009 general elections both the national level alliances declared their prime-ministerial candidates beforehand and the people of India gave a verdict in favour of Sh. Manmohan Singh. Therefore, except the hung houses, and the negative verdicts, the Prime-ministers in India have come to the office with the support and approval of the people of India. They have not been there through back room manoeuver. To make such a leader accountable to a nominated body of 'Ombudsman' would be mockery of democratic system. It would subject people of India to ridicule.

III

Responsible Government

Dr. B.R. Ambedkar, while proposing the 'Draft Constitution' in the Constituent Assembly, distinguished the Westminster Model with the American System in this way: "Under the non-parliamentary system, such as the one that exists in America, the assessment of responsibility is periodic. It is done by the electorate. In England where the parliamentary system prevails, the assessment of responsibility of the executive is both daily and periodic. The daily assessment is done by members of Parliament through questions, resolutions, no-confidence motions, adjournment motions and debates on addresses. The periodic assessment is done by the electorate.[6]

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5 Supra note 3, p.521

6. Constituent Assembly Debates, Vol. VII at p. 32-33.

This perpetual accountability of the government of the directly elected representatives of people is the basic bulwark of the Parliamentary System. It is contained in Article 75 Clause 3 of our Constitution in these words: "The Council of Ministers shall be collectively responsible to the House of the People." Few words! But these words are the very soul of the parliamentary system. The continuance of a Government in power depends upon the majority in the lower house of the people. This relationship between the government and the elected house can not be defined. According to A.W. Bradley, "The responsibility of the Government to the Parliament is a political relationship. As such it is not a matter of precise definition and lawyers must resist the temptation to lay down rules for it."[7] However this responsibility of the Council of Ministers to the House of People is absolute and exclusive in nature. Conversely speaking, under the scheme of our Constitution, the Prime Minister and his Cabinet are not accountable to any other authority, forum or group of men, howsoever distinguished they may be.

Bringing Prime-minister and his team under the jurisdiction of Lokpal, would be in violation of the "Presumptive immunity" so clearly evident from the text of the Constitution. Presuming for sake of argument that the office of Prime Minister is brought under the ambit of Lokpal and proceedings begin against him, then what in nutshell would it mean is that, "Mr. Prime-Minister, we do not take you for your word." This is clearly an expression of no confidence in him, which is the exclusive prerogative of the entire House of the people. It will not only be a usurpation of the power of the Lok Sabha, but would also be laying down the foundation of a convention, which overtime will undermine and put to disuse the responsibility clause of Article 75.

The term 'collective responsibility' is quite often used to assert two contradictory propositions. It requires little clarification. The principle of collective responsibility and corporate unity were recognized for the first time in 1782. "As a general rule," wrote Lord Morley, "every important piece of departmental policy is taken to commit the entire cabinet and it's members stand or fall together."[8] But in practice the principle of collective responsibility is not carried so far. The cabinet may decide for itself whether it would accept or disown the responsibility for a decision taken by a minister, with or without consulting the cabinet. Dr. Jennings points out that the Hoare – Laval Agreement of 1935 had apparently the sanction of the cabinet behind it, but when the Baldwin Cabinet found that it was bitterly opposed by the public, it decided to repudiate it. Sir Samuel Hoare was therefore allowed to make himself a scape-goat and to resign his office of Foreign Secretary.[9]

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7 E.C.S. Wade and G. Philip, *Constitutional and Administrative Law by A.W. Bradley* p.97, 5th Ed.

8 Dr. B.B. Majumdar, *'Rise and Development of the English Consstitution'* p.312, 1978.

9 *Ibid.*

IV

Powers, Privileges and Immunities of the Parliament and its Members

Civil society representatives want that speeches and votes given by Members of Parliament in their respective houses should be subjective to the jurisdiction of Lokpal. This suggestion is extraordinary in itself. Then why have parliament at all. Why incur so much expenditure. Why government measures should be debated at all.

The significance of a debate in Parliament is the possibility of a reasoned argument influencing the members and the prevailing idea in the house. We are a nation of sycophants and mental slaves and there have been very few men of integrity, well versed in parliamentary practices, who could put fear of God into the hearts of the executive. After all how many Members of Parliament opposed the drastic 1975 emergency resolution, Maintenance of Internal Security Act and wholesale arbitrary arrests. But one should not forget that as early as 1951, the Government was forced to retreat on Hindu Code Bill, primarily because of widespread discontent in the members of Parliament. Powerful men like Jawahar Lal Nehru, Sardar Patel and Ambedkar were made to surrender to the popular view prevalent in the house at that time. During Janta rule, there were at least four occasions on which Government did relent to the pressure of the M.P.'s. The legislative measures that Government either dropped or took back on the floor of the house were Compulsory Deposit Scheme for working class, Criminal law Amendment Act (incorporating preventive detention provision in the code), Industrial Relations bill (anti worker) and Anti Defection Bill of 1978. Mr. Madhu Limaye, the then ruling party General Secretary played a key role in compelling the government to withdraw these unjust legislative measures.[10] Interesting fact is that Sh. Shanti Bhusan, the then Law Minister was the architect and pioneer of these draconian proposals.

V

Conclusion

It is important to note that the powers, privileges and immunities of the Indian legislatures collectively and of their members individually are the same as are enjoyed by the House of Commons and it's members. The combined effect of 42nd and 44th Constitutional amendments on Article 105 and 194, is that unless, legislatures, legislate their privileges (which they have not), they would remain

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[10] Lalit Mohan Gautam, *'Presidentialising the System' or 'Rewriting the Constitutional History of India'. Delhi Law Review*, p.70, Vol. 22, 2000.

as they were in April 1979. The view of the Supreme Court, taken in reference, under Article 143 In the matter of under Article 143, AIR 1965 SC 745, remains the law, i.e. the privileges of Indian legislatures remain the same as that of House of Commons in 1979.

According to Erskine May, the privileges and immunities of the Members of Parliament are the sum of particular rights enjoyed by the house collectively and by members individually, without which they cannot discharge their functions and which exceed those possessed by the other bodies or persons. These privileges of the House of Commons have also been defined as fundamental rights of the house and its individual members.[11] To destroy this freedom means to destroy the collective power of the legislature.

The members of the House of Commons are constantly on guard against any outside encroachment on their rights and independence. It was so clearly demonstrated when committee on Standards in Public life (Nolan Committee) gave it's first report in 1995. It came under attack from members of House of Commons cutting across party lines. Sir, Edward Heath for example, denounced the principle of an independent parliamentary commissioner for standards because an external bureaucratic organization could not possibly understand the internal complexities of Westminster's interior social order. He complained that Lord Nolan seemed to 'lack a certain worldliness, of realizing what goes on in this world of ours'. He continued, "We in this House know far more of what is going on with our fellow members than any bureaucrat brought in from outside. Of course, we do. What can this gentleman do? By the way have you heard so and so about so and so? Do you think I ought to look at that? Of course not."[12]

Enoch Powell on the other hand complained that the entire exercise was logically flawed. He said, "the trouble about Nolan committee is that it was established to define the indefinable and reduce to a set of rules that which cannot be so treated. The House of Commons expects it's members to behave as a gentleman would behave; but to sit down and draw up a schedule of how a gentleman will behave is in the nature of the case not possible. If it were, we could be without gentlemen.. If 'my honourable friend' or 'the honourable member' is not honourable, no amount of regulation or supervision will make him so."[13]

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[11] Erskine May, *Parliamentary Practie,* P.70, 20th Edition, 1980.

[12] Michael Foley, *The Politics of British Constitution,* p. 172, (1999).

[13] *Id.* at p. 173.

THE GRAM NYAYALAYAS ACT, 2008 – ACCESSIBILITY TO JUSTICE FOR ALL

*Harleen Kaur**

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

- U.S. Supreme Court Justice Hugo Black, 1964

I

Introduction

Access to Justice is considered as one of the major Human Rights of any individual[1]. When we talk of "Access to justice" it means an individual's access to the Court of law for attaining justice. It has some fundamental elements such as identification and recognition of grievance, awareness and legal advice or assistance, easy accessibility to Court to claim relief, adjudication of grievance and enforcement of relief etc. Thus, almost all States are in search of new mechanisms for quick resolution of the disputes and to lessen the burden of Courts through speedy trial. Such is the case with India as well. In India, access to justice is a dream of every person, poor or rich. Long pendency of cases in Courts, lack of adequate number of judges, complexity of procedures, application of rules of evidence in legal language, high cost involved in conducting of cases including availing the services of lawyers and necessity to travel long distance to reach the court are some of the factors leading to lack of access to justice to the common man[2].

II

Constitutional Vision towards Access to Justice:

The preamble of our Constitution secures justice, liberty, equality and fraternity of all citizens. Further, the Fundamental rights as mentioned in the part III of the Constitution include in its content certain basic rights which every individual enjoys being a part of free nation, and tries to ensure that minimum standards that are required for survival, with dignity and respect, are not taken away. Also, the Directive Principles set forth in part IV of the Constitution establish the inspirational goals of economic justice and social transformation.The

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1 International Covenant on Civil and Political Rights 1966, under Article 2(3)b

2 H.R. Bharadwaj, *"Justice to the Poor at their Door Step: Urgent Need to set up Gram Nyayalayas" Journal of Constitutional and Parliamentary Studies*, volume3, 22-23, 2008

Constitution of India promises all its citizens, secured Justice - Social, Economical and Political, which is also fortified in the directive principles, especially after insertion of Article 39(A), which directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity and in particular, secures provision of free legal aid, by suitable legislations or schemes or in any other way. Thus, in furtherance of the positive duty cast on the State for providing easy access to Justice to poor or to provide justice to the deprived class especially to the rural litigants, the concept of The Gram Nyayalaya was conceived and passed[3]. Several initiatives have been taken from time to time to improve and expedite the justice delivery system and for making it affordable and easily accessible to the common man all across the country viz. simplification and bringing changes in procedural laws, accepting and implementing the concept of LokAdalat incorporating various ADR mechanisms such as arbitration, conciliation and mediation and extending the facility of legal aid to the poor, women and children and to the scheduled castes and scheduled tribes and other weaker sections of the society, establishment of fast track Courts, improving the service conditions of judges and computerization of courts. However, in spite of all these measures, no considerable relief came to be extended to the common man and easy access to justice still remained a dream, yet to be fulfilled. It was in this backdrop that the Law Commission of India in its 114th report on Gram Nyayalayas recommended for the establishment of Gram Nyayalayas at the grass root level for the purposes of providing access to justice to citizens at their doorstep and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and which was also in furtherance of the mandate contained in Art 39(A) of the Constitution. This was the stepping stone leading to the enactment of The Gram Nyayalayas Act, 2008.

The Gram Nyayalaya, a different court as proposed in 114th report of the Law Commission, had two objectives. The major objective was to address the pendency of cases in subordinate Courts and the other was introduction of participatory justice concept. On comparing the concept of Gram Nyayalaya with all alternative dispute resolution techniques such as Conciliation, Mediation, LokAdalat etc., it can be stated that the Gramnyayalaya mechanism is a combination of all ADR techniques. The difference, however, lies in the fact that while ADR techniques are enforced through quasi judicial authorities and many times it may not have legal sanctity, the Gram Nyayalayas are a legally constituted forum which resolves disputes and by the legal charter it can enforce

[3] The Gram Nyayalaya Act, 2008 (Act 4 of 2009), received the President Assent on 7.1.2009, came into force on 2.10.2009,vide S.O.2313(E) dated 11 September, 2009

the order so passed. Further, the ADR techniques are normally used to settle the individual disputes or a right in *personam*or disputes of a civil nature. As the the philosophy of ADR mechanism and the Gram Nyayalaya is akin, one can say that Gram Nyayalaya is a more refined concept of ADR techniques[4].

III

Chief Features of The Gram Nyayalayas Act, 2008

1. The Gram Nyayalaya is a court presided by a Judicial Magistrate of the First class[5] and its presiding officer i.e. 'The Nyayaadhikari' is appointed by the State Government in consultation with the jurisdictional High Court[6] and their qualification, salary and condition of services are similar to that of a First Class Judicial Magistrate.[7]

2. It would be established for every Panchayat at an intermediate level or a group of contiguous Panchayats at an intermediate level in a District[8]. It is a mobile court and would conduct proceedings in close proximity of the cause of action [9] while its head quarter may be located at the head quarter of the intermediate Panchayat.

3. It would have jurisdiction over both civil and criminal cases as specified in schedule I & II of the Act[10] while the pecuniary jurisdiction in civil matters would be notified by the jurisdictional High Court [11]. Further, the schedule would be amenable to be amendment by the Central Government and the State Government[12].

4. Summary procedure in criminal trials as provided in Cr.P.C (u/s 262(1), 263,264 & 265 of Cr.P.C) would be adopted with certain modifications[13] and in relation to civil matters, the Act has provided a special procedure[14] whereby it can entertain suits, claims or disputes, on an application from the parties, accompanied with the prescribed fees subject to maximum fee of Rs. 100 [15].

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4 Dr. Prasant Kumar Swain, " *Gram Nyayalaya: A Varied ADR For Social Justice of Rural Poor*", The legal analyst ISSN:2231-5594 Volume1, 21-26, 2011,
5 The Gram Nyayalayas Act, 2008, Sec-6
6 *Ibid,* at Sec-5
7 *Ibid,* at Sec-7
8 *Ibid,* at Sec-3&4
9 *Ibid,* at Sec-9
10 *Ibid,* at Sec-11&12
11 *Ibid,* at Sec-13(2)
12 *Ibid,* at Sec-14
13 *Ibid,* at Sec-19
14 *Ibid,* at Sec-24
15 *Ibid,* at Sec-24(1)

5. The Nyayalayas would be required to dispose the case within 6 months from the date of institution of the case[16] and would also have the power to dismiss any case in default and pass ex parte decrees[17].

6. The judgment and orders passed by it shall be akin to a decree of a Court [18] and to avoid delay in its execution, the Gram Nyayalaya shall follow a summary procedure.

7. The Nyayalayas shall not be bound by the Code of Civil Procedure, 1908 and may accept evidences that may not be strictly admissible under the Indian Evidence Act. However, the Nyayalaya shall be bound to adhere to the Principles of Natural Justice[19].

8. The first endeavor of the Nyayalaya shall be to try to settle the disputes by bringing about conciliation between the parties[20] and for which purpose it would be assisted by conciliators from amongst the appointed panel of conciliators.

9. An appeal from the judgment and order of the Gram Nyayalaya in criminal cases, to the extent provided in the Code of Criminal Procedure,1973, shall lie to the Court of Sessions which shall be heard and disposed of within a period of Six months from the date of filing of such appeal[21].

10. An appeal from the judgment and order of the Gram Nyayalaya in civil cases, to the extent provided in the Code of Civil Procedure,1908, shall lie to the District Court and which shall be heard and disposed of within a period of Six months from the date of filing of such an appeal[22].

11. A person accused of an offence may file an application of plea bargaining in Gram Nyayalaya in which the offence is pending trial and the same will be disposed of by the Gram Nyayalaya in accordance with the provisions of chapter XXIA of the Code of Criminal Procedure, 1973[23].

12. During the conduct of criminal cases, the Nyayalaya shall provide legal aid to the parties[24].

13. The judgment in each trial shall be pronounced in open court and copy of judgment will be supplied to the parties free of cost[25].

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[16] *Supra note 5,* at Sec-24(8)
[17] *Ibid,* Sec-24(5)
[18] *Ibid,* Sec-25
[19] *Ibid,* Sec-30
[20] *Ibid,* Sec-26
[21] *Ibid,* Sec-33
[22] *Ibid,* Sec-34
[23] *Ibid,* Sec-20
[24] *Ibid,* Sec-21
[25] *Ibid,* S-22

On a careful reading of the various provisions of the Act, it can be observed that the philosophy of Gram Nyayalaya is to provide access to inexpensive and quick justice to all citizens at their doorstep and in their own environment[26]. For this avowed purpose, the Act contains some provisions which are in departure from the general rule of adversarial system of justice. The provisions like summary trial of criminal cases, the court not being bound by the provisions of Code of Civil Procedure and Evidence Act, accepting plea bargaining applications, disposal of disputes in a time bound framework and power of enforcing the order as decree of court are some of such provisions along with the provision of disposal of appeals which would certainly be helpful is settlement of disputes and lessen the burden of cases in other subordinate judiciary. Further, certain provisions such as provision relating to transferring of cases pending in higher courts i.e., The District Court or the Court of Session, as the case may be, with effect from such date as may be notified by the High Court, to the jurisdictional Gram Nyayalaya would reduce the pendency. Further, declaring the Gram Nyayalaya a Mobile Court would strengthen the concept of participatory and inexpensive justice thereby reducing enmity between the parties in comparison to the judgments in adversarial system of Justice[27]. Thus, social harmony amongst the people of a village or nearby villages can be maintained. Other provisions of the Act such as The Nyayadhikari shall not preside over the proceedings of a Gram Nyayalaya in which he has any interest or is otherwise involved in the subject matter of the dispute or is related to any party to such proceedings and further that A Nyayadhikari may be removed from his office on grounds of incompetence, gross negligence, corruption, malfeasance or conduct unbecoming of a Nyayadhikari have also been incorporated to ensures transparency and administration of fair justice. Further, for the betterment of this Act, there is also a provision for provision of Police assistance to Gram Nyayalayas.

IV

Gram Nyayalayas have started functioning:

As per the information available, 166 Gram Nyayalayas have been notified by six State Governments and of which 151 Gram Nyayalayas have started functioning. State-wise progress may be tabulated as under[28]:

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[26] *Supra* note 2

[27] N.R.Madhava Menon, "*Lok Aadalat: Peoples Program for Speedy Justice*", vol 13, 32-38 No.2,1986 Indian Bar Review

[28] Information released by Press Information Bureau ,Government of India , Available at http:/ / wwwpib.nic.in /newsite/errelease.aspx ? relid=87282 accessed on 20 June 2013

Sl. No.	State	Number of Gram Nyayalayas Notified	Number of Gram Nyayalayas in operation
1.	Madhya Pradesh	89	89
2.	Rajasthan	45	45
3.	Orissa	14	8
4.	Karnataka	2	0
5.	Maharashtra	10	9
6.	Jharkhand	6	0
Total		**166**	**151**

In terms of Section 3 (1) of the Act, it is for the State Governments to establish Gram Nyayalayas in consultation with the respective High Courts. Most of the States to which the Gram Nyayalayas Act, 2008 extends, have supported the setting up of Gram Nyayalayas. However, a number of States have either requested for higher Central Financial Assistance while indicating their willingness to establish Gram Nyayalayas or have conveyed their non-inclination. While Uttar Pradesh, West Bengal and Rajasthan are among States which have demanded higher amount, States/ UTs of Tamil Nadu, Chhattisgarh, Uttarakhand, Himachal Pradesh, Delhi, Chandigarh and Lakshadweep have, for different reasons, not felt the need to set up Gram Nyayalayas.

V

Some Practical Difficulties

The Gram Nyayalaya, the latest judicial mechanism to provide access to justice at grass root level, although appears to be very effective, there may be some practical difficulties which may come in the functioning of the Act which may be understood as under:

1. Initially, it was decided to form Gram Nyayalaya for every 50,000 people and estimated 6000 Gram Nyayalaya were to be constituted[29] and at present, the Government has declared that more than 5000 Gram

[29] N.R. Madhava Menon, "A Talk on Gram Nyayalaya Bill, 2007,8.2.2009, organized by the Centre for Public Research and Kerela Law Academy.

Nyayalayas are expected to be set up under the Act for which the Central Government would provide about Rs.1400 crores by way of assistance to the concerned States/Union Territories[30]. However, from the population and Nyayalaya ratio, it can be apprehended that the number of proposed Nyayalayas cannot meet the whole of rural India. Further, looking at the information issued by Press Information Bureau, the progress of the Gram Nyayalayas Scheme has not been up to the mark;

2. It has been mentioned that the Gram Nyayalaya would adjudicate cases in close proximity of the cause of action and it will be a mobile Court with a stipulated time frame for giving judgment. Thus, the Court must go to the place of cause of action at the request of the aggrieved party to decide the matter. For the time frame, it may not wait for the parties or witnesses to prove the particular fact in issue. The question, therefore, arises, if the opposite party or all the necessary parties in case of a civil disputes are not available before that mobile court within the stipulated time or if they deliberately avoid the Court, the Court would pass an *ex-parte* decree and render the judgment on the basis of the available facts and evidence. Such a decision may not give justice to the effected party and there may also be a violation of natural justice, for the redressal of which, the affected party may approach the regular Court for enforcement of his/their rights. In such case, the object of the Act to reduce the burden of cases in regular Courts will be defeated. Further, on the proximity of the Court to the cause of action, it will give an opportunity for the litigant to mobilize his/her community and impact the procedures in the Court. The presence of the litigant's community in the Court would provide the much required show of strength as well as enabling negotiations;

3. It is provided in the Act that, all proceedings in criminal cases have been made into a summary one. But by resorting to summary trial, one is giving more room for the Judge to exercise his discretion as in a summary trial, charges are not framed and only the gist of the evidence

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[30] Available at http:// wwwpib.nic.in press Note on Gram Nyayalaya Act, 2008 to come into effect from October2, 2009 dated 29 September, 2009.

is recorded. Further, the concept of natural justice provides for fair trial and protection from reasonable bias. In criminal cases, the duty of the State is to prove the case beyond all reasonable doubts. By summary trial it may amount to not providing sufficient opportunity to the accused for defence and discretion of the Judge may turn arbitrary;

4. The Act enjoins the Nyayadhikari with a duty to assist, persuade and conciliate the parties at the first instance of the case, apart from their regular Court function. However, if the Nyayadhikari were to assist, persuade, conciliate the parties, even with the assistance of the conciliators, there is a strong possibility of the Nyayadhikari being exposed with the litigants and in the case of failure of mediation or conciliation, there may be a likelihood of favoritism or bias from the Nyayadhikari; and

5. The provision relating to standardizing court fees to Rs. 100/- in civil cases may lead to excessive and luxury litigation.

VI

Conclusion

No doubt that The Gram Nyayalya Act, 2008 is a new revolution in a Country like India where crores of people are waiting for their chance to get justice, however, one would have to patiently wait and watch with optimism, the development of Gram Nyayalayas without losing sight of the fact that even if all the proposed Gram Nyayalayas start functioning today, they would still have to go a long way to control the back log of cases pending before the Indian Judiciary. All what is required is detection and plugging of the loop holes in the Act as early as possible and ensure proper implementation of the Act which would be vital in extending justice to all and varied and following suggestions can be also considered in this regard.

1. While establishing Gram Nyayalayas, the Government may consider the population court ratio to achieve the objective of the Act.

2. While the Gram Nyayalaya is not strictly bound by the provisions of the Criminal Procedure Code, 1973 yet, there is a need to amend the same

in order to insert the Gram Nyayalaya and the Nyayadhikari as a cadre of lower judiciary with defined power.

3. The Nyayalaya must have the power to enforce attendance of the parties before the mobile court.

4. Ethical standards and moral values should be maintained by the Nyayadhikari while performing its functions including conciliation.

5. Strict guidelines for flexibility of recording evidence and use of discretionary power should be prescribed.

LEGAL AID : RIGHTS OF ACCUSED

*Anju Sinha**

I

Introduction

The notion of justice evokes the rule of law, of the resolution of conflicts, of institutions that make laws and of those that enforce it Justice implies fairness and the implicit recognition of the principle of equability.[1] The preamble to the Indian constitution invokes 'Justice – social, economic and political as a core principle.

Access to justice inheres in the notion of justice. Two basic purposes which are intended to be served by providing access to justice are:

1. To ensure that every person is able to invoke the legal processes for redressal, irrespective of social or economic status or other incapacity, and
2. That every person should receive a just and fair treatment within the legal system[2]

Legal Aid implies giving free legal services to the poor and needy who cannot afford the services of lawyer for the conduct of a case or legal proceeding in any court, tribunal or before any authority. One of the fundamental rights in the legal system is the right to counsel. This right generally provides that anyone who is accused of a crime has the right to receive legal aid from an attorney. The right to counsel may be found in various international, regional, as well as domestic legal authorities.

The question of providing equal access to justice in India has engaged the interest of law makers, the central and state government, law academics, judges and occasionally, the organized legal profession,. The vision of legal aids as a tool for achieving social objectives has been emphasized by expert bodies constituted by the state to examine the questions.[3]

Unless the poor and the weaker section of the society are able to take advantages of administration of justice and are able to assert for their rights, democracy cannot be said to be blooming. Legal aid is a noble approach to help the poor

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1 John Rawls, *A Theory of Justice*, 11, 1971

2 S. Murlidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice,* 1, 2004

3 *Id,* at page 3

accused by providing him with a competent counsel to defend his case. The concept and provision of legal aid has been made to stop inequality due to economic differences between parties. The right of access to justice and to legal aid in the criminal justice system is considered imperative and an essential fair trial is standard both in international human rights law and in domestic law.[4]

II

Legal Aid: International Sources

Universal declaration of Human Rights: Art. 8

- Everyone has a right or an effective remedy by the competent national tribunals for acts violating fundamental rights granted by constitution or by law.

International Covenant on Civil and Political Rights, 1966

- The International Covenant on Civil and political Rights (ICCPR) was adopted by the United Nations in 1966. The rights enshrined in the treaty are basic human rights that form a foundation for freedom, justice, and peace in the world.[5] The rights in the ICCPR are "designed primarily to protect individuals against arbitrary government action and to ensure individuals the opportunity to participate in government and other common activities."[6]

Article 14, Section3- ICCPR, 1966, guarantees the following rights to the accused in a criminal trial:

i. To be promptly informed of the charge against him in a language that he understands;

ii. To communicate with a lawyer of his own choosing and have enough time to prepare for his defense;

iii. To be tried promptly;

iv. To defend himself in court or have a lawyer defend him in court; to be informed of his right to legal counsel if he does not know of that right;

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[4] *Id,* at page 6

[5] Ronald B. Hurdle and Walter J Champion Jr, *The life and Times of Napole on Beazley: The Effective (if any) of the International Covenant on Civil and Political Rights on Texas 17 and UP Execution Standard*, 28T Marshall L. Rev.1 (2002).

[6] *Ibid*

and to have a lawyer assigned to his case if the accused cannot otherwise afford a lawyer;

v. To question opposing witnesses and to call witnesses for his side of the case;

vi. To have the assistance of an interpreter if he cannot understand or speak the language used in court;

vii. To refrain from making any self-incriminating statements.

III

Legal Aid: Indian Sources

The Law Commission of India, an executive body established by the Indian government, highlighted the principle of legal aid in its 48th report, while discussing safeguards against overuse of state power in criminal proceedings. The Commission stated that "the accused must be informed of his right to consult a legal practitioner of his choice, and the accused must also be given an opportunity to consult such a legal practitioner before making the confession."[7]

The report further remarked that the Commission is "of the view that defense of the indigent accused by a pleader assigned by the State should be made available to every person accused of an offense (i.e. in all criminal trials) so that mere poverty may not stand in the way of adequate defense in a proceeding which may result in the deprivation of liberty or property or loss of reputation."[8] The Commission thus recognized the right to counsel as a "basic ingredient" of a criminal trial, and commented that the law should "go as far as possible' in assuring that this ingredient is not absent.[9]

The right to legal representation has been expressed both in terms of the constitution and the statute governing criminal procedure.

Legal Provisions related to Legal aid can be divided under 3 broad heads:

(i) Constitutional
(ii) Procedural
(iii) Statutory

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[7] Law Commission of India, 45th Report (Some questions under the Code of Criminal Procedure, July 1972, Para 17)

[8] *Ibid*

[9] *Ibid*

(i) Constitutional

Constitution of India is regarded as basic statute of the country. All statutes which get enacted by the legislature find their sources in the constitution. It contains provisions for citizens as well as non-citizens. Indian constitution promises equality[10], the concept of legal aid has its roots in this very provision of the constitution. The role of equality before law and equal protection of law would only remain constitutional shibboleth, if a person cannot secure legal protection because of being poor[11]. The Constitution treats all citizens as being equal and provides them equal protection under law, yet common persons face "barriers to access to justice", illiteracy, lack of financial resources and social backwardness are major factors that hinders the common person from accessing justice. If a person does not have the means of obtaining access to a court, justice become unequal.

The denial of access to justice in criminal justice system impacts directly on the liberty of victim or accused, who mostly belong to socially & economically weaker section of the society. Selective application of the law[12] and use of law as a tool of oppression against poor[13] violates the right to equality before law and equal protection of law because then the police rather than the law determines what is right and what is wrong.

Part III of The Indian Constitution guarantees fundamental rights to all citizens and some of these rights, particularly the right to equality (Article 14) and the right to life (Article 21), to all persons. Both these articles are essential for understanding the nature and scope of the right to legal aid as access to justice. The denial of access to justice to a person on account of economic and social inequalities is a manifestation of the violation of the right to equality[14] as forming part of the scheme of Article 14 and 21 had to await judicial interpretation in late 1970s. Prior to this, the Constitutional rights of an arrested person to legal representation were seen as being contained in Article 22 of the constitution[15].

Indian Constitution asserts the right to life and personal liberty. This right cannot be taken away except according to procedure established by law.[16] A procedure is fair and just only when it follows the principles of natural justice. If the right

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[10] Constitution of India 1950, Article 14

[11] S.S. Sharma, *Legal Aid to Poor: The Law and Indian Legal System* (Deep & Deep, 1993)

[12] Report of the Expert Committee on Legal Aid :Processual Justice to the People, Government of India, Ministry of Law, Justice and Company Affairs, 10 (1973).

[13] Id. at page 11

[14] *Supra* note 2, at page 79

[15] Id. at page 80

[16] *Supra* note 10, Article 21.

to counsel is essential to fair trial then it is equally important to see that the accused has sufficient means to defend himself. Breach for safeguards of fair trial would invalidate the trial and conviction, even if the deceased did not ask for legal aid.

The constitution provides that a person arrested should not be detained in custody without being informed of the grounds for such arrest and should not be denied the right to consult and be defended by a legal practitioner of his choice.[17]

The constitution also provides that the state should strive to promote the welfare of the people by securing and protecting as effectively as it may be a social order in which justice; social, economic and political shall inform all the institutions of national life.[18]

In 1976 a new provision was incorporated in the Constitution under Article 39A.[19] for providing free Legal Aid and concept of equal justice found a place in our constitution Article 39A which was incorporated under part IV-Directive Principles of State Policy reads as under: "Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

The state has recognized the right to free legal aid as a non enforceable directive principle of state policy by inserting Article 39A. The judiciary, however, creatively interpreted the guaranteed fundamental right to life and liberty under Article 21 of the constitution as including the right to legal assistance at state expense.[20]

(ii) Procedural

Criminal Procedure Code provides that legal aid to accused at state expense has to be provided, it further provides that where in a trial before the court of session, the accused is not represented by a pleader and where it appears to the court that the accused has no sufficient means to engage pleader the court shall engage a pleader, the court shall assign a pleader for his defense at the expense of the state.[21]

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[17] *Ibid*
[18] *Ibid,* Article 38.
[19] Constitution (Forty-Second Amendment Act), 1976.
[20] *Supra* note 2, at page 78
[21] Criminal Procedure Code, 1973.Sec 303, 304.

The question, whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperiling his personal liberty, is entitled to free legal aid at state cost and whether it is obligatory on him to make an application for legal assistance or Magistrate or Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost.Civil Procedure Code provides for filing of suits by indigent persons. It enables persons who are too poor to pay court fees and allow them to institute suits without payment of requisite court fees.[22]

(iii) Statutorys

Delhi being the capital of India, a number of poor persons used to approach the Hon'ble Supreme Court for aid to sort out their cases, file cases on their behalf, get justice for them for which they could not afford anything and since some of the letters addressed to the Hon'ble Supreme Court were treated as writ petitions and action taken thereon, and the press gave wide publicity to a number of such cases with the result that more and more letters started pouring in. Due to this Free Legal Aid (Supreme Court) Society was formed in the year 1978, Hon'ble Justice Desai and Justice Krishna Iyer took great initiative in the scheme. Committee formulated under Justice Krishna Iyer clearly laid down that it is a democratic obligation of the state towards its subject to ensure that legal system becomes an effective tool in helping secure the ends of social justice.[23]

With the object of providing free legal aid, the Government of India had, by a resolution dated 26th September, 1980 appointed a Committee known as "Committee for Implementing Legal Aid Schemes" (CILAS) under the chairmanship of Mr. Justice P Bhagwati (as he then was) to monitor and implement legal aid programs on an uniform basis in all the States and Union Territories in fulfillment of constitutional mandate. Experience gained from the review of the working of the committee eventually led to the enactment of the Legal Service Authorities Act 1987 CILAS evolved a model scheme for legal aid programs applicable throughout the country by which several legal aid and advice Boards were set up in the States and Union Territories. LokAdalats were constituted under Legal Service Authorities Act 1987.

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide fee legal services to the weaker section of the society and to organize LokAdalats for amicable settlement

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[22] Civil Procedure Code, 1908 – Order 33.

[23] Justice Ranganath Mishra: *Supreme Court Legal Aid Committee, New Delhi – Its Aims, Activities and Achievement* (1995) 5 SCC Jour.

of disputes. In every state, a state legal services authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct LokAdalats on the state. One of the problems faced by legal services institutions is their inability to reach out to the common people. In this context the NALSA has come up with the idea of para-legal volunteers to bridge the gap between the common person and legal services institutions. In 2010, the NALSA adopted the National Legal Services Authority (Free and Competent Legal Services) Regulations in exercise of its power under sec. 29 of 1987 Act The Regulations are applicable to the legal service committee of the Supreme Court, High Court, the state, district and taluks.

IV

Judicial Trend towards Legal Aid

The Supreme Court has taken a big innovative step forward in humanizing the administration of criminal justice by suggesting that free legal aid be provided by the state to poor prisoners facing a prison sentence. When an accused has been sentenced by a court, but he is entitled to appeal against the verdict, he can claim legal aid; if he is indigent and is not able to afford the counsel, the state must provide a counsel to him. The court has emphasized that the lawyers service constitute an ingredient of fair procedure to a prisoner who is seeking his liberation through the court's procedure. The Supreme Court has reiterated this theme of providing legal aid to poor prisoners facing prison sentence again and again. The court has exhorted the Central and State Governments to introduce a comprehensive legal service program in the country. In support of this suggestion, the court has also invoked Article 39A which provides for free legal aid .and has interpreted Article 21 in the light of Article 39A. Article 39A lays stress upon legal justice, accordingly the state is required to provide free legal aid to deserving people so that justice is not denied to any one merely because of economic disability. In the absence of legal assistance injustice may result.

Much of this vision to access to justice was carried forward into the judgments handed down in the post – 1974 phase by the Supreme Court and followed by the High Courts. Further, the courts developed the PIL jurisdiction as a strategic arm of legal aid movement.

In the case of HussainaraKhatun vs. State of Bihar[24], the Supreme Court held that the right to free legal services is an essential ingredient of reasonable, fair

[24] AIR 1979 S.C. 1371

and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This was a case where it was found by Mr. Justice P.N. Bhagwati and Justice D.A. Desai that many under-trail prisoners in different jails in the State of Bihar had been in jail for period longer than the maximum terms for which they would have been sentenced, if convicted, and that their retention in jails was totally unjustified and in violation of the fundamental rights to personal liberty under Article 21 of the Constitution. While disclosing shocking state of affairs and callousness of our legal and judicial system causing enormous misery and sufferings to the poor and illiterate citizens resulting into totally unjustified deprivation of personal liberty, Justice P.N. Bhagwati (as he then was), made following observations in the judgment[25], which are thought provoking:

"This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programs, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service program to provide free legal services to them."

It is also worthwhile to quote the following observations of Justice P.N. Bhagwati in para 9 of the said judgment: "We would strongly recommend to the Government of India and the State Government that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and to right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39A."

Two years thereafter, in the case of Khatri Vs. State of Bihar[26] (Bhagalpur Blinded Prisoner case) Justice P.N. Bhagwati while referring to the Supreme Court's mandate in the aforesaid HussainaraKhatun's case[27], made the following comments, in para 4 of the said judgment

"It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence, and whatever is

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[25] *Ibid*
[26] AIR 1981 SC 926
[27] *Supra* note 24

necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but the law does not permit any Government to deprive its priorities in expenditure but the law does not permit any Government to deprive its citizens of constitutional rights on the plea of poverty"

In 1986, in another case of Sukhdas V. Union Territory of Arunachal Pradesh[28], Justice P.N. Bhagwati, once again, while referring to the earlier decision of HussainaraKhatun's[29] case and some other cases had made the following observations in para 6 of the said judgment:

"Now it is common knowledge that about 70% of the people living in rural area are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. The Law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programs for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the program of the legal aid movement in the country to promote legal literacy. It would be in these circumstances made a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail its purpose." The Supreme Court has thus ruled that the trial judge is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of state. Failure on part of the trial judge to inform the accused that he is entitled to free legal aid amounts to violation of fundamental

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[28] AIR 1986 SC, 991.

[29] *Supra* note 24

right of the accused and thus, the trial is vitiated on account of fatal constitutional infirmity which means that conviction must be set aside.

This principle has also been affirmed by the Indian Supreme Court in 1974 in R.M. Wasawa v/s State of Gujarat.[30] In this case the Court proclaimed, "Particular attention should be paid to appoint competent advocates, equal to handling complex cases, not patronizing gestures to raw entrants at the Bar. Sufficient time and complete papers should also be made available so that the advocate chosen may serve the cause of justice."

The Supreme Court proclaimed that a Judge has a duty to inform an indigent accused that he has the right to counsel. In RanjanDwivedi v. Union of India, the Court also stated that there is "no doubt" that the accused is entitled to financial assistance to engage a counsel of the accuser's choice[31]. It also remarked that the government should implement legislation that has appropriate schemes for free legal aid. The Supreme Court has clarified that free legal assistance at the cost of the state is a fundamental right of a person accused of an offence involving jeopardy of his life or personal liberty. This requirement is implicit in the requirement of a reasonable, fair and just procedure prescribed by Art. 21.

The Supreme Court in its very recent judgment in Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi[32] has stated that "every person has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that accused gets free and fair, just and reasonable trial of the charges in a criminal case.

An accused is entitled to free legal aid not only during his trial in a lower court but also during adjudication of his appeals by higher courts. A bench of Justice A.K. Patnaik and Madan B Lokur in Rajoo @ Ramakant V/s State of M.P. gave the ruling while setting aside a Madhya Pradesh High Court verdict which had upheld the conviction and ten year jail term given to a man in a rape case without any lawyer appearing for him during adjudication of his appeal. It was further held, "that it is important to note in this context that section 12 & 13 of the Legal Services Authorities Act do not make any distinction between the trial stage and the appellate stage for providing legal services in other words, an eligible person is entitled to legal services at any stage of the proceeding which he or she is prosecuting or defending". In fact, the Supreme Court Legal

[30] (1974) 3 SCC 581.
[31] (1983) 3 SCC 307
[32] 2012 (1) SCALE 145.

Services Committee provides legal assistance to eligible persons in apex court as well. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of proceedings i.e. trial as well as appellate.[33]

V

Legal Aid to Accused of Capital Punishment

After discussing the rights of accused as conferred by the constitution I feel that there is a need to balance the right of accused against the growing crime rate and the need to protect society from criminals. There are two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty and fundamental right of free legal aid.

Thus, another fundamental issue to be focused on is to analyze that whether this fundamental right of free legal aid is to be given to all criminals irrespective of the gravity of crime committed by them. While saying so, I am not denying the fundamental right guaranteed to accused but the point is that whether a person accused of heinous crime and against whom sufficient evidence is there on record should be given benefit of constitutional provisions. I have tried to analyze this aspect with the help of Kasab's case[34]. Taking the fact into consideration that every lawyer was given the choice to accept the case of Mohammad Ajmal Amir Kasab and nobody was ready to accept his case, Kasab still had his fundamental right to defend himself in the court of law which can never be denied to him. The Supreme Court held that even a detenu who is statutorily denied legal representation is entitled to a common law right of representation through a friend. So even if the lawyers of The Bombay Metropolitan Magistrate Court Bar Association refused to accept his case Kasab still had other options to defend himself and that does not mean that in such a situation there would be denial of a fair trial. In NandiniSatpati v. P.L. Dani,[35] it was held that the existing law in our country as per Article 22 (1) of the Constitution read with Article 39A provides that free legal aid and consultancy be provided to the person arrested or facing a trial. According to Supreme Court in Madhya Pradesh v. Shabnam[36], it is legal obligation on the part of the

[33] Accused entitled to free legal aid in all Court: SC available: at http/zeene ws.india.com visited on 24-6-2013.

[34] Mohammed Ajmal Amir Iman "Kasab", the lone survivor among the terrorists involved in the Mumbai attacks. On 26th November, 2009

[35] AIR 1978 SC 1025.

[36] AIR 1966 SC 1910

State to provide for a lawyer acceptable to the accused. The right to free legal aid has been given a constitutional status by the Supreme Court by including it in Article 21 of the Constitution in the case of M.H. Hoskot v. State of Maharashtra[37]. Similarly Section 304 of The Code of Criminal Procedure, 1973 also includes the provision of free legal aid to the accused at the expense of the State. Moreover a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer cannot be regarded as just and fair[38]. However this does not impose upon the lawyer a duty to accept any of the case brought for his consideration.[39] As per the Bar Council of India Rules framed under the Advocates Act, 1961 there is an obligation on the part of the lawyer to accept any brief brought before him. But if special circumstances justify he can refuse to accept a particular brief [40].

The terrorist attacks have filled so much anger and hatred in the people that even a lawyer who is forced to accept the case on his behalf would be subject to criticisms and ostracism. The consequences of a lawyer willing to accept the case of a terrorist like Kasab are not only social but as well political and professional. Lawyers who have come forward and have tried to bring him to justice through the means of legal system have been vandalized with their houses being attacked by the members of Shiv Sena and other political party workers. Further such activities also affect the image of the lawyer in the eyes of the general public and there would be huge protests and anti-feelings about him which would affect his profession and personal life.

So after the deadly terrorist attacks in Mumbai, an intense debate gripped the whole nation. Should such cases be given a chance to defend in the court of law? Are they entitled to legal help considering the degree of his crime? Should they be executed or hanged without any trial as it is done in countries like China, Iran, Iraq etc? Whether not providing any legal help will spoil India's image as world largest democracy, which is built on the principle of justice and equality. Is capital punishment all that they deserve?

However, answers to these questions require several aspects to be considered thoroughly, including India's international obligations, the constitutional guarantees provided to every citizen in this regard, violation of human rights, and the difference between democracy and an unjust society.

Legally speaking, there is no denying the fact the cases like AjmalKasab should be given legal aid, but going by the anger in the common public and popular

[37] AIR 1978 SC 1548
[38] AIR 1979, SC 1369
[39] The Advocates Act, 1961, Part VI, Chapter 11, Section 11, Duty to the Client, Rule 11
[40] *Ibid*

sentiment that he should be hanged so as to send a clear message that no one should dare threaten the country's integrity and security.

Over the years Indian laws and its interpretation by the Supreme Court as well as the High courts are emphatic that an accused charged with committing heinous offences would have to be provided legal aid, irrespective of the fact whether he asks for it or not.

Human rights group cited Universal Declaration of Human Rights 1948, ratified by India which protects the presumption of innocence until proven guilty in a court of law. Right to life guaranteed under constitution of India, includes right to legal aid. Article 22 and 39A of the constitution further mandates equal justice and free legal aid. Section 303 and 304 of Criminal Procedure Code speaks of right of an accused to be defended by a lawyer and the duty of the state to provide legal aid. Issues of guilt and innocence go to the substance of the trial whereas the right to engage a legal practitioner to represent the accused is a procedural right, which should be treated separately and honored.

VI

Conclusion

While concluding it can be said that the constitution treats free legal aid as a non-enforceable directive principle of state policy under Art. 39A. It denies the right to legal representation, and therefore legal aid to a person preventively detained. The statute governing criminal procedure too recognizes only a limited right of criminal legal aid Sec. 304 Cr. PC provides for a statutory, procedural right to legal representation in trials before the sessions court. It does not provide for the right of legal aid in other criminal proceedings or at any of the other stages of the criminal justice process including arrest and pre-trial. This failure to acknowledge the right of an indigent person to legal and at all the stages of criminal justice process as an enforceable fundamental right results in denial of an effective access to justice.[41] Article 22 talks about legal aid before the courts whereas in my opinion legal aid should have been granted even at the stage of interrogation and at the lower level to the accused so that right to defense is not denied at the initial level.

Since the addictions of Article 39 A in our constitution[42] and passing of NALSA[43] the state has been trying to fulfill the mandate caste upon it. The judicial decisions have acted as a guiding force in the implementation of legal aid programmes in India.

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[41] *Supra* note 2, at page 377

[42] The Constitution (42nd Amendment) Act, 1976 w.e.f. 03.01.1977

[43] National Legal Service Authority Act, 1987.

"Free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty"[44]. This view was not new as right from Independence and the promulgation of the Constitution, courts have been equivocal that every accused person has the right to be represented by a lawyer of his choice. The concept of equality in Preamble and Article 14 and the right to life guaranteed under Article 21 of the Constitution of India, includes right to Legal aid. Article 39A of Constitution further mandates equal justice and free legal aid. Section 303 and section 304 of the Criminal Procedure Code and order 33 CPC speaks of the right of an accused to be defended by a lawyer and the state's duty to provide legal aid. In Kasab's case, he has sought legal assistance, but the Supreme Court judgment ruled that an accused need not even make such request. Legal aid is not a matter of charity but a matter of right. But many times a question is raised that why legal aid should be given to terrorists or to persons who have committed heinous crimes. Answer to this question is that nobody is terrorist until held so by the court. There is a huge process between suspicion and ultimate conviction of a person and nobody is terrorist until held so by the court. Much of the criminal trials are media driven and in many cases even convicted persons are acquitted by the court.

The exercise of this fundamental right is not conditional upon the accused applying for free legal assistance. The conviction reached without informing the accused that they were entitled to free legal assistance and inquiring from them whether they wanted a lawyer at State cost which resulted in the accused remaining unrepresented by a lawyer in the trial is clearly a violation of his fundamental right. We need to understand that by providing legal aid to accused of heinous crime, India has nothing to lose since sentencing in such cases looks inevitable. So in the larger public interest we should keep faith in Indian judicial system and at the same time we cannot deny right of fair trial or legal aid to accused of heinous offence because as it has already been highlighted that there is a long process between suspicion and conviction, and before any suspected terrorist has been held guilty by the court, he cannot be denied the fundamental and statutory right to get free legal aid.

[44] AIR 1986 SC, 991

THE COMPANIES BILL, 2013: GLORY AND GLARE AT GALORE

*Bharat**

I

Introduction

But it is only for the sake of profit that any man employs his capital in the support of industry; and he will always, therefore, endeavor to employ it in the support of that industry of which the produce is likely to be of the greatest value, or to exchange for the greatest quantity either of money or of other goods... he is in this, as in many other cases, led by an invisible hand[1] to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interests, he frequently promotes that of the society more effectually than when he really intends to promote it.

This was conceptualized by Adam Smith more than two centuries ago and holds good even today. By this contribution of Adam Smith in his Book – 4, *An Inquiry into the Nature and Causes of the Wealth of Nations*, under Chapter 2, he argued that even if individuals behave selfishly and pursue their own interests, they will be, indirectly, promoting the interests of the nation and a society as a whole.

The Corporate sector constitutes an important segment of the economy and the rapidly developing economy of India has 'India Inc.' as a key driver in the efforts to achieve the 2020 dream of making India a developed nation.

II

Gestation of the Companies Bill, 2013

The anachronistic provisions of the Companies Act, 1956 were no longer conducive to the growth of the India Inc. and the exponential growth of corporate sector under the changing national and international economic environment

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1 Invisible hand is a mechanism that ensures maximization of social benefit even when individuals behave and take decisions independently, to maximize the individual benefit. No introduction to economics in general is complete without exposing the reader to the concept of the 'invisible hand'. This concept is to economics what Darwin's principle of natural selection is to biology or what Newton's principle of gravitation is to astronomy. Suma Damodaran, *Managerial Economics* 11 (2008).

necessitated the need for a legal framework to enable the Indian corporate sector to adopt the best international practices in a globally competitive manner, fostering a positive environment for investment as well as growth.

Intending to replace the 56 years old Companies law, which was enacted way back in 1956 to cater approximately 30,000 companies; the Companies Bill, 2013 attempts to create a congenial environment for the growth of corporate sector with the number of companies gone up to approximately 11,00,000 by 2013.[2] It is an open secret that 'growth' is directly relative to 'change' and it is because of growth in the various magnitude of corporate milieu that ignited the necessity for change in more than half a century old legislation controlling, governing and regulating the corporate giants.

The vivacious initiative of the Companies Bill, 2013 is not the result of an instantaneous innovation or discovery. In fact this path-breaking voluminous Bill, to foster the growth of corporate economy, was recommended by numerous connoisseur committees constituted for this purpose after marathon discussions and debates by the Indian industry, the academicians, the professionals and the bureaucrats concerned with the Ministry of Corporate Affairs in India.

The review and revision of corporate laws is an on-going process in tune with the changing economic and technological scenarios. A broad-based consultative process, followed by merit evaluation of the responses received by committees of experts drawn from diverse backgrounds is essential so that contemporary thinking and best practices are incorporated into evolving regulatory structures. This underscores a continuous need for research into legal and corporate governance practices, their relevance and effectiveness before they can be adopted for incorporation into law. In light of the contemporary business and economic environment, after dilly-dallying struck up in the throes of procrastination, the Indian Parliament has passed the Companies Bill, 2013 (*however, the earlier avtars in the form of the Companies Bill, 2008*[3] *and*

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2 http://www.caclubindia.com/news/icai-highlights-of-companies-bill-13266.asp?utm_source=newsletter & utm_content = news & utm_ medium = email & utm_campaign=nl_34_2013 #. Uhhg HdKtGSM last visited on August 10, 2013 at 1400 hours. As on May 31, 2013 the total number of 13,21,000 companies were there in the Official Registry of the Ministry of Corporate Affairs out of which 2,60,000 companies were closed for varied reasons and 30,435 companies were in the process of liquidation.

3 Introduced in the *Lok Sabha* on October 23, 2008 but due to dissolution of the 14th, *LokSabha*, it had to be reintroduced as the Companies Bill, 2009.

the Companies Bill, 2009[4] *could not have the desired form of an enactment*) to enable comprehensive revision of the Companies Act 1956.[5]

III

Legal Frame Work and Scheme of the Companies Bill, 2013

The Companies Bill aims to consolidate and amend the law relating to the companies and intends to improve corporate governance and to further strengthen regulations for corporate. The scheme comprises of 29 Chapters, 470 Clauses and 7 Schedules (*as against 13 Parts, 658 Sections and 15 Schedules in the Companies Act, 1956*). The capacious Clause 2 contains 95 'Definitions' (*as against 67 in the Companies Act, 1956*).[6] The new chapters introduced include that of Registered Valuers (Chapter XVII); Government Companies (Chapter XXIII); Companies to furnish information or statistics (Chapter XXV); Nidhis (Chapter XXVI); National Company Law Tribunal & Appellate Tribunal (Chapter XXVII); and Special Courts (Chapter XXVIII); besides authorization to the Central Government to make rules & orders (Clauses 469 and 470 respectively).

The Companies Bill targets whole of India and also to the companies or bodies corporate governed by Special Acts. The substantial part of the Companies Bill will be in form of rules, to be prescribed separately. The provisions of the Companies Bill will have the force of law only after the assent of the President of India and notification by the Central Government.

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[4] Introduced in the *Lok Sabha* as Companies Bill, 2009 on August 3, 2009 with minor modifications to the Companies Bill 2008, this Bill was referred to the Parliamentary Standing Committee on Finance on September 9, 2009 for its recommendations and the Committee's Report was introduced in the *Lok* Sabha on August 31, 2010. In view of the suggested changes; it was reintroduced as a fresh Companies Bill, 2011.

[5] http://www.iica.in/school/corporatelaw.aspx last visited on August 11, 2013 at 1500 hours. Initially the Companies Bill, 2011 was introduced on December 14, 2011 in the *Lok Sabha* and was referred to the Parliamentary Standing Committee on Finance on January 5, 2012. The Standing Committee submitted its report on June 26, 2012. Accordingly, the Companies Bill, 2012 is based on the recommendations of the Parliamentary Standing Committee on Finance and was introduced & passed by the *Lok Sabha* on December 18, 2012 and by the *Rajya Sabha* on August 8, 2013 with amendments and returned it to the *Lok Sabha* on August 12, 2013.
The *Lok Sabha* approved the amendments on the very same day. The amendments pertained to change of year from the 'Companies Bill, 2012' to the 'Companies Bill, 2013'.
It is now desperately awaiting the formal nod of the President of India in the form of assent to become a statute slated to be titled as 'The Companies Act, 2013'.

[6] The new definitions includes the terms which came into fashion in recent times like: Accounting Standards; Associate Company; Called up Capital; Chief Executive Officer; Chief Financial

IV

The Combanies Bill, 2013 : Glory at Galore

The corporate governance and governance facilitating milieu are the basic tenets of any corporate law. The main thrust of the Companies Bill is to enhance the corporate governance with accountability and transparency. The glories of the first major overhaul of the Company Law in India are as under:

i. Private Companies: Sensing the vital role played by the private companies, the maximum number of permissible members in a private company is increased from fifty to two hundred (*except in case of One Person Company*) facilitating the mushroom growth of such companies. However, a Private Company which is a subsidiary of a public company is deemed to be a public company.

ii. One Person Companies: The secret of success in life is for a man to be ready for his opportunity when it comes.[7] Corporatizing sole proprietorship, the one person company is accredited under Clause 2(62) and the incorporation of One Person Company is permitted as a PrivateCompany under Clause 3. The individualmember is deemed to be the first directoruntil the directors are appointed byhim. The annual return shall be signed bythe company secretary, or wherethere is no company secretary, by thedirector of the company and at all places the words 'One Person Company' is to be mentioned in brackets belowthe name of such company.[8]

Officer; Company limited by Shares; Company limited by Guarantee; Company Liquidator; Control; Employee's Stock Option; Financial Statement; Financial Year; Global Depository Receipt; Independent Director; Interested Director; Indian Depository Receipt; Issued Capital; Financial Statement; Key Managerial Personnel; One Person Company; Promoter; Remuneration; Small Company; Sweat Equity Shares; Turnover; Voting Right, among others.

7 The variant of the quote, '*One secret of success in life is for a man to be ready for his opportunity when it comes*' by Benjamin Disraeli, (December 21, 1804 to April 19, 1881) who was a novelist and essayist and served as Prime Minister of United Kingdom twice. His Death Anniversary is known as 'Promise Day'.

8 Provision to Clause 12(3). However, Clause 98 & Clauses 100 to 111relating to Annual General Meeting & Extra-ordinary General Meeting are notapplicable. One Person Company is required to conduct at least one meetingof Board of Directors (*if more thanone director, then to hold a meeting, otherwise, to minutiae the working ofthe company*) in each half of thecalendar year & gap between twomeeting should not be less than ninetydays and Clause174 relating to 'quorum' does not to apply for Board Meetingwhere there is only one director.

iii. Small Companies: In order to boost the corporate entities, another type of company accredited to the kitty is 'small company'. Small company is a company other than a public company having a paid-up share capital of not exceeding fifty lakh rupees or such higher amount as may be prescribed not exceeding five crore rupees or turnover of which does not exceed two crore rupees or such higher amount as may be prescribed not exceeding twenty crore rupees.[9] These companies are subject to comparatively less stringent regulatory framework.

iv. Government Companies: The Government Companies are required to follow all the provisions applicable to any other company unless specifically provided to the contrary.[10] However, Clause 461 of the Companies Bill empowers the Central Government to notify by means of notification that any specific provisions of the Companies Bill will apply (*with such exceptions or modifications or adaptations as specified*) or will not apply to any class or classes of companies.

v. Enhanced Financial Disclosures and Accountability:The financial statements gives a true and fair view[11] of the state of affairs of the companies, the accounting standards notified under Clause 133 are to be in the form(s) as provided in Schedule III. The Annual Financial Statements of every company is also required to include a cash flow statement (*except in case of one Person Company, small company or dormant company*). The vigil mechanism (*whistle blowing*) is

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9 Clause 2(85).

10 Under Clause 161, by virtue of the share holdings, the Central / State Government are empowered to nominate any person as director on Board of a Government Company subject to the provisions of the Articles of Associations; Clause 182 states that a government company is prohibited from making contributions, directly or indirectly, to any political party; under Clause 139 the Auditor for each financial year is to be appointed by the Comptroller and Auditor General of India within 180 days of the commencement of the financial year; however, the first auditors are to be appointed within 60 days of incorporation; Clause 294 provides that in case of audit of accounts of Government Company which is under liquidation, the official liquidator is required to forward a copy of the annual report to the Central or State Government or to both and if the liquidation proceedings are not concluded within a year then the official liquidator is required to submit an audited statement relating to proceedings and position of the liquidation to the Central or State Government or to both; Clause 394 and 395 provides for Annual Report on the working and affairs of the Government Companies are to be prepared within three months of its annual general meeting with comments by the Comptroller and Auditor-General of India and the Audit Report to be laid before both the Houses of Parliament or the State Legislature or both as the case may be.

11 The phrase, '*true and fair view*' means that neither the books should suppress any transactions undertaken by the limited liability partnership nor the books should contain any fictitious transaction.

proposed under Clause 177(9) & (10) enabling a company to evolve a process to encourage ethical corporate behavior, while rewarding employees for their integrity and for providing valuable information to the management on deviant practices; and in addition, Clauses 130 & 131 proposes for allowing re-opening of accounts in certain cases with due safeguards. Directors are made more accountable with disclosure of their interests and defining of the non-cash transactions involving them under the Inside Trading Rules & Restrictions. Moreover, there is restrain on forward dealings in securities of company by the Key Managerial Personnel.

vi. E-governance Initiatives: The registration process is made faster and compatible with e-governance mode. Besides this, the e-governance model is proposed for various company processes like maintenance and inspection of documents in electronic form;[12] option of keeping of books of accounts in electronic form; financial statements to be placed on company's website; holding of board meetings through video conferencing/other electronic mode; voting through electronic means in general meetings of shareholders, etc.

vii. Corporate Social Responsibility Pitch: The existence of a 'symbiotic relationship' between business and society cannot be denied.[13]A corporation is a social institution whose responsibilities extend far beyond the wellbeing of its equity owners to giving security and a good life to its employees, dealers, customers, vendors and subcontractors. Their whole life hinges on the well being of the corporation.[14] Much before legislative initiation on this front, it was vehemently observed that under the corporate social responsibility, 'all the enterprises are expected to design and implement such socio-economic programmes as may be required for empowerment of people who live in the vicinity of the companies.'[15] India is all set to become the first country to mandate corporate social responsibility through a statutory provision under Clause 135. As every company having net worth of rupees 500 crore or more, or turnover of Rs. 1,000 crore or more or net profit of rupees 5 crore or more during any financial year are required to spend at least two percent of their average net profits for the three immediately preceding financial

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12 Clause 120.

13 [2013] 113 CLA (Mag.) 51.

14 Kenichi Ohmae argued in *The Borderless World: Power and Strategy in the Interlinked Economy* 214 (1991).

15 *Shri. Rafique Ansari v. Damodhar Valley Corporation,* No.5478/IC(A)/2010.

years on corporate social responsibility and a Corporate Social Responsibility Committee of the Board is to be constituted consisting of three or more directors, out of which one should be an independent director. This committee will formulate the Corporate Social Responsibility policy which will initiate the activities as specified in Schedule VII.[16] The total spend, based on registered companies in India, would tantamount to about rupees 18,000/- crore and it is estimated that top hundred companies will spend rupees 5611 crore as per a report published in the Forbes India magazine.[17]

viii. Augmented Investor Protection & Activism: As per Clause 76, the acceptance of deposits from public is now subject to a more stringent regime; and under Clause 245, the concept of Class Action Suits is there to provide a safeguard to minority shareholders/depositors to take collective action against errant companies and protect their interest. Moreover, as per Clauses 135, 177 & 178, in addition to other Committees of the Board, the Audit Committee, Nomination & Remuneration Committee and Stakeholders Relationship Committee are provided. These committees will comprise of Independent Directors/ Non- Executive Directors to bring more independence in Board functioning and for protection of interests of minority shareholders.

ix. Up-keeping Audit Accountability: Learning from corporate fiasco of Enron[18], Worldcom[19] and Satyam[20], there is a mandatory provision for

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[16] Activities includes: *eradicating extreme hunger and poverty; promotion of education; promoting gender equality and empowering women; reducing child mortality and improving maternal health; combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; ensuring environmental sustainability; employment enhancing vocational skills; social business projects; contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and such other matters as may be prescribed.*

[17] http://www.caclubindia.com/articles/csr-under-companies-bill-2012-18166.asp?utm_source= newsletter& utm_content=ar ticle & utm_medium=email&utm_ campaign=nl_34_2013 #.UhN15NKBl-Y last visited on August 15, 2013 at 1800 hours.

[18] An American energy, commodities, and services company based in Houston, Texas. In late 2001, Enron filed for bankruptcy protection despite of the f act that the Chairman of the Audit Committee was no less than a person than the Dean of Stanford Business School.

[19] For a time, WorldCom was the United State's second largest long distance phone company *(after AT&T)*. On July 21, 2002, WorldCom filed for bankruptcy protection in the largest such filing in United States history at the time.

[20] The accounts of Satyam Computer Services, once the fourth largest Information Technology Company in India, had been falsified; the scandal was publicly announced on January 7,

rotation of auditors every five years to have checks & balances and to end the wedlock between the company & the auditors. No listed companies shall appoint an individual as auditor for more than one term of five consecutive years, and an audit firm as auditor for more than two terms of five consecutive years as per Clause 139(2). Shareholders are at liberty to decide by passing a resolution that audit partner and the audit team, be rotated every year. Moreover, a new regulatory body called the National Financial Reporting Authority (NFRA) under Clause 132 (*instead of National Advisory Committee on Accounting and Auditing Standards (NACAS) and unlike NACAS it is not merely an advisory body. NFRA will have wide powers, inter alia, the power to investigate, the powers of a civil court related to discovery & seizure of books and examination of witnesses, the power to impose penalties on individuals & firms and even debarring errant persons*) is to be set up, with head office at New Delhi, to ensure monitoring and compliance of accounting and auditing standards and to oversee quality of service of professionals associated with compliance. Besides, under Clauses 141 & 144, stricter & more accountable role for auditor is provided and to ensure independence & accountability of auditor. The auditors are prohibited from performing non-audit services. By Clauses 139 &141, the new corporate vehicle of the Limited Liability Partnership is also made eligible to be appointed as auditor of company under the sphere of 'firm'.

2009. The historic confession letter of former chairman By Raju Ramalinga Raju (*born on September 16, 1954, he founded Satyam Computers in 1987 and was its Chairman until January 7, 2009*), admitting a fraud of Rs 78 billion has given a setback to the regulators and the investors. The multibillion dollar scam is unprecedented and idiosyncratic for two more reasons; *firstly*, Andhra based giant 'Satyam' was having illustrious personalities on its board, "Dr. (Mrs.) MangalamSrinivasan (Management Consultant & Visiting Professor, University of California, Harvard University, American University, Tufts University, Northeastern University), Prof. M. Rammohan Rao (Dean, Indian School of Business), Mr. Vinod Dham (former Vice President of Intel's Microprocessor Products Group and presently the founder Executive Managing Partner of NEA-Indo US Ventures), Prof. V.S. Raju (former Director of two Indian Institute of Technology), Prof. Krishna Palepu (Professor, Harvard Business School) and Mr. T.R. Prasad (former, Union Cabinet Secretary)" and *secondly*, the fact that company which was audited by one of the most prestigious audit firms 'Pricewaterhouse Coopers' and adopted most advanced accounting and transparent IFRS accounting systems much ahead of time can penetrate such a colossal and a global fraud is clearly eye opening for corporate counsel worldwide.
The Indian arm of 'Pricewaterhouse Coopers'was fined $6 million by U.S. Securities and Exchange Commission for not following the code of conduct and auditing standards while pursuing its duties while auditing the accounts of Satyam Computer Services. The sad part is that B. Ramalinga Raju along with 2 other accused of the scandal, had been granted bail from Supreme court on 4 November 2011 as the investigation agency Central Bureau of Investigation failed to file the charge-sheet even after more than 33 months Raju being arrested.

x. Constitution of National Company Law Tribunal and National Company Law Appellate Tribunal: The National Company Law Tribunal and the National Company Law Appellate Tribunal proposed to be set up by the Companies (Second Amendment) Act, 2002 (Act No. II of 2003) could not see the light of the day as the matter was challenged in the court of law.[21] However, the Supreme Court's guidelines on the constitution and composition of National Company Law Tribunal and the National Company Law Appellate Tribunal are given due respect now under the mandate of Clauses 408 & 410 (Chapter XXVII). Besides, the holistic concept of consensus-oriented settlement is given due importance with the Central Government required to maintain a panel of experts for mediation between the parties by virtue of the 'Mediation and Conciliation Panel' as provided in Clause 442. Either the parties during the pendency of any proceedings before the Central Government or the National Company Law Tribunal or the National Company Law Appellate Tribunal may resort to mediation or the Central Government or National Company Law Tribunal or the National Company Law Appellate Tribunal, may, *suomoto*, refer any matter pertaining to such proceedings to panel and the panel is required to forward its recommendations within a time span of three months. The form and the fee for the same will be as per the Rules.

xi. Professionals for Corporate Governance: The Company Secretaries are transformed into the corporate governance professionals as in case of certain companies it is made mandatory to appoint Company

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[21] The institutional structure relating to the National Company Law Tribunal was provided under Section 10FB of the Companies Act, 1956, [*Sections 10FB to 10FP, inserted by the Companies (Second Amendment) Act, 2002 vide Notification No. S.O. 344(E), dated March 31, 2003, published in the Gazette of India, Extraordinary, No. 290, Part II, Section 3(ii): (2003) 114 Comp. Cas. (St.) 237*]. The NCLT was empowered to exercise such powers and perform such functions as are or may be, conferred on it by or under the Act or any other law for the time being in force. It was provided that NCLT will consists of a President and such number of Judicial and Technical Members not exceeding sixty-two who shall be appointed by the Central Government by notification in the Official Gazette. The President of the Tribunal, who is, or has been, or is qualified to be a Judge of a High Court, shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee. The qualifications for appointment of Judicial and Technical Members of the Tribunal shall be such as specified in Section 10FD. The term of office of the President shall be sixty-seven years and for any other Member it shall be sixty-five years or three years from the date on which he enters upon office, whichever is earlier. The NCLT is envisaged to discharge the functions and exercise powers currently with the Company Law Board, the Board of Industrial and Financial Reconstruction (BIFR) and the High Courts in respect of liquidation and winding up, amalgamation and mergers.

Secretary with the defined functions of Company Secretary making him the 'Chief Governance Officer'. Moreover, Company Secretary is included within the definition of Key Managerial Personnel along with Chief Executive Officer / Managing Director / Manager / Whole-time Director and Chief Financial Officer. Now the annual return is to be signed by the Company Secretary in employment or in practice for all the companies except one person companies and small companies. Under Clause 247, the Registered Valuers are brought into for valuation in respect of any property, stock, shares, debentures, securities, goodwill, net-worth or assets of a company are to be valued by a person registered as a valuer, in the register maintained by the Central Government. The Registered Valuer is a person having such qualification and experience and registered as a valuer in such manner and on such terms and conditions as may be prescribed.

xii. Enhancing Secretarial Audit and Standards: All the listed companies are required to annex secretarial audit report obtained from a practicing Company Secretary to the Board's Report and also that the Board is to respond to qualifications, made by the Company Secretary, in the Board's Report. Besides, the secretarial standards are given statutory mandate for the first time in the history of Companies Law in India and the Company Secretary is required to ensure that the company complies with all the Secretarial Standards.

xiii. Board and Governance: Directors functions like brain of the company.[22] Various reformative measures are imbibed in Board structure keeping Governance Avenue in the backdrop. It is for the first time that the

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However, the constitution of NCLT/NCLAT was challenged in *R. Gandhi v. Union of India*, (2004) 120 Com Cases 510(Mad.), with the main objection relating to the qualifications of members to be appointed to the proposed Tribunals, the Madras High Court which gave its ruling in April 2004 held that the amendments relating to composition of the NCLT/NCLAT were against the doctrine of separation of powers as visualized by the Constitution. Thereafter, an SLP was filed by the Central Government in the Supreme Court. The SLP was heard by the Supreme Court after which the matter was referred by the Apex Court to a Constitution Bench. The matter was finally decided by the Supreme Court by its judgment dated May 11, 2010 in *Union of India v. R. Gandhi,* (2010) 156 Com Cases 392(SC), upholding the setting up of NCLT and NCLAT in principle but recommended changes as to qualifications of members. This landmark decision also stipulated important requirements to ensure the independence of the Tribunals. The revised Companies Bill, 2012 incorporates the Supreme Court's guidelines.

22 Justice Hidayatullah observed in *State Trading Corporation v. C.T.O.*, AIR 1963 SC 1811.

duties of the directors are specified in the Bill.[23] All companies are required to have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year as per Clause 149(3). The maximum number of directors is increased from twelve to fifteen which can be further increased by a special resolution without any approval of the Central Government. Further, a person can hold directorship of maximum 20 companies, of which not more than 10 can be public companies. The capping of 5% of the net profits is provided for the remunerations of directors besides the companies are required to disclose the ratio of remuneration of each director on the board to the average of employee's salary. Besides, under Clause 149, the appointment of at least one woman director on the board of prescribed classes of companies is henceforth mandatory.

Advocating independence of the Board, the concept of Independent Directors is sanctified in law with specified provisions relating to their tenure and liability. The Companies Bill provides the codes and the databank to be maintained by a body/institute notified by the Central Government to facilitate appointment of Independent Directors.[24] The listed companies are required to have at least 1/3rd of the total number of directors as Independent Directors and the Central Government may prescribe the minimum number of Independent Directors for any class of public companies but the nominee director cannot be regarded as Independent Director. The maximum term of Independent Director has been restricted to five years at once subject to a maximum of two such terms and not entitled to any remuneration except the sitting fee, reimbursement of expenses for attending meetings and commission as approved by members.

xiv. Simplified & Streamlined Corporate Restructuring: Under Clauses 230 to 240 (Chapter XV) the provisions for compromise or arrangement

[23] The duties of director includes: to act in accordance with the articles of the company; to act in good faith in order to promote the objects of the company for the benef it of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment, to exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment; not to involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company; not to achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company; and not to assign his office and any assignment.

[24] The Code is a guide to professional conduct for independent directors under Schedule IV and Clauses 149(7), (10), (11) and 150 relates to the databank.

between companies and its shareholders and/or creditors including merger or demerger of companies/undertakings is contained with the simplified and streamlined procedures for Merger & Acquisition (fast track[25]/cross border[26] etc.).

xv. Statutory Serious Fraud Investigation Office and Stringent Punishment for Fraud: The grant of statutory status, under Clause 211, to the Serious Fraud Investigation Office is another praise-worthy feature;[27] besides this Clause 212 authorizes the Central Government to investigate into the affairs of a company by the Serious Fraud Investigation Office on receipt of a report of the Registrar or inspector; on intimation of a special resolution passed by a company that its affairs are required to be investigated; in the public interest; on request from any Department of the Central Government or a State Government. The Serious Fraud Investigation Office is empowered to arrest any person in respect of certain offences involving fraud and to present the arrested person before the Judicial Magistrate or a Metropolitan Magistrate within 24 hours. Moreover, in order to augment the standing of the Serious Fraud Investigation Office, the jurisdiction of Special Courts is ousted unless the Director of Serious Fraud Investigation Office or any authorized Officer of the Central Government orders in writing. Henceforth, fraud is created as a substantive offence. For Fraud, the minimum punishment prescribed is six months (*however, in case the fraud involves public interest the minimum imprisonment is three years*) and the maximum punishment is up to ten years under Clause 447 along with a minimum fine of not less than the amount involved in the fraud but it may extend to three times the amount involved in the fraud.[28] Clauses 448 & 449 provides for increased penalty.

xvi. Special Courts for Speedy Justice: For the purpose of providing speedy trial of offences, Chapter XXVIII empowers the Central Government to establish or designate as many Special Courts as may be necessary, by notification. The Special Courts shall consist of a single judge

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[25] The provision facilitating speedy merger between certain companies, *viz.*, small private companies, holding and wholly-owned subsidiaries.

[26] Merger between Indian companies and foreign companies with the prior approval of the Reserve Bank of India is allowed.

[27] Serious Fraud Investigation Office was initially set up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated July 2, 2003.

[28] Clauses linked to Clause 447 for punishment includes: Clauses 7(5) & 7(6) – Incorporation of a Company; Clause 8(11) Provision – Social/Charitable Companies; Clause 34 – Criminal Liability for Misstatement in Prospectus; Clause 36 – Punishment for fraudulently inducing

appointed by the Central Government in concurrence of the Chief Justice of the concerned High Court under Clause 435. As per Clause 436, the Special Court is having the liberty to try summary proceedings for offences punishable with imprisonment for a term not exceeding three years, although it may order for the regular trial.

V

The Companies Bill, 2013 : Glare at Galore

The Companies Bill is undeniably an initiative worth salutation, but it needs a vetting, as there are a few wrinkles that need to be creased out, for the want of following glares:

i. Syntax errors: The various clauses of the Companies Bill contain syntax errors. To quote, in Clause 96(1), the expression, 'every company other than a one person company shall in each year hold in addition to any other meetings' must be replaced with 'every company other than a one person company shall in each year hold in addition to any other meeting'; in Clause 102(1)(a), the expression 'in respect of each items of' must be replaced with 'in respect of each item of'; in Clause 114(1), for the words 'exceed the votes' the words 'exceeding the votes' must be substituted; in Clause 122, the expression 'minutes-book' needs to be changed to 'minute-book' as rightly used in the marginal notes to the said Clause; and in Clause 143(5) the word 'include' need to be altered as 'includes'.[29]

ii. Removing Glitches: The various glitches present under the Companies Bill also need to be removed for better clarity and to avoid controversies. Like, in Clause 102(2)(a), after the words 'other than' the words 'the ordinary business namely' should be added; in Clause 102(2)(a)(iii), after the word 'retiring' the words 'by rotation' should be added; in Clause 107(2), after the words 'chairman of the meeting' the words 'jointly with the company secretary of the company or the practicing

persons to invest money; Clause 38(1) – Punishment for personation for acquisition etc. of shares; Clause 46(5) – Certificate of Shares; Clause 56(7) – Transfer and Transmission of Securities; Clause 66(10) Reduction of Capital; Clause 75 – Deposit; Clause 140(5) Provision – Removal, resignation of auditor and giving of special notice; Clause 206(4) Provision – Power to call for information, inspect books and conduct inquiries; Clause 213 – investigation into company's affairs in other cases; Clause 229 – Penalty for furnishing false statement, mutilation, destruction of documents; Clause 251(1) – Fraudulent application for removal of name; and Clause 339(3) – Liability for fraudulent conduct of business. All these Clauses will constitute cognizable offence and the guilty will not be released on bail or bond.

[29] [2013] 115 CLA (Mag.) 19.

company secretary present at the meeting' should be added to have professional touch; in Clause 110(2), after the words 'general meeting convened' the words 'and held' should be added. Clause 147(4) states as follows at its end '...such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification'; the word 'making' does not make any sense here accordingly, it should be altered as 'making payment of' or alternatively, the word 'payable' should be inserted after the word 'damages'.[30]

iii. Substitutions Required: Under Clause 111, dealing with circulation of member's resolution, the word 'resolution' should be substituted with the word 'motion', as a motion on passing becomes resolution.[31] Clause 143, dealing with powers and duties of auditors, etc. the marginal note refers only to 'powers and duties of auditors' whereas the very first sentence in Clause 143 is with regard to his right of access to the books of account and vouchers of the company. Also, Clause deals with both accounting and auditing standards, therefore, it needs to be reworded as 'Rights, powers and duties of auditors and accounting & auditing standards'.[32]

iv. Omitting Redundant and Superfluous words/expressions: In Clause 147(2) the words, 'with the intention to deceive the company or its shareholders or creditors or tax authorities' are redundant in the presence of the words 'knowingly & willfully' and hence call for omission. Also, in Clause 147(5), the words 'or by' in the expression 'or in relation to or by' need to be omitted since they appear superfluous.[33]

v. Quorum in Percentage: Clause 103(1)(a), prescribes the quorum for shareholders meetings in numbers like five/fifteen/thirty in case of public company. Moreover, the thirty member quorum is prescribed for both five thousand shareholder's company as well as in, one lakh shareholder's company, which is unjustifiable as in democracy the numbers matter and make a big difference. The quorum should be in fixed in percentage and not in numbers as that would make a better sense upholding the corporate governance in a democratic spirit. As all the policy matters

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30 *Supra note 29,* at 32.
31 *Id.* at 23.
32 *Id.* at 29.
33 *Id.* at 32.

are decided in the formal meetings where stakes involved are very high and can overturn fortunes of all involved the relatives / associates of the promoters and also of top ten shareholders of the company should be excluded in the number count for quorum.[34]

vi. Right to Proxies : In order to promote the culture of healthy debates & discussions and also to advance corporate governance, the innovative & inventive ideas should be welcomed from proxies by giving them the right to speak at meetings. Clause 105 should be generous enough to include the right to speak at meetings.[35]

vii. Clubbing of Clauses: Clauses 97 & 98 provides for the power of the National Company Law Tribunal to call the Annual General Meeting and the power of the National Company Law Tribunal to call general meetings other than Annual General Meeting respectively. In a situation when it is the National Company Law Tribunal only to call both, the Annual General Meeting as well as the general meetings other than Annual General Meeting, than there is no reason to have two separate Clauses devoted to the same, instead one Clause would suffice stating, 'Power of the National Company Law Tribunal to call Meetings'.[36] Clauses 143(3)(f) & 143(3)(h) dealing with auditor's adverse comments/qualifications, etc., on financial transactions and maintenance of accounts, respectively, should be combined as the subject-matter for the both is the same, namely, 'auditor's adverse observations/comments/ qualification/reservations, etc.'[37]

viii. Accretion to Clause: Clause 112 should accrete the provision of allowing the representatives of the President of India or the Governor of a State or of both (*as the case may be*) to attend the meetings of creditors or debenture holders of a Government Company and put forth submissions, incase the Company has taken loan from Government or from any financial institution on the guarantee of the Government.

ix. Anomaly in Auditors Certificate: The second provision of Clause 139(1) requires a certificate from the proposed auditor stating that the appointment is in accordance with the conditions as may be prescribed. The anomaly is that how can an auditor grant such certificate when the conditions to be prescribed by the Government are not known at all.[38]

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[34] *Supra note 29,* at 20.

[35] The *Justice Rajinder Sachar Committee* shared the similar view almost three decades ago.

[36] *Supra note* 29 at 20.

[37] *Id.* at 31.

[38] *Id.* at 25.

x. Clarification Necessitated: Clause 139(2)(b)(ii) entails that every company shall comply with the requirements of this sub-clause within three years from the date of commencement of the Act. But the expression 'year' is no where defined in the Companies Bill or the Securities (Contracts) Regulation Act, 1956 or the Depositories Act, 1996 (*however, as per the General Clauses Act, 1897 'year' means a calendar year*). There is a need to indicate the meaning of the expression 'year' clearly – whether it implies, 'twelve months' or 'calendar year' or the 'financial year' to avoid the time-honoured game of passing the buck.[39]

xi. Issue of Security by Private Company: Clause 23 permits the Private Companies to issue security only through private placement after complying with Part II of Chapter III; thereby, private companies cannot issue right/bonus shares. But no restriction is contained in Clause 62 and 63 dealing with Right Shares and Bonus Shares respectively. Hence suitable changes are required for clarity.

xii. Corporate Social Responsibility – a non-punitive, non-political & non-lucrative initiative: The new dispensation needs to spell out the penalties for not spending on Corporate Social Responsibility activities besides providing adequate safeguards to plug the political leanings in the shape of charitable activities; otherwise the lofty philanthropy will have a natural fall through. Besides, there is no clarification whether the amount spent on Corporate Social Responsibility will be considered as business expenditure under the Income Tax Act, 1961 or not.

xiii. Paradox of Woman Director on Board: While there is express provision of having at least one woman director on board under the Companies Bill but on the contrary neither the Corporate Governance Voluntary Guidelines issued by the Ministry of Corporate Affairs nor the SEBI's Listing Agreement contain any provision in this regard.

xiv. International Financial Reporting Standards: International Financial Reporting Standards are designed as a common global language for business affairs so that company accounts are understandable and comparable across international boundaries. Despite much hue and cry about adhering to corporate governance norms at par with international standards, the Companies Bill fails to give a formal recognition to International Financial Reporting Standards.

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[39] *Supra note 29,* at 26.

xv. National Financial Reporting Agency sans clarity: Although all encompassing powers relating to scrutiny and compliance of accounting and audit standards are given to the NFRA but there is little clarity on the point whether NFRA will function in combination with the Institute of Chartered Accountants of India or it is visualized to supersede the powers of the Institute of Chartered Accountants of India.

xvi. 'Rule of Law' or 'Law of Rules': The Companies Bill banks heavily on the Rules which are to be specified/prescribed by the Central Government and the reading of the Companies Bill gives a clear cut idea that it is prejudiced to 'Law of Rules'. However, the true intention to any piece of legislation is accorded by the legislature and not by the executive. So, there is an urgent need to eliminate excessive delegation.

VI

Conclusion

The wait is finally over – After seven years of discussions & drafting delays with two referrals to the Parliamentary Standing Committee on Finance and shepherding by five Corporate Affairs Ministers, more than half a century old Companies Act, 1956 is all set to have sweeping reforms imbibed in the new piece of legislation eagerly waiting for the dawn of the day post to the assent by the President of India and notification in Gazette of Government of India.

Barring the glares pointed, the glory of the Companies Bill on its enactment, will allow the country to have a modern legislation for growth and regulation of corporate sector in India as the Companies Act, 1956 – the existing statute outlived its life and badly needed a comprehensive revision in view of the changing economic and commercial milieu nationally as well as internationally. The new law will facilitate business-friendly corporate regulation with pro-business structural initiatives like improved corporate governance norms, better e-governance initiatives and facilitation of corporate social responsibility; enhanced financial disclosures for a greater degree of transparency & accountability, coupled with secretarial audit & standards, besides self-regulation; increased protection of interest of investors & stakeholders with healthier shareholder democracy; simplified and streamlined corporate restructurings; and stricter norms for enforcement and handling instances of fraud giving impetus to *entrepreneurs to come forward in the growth and development of India Inc.*

Effective and appropriate to combat the challenges of the present day economic scenario, the Companies Bill brings flexibility in adoption of internationally

accepted practices by proposing drastic changes in the administration and management of the company form of business with a progressive and forward looking approach it is bound to usher into a new era of more liberal, growth oriented and competitive regulatory frame work. The position of India Inc. is very truly described in the following lines:[40]

The woods are lovely, dark and deep, but we have promises to keep,

And miles to go before we sleep, and miles to go before we sleep.

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[40] Robert Frost, *Stopping by Woods on a Snowy Evening* from *The Poetry of Robert Frost,* edited by Edward Connery Lathem. Sir Robert Frost (March 26, 1874 to January 29, 1963) was the most popular and critically respected American poets of the twentieth century.

LIVE-IN RELATIONSHIP AND LEGAL ISSUES WORLDWIDE – A COMPARISION

*Alia Kamal**

I

Introduction

There is an interesting phenomena developing all over the world in family law, is the emergence of non- marital cohabitation[1] or live-in relationship[2] or a relationship in the nature of marriage[3], between an adult man and an adult woman, not going through the established norms of marriage. Live-in relationships in many Western countries are formally referred to as cohabitation. However in India, judges and activists commonly refer to such relationships as 'live-in relationships'.[4] People generally choose to enter into such consensual arrangements either to test compatibility before marriage, or if they are unable to marry or simply because it does not involve the hassles of formal marriage.

The legal problem that this development entails has catalyzed significant activity at both the judicial and legislative level in several countries. This alternative lifestyle which has increased in India in past one decade also has the bearing on the institution of marriage. It has also affected the established principles of inheritance and other rights entailing from a valid marriage.

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1 The term non marital cohabitation is used in various countries and is defined as a living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage, a terminology mainly used in western countries, *available at*: (http://definitions.uslegal.com/c/ cohabitation/ last visited on 2013 03 04.) whereas in India instead the use of the word cohabitation, live in relationship or 'relationship in the nature of marriage' has been used such as in Protection of Women Against Domestic Violence Act, 2005 (Act, No. 43 of 2005).

2 Term live in relationship is used in many Indian cases particularly those not relating to maintenance or economic rights. It has been defined in *Alok Kumar* v *State*, II (2010) DMC 286, as a relationship of convenience where parties decide to enjoy the company of each other at will and may leave each other at will, it is not a marriage.

3 The term 'relationship in the nature marriage' has been used by the Indian legislature in Protection of Women Against Domestic Violence Act, 2005. It has been interpreted by the Supreme Court in *D. Velusamy* v *D. Patchaiammal*, (2010) 10 SCC 469, with common law marriage prevalent in USA.

4 Supriya Yadav, "Live-in relationship in India", 2 (1) *WSLR*, 2012, p 54, *available at*: http://media.wix.com/ugd/430120_88577c36887 ac2f6ac1eb12d317961e4.pdf, (last visited on 2013-03-16).

II

Validity the Essential Phenomena not Legality

Traditionally, the law has distinguished between the marriage and live-in relations, to the extent of invalidating rights in live-in relations, even where it explicitly resembled the marriage-like commitments. Law's hostility toward cohabitation or live-in relations was part of the public policy approach that viewed this cohabitation choice as immoral and defended marriage as the core social institution through which spousal relationships must be conducted.[5] Influenced by the liberal transformation of Western family law during the second half of the twentieth century, most jurisdictions worldwide now respect 'spouses' private choices and validate explicit contracts in which cohabitants or live-in partners assume marriage-like commitments.[6]

Today there is no uncertainty about the legal status of live-in relationships in India, though still considered not with utmost respect, live-in relations are held to be not illegal by the judiciary and have also been given legal recognition.[7] But the point for contemplation is that the issue of legalization of live-in relations was never in question, as something which is not illegal cannot be made legal by applying any amount of underlying reasons, which is a question rather of validity not legality. Living together without getting married though considered a sin and immoral in every religion was never an offence except where it fell under the description of adultery. Besides Islamic countries where Sharia laws are followed nowhere in the world such relations have been held to be an offence or illegal.[8]Through various judicial pronouncements in giving all the rights of succession, maintenance etc. to the live-in partners and their children, it can be said that a legal validity is impliedly given to such relationships.[9]

Solemnisation of marriage carries with itself significant legal implications. Law confers mutual rights on the parties to the marriage not only in respect of domestic

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5 Shahar Lifshitz, "The Pluralistic Vision of Marriage" in Elizabeth Scott, Marsha Garrison, (eds.), *Marriage At Crossroads* Cambridge Publishing, 2012, at p 1, *available at* SSRN: http://ssrn.com/abstract=2120355 (last visited on 2013 0324).

6 *Id.* at 16.

7 *See S. Khushboo* v *Kanniammal & Anr.*, AIR 2010 SC 3196.

8 Countries like Saudi Arabia and other Middle East countries where Sharia law is followed living as husband and wife without getting married is considered a sin and a punishable offence; *See* Charlotte K. Goldberg, "The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage", 13 *Wm. & Mary J. Women & L.* 2007, p 483, *available at* http://scholarship.law.wm.edu/wmjowl/vol13/iss2/4, (last visited on 2013 03 28).

9 *Chanmuniya* v *Virendra Kumar Singh and Othrs* (2011) 1 SCC 141; *See* also *Rameshwari Devi* v *State of Bihar*, AIR 2000 SC 735; *Tulsa & Ors* v *Durghatiya & Ors*, AIR 2008 SC 1193; *Madan Mohan Singh* v *Rajani Kant*, (2010) 3 SCC 209.

relations but also gives right to succeed to the property of the other spouse which is not given to a person not related to the deceased spouse by consanguinity or marriage. Similarly legitimacy to the children born out of lawful wedlock confers right on the children to succeed the property of their parents. Children of no marriage or marriage without essential ceremonies are not given any right to inherit the property of their father. However, this proposition seems to have been started to alter.

Courts in India in order to provide succession and maintenance rights to such live- in partners and their children have resorted to the presumption of long cohabitation, which is a presumption as to the existence of marriage presumed by long cohabitation and such presumption is rebuttable. This presumption cannot be applied to cases where there never was any marriage or to relations which have avoided the solemnisation of marriage[10]. Upholding of rights of maintenance and inheritance to those who do not fall under the protection provided by a valid marriage using increasingly such presumption, even where there is no fact of marriage taking place,[11] has tacitly provided the validity to such relations.

III

Relationship in the Nature of Marriage

The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as PWDVA), is considered to be the first piece of legislation that, in having covered relations "in the nature of marriage", has provided a limited legal recognition and validity to relations outside marriage. The term 'relationship in the nature of marriage' has been used by the Indian legislature instead of term 'live in relationship' as understood in common parlance or non-marital cohabitation which has been prevalent in many other countries. The reason for the use of term 'relationship in the nature of marriage' could be seen as giving protection to the female live in partners of long cohabitation and not just casual relationship. In *Alok Kumar* v *State,*[12] Delhi High court held that "live-in relationship is a walk-in and walk-out relationship. There are no strings attached to this relationship nor does this relationship create any legal bond between the partners."

The Apex Court in India in a landmark case, *D. Velusamy* v *D. Patchaiammal*[13] made a distinction between the two, and stated that the intention of the legislature

[10] *See* Bharatha *Matha,* AIR 2010 SC 2685; here the court took the view that if a man and a woman lives together as husband and wife for long period such relation would presumed to be equivalent to marriage.

[11] *Madan Mohan Singh & ors.* v *Rajanikant & Anr.*, AIR 2010 SC 2933.

[12] II (2010) DMC 286.

[13] (2010) 10 SCC 469.

was to give protection to the relations which have seriousness attached to it, and not all the live-in relationships are protected. Hence it can be said that the live-in relation which is in the nature of marriage, is only protected.[14] However, in some other cases the court has not endeavoured to make any apparent distinction between a live-in relationship and a relationship in the nature of marriage. In *Chanmuniya* v *Virendra Kumar Singh Kushwaha*[15] case Apex Court held that the women in live-in relationships are entitled to all the reliefs under the PWDVA, 2005. Further Madras High Court in *M. Palani* v *Meenakshi*,[16] case where parties had casual sexual relationship held that while having sexual intercourse they shared household together as required by the Act of 2005. Moreover the requirement laid down by the Supreme Court in *D. Velusamy* case that for coming under the Act partners should hold themselves out as husband and wife to the society, was also not considered, the Madras High Court held that female live-in partners are entitled under the Act to the rights of maintenance.

Therefore it can be said that confusion still prevails in respect of the interpretation of the term 'relationship in the nature of marriage' as to whether it include all types of live-in relations or only those live-in relations in the nature of marriage having seriousness, which has been opted out as a substitute of marriage.

Supreme Court in *D. Velusamy* while elaborating on the term 'relation in the nature of marriage' equated it with the form of cohabitation[17] prevalent in the United States; the court stated that in their opinion a 'relationship in the nature of marriage' is akin to a common law marriage. The court took the notice of latest developments in USA in the form of 'Palimony' with respect to maintenance given to woman who has lived for a substantial period of time with a man without marrying him, and is then deserted by him thereby provided that a relationship is in the nature of marriage as required by PWDVA if it satisfies following requirements of 'common law marriage', that is, the couple must hold themselves out to society as being akin to spouses, they must be of legal age to marry, they must be otherwise qualified to enter into a legal marriage, including being unmarried, they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.[18] The third criterion which has been set out seems to considerably delimit the scope of relations covered by thePWDVA, as a live-in relation of a woman with a married man will not fall under these criteria.[19]

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[14] *Id.* at 478 Para 33.
[15] (2011) 1 SCC 141.
[16] AIR 2008 Mad 162.
[17] *See supra* note 1.
[18] *See D. Velusamy, supra* note 13 at 477 Para 31.
[19] Anuja Agarwal, "Law and Live- in Relationships in India", XLVII (39) *EPW*, Sep 2012, p 51.

Supreme Court in coming to the interpretation of the term relationship in the nature of marriage solely relied on the institution of common law marriage and did not take into account development in other western jurisdictions, such as of the South African case of *Ethel Robinson Women's Legal Centre Trust* v *Richard Gordon Volkasetc*,[20] in which the following factors were considered in arriving at a conclusion on whether or not a relationship can be deemed to be a relationship in the nature of marriage between the parties, it was observed that there should be, the commitment of the parties to the shared household, the existence of a significant period of cohabitation, the existence of financial and other dependency between the parties including significant mutual financial arrangements vis-à-vis the household, the existence of children of the relationship, the role of the partners in maintaining the household and in the care of the children.[21]

IV

Concept of Common Law Marriage

In the United States, Northern and Western Europe, Canada, Australia and New Zealand, the courts have attempted to resolve the family law problems of cohabiting parties through the application of property law principles. On the other hand at legislative level, several jurisdictions have enacted cohabiting legislations giving rights that have increasingly come to resemble formal marriage.[22] One such example in the United States of tacitly sanctioned cohabitation is known as common law marriage.

Common law marriage in the United States originated from the early frontier conditions when the settlement of the new uninhabited land started towards west coast, where the proper legal marriage often had to be postponed until clergymen could be found. Under these circumstances common law marriage was an easily accessible way to get all the legal effects of a ceremonial marriage. The absence of a State church and the diversity of the faiths that grew in the new world constrained the possibility of achieving a uniform and unconditional

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[20] Case no 7178/03, in the High Court of South Africa, Cape Province Division.

[21] Lawyers Collective Women's Rights Initiative, *Frequently Asked Questions on the Protection of Women from Domestic Violence Act 2005*, 2007, p 1, *available at* http://www.lawyerscollective.org/files/FAQonProtectionOfWomen2.pdf (last visited on 2013 04 20).

[22] Goran Lind, *Common Law Marriage: A Legal Institution for Cohabitation*, Oxford University Press, USA, 2008, p 3.

form requirement.[23] The common law marriage in United States, therefore, developed as a practical necessity.

The emergence of cohabitation in the nineteen seventies has developed under quite a different set of circumstances from those of cohabitation and concubinage in the past.[24] Instead of constituting an imperative, it is characterised by free choice; it is a lifestyle chosen by the people as matter of freedom.[25] In America the term common law marriage appears to have been developed in case law, creating an American common law in this area.[26]

Conceptually a common law marriage entails in principle all the legal effects of formal marriage. The parties in such marriage consequently have the same obligations to each other as do spouses. The dissolution of the relationship inter vivo occurs through marital divorce. Consequently, the establishment of the common law marriage is informal but its dissolution is formal. A common law marriage is not terminated merely by separation.[27] The same regulations for the spouse concerning inheritance, wills, and administration of estates are applicable. Children in common law marriage are legitimate, and their parents have the same rights and responsibilities as formally married parents. In some American States a person is guiity of bigamy when knowingly he or she is common law married, the person purports to marry or cohabit another person.[28] The United States Supreme Court in *Meister* v *Moore*[29] held that statutes controlling marriage can only be directory because marriage is a common right, which is not subject to interference or regulation by government.The statutes to which the Court referred were statutes in Massachusetts and Michigan that purported to render marriages invalid, not entered into under the term of written [statutory] State law.

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[23] *Id.* at 158; *see* also Rothstein, "Decline and Fall of Common Law Marriage in Pennsylvania", 18 Temp. *U.L.Q.* 1944, p. 264-265. *See* also Chambers v Dickson (1816) where the Pennsylvania Supreme Court observed that the "we have no established church; a certificate from bishop, therefore is out of question ...to hold a woman to proof of her actual marriage might be productive of great inconvenience without advantage.

[24] *Id.* at 3.

[25] *Ibid.*

[26] *Id.* at 131.

[27] *Id.* at 6; *see* also *cardwell* v *cardwell*, 195 S.W.3d 856 (Tex.App.- Dallas 2006); *Dickey* v *Office of Personal Management*, 419 F.3d 1336 (C.A.Fed. 2005).

[28] *Id.* at 8.

[29] 96 US 76 (1877); in the United States common law marriage during the 1800's was recognized by many courts, despite the fact that all states had form requirements for commencement of marriage. These regulations were not considered mandatory but only directory as long as legislation did not expressly invalidate common law marriage (*see* also *supr* a n 130 at 22).

However these courts' rulings also indicate legal confusions and are, at times, contradictory.[30] Occasionally in the court's decisions, there are more or less desperate cries concerning the legal uncertainty in the applicable as well as numerous and often drawn out lawsuits to which the legal regulations give rise. For example, in *Ridley* v *Grandison,*[31] Georgia Supreme Court exclaimed that "plainly, the law of common law marriage is chaos that cries out for order".[32]

When cohabiting couples separate, division of assets often becomes a contentious issue. In the past, courts refused to enforce agreements between unmarried couples to share income or assets, holding that such agreements were against public policy.[33]. In 1976, the California Supreme Court decided *Marvin v. Marvin,*[34] holding that agreements between cohabiting couples to share income received during the time they live together can be legally binding and enforceable. The highly publicized suit between actor Lee Marvin and his live-in companion, Michelle Triola Marvin, was the first of a series of "palimony" suits. Accordingly plaintiff in a palimony suit must prove that the agreement of financial support is not a meretricious agreement, that is, one made in exchange for a promise of sexual relations. Courts refuse to enforce meretricious contracts because of their similarity to contracts for prostitution.[35]

However, an important fact is that common law marriage which got abolished in California in 1895 and it was revived by the court in above said case but here the emergence of the concept of a "committed intimate relationship," the term used in the case, for determining whether a cohabitant can attain shared property rights is instructive.[36] A committed intimate relationship is one that resembles common-law marriage with the additional requirement of intertwined financialaffairs.[37] It means that there still exists confusion in regard of the concept of common law marriage.

This confusion is still persistingmany cohabiting heterosexual couples believe that the law will recognize their relation-ship as a common-law marriage with

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[30] G. M. Weirma, *Cohabitation: An Alternative* (1983) Unpublished Dissertation, faculty of law, University of Amsterdam, *available at* Campus Law Centre Library, faculty of Law, University of Delhi, p 3.

[31] 260 Ga. 6, 389 S.E.2d 746, 749 (1990); *see* also *Russell* v *Russell*, 838 S.W.2d 909,911 (Tex.App.-Beaumont 1992).

[32] *See* Goran Lind, *supra* note 22 at 13.

[33] Cohabitation in US *available at* http://legal-dictionary.thefreedictionary.com/cohabitation, (last visited on 2013 04 22).

[34] 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106.

[35] *Supra* note 33.

[36] *See* Charlotte K. Goldberg, *infra* note 42.

[37] *Ibid.*

the legal protections and financial benefits of marriage. However, only Alabama, Colorado, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah recognize common-law marriage.[38]

Apart from the above mentioned States, common law marriage has been abolished in United States by statute as a means to alleviate confusion as to marital status in all other States. Common law marriages became disfavored in the early twentieth century because there was a modern need for records and proof, and there were public health reasons requiring testing as a prerequisite to marriage. In addition, common law marriage was seen as encouraging fraud and debasing conventional marriage.[39] Even in the states which earlier allowed common law marriage there is a change in law. Today, common law marriage is not a result of geographic isolation, which might explain why it has been abolished in so many states. Now, it results from a couple's actions. In Georgia common law marriage is recognized if it was created before January 1, 1997, and is abolished through 1996 Georgia Act 1021, whereasin Ohio common law marriage entered after October 10, 1991, was abolished in the case of *Lyons* v. *Lyons*[40]. In Idaho it was recognized only if it was created before January 1, 1996.[41] Pennsylvania legislature also abolished common-law marriages entered into after January 1, 2005 by the Act 144 of 2004, Amending 23 Pa.C.S. Section 1103.[42]

Furthermore, apart from common law marriage institution in United States cohabitation is started to be recognised but not as common law marriage. The Domestic Partnerships chapter in the Principles of Family Dissolution[43] adopted

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[38] *See* Goran Lind, *supra* note 22 at 11; Ohio, Idaho, Georgia, and Pennsylvania has repealed the common law marriage during 1990's and in the beginning of the 2000's, however the repeal has no retroactive effect.

[39] Common law marriage, available at http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelations/Marriage/CommonLawMarriage.asp (last visited on 2013-03-29).

[40] 621 N.E. 2d 718 Ohio App. 1993.

[41] Idaho Code § 32-201.

[42] Charlotte K. Goldberg, "The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage", 13 *Wm. & Mary J. Women & L.* 2007, p 483, *available at* http://scholarship.law.wm.edu/wmjowl/vol13/iss2/4, (last visited on 2013 03 28).

[43] American Law Institute (ALI). *Principle of the law of family dissolution: Analysis and recommendations,* (2002), cited in Shahar Lifshitz, "The Pluralistic Vision of Marriage" in Elizabeth Scott, Marsha Garrison, (eds.), *Marriage At Crossroads* Cambridge Publishing, 2012, at p16, *available at* SSRN: http://ssrn.com/abstract=2120355 (last visited on 2013 0324).

by the American Law Institute (ALI) may reflect the next step equation of the regulation of the internal relationship between unmarried cohabitants with that of married partners.[44]

V

Position of Non-Marital Cohabitation in Other Countries

The term common law marriage is used for the non-marital cohabitation in United States whereas in other jurisdictions, it is commonly understood through the term 'cohabitation'. In United States the use of the term common law marriage signifies something more than a live in relation or mere cohabitation because of the legal consequences it entails. In other western jurisdictions also legal provisions have been made or are being provided for where there are no clear legislations for cohabiting couples.

Different countries have different stand on Live-in relationships/cohabitation. For example in Bangladesh, cohabitation after divorce is frequently punished by the salishi system of informal courts, especially in rural areas. In Indonesia, an Islamic penal code proposed in 2005 would have made cohabitation punishable by up to two years in prison. Also Cohabitation is illegal according to sharia law in countries where it has been practiced. On the other side in many developed countries like USA, France,Scotland, UK and Australia etc. cohabitations are very commonly practiced, accepted and are not considered to be illegal.[45]

(i) *United Kingdom (UK)*

In UK, when a man and a woman live together without being married to each other they are said to 'cohabit' and they are referred as 'cohabitees' and unlike marriage, no legal or financial responsibility between couples arises from the simple fact of cohabitation. Despite a common misconception to the contrary, England and Wales does not recognise so-called 'common law marriage', regardless of the length of time couples have cohabited for.[46]

Cohabitants have little legal protection and any claims that arise from the relationship fall into two categories: claims brought on behalf of children and claims for an interest in property. It is pointed out that to establish an interest in a property which is not in joint names, a cohabitants must rely on a hotchpotch

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[44] *Ibid.*

[45] Live-In Relationship, *available at* http://legalservices.co.in/blogs/entry/Live-In-Relationship, (last visited on 2013-03-24).

[46] James Stewart Manches (ed.), *Family Law-jurisdictional Comparisons*, European Lawyer Reference, *LLP*, 2011, p 95.

of laws based on the principles of 'constructive trusts', and 'proprietary estoppels', etc. laws applicable in England.[47]

In July 2007, the Law Commission in UK published a report[48], '*Cohabitation: the financial consequences of relationship breakdown*', which considered the financial consequences of the ending of cohabiting relationships. The Law Commission recommended the introduction of a new statutory scheme of financial relief on separation based on the contributions made to the relationship by the parties.[49] In formulating its proposals, the Commission provisionally rejected the view that the redistributive jurisdiction of the Matrimonial Causes Act 1973 to be extended to cohabitants on separation.[50]

In 2011, Parliamentary Under-Secretary of State for Justice in UK announced that the Government did not intend to reform cohabitation in this Parliamentary term as recommended by the Law Commission, together with the outcomes of research on the Family Law (Scotland) Act 2006.[51] Following a separate consultation, the Law Commission recently recommended that a qualifying cohabitant should be entitled to benefit from the estate of a deceased partner under the intestacy rules,[52] which is yet to be implemented.

Hence it appears that cohabitants in UK have very little legal protection and any claim could be brought through children and interest in the property through general application of property laws, constructive trust etc.

(ii) *Scotland*

In Scotland the Family law (Scotland) Act 2006, for the first time identified, and in the process by default legalized cohabiting couples in the country. Section 25 (2) of the Act said that in determining for the purpose of any of section 26 to 29 whether a person is cohabitant of another, a court of law can consider a person as a co-habitant of another person, by taking in regard: The length of the period during which they lived together, the nature of the relationship during that period

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[47] *Ibid.*

[48] The Cohabitation Consultation Paper (Law Com CP No 179) available *at* http://www.lawcom.gov.uk/cohabitation.htmlast visited on 2013 03 24. *See* also Stuart Bridge Law Commissioner, "Money, Marriage And Cohabitation", *Fam Law*, 2006, p 643, *available at* http://lawcommission.justice.gov.uk/docs/Cohabitation_FamLaw_082006.pdf, (last visited on 2013-03-26).

[49] *Ibid.*

[50] *Ibid.*

[51] Catherine Fairbairn, "Common law marriage and cohabitation - Commons Library Standard Note", 2012, *available at* http://www.parliament.uk/briefing-papers/sn03372, (last visited on 2013 03 24).

[52] *Ibid.*

and the nature and extent of any financial arrangements, subsisting, or which subsisted, during that period. However, the length of time to live together for a couple to be cohabitants is not specified in the Act, which has caused much confusion as to what length of cohabitation will be provided with protection in the event of separation.[53]

(iii) ***Australia***

Again, in Australia cohabitation is recognised and provided with legal protection through the Act of 2009.[54] But it has laid down the same conditions to constitute cohabitation as of common law marriage.[55] But here orders for 'spouse' or 'cohabitants' maintenance are greatly attenuated, being usually rehabilitative and always for a brief period.[56]

(iv) ***Canada***

Recently in Canada a new family law bill was passed in the British Columbia (B.C.) legislature. The Family Law Act came fully into force on March 18, 2013, and replaced the Family Relations Act of 1990. The Act provides under Part 1 section 3 of the Act, defining Spouse to include[57], a person is married to another person, or has lived with another person in a marriage-like relationship, and has done so for a continuous period of at least 2 years, or has a child with the other person.Further it lays down that a relationship between spouses begins on the earlier of the following: (a) the date on which they began to live together in a marriage-like relationship; (b) the date of their marriage.

The effect of the provision is that separation between any couple that has shared the same roof for more than two years — or has had a child together — will now carry many of the trappings of divorce, including an equal division of assets and debts.[58] Thus under the Act there no distinction has been maintained between married couples and the mere cohabitants if they satisfy the above said criteria.

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[53] *See* James Stewart, *supra* note 46 at 328.

[54] Family Law Amendment (De Facto Financial Matters and Other Measures) Act; *see*also *Id.* at 46.

[55] *Id.* at 47.

[56] *Ibid.*

[57] Family Law Act, BRITISH COLUMBIA, *available at* http://www.ag.gov.bc.ca/legislation/family-law/ (last visited on 2013 04 23).

[58] Family Law Act, Part 5 Property division, section 81(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt; Tristin Hopper, "How a new law in B.C. turned thousands of live-in lovers into married couples", *National Post,* March 17, 2013, *available at* http://news.nationalpost.com/2013/03/17/at-midnight-on-sunday-b-c-s-common-law-couples-transform-into-married-couples/ last visited on (2013 04 23)

(v) *France*

While in France the French National Assembly passed the Civil Solidarity Pact in 1999. The civil solidarity pact is a contract binding two adults of different sexes or of the same sex, in order to organize their common life; contract ants may not be bound by another pact, by marriage, sibling or lineage.[59]

(vi) *Russia*

However a strong conservative attitude from any European country is exhibited by the Russia, which recognises marriage only if it is registered in the civil acts registration office. This has been interpreted as stipulating that all other forms of cohabitation do not have any legal consequences, irrespective of the length of that cohabitation, common children and any other circumstances. A church marriage is also not considered to be legally valid if it has not been registered in the administrative manner afterwards. From the standpoint of Russian law, the relationship simply does not exist. Accordingly, there may be no cohabitation agreements outlining the order of expenses division and property ownership, or assets distribution if one partner dies or leaves the relationship.[60]

VI

Analysis

The position, therefore, which appears, from of law relating to cohabitation in various countries is that the France and Scotland are the most liberal countries as far as concept of non marital cohabitation is concerned. Canada has also started recognising the cohabitations on equal terms with marriage leaving no distinction between the two in recent enactment. However, unlike France, Scotland and Canada, in UK very limited rights are guaranteed to such partners. The rights of the separated partners and children born out of such unions, issue of legitimacy and maintenance of the children lacks effective solution. While in Australia cohabitation is legally recognised but the benefits are made on the rehabilitative concern rather as a matter of right. Whereas in Russia conservative approach towards relations which do not satisfy the statutory requirement are still not recognised. Position, thus, that emerges with respect to the live-in relationships or cohabitation is not very discernible and lacks proper definition in most of the countries.

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[59] *See* Live-In Relationship, *supra* note 45.

[60] *See* James Stewart, *supra* note 46 at 310; moreover non-married partners are banned from adopting a child together (section 127 of the Family Code)

In India, unlike above mentioned western jurisdictions, there is no legislation which directly deals with all the issues connected with the live-inrelationships. PWDVA has only touched upon the rights of the female live-in partner against domestic violence, including maintenance rights of such 'aggrieved person'.[61] Moreover, the Act has used the term 'relationship in the nature of marriage' in place of commonly used expression live-in relations; the distinction between the two is also reinforced by the Supreme Court in *D. Velusamy*[62]. This distinction is more in the line of Canadian law which provides the particular period (two years) of cohabitation to constitute such relations qualified for protection in the same way as marriage.

A thorough examination reveals that both justification and rejection of thedistinction between marriage and cohabitation have been based on the theories of contractual theory on the one hand and the public policy theory on the other. Courts in western countries have justified the imposition of marital commitments towardcohabitants using the doctrines of express and implied contract.[63] Yet there are many who object to applying marital commitments to the relationship between cohabitants base their arguments on the idea of contractual freedom, or rather freedom from contracts. According to the latter claim, the absence of a formal marriage reflects the rejection of marriage laws. Therefore, imposing marriage laws on cohabitants does not respect their choice not toget married.[64] On the other hand, in many cases equate marital commitments have been demanded on public values and extra-contractual considerations of justice, fairness, andequality.[65]

An underlying aspect related to this issue is that, in all other western jurisdictions live-in partners or cohabitants are given equal protection of law however under the PWDVA, it confers beneficial rights only on one party to such relationships it would be like assuming lack of seriousness on the part of every male partner who chooses to be in such relationship with equal sincerity.

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[61] Protection of Women from Domestic Violence Act, 2005, Section 2(a) ;"any woman who is, or has been, in a *domestic relationship* with the respondent and who alleges to have been subjected to any Act of domestic violence by the respondent".

[62] *Supra* note 13

[63] *Marvin* v *Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106.

[64] M. Garrison, "Is consent necessary? An evaluation of the emerging law of cohabitant obligation." 52 *UCLA Law Review*,2005, p 815–897.

[65] G. G. Blumberg, "Unmarried partners and the legacy of *Marvin v. Marvin*: The regularization of non-marital cohabitation: Rights and responsibilities in the American welfare state"76 *Notre Dame Law Review*, 2001, p 1265–1310.

This also refers to one fundamental question of gender justice in giving protection in contradistinction of marriage, in shape of maintenance[66] only to female partner leaving behind the male partner from its protection when both the partners have agreed to live in without any legal obligations and responsibility towards each other.

The protection provided under the PWDVA, 2005 can be termed as to falling under the special provision of Article 15(3) of the Constitution of India. However any move made toward giving special protection to women has been targeted by liberal feminist legal scholars,[67]as being fruit of paternalistic approach meant to subjugate women. In this approach any legislation or practices that treat women differently than men can be justified on the basis that men and women are different, and that women need to be protected, in the name of protecting women, this approach often serves to reinforce their subordinate status.[68]

Thus seen from this aspect it makes it important that for a law to be gender just it should not favour few but should have equal protection for all. Like marriage, if relationships in the nature of marriage are to be recognised they should be recognised for both male and female partners.

On the other hand it signifies that the PWDVA being a mere welfare legislation only tries to help the women in distress, suffering from all forms of domestic violence, and it was never an intention on the part of the legislature to grant any legality or status and recognition to the live-in relationships. Seen from this point of view it can be argued that PWDVA being a statute for social welfare and the protection of women, the clause, 'relationship in the nature of marriage', should be given a broader andmore dynamic interpretation to reflect current social reality. The women caught in invalid, fraudulent and bigamous marriage should out rightly be brought under the definition, as ceremonies for a valid marriage were gone through showing the seriousness on the part of the female partner, so it can be qualified as a relationship in the nature of marriage.[69] As see above the judicial interpretation in *D. Velusamy*[70] Case ousted all the relations though, in the nature of marriage but initiated through bigamous marriage.

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[66] PWDVA, 2005 is a comprehensive law providing not just the maintenance but also protection against domestic violence to all women.

[67] M.D.A. Freeman, (ed) *Lloyd's Introduction To Jurisprudence*, Sweet & Maxwell, 2008, p 1288,89.

[68] Brenda Crossman and Ratna Kapoor, *Subversive Sites: Feminist Engagement with Law in India* (1996), chapter 1, p180-81.

[69] *See* Anuja Agarwal, *supra* 19 at 56.

[70] *D. Velusamy, supra* note 13at 477 Para 31.

VII

Conclusion

What is needed, in India, is a special statutory legislation. In the absence of the laws regulating such relations judiciary has tried to fill the gap. Indian judiciary has accorded the inheritance right in cases where there has been long cohabitation between two partners which is akin to a marriage. The legislative measures till now are a response to more traditional and paternalistic view to subjugate women or colour them as virtue less women who does not deserve protection. Courts and legislature both have now and then described women in such way. The highest judicial functionaries have allowed themselves to preach upon the need to separate a "relation in the nature of marriage" from that with a "servant" or a "keep" and a "one night stand".[71] The use of word keep is criticised as being a moral judgment on the character of a women.[72]

The legislation on this issue has to be made objectively protecting the fundamental rights of a person as envisaged under the Constitution of India. While providing legal protection care must be taken of the fact that the parties had the option of choosing a valid marriage with all the protection but they chose to be in a less formal relationship in order to avoid the technicalities, commitments and obligations of the marriage. Though the rights of the live-in partners or cohabiters to some essential extent should be recognised, they cannot be totally equated with the marriage institution. A distinction between the two needs to be maintained as where parties never intended any serious relation from the beginning cannot be made to bear the consequence of marriage like commitment. As seen above in many western countries like Canada, France and Scotland non-marital cohabitation is almost equated with the institution of marriage giving same protection to both on the basis of period of cohabitation. Even there except Canada no other country has provided definite period of cohabitation to fall under the protection. In Scotland no mention of the period of cohabitation requisite for recognition of such relation in the Act has caused much confusion. While in other countries like UK and Australia only a limited recognition and benefit has been given to such cohabitants on the basis of their cohabitation agreement. Therefore, a distinct pattern to accord status to live-in partners who are involved in a relationship in the nature of marriage should be adopted. The status accorded

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[71] *D. Velusamy*, *supra* note 13 at 478 Para 33.

[72] Lawyers Collective and ICRW: *Staying Alive*: *second Monitoring & Evaluation Report on the Protection of Women from Domestic Violence Act, 2005,* 2010, p 57, *available at* http://www.unwomensouthasia.org/assets/LCWRI-4th-PWDVA-ME-Report-2010-Staying-Alive3.pdf (last visited on 2013 03 20).

to such partners may be achieved through a registration process where they nominate each other as "domestic partners", laying down terms and conditions for cohabiting for registered partners.

Important question however, arises, what will happen to the cases where parties did not intend serious relationship but the outcome of such union turned out to be serious like if parties beget children, this will make the relationship serious though not intended to be from the start. In such cases the rights of children and mother need to be protected, it cannot be shrugged off because the parties did not intend marriage like commitment. A good legal system always tends to adapt to the gradual social changes. As such, the law cannot grope in dark, when the number of live in couples is on rise.

The rights of live in couples should be legally recognized while ensuring that it does not impede upon other institutions of marriage, inheritance etc. at the same time the process of making law has to be Indian. Western pieces of legislation dealing with non-marital cohabitation are being made in consideration of the situation particular and unique to their society such legislations like French Solidarity Pact or British Columbian family law Act, 2013,have not addressed secondary marital relations of the sort sought to be addressed in the Indian cases. Hence, it is useful not to see the legal trend in India as replicating the western model in any sense as much as asserting the need to more openly discussing the desirability and nature of legal remedies for men and women in such relations in our societal conditions.[73]

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[73] *See* Anuja Agarwal, *supra* 19 at 56.

BOOKS REVIEWS

MANUAL ON DRUGS AND COSMETICS, 8th Edition 2013, by Ram Avtar Garg, Commercial Law Publishers (India) Private Limited, pages 1444, price Rs. 1495.

The problem of adulteration of drugs and production of spurious and sub-standard drugs has been posing serious threat to the health of the community since long. It was, therefore necessary to prescribe stringent penalties on anti-social elements indulging in the manufacture or sale of adulterated drugs or sub-standard drugs, which in some cases, are likely to cause even death. In 1940, an Act was passed to maintain high standards of medical treatment known as Drugs and Cosmetics Act, 1940. The Act regulates import, manufacture, distribution, sale of drugs and cosmetics in the country. Drug is defined in the Act as an article intended for use in the diagnose, cure, mitigation, treatment or prevention of disease in men or other animals and any article other than food intended to affect the structure or any function of the body men or other animals. It is the general name of substances used in medicine; any substance; vegetable; animal or mineral used in the composition or preparation of medicines or any substance used as a medicine. The word 'cosmetics' means a preparation to be applied to human body for the purpose of beautifying, preserving or cleansing.

Before this Act of 1940, there was another Act in force by the title-Dangerous Drugs Act 1930. The Act of 1940 is in addition to and not in derogation of 1930 Act. Under the Drugs and Cosmetics Act the Central Government is empowered to constitute Drugs Technical Advisory Board to advise the Central Government and the State Government on technical matters arising out of the administration of the Act and to carry out other functions assigned to it by the Act. The Central Government is empowered to prohibit import of drugs or cosmetics in public interest.

The Act also regulates the preparation of Aurvedic and Unani Drugs as it is no longer confined to the Vaidyas or Hakims but have been commercialized by firms. There was a growing tendency on the part of certain manufacturers to market preparations containing partly modern drugs and partly Ayurvedic or Unani drugs under names which simulate Ayurvedic or Unani preparations, thus making it difficult to exercise control over them under the Drugs Act. Costly raw material such as gold, musk, pearl, saffron etc which are component ingredients in various Ayurvedic and Unani preparations were either not used or substituted by imitation products. In order to tide over these menaces Ayurvedic and Unani drugs are also brought within the scope of the Act. In

1945, the Central Government issued Drugs and Cosmetics Rules, 1945 to provide rules for Drugs and Cosmetics Act, 1940. These Rules have been amended from time to time and the most recent amendment is of February 8, 2013.

The Manual, under review, is divided into four parts. Part-I deals with Drugs and Cosmetics Act and Rules, Part –II deals with Drugs Price (Prices Control) Order and latest Notifications relating to Drugs Price Control Order. Part- III provides the text with comments of allied Acts, Rules, Orders etc. Part-IV contains Allied Information on major associations in pharmaceuticals industry, pharmaceutical consultants in India, sources of medicinal herbs in India, world importers of medical herbs etc.

The statutes in Part-I include Drugs and Cosmetics Act, 1940, Drugs and Cosmetics Rules, 1945, Drugs (Price Control) Order, 2013, Drugs (Price Control) Order, 1995. Pharmacy Act, 1948 is another important legislation covered in the book to regulate the profession of pharmacy. It deals with the ambit of medical practitioners, registered pharmacist and authorizes the Central Government to constitute a Central Council. The Council constituted by the Central Government is a body corporate having perpetual succession and a common seal with the power to acquire and hold both the moveable and immoveable property. Under the Act the Central Government may prescribe the minimum educational qualification for pharmacist. The Act regulates the registration of pharmacist and prescribes the qualification for entry in the register.

The other statutes include-, Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004, Cigarettes and other Tobacco Products (Packaging and labeling) Rules, 2008, the prohibition of Smoking in Public Places Rules, 2008, the Cigarettes and other Tobacco Products (Display of Board by Educational Institutions) Rules, 2009, the Clinical Thermometers (quality Control) Order, 2001, the Clinical establishment (Registration and Regulation) Act, 2010, the Clinical Establishment (Central Government) Rules, 2012, the Dangerous Drugs Act, 1930, the Drugs and magic Remedies (objectionable Advertisement) Act, 1954, the Drugs and magic Remedies (objectionable Advertisement) Rules, 1955, the Drugs (Control) Act, 1950, Epidemic Diseases Act, 1897, the Essential Commodities Act, 1955, the Essential Commodities (Special Provisions) Act, 1981, the Prevention of Black Marketing and Maintenance of Supplies of essential Commodities Act, 1980, the Colliery Control Order, 2000, the Indian Medical

Council Act, 1956, the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992, the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Rules, 1993, the Medical Termination of Pregnancy Act, 1971, the Medical Termination of Pregnancy Rules, 2003, the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Narcotics drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013, the National Pharmaceuticals Pricing Policy, 2012, the Opium Act, 1878, the Central Opium Rules, 1934, the Pharmacy Act, 1948, the Poisons Act, 1919, The Pre-Conception and Pre-natal Diagnostic techniques (Prohibition of Sex selection) Act, 1994, The Pre-Conception and Pre-natal Diagnostic techniques (Prohibition of Sex selection) Rules, 1996, The Transplantation of Human Organs Act, 1994, The Transplantation of Human Organs Rules, 1995 etc.

The Manual is the 8th edition in the journey of its publication. The reviewer has read only the present edition and is therefore not in a position to comment on the improvement of the book in comparison to previous editions. However, this edition of 2013 has been satisfactorily updated covering Drugs (Prices Control) Order, 2013 dated 15.05.13 and National Pharmaceuticals Pricing Policy, 2012. It would have been better if the book had contained 'Introductory' from publishers of previous editions too. Nevertheless, the Manual is a good compilation of Statutes, Rules, Regulations, Notifications and other material on the subject of Drugs and Cosmetics at one place. It provides the full text with comments of more than fifty legislations and Rules. The price of the Manual is very reasonable taking into account the exhaustive information contained in the book. It is a useful Manual for lawyers, researchers and other interested in the subject. It is recommended not only for law library but also other libraries.

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GUIDE TO SERVICE TAX VOLUNTRY COMPLAIANCE ENCOURAGEMENT SCHEME BY BIMAL JAIN, 2013 COMMERCIAL LAW PUBLISHERS (INDIA) PVT. LTD. PAGES -170, RS. 250

This book is an endeavor to decode the recent scheme lunched by Central Government on 28 Feb 2013 named as Service Tax Voluntary Compliance Encouragement Scheme to encourage the defaulters who have not paid the servicer tax during October 1, 2007 to December 31, 2012. The Peculiarity of this scheme is that the defaulter who paid the Service Tax will get complete immunity frominterest, penalty and other proceedings of Finance Act. This Scheme is available only to those assesses who file a truthful declaration of their service tax. Service Tax is a form of indirect tax which is under the Finance Act 1994. Service Tax is also the way to generate the funds for the Government, to generate the policies and to develop infrastructure

There are 17,00,000 registered assesses under the service tax but only 700000 assesses file their tax returns. It in only one time scheme introduced by chapter VI of the Finance Act 2013. This Scheme thereby will not be applicable to cases wherein search audit, investigation has been initiated or show cause notice or summon has been issued on or before 1 March 2013.

According to this Scheme at least 50% of declared tax has to be paid on or before December 31, 2013 and remaining balance is to be paid by June 30, 2014 without interest and December 31, 2014 with interest w.e.f. July 01, 2014. According to Scheme the Commissioner has a power to issue show cause notice to defaulters in case of false declaration.The another peculiarity of this Scheme is that it gives exclusive liberty to the assesses that if once acknowledgement of discharge of tax dues is issued that declaration of discharge shall become conclusive and no reopening will be permissible, provided the declaration has made truthful declaration.Ultimately we can say that it is the welcome step initiated by the central Government to motivate and encourage the defaulter to pay the service tax

The book comprises of IX Chapters. Chapter one deals with introduction. Chapter two is for the better understanding of this Scheme through flowchart. Chapter three deals with some relevant provisions of this Scheme.Chapter four deals with Rules and Circular commentary which explains the procedure. Chapter five is the case study related to this Scheme.

Chapter six and seven are dealing with the practical examples and observations related to theScheme. Chapter eight explains the provisions (sectionwise) of this Scheme. Chapter nine explains some statutory provisions relating to the Scheme.

The book under review, in the name of 'Guide' contains,170 pages and is written in simple language. The printing and editing of the book is free from any visible error. It analyses Voluntary Compliance Encouragement Scheme 2013 in a satisfactory manner. It is useful for lawyer, executives, students and others. The 'Guide' is recommended to being kept in the library.

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TRIBUTE TO A RETIRING COLLEAGUE

PROF. RAJIV KHANNA : A BRIEF PROFILE

It gives me immense pleasure that I am given the privilege of writing this column with respect toa senior professor and a great jurist.

Born in the year of Independence and partition of India, i.e. 1947. Prof Rajiv Khanna earned his Master Degree in law from the Faculty of Law, University of Delhi in the year 1973, and immediately theirafter, he joined the very same faculty and served his full tenure of almost full four decades till he retired in the year 2012.

Prof. Rajiv Khanna haswitnessed development of the constitution by virtue of judicial activismin India and at the same time he produced numerous advocates, Judges &eminent jurists. It would not be an exaggeration if I say that Prof. Rajiv Khanna has been a Professor of various generations and it would also not be incorrect tosay that the bright students that he taught in his tenure would include today's eminent lawyers and some must be holding active positions as judges in superior courts and may even be in the Supreme Court.

So far as my personal acquaintce is concerned, I seek to say that Ijoined him as his junior colleague and during all these times, I had an opportunity to work with him for almost 16-17 years . I had an occasion to see the manner in which, the students used to be crazy for attending his jam packed classes. He had super specialization inLabour Laws & Matrimonial Laws besides laws relating to property, consumer, land lord and tenancy. As the Professor-In-Charges of Campus Law Centre, Prof Rajiv Khanna always took along all his colleagues while taking crucial and important administration decisions and made participate each one of his colleagues in the day to day academic and administrative functions of the faculty.

Prof. Rajiv Khanna has guided various scholars for the purpose of award of degree of doctrine. Prof. Khanna is having to his credit numerous articles and write-ups published on Labour Laws, Intellectual Property Laws, Constitutional Laws, industrial Laws and General Sensitive Laws and various law journal from India and abroad.

May his special wisdom bestow on us even after his retirement!

*Gunjan Gupta**

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COMMEMORATIVE SECTION

THE MIND AND HEART OF LOTIKASARKAR, LEGAL RADICAL, FRIEND, FEMINIST

We have to marvel at how the world has changed since r*** was a four letter word, and young Lotika Sarkar (1923-2013), the first woman lecturer in the Faculty of Law, University of Delhi, shocked the department by teaching rape to her students.

This is what happens when you let women into hallowed institutions of learning: They don't understand that, even when they are allowed to be seen, they may not be heard about the obscene. This was our LS-given, early version of the Vagina Monologues, without the theatre. Shift to the present: I suspect some will tell us that the battle to take rape to the classroom is far from over; except, thanks to LS, it is prudery that is on the back foot now.

When the letter protesting the 'Mathura' judgment was written, it constituted many firsts. It was the first time that an 'open letter' was written to the Chief Justice of India – braving its contempt powers. A first for law teachers – Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar and LS – questioning the legitimacy of the court's decisions. The first time the cover of silence shrouding custodial rape was torn asunder by the written word. It is one of the contradictions of those times that, in the wake of the 'Mathura' letter, the law was changed to make it a crime to reveal the identity of a victim of rape. Yet, 'Mathura' remains 'Mathura', while Tukaram and Ganpat haunt the peripheries of feminist consciousness. Such is the stuff of which iconisation is made.

A while later, LS was to advocate caution in shifting the burden of proof: A matter that continues to need explaining, and demands debate – especially with the state having used terrorism as a causative agent for extraordinary laws!

In a haze of cigarette smoke, in a room in Delhi's Centre for Women's Development Studies, dwarfed by the personalities of the two women in it, sits a third listening to a narrative unfold. "When they set up the Committee on the Status of Women in India (CSWI), no one in government expected the report that we produced," chuckles Vina Mazumdar. LS smiles wryly. No one in the committee had anticipated the work, travel and discovery either. Soon, though, they had formed teams, and were coursing in all directions, meeting women of all ilk and hues, life experiences and dispositions all over the country.

Before they knew it, the women they met unalterably radicalised them. The Status of Women in India Report is testimony to what they learnt from the women who spoke to them.

It was on reservation in legislative bodies that LS and Vinadi dissented. You see, we had not gone looking for how the political system should be changed for women. But wherever we went, women would raise the problem of political participation. The report had to reflect what they were saying. The Note of Dissent was to resurface years later with the Women's Reservation Bill.

Thinking back, this was a casual conversation while taking time off for a smoke. If this is the stuff of which feminist gossip is made, it is no wonder that the women's movement is now so articulate about how the law needs to change, and where it needs more thought; a far cry from a government that seems clueless that neither patriarchy nor paternalism can provide answers to the women's question.

Feminism, as feminists know, has its share of mirth, even when it is serious business. The serious business of feminism was on display when LS was co-petitioner in the public interest petition on the Agra Protective Home. 'Protective home'. We know what that means. The conditions were abominable, the rules were like those of a punitive institution, and codes of civilised conduct seemed to stop at the doorstep.

In 1994, when she was over 70, it fell to LS to pursue the case in the Supreme Court. She was daunted, but determined. What was at stake? An illustration: Now that the 'Home' was under the court's scrutiny, it had directed the District Judge to file a monthly report on the 'Home'. In this document that was accessible to anyone who cared to look at court papers was the record for every woman in the 'Home', tying up her identity with her HIV status. On August 30, 1994, the court directed that all persons testing positive be segregated! On October 10, 1994, armed with a doctor's opinion, LS stood her ground with a reluctant court to change its earlier order. Fighting prejudice is an everyday task for the feminist, right? It tired her out, and she did the rest of the case with Muralidhar – Murali to LS – by her side, but she stayed the course.

There was no fuss about LS. Just meticulous preparation and grounded work. Ask Gobind, Khem Singh, Dayalji in the Indian Law Institute library, and they would tell you that "Madam worked very hard." And, they would say, in voices tinged with affection and respect that they were happy to take the books to her, but, no, she will go to the racks and get the books down herself. Mutual respect, no hierarchy, unacceptance of nonsense, and a deep sense of fairness. No pre-judgment, no prejudice; but excellent judgment.

Students who are now teachers speak of being ticked off by her, and then treated to a cup of coffee in her room. There was never any malice, jealous self-interest or meanness about her. Sure, there were those she did not like or trust – but isn't that what judgment is about? There is just one person about whom I have heard her say 'he should be punished', and that after extraordinary provocation. Need I say more? With her friends, it was affection, jollity, respect and a free exchange of thought, opinion and … well, lunch.

Have you had payesh with mini-oranges? What about lauki in milk with ginger and an indefinable something? Or palak in a million combinations? Ah, that tomato chutney – we have to find another name for it that will do it justice. The three-tiered dabba was not hers once she reached ILI, CWDS, perhaps the Law Faculty too? Her most delectable concoctions were made from – guess what? – leftovers. The thing is, it was true. A visiting friend may leave some mushrooms in a form that does little to add pleasure to the palate; overnight, it would become a creation whose recipe must be written; except, it had just one ingredient – leftovers!

Politics and pleasure were on the same canvas. Who among us remembers LS, laid up after a hip surgery, spending the evening before 2006 was to arrive, with friends, wine and chocolate cake, discussing a freshly minted Protection of Women from Domestic Violence Act which, she angsted, she needed to understand.

When Anthony Lester writes, about LS, that "she changed my life ..... But for Monu, I would not be a human rights lawyer", he is expressing a sentiment oft-voiced. At the release of LS's Festchrift (1999), I am told, the hall was full to overflowing. As the proceedings drew to a close, as indeed they must, there was a spontaneous standing ovation. I didn't hear it then, because I wasn't there. But, after four years of sharing a home and being witness to her inexhaustible charm, cheer, comradeliness, compassion, concern, quiet – very quiet – dignity, trust and fairness, we know why the applause will never stop.

*Usha Ramanathan**

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* Independent Law Researcher.

REMEMBERING PROF. MATA DIN MADHOLIA

It is indeed sad that Professor Mata Din, an awardee of Dr. B. R. Ambedkar Ratan Award (NCT) 2011-12, a dear friend, and a very fine human being is no more between us as he left for the heavenly abode on January 16th 2013. He was a brilliant teacher and a researcher who carved a distinct place in the academic realm of Delhi University.In his professional career, he served as Professor-in-Charge Campus Law Centre from May 1992 to August 1994. Prof. Mata Din brought an extraordinary breadth of knowledge and experience, an intense love for learning and a profound sense of what truly matters in this life to everything he did as a teacher, colleague and administrator. Even after his superannuation from the Faculty of Law, Prof. Mata Din continued to lend his valuable services to many academic committees of which he was a part. Some of the positions which he held were - Head of Law Department Dr. Ambedkar University, Agra; Chairman, Governing Body, Sri Aurobindo College, University of Delhi, Chairman, Governing Body Acharya Narender Dev Dayal Upadhyaya College, University of Delhi, Delhi; Chairman, Department of Contemporary Social Studies and Law Dr. Ambedkar University, Agra; Director, Mahatma Gandhi University, New Delhi - which is working for the weaker sections of the society especially for SC/ST through distant education; Chairman, Dr. Ambedkar Education Trust working for the interests of SC/ST and weaker sections of the society; Chairman, Central Admission Grievance Committee, SC/ST, Delhi University, Delhi (1996-98); Chairman of SC/ST Employees Association of Delhi; Chairman, Admissions Committee of SC/ST students at Delhi University; and Chairman of SC/ST Education Committee of Dr. Ambedkar Centenary (1989-93). Prof. Mata Din was also a Member of the National Committee for Centenary Celebrations of Dr. Ambedkar, 1990-93; Advisor, Member of UPSC; Advisor, Member to the Staff Selection Commission, New Delhi were some of the other committees of which Prof. Mata Din was a part of. Prof Mata Din was a scholar who had a deep understanding of the weaker sections viz. the SC/ST and had a deep concern for their upliftment.

His interest and respect for education was evident in his writings. He wrote numerous articles and got published a number of books. His achievements are

indeed remarkable. I personally know that he has been a very kind man and a "true gentleman with a warm heart". He loved his family and his friends but also held a place in his heart for his students and his colleagues. I always enjoyed the occasions on which work brought us together. His departure has surely left a vacuum in my life and I am sure that all those people who were close to him or had the opportunity to know him must also be feeling the same. I pray to the almighty that his soul rest in peace.

D.S. Bedi[*]

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FORM IV

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I, Prof. Usha Tandon, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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