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E-COMMERCE IN THE CYBERSPACE: EXIGENCY OF LAW IN THE ELECTRONIC - COMMERCIAL TRANSACTIONS

*Prof. (Dr.) Rajinderjit Kaur Pawar**
*Gagandeep Kaur***

1. Introduction

In the era of third millennium the Information and Communication Technology has touched entire spectrum of society. In the lap of Information and Communication Technology the world has entered in an unprecedented phase of an unparallel metamorphosis wherein the cosmos is administered by Cyber space. Information Technology is, thus, evolved out of the marriage between two versatile technologies namely, Computer and Communication technologies.[1] Information Technology represents the fourth generation of human communication, after sight, oral and written communication. Information Technology has opened vistas for developing complete new business modules in order to facilitate and expedite modern day business transactions. The cutting edge for business today is E-Commerce and certainly one of the officially proclaimed objectives of the Internet. E-Commerce is a commerce revolutionized by the Internet–era technology (Information Technology). The philosophy behind the Indian economy has transformed into a new concept that is digital economy.[2] The digital economy is also sometimes called the *Internet Economy*, the *new economy* or the *Web economy.* In this new economy digital networking and communication infrastructures provide a global platform over which people and organizations devise strategies, interact, communicate, collaborate, and search for information. The digital economy has helped to create an economic revolution, which is evidenced by unprecedented economic performance and the longest period of uninterrupted economic expansion in history.[3] With the invention of the web technology, economy has revolutionized from *B-Commerce (Bania Commerce) to E-Commerce (Electronic Commerce).*

When the Internet tsunami hit the industry, it submerged everything existing business model and left behind a plethora of the vowel 'e', just

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as a real tsunami would leave seaweed. These days, if a company name does not end with '.com', it is considered as a part of the old economy. The 'dot com' and 'e' - version companies have killed the old brick-and-mortar business industries. The Internet as a commercial entity has come a long way in a short time, though its technical developments stretch over four decades. Emergence of the Internet as a vast public network with millions of people connected online has given rise to a new interactive e-market for buying and selling.[4] The shield of Internet technology lead to Digital revolution and this Digital revolution has given birth to cyberspace.

2. Information and Communication Technology in the Cyber Space: A Vehicle for E-Commerce

The phrase 'Information and Communication Technology' has many varying connotations in the same way as it has a wide spread presence and utility. In a broad perspective, it is concerned with all the aspects of managing and processing information, especially within a large organization or company because computers are central to information management, computer departments within companies and Universities are often called IT (Information Technology) departments. Information technologies are systems of hardware and software that capture, process, exchange, store and present information using electrical, magnetic or electromagnetic energy.[5] Information Technology also includes networking of computers and databases exchanging and feeding information between one another. Internet is the heart of Information Technological development. Internet runs like a golden thread which provides life to sustain the movement of information from one computer to other.[6]

2.1 Meaning of Information Technology:

The last decade of 20th century has witnessed Information Technology as the most prominent technology which has a revolutionary effect on the lives of the people across the world so much that the world has literally become a global village.[7] Information Technology is the combination of two words: Information and Technology. Information is considered as a nervous system for an organization. It is a valuable asset that must be planned, protected, preserved and controlled as other valuable assets such as people, money, material, machine and other facilities etc. Managing information involves professional approach to deal with the global dynamic interactive environment.[8] Technology is a term which is originated from the Greek word "technologia", ("ôÝ÷íç"+"ëïãßá"). — It is combination of two terms "techne" + "logia" ("ôÝ÷íç"+"ëïãßá"). If we crystalise this terminology then "techne" ("ôÝ÷íç") means "craft" and "logia"("ëïãßá") means "saying". Technology refers to material objects for the use of humanity,

such as machines, hardware or utensils. This term states that in order to achieve information it is need of the hour to acquip with these new techniques to elicit that knowledge.[9] Information Technology has come-forth for managing the valuable information in the lap of computers. This new technology coupled with an inspiration to explore has generated an incessant exodus of creativity reducing time and distance on the globe.[10]

Computer and the Internet is the driving force behind the revolution in Information Technology in the era of globalization. It has brought the globe in the "third wave" society which is bound to reshape fundamentals of our economy which in the beginning was primarily agrarian in nature, then industrial and now in the process of becoming information based. The Internet has become the most important infrastructure of this world. There is no such period in the history of mankind and no such innovation that has produced such incredible and significant changes in the world's economy. The Internet is an ideal delivery vehicle for providing a plethora of information.[11] No words can better describe the present scenario of digital technology than the following stated by cosmos the villain in the movie "Sneaker".

> The world is not run by weapons any more, or energy or money. It is run by Ones and Zeros little bits of data. It is all electrons. There is new world war. It is not about who has the most bullets. It is about who controls the information. What we see and hear, how we work, what we think. It is all about information in the digital world.[12]

It is commercialization and popularization of the Internet that has put e-commerce towards the top of public, political, economic and legal agenda.[13]

2.2 Meaning of Cyber Space

The 'e-Revolution' has placed virtually the entire trading universe in the cyberspace. A space without frontiers known as cyberspace has emerged within little time with the invention of computers and their interconnectivity. The cyberspace is the virtual space where innumerable computers are connected together for sharing data, information, knowledge and documents. Cyberspace, therefore, is the place where two people meet, not physically but virtually, and communicate with each other electronically. This 'space' has enabled people to interact with each other, exchange information, share valuable data and ideas. People have worked in this 'space' and enriched themselves with knowledge and money. The information processing speed has increased to the levels, which were unimaginable, a few decades ago.[14]

The term Cyberspace is coined by a scientific fiction novelist *William Gibson* in his story "Burning Chromes" in 1982 which was made popular in his book "Neuromancer" published in 1984. The term is the combination of two words: Cyber and Space. The word Cyber is derived from Greek word *'Cybernetics'* which means "Art of Steering, Pilot, Leader, and Governor". According to the Chambers Dictionary *'Cybernetics'* is the comparative study of automatic communication and control in functions of living bodies and in mechanical electronic systems such as computers.[15] The control functions take place in the brain of the human body, and the world "Cyber" has evolved to denote a virtual space or memory. Cyber is analogous to human memory, that is to say it denotes the medium in which certain activities take place, like the way thoughts work in human memory. Here activities take place in the back end of a computer and the results are displayed on the monitor.[16] The term Cyberspace has its roots in the science of *Cybernetics* and pioneer work is done by *Norbert Wiener* in 1947, 1948 in *Electronic Communication Technology*. Cyberspace is the total interconnectedness of human beings through computers and telecommunication without regard to geographical location. It is also called virtual space as physical existence of cyberspace is not detectable at all.

3. E-Commerce: A New Business Paradigm

> "Information Technology and business are becoming inextricably interwoven. I don't think anybody can talk meaningfully about one without talking about the other."
>
> *Bill Gates*

E-Commerce is a new gateway of technological success of the Indian business scenario in the era of information explosion. E-Commerce has revolutionized business activities globally through the use of information and digital technology in the new millennium. Digital technology provides effective communication platform to communicate to the consumers directly or through on-line marketing. It means conducting business through network technology. E-Commerce means application of electronics in commerce. 'e' is a question of technical capability and commerce is the way in which that capability is applicable.[17]

E-Commerce is a new way of conducting, managing and executing business transactions using modern Information Technology. The Internet has provided access 24 hours a day, seven days a week, any time and anywhere. Theoretically, the Internet is the main technology whereby all elements of a commercial transaction (advertising, production, purchase, payment and the delivery of the service) can be conducted on an interactive basis with more than one person, unconstrained by time and space, in a

multimedia (sound, image and text) environment at a relatively low cost savings as well as increasing competitiveness and efficiency through the redesign of traditional business. E-Commerce is, thus, a business practice that involves use of computers, computer systems or computer networks.

3.1 Definitions of E-Commerce

E-commerce is a 'commerce based on bytes'. E-commerce, defined simply is the commercial transaction of services in an electronic format. In general terms, e-commerce is a business methodology that addresses the needs of organizations, traders and consumers to reduce costs while improving the quality of goods and services and increasing the speed of service delivery.[18] It may also be referred to as the paperless exchange of business information using Electronic Data Interchange, Electronic Fund Transfer etc. E-commerce is not only about simple transactions of data but also general commercial acts such as publicity, advertisements, negotiations, contracts and fund settlements.[19] It refers to all forms of transactions relating to commercial activities, including both organizations and individuals that are based upon the processing and transmission of digitized data, including text, sound and visual images.[20]

The *World Trade Organization* (WTO) Ministerial Declaration on E-commerce defines e-commerce as, "the production, distribution, marketing, sales or delivery of goods and services by electronic means". The six main instruments of e-commerce that have been recognized by WTO are telephone, fax, TV, electronic payment and money transfer systems EDI (electronic data interchange) and the Internet.[21]

The *European Union* defines, "Electronic commerce is a general concept covering any form of business transactions or information exchange executed using information and communication technology, between companies and their customers, or between companies and public administrations. Electronic Commerce includes electronic trading of goods, services and electronic material".[22]

According to *European Commission*, "E-commerce encompasses more than the purchase of goods online. It includes a disparate set of loosely defined behaviors, such as shopping, browsing the Internet for goods and services, gathering information about items to purchase and completing the transaction. It also involves the fulfillment and delivery of those goods and services and inquiries about the status of orders. Like any other sustained business activity it also means conducting consumer satisfaction surveys, capturing information about consumers and maintaining consumer databases for marketing promotions and other related activities."[23]

3.2 History of E-Commerce

Keeping in view Darwinian view of technology, doing business electronically has certainly been an evolutionary process. In fact the origin of e-commerce dates back some 30 years and lie in Electronic Data Interchange (EDI), a standard way of exchanging data between companies. Retailers often used it because it allowed stores to link their supplies directly into their stuck databases. The "paperwork" including the order and the bill of sale, also took place in this secure, safe and verifiable electronic environment. EDI had some serious shortcomings. It usually required an expensive or dedicated Network Connection between two trading partners. It was not interactive method and there was no opportunity for discussion or negotiation. After 30 years EDI is out of synch with the business environment because speed is the order of the day. Companies need safe, reliable access to a large, fluid pool of partners and suppliers so they can find customers and deliver the goods quickly. The arrival of the Internet promises a solution. Now EDI is being integrated into some Internet technologies. But Internet is global and ubiquitous.[24] E-Commerce is a term popularized by the advent of commercial services on the Internet. Before the invention of the Internet, E-Commerce was largely a hidden business-to-business affair. Internet E-Commerce is, however, only one part of the overall sphere of E-Commerce.[25]

3.3 Scope of E-Commerce

E-Business in broad terms as a mass market capability that is enabled by a combination of the Internet's global reach and the vast resources of traditional Information Technology (IT). It is a multi-headed monster wherein many facets are technical but others are not. There are several commonly used names for e-Business, the most popular being e-Commerce and e-Trade. E-commerce is just one aspect of e-business. The term 'e-commerce' is a rather narrow constructed definition with its emphasis on the transactional process.[26]Online commerce is referred to as e-business, e-trade and e-commerce. In this research paper such terms are taken as synonyms and take them as referring to the same thing. Whichever term is used e-business, e-commerce or e-trade there is a clear differentiation between the 'e' and the 'business', 'commerce' or 'trading'. The 'e' is a question of technical capability; the latter is the way in which that capability is applied. [27] E-Commerce is a term popularized by the advent of commercial services on the Internet. Internet e-commerce is, however, only one part of the overall sphere of e-commerce.

To get a grasp on the overall scope and nature of the e-business proposition, it is required to have a look at the constituent parts of trading

over a network. The mainstream of e-commerce consists of these three areas:[28]

3.3.1 Electronic Markets

3.3.2 Electronic Data Interchange

3.3.3 Internet Commerce

3.3.1 The Electronic Market (E-Market):

Electronic Market is the use of information and communication technology to present a range offering available in a market segment so that the purchaser can compare the prices and other attributes of the offerings and make a purchase decision. The evolution of the information society is often compared to the Industrial Revolution on the terms of its consequences. The use of information and communication technologies provides the opportunity to extend the abilities of individuals and organizations to act, to reinforce cross border contracts, and to develop an open society with cultural originality and variety. Due to technological changes and economic development, the information factor has become more significant than the production factor. Many companies and organizations have moved their business processes on the web and realized customer relationship with the help of electronic means of information and communication.[29] E-marketing is described as the use of Internet and related digital information and communication technologies to achieve marketing objectives. Internet marketing is the process of building and maintaining customer relationship through online activities to facilitate the exchange of ideas, product and services that satisfy the goals of both parties.[30]

3.3.2 Electronic Data Interchange

Electronic Data Interchange (EDI) is used by organizations for transactions that occur on a regular basis to a pre-determined format. EDI is the Inter-company computer-to-computer communication of standard business transactions in a standard format that permits the receiver to perform the intended transactions. In execution of a simple trade exchange, the customer's order can be sent by EDI and the delivery notification from the supplier can use EDI to send the invoices and the customer can finish the trade cycle with an electronic fund transfer via bank and on EDI notification to the supplier.[31] EDI provides a standardized system for coding trade transactions so that they can be communicated directly from one computer system to another without the need for printed orders and invoices in paper handling. EDI is used by organizations that make a large number of regular transactions.

3.3.3 Internet E-Commerce: A New Revolutionary Phase in E-Commerce

Over the last few years, the Internet has matured to provide a global infrastructure accessible to a vast number of people. It makes global markets a reality, even for individuals and small business more significantly. The Internet makes it possible to transform electronic trading from an expensive and specialized process into a cheap and realistic proposition for the masses.[32] Physical business to e-commerce on the Internet is an area of rapid development. Consumer e-commerce has gained a new dynamics by the popularization and commercialization of the Internet. The basic elements of Internet E-Commerce are (i) the consumer with a computer hooked up to the Internet (ii) the content provider who has set up an Internet application and installed it on the Internet linked computer. Consumer trade transactions are open to anyone with an Internet connection. E-Shopping is every where in the world and it is open 24 hours a day.[33]

Therefore, E-Commerce includes: (1)Electronic Data Interchange (EDI), (2) Electronic Mail (e-mail), (3) World Wide Web (www.),(4) Electronic Bulletin Boards (EBB), (5) Electronic Fund Transfer (EFT). As a vehicle E-Commerce requires communication networks like: (1) Value Added Network (VAN),(2) Local Area Network (LAN) and (3) Internet. It has rapidly emerged as an important channel for commerce with the exchange of transactional and site data providing a rich source of customer information for creative online marketers to exploit. The Internet has become a central platform for assorted forms of information exchange. The dominant reason for Internet adoption among enterprises is information gathering. Almost infinite number and diversity of public, private and individual websites offer valuable marketing research information in volumes and accessibility like never before.[34] It is widely acknowledged that the Internet has revolutionized and restructured many sectors of industry and provided a new focus for their activities. The Internet has generated opportunities and challenges for existing business and new entrants dealing in new direct relationships with customers.[35]

4. Types of E-Commerce

Over the last few years the technology has landed us in the new paradigm. The Internet has evolved from being a scientific network only, to a platform that is enabling a new generation of business. The first wave of electronic business was fundamentally the exchange of information. But, with the passage of time, more and more types of business have become available electronically. Particular from the perspective of buyer and seller relationship, E-Commerce application can be divided formally into six categories:[36]

I. Business-to-Business (Termed as 'e-hub', the Second Industrial Revolution. It includes: Electronic Data Interchange (EDI), Electronic Resource Management (ERM).

II. Business-to-Consumer (Includes: e-tailing, e-brooking, e-news, e-learning, e-service etc. etc.)

III. Consumer-to-Business (Includes: commercial transactions between consumers and businessmen in on-line shopping and trading).

IV. Consumer-to-Consumer (Popularly termed as e-Bay e-commerce).

V. Business-to-Government

VI. Government-to-Consumer

The last two categories have been added in the 21st Century only. Earlier there were prominent four categories of E-Commerce. For the purpose of on-line payments in E-Commerce from the Government Banks and taxation purpose, it becomes necessary to involve the Government sector also along with private companies in E-Commerce.

5. Exigency of Law in E-Commercial Transactions

Commerce is global, however, law governing commerce is not globally uniform. A global spanning technology; that is Internet, has made possible the flow of data and digitalized information across the NET in easily digitalized packets through the interconnection of telephone networks. The old set of rules and practices governing communication and trading are largely incompatible with the emerging system of communication and trading practices in a borderless world created by the Internet. The influx of the Internet and World Wide Web even though made it possible to communicate and transact over cyberspace, it resulted in the emergence of multitude of problems including crimes and need for its regulation emerged as a prime concern for the authorities. However, Internet worked as a double edged weapon. On one hand, it has flourished commerce; on the other hand, it has also posed great challenges before the contemporary society.[37]

5.1 Some major challenges to the Cyber Law Jurisprudence are as follows:

Challenge 1: In the real world, a consumer goes into shop, selects commodity and hands over cash in return for the goods which he carries away. The risks are very small, and even if things go wrong, consumer can usually exchange the faulty goods. Consumer knows where to go back to shop because bricks and mortar rarely move overnights. However, when

trading over the Internet, things are not simple: The dream of virtual trader can suddenly become a nightmare.

Challenge 2: Violations of rights of e-consumers (consumers using Internet), a 20th century foetus of technological development has grown to an epidemic and has become an uncontrollable in the 21st century. One of the characteristics of on-line frauds is that these are transnational and faceless unlike the conventional crimes. Often investigations end up in vacuum due to the very nature of the crime and for the lack of effective legislative framework in combating the same.[38]

Challenge 3: With proliferation of information technology enabled services such as e-governance, e-commerce and e-transactions; the protection of personal data, information and implementation of security practices has assumed a great importance. However security on the Internet is a biggest and sensitive issue which needs amendment in the present legislation.

Challenge 4: Exploitation of the rights of e-consumers under the veil of information technology has grown from a cesspool into a huge iceberg. Unfortunately in India, we are just thinking of touching the tip of the iceberg through ad-hoc measures. E-Commerce demands greater vigilance to ensure that the parties do not violate or infringe upon their rights. But the present legislation is not giving response to the need of the hour.

Challenge 5: Normally Indian Laws are very specific in terms of Jurisdiction. However the IT Act is an exception. How does a government propose to exercise the said extra-territorial jurisdiction in the light of established principles of International Laws? Assuming that the computer system and network is located in India, how would the Indian Law enforcement agencies actually catch-up the criminals outside India?The more vexing issues are Jurisdiction and enforcement of Taxation. Since many online transactions involve parties residing and operating in different legal and tax jurisdictions, which authority has the necessary tax jurisdiction is not clear in many situations?

5.2 Some unanswered questions in the Cyber Law are as follows:

a) How does a consumer know (before the consumers handover their credit card details) that the company they are dealing with is trustworthy and reputable?

b) Furthermore, how do both the parties ensure that their transaction take place privately without someone else snooping on it, even worse, tinkering with the transaction details while they are in transit across the market? If a consumer transmit his credit card information over the internet. Can he sure that the people other than the intended receipt has not read it or not?

c) Secret codes have long been used to ensure the privacy of information. For two people to be able to communicate using a code they must 'share a secret' and this secret must be denied to everyone else. How do a trader and a consumer (who will probably never meet) agree on a secret code that cannot be guessed by anyone else? And when things go wrong (as they inevitably do), what sort of mechanism is there to ensure that both parties fulfil their obligations?

d) To what extent "Buyer Beware" principle holds its place in on-line sale and purchase?

5.3 The Grey Areas in the Information Technology Act, 2000

The bible of cyber law in India is the IT Act 2000. The IT Act, 2000 has been adopted from the UNCITRAL Model Law of 1996. IT Act is a legislation to facilitate e-commerce and to deal with the computer related crimes. The objective of the Act is to recognize e-commerce as well as e-governance but in this Act adequate provisions and safeguards are not provided for e-commerce. The protection of consumers in the online shopping has totally been ignored. The IT Act provides no protection to the consumers whose credit card numbers are stolen and misused. E-commerce is based on the system of domain names. However, this Act does not deal with the protection of Intellectual Property Rights in the context of online environment. The IT Act 2000 has been amended in 2008, but the amendment has merely added new types of crimes and enhancement of punishment. Another grey area is that it is silent on the issue of online Banking frauds i.e. online card payments, misuse of credit card numbers and hacking of account numbers. This Act has left the concept of e-Contracts entirely for the Indian Contract Act, 1872.

6. Conclusion

Just as a country's jurisprudence reflects its unique historical experience and culture, the law of cyberspace too reflects its special character, which differs markedly from anything found in the physical world. While the cyber world is wonderful, useful and interesting, it is not altogether free from dangers. It has also become a soft target for criminal activities also. As the society has become more and more dependent on information processing and communication, such risks are increasing at an exponential rate. The total dependence of commercial, banking, and even government activities on the networking is providing opportunities to criminals to commit mischief and crime on the Internet with disastrous and far reaching effects with the boom in e-commerce and other network dependent activities cyber crimes has become a very serious threat for the information age. The

Information Technology Act, 2000 has been enacted to give effect to the UNCITRAL Model Law 1996 in India. In this regard, the *Information Technology (Amendment)* Act, 2008 has been amended in order to give widest possible applicability. On the basis of the analysis of the *Information Technology (Amendment)* Act, 2008, it is clear that the Act is like a skeleton legislation where all provisions are decorated in a very beautiful and systematic way, however, these are not worth for jurists, academicians and lawyers. In fact the need of time is to peep deeply inside these challenges and make adequate provisions for suitable solutions.

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IMPACT OF GLOBALIZATION ON INDIAN FEDERALISM WITH SPECIAL REFERENCE TO FOREIGN POLICY

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Introduction

In the contemporary world, federalism as a political idea has become increasingly important as a way of peacefully reconciling unity and diversity within a political system. The reason for this can be found in the changing nature of the world leading to simultaneous pressures for both the larger States and also for the smaller ones. Modern developments in transportation, social communications, technology, industrial organization, globalization and knowledge–based, and hence learning societies, have all contributed to this trend. In essence, federalism is a principle that structures and orders complex national entities by spreading state power among several levels of government. Traditionally, it is considered as being closely connected to the idea of the federal state. The principle features of a federal system of a government are the vertical separation of powers, the substantial autonomy of the constituent states, and their right to participate in the administration, decision shaping and making of the federation. In the first instance, the constitution of the federal state shares out powers between the federal level of the confederation and its constituent states through a vertical separation of powers, allocating a considerable degree of freedom to member states to shape politics and policies. In a federal state, constituent states, thus, have autonomy that derives directly from its federal constitution. While different levels are related hierarchically with constituent states as subordinates, they exercise their respective powers independently, as allocated to them by the Constitution. The constituent states generate their own purposes and aims, and engage in the decisions of the state as a whole through various participatory rights.[1]

Federalism is not only an internal structural and organizational principle of the nation state; it is also a notion with a growing formative influence in both international relations and international organizations. The dynamic process of federalizing state power in foreign relations depends to a large

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extent on a state's historical, cultural, economic and political conditions, takes different forms, and occurs on a different scale in different countries and regions. While federalizing foreign relations means more autonomy for sub-national entities in observing their own interests, it does not mean the dissolution of the nation's state power and recognition of the right of secession of particular ethnic groups.

The role of sub national units (states, provinces, cantons, Lander) in international affairs is a growing subject in the literature on federalist affairs. Scholars of political science have traditionally seen the conduct of foreign policy as the exclusive domain of the national government. This would seem an especially apt observation about India's federalist system. The Indian Constitution has given the Centre particularly strong powers – so strong, in fact, that some have described it as "quasi federal" because of the lack of autonomy it affords to the States. Yet, there is an increasing consensus that the States have not been shy of foreign policy advocacy. Some have argued that the era of coalition government has increased such advocacy and, potentially, influence, especially in the context of globalization, economic reform and liberalization. Indian Constitution grants greater power to the Centre than to the States has been well documented in scholarly literature. A few key points highlight this centre-oriented position. The Constitution clearly delineates powers to the centre, the states, and those over which the states and centre have concurrent adjudication. However, whenever there is any conflict over the laws on the Concurrent list, the national parliament laws prevail over those of the state legislative assemblies. In addition, according to Article 248 of the Constitution, all residuary powers are given to the Union, unlike in the United States, where residuary powers go to the states. In practice, this has meant that the central government controls most of the powers of taxation (an important exception is agricultural income tax, which is a state subject). This has led the States to negotiate revenue sharing and other financial allocations among themselves and with the centre through centrally supervised bodies, such as the Planning Commission and the Finance Commission. Finally, the centre appoints the governor of each state, a conventionally powerless position that nonetheless can and has been used on occasion to influence state policy and politics, such as the dismissal of state governments.[2]

Despite the immense powers granted to the Centre, states are extremely important actors in the Indian political system. States retain sole or primary constitutional authority over education, agriculture, law and order, health, welfare, and local government. Central leaders may make policy on these and other concurrent subjects, but they may find that the states do not always implement the center's recommendations. In particular,

finance and planning commissions have met with resistance from powerful state leaders.

In a discussion of state advocacy in foreign affairs, "involvement in foreign policy" can involve different degrees of influence. For example, the central government may informally consult a border state government to understand the impact that placing troops in the area prior to offensive action would have on local opinion. The outcome of such consultations may influence the central decision about timing, location, and the like, but the state government would not be considered to have played a strongly influential role. On the other hand, if the state government advocated against war and was found to have changed the central government's position on the subject, then such a role would be considered strongly influential. Jenkins argues against overstating the states' level of influence, and makes important qualifications about various scholars' works. He points out that Indian states' increasing exposure to and involvement in international affairs does not necessarily translate into autonomy in conducting foreign policy. He also argues that although States interact increasingly with multilateral institutions (such as the WTO); the result has been "to take domestic policy to an arena – the intergovernmental negotiations within the WTO – where India's sub national authorities have difficulty in gaining access." In other words, Jenkins suggests that States influence foreign economic policy, but only within a limited framework and amid a complicated network of State politicians, national politicians, and bureaucrats.[3]

Meaning of 'Federalism'

Federalism as Dicey put, is a political contrivance intended to reconcile national unity with the maintenance of states' rights. In the words of Hamilton, 'it is an association of states that forms a new one.' As a particular type of the constitutional government, federalism is a "composition system of the government" characterized by a contractual and territorial anchored dynamic balance of power. Thus, federal systems distribute powers and jurisdictions constitutionally among the federation and the constituent units to safeguard the existence and the authority of members and the systems alike. Consequently, federalism is basically co-operative in the sense that policies are decided upon and implemented by processes that allow the member-states to participate though the degree of cooperation may differ from one federal system to another.[4]

Meaning of the term 'Foreign Policy'

While one often talks about foreign policy in any discussion in International Relations, it is difficult to precisely tie down the connotations of the words foreign policy. Various scholars define it variously. Hugh

Gibson, for example, defines foreign policy as: "a well rounded, comprehensive plan, based on knowledge and experience, for conducting the business of government with the rest of the world. It is aimed at promoting and protecting the interests of the nation. This calls for a clear understanding of what those interests are and how far we can hope to go with means at our disposals. Anything less than this falls short of being a national foreign policy."According to Joseph Frankel, foreign policy "consists of decisions and actions which involve to some appreciable extent relations between one state and others." George Modelski, on the other hand, views foreign policy as a "system of activities evolved by communities for changing the behavior of other states and for adjusting their own activities to the international environment." Thus foreign policy means a country's dealing with other countries and international agencies in order to promote its national interest.[5]

INDIAN FEDERALISM AND FOREIGN POLICY UNDER INDIAN CONSTITUTION

The treaty making capacity of a full-sovereign State is the highest water-mark of power which its Government may reach only under the most favourable grant of the Constitution. To quote Potter, "such plenary power continues to accompany, or stand back of, and possibly exceed the degree of treaty-making power purported to be granted by the national constitution." In the case of many States, there is a distinct gap between this capacity of the State and the competence of its Government. The Constitution of India, like those of Canada and Australia, does not vest in the member-States any power to conclude treaties with foreign States, even with consent of the Union Government. This is not anything strange. During the long period of British administration neither the Provinces of British India nor the Indian States enjoyed an iota of this power. It is true that Section 9 of the Regulating Act impliedly recognized a very limited right of treaty-making for the Governments of the Presidencies while prohibiting them from making "any treaty of peace or other treaty with any Indian Princes or Powers, without the consent and approbation of the said Governor-General and Council, first had and obtained except in such cases of imminent necessity as would render it dangerous to postpone such…….treaties until the orders from the Governor-General and Council might arrive…." The substance of this provision was preserved in Section 43 of the Act of 1793 and continued to be in the statute book even after the transfer of the administration from the Company to the Crown. But it does not appear to have been ever acted upon after British rule was firmly established in India.[6]

The Government of India Act, 1935 provided for the first time for a federal system of the government for the whole of India. It showed great concern for the rights of the constituent units of the Federation, viz., the Governor Provinces and the Indian States that might accede to the Federation. Of course, the treaty making power was not statutorily vested in the Federal Executive in India. It continued to be delegated by the Crown from time to time, as before, to the Governor-General who was to exercise the executive authority of the Federation on behalf of His Majesty. The constituent units of the Federation were not given any share in treaty-making or in the regulation of "external affairs".[7]

The Constitution of Indian Republic, whose territory now includes not only the territory of British Indian Provinces but also that of the Indian States that lay between the eastern and western wings of the Pakistan, vests all treaty making power in the Union Government and excludes the member-States from having any share in it. Article 246 of the Indian Constitution states that. "Notwithstanding anything in Clause (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in the list I in the Seventh Schedule of the Constitution referred to as the Union List". Item No. 14 of the Union List reads as follows: "14. Entering into treaties and agreements with foreign countries and implementation of treaties, agreements and conventions with foreign countries". Other items in the Union List unmistakably show that the whole gamut of foreign relations has been placed under the exclusive competence of the Union Parliament. Item No. 10 reads as follows: "Foreign affairs; all matters which bring the Union into relation with any foreign country". Other items include "diplomatic, consular and trade representation", "United Nation Organization", participation in international conferences, associations and other bodies and implementing of decisions made thereat" , "war and peace", foreign jurisdiction", naturalization and aliens", extradition", admission into and emigration and expulsion from India', piracies and crimes committed on the high seas or in the air", offences against the law of nations committed on land or the high seas or in the air". Item No. 10 is generic while other items are specific and descriptive. In the Constituent Assembly, Dr. Ambedkar who piloted the Constitution Bill stated that the term "foreign affairs" was broad enough to include all the possible activities in the external field. In the Delhi Laws Act case,[8] the court held that the duty of law making was primarily to be performed by the legislative body itself, and that by bestowing on the Central government the power to repeal or amend any law applicable to Part C States, Parliament had acted unconstitutionally. Besides, Article 248 of the Constitution confers upon the Parliament "exclusive power to make any law with respect to any matter not enumerated in the Concurrent list." Further, in Ram Jawaya Kapoor

V. The State of Punjab[9], the Supreme Court said that the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity, but functions of different parts or branches of the government have been sufficiently differentiated and consequently it can be very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belongs to another. Thus, the residuary powers of legislation also rest with the Union. In addition, reference need to be made to three other constitutional provisions which give the federal government full power to match their responsibility in respect of the conduct of foreign affairs. Article 253 stipulates that the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Finally, Article 73(1) of the Constitution declares that "subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws". It is, thus, obvious that the treaty making power in India is an exclusively Union power and the States cannot exercise any part of it. They have no power to enter directly in the field of international law. Article 257 lays down that the executive power of the States is to be exercised as not to impede or prejudice the exercise of the executive powers of the Union. The executive power of the Union also extends to the giving of such directions to a state as may appear to be necessary for that purpose. Thus, a well known and distinguished constitutional expert, H.M. Seervai, rightly observes that the Indian Constitution confers upon the Union of India legislative and executive powers which embrace the total field of the external sovereignty.[10]

PARTICIPATION OF THE STATES IN FOREIGN POLICY

Significant changes are taking place across the world following the advent of globalization and the consequent decline of the nation-state. The conventional parameters of understanding domestic politics and international relations are becoming redundant. New forms of international treaties - relating to regional trade, culture, economy, human security, and national security - have become essential. The increasing role played by the civil society has changed the ground rules of foreign policy processes. The structure, quality, and dimensions of federalism in India are witnessing drastic changes. In this context, the nature and dynamics of federalism in the coming decades will be a pertinent issue for analysis. The concerns of the states in the Indian Union are also changing significantly. Their demand for a share in foreign policy dynamics raises new questions in the study of federalism.[11] While the political discourse regarding the role of

the federating units in the making of the foreign policy is a recent one, the phenomenon of provinces taking part in international activities is neither new nor particular to any specific country. The distinguishing feature of international politics has always been the existence of independent political communities trying to give expression to their autonomy. The modern state system has sought to institutionalize this ideal state of autonomy as sovereignty. Five major reasons for the contemporary assertion of various sub-national authorities on the international scene are:

(i) The expansion of the field of the foreign policy from the traditional concerns with status and defence into economic, social, cultural and environmental issue areas;

(ii) The imperatives of contemporary global and regional interdependence;

(iii) The inevitable consequences of the contemporary tutelary welfare roles of all the governments;

(iv) The awareness of vulnerability to distant events (especially since the OPEC or embargo) and, on the part of regional elites, the corresponding increase of knowledge about, and skill to handle, external threats to or opportunities for their territorial interests;

(v) Emulative "me-tooism," facilitated and accelerated by modern communications linking up the far corners of our planet.[12]

The shift we see today in foreign policy making, where New Delhi is being forced more and more to yield ground in the face of State pressure, may have started more than a decade ago when India began to open up its previously protectionist economy. Former Secretary in the MEA, N. Ravi explains, "The allowance that the Centre gave the States to generate revenue and attract investments from outside has also increased their leverage in the domain of foreign policy." Most of the States are today directly in touch with foreign governments and do not depend on the New Delhi to showcase to their States. In addition to the growth in the States' leverage, the nature of the coalition politics in India, where neither the Congress nor the BJP in a position to form a government without relying on support from regional parties, has also made the States more vocal and proactive in foregrounding their own ambit of interests. [13]

The deepening of democracy and assumption of power by different regional parties in various States has generated an intense debate on giving States more fiscal and other powers. The discourse on the issue also talks of devolution and decentralization of powers to local self governments and Panchayats. The recent victory of Samajwadi party in the biggest State of Uttar Pradesh and the return to power of the Shiromani Akali Dal in

Punjab only confirms the trend of the rise of the regional parties that began in 1967 when a number of non-Congress governments assumed powers in different States. Punjab Chief Minister Parkash Singh Badal has even demanded the setting up of a new constituent assembly to rewrite the Constitution along "general federal lines". The recent stand of West Bengal on river Teesta embarrassed the foreign policy position of the Government of India with Bangladesh. The Tamil Nadu Assembly unanimously passed a resolution seeking imposition of economic sanctions on Sri Lanka. Jammu and Kashmir and Punjab have been asking the Centre to take them on the board while discussing water issues with Pakistan. Foreign Direct Investment in retail was opposed by several States on the grounds that the move would hurt the interests of the farmers and retailers in their States, forcing the Central Government to postpone the move. Similarly, the fate of the proposed National Counter-Terrorism Centre (NCTC), the Lokpal Bill, the amendment to the Railway Police Force Act to abolish State controlled Government Railway Police (GRP) and the Border Security Force Amendment Bill extending the policing powers of the paramilitary forces remain uncertain with fierce opposition from regional parties and affected states with strong arguments around the interpretation of federalism in the Indian Constitution.[14]

Conclusion and Suggestions

The aforesaid analysis, thus, clarifies that the federal impact on the foreign policy making and its implementation can be studied at two levels: first, at the level of an analysis of provisions enshrined in the Constitution facilitating a division of powers between the Union and its constituent units with regard to subjects concerning the field of foreign relations; and second, at the level of an analysis of the special problems which the constituent units may have with regard to their neighboring foreign states and the possible interests which they may have in the developing economic and trade relations with some other countries or constituent units of some other federal states. Thus, the issue concerning the relationship between federalism and foreign policy can be approached at two levels. At a broader level, it concerns the operation of federal political system. As the boundaries between the domestic and international policy arenas become hazier, understanding federalism increasingly demands that the international environment in which a given system function be taken into account. The traditional concern with relationship between central government and the constituent elements of the federation now has to be expanded to embrace the international environment in which both levels of the government operate. The second level concerns the conduct of foreign relations. The traditional assumption that the foreign relations are the exclusive concerns

of central governments no longer holds validity. Certainly, the international interests of non central governments are more limited in scope than are those of national governments and have a pronounced economic orientation. It would, however, be misleading to dismiss them as second order actors. The global web of the world politics ensures that non-central governments have interests and responsibilities, which can often, quite unexpectedly, and sometimes against their wishes, project them into international limelight. Increasingly, the various levels of the governments have legitimate international interests and these have to be accommodated rather than denied. This is hardly likely to be achieved by recourse on the part of the central governments to constitutional claims regarding their exclusive right to deal with international issues. The management of foreign policy demands cooperation between the levels of the government. Though the conflicts of interest may occur, structures and practices will emerge to achieve co-operation.

K.C Wheare, the rated constitutionalist, once observed that a 'spirited foreign policy' and federalism sit together uneasily. The entire relationship between federalism and foreign policy is so fluid, varied and complicated to deal with the matter adequately. Accordingly, the 'real' regime for the management of external relations is all too often located outside the constitution concerned. According to Suhas Palahikar, a Pune based political scientist "Federalism in India has reached a stage where a foreign policy can no longer be formulated in the abstract and by New Delhi alone, it had to take into account the concerns and interests of the States." [15] Undoubtedly, the time has come to take stock of the prevailing situation. It is, therefore, important to look at the Constitution with an approach of pragmatic evolution rather than treat it as a sanctified static document. Federalism too will need to expand beyond its rigid boundaries lest the prevailing tensions between the Centre and States exacerbate to a point beyond constitutional sanction. The ruling establishment of whatever ideology, background or hue, would have to learn the art of steering the ship of the nation with adequate flexibility, striking constructive compromises in the spirit of give and take. It would have to learn to stoop to conquer and whichever party learns the art of managing the rising federal aspirations would in the long run emerge as a force to reckon with. It is here that the model of "cooperative federalism" that has been discussed and debated could be one of the guiding principles in the evolution of redistribution of powers and responsibilities between the Union and the States.

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VIOLENCE AGAINST WOMEN: SOME PROTECTIVE MEASURES

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Introduction

The position of a woman in our religion is very high. Our Sastras lay stress on Mathru Devo Bhava, Pithru Devo Bhava, Acharaya Devo Bhava and Atithi Devo Bhava. Among all the four mentioned above, mother is given first priority.[1]

Family is usually viewed as a place where love and affection abound, but there is a darker side attached to it. It has also been described as a cradle of violence and marriage license as a hitting license in recognition of the extent of domestic violence. Violence between family members is as common as love. It has been hidden, ignored or condoned, because it occurs between close relations in the privacy of their homes. Family is widely considered a fundamental building block of society and an enduring source of personal fulfillment. It has been characterized as an island of affection in a sea of impersonal relations a "heaven in a heartless world."[2] In other words, family which was perceived as an arena of love, affection, gentleness and centre of solidarity and warmth has now become a centre of exploitation, assault and violence etc. The home and family are idealized as a peaceful refuge from the hard world outside. The social institution of family is expected to satisfy basic, physiological, psychological and social needs of its family members.

The problem of violence, especially, violence against women is not a new one and evidence of such violations can be found throughout in the historical records of any culture. Woman has been victim of rape, husband beating, murder, dowry violence etc. in the past too. Women always suffer in silence, suffer from physical and psychological abuse filled with terror and pain. Most of them are victims in their own homes by men whom they love. Domestic violence in all its forms has increasingly over the last two decades been recognised nationally and internationally as a serious problem.

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However awareness about the extent and nature of these issues came to the forefront during 1970's in USA as a result of the National Family Violence Survey. In India, it was during the early 1980's, in the wake of dowry and related problems that violence against women came to be recognized as an important social problem. The recognition of domestic violence as a serious human right violation of women is a recent phenomenon. It has reached epidemic proportions and is admittedly now a major issue, being recognized in International Jurisprudence as a violation of the Human Rights of Women, yet it is the most debased and ignored human rights issue.[3]

The ratification of the United Nations declaration on the Elimination of Violence against women in 1993 and the Platform for Action on the Fourth World Conference on Women in Beijing in 1995; the international attention around this issue has increased. The pervasiveness and magnitude of domestic violence in nineties is reflected in the Declaration on the Elimination of Violence against Women adopted by the General Assembly of the United Nation at its 83rd Plenary Meeting held on 20th December, 1993.[4] In 1993, the UN General Assembly Declaration on the Elimination of Violence against women defined violence against women as:

> "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[5]

Domestic violence includes all types of violence against women. It includes abuse of all kinds: physical, psychological, sexual, economic, emotional and verbal. Domestic violence also known as domestic abuse, spousal abuse, battering, family violence, dating abuse, and intimate partner violence (IPV), is a pattern of behavior which involves the abuse by one partner against another in an intimate relationship such as marriage, cohabitation, dating or within the family. Domestic violence can take many forms, including physical aggression or assault (hitting, kicking, biting, shoving, restraining, slapping, throwing objects, battery), or threats thereof; sexual abuse; controlling or domineering; intimidation; stalking; passive/covert abuse (e.g., neglect); and economic deprivation. Domestic violence and abuse is not limited to obvious physical violence. Domestic violence can also mean endangerment, criminal coercion, kidnapping, unlawful imprisonment, trespassing, harassment, and stalking.[6]

Section 3 of the Protection of Women from Domestic Violence Act, 2005 (Act no. 43 of 205) defines domestic violence that any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

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

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

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

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

Explanation I- For the purposes of this section:

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation II.- For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes" domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

The folowings are some of the important forms of violence which violate the human rights of women:

1. Domestic Violence
2. Physical Violence
3. Sexual Violence
4. Dowry Violence
5. Violence against Women-Domestic workers.
6. Female foeticide and infanticide
7. Torture and Harassment
8. Wrongful Restraint and Confinement
9. Violence against Widows

It is generally denying the women her right as an individual. It is also manifested in the form of trafficking in women, child prostitution, female foeticide and infanticide. These acts against women are committed over and above the discriminating and inequality they suffer in every walk of life. In UN Report 1980, it is reported that, 'women constituted half of the worlds' population perform nearly two thirds of its work hours, receive one tenth of the worlds income and less than one hundred of the world's property.[7] Major causes of domestic violence are:

1. Illiteracy
2. Lack of awareness about their rights
3. Patriarchal structure of society and social conditioning.

4. Intoxication
5. Economic dependence
6. Poverty
7. Hostility towards women
8. Moral and Psychological Environment
9. Role of Mass-Media.
10. Marital Mal-adjustment

A study conducted by International Council for Research on Women reveals that about 45% of the Indian women experience violence in some form. Around the world at least one woman in every three has been beaten, coerced into sex, or otherwise abused in her lifetime and whooping about 74.8% of women cited domestic violence as the compelling factor for committing suicide. It is also found that 213 or more married women have suffered domestic violence in the developing countries.[8] Every year, violence in the home and the community devastates the lives of millions of women. Gender-based violence kills and disables as many women between the ages of 15 and 44 as cancer, and its toll on women's health surpasses that of traffic accidents and malaria combined. Violence against women is rooted in a global culture of discrimination which denies women equal rights with men and which legitimizes the appropriation of women's bodies for individual gratification or political ends.[9]

Gender equality is a constitutional mandate, but in practice, a woman is faced with a different treatment everyday. All the laws proposed for getting rid of gender offences such as sexual harassment, rape, dowry, bigamy and domestic violence are collecting dust on the shelves of the parliament or are shockingly inadequate to deal with the present situation. Gender equality has always eluded the constitutional provisions for equality before the law or equal protection of law. This is because equality is always assumed between equals and the law, practically does not treat women as equal to men. Women in India do not usually own property. They stay in the shared household; if unmarried, in the joint family household, and if married in her matrimonial home. This matrimonial home may be owned by her-in-laws, or even be jointly owned by the spouses or rented. What makes it matrimonial home is the fact of residence of the spouses in a relationship and not the ownership of the home. In the case of daughter, they have little or no right in the parental home. They are seen as parayadhan (outsider's wealth) and a burden on the family finances. Still she does not enjoy a respectable position in the family.[10]

Violence against women has become an acceptable norm of life. Statistics reveal that 45% of Indian women all slapped, kicked or beaten

by their husbands. About 75% women who reported violence have attempted to commit suicide; 77% men felt their masculinity threatened if their wives did not listen to them; 55% women perceive violence as normal part of their marriages.[11] Based on a sample size of 10000 women, these figures are from a study conducted by the International Center for Research on Women (ICRW) in collaboration with the International Clinical Epidemiologists Network in seven cities of India in the year 2000.

A study of International Center for Research on Women (ICRW), 2002 conducted on men, masculinity and domestic violence in four Indian States reveals that men are not naturally violent. Men have, always, been taught to perceive themselves as the superior sex. It is this conditioning that makes them believe that they have to control their wives. The other main justification for violence against women is disobedience. Obviously, there is sanction to beat the wife, if the husband feels his wife is disobedient. The ICRW study also found that disrespect towards the husband was a key factor in linkages between violence and masculinity. According to the study conducted in Rajasthan, Tamil Nadu, Punjab and Delhi 77% of men felt their masculinity was being threatened, if their wives did not listen to them. They said force was justified to assert their superiority.[12]

Position of Women in Traditional Society

The position of women, since long, has been pitiable in all aspects of life and her subjugation by males has been throughout a matter of history. During Vedic Period, women enjoyed equality and freedom in all walks of life before and after marriage; whether it was a case of attaining academic excellence, participation in religion and cultural rites or in socio-economic matters.

During Vedic period, man being physically strong remained busy in battles and wars. Women were not deemed fit to participate in wars because of biological and psychological reasons. This might be the reason that during Smriti period the equal status of women as witnessed in Vedic period deteriorated. Women were compelled to confine hereby within the four walls of the house. Her educational, cultural, social, economic developments were ignored and it led to many evils.

The Shastric Hindu Law manifested disabilities based on sex. An often quoted (Manu, the ancient law–giver) states that a woman is never fit for the independence, because her father protects her in childhood, her husband in youth and her sons in old age. The low status accorded to women in post-vedic period in traditional Indian society reflected in its culture and law.

Present Position of Women in India

The entire world bears various colours of God, but women have been its best and most beautiful colour. But this best and most beautiful colour has not been treated best on this cosmos. What is demanded is not charity, nor grace, nor legal aid to a weak sex. The militant claim is the women's right to be one self, not a doll to please, nor an inmate of a workhouse. She has the human right to be women. The personality of women cannot be worked to suit the masculine ethos nor shaped to confer fake freedom, keeping subordination as an unwritten code of the suppressed tribe. Justice Krishna Iyer has said that "Mine are the tears that froze with the pain, mine is the pain that has no name."[13] This is the real story of Indian women which Justice Krishna Iyer has portrayed beautifully in few words.

By reaching twenty first century women have become more independent and, therefore, not willing to submit to the domination by males. Although, a new phase has entered in the women's position, still, her exploitation continues, whether it is rigid societal norm or it is psychologically by the male dominated society. Still she is beaten, tortured, kidnapped, burnt, murdered and raped. Her position is not better one. Women play many roles during various stages of their life as a daughter, mother and sister etc. They have a unique position in every society. Inspite of her contribution in the life of every human being, she, still, belongs to a class which faces disadvantaged position on account of various social, political, economic and psychological impediments.

Constitutional Provisions for Women Protection

There are various provision in the Constitution related to women. The Constitution of India under Article 14 prohibits class legislation but permits reasonable classification. It is essential that classification must be based on intelligible differentia, and should have a rational nexus with the object sought to be achieved by the act or legislation. Keeping in view such classification and the basic object if the legislation 'women' can be treated as a class and special laws can be made in their favour. Article 15(3) of the Constitution empowers the State to make special provision for protection of women and children. In Anjali Ray v. State of West Bengal[14] the court held that Article 15(3) enables the State to make special provisions favouring women, it cannot be interpreted in a manner so that it denies the right already guaranteed to them under Article 15(1). Under Article 16 discrimination on the basis of sex has been specifically prohibited under the Constitution. Basic reason behind this is to bring women at par with men. In the case of C.B Muthamma v. Union of India[15] Justice Krishna Iyer observed that "we do not mean to universalize or degmatise that men and women are equal in all occupation an all situation and do not exclude

the need to pragmatise where the requirement of particulars employment, the sensitivities of sex or the handicaps of either sex may compel selectivity, but save where the difference in demonstrable, the rule of equality must govern. Article 23 and 24 guarantee the right against exploitation which inter alia prohibits trafficking in human beings. Article 25(2)(b) mandates that social reform and welfare can be provided irrespective of the right of freedom of religion. Article 39(a) directs the state to the right to adequate means of livelihood to both men and women. Article 39(d) directs the state to secure equal pay for equal work for both men and women. Article 39(c) specifically directs the state not to abuse the health and strength of workers men and women. Article 42 directs the state to provide for just and humane condition of work and maternity relief. Article 44 of the constitution directs the state to secure for the citizens a uniform civil code throughout the territory of India. Similarly Article 51-A imposes certain fundamental duties on citizens, inter alia, provides that every citizen is duty bound to renounce practices derogating to the dignity of women. Articles 243-D, 243-T provide for 1/3rd seats for women in the Panchayats and Municipalities respectively.

A look at the Constitutional provisions shows that the Constitution of India is gender sensitive, and has provided for adequate protection to the women. Apart from protective discrimination in their favour. An analysis of the laws made after 1950's shows that the State has made sincere efforts to implement majority of these provisions, even though, their implementation has not been so effective. The biggest failure on the part of the state in this regard appears to be in not introducing a uniform civil code, and in not providing for reservation for women in state and union legislatures. The uniform civil code which was never meant to remain a directive principle for ever, received either little or no attention in spite of the fact that it would lead to gender justice. Narrow considerations and political inclinations have stalled the efforts of the State in this direction, despite the mandate of the majority people from all religions and judicial activism.

Civil Laws for Women Protection

Civil Law remedies allow women to take action against her husband that does not involve sending him to jail. Sometimes, women prefer taking civil action rather than criminal either because of the stigma attached to criminal proceedings or because having the husband jailed will deprive the family of its primary paining members. Also, she can sue her husband for monetary compensation for his abusive conduct in civil law an option that is not available in criminal law.

Prior to the amendment of the Indian Penal Code, Indian women experiencing domestic violence had recourse only to civil law remedies of injunctions of restraining orders available to any persons subjected to assault and battery. The remedy has been invoked by approaching any civil court, which has jurisdiction over the place where the acts of violence accrued or are likely to occur.[16] The protections available to women under civil law are:

1. Divorce
2. Cruelty
3. Maintenance
4. Interim Maintenance
5. Restitution of Conjugal Rights
6. Property Rights
7. Guardianship

Criminal Laws for Women Protection

The Criminal Law per se, does not discriminate against women, be it the India Penal Code, the Criminal Procedure Code or the other relevant laws like the Indian Evidence Act. However, with regard to the offences related to women and their prosecution, certain loopholes are found, on a careful analysis, for instance in the case of rape, marital rape has been exempted from punishment under section 375 of IPC. Similarly, the wife of an adulterer cannot be complainant for the offence of adultery as per Sec. 198 (2) of Cr.P.C, even though the husband of an adulteress can be a complainant. Under the Indian Evidence Act, 1872, till recently, the evidence of a rape victim, if she was a women of easy virtue was not reliable and could be impeached under section 155 of the Act. The Indian Penal Code has about 511 sections. Many of these sections define offences that may be relevant to women. They range from grave offences, such as dowry death and suicide to comparatively milder offences, such as assault. Relevant offences are:-

1. Offences posing a danger to life.
2. Causing dowry death (Section 304 B, IPC)
3. Abetment of suicide (Section 306, IPC) offences posing or causing bodily harm short of death.
4. Hurt and Grievous hurt (Section 319-320, IPCS wrongful restraint and wrongful confinement (Section 339 and 348, IPC).
5. Offences with a sexual element.
6. Assault with the intent to outrage modestly (Section 354, IPC)

7. Sexual intercourse with separated woman (Section 376 A, IPC).
8. Offences connected with property.
9. Criminal beach of trust (Section 405, IPC).
10. The offence of cruelty.
11. Cruelty by husband or his relative (Section 498A, IPC).
12. Offences against marriage.
13. Bigamy (Section 494, IPC)
14. Fraudulent marriage ceremony (Section 496, IPC).
15. Deceitfully causing a person to believe that she is lawfully married (Section 493, IPC). Each of these offences can be classified into cognizable / non cognizable, bailable/ non-bailable and compoundable/ non compoundable offences.

Judicial Approach

The Indian Judiciary has played a creative role in providing social justice to women and uplifting the socio-economic and political status of women and to place them at par with their male counterparts in different walks of life. The judiciary has played the role of integrator of values and has proved its ability in maintaining socio-economic and political equilibrium between men and women. Even it is guardian and guarantor of every right of human being, whether living or yet to born. Doctrine of equality and various provisions for their benefit and protection were incorporated in the Constitution and various provisions for their benefit and protection were incorporated in the Constitution and various legislations were enacted accordingly by the Indian Legislature.

There is no law dealing with the offence of sexual harassment of working women and domestic violence and other forms of violence against women. The Supreme Court has used its extraordinary power under Article 142 of the Constitution in Vishaka v. State of Rajasthan[17] to emphasis the need for such a legislation to curb this kind of harassment manifesting itself in unwelcome sexually determined behaviour like physical contact and advances, demand for sexual favours, sexually coloured remarks and showing pornography etc. The Supreme Court laid number of guidelines in this case amounting to judicial legislation, with the fond hope that the Parliament would pass the legislation which is still found wanting.

Another area which requires the attention of the State is to provide law and mechanism to compensate the victim of crime rape. In the landmark judgement of Delhi Domestic Working Women's v. Union of India.[18] The Supreme Court suggested the formulation of a scheme for

awarding compensation to rape victims at the time of convicting a person found guilty of rape.

In Renu v. State of Haryana[19] the Court held that the leveling of false allegations regarding the incapability of wife to conceive a child by the husband in divorce petition amounts to cruelty under section 498-A of the Indian Penal Code.

The Apex Court in Pawan Kumar v. State of Haryana[20] held that taunting the woman for bot bringing dowry and calling her ugly, amounts to mental torture. Further, if there is a quarrel a day before her death, this would constitute wilful act of cruelty both within the meaning of sections 498-A and 304-B of the India Penal Code.

The Punjab & Haryana High Court in Dr. Mangla Dogra v. Anil Kumar Malhotra[21] held that the concent of husband is not required while getting the pregnancy terminated by wife. It is a personal right of a woman to give birth to a child but it is not the right of a husband to compel her wife to give birth to a child for the husband.

But these constitutional and legislative efforts could not produce the desired result as the position of women in the field of education, employment and family relation is, still, unsatisfactory. Non–implementation of these welfare and reformatory legislation in their true spirit was considered the main reason for perpetuating unequal status of women. The Indian judiciary has come forward, and as desired, played a creative and balancing role in providing blood and flesh to the skeleton of these welfare legislations and in improving women's socio–economic and political status in the society. Judicial decisions reveal a high level of judicial statesmanship. However, the problem is deep rooted and cannot be solved until the norms set up by the legislature and the judiciary fully percolates to the society and implementation machinery. There is an urgent need to sensitize the law enforcement agency and judiciary by training programmes like seminars and workshop, so that they can perceive the situation of domestic violence as a serious and threatening social evil which needs immediate attention of the judiciary as well as legislation.

Conclusions and Suggestions

Justice, liberty, equality and dignity are the quadruple elements of free living stipulated in the Indian Constitution. But unfortunately even after sixty five years of Indian Independence, women continue to grope in the dark and all dreams of ensuring liberty, equality and dignity of individuals continue to be mere farce. One such area where Indian government has not succeeded yet to frame a law, to control deep seated menace in the society is the domestic violence against women. No doubt, passing of the

protection from Domestic Violence Act, 2005 is a positive step towards controlling this social evil and providing protection to the victims of domestic violence. But still, a lot needs to be achieved in this area.

At last some observations are made which are given in the form of suggestions, how domestic violence can be prevented, controlled and reduced. These suggestions are:

- Role of Government
- Need for a New Laws
- Representatives in the Parliament
- Free and Compulsory Education
- Economic Self Dependence
- Legal aid
- Special Courts
- Role of Non-Governmental Organizations
- Role of National Commission for Women
- Need for State Level Commissions for Women
- Awareness of Legal Rights
- Change in our mindset
- Role of Mass-Media
- Publicity and Counselling

For the emancipation for women in every field, economic independence is of paraamount importance. Along with economic independence, equal emphasis must also be laid on the total development of women, creating awareness among them about their rights responsibilities, the recognition of their vital role and the work they do at home. It is necessary that a new social system must evolve. The society must respond and change its attitude. In other words, change in the attitude of the society is essential to break through the silence about violence against women. These changes includes change in the parent's attitude, change in the attitude of judiciary, police, other government authorities and non-governmental organizations dealing with the women issues, is very essential in controlling violence against women. Thus, awakening of the collective consciousness is the need of the day.

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SOCIAL JUSTICE IN LAND ACQUISITION : A PERSPECTIVE ON THE NEW BILL

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Introduction:

The individual right of property is not simply an economic right. Individual property rights are also about self-expression, self-governance, belonging, and civic participation. A proper theory of constitutional protection of property should therefore be concerned about possible abuse of government power when cities condemn land, especially residential land, to enable projects whose benefits rebound substantially to private entities. Monetary compensation, even when it satisfies the constitutional requirement of being "just," is not always enough to make the dispossessed landowner whole.[1] For an inclusive growth strategy, to be able to connect all Indians and provide them both physical and human infrastructure, land is needed. Land is a precious natural resource and is main source of livelihood of the millions in India. 58 percent of the labour in the country is still engaged in agriculture and allied occupations. Besides, as per 'Economic Survey of India 2011' over 1.8 crore rural families in India are landless.[2] Not only in India, according to UN-Habitat[3] five million people worldwide suffer forced evictions every year. In a recent study, conducted by global experts in international conference on land and forest rights, it has been said that, India has joined the ranks of China, South Korea and Saudi Arabia in snatching stretches of prime livelihood resources to grow crops and extract commodities for domestic and global markets. The researchers have also blamed the Indian government agencies and investors for the growing spate of violent clashes in the forest and tribal areas and further revealed that the nation can expect rising civil unrest in response to major projects planned for the next 15 years.[4]

Most of legislation has been enacted by the Parliament to provide social justice to its citizens and one of the oldest amongst these is Land Acquisition Act, 1894[5] (herein after referred as 'The 1894 Act'). The main reason, which led to its enactment, was the acquisition of land needed for 'public purpose', for companies and for determining the compensation to

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be made on account of such acquisition.[6] Over the course of the past few years, the issue of land acquisition commonly referred to as "land grabbing" has become one of the top discussion agenda in media as well as in academic discourse. Land Acquisition has been depicted as the cause in every third (in proportion) legal conflicts in India in the past decade. The reason for this is obvious: Land is being transferred at an exceptional rate, in ways that not only permanently alter millions of people's livelihood and economic opportunities, but also the plight of landowners is in most of the cases been ignored. It is imperative to examine the principle of social justice in the context of land acquisition laws, also referred as *'eminent domain'* doctrine, so as to determine whether current *'eminent domain'* law upholds or undermines our country's commitment to social justice.

The Preamble of the Constitution of India along with Articles 38 and 39 recognizes India as a socialist republic, with aim to provide social justice to its citizens. 'Social justice' may be generally understood as fair and compassionate distribution of the fruits of economic growth. The notion of social justice is relatively new. No one of history's great philosophers, like Plato[7], Aristotle[8], Confucius[9], Averroes[10], Rousseau[11] or Kant[12] etc., saw the need to consider justice or the redress of injustices from a social perspective. The concept of social justice was first surfaced in Western thought in the wake of the industrial revolution and the parallel development of the socialist doctrine. It emerged as an expression of protest against what was perceived as the capitalist exploitation of labour and as a focal point for the development of measures to improve the human condition.[13] . This attitude led to excessive reliance on public ownership and public intervention in the economy.

However, in John Rawls's view, justice cannot be achieved through a system that allows, at least in theory, that "the greater gains of some... may offset the losses of others less fortunate."[14] In that way, Rawls advanced a view of social justice that would not allow individuals or institutions to impose upon the vulnerable in society the lower prospects of displacement from home and community for the sake of promoting the profit of others.[15] The concept of social justice, which the Constitution indoctrinated, consists of diverse principles essential for the orderly growth and development of personality of every citizen.

Doctrine of "Eminent Domain"- Acquisition for Private Corporations and Public-Private Partnerships:

The power of compulsory acquisition is described by the term "*eminent domain*" means the supreme control over the property of the subjects is enjoyed by the sovereign. This term seems to have been originated in 1625

by Hugo Grotius [16] that is quoted in his work "*De Jure Belli et Pacis*" as follows:

> The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property.

The intention of lawmakers at the time of enactment of 'the 1894 Act' was to limit the exercise of the doctrine of *'eminent domain'* in acquiring land for 'public purpose' only.[17] The Central Government and State Governments acquire land across the country for setting up infrastructure projects like airports, roads, for setting up universities/scientific institutions, projects of basic amenities, water/ sanitation works/hospitals, industry and urban development in the name of '*public purpose'* also known as *'eminent domain'*.

The 1894 Act has been amended from time to time (in pre-independence and post-independence India).[18] The amendments made in 1984 extinguished any differentiation between 'acquisition for a State purpose' and 'acquisition for a private enterprise' or 'State enterprise' by amending section 4 of the original Act to insert the words 'or for a Company' after 'any public purpose'.[19] The Courts have interpreted this amendment to mean that any notification of acquisition issued under section 4 need not specify whether the acquisition is for a 'public purpose' or for 'a company'. This opened the floodgates to acquisition of land by the State for companies. And, this in turn, has unleashed the tribal and rural backlash that has caused the current decision of the Government to replace 'the 1894 Act' with an altogether new Act. In our country, acquiring of land has got some additional definitions, i.e., it involves the hands of political bigwigs, and hence, there is lot of black money involved, thereby accelerating our nation in the corruption race.[20]

Over the years, definition of "public purpose" has been loosely interpreted. The Supreme Court of India is on record, saying: "The concept of public purpose has to be held to be wider than 'public necessity'".[21] The Supreme Court has constantly in many cases held that 'whether acquisition be for public purpose or not is entirely for the State to decide and that the courts are not competent to go into the issue of whether a particular purpose is a public purpose or not unless colorable exercise of power is proved'.[22]

With the increasing pace of liberalization and privatization in India, the Indian government is finding it increasingly difficult to maintain the delicate balance between stimulating growth and extending the benefits of development to multiple stakeholders. Such acquisition has promoted private corporate interests, the State, in turn, becoming an estate agent of the companies. Civil Society groups see the 1894 Act as too industry-friendly. Weak implementation and ineffective administration at the ground level has increased the suffering and anguish of the people. Despite many amendments, over the years, in the 1894 Act there has been an absence of a cohesive national law to addresses the following issues:[23]

- Fair compensation when private land is acquired for public use.[24].
- Fair rehabilitation of landowners and those directly affected from loss of livelihoods.
- Profiteering by private interests taking advantage of government acquisition (e.g. NOIDA, Bhatta Parsaul).
- Affected people have no recourse for enforcing their rights, which are often ignored both during land takeover (e.g. POSCO) and during rehabilitation.
- A decision-making process is totally controlled by government officials, with no democratic or public involvement.

In 2007, two Bills were introduced in the Lok Sabha, one to amend the 1894 Act, and the other to provide statutory status to the R&R policy of 2007. These Bills lapsed with the dissolution of the 14th Lok Sabha in 2009. In May 2011, the National Advisory Council (NAC), headed by Congress Party President Sonia Gandhi, recommended combining the provisions of land acquisition and R&R within a single Bill.

In July 2011, the Draft on Land Acquisition, Rehabilitation and Resettlement Bill[25] was published by the Ministry of Rural Development for public comments. The Bill was subsequently introduced in the Parliament in September 2011 and was referred to a Parliamentary Standing Committee[26], which submitted recommendations in May 2012.

The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 has been rechristened as *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill, 2012*. The ministry of Rural Development, which is piloting the Bill, rejected the Parliamentary Standing Committee's recommendation that the government should not be involved in acquiring land for private companies or public-private partnership projects, even in cases where 'public purpose' is involved. According to the Government, changes are aimed at boosting industrial growth, which had suffered considerably because of the enormity

of challenges associated with acquiring land. Due to differences within the Government, Prime Minister Manmohan Singh constituted a Group of Ministers (GoM) in September 2012 to formulate a consolidated draft of the Bill. The GoM, headed by Agriculture Minister Sharad Pawar, approved the draft in the month of November 2012. On December 13, 2012, the Cabinet gave official nod. However, bill now have been deferred to the Budget session of Parliament 2013, as Opposition members in Lok Sabha complained that the important and contentious legislation was being rushed through as more time was needed to discuss the provisions of such an important Bill having a far reaching impact on farmers and industries.[27]

The Cabinet cleared the Bill by making approximately 154 amendments to the Bill, 2012 and following are the highlights of the proposed amended bill:

- In the final draft of the Bill, it is now mandatory to seek the consent of 80% of affected landowners in case private companies acquire land and relaxed the consent requirement for a public-private partnership (PPP) project to 70%. But no consent will be needed if the government for infrastructure projects fully owned and executed by it acquires land.[28]
- The new rules will be applied with retrospective effect and will be applicable to all ongoing land acquisition proceedings where "no award" has been made under the existing 1894 Act.
- It also provides for compensation to land losers and says rehabilitation colonies must have facilities like schools and hospitals.
- According to the bill, all affected families are entitled to a house provided they have been residing in an area for 5 years or more and have been displaced. If they choose not to accept the house, they will be offered a one-time financial grant in lieu of the same.
- Another clause stipulates that if the land acquired remains unutilized for five years, the acquisition will lapse.
- There would be flexibility in the validity period for the Social Impact Assessment (SIA), based on the assessment of the State Chief Secretary's Committee which has to be constituted to review SIAs for acquisition above 200 crores.
- There is no mandatory fixed ceiling for land acquisition of multi-crop land, leaving the decision to the State Governments. The State governments will have to fix a threshold of land acquisitions, beyond which they can impose rehabilitation and resettlement requirements even on private land purchases.

- The proposed provisions will allow possession of acquired land even before the completion of rehabilitation and resettlement of the affected families, but only after having provided monetary compensation. However, in case of irrigation projects, the rehabilitation and resettlement provisions must be fulfilled at least six months before the submergence takes place.
- The definition of 'public purpose' has been made clear as, 'acquiring land for strategic purposes, infrastructure and industry'. Hotels, hospitals and educational institutions belonging to private sector will no longer be eligible for land acquisition by government. These bodies have been removed from the definition of 'infrastructure' that falls under 'public purpose'.[29]
- Definition of 'affected family' includes agricultural labourers, tenants including any form of tenancy or holding of 'usufruct' right, share-croppers or artisans who may be working in the affected areas for three years prior to the acquisition, whose primary source of livelihood stand affected by the acquisition of land.
- The bill has the choice of annuity or employment : all affected families will be given a choice of annuity or employment. If employment is not forthcoming, they will be entitled to a one-time grant of Rs five lakh per family. Alternatively, they will be provided with an annuity payment of Rs 2000 per month per family for 20 years. There is also a provision, which says that this will be adjusted for inflation. According to the bill, all affected families, which are displaced from the land acquired, shall be given a monthly subsistence allowance equivalent to Rs 3000 per month for a period of one year from the date of award. The bill also says that all affected families will also be given training and skill development while being offered employment.

The Bill is apparently meant to address the larger political problem of increasing people's opposition to displacement. On 2 January, 2006 there was a protest campaign against land acquisition for Tata Steel in Kalinganagar, Orissa State, where 13 people were reportedly shot and killed by police. Then, in 2007, there was a campaign against land acquisition for building a Special Economic Zones for Indonesian Salim Group in Nandigram of West Bengal State where over 4,000 heavily armed police were deployed and 14 protestors were reportedly shot dead. In 2008, the Singur Tata Nano controversy at Singur in West Bengal, and protests in 2009 at Chandigarh are few to be mentioned. On May 2011, the state government confronted farmers over land acquisition for constructing

highways in Noida (Bhatta Parsaul Village) and four farmers were reported killed. In the month of March, 2012 the fishworker community protested over the decision of Tamil Nadu government to forcefully go ahead with the Kudankulam Nuclear Power Plant. All these incidents make it evident that there has been a widespread condemnation of the government's repression and intimidation tactics, everywhere in India.[30]

Role of Judiciary

The judiciary in the last few decades has delivered tough judgments towards land acquisitions made by governments based on the emergency clause that, forcible and unilateral land acquisition under the clause may no longer be accepted by society, which is sometimes against the social justice principle.

It is argued that any compulsory acquisition-based process is innately prone to litigation, even if accompanied by probably generous schemes such as land-for-land and the rehabilitation and resettlement packages. In the period of globalization, such acquisition has promoted private corporate interests, the state in turn, becoming an estate agent of the companies. Giving a land- mark judgment on the arbitrary action of the State government, in *K.T. Plantation Pvt. Ltd. and Anr.* v *State of Karnataka*[31], the Supreme Court dealt with the constitutional validity of the Land Acquisition Act and the claim for enhanced compensation. The Hon'ble Court held that 'public purpose' is a pre-condition for deprivation of person from his property under Article 300A. Right to claim compensation is also inbuilt in that Article and when a person is deprived of his property, State has to justify both the grounds, which may depend on scheme of the statute and legislative policy.

The Supreme Court has even backed the ongoing and proposed government projects to set up SEZs or industrial and IT parks on land acquired from farmers if such projects bring in foreign exchange, generate employment opportunities, and "secure economic benefits to the State and the public at large."[32] In the case of *Sooraram Pratap Reddy,* the court held that the joint venture (JV) mechanism for implementing government policy, executing a project and achieving larger public good 'would neither destroy the object nor vitiate the exercise of power of public purpose for development of infrastru[33]cture.'[34]

Earlier, in another very important case of *Bondu Ramaswamy*[35], the Supreme Court pointed out that in case of acquisition for setting up industries or special economic zones, the government should "play not only role of a land acquirer but also the role of a protector of the land-losers." As most agriculturists who lose their lands do not have the expertise or

the capacity for a negotiated settlement, the State should act as a benevolent trustee and safeguard their interests. The Court observed that in order to ensure a smooth and litigation-free acquisition, beneficial to all concerned, it was necessary to evolve tailor-made schemes to make acquisitions more acceptable to the landowners.

In *Sri Radhy Shyam (Dead) Through L.Rs. and others* v. *State of U.P. and others*[36] the apex court pronounced that the Land Acquisition Act, which was enacted more than 116 years ago for facilitating the acquisition of land and other immovable properties for construction of roads, canals, railways etc., has been frequently used in the post independence era for different public purposes like various public establishments/institutions, planned development of urban areas, providing of houses to different sections of the society and for developing residential colonies/sectors. The court further held that the valuable right of the appellants under Section 5A of the Act[37] cannot be flattened and steamrolled on the '*ipsi dixit*' of the executive authority. "Court should not adopt a pedantic approach, and decide the matter keeping in view the constitutional goals of social and economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A, no person can be deprived of his property except by authority of law," said Justice Singhvi.

In *Gajraj and Others* v *State of U.P. and Others*[38] also popular as *Noida Extension Case*, the hon'ble Court stated that:

> …the land owners come to court when the land was started being transferred to private builders and colonizers, it transpired that the land is not being utilised for the purpose for which it was acquired and instead of industries coming in the area only builders have come up. The authority has given meager some of few hundred rupees per square yard to the land owners, but they have been transferring the land to the builders for hefty amount ranging from Rs. 10,000 to 20,000 per square metre. Since the facts elaborated above indicate that the respondents have played fraud and the acquisition was in colourable exercise of power [39]

In *Darshan Lal Nagpal & Ors.* v. *Govt.of NCT of Delhi & Ors.*[40]**,** the apex court rejected the contentions of the company and the government and enshrined that "compulsory acquisition has generated enormous litigation in the last more than five decades … it must be remembered that compulsory acquisition of property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law." The acquisition of land for residential, commercial, industrial or institutional purposes can be treated

as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of *audi alteram partem* embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.

Similarly, disposing of a case with the Maharashtra Government which agreed to pay compensation for land acquired in 1964, the Supreme Court has observed that denying rehabilitation to people whose land is taken would amount to inciting them to resort to anti-national activities. A Bench comprising of Justices BS Chauhan and JS Khehar stated that, it is not permissible for any welfare state to uproot a person and deprive him of his fundamental/human rights under the garb of industrial development. It also ruled that delay in appeal against an injustice could not come in the way of redress when there was compelling evidence. It further explained, that "when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred."[41]

Recently, in a very important judgment, the Punjab and Haryana High Court has held that the action of a company to set up a school and carve out a residential colony on the land of farmers acquired for industrial purpose amounted to fraud on the power of *"eminent domain"*.[42]

In the earlier case of *Ramji Veerji Patel*, the appellants alleged that the 1894 Act has become outdated as it does not provide for rehabilitation of persons displaced from their land, although their livelihood is affected by compulsory acquisition, a Bench of Hon'ble Supreme Court has called for replacement of the law without delay. Justice R.M. Lodha said all concerned felt that the provisions of the Land Acquisition Act "do not adequately protect the interest of owners/persons interested in the land. For years, the acquired land remains unused. To say the least, the Act has become outdated and needs to be replaced at the earliest with fair, reasonable and rational enactment in tune with the constitutional provisions, particularly, Article 300A."[43]

Conclusion:

In brief, the above study has shown a clear nexus between social justice and Jurisprudence of '*Eminent Domain*'. This interconnection can be clarified by examining the application of social justice, on the individual and institutional levels wherein people are treated fairly in a "just" way,

in a way that does not differentiate on the basis of class, race and ethnicity. In fact, when used responsibly, the power of *eminent domain* can produce economic and social benefits for a community and residents within the community. However, when, a government abuses its power of *eminent domain*, the economic and social costs to the affected individuals and neighborhoods, combined with the moral costs, far outweigh the benefits.

Moreover, whenever there has been mass displacement there was rise of resistance and protest. Rehabilitation was one of the uneasy outcomes. The mass displacement and pitched battles on the ground (such as the Narmada Bachao Andolan) is one of the reasons that the old law had to be eased out. But historically speaking, the government doesn't have a successful record at rehabilitation and resettlement. For instance, in the case of the Bhakra Dam in Bilaspur district of Himachal Pradesh, people displaced in the 1950s haven't been rehabilitated properly; or that of the Sardar Sarovar Dam in Gujarat, where the state found 33 villages had been displaced, but only six rehabilitated.[44] The reform efforts till now have essentially ignored the plight of displaced low-income residents who are left without affordable housing in a neighborhood of their choosing and devoid of their agricultural lands and employment. Names like Singur, Nandigram, Kalinganagar, Jaitapur and Bhatta Parsaul have entered our lexicon as poignant metaphors of social conflict.

It is rightly being stated that allowing land acquisition for the private and PPP projects is nothing but a *loot* of natural resources and would deprive the nature resource-based communities of their livelihood . The Government perhaps, has failed to learn lessons from the past failures related to resettlement and rehabilitation of displaced of Bhakra dam and Sardar Sarovar project that led to withdrawal of World Bank.[45]

Further, the latest Bill's provisions rely overtly on cash. For example, the section on rehabilitation and resettlement talks about finding a job or vocational training to the persons whose land is being acquired, and 'if employment is not forthcoming', they are entitled to a one-time grant of Rs. 5 lakh as compensation. This means, if someone is earning Rs.20,000 a month, that's how much he makes in 25 months. Another principal defect in compensation calculation is that, it attaches an arbitrary mark-up to the historical market price to determine compensation amounts. This will guarantee neither social justice nor the efficient use of resources. Whenever land acquisition takes place in the hilly areas, large tracts of land are taken away from the herdsmen where their animals have been grazing for ages. Consequently, these herdsmen lose their livelihood, but they are never compensated. A case in point is that of Assam, where 168 dams are to be built. It is well known that due to dams fishermen of downstream areas

lose their livelihood due to non-availability of catch there. No policy till date has talked about the rights of downstream population Even, the Bill's application to Special Economic Zones that account for a big chunk of acquisitions, have also triggered opposition, that these special zones have become heavan for real estate agents. The present Bill will only further the land conflict because it legitimises land acquisition of most kinds even for private profit, and is only trying to play with language of transparency and fair compensation.[46]

To conclude, the current land acquisition Bill needs intensive discussion before being adopted officially. It must ensure that land acquisition becomes fair, equitable and transparent, so to go a long way in imparting social justice to the affected landowners. Otherwise, the present Bill does not guarantee social justice in the true spirit and is against the 'socialist' fabric of our country.

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2. http://indiabudget.nic.in/survey.asp (visited on 15 October, 2012).
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8 Aristotle (384–322 B.C.E.) numbers among the greatest philosophers of all time was a Greek philosopher, gave a basic account of property ownership that is similar to modern concepts of property rights. http://www.oxfordscholarship.com/view. (visited on December 12, 2012).

9. Confucius (551–479 B.C.E) was a Chinese teacher and philosopher of the '*Spring and Autumn Period*' of Chinese history. The philosophy of Confucius emphasized personal and governmental morality, correctness of social relationships, justice and sincerity. http://www.angelfire.com/md2/timewarp/rousseau.html; http://en.wikipedia.org/wiki/Confucius. (visited on December 13, 2012).
10. He is commonly known as Ibn Rushd or by his Latinized name Averroes (April 14, 1126- December 10, 1198). He has been described as the "founding father of secular thought" in Western Europe and also highly regarded legal scholar of Maliki School. *Ibid.*

11. Jean-Jacques Rousseau (28 June 1712 – 2 July 1778) was a Genevian philosopher. Rousseau's most important work is *The Social Contrac*t, which outlines the basis for a legitimate political order within a framework of classical republicanism. Social contract is necessary in order to protect civil liberty and in order to protect basic rights such as the legal right to property. http://www.angelfire.com/md2/timewarp/rousseau.html. (visited on December 15, 2012)

12. Immanuel Kant (22 April 1724 – 12 February 1804) was a German philosopher from Russia. Kant's major work, The Critique of Pure Reason (1781). According to him, each person must acknowledge an obligation to refrain fromusing objects that belong to another and individuals enforce such a law obligating everyone to respect others' property. The state itself obligates all citizens to respect the property of other citizens. http://plato.stanford.edu/entries/kant-social-political/#ProConRig. (visited on November 10, 2012)

13. A report by the International Forum for Social Development titled as "Social Justice in an Open World : The Role of the United Nations" United Nations Publication, New York. http://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf, (visited on November 1, 2012).

14. John Rawls, Justice As Fairness (1958), reprinted in John Rawls: Collected Papers, at 168 (Samuel Freeman ed., 1999). John Bordley Rawls (February 21, 1921–November 24, 2002) was an American philosopher. http://trace.tennessee.edu/cgi/viewcontent.cgi (visited on November 11, 2012).

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16. Hugo Grotius (1583-1645) was a jurist in the Dutch Republic. His first occasion to write systematically on issues of international justice came in 1604. His book, De jure belli ac pacis libri tres (On the Law of War and Peace) advances a system of principles of natural law, which are held to be binding on all people and nations regardless of local custom.

17. Section 3(f) as it originally stood in Land Acquisition Act, 1894, read as under :

    "(f) the expression 'public purpose" re-defined under Sec. 3 clause 9f) Land Acquisition (Amendment) Act, 1984, includes-

    (i) the provision of village-sites, or the extension, planned development or improvement of existing village-sites;

    (ii) the provision of land for town or rural planning;

    (iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

    (iv) the provision of land for a corporation owned or controlled by the State;

    (v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

    (vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or with the

prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by Government or with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies but does not include acquisition of land for companies;

18. So far, the 1894 Act has been amended 17 times.

19. Supra note 18.

20. The latest report of Transparency International (TI) on November 2012, has ranked India 94th in the corrupt practices ranking among the 176 nations. http:/ /dailypioneer.com/nation (visited on November 15, 2012).

21. Nand Kishore Gupta & Ors v State of U.P. & Ors. 2010(10) SCC 282 The Court comprised of Justice V.S. Sirpurkar. In this case acquisitions made for the Yamuna Express-way were challenged. The two most important grounds were that apart from acquiring lands for the expressway itself, there were other lands being acquired for amusement parks, etc, which could not be held to be acquired for a public purpose. The second ground was that the land was being acquired and handed over to a private developer and if it is actually a colourable exercise of powers. The court held that public purpose does not mean either public necessity or public use. Even if the acquired land is put to the use of a fraction of the public it is still public purpose and that too independent of which strata of society will use it.

22. Gulam Mustafa v State of Maharashtra, 1976 (1) SCC 800. The Bench comprised of: Justices V.R Krishnaiyer, & Fasalali Syed Murtaza. The Supreme Court observed, once the original acquisition is valid and title has vested in the municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition.

23. The Draft Land Acquisition and Rehabilitation and Resettlement Bill (LARR), 2011- An Overview. Ministry of Rural Development, Government of India, http:/ /rural.nic.in/ (visited on 5 November 2012).

24. ***Section 23 (1)*** of the 1894 Act -**Matters to be considered on determining compensation.** - (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration-

first, the market-value of the land at the date of the publication of the [notification under section 4, sub-section (1)];

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of serving such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change, and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

25. Salient features of the LARR Bill, 2011 are as under: -

(1) New integrated legislation dealing with land acquisition and rehabilitation & resettlement while repealing the Land Acquisition Act, 1894.

(2) Exemption to 16 Central Acts specified in Fourth Schedule from the ambit of the Bill.

(3) Defining the term - "affected family", which includes both the land losers and livelihood losers.

(4) Provision of R & R benefits in case of specified private purchase of land equal to or more than 100 acres in rural areas and equal to or more than 50 acre in urban areas.

(5) Provides Social Impact Assessment (SIA) study in all cases where the Government intends to acquire land for a public purpose.

(6) Provides for formation of a Committee under the Chief Secretary for examining proposals of land acquisition where land sought to be acquired is equal to or more than 100 acres.

(7) Putting limitations on acquisition of multi-crop land for safeguarding the food security.

(8) Institutional mechanism for R&R in the form of institutions of Administrator for Rehabilitation and Resettlement, Commissioner for Rehabilitation and Resettlement, Rehabilitation and Resettlement Committee at project level, the Land Acquisition, Rehabilitation & Resettlement Authority at State level and National Monitoring Committee at Central level.

(9) Provisions of consent of the 80 per-cent affected families for land acquisition for certain projects.

(10) Provision for enhanced compensation to the land owners and rehabilitation and resettlement entitlements.

(11) Provision of 25 per-cent on shares as part of compensation in cases where the Requiring Body offers its shares to the owners of land whose land has been acquired.

(12) Restricting the 'urgency clause' for land acquisition for Defence of India or National Security or for any other emergency out of natural calamities.

(13) Specified timelines for payment of compensation and provision of rehabilitation and resettlement entitlements.

26. Standing Committee on Rural Development (2011-2012), 31st Report on 'The Land Acquisition, Rehabilitation and Resettlement Bill, 2011' Lok Sabha Secretariat,

New Delhi. Shrimati Sumitra Mahajan, Chairperson of Standing Committee presented the report on 17.05.2012 before Lok Sabha.

27. "Land Bill Deferred" The Tribune December 19, 2012.
28. "The Land Bill Gets Cabinet Nod" *The Tribune*, Date December 14, 2012.
29. "Govt. won't get land for Pvt. Hotels, Hospitals, Cabinet Nod" The Times of India, December 15, 2012.
30. Hajime Sato, "Land Acquisition Issues in Noida District: Background to Land Wars in India" Ide-Jetro, August 2011, <http://www.ide.go.jp. For more detailed analysis, see, articles in Frontline 28 (12) (2011 June) and India Infrastructure Report 2009: Land - A Critical Resource for Infrastructure in 3iNetwork (2009).
31. AIR 2002 Kant 365, The Bench comprised of former Chief Justice S.H. Kapadia, Mukundakam Sharma, K.S. Radhakrishnan, Swatanter Kumar and Anil R. DaveJJ. The constitutional validity of the Amending Act has been questioned inter alia on the ground that the amount of compensation provided under Sections 7 and 8 of the Acquisition Act is not adequate since it is nowhere near the market value of the property sought to be acquired. The Court heldthat the said Act is protected by Article 31A of the Constitution after having obtained the assent of the President and hence immune from challenge under Article 14 or 19 of the Constitution.
32. Rakesh Bhatnagar "Apex Court bats for SEZs, IT parks" DNA Moneys (Daily News and Analysis), www.3dsyndication.com/ (visited on 10 February, 2012).
33. Sooraram Pratap Reddy & Ors. v Distt. Collector, Ranga Reddy Civil Appeal No. 5509 of 2008, para 17 http://www.indiankanoon.org/doc (visited on December 18,2012). In this case Government of Andhra Pradesh sought to acquire land for the purported development of 'Financial District and Allied Projects'. According to the appellants, the action has been taken in colourable exercise of power and in total violation of the Land Acqusition Act.
34. Bondu Ramaswamy v. Bangalore Development Authority and Others (2010)7 SCC 129, para 75 and 87. Bench comprised of: Justice K.G. Balakrishnan, R.V. Raveendran, D.K. Jain JJ. The appeal is related to acquisition of lands for formation of Arkavathi layout on the outskirts of Bangalore by the Bangalore Development Authority and later arbitrary withdrew or deleted huge chunks of land. The court held that the development by the development authority will resemble haphazard developments by unscrupulous private developers rather than being a planned and orderly development expected from a Development Authority unless power is exercised with fairly and reasonably.
35. SC Civil Appeal No.3261 of 2011; MANU/SC/0429/2011; Decided on 7 March, 2011, para 17, The Bench comprised of: Justices G.S. Singhvi, & Asok Kumar Ganguly. In this appeal appellants questioned the acquisition of their land for planned industrial development of District Gautam Budh Nagar through Greater NOIDA Industrial Development Authority on the grounds of being contrary to proposed master plan of NOIDA whereunder it was marked as residential and, hence, its acquisition for industrial purpose was arbitraryand illegal.

    The court held that there was no real and substantive urgency, which could justify invoking of the urgency provision under Section 17(1), to exclude the application of Section 5-A. The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lot of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns.(para 55).

37. Gajraj and Others v State of U.P. and Others, Writ No - 37443 of 2011; MANU/UP/2122/2011. Allahabad High Court, (Bench Comprised of Justice Ashok Bhushan, Justice S.U. Khan, Justice V.K. Shukla), case decided on 21.10.2011. The Hon'ble Allahabad High Court in this case set aside acquisition of land in three villages of Noida, Greater Noida and Noida Extension areas while ordering enhanced compensation to farmers of some other villages in Gautam Budh Nagar district.

39. Ibid.

40. Civil Appeal No. 11169 of 2011, Judgment delivered on 3 January, 2012, The Bench comprised of: Justice G.S. Singhvi, Justice Sudhansu Jyoti Mukhopadhaya. The questions which arose for consideration in this appeal was, whether the Government of NCT of Delhi could have invoked Section 17(1) and (4) of the Land Acquisition Act, 1894 and dispensed with the rule of hearing embodied in Section 5A(2). The validity of the Amending Act has been questioned inter alia on the ground that the amount of compensation provided under Sections 7 and 8 of the Acquisition Act was inadequate.

41. "Rehab denial amounts to inciting violence, rules SC" The Tribune 7 November 2012, http://www.tribuneindia.com/2012/20121108/edit.htm#3 (visited on 8 November 2012). The SC gave out the ruling while disposing of a case filed by illiterate farmers from Maharashtra who had been dispossessed of their land without acquiring it in a proper way and without paying any compensation. The land was promptly handed over to the Maharashtra Industrial Development Corporation (MIDC) in 1964. Since the farmers were not aware of their rights, the authorities persuaded them to hand over possession of their land.

42. Saurabh Malik "HC slams firm for change of land use" The Tribune, December 18, 2012. The Division Bench of high court comprisingof: Justices Jasbir Singh and Rakesh Kumar Jain said that land shall be used for industrial purpose only otherwise it shall be ordered to be restored to the original owners who would return the amount of compensation along with 15% per annum interest from the date of receipt of compensation by them. The land has been acquired from poor farmers in the name of expansion of paper-making plant but was sold to Parsvnath Developers by Vinod Paper Mills Ltd and further to Tara Health Food Ltd.

43. Ramji Veerji Patel & Ors. v Revenue Divisional Officer & Ors JT2011(13)SC23; 2011(2)SCALE 364 The requisition was made by Cholan Roadways Corporation Limited, Kumbakonam for making available land for expansion of their depot, particularly for a workshop, at Chidambaram, the State Government of Tamil Nadu issued a notification under Section 4(1) of the Land Acquisition Act, 1894. Objections to the acquisition were raised but appeal was dismissed.

44. Ibid.

45. http://www.firstpost.com/economy/india-inc-divided-over-modified-land-bill-activists-slam-gom-494743.html (visited on December 10, 2012).

46. http://www.moneycontrol.com/news/cnbc-tv18-comments (visited on December 2, 2012).

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THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: A CRITIQUE

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1. Introduction

Violence against women is a social phenomenon that crosses cultural, religious, racial and geographical boundaries. It is said to be as old as human civilisation. It manifests itself in various forms including domestic violence, bride-burning, sex-selective abortions, female infanticide, female circumcision, child marriages, eve-teasing and rape. The Report of National Crimes Record Bureau (NCRB), 2010 provides that a total of 2,13,585 incidents of crime against women were reported in the country during 2010 as compared to 2,03,804 during 2009, recording an increase of 4.8% during 2010. These crimes have continuously increased during 2006-2010 with 1,64,765 cases in 2006,1,85,312 cases in 2007, 1,95,856 cases in 2008, 2,03,804 cases in 2009 and 2,13,585 cases in 2010. The present paper is a humble attempt to analyse the problem of Domestic Violence against women and protection and remedies available to them under the Protection of Women from Domestic Violence Act, 2005 (herein after referred as PWDV Act, 2005).

Domestic violence as a serious human right violation of women is a recent phenomenon. At the International level, this issue came to the limelight during 1970s in USA as a result of National Faculty Violence Survey.[1] The recognition of domestic violence as a crime in India was brought about in the early 1980s after a sustained campaign by feminist groups and women activists all over the country. There was a huge demand for tackling the criminalisation of dowry death and domestic violence which led to the enactment of section 498A in the IPC in 1983, section 304B in 1986 and corresponding provisions in the Indian Evidence Act, 1872.[2] It is submitted that despite these legal provisions justice to

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women was a far cry, as remedies available to a victim of domestic violence under these legal provisions were very limited. This led to the enactment of Protection of Women from Domestic Violence Act in 2005.

2. Main Features of the protection of women from domestic violence act, 2005

The United Nations Committee On Convention On Elimination Of All Forms Of Discrimination Against Women has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. India is also a signatory to the said Convention. Therefore, Indian Parliament has passed the PWDV Act, 2005.The main features of the Act are as follows:

2.1. It extends to any woman who is related to the respondent by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family and who alleges to have been subjected to any act of domestic violence by the respondent. It extends not only to legally wedded wives, but also to women in 'relationship in the nature of marriage'.[3] Hon'ble Supreme Court in *D. Veluswamy* vs. D. *Patchaiammal*[4], ruled that in their opinion not all live-in relationship will amount to a relationship in the nature of marriage to get the benefit of the PWDV Act, 2005.Apex Court held that merely spending weekends together or a night stand would not make it a 'domestic relationship'.

2.2. Another novel feature of the PWDV Act, 2005 is the concept or shared household. "Shared Household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or rented either jointly by the aggrieved person and the respondent, or owned or rented 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.[5]

2.3. The Act provides for a very wide definition of Domestic Violence. It includes any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person.[6] It includes causing physical, sexual, verbal and emotional as well as economic abuse. Any harassment, harm, injury

caused to the aggrieved person with a view to coerce her or her relatives to meet any unlawful dowry demand also constitutes domestic violence under the Act. [7]

2.4. The Act provides that not only aggrieved person but any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer. Thus a family member, a friend or even a neighbour can be informant under the Act.[8]

2.5. The distinct feature of the Act is appointment of Protection Officers. The Act provides that the State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act. The Protection Officers shall be as far as possible women and shall possess such qualifications and experience as may be prescribed.[9] The Protection Officers are entrusted with various duties and functions under the Act. The duties of the Protection Officers inter-alia include assisting the Magistrate in the discharge of his functions, to make a domestic incident report and to ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987. It is the duty of Protection Officer to make available a safe shelter home, if the aggrieved person so requires, to get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place.[10]

3. VARIOUS REMEDIES PROVIDED UNDER THE ACT

The Act provides for various remedies to the aggrieved person. Some of the important remedies are discussed as follows:

3.1. Protection Orders

The Act has empowered the Magistrate to pass a protection order in favour of the aggrieved person and prohibit the respondent from committing any act of domestic violence, aiding or abetting in the commission of acts of domestic violence, entering the place of employment of the aggrieved person or school, if the person aggrieved is a child.[11] Along with this, the respondent can be prohibited from attempting to communicate with the aggrieved person, alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties,

jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* without the leave of the Magistrate.[12]The Act provides that breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.[13] The purpose is to prevent the respondent from committing physical, sexual, verbal, emotional or economic abuse.

3.2. Residence Orders

The Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order[14] restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household, directing the respondent to remove himself from the shared household, restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides, restraining the respondent from alienating or disposing off the shared household or encumbering the same, restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same. However, no order can be passed against any person who is a woman. The purpose of this section is to protect a woman from being rendered homeless by the respondent.

3.3. Monetary Relief

The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence. Such relief may include, the loss of earnings; the medical expenses; the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force. The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.[15]

3.4. Custody Orders

The Magistrate may grant temporary custody of any child or children to the aggrieved person. If the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.[16]

3.5. Compensation Orders

In addition to other reliefs the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.[17]

3.6. Counseling

The Act also provides for counselling for parties. The Magistrate may, at any stage of the proceedings under this Act, direct the respondent or the aggrieved person, either singly or jointly, to undergo counseling with any member of a service provider who possesses such qualifications and experience in counselling as may be prescribed.[18]

3.7. Emergency Relief

In an emergency situation, where the Protection Officer receives reliable information through e-mail or a telephone call from the aggrieved person or from any person who has reason to believe that an act of domestic violence is being or is likely to be committed, the Protection Officer shall seek immediate assistance of the police who shall accompany the Protection Officer, to the place of occurrence and record the domestic incident report and present the same to the Magistrate without any delay for seeking proper orders under the Act.[19]

4. Shortcomings of the Act

No doubt, the Act is an important social legislation, enacted with the aim of eradicating the global social evil of Domestic Violence. Yet, the present Act suffers from certain drawbacks which are discussed as follows:

4.1. The Act provides for a very wide definition of an aggrieved person under Section 2(a). It is criticised on the ground that it covers live-in partner along with a legally wedded wife. However, the Supreme Court has held that a woman in live-in relationship is not entitled to maintenance

unless she fulfills certain parameters. The Legislature should bring more clarity to the provision.[20]

4.2. The Act is meant for the protection of women and it gives protection to woman not legally wedded, but it excludes mother-in-law and sister-in-law who have to face violence at the hand of daughter-in-law and bhabhi. There is no denial to the fact that helpless mother-in-law and sister in law are equally susceptible to domestic violence at the hands of daughter in law. It appears that the Act is concerned about a wife only. If the Act wants to protect women effectively then the plight of these women should also be included within the definition of aggrieved person.

4.3. The concept of 'Shared household' is ambiguous. The Hon'ble Supreme Court in *S.R. Batra versus Taruna Batra*[21] has said that Section 2(s) of the Act, which gives right of residence to a married woman in a 'shared household' is not properly worded and appears to be the result of clumsy drafting. In this judgement, the Court has interpreted 'shared household' in detail, wherein it held that the wife is only entitled to claim a right to residence in a shared household, and a shared household would duty mean the house belonging to or taken on rent by the husband, or the house which belongs the joint family of which the husband is a member. The Supreme Court held that the house in question belonged to the mother-in-law of *Smt. Taruna Batra* and it did not belong to her husband *Sh. Amit Batra.* Hence, *Smt. Taruna Batara* cannot claim any right to live in the said house.

In *Neetu Mittal versus Kanta Mittal and others*[22], it was held that a woman has her rights of maintenance against her husband. She can assert her rights, if any, against the property of her husband and she cannot claim a right to live in the house of parents of her husband, against the consent and wishes of the in-laws, if the property is the self acquired property of the in-laws.

It is submitted that this vague concept of shared household is ineffective in providing complete remedy to aggrieved woman. She can be easily turned out of her matrimonial home on the ground that it belongs to her in- laws and her husband has no right in it.

4.4. Another glaring drawback of the Act is that, it is gender biased. A husband, a father-in law, a brother can also be equally victim of domestic violence, if the law wants to protect a mother-in-law from domestic violence at the hands of her son, then why a father-in-law who is suffering violence by his son and daughter-in-law, should not be given

equal protection of laws. It is high time that the Act should be made gender-neutral because males and females are equally susceptible to Domestic Violence.

4.5. The Act provides that breach of Protection Order by the Respondent is a cognizable and non-bailable offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to twenty thousand rupees.[23]The quantum of punishment including imprisonment and fine should be enhanced to have a deterrent effect. Simillar remedy should be available in case of the breach of residence orders, monetary relief, custody orders and compensation orders for an effective implementation of the Act.

4.6. The Act provides no fixed time limit for the purpose of appointment of Protection Officers by the State Governments. In majority of states no Protection Officers have been appointed. This is a major hindrance in the way of effective implementation of the said Act. The procedure of appointment of Protection Officers may be made clearer. Only specially trained staff, who is sensitised to the needs of a victim of domestic violence should be appointed. There is an urgent need for strict implementation of the Act, to prevent it from reducing into a paper tiger.

4.7. The Act needs to adopt a more realistic approach. The prosecution, conviction and imprisonment of the husband may not be the best solution to the problems of a victimized wife. It will not be easy for the aggrieved person to follow up the litigation. Counselling of the parties under Section 14 should be relied upon before resorting to other remedies under the Act.

4.8. Like many other Acts in India, the misuse of this Act also can not be ruled out. There is ample misuse of Section 498A of the Indian Penal Code, which was added to protect the rights of women. The possibility of misuse of the Domestic Violence Act cannot be ruled out. Frivolous Complaints under the Act should be dealt with strictly.

5. Concluding Remarks and Suggestions

It is submitted that violence can be inflicted on any member of family, whatever the age, gender or relationship. It can be old, handicapped or dependent relatives of either sex and of any age, a step child or step-mother, an unmarried, widowed, married or divorced daughter, the list can be endless.[24] There is need of long lasting solutions. Domestic violence should not be seen as merely a legal problem but as a part of wider social remedy. Mere legislative measures and subjection of domestic dispute of

every nature to judicial scrutiny would not help rather it has the potential to play havoc with our traditional values.[25] Some suggestions for the amendment and effective implementation of the Protection of Women from Domestic Violence Act, 2005 are discussed as under:

5.1. Wide Publicity to the Act should be given to the Act. For this legal awareness camps should be organized for the purpose of disseminating information about the rights of the women provided under the Act. Media, NGOs, Anganwari Workers can play a significant role in this direction.

5.2. State Governments should allocate sufficient funds for appointment and payment of Protection Officers, Legal Advisers, Counselors; and for providing shelter homes, legal aid, health services and other related services to the aggrieved parties.

5.3. Independent and separate Protection Officers in sufficient number should be appointed by the Government. The qualifications of the Protection Officers should be clearly mentioned in the Act itself.

5.4. The Government and Non-Governmental Agencies should conduct studies to check and analyze the proper functioning and effects of the implementation of the Act.

5.5. There is a need to strike a balance between the rights of the respondent husband or his relatives and the rights of aggrieved woman. The use of Act, 2005 as a weapon in the hands of women against innocent husband and in-laws should not be allowed.

5.6. Judiciary should also play an active role to see that the Act is enforced effectively. There is a need to check the filing of frivolous complaints. Filing of such vexatious complaints with a malafide intention should also be made punishable under the Act, 2005.

5.7. Last but not least, the Act cannot be implemented effectively until the women themselves come forward to fight for their rights. There is no denial to the fact that a large number of cases of domestic violence still go unreported. So women should be made aware of their rights. For this, they should be adequately educated and made financially independent. Parents of the girls can play a major role in this context.

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MEDIA VIOLENCE AND JUVENILE DELINQUENCY—AN APPRAISAL

*Dr. Pawan Kumar**

JUVENILE DELINQUENCY

The term delinquency has been derived from the Latin word *'delinquer'* meaning 'to omit'. The Roman used the term to refer to the failure of a person in case of performing the assigned duty or task. It was in 1484 when William Coxton used the term 'delinquent' to describe a person found guilty of customary offence. Indeed,in ordinary sense, delinquency is a form of behaviour or rather misbehaviour or deviation from the commonly accepted norms or conduct in the society.

The word juvenile is derived from latin, meaning thereby young.Thus Juvenile delinquency involves wrong doing by a child or by a young person who is under an age specified by law (for the time being in force) of the place concerned. A statute may include in the definition of delinquent child even a 'wayward', incorrigible, or habitually disobedient child. And a child or young person, growing up idly or living in crime, or associating with thieves, robbers as bad character, vagrants, prostitute or vicious person, or a child who visit a gambling saloon or billiard room or wanders about street at night or who absent himself from home without the consent or parent or guardian, may be regarded as delinquent child. Juvenile delinquency then is a type of anti-social behavior by a juvenile who is below an age specified by the statute.

The definition of juvenile delinquent has transformed according to the circumstances and need of the society, which differs from country to country, and for the purpose of the use of definition. As far as general principle of juvenile delinquency is concerned, first level of childhood (0-7 in India) is privilege[1]. Secondly, it is childish age (7-18 in India), where a child is neither absolutely free from criminal liability nor covered by criminal justice system, but treated differently to mainstream the child by using restorative theory[2].

In India before 1986, the ambit of juvenile delinquency was only up to 15/16 years as under the State Children Act, in force since 1920. Second phase is 1986 to March 2001.Under the juvenile justice Act 1986

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the juvenile delinquent was a juvenile who had been found to have committed an offence and juvenile was defined as a boy who had not attained the age of sixteen years or a girl who had not attained the age of eighteen years[3]. The Act of 1986 was substituted by The Juvenile Justice (care and protection of children) Act, 2000,came in to force w. e. f. 1st April 2001, and the term 'juvenile delinquent' in India is substituted by the term 'juvenile in conflict with law'. The juvenile in conflict with law means a person who has not completed the age of eighteen years and has alleged to commit an offence under IPC or any other law in force[4]. The age of male juvenile was raised to 18 years at par with girl .Regarding determination of age in case Earti Laxman v. State of A.P[5]. Supreme Court held that in computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. It is true that no child is born a delinquent, but circumstances pull the juvenile conflict with law.

According to a Home Ministry data, of the total of 33,387 juveniles apprehended in 2011, 21,657 were in the 16-18 age group, 11,019 of 12-16 age group and 1,211 between 7-12 age .A total of 33,628 adolescents were held in 2001, 35,779 in 2002, 33,320 in 2003, 30,943 in 2004 and 32,681 in 2005 for their involvement in different criminal acts. Whereas, 32,145 such youngsters below 18 years of age were held in 2006, 34,527 in 2007, 34,507 in 2008, 33,642 in 2009 and 30,303 during 2010, the data revealed. The data also shows increasing cases of rape by juveniles. As many as 1,419 such cases were recorded in 2011 as compared to 399 cases in 2001[6].

It is pertinent to mention that a juvenile and five others were arrested by Delhi Police for brutally raping and assaulting a 23-year-old girl in the national capital on December 16. The victim later succumbed to her injuries. The cases of murder by juveniles have also shown a surge in last ten years. As many as 531 youngsters below the age of 18 were apprehended for murder in 2001 as against 888 arrests between January and December 2011[7].

Causes for juvenile delinquency have been pointed out by different criminologists in different ways and may be summed up as; Although increasing industrial and economic growth in India has resulted into urbanization, it has invited various novel problems like housing, slum dwelling, overcrowding, lack of parental control and family disintegration and so on. Moreover temptation for modern luxuries of life lures young people to resort to wrongful means in order to satisfy their wants. Such factors cumulatively lead to an enormous increase in juvenile delinquency

in urban areas of the country. The natural consequences of broken homes Disintegrated family system and laxity in parental control over children is also another reason for it., lack of parental control, absence of security and want of love Certain biological factors are also responsible for creating delinquent behavior amongst juveniles. Early psychological maturity and low intelligence carry a major problem; especially to the young Indian girls. Though Indian girls attain puberty mostly at the age of twelve or thirteen, they still remain incapable of conceiving about the realities of life. Consequently they fall a very easy prey to sex involvements for momentary pleasure without, however, realizing the seriousness of the result of the act. So, it is necessary for the parents to unhesitatingly explain to their children, especially the girls, the probable consequences of prohibited sex indulgences which might serve a timely warning to them. Special care should also be taken in order to ensure effective protection to girls and child pornography.

- The rapidly changing patterns of modern lifestyle have created difficulty among young people regarding adjustment to new ways of life. They are seriously confronted with the problem of culture conflict and usually fail to differentiate between what is right and what is wrong that may so easily and affection towards children are contributing factors
- In a country like India poverty is one of the potential causes behind juvenile delinquency. Parent's failure in providing basic necessities of life such as food and clothing drive to their children to earn money by easier means, no matter what the way is that they will have to choose.
- Apart from these all illiteracy, child labour, squalor etc. is other contributing factors aggravating juvenile delinquency.

The explosion of technology and the 24/7 media access has become a major cause of juvenile delinquency. Violence is literally everywhere in media .In this article an attempt has been done to evaluate the impact of media violence on juvenile delinquency

MEDIA VIOLENCE & ITS IMPACT ON JUVENILE DELINQUENCY

Does entertainment influence society's attitude towards violent behavior? In order to fully answer this question we must first understand what violence is. Violence is the use of one's powers to inflict mental or physical injury upon another; examples of this would be rape or murder. Violence in entertainment reaches the public by way of television, movies, video games, music, and novels. Violent images on television, as well as in the movies, have inspired people to set spouses on fire in their beds, lie down in the mid

While violence is not new to the human race, it is an increasing problem in modern society. With greater access to firearms and explosives, the scope and efficiency of violent behavior has had serious consequences.

It's in video games, movies, books, music videos, cartoons, and the nightly news, on the web and even in commercials. Violence is literally everywhere in media. And it's becoming harder to avoid. Today, with the explosion of technology and the 24/7 media access that comes along with it, the question more than ever is what's the impact, especially on our kids?

Experts agree that no one single factor can cause a nonviolent person to act aggressively, heavy exposure to violent media can be a risk factor for violent behavior. Many researchers have concluded that young people who watch violence tend to behave more aggressively or violently, particularly when provoked. This is mainly characteristic of 8 to 12 year old boys, who are more vulnerable to such influences. Media influence an individual to violence in three ways. First movies that demonstrate violent acts excite spectators, and the aggressive energy can then be transferred to everyday life, pushing an individual to engage in physical activity on the streets. This type of influence is temporary, lasting from several hours to several days. Second, television can portray ordinary daily violence committed by parents or peers (the imposition of penalties for failing to study or for violations of certain rules or norms of conduct). It is impossible to find television shows that do not portray such patterns of violence, because viewer approval of this type of programming has ensured its perpetuation. As a result, children are continually exposed to the use of violence in different situations—and the number of violent acts on television appears to be increasing. Third, violence depicted in the media is unreal and has a surrealistic quality; wounds bleed less, and the real pain and agony resulting from violent actions are very rarely shown, so the consequences of violent behavior often seem negligible. Over time television cause a shift in the system of human values and indirectly leads children to view violence as a desirable and even courageous way of reestablishing justice. The American Psychological Association has reviewed the evidence and has reviewed the evidence and has concluded that television violence accounts for about 10 percent of aggressive behavior among children.

Delinquent identity is always constructed as an alternative to the conventional identity of the larger society. Violence and conflict are necessary elements in the construction of group and delinquent identities. The foundations of group identity and activity are established and strengthened through the maintenance of conflict relations with other

juvenile groups and society as a whole. Violence serves the functions of integrating members into a group, reinforcing their sense of identity and thereby hastening the process of group adaptation into the local environment.

Others factors that may provide motivation for joining a gang are the possibilities of economic and social advancement. In many socio-culture contexts the delinquent way of life has been romanticized to a certain degree, and joining a gang is on e of the few channels of social mobility available for disadvantaged youth. According to one opinion, urban youth gangs have stabilizing effect on communities characterized by a lack of economic and social opportunities.

Delhi High Court has observed that every juvenile has some background for indulging activity. Section 12 of the Juvenile Justice Act requires a juvenile to be released on bail in all cases except in those where there are grounds to believe that the release was likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger. It appears that continuous exposure to the adult programmes on the TV, some of which are known to be obscene and sensuous has lend the juvenile to develop sexual fantasies which has led to the offence. The report of the social investigation says that the TV of the Juvenile's family went out of order and he started going to the neighbors' house to watch the TV. It appears that the TV was not repaired which lend the juvenile to look to other houses for his entertainment[8].

Sentence was reduced on the ground that accused have seen blue film before committing rape—the Hon'ble Gujarat High Court held that State is duty bound to stop the availability of blue film in the State and not to run any such movie on the channels on TV. Where the trial court held the conviction under sections 376 and 452 and awarded rigorous imprisonment for seven and two years and fine of Rs 1000 and 500, respectively. But, High Court in appeal reduced the sentence on the ground that, the accused had committed such offence after watching of such movie. It is the duty of the State to stop the availability of such movies to the citizen, but the state has failed. It is also correct that by putting such liability on the State, it can acquit the accused but the sentence of the accused was reduced to two years rigorous imprisonment. In this case State has failed to maintain its duty, but for the failure of State, society has suffered and innocent victim is tortured[9].

In today's world, means of mass communication like the cinema, press, television and internet have assumed very great significance. Not only do they serve that various positive purpose but their enormous

capacity has created some problems which are of interest to those who have to study human behaviour, including criminologists. The connection between movie and delinquency is considered to be quite close. Inducement by oversexed films, T.V., pornography violence blended Cinema and the imbibed feelings about criminals through media are vital reasons for juvenile delinquency. Juvenile learn and imitate such characters of the

On the mass media and delinquency, many studies have been carries out to find out as to influence in learning process and in the shaping of the state leading to juvenile delinquency. The Press through sensational news of crime and sex stimulate delinquent conduct. Children are attracted and lured by the head-lines of newspaper announcing the news of robbery, describing it as an adventures short cut to riches. The children learn the mode of committing the offence. Cases of kidnapping and child lifting reported in the daily newspapers are very educative to the young who run away from homes or schools.

Multi Channel cable network has become an integral part of our society, particularly in our urban areas, which is also directly responsible for delinquency. As it is seen that certain programmers telecasted by these channels are not suitable for children as per our culture. These programmes are based on violence or sex and provoke the young children of our society to break our social norms based on morality. It is also well known fact that audio-visual impact last long and that too particularly in children. So what so ever the children watch in these programmes they want to put the same in their day to day life as they are unable to differentiate between right and wrong acts as per our culture. Children follow these acts because limitation is unique habit or childhood. By this way certain program telecasted by these multi-channels, proceeds our children towards delinquency. Secondly, program telecasted by these channels continue for the whole day which badly affects study of children. No one can deny this fact that mass media play an important role in causations of juvenile delinquency. But it can be noted here that the mass media can play a great role in prevention of delinquency if it is bring about the information without sensationalization. If the mass media terms have positive and constructive approach it will add to the efficiency of the enforcement agencies in the prevention and detection of crime and delinquency. Our audio-visual media should telecast those programs which could inculcate the moral values particularly in children. The program made should not be thrilling by exaggeration of violence and sex. The program telecast on television by different channels should be of that nature which inspires that people to be a law abiding citizen.

CONCLUSION AND SUGGESTIONS

Television, which once dominated children's media consumption habits, is now joined by computers, video game players, cell phones and other connected devices. The result is that children today are completely immersed in media experiences from a very young age.When we switch on the television, there is an array of channels to keep us informed and entertained 24x7. If we browse the Internet, an ocean of information unfurls at a click of a mouse. Aren't we extremely lucky to be living in this era? Of course we are. Media plays a very imperative role in shaping our beliefs, perception, ideas, and behaviour in society. It is a powerful entertainment and education tool for us in abundant ways; however, media can have a negative impact on children and adolescents. Do we ever stop to think: "What is media teaching our children?" Our society is rampant with much corruption, immorality and crime, and to negate the fact that media does plays a role in fueling aggressive behaviour, particularly in the younger generation, would be erroneous. Nowadays, children and adolescents are very much exposed to violence, sex, profanity and much more in media. To parents, over-exposure to violence in media is seen as a threat to their children's behavior.

Some parents, however, may not be aware of the amount or content of media violence their children experience. Media violence can hurt. It can poison the minds of children and teenagers and lead to violent behavior. And even in the case of adults, it can push the insane over the edge and lead to stalking, theft, rape, or murder. What make things difficult for parents is that the violence in programs is often glamorized, belittled, and at times depicted as humorous. Most of the violent acts on television result in no punishment to the offenders. These offenders are portrayed as heroes, and children emulate such characters who they see as strong, brave, and unafraid of any threat.

Media violence influences our children/juvenile (and us, too) by modelling and glamorizing the use of deadly force as a first choice to solve conflict between characters. We will never totally eradicate violence from our lives or from the media. That is unrealistic. As long as there are human beings on earth, there will be violence among some of them. But enough questions present themselves about the cumulative impact of violence as entertainment (i.e. violence portrayed without consequences or violence as funny) in television, movies, videogames, music and even advertising, that I believe we must, as parents and teachers, as citizens and community leaders, look more closely at the issue of media violence

and find ways to reduce it, especially in the lives of our children .No responsible person advocates that violence in the media is desirable. Following suggestions are given to check the impact of media violence on children/juvenile

1. Parental/adult responsibility for managing media in the lives of children is fundamental. When children watch less television, they will see less violence.

   Young fathers, uncles and older brothers especially need to get the message that too much media violence can truly harm children. Most violent media is targeted at adult males, 18-49. They must be challenged to examine their preference for "action-adventure" especially when children are present.

2. Parents also have a right to expect that society and its entertainment industries accept responsibility for not harming children by allowing the creation of media violence which can endanger children in their formative years. Teddy bears and children's pajamas are subjected to more safety standards than are the TV shows that entertain our children for hours each day. An African proverb states: "It takes a whole village to raise a child." We are all responsible for the cultural environment in which today's children are growing up.

3. Research indicates that the effects of viewing media violence can be mitigated in all age groups by learning and applying critical viewing and media literacy skills.

   Media literacy curricula provide a variety of teaching tools to deconstruct the techniques used to stage violent scenes and decode the various depictions of violence in different media genres — news, cartoons, drama, sports and music. It is important for children to learn early on the difference between reality and fantasy and to know how costumes, camera angles and special effects can fool or mesmerize them. Research shows that critical skills of media analysis can be taught from the earliest years and, through guided practice, can become everyday habits for both children and adults. Media literacy education is a necessary component of violence prevention for young people. It must become a community-wide initiative in cities and towns throughout North America.

4. There are many steps that each of us can take, wherever we are, to reduce the amount and impact of violent entertainment in our lives and in the lives of children.

Tips for parents

- Explain consequences. What parent hasn't heard "but there's no blood" as an excuse for watching a movie or playing a video game? Explain the true consequences of violence. Point out how unrealistic it is for people to get away with violent behavior.
- Keep an eye on the clock. Don't let kids spend too long with virtual violence. The more time spent immersed in violent content, the greater its impact and influence.
- Teach conflict resolution. Most kids know that hitting someone on the head isn't the way to solve a disagreement, but verbal cruelty is also violent. Teach kids how to use their words responsibly to stand up for themselves without throwing a punch.
- Know your children,s media. Check out ratings and, when there are none, find out about content. Content in a 1992 R-rated movie is now acceptable for a PG-13. Streaming online videos aren't rated and can showcase very brutal stuff.

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SPEEDY JUSTICE DELIVERY AND EASY ACCESSIBILITY TO JUSTICE

Bimal Deep Singh[*]

Abstract

The Constitution of India recognises Judiciary as an important (third) pillar of our democracy and it is the policy of the Government to ensure adequate provision of infrastructure facilities for it to enable its functioning- freely and fairly. Article 39-A has been added as a major Directive Principle in the Constitution, obliging the State to secure such operation of legal system as it promotes justice and to ensure that opportunities for securing justice are not denied to any citizen. Article 21 commits that no person shall be deprived of his life or his personal liberty. The twin rights of Life and liberty, used in Article 21, are not to be understood in a narrow sense. The courts have further impregnated these words with humanity and dignity. Speedy trial is of essence to criminal justice and there can be no doubt that the delay in trial by itself constitutes denial of justice. Social justice include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources

Introduction

The Constitution of India recognises Judiciary as an important (third) pillar of our democracy and it is the policy of the Government to ensure adequate provision of infrastructure facilities for it to enable its functioning- freely and fairly. JUSTICE-social, economic and political is a Preambular promise. Article 39-A has been added as a major Directive Principle in the Constitution by 42nd amendment (1976), obliging the State to secure such operation of legal system as it promotes justice and to ensure that opportunities for securing justice are not denied to any citizen. Article 21 commits that no person shall be deprived of his life or his personal liberty except according to procedure

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established by law. The twin rights of Life and liberty, used in Article 21, are not to be understood in a narrow sense; these are dynamic terms to be interpreted in that light only. The courts have further impregnated these words with humanity and dignity.

The Supreme Court has made it clear time and again, "Speedy trial is of essence to criminal justice and there can be no doubt that the delay in trial by itself constitutes denial of justice."[1] Supreme Court has held, "Social justice include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources."[2] In yet another case, it added, "there can be no doubt that speedy trial- and by speedy trial we mean a reasonably expeditious trial- is an important and vital part of fundamental right to life and liberty enshrined in Art 21".[3] In *All India Judges Association & Ors. v. Union of India & Ors.*[4] J. Kirpal has succinctly stated the anxiety of all concerned about quick dispensation of justice. The observations of a Seven Judge Bench in *P. Ramachandra Rao v. State of Karnataka*[5] are also relevant. The efforts to speed up the justice by filling up the vacancies in Judicial offices within the time schedule stipulated by the Hon'ble Supreme Court was made in *Malik Mazhar Sultan & Another Vs. Uttar Pradesh Public Service Commission and Other*.[6]

A considerable delay in deciding the cases, particularly in case of under trials who have spent more time in jails as under trials than the punishment prescribed for the offences, they are charged; is undermining the judicial system.[7] As per an estimate 27 million litigants were waiting for 'all elusive justice' at the doorsteps of our courts.[8] The huge backlog of cases in the courts and inordinate delay in their disposal has been a cause for concern; it has created an alarming situation. Factors underlying the problem are varied.[9] Inefficiency in the judicial system leads to frivolous litigation, harassment and delays, crowding out genuine litigants and forcing them to seek solutions in quasi-legal framework. The inordinate delay in the disposal of court cases induces the public to hunt for justice through extra judicial means.[10] The 'rule of law' is the sufferer in the process.[11]

As per the information collected by First National Judicial Pay Commission, every state except Delhi has been providing less than 1% of the budget for subordinate judiciary whereas the figure is 1.03% in case of Delhi. In terms of G.N.P., the expenditure on judiciary in our country

is hardly 0.2 per cent, whereas it is 1.2 per cent in Singapore, 1.4 per cent in United States of America and 4.3 per cent in United Kingdom. In the Ninth Plan (1997-2000), the Centre released Rs.385 crores for priority demands of judiciary which amounted to 0.071 per cent of the total expenditure of Rs.5,41,207 crores. During Tenth Plan (2002-2007), the allocation was Rs.700 crores, which is 0.078 per cent of the total plan outlay of Rs.8,93,183 crores. National Judicial Academy has prepared *National Judicial Infrastructure Plan* which provides for upgrading and augmenting judicial infrastructure such as buildings, equipment, software, knowledge, resources, human resources, facilities and systems, so as to make it capable of providing access to justice to all the sections, particularly those belonging to lower strata of the society.

Several statutes like Indian Penal Code, Code of Civil Procedure, Code of Criminal Procedure, Transfer of Property Act, Contract Act, Sale of Goods Act, Negotiable Instruments Act etc., which contribute to more than 50% to 60% of the litigation in the trial Courts are Central enactments, referable to List I or List III and these laws are administered by the Courts established by the State Governments. The number of Central laws which create rights and offences to be adjudicated in the subordinate Courts are about 340. It is obvious that the central Government must establish Courts at the trial level and appellate level and make budgetary allocation to the States to establish these courts to cut down backlog of cases arising out of these central statutes. Article 247 of the Constitution enables Union Government to establish additional courts for better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List. This Article is specially intended to establish courts to enable parliamentary laws to be adjudicated upon by subordinate courts but has not been resorted to so far.[12]

Economic reforms are also driven by the intention of driving up India's GDP growth rates. In attaining GDP growth, legal reforms are, now recognized as, critical. Economic surveys since 2004-2005 have rolled out the agenda. There are three layers in legal reform. First, there is an element of statutory law and there are three clear elements to statutory law reform: a) weeding out old and dysfunctional elements in legislation; b) unification and harmonization; and c) reducing state intervention. Second, legal reform has to have an administrative law reform component, meaning the subordinate legislation in the form of rules, regulations, orders and instructions from ministries and government departments. Often, constraints to efficient decision making come about through administrative law, rather than through

statutory law and discretion, bribery and rent seeking are fall outs. Finally, the third element of legal reform is what may be called judicial reforms, although swifter dispute resolution.

Law Commission Report suggesting measures for Speedy Justice and Trial: Law commission has considered issues of arrears and speedy Justice time and again. In its 221sr report the commission has made certain recommendations.

Mounting of arrears of cases in courts, particularly in High Courts and District Courts, has been a cause of great concern for litigants as well as for the State. It is a fundamental right of every citizen to get speedy justice and speedy trial which also is the fundamental requirement of good judicial administration. In this Report, we have made few proposals which when given effect to, will be helpful not only in providing speedy justice but also in controlling frivolous, vexatious and luxurious litigations.[13]

The Law Commission took up the study *suo motu* and recommends the following amendments:

1. Amendment of section 80 and Order V of CPC and also the concerned Court's Rules - In order to shorten delay, it is necessary that provisions parallel to section 80 CPC be introduced for all kinds of civil suits and cases proposed to be filed by a litigant.
2. Amendment of sections 378, 397 and 401 CrPC – 6
   (i) In complaint cases also, appeal against an order of acquittal passed by a Magistrate to the Sessions Court be provided, of course, subject to the grant of special leave by it.
   (ii) Where the District Magistrate or the State does not direct the Public Prosecutor to prefer appeal against an order of acquittal, the aggrieved person or the informant should have the right to prefer appeal, though with the leave of the Appellate Court.
   (iii) There should be only one forum for filing revisions against orders passed by Magistrates, that is, the Sessions Court, instead of two alternative forums as now provided.
   (iv) The Legislature should specifically categorize revisable orders, instead of leaving the matter to confusion caused by various interpretations of the expression "interlocutory order".
3. Amendment of Transfer of Property Act 1882 – It should be made mandatory that the consideration for every sale shall be paid through Bank Draft.[14]

Some Basic Notions on which our present system is lagging behind: The Researcher after making a review of the various reports and recommendations is of the view that to our system has been ignoring some basic points:

- The archaic set up as a result of British Colonial Legacy is bogging down the entire setup, like a dying Neutron star. Adequate reorganisation of Judiciary is at the one and at the same time everybody's concern and, therefore, nobody's concern.
- The decline in institution of Civil Cases and directly multiple proportional increase in institution of Criminal cases is an indication of the deep and quiet burial of all legal notions.
- 'Justice' is the foremost promise , made by our Constitution. The National Commission for Review of the Working of the Constitution has suggested its further strengthening by incorporating Article 30-A. So that the right can be available as a fundamental right.
- The total number of cases pending in nearly 16,000 district and subordinate courts are nearly 3 crore. Over 10% of these are more than 10 years and majority more than 3 years old. The rate of new institution may be on a decline due to the shying away rather than ADRs methods, Morning/Evening/ Mobile Courts/shift courts.
- At the current rate of disposal, it would take more than 300 years to clear the backlog, provided no fresh cases are instituted during the period. As per an estimate 75000 judges are required to administer speedy justice.
- More and more Central and State level Laws are being passed without arranging for its adjudication. There is a need to have a relook at the working of entire judicial system.
- Adequate reorganisation of Judiciary is at the one and at the same time everybody's concern and, therefore, nobody's concern.

Suggestions

- A special Session of the parliament may be convened to discuss suitable Legislation/amendments in the set up of courts.
- The description 'subordinate courts/inferior courts' may be used as a categorisation and not as a derogatory remark.

- The appeal stages are required to be minimised and Law Commission may be asked to make a study on this aspect.
- There is need to decentralise the administration of justice and centralise the funding. The Chief Justices of the High Courts can be given financial and administrative autonomy for these Courts.
- A civil expense and delay reduction plan (USA introduced it in 1990) for the Courts may be devised.
- The recommendations of Chief Justices Conferences 2004-2009 must be respected and incorporated in the scheme for the Courts.
- A 'Legal Education and Judicial Policy' is needed.
- The Research and funding to the University Law Institutions must be increased to replace the outdated and counter productive laws.
- The training of all those admitted to the law courses may be as that of a judge so that they are better equipped in ADRs and interpretative techniques.
- Procedural innovations are required otherwise as Lord Devlin said, " If our methods are as antiquated as our legal methods, we should be a bankrupt country."
- The judicial placement should be lucrative to the members of bar.
- The mainstream judges should be encouraged to act on a track to make all courts fast track courts.
- The entire Justice system needs to be run on "Fast Track" on Justifiable mission, rather than having two-three (adhoc) courts in each district with see-saw struggle for funds, infrastructure and building.
- The Petty and Compoundable cases as suggested by Malimath Committee are required to be compounded or sent to Lok-Adalats.
- Substantive Laws also need to be suitably amended to introduce compensation in petty cases instead of punishment.
- Twice a year full High Court and Supreme Court should meet to examine the arrears and decisions taken in these meetings should be treated as *Vox Populi* by the government.

- Ombudsman at each level may be established, to maintain transparency and accountability in the judiciary.
- The hierarchy of the subordinate courts should be brought down to two tiers below the High Court (as suggested by National Commission to Review the Working of the Constitution).
- Unnecessary formalities should give way to simplified procedure.
- The presiding judges be made accountable.
- Information Communication Technology should be used liberally.
- Video recording of crime scene, witnesses statements by employing specialised Magistrates can be done and used at all stages of a suit.
- The time is ripe to set up human rights, environment, matrimonial, NRI, Senior Citizens, Juvenile courts on specialised basis and all work being attended by one Judge needs to be shunned.
- Sensitivity towards women, children, Senior citizens, Economic Offences, Forensic evidence, cyber crimes, etc. is required to be parameters while doing justice.
- The services of retired judges should be availed in more useful ways e.g. to create legal software, help High courts in Research and Case management, grouping, bunching and ADRs processes.

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RIGHT TO INFORMATION: THE GLOBAL PERSPECTIVE

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1. Freedom of Information: The Historical Perspective

Over the years, laws relating to freedom of information have made headlines in over ninety countries the world over. During the last decade or so, many countries have enacted new legislations, thereby giving their citizens access to government information. This is so because the concept of freedom of information is evolving from a moral indictment of secrecy to a tool for market regulation, more efficient government, and economic and technological growth. Governments around the world are providing information about their activities. Almost ninety countries from around the world have implemented some sort of freedom of information legislation. As a matter of fact, many countries have adopted comprehensive freedom of information laws to facilitate access to records held by various government agencies. While such legislations have been around for long but over about half of these have been adopted in the last decade only. The growth in transparency is primarily in response to the demands of a progressing civil society in general and civil society organisations, the media and International financial organisations in particular. In addition, many countries have also adopted other laws that can provide for limited access. These, *inter-alia* include, data protection laws that allow individuals to access their own records held by government agencies as well as by private organisations. Specific statutes have been enacted that give right of access in certain areas such as health, environment, executive orders and/or codes of practice.

There have also been a variety of external and internal pressures upon governments to adopt freedom of information laws. In most countries, pressure groups such as the press, human rights groups and environmental societies have played a key role in the promotion and adoption of such laws. International organisations demanded improvements and finally governments themselves recognised the need to modernize such information laws.

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Even as freedom of information moves into the mainstream worldwide, few governments are fighting back, ratcheting up fears about their national security to introduce new secrecy laws and tighten restrictions upon the sharing of public information. The terror attacks of September 11, 2001 in the United States of America, have compelled a reappraisal of the balance that should be struck between the interests served by governmental openness, and need to protect national security not only in the United States but in many other countries as well. However, in the last decade, dozens of countries have enacted formal statutes guaranteeing their citizens' right to access to government information. Elsewhere, even without legal guarantees, citizens are asserting their right to know.[1]

2. The United Nations and the Right to Information

From the very beginning, freedom of information was recognized as a fundamental right within the United Nations (UN). In 1946, at its First Session, the UN General Assembly adopted the Resolution 59(1) which stated: "Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the UN is consecrated." In ensuing international human rights instruments, freedom of information was set out as a part of the fundamental right of freedom of expression, which included the right to seek, receive and part information.[2]

In March 1948, the UN proclaimed a Universal Declaration of Human Rights (UDHR) which was followed by the adoption of the International Covenant on Civil and Political Rights (ICCPR), 1966. Article 19 of the said covenant guarantees freedom of opinion and expression. It lays down that "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information on ideas through any media and regardless of frontiers."

Similarly, the International Covenant on Civil and Political Rights was adopted by the UN General Assembly in 1966. The Covenant formally guaranteed that:

(a) Everyone shall have the right to freedom of opinion;

(b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice; and

(c) The exercise of the rights carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.

Further, Article I of the UNESCO Declaration of 1978 on 'Fundamental Principles Concerning the Contribution of Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement of War' states: "The strengthening of peace and international understanding, the promotion of human rights and the countering of racialism, apartheid and incitement of war demand a free flow and a wider and better balanced dissemination of information". Article II of the Declaration states: " . . . the exercise of freedom of opinion, expression and information, recognized as an integral part of human rights and fundamental freedoms, is a vital factor in strengthening of peace and international understanding."

In 1993, the UN Commission on Human Rights established the office of the United Nations Special Rapporteur on Freedom of Opinion and Expression. Part of the Special Rapporteur's mandate is to clarify the precise content of the right to freedom of opinion and expression. In 1993 itself, the Rapporteur on Freedom of Opinion and Expression declared that Article 19 of the International Covenant on Civil and Political Rights, 1966, imposes a positive obligation on states to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems.[3] In 1998, the UN Commission welcomed this view[4] and in 2000, the Special Rapporteur endorsed a set of international principles[5] on freedom of information of which the Commission has taken note.[6]

In 2000, as per the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Abid Hussain, the following UN Principles on Freedom of Information were suggested:

(i) Maximum Disclosure:[7] This Principle establishes a presumption that all information held by public bodies is subject to disclosure and this presumption can be overcome in very limited circumstances. This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice. Public bodies have an obligation to disclose information

and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which they are stored. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings.

(ii) Obligation to Publish:[8] Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published. Public bodies should, as a minimum, be under an obligation to publish the following categories of information namely, operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public; information on any requests, complaints or other direct actions which members of the public may take in relation to the public body; guidance on processes by which members of the public may provide input into major policy or legislative proposals; the types of information which the body holds and the form in which this information is held; and the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

(iii) Promotion of Open Government:[9] At a minimum, the law should make provisions for public education and the dissemination of information regarding the right to access information. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body

- either the one which reviews requests for information, or another body established specifically for this purpose. The law should also provide for Mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish. The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticising those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead. Public bodies should be encouraged to adopt internal codes on access and openness.

(iv) Limited Scope of Exceptions:[10] All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test, that is, in the first place, the information must relate to a legitimate aim listed in the law; secondly, the disclosure must threaten to cause substantial harm to that aim; and lastly, the harm to the aim must be greater than the public interest in having the information. No public bodies should be completely excluded from the ambit of the law, even if the majority of their functions fall within the zone of exceptions. This applies to all branches of government (that is, the executive, legislative and judicial branches) as well as to all functions of government (including, for example, functions of security and defence bodies). Non-disclosure of information must be justified

on a case-by-case basis. Restrictions whose aim is to protect governments from embarrassment or the exposure of wrongdoing can never be justified. The law should include a complete list of the legitimate grounds which may justify non-disclosure and exceptions should be narrowly drawn to avoid including material which does not harm a legitimate interest.

(v) Processes to Facilitate Access: A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide strict time limits[11] for processing requests and require that any refusal be accompanied by substantive written reasons.

(vi) Costs:[12] Fees for gaining access should not be so high as to deter potential requesters and negate the intent of law.

(vii) Open Meetings:[13] The law should establish a presumption that all meetings of governing bodies are open to public.

(viii) Disclosure Takes Precedence:[14] The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation. The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law. Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.

(ix) Protection to the Whistle-Blowers:[15] Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection

should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In 2004, a Joint Declaration on International Mechanisms for Promoting Freedom of Expression was released by the UN's Special Rapporteur on Freedom of Speech and Expression, the Organization of American States and the organization for Security and Cooperation in Europe.[16] This Declaration affirmed that access to information is a "fundamental human right" for all citizens and stated that governments should respect this right by enacting laws that allow people to access as much information from them as possible - this is the principle of maximum disclosure.[17] The Declaration also recognized how important access to information is for supporting people's participation in government, promoting government accountability and preventing corruption.[18]

2.1 The UNDP and Right to Information

The United Nations Development Programme (UNDP), is the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.[19] In an effort to encourage the development of right-to-know legislations in developing countries, the UNDP conducted a seminar and issued a report in May 2006, designed to heighten awareness about transparency laws and their values. The Report describes these laws, their advantages and their evolution, all with the goal to encourage and help the UNDP to promote their adoption. The UNDP officials are advised to analyse the current state of law and identify the most important institutional allies and potential blockages. Other steps stated in the report include: raising awareness of the issue, supporting activities that feed local initiatives, providing space for a dialogue between civil society and activists and offering expertise about the content of such laws.

The seminar reiterated that freedom of expression is the undisputed international right in all international treaties. It has a number of rights packed into it including the right to information. Seeking and receiving implies a human right to information. Although the right to information has never appeared as an independent right in any global UN treaty, it is guaranteed by a number of regional treaties and declarations by the bodies such as the Council of Europe and other bodies. The media functions as a channel through which the individual right to freedom of expression is given a public form. It operationalizes the right but is not a privileged right-holder per se. It is also important to bear in mind that it is possible to push

the RTI agenda without specific legislation. In these circumstances it is possible to make use of and build on other legal frameworks such as the constitution and international treaties. Further, it is also important to identify and work with groups and sectors of society to mobilize them and support their efforts in demanding RTI. The UNDP and other development organizations can draw upon drivers of change analysis. Youth are an especially important group to work with and stimulate their demand for greater access to information. While citing the rapid increase in right-to-know laws in the last decade, the report points out that only thirty of the countries in which UNDP operates have such laws.

Thus, we see that the right to get information in a democracy has been recognized throughout and it is a natural right following from the concept of democracy. The freedom of expression including freedom to information has four broad social purposes to serve. These include: helping an individual to attain self-fulfillment; assisting in discovering the truth; strengthening the capacity of an individual in participating in decision-making; and providing a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

3. The Commonwealth and the Right to Information

In 1980, the Commonwealth Law Ministers Meeting in Barbados stated that "Public participation in the democratic and governmental process was at its most meaningful when its citizens had adequate access to official information". More recently, the Commonwealth has taken a number of signifying steps to elaborate on the content of that right.[20] In March 1999, the Commonwealth Expert Group Meeting at London in the United Kingdom adopted a document setting out a strong set principles and guidelines as well as key statements regarding the Right to Know and Freedom of Information as a Human Right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, legislative and the judicial arms of the State, as well as any government-owned corporation and any other body carrying out public functions.

These principles and guidelines were endorsed later at the Commonwealth Heads of Government Meeting in November 1999. The Commonwealth Freedom of Information principles are as follows:

(i) Member countries should be encouraged to regard freedom of information as legal and enforceable right;

(ii) There should be a presumption in favour of disclosure and governments should promote a culture of openness;

(iii) The right of access to information may be subject to limited exemptions but these should be narrowly drawn;

(iv) Government should maintain and preserve records; and

(v) In principle, decisions to refuse access to records and information should be subject to independent review.

Hence these principles cast a moral obligation on the member countries to develop domestic legislation to further these enunciated principles which had received great support from heads of member countries at the November 1999 meeting. All this had a positive impact on the already ongoing movement for a full length legislation on freedom of information in India.

4. The African Union and Right to Information

The African Union (AU) consists of 53 states. The only African nations with a law implementing the right to information are Angola, South Africa, Uganda and Zimbabwe. In Zimbabwe, the *Access to Information and Protection of Privacy Act*, 2002, in effect restricts the flow of information instead of facilitating transparency in government bodies. However, Article 9(1) of the African (Banjul) Charter on Human and Peoples' Rights, explicitly recognizes the right of people to seek and receive information and says that "Every individual shall have the right to receive information.[21]

In 2002, the African Commission on Human and Peoples' Rights reinforced the view that: "public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information".[22]

The African Union's Declaration of Principles on Freedom of Expression in Africa, 2002 also recognizes that everyone has a right to access information held not only by public bodies, but also by private bodies when this information is necessary for the exercise or protection of a human right. Though not binding, the aforesaid Declaration has considerable persuasive force as it represents the will of a sizeable section of the African population.

The Declaration lays down the following principles:

- Everyone has the right to access information held by public bodies.

- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
- Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest.
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment.
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.[23]

The African Union's Convention on Preventing and Combating Corruption, 2003 further recognizes the role that access to information can play in facilitating social, political and cultural stability.[24] For this reason, Article 9 requires that every State adopt: "legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences".[25]

5. The Organization of American States and Right to Information

Of the OAS members, those countries with a specific law implementing the right to information are Antigua and Barbuda, Argentina, Belize, Canada, Columbia, Dominican Republic, Ecuador, Honduras, Jamaica, Mexico, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago and the United States of America.

Twenty four countries of the OAS, out of a total membership of thirty four, have ratified the American Convention on Human Rights, 1969. Article 13(1) of the American Convention on Human Rights, 1969 states that: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

Paragraphs 2 and 3 respectively of the Inter-American Declaration of Principles on Freedom of Expression adopted in 2000 specifically recognises that "access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full

exercise of this right. This principle allows only exceptional limitations to the right that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies." The Declaration was approved by the Inter-American Commission on Human Rights in October 2000.[26]

On 10 June 2003, the OAS General Assembly adopted a resolution on "Access to Public Information: Strengthening Democracy" (AG/RES. 1932 (XXXIII-O/03)).[27]

In August 2003, the Permanent Council of OAS, instructed the OAS Special Rapporteur for Freedom of Expression to submit to the Council proposals for operationalising paragraph 5 of the June 2003 Resolution, which instructs the Permanent Council "to promote seminars and forums designed to foster, disseminate, and exchange experiences and knowledge about access to information so as to contribute, through efforts by the member states, to fully implementing such access." Consequently, the Special Rapporteur produced two Reports: the First Report on Access to Information was considered by the Permanent Council on 10 September and the Second Report on Access to Information on 17 December 2003. On 9 February 2004, the Report of the Chair of the General Committee on the Reports of the Special Rapporteur for Freedom of Expression was produced, and is to be considered by the full membership of the Permanent Council.

Chapter IV of the 2003 Annual Report of the OAS Special Rapporteur for Freedom of Expression specifically discusses access to information throughout the western hemisphere.

In October 2006, the Inter-American Court of Human Rights made history, being the first international tribunal to recognize the human right to access information.

In the judgment of *Claude Reyes et al.* v. *Chile,* the court held that Chile had violated Article 13 of the American Convention on Human Rights, and ordered Chile to establish an effective legal mechanism that guarantees the right of all persons to request and receive information held by government bodies, including defining limited exemptions to the right, setting deadlines for providing information, providing reasons where information is not given, and training public officials on the right to information. The Inter-American Court of Human Rights held that public access to information is essential to democratic participation and freedom of expression. The court ruled that countries that have signed the American Convention on Human Rights

(which includes Chile) must develop procedures for releasing government-held information that are guided by the principle of "maximum disclosure." This means that, with few exceptions, all government-held information must be made accessible. In its judgment, the Inter-American Court concluded that Article 13 of the Convention contains a right of general access to government-held information and that Chilean authorities had violated this right. Article 13, the court said, "supports the right of persons to receive such information and the positive obligation on the state to supply it," except in the few cases where access is limited by the convention, and said "information should be provided without a need to demonstrate a direct interest in obtaining it." The court highlighted the connection between freedom of expression and information and rights of democratic participation in concluding that "access to information held by the State . . . permits participation in public governance." "In a democratic society it is indispensable that state authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions," the court stated, before concluding that the burden is upon the state "to prove that in setting restrictions on access to information in its possession it complied with the restrictions" laid out by the court.[28]

The judgment of the Inter-American Court had an important impact on the development of the right to information at the national level in the Americas. In those countries where the American Convention had been incorporated into domestic law, individuals and groups cited the Claude Reyes judgment to assert a right of access to government-held information.

6. The Council of Europe and the European Union

The Council of Europe formally recognized the people's right to access information as early as in the year 1950. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, states that everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

This commitment has been developed and interpreted over the year by the European Court of Human Rights. This was also included as Article 11(1) of the Charter of Fundamental Rights of the European Union which has become legally binding on all members of the European Union except Poland and the United Kingdom after signing of the Treaty of Lisbon.

The European Union has also shown its commitment to the right to information by implementing regulations that provide mechanisms through which people can access information from the institutions of the European Union. In March 2008, the Council of Europe's Steering Committee on Human Rights (CDDH), adopted the Convention on Access to Official Documents[29] at Strasbourg. However, the Convention has been criticized as it falls short of many national laws on access to information and of the new international standard set by the Inter-American Human Rights Court.

7. The Asia-Pacific and the Right to Information

The Asia-Pacific nations with a specific and functional law implementing the right to information are Australia, Azerbaijan, Georgia, India, Israel, Japan, New Zealand, Pakistan, South Korea, Tajikistan, Thailand and Uzbekistan.

Neither Asia nor the Pacific has an over-arching regional body that sets or monitors human rights standards in the regions. However, this does not mean that there is no recognition of the people's right to information – it just comes from different fora. Rather than being recognized in human rights related treaties, the Asian and Pacific countries have generally recognized the importance of the right to information in other agreements.

One human rights charter in the region that includes the right to information is the revised Arab Charter on Human Rights which was adopted at the Summit Meeting of Heads of State of the members of the League of Arab States at their meeting in Tunisia in May, 2004. The Charter includes a specific right to information provision in Article 32(1) which states: "The present charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through and medium, regardless of geographical boundaries." Although the Charter has been signed by a number of countries, it has not received the required number of ratifications to come into force.

The Association of South East Asian Nations' (ASEAN) 1967 Bangkok Declaration states in its aims and purposes that it adheres to the principles of the United Nations Charter, including Article 19 of the Universal Declaration of Human Rights which includes the right to information.

The Asia Development Bank - Organisation for Economic Cooperation and Development (ADB-OECD) Anti-Corruption Initiative Action Plan, sets out members states' commitment to freedom of information in order

to: "ensure that the general public and the media have freedom to receive and impart public information and in particular information on corruption matters in accordance with domestic law and in a manner that would not compromise the operational effectiveness of the administration or, in any other way, be detrimental to the interest of governmental agencies and individuals...."[30]

The Pacific Plan, endorsed by leaders of 16 Pacific Island nations, has a good governance pillar which includes the requirement that states develop freedom of information mechanism. Recognizing the importance of sharing information, the Pacific Islands Forum Secretariat is in the process of developing its own internal disclosure policy which will provide people access to the information it holds.

8. The Recent Global Trends with Regard to Access to Information

Almost ninety countries around the world have implemented some form of legislation guaranteeing freedom of information. Although freedom of information laws have existed since 1766, when Sweden passed its *Freedom of the Press Act* (thought to be the oldest one), the last ten years have seen an unprecedented number of states striving to become more transparent and legislating on access to information. Continent-wise, four countries in Africa, seventeen countries in the Americas (including the Caribbean), nineteen countries in Asia, thirty seven countries in Europe and three countries in the Oceania have legislations pertaining to freedom of information. This is indicative of the positive world-wide trend in support of the right to information.

In Sweden, the *Freedom of the Press Act*, 1766 granted public access to government documents. It thus became an integral part of the Swedish Constitution, and the first ever piece of freedom of information legislation in the modern sense. In the Swedish language this is known as *Offentlighetsprincipen* (The Principle of Public Access), and has been considered valid since.

The Principle of Public Access means that the general public are to be guaranteed an unimpeded view of the activities pursued by the government and by the local authorities; all documents handled by the authorities are public unless legislation explicitly and specifically states otherwise, and even then each request for potentially sensitive information must be handled individually, and a refusal is subject to appeal. Further, the constitution grants the Right to Inform, meaning that even some (most) types of secret information may be passed on to the press or to the other media without risk of criminal charges. Instead, investigation of the informer's identity

is a criminal offence.[31] Sweden's *Freedom of the Press Act* required the disclosure of official documents on request. The *Freedom of the Press Act*, 1766, now a part of the Swedish Constitution, provides among other things that "every Swedish subject shall have free access to official documents". While Chapter Two sets out the exceptions to free access, however, in most cases, it provides for a right to appeal to courts in case of refusal to grant access.

Another country with long history of freedom of legislation is Columbia, whose *Code of Political and Municipal Organisation*, 1888, allowed individuals to request documents held by government agencies or in government archives.

The United States of America passed a freedom of information law in the year 1967; this was followed by legislation in Australia,[32] Canada[33] and New Zealand,[34] all in 1982. In Asia, the Philippines recognized the right to access information held by the State relatively early, passing a *Code of Conduct and Ethical Standards for Public Officials and Employees* in 1987.[35] A *Code on Access to Information* was adopted in Hong Kong in March 1995,[36] and in Thailand, the *Official Information Act* came into effect in December 1997.[37] In South Korea, the *Act on Disclosure of Information by Public Agencies* came into effect in 1998,[38] and in Japan, the *Law Concerning Access to Information Held by Administrative Organs* was enacted in April 2001.[39]

South Africa along with Angola, Uganda and Zimbabwe are the only African country to have actually passed freedom of information legislation. The 1996 Constitution of the Republic of South Africa is perhaps unique, not only in the breadth of its guarantee of freedom of information, but also in that it requires the adoption of national legislation to give effect to this right, within three years of its coming into force. The enabling legislation, the *Promotion of Access to Information Act*, came into effect in March 2001. It applies to a record of public body as well as a record of a private body, regardless of when the record came into existence. The right to access information privately held is an interesting feature of this law as most of the laws on right to information the world over cover only the information in the public domain.

Since the 1980s, the collapse of authoritarianism and the emergence of new democracies have given rise to new constitutions that include specific guarantees of the right to information and this has spurred this flurry of interest in transparent governance. Even older democracies such

as the United Kingdom saw wisdom in enacting a specific legislation on the right to information.

In most countries where large-scale administrative reforms have been carried out, emphasis has been laid on liberalizing the extent to which details of policy, performance and other information about governmental activities are made available to the general public.

International bodies such as the Commonwealth, the Council of Europe and the Organization of American States have drafted guidelines or model legislation to promote freedom of information. The International Bank for Reconstruction and Development (IBRD) also known as the 'World Bank', the International Monetary Fund (IMF) and various other donors are also pressing donee countries to adopt access to information laws as part of an effort to increase transparency and reduce corruption. Finally, there is agitation from media and civil society groups for greater access to government-held information and for more participation in governance.

Human rights treaties concerned with the protection of particular groups of people have also recognized the importance of right to information. For instance, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; the Convention on the Rights of the Child (CRC), 1989; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 all place an obligation on State Parties to guarantee them their right to access information from governments.

Access to Information is also a central element of the UN Convention Against Corruption, 2003, with Article 13 specifically recognizing the importance of information to facilitate public participation in the fight against corruption.

9. Conclusion

From the above discussion, it is obvious that there is a trend world-wide to have increasing openness in the system of governance. Various factors like changing socio-economic milieu, increased awareness of public about their rights, the need to have a fully accountable and responsive administration and growing public opinion which views efforts at secrecy as enhancing the chances of abuse of authority by the government functionaries have led to a demand for a greater transparency in government functioning. Though complete openness is neither feasible nor desirable, a balanced approach to openness in government functioning has to be devised.

In summation, we can see that there is no dearth of commitment by the international community to providing the public with the access to information about their policies and actions. Countries across the globe have recorded this commitment to transparency in both binding human rights instruments and in the declaratory statements. What has been slow in coming is the political will to translate this commitment into action - with only around ninety of the 193 nations of the world having access to information laws. Nevertheless, the power of information cannot be denied and it is evident that a movement to secure freedom of information has begun to spread worldwide. Slowly but surely the entire world community shall honor this basic right of every citizen and accord it the primacy it deserves.

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WHITE COLLAR CRIMES IN GLOBALIZED INDIA: AN ANALYTICAL STUDY

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Abstract

Main argument of this paper develops around five hypotheses. First, the corruption is not only one type of White Collar Crime (WCC) but it is the mother of all WCCs). Second, the state driven model of economic development in India till 1990 promoted corruption and thereby WCCs. Third, India has opted for the market driven model (1991) of economic development to address corruption and other WCCs but on the contrary it further fuelled corruption and thereby promoted all types of WCCs. Fourth, the response of Indian state to address this problem has remained inadequate. Fifth, the stringent laws and punishment can prove deterrent but not enough to deal with WCCs in India.

Introduction

White collar crime has always remained part and parcel of public life in India from ancient to modern period. Its complexity and intensity increased with changing nature of state, society and economy. While codifying the legal system of India during colonial period, the various laws were enacted to deal with corruption, which has been the mother of all White Collar Crimes. In post-colonial period more laws were enacted to check the problem of corruption but it has been continuing unabated. The State control over economic resources further accentuated this problem. State driven model of economic development suffered from corruption and thereby could not ensure the growth at fast pace that ultimately culminated into an economic crisis. Santhanam Committee reported in 1964 that the sudden extension of the economic activities of the government with a large armory of regulations, controls, licenses and permits provided new and large opportunities for corruption. Planned development considerably helped the bureaucrats to acquire administrative and political power, which expanded their role in the economy, permitting them greater opportunity to satisfy their self-interest[1]. Instead of correcting the course of state driven model of economic development, India abandoned it and opted for the market driven model of development. Logic given for this change was that the

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state control over the economic resources has not only promoted corruption but also resulted into economic mess in India. Market driven economy was considered as the best medicine to deal with this ailment because it was believed that market is the efficient and least corrupt institution. In this context, India had gone for globalization in early 1990s, which has further increased the complexity and intensity of WCCs in India.

Globalized India celebrated the role of corporate sector in its economy and gradually it relaxed the checks which state used to exercise in this sector. Consequently, corporate sector's role in the commission of WCCs has increased considerably. Lucrative financial terms, weak environmental regulations, low wage labour attract multinationals, which rarely contribute to the economic self-sufficiency of the developing nations[2]. Instead, developing economies like India serve as a ground for corporate criminality. Businessmen in collaboration with politicians are involved in commission of WCCs at massive level. Many scandals committed by them have caught the imagination of media and public in India during last two decades. The Satyam, 2G Spectrum, Fodder, Adarsh Society, Hawala, Commonwealth game, Urea, Securities, Sugar, Banking and Telecommunications scams are worth mentioning here. Tax and public sector fraud reduces government resources for health, education and welfare. The harmful activities of corporations endanger the safety of workers, consumers and passengers, and have a wider impact on public health and the environment.[3]

Mysterious disappearance of companies is a serious problem emerged in corporate sector. Disappearance of a large number of companies listed on Bombay Stock Exchange is a classic case in point. These companies registered on the stock exchange raised million of rupees from investors from their hard earned income and then run away. These WCCs were planned and carried out with the help of technocrats as the technology has changed the nature of WCCs on two counts: first, it has changed the operational course of all the professions and second, it has not only empowered the professionals to perform their job in better way but equally enabled them to indulge into the menace of WCCs by making the use of technology. Violation of foreign exchange regulations and import and export laws are frequently resorted to for the sake of huge profit as the commission of WCCs is always driven by greed rather than need. Such a scenario leads to a series of questions not only about the concept of WCC, laws to deal with it but also regarding the increasing role of corporate sector in commission of WCCs in India which is increasingly facilitated by the globalization and technology. Is the term White Collar Crime coined by Sutherland relevant in the present context? Does globalization accompanied by revolution in information technology facilitate corporate crimes in India? What are the laws to check the menace of corporate crime in globalized

India? How has the Indian state responded to the menace of WCCs? Can laws alone become deterrent to corporate crime in India? In this paper an attempt has been made to answer these and related questions.

Conceptual Riddle

Initially a sociological concept, "white collar crime" is today recognized as a legal term[4]. However, Edwin H. Sutherland coined this term first while addressing the American Sociological Society in 1939 but many scholars like W. A. Bonger (1916) E. A. Ross (1907) Sinclair (1906) and Steffens (1903) pointed out the misdeeds by businessmen and elites much before him. Edwin C. Hill laid emphasis on the criminal behaviour of elites in US Congress in 1872 in his paper titled *Criminal Capitalists*. Although, the idea of WCCs was conceptualized in the first half of twentieth century but, this problem is as old as human civilization because it has close relationship with human nature, which is selfish.

Sutherland defined WCC as a crime committed by a person of respectability and high social status in the course of his occupation. It was of critical significance because he conceptualised a crime which was wide-spread in every country but was not taken into cognizance for long time. Idea of WCC articulated by Sutherland is not exhaustive as it does not provide the meaning of WCC in totality. It was manifested when he himself modified his definition of WCC as "crimes committed by a person of the upper socio-economic class who violates the criminal law in the course of his occupational and professional activities". Further in his idea of WCC, he included crimes committed by corporations and other legal entities. His idea needs to be elaborated further on these counts. **First**, the identification of WCC with upper class does not explain the problem of WCC in its entirety because this crime is not only committed by the upper class but also by the middle and lower classes. There are many cases of WCCs that involved these classes, which substantiate this argument. For instance the food adulteration, corruption and the tax-evasion are crimes, which are not only committed by the upper class but also by the middle and the lower classes. Upper class based definition of WCC may be partially true for the analysis of this problem at macro-level but at the micro level the upper, middle and lower classes are involved in the commission of WCCs. **Second**, instead of focusing on the criminal, the crime should be focus of attention. While collaring the criminal, it appears that Sutherland has given more stress on criminal rather than crime. If at all the collaring is required, it should be of crime rather than criminal. The critical issues needs to be highlighted here, are crimes committed and the modus operandi used by the criminals in the commission of crime. **Third**, Sutherland articulated that WCCs are committed by the professionals while performing their

occupational and professional duties but an overview of WCCs indicates that these crimes are committed by the professional as well as non-professionals. The WCCs also include extra-vocational crimes. But this does not undermine the contribution of Sutherland who highlighted and conceptualized a severe problem confronting the human societies across the world. Whatever meaning, he has given to the menace of WCC, needs to be redefined in the changing context. Meaning of the WCC needs to be context, crime and modus operandi specific. It is very difficult to reach at a comprehensive definition of WCC. **Fourth**, generally, the corruption is considered one type of WCCs but it is not only one type of WCC rather the mother of all types of WCCs. Therefore the corruption needs to be understood in a broader context. According to Carl J. Friedrich, corruption is a kind of behaviour which deviates from the norm actually prevalent or believed to prevail in a given context. It is a deviant behaviour associated with a particular motivation, namely that of private gain at public expense. The private gain may be monetary one, and in the minds of general public it usually is, but it may take other forms[5]. All the types of WCCs are reflection and product of this deviant behaviour. **Fifth**, revolution in Information Technology (IT) has further added complexity to the nature of WCCs throughout the world. Increasing use of technology has changed the operational modes of almost all the professions and thereby it has empowered the professionals to do their job in more effective way in less time on the one hand and also provided them enough avenues to indulge into WCCs with the help of new techniques. Revolution in IT accompanied by the increasing use of electronic machine, computer and internet has increased the pace, scope, intensity and complexity of WCCs. Computer and internet have become the medium of WCCs. Technology has not only facilitated the professional efficiency by changing the nature of different professions but also that of white collar criminality. **Sixth**, globalization has led to the commercialization of economy, which has accentuated competition for resources, oligopolization of economic activities and rat race for quick, unearned and substantive profit returns. It has been driven by the Multinational Corporations (MNCs), International Bank for Reconstruction and Development (IBRD) popularly known as World Bank and International Monetary Fund (IMF). If IMF and World Bank adopt policies that violate the provisions of international human rights accords and covenants then they may be said to be complicit in a form of crime[6]. The United Nations International Covenants on Economic, Social and Cultural Rights (1966), holds that:

> All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.... In no case may a people be deprived of its own means of subsistence[7].

Globalization throughout the developing world including India has violated the aforesaid rights of people as it was imposed from the above in undemocratic way instead of evolving from below in democratic fashion. It has immensely benefited the MNCs and incurred huge loss to poor people especially the indigenous peoples in developing world. Richard Falk[8] argued that the logic of globalization is dictated by the well being of capital rather than of people. When the socialization practices of MNCs combine with the economic needs of transitional economies many WCCs like discrimination, sexual harassment, political violence, environmental crime and bribery take place[9]. The World Bank's perspective on law has been market focused and has failed to recognise the protection of human rights of settled indigenous communities as legitimate purposes of law[10].

Distinguishing White Collar Crimes from Blue Collar Crimes

WCCs are different from the Blue Collar Crimes (BCCs) on five counts: **first**, the former is more complex than the latter as it is the product of complex mindset than the BCCs. The BCCs are generally committed by the people having ordinary mental faculties, whereas the WCCs are committed by the people with complex mental faculties. **Second**, the WCC by and large is an urban phenomenon because of the complex nature, high cost of living and competition for resources, industrialization of economy, professional avenues and socially instigated desire to maintain and improve status in urban areas. Due to that the locale of WCCs is urban area as compared to BCCs, which is taking place both in rural and urban areas. **Third,** driver behind the commission of WCCs is different from that of BCCs. Motives behind the commission of BCCs are necessity, compulsion and ego, whereas the WCCs are committed out of greed and arrogance. **Four**, the BCCs are always committed by the individuals however the WCCs are not only committed by the individuals but also by the corporate houses and companies. **Fifth,** the social acceptability of WCCs exists but not that of BCCs in almost all the societies including Indian society. **Sixth**, the laws governing WCCs are soft in comparison to the laws enacted to deal with BCCs.

Besides this, WCCs are also distinguished from economic offences by arguing that the WCCs are committed by professionals like charted accountants, doctors, engineers, public servant, lawyers, educators and private employees in the course of their occupation, whereas, the economic offences are crimes committed by intelligent but devious individuals involving huge sums of public and government money[11]. However this distinction of WCCs from economic crimes is not convincing on two counts: first, the crime irrespective to its categorization like WCCs, BCCs and economic crimes are generally committed by intelligent people; second, damages/

impact of WCCs and economic crimes are same that is the huge loss to state exchequer for private gains.

Now-a-days many scholars acknowledge that a broad distinction can be drawn between white collar offences motivated by individual monetary gain and those that are more directly related to the survival or profitability of organizations. Distinction between occupational and organizational crime points to some major contrasts. Broadly speaking, occupational crime, a typical example of which is embezzlement, involves offenders, either individually or in groups, engaging in illegal or rule-breaking activities for personal gain at the expense of consumers, clients or employers[12]. Organizational crime, a typical example of which is the neglect of safety regulations, does not involve personal gain, but may be seen as being 'for the good of' the organization by enhancing profitability or efficiency. Whereas occupational crime more obviously involves intent and individual responsibility, organizational crime illustrates the diffusion of responsibility[13].

Globalization and White Collar Crimes in India

Origin of WCCs in India can be traced back to the colonial period but this problem is as old as Indian civilization. Kautilya talked about corruption in Indian society in his writings. Modern industrial economy evolved over a period of time has added complexity to the problem of WCCs in several ways because it resulted into a growing commercial nexus among various stakeholders like insurance, banking, stock and related corporate matters. India's New Economic Policy (NEP) with its major thrust on Liberalization, Privatization and Globalization (LPG) has resulted into a new mind-set and neo-capitalist culture which accentuated a voracious and instant appetite for accumulation of wealth. It has also transformed a largely traditional and hoarding society into consumer nation with great abandon and amorality. The opportunities for corruption have become abundant starting with a highly administered society to the current neo-liberal economy[14]. Paradoxically, the LPG reforms promoted the cause of private sector in Indian economy, which has proved more corrupt but the Prevention of Corruption Act 1988 does not apply to this sector[15].

Although, the problem of WCCs is not new but the number of cases of WCCs have increased considerably in India during the last two decades. Globalization is considered as a factor which accelerated the phenomenon of WCCs. It is driven by the corporate sector in general and Multinational Corporations (MNCs) in particular. Market pressures on MNCs to cultivate global dominance coupled with economic pressures on developing nations to participate more fully in the world economy lead to WCCs[16]. Nations with transitional economies do no stand alone resolving contradictions between ethical behaviour and economic growth. Multinational corporations

struggle with their own contradictions over the ethical versus the prudent in the pursuit of profit maximization[17]. Interestingly, one of the reasons why India had gone for globalization in 1991, was growing corruption in the public sector and thereby the corrupt nature of Indian state. Advocators of globalization argued that globalization will address the problem of corruption, which had happened to be the most rampant WCC in India. Long inventory of WCCs in globalized India can be traced back from Harshad Mehta scam to the recent Reebok incident. Indian banking and financial services sector has witnessed exponential growth in the last decade, which has not been without its pitfalls as this sector has witnessed a rise in the number of frauds. Delotte's "Indian Banking Fraud Survey-2012" shows that banks have witnessed a rise in the number of frauds in the last year and the trend is likely to continue in the near future.

Due to economic reforms, the entire banking sector in India has undergone a major change. Decrease of regulation, increased competition and increasing use of IT in Indian banks are making it possible to provide ease and flexibility in operations to not only customers but also to WCCs. In order to earn more profit, banks are trying hard to become one-stop financial supermarkets. Modes of committing frauds in banks have changed tremendously. Earlier banks were defrauded by the fraudster by depositing stolen, forged and altered cheques, fraudulently procuring loans by submitting fake documents etc. With the increasing use of technology in day to day operations of banks, the fraudster has become more technology savvy. The fraudster has shifted the focus to technology driven products like wire transfers, internet, mobile and correspondent banking etc. Technology has increased the reach of fraudster as he can sit in one corner and commit crime in the other corner of country. However, technology has provided new tools and avenues for fraud, the traditional frauds committed by employees and fraudster continues unabated. According to Deloitte Survey titled *India Banking Fraud Survey-2012* nearly 37% of the respondent indicated that there was collusion by employees in fraud cases identified by them. In its report, this survey indicated that India's public sector banks have reported frauds amounting to almost Rs. 9000 crores to the Reserve Bank of India (RBI). The report submitted to the Lok Sabha indicates that the amount involved in these frauds is a whopping Rs. 8,848 crores and the cases registered are nearly 11,313 during the last three years. State Bank of India (SBI) tops in list of bank frauds with 2195 cases valued at Rs. 1221 crores.

Besides banking sector, the telecommunication sector has been remained notorious for increasing WCCs. The 2G Spectrum is classic case in point, which has incurred loss to the tune of 1 lakh 76 thousand crores to state exchequer. Crime of this magnitude cannot take place without the

collusion between politicians, bureaucrats, independent regulators and corporate executives acting as partners. This sector has always remained in news because of its various scams- involving various Union telecom ministers. Paradoxically, frauds in telecom sector are costing exchequers hundreds of crores of rupees annually, but the action against the culprits has to be taken under the Indian Telegraph Act 1885. Maximum punishment provided under this law, is three years imprisonment with a fine of rupees one thousand only. Imagine a culprit sentenced to a fine of one thousand rupees for causing loss of a few hundreds crores[18].

Globalization has created the favourable environment for WCCs, not only by changing the nature of economy but also that of State as well. Neo-liberal Indian State has not only loosened its control over the private sector but also collaborated with and facilitated the big businessmen and corporate houses to establish their hold over the resources of society in the name of growth and development. In neo-liberal state and market friendly economy, everything is commercialised including politics. Politics is no more a service rather it has become a business enterprise in which the politicians and big business houses invest money during the elections and reap the dividends once the politicians and political parties to whom they financed in election voted to power. The corporate houses, which sponsored the election of different political parties, are actually setting the agenda of politics and shaping the policies of the state. During the last couple of years, the media has reported various scams and Income Tax Department and Enforcement Directorate conducted raids in houses and business premises of businessmen but the nothing has been heard about their persecution because these business tycoons are operating hand in glove with political elite-as they have convergence of interests. Political elite support them for funds which, they receive from them for elections and also for filling up their personal coffers and in lieu of that they are compensated by accommodating their interests while formulating the policies of the State. Apart from the political elite, the state officials including enforcement personnel dealing with these WCCs are also bribed. Interesting one WCC is giving birth to the other WCC and the state machinery is being used for private gains by the vested interests. It amounts to WCCs, which have incurred the huge and irreparable loss to Indian economy.

Interestingly in India, the globalization has been accompanied by the coalition governments abet a great deal of corruption. To ensure their survival, the coalition governments have been succumbing to the pressures of their partners who have been indulging into the politics of blackmailing and opportunism. They are getting political mileage by threatening the coalition dispensation of the withdrawal of their support. This is how the NDA and UPA coalition dispensations India have blackmailed by their coalitions partners for their partisan interests.

State Response: Neither Adequate nor Appropriate

When the Indian Penal Code was drafted and enacted one and half century ago, the punishment was provided for cheating (Section 420), criminal breach of trust (Section 409), counterfeiting of coins (Section 232), making and selling of adulterated drugs (Section 274 & 275), fraudulent use of weights and measures (Section 265), counterfeiting government stamps and their sale (Section 255 & 258), making and selling of fake goods (Section 481 to 489), counterfeiting of the currency led to addition of Section 489-A and B in the Indian Penal Code in the year 1955[19].

In the post-colonial period, India passed the law to check the problem of corruption as a WCC. In 1947, the Prevention of Corruption Act was enacted to deal with corruption, which was subsequently, replaced by the Prevention of Corruption Act, 1988. Under this Act, it is criminal offence to possess wealth disproportionate to the income of public servant. It was essential because corruption is a mindset wherein all sort of WCCs are deeply embedded. Committee on the Prevention of Corruption in India popularly known as Santhanam Committee in its report (1964) observed that:

> The advancement of technological and scientific development in contributing to the emergence of mass society with a large rank of file and a small controlling elite, encouraging growth of monopolies, the rise of the managerial class and intricate institutional mechanisms. Strict adherence to high standard of ethical behaviour is necessary for the even and honest functioning of the new social, political and economic processes. The inability of all sections to appreciate this need in full results in the emergence and growth of white collar and economic crimes renders enforcement of all laws, themselves not sufficiently deterrent, more difficult. Tax evasion and avoidance, share-pushing malpractices in the share market and administration of companies, monopolistic control, usury, under-voicing or over-voicing, hoarding, profiteering, substandard performance of contracts of constructions and supply, evasion of economic laws, bribery and corruption, election offences and malpractices are some examples of white collar crime.

On its recommendations, the Central Vigilance Commission (CVC) was set up in 1964, which was accorded statutory status through the Central Vigilance Commission Act 2003 enacted on the direction of the Supreme Court of India given in its judgement in Vineet Narain and others versus Union of India popularly known as Jain Havala case (1998) 1 SSC 226. Public interest litigation was filed by journalist Vineet Narain and two

advocates of the Supreme Court in October 1993 complaining that Central Bureau of Investigation (CBI) has not done its legal duty honestly and sincerely by not properly investigating havala transactions involving crores of rupees. Consequent upon arrest and interrogation of a member of terrorist organisation, raids were conducted by the CBI on the premises of Surender Kumar Jain, his brothers and relatives and businesses. Along with Indian and foreign currency, the CBI seized two diaries and two notebooks from the premises. They alleged that these diaries and notebooks recovered by CBI during investigation reveals payment to large number of politicians and bureaucrats, but no action was taken against them and prayed for intervention of the Court in the interest of justice. The three Judge Bench observed "the holders of public offices are entrusted with certain powers to be exercised in public interest alone and therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and rule of law vindicated".

Deliberating on adverse effects of corruption, it further observed, "the adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effects on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to the underdeveloped countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant". The Court held that everyone against whom there is reasonable suspicion of committing a crime has to be treated equally and similarly under law and probity in public life is of great significance. The constitution and working of the investigating agencies revealed the lacuna of its inability to perform whenever powerful persons were involved. The Court directed that the CVC shall be given statutory status. The CVC shall be responsible for the efficient functioning of the CBI. While Government shall remain answerable for the CBI's functioning. The Central Government shall take all measures necessary to ensure that CBI functions effectively and efficiently and is viewed as non partisan agency. The CVC shall have separate section in its Annual Report on CBI's functioning after the supervisory function is transferred to it. The CVC advises the Government of India (GOI) on all matters regarding the integrity of administration apart from exercising superintendence over the working of the CBI, the principal investigating agency of India in anti-corruption matters- and also over the vigilance administration of various ministries and other organization of the

GOI. In spite of that the frauds and scams have been taking place in India. Every year some scams are unearthed but many of them go unnoticed.

The CVC is a strong advocator for tightening law and procedure with a view to enhance deterrence of anti-corruption measures in India. Two significant moves of CVC deserve attention here. First, is to request government to notify under the Benami Transactions Prohibition Act 1988, how to confiscate benami property and how to empower the CVC in this regard. Secondly, the CVC has forwarded to the government for its acceptance- draft legislation called the Corrupt Public Servant Forfeiture of Property Act, prepared by the Law Commission. If these two recommendations of CVC will be accepted by the government, are expected to give a new thrust to the battle against corruption in the civil services[20].

Although, a large number of occupational scams/economic offences have been detected in India during the last two decades but the conviction rate is low and sentences awarded are mild or non-deterrent in nature. The classic case in this point is of Harshad Mehta's[21] in which there was illegal transfer of a large sum of money. The National Housing Bank (NHB) lent a sum of Rs. 40 crores to UCO Bank, Mumbai on April 6th, 1992, which was actually credited in the account of Harshad Mehta in UCO Bank. The transaction between the NHB Bank and the UCO Bank was in fact between the NHB Bank and Harshad Mehta. According to the rules the NHB could not have advanced loans directly to the brokers[22]. Although a huge amount was involved in the transaction but the sentences given to the accused involved in the case are very mild. The main accused Harshad Mehta died while the case was pending, but with regard to K. Margabanthu who was Chairman and Managing Director of a public sector bank when he committed the offence was sentenced to undergo only six months rigorous imprisonment and was ordered to pay a fine of Rs. 1,00,000/- and in default to pay fine to undergo simple imprisonment of two months. It took almost 18 years to decide the said case. Slow and complex judicial procedure is one of the reasons, which rather than deterring the potential offenders, encourages them to indulging into WCCs. Although the Supreme Court was of the opinion of giving a harsh sentence to Margabanthu who played key role in the entire transaction, but considering his age and health condition took a lenient view in awarding the sentence. Likewise the other accused in this case were also given mild sentences.

Aforesaid account indicates that the Indian state has remained insensitive towards corruption and corrupt mindset. Civil society movement against corruption is the outcome of slumber in which the Indian State has gone on this issue long back. Indian state has failed to establish an effective institutional mechanism to address this problem. Appointment of Lokpal

was recommended by the First Administrative Reform Commission (ARC) in 1969 and was repeated by the Second Administrative Reform Commission in 2007, but nothing concrete has come out. A useless debate goes on whether the office of the Prime Minister be subjected to the ambit of Lokpal. This has been happening since long because there is consensus in the political class across the party lines either not to establish this institution or if at all there is compulsion to establish it then establish a week and crippled Lokpal, which cannot make its presence felt. It has been happing because majority of the members of political class have become corrupt and have been using their official/public position for their private gains. Their fear is that if effective Lokpal will come into being they will be either caught or the chances of corruption for them will be minimized.

Problems in dealing with WCCs

To tackle the phenomenon of WCCs is a difficult job in India and elsewhere due to various reasons. First, the lack of agreement on concept of WCC, has caused confusion in the courts when offenders are indicted and punishment strategy is considered and administered[23]. Second, however, white collar offenders are prosecuted less often and punished less severely than the blue collar offenders but the formers always damaged society, economy and polity more than the latter. White collar offenders are widely perceived as deserving little or no sympathy because of their status, wealth and education[24]. Third, one thing noticed in India is that the laws made to deal with WCCs are not keeping pace with the changing nature and magnitude of the said crime. Most of the laws made to check the menace of WCCs in India are obsolete and soft. Besides this, no amount of legal restrictions would help so long as the society itself is tolerant towards corrupt. Fourth, however, the track record of government to take action against corporate houses that have broken law is very poor in India. In telecom sector alone, there are many cases of blatant legal violations that remain unprosecuted and violators walk away scot free[25]. Fifth, globalization has expended the space for private sector in Indian economy since last two decades, which is not having the internal mechanism to report frauds therefore many frauds in this sector remain unreported. The number of frauds and bribe cases reported in the private sector is one-tenth of the cases reported in the public sector in India because, the latter is having inbuilt mechanism like Comptroller and Auditor General (CAG) to detect financial frauds. Moreover, the lack of criminal intent argument is given by the white-collar defendants[26] to save themselves from criminal proceedings.

Conclusion

To sum-up, it is articulated that the WCC is a widely growing phenomenon in India. Its scope, rate and reach have been increasing continuously irrespective to this fact that state has made certain laws and established certain institutions to address this problem. The WCCs could not catch the imagination of Indian society, the way the BCCs caught, however the losses incurred by the former are more than the latter but still some sort of tolerance and soft corner regarding the WCCs prevails in public imagination. The state functionaries and agencies who are supposed to check this menace are either soft in handing WCCs because either they are corrupt or collaborating with white collar offenders- as most of them are hailing from the same class. Nature and magnitude of WCCs in India have changed beyond imagination but the laws to deal with them are either obsolete or old. The conviction rate is almost negligible. Most important reason for corruption as WCCs in India till 1990, was State control/ regulation/intervention in economy or economic matters apart from the aforesaid factors. To address this problem, India has gone for globalization. It was argued that the reduction in the role of state in economic matters and increased space for the private sector in economy would automatically reduce opportunities for WCCs, however the reverse has happened. An overview of scams, frauds and corruption cases detected since liberalization and privatization of Indian economy substantiates this argument. These LPG reforms increased the role of private sector in Indian economy which has proved more corrupt and the Anti-Corruption Law does not apply to this sector. Increasing insensitivity of the Neo-liberal Indian State regarding growing corruption has been giving shape to anti-corruption movement in India. Anti-corruption laws need radical reforms to deter corruption in India but lack of political will is a major stumbling block here, thanks to the consensus within political class across party lines and coalition politics. Multi-pronged strategy and effective institutional mechanism are required to deal with this widespread problem.

Besides this, it is also inferred that no amount of legal restrictions would help so long as the society itself is lenient and tolerant. Actually, the WCCs are required to be dealt both at individual as well as society level because this issue is the reflection of human nature. Materially the human societies have progressed tremendously but their mental and spiritual growth could not keep pace with their material growth. Increasing dichotomy between the material and spiritual growth resulted into the degradation of human values and ethics. It has happened because the unequal material growth created a social environment which instigated people to indulge into inhuman, unlawful and unethical practices to accumulate wealth. This resulted into the menace of WCCs, which is widespread throughout the society and no country is immune from this problem.

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US AF-PAK STRATEGY: CHALLENGES AND IMPLICATIONS FOR INDIA

*Shaveta Sharma**

Abstract

This paper unfolds into six parts. Part first introduces the subject under discussion apart from problematizing the same. Part second elaborates the factors leading to the framing of US Af-Pak strategy. In part third, India's response to Af-Pak strategy is discussed. The US policy to balance India and Pakistan in its Af-Pak strategy is figured in the subsequent part. The courses adopted by the US while pursuing its Af-Pak strategy so far and the courses which the US would probably adopt in that strategy in the days to come, are discussed in part fifth. The last part carries the concluding observations.

1. Introduction

In the present scenario, the menace of terrorism has engulfed the whole world. This menace has been continuing more severely in the 21st century than before. However, the 9/11 terrorist assault on the World Trade Center and the Pentagon, changed the overall situation especially in the South Asian region. It became clear that in spite of being a superpower, the US is not immune from the threat of terrorism. Some US counterterrorism experts, notably Bruce Hoffman, turned his attention to the shifts under way from secular to religiously based terrorism, from state- sponsored terrorist groups with traditional structures to networks and from targeting Americans abroad to targeting them in the United States.[1]

In the history of US, such a grave physical assault was never posed to its security. There was hardly any opposition to the US decision to attack Afghanistan when the Taliban, which controlled 90 percent of the country's territory, refused either to hand over Osama Bin Laden – the head of Al-Qaeda- for trial or to expel him.[2] US termed terrorism as the anti- thesis of freedom. So, as a self- proclaimed morally and politically superior country, the United States could remain

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uncontaminated only by abstaining from involvement in a corrupt world or, if the world would not leave it alone, destroying the source of evil.[3]

As a consequence of the catastrophic event of 9/11, Pakistan has again grabbed the center- stage due to its important strategic position and the Indo- US bi-lateral relations were put in the state of "stand-by". Pakistan had lost much of its importance to US in the post- cold war era, but now overnight, became the most trusted ally of US. US declared Pakistan as the frontline state in its "Global War On Terrorism (GWOT)[4] in 2001 with a huge amount of economic and military aid and also conferred on Pakistan, the status of Major Non-NATO Ally (MNNA)[5] in 2004. This marked change in US policy leads to a series of questions. What were the considerations behind Obama's declaration of Af-Pak strategy? How has India responded to Obama's Af-Pak strategy? Why do US want to balance India and Pakistan in Afghanistan? What course of action should US follow in order to make its Af-Pak strategy a success? This paper seeks to address this and related questions.

2. Obama's Af-Pak Strategy

On 27th of March 2009, the US President Barack Obama revealed his 'Af-Pak Strategy'. In this strategy, Pakistan is bracketed with Afghanistan because its tribal areas alongside the Afghan border are perceived by the Obama Administration to be a safe haven for Al-Qaeda and its terrorist allies, fueling Afghan insurgency and threatening to increase international terrorism.[6] One of the first premises on which Obama has developed the strategy is his realization of the difficult enterprise of going solo in Af-Pak in fighting terrorism and religious fundamentalism.[7] Obama stressed that the success of war on terrorism in Afghanistan would depend mostly on US' approach of handling Pakistan. Main features of Af- Pak strategy can be highlighted as:

- US again stressed the fact that there is a deep connection of Pakistan with the activities of Al- Qaeda and many plans are set up by Al-Qaeda to create chaos and damage in US.
- Besides military aid, Obama also announced non- military financial aid worth US$ 1.5 billion – annually and for next five years to Pakistan under Kerry-Lugar Bill.
- Pursuing its policy of 'Carrot and Stick', US again stated that Pakistan must prove her sincerity and commitment to uproot the nexus of Al-Qaeda and Taliban from its soil, only then she can expect more financial aid from US in the coming years. According to Obama- 'no more blank cheques would be

provided to Pakistan.' In other words, Obama Administration attached aid with accountability to Pakistan.

- Stress laid on adopting the regional approach to tackle the menace of terrorism in Af-Pak region and for this particular goal, a new Contact group on Af-Pak region proposed to be established. This group includes all the members of NATO, Central Asian Republics, Gulf Countries, Iran, India, Russia and China.
- Obama's Af-Pak strategy also coined a new approach to tackle the Taliban i.e. by bifurcating it into two groups – 'Moderate Taliban' and 'Extremist Taliban.' US unveiled its strategy to engage the moderate Taliban into the dialogue process in order to wean this section away from the extremist one.
- Obama also stated that US wants to develop cordial relations with India and Pakistan and also looks forward to normalization of relations between the two regional nuclear powers.

On 1st December 2009, Obama announced a surge of troops into Afghanistan in order to accelerate the efforts to accomplish the goals announced under Af-Pak strategy. The majority of Afghans does not like Taliban and here lies the opportunity for US and her allies to deal with Taliban. There is a need for the US to take into confidence the local people of Af-Pak region both by fastening the reconstruction efforts of the trouble-torn region and also by encouraging and engaging these people into the mainstream political decision making process. Another aspect of this strategy was to engage Iran as a partner in war on terrorism. Iran has always been remained a stake holder in war against terror as she has also been fighting and resisting the menace of terrorism on its soil. But given the divergent issues between Iran and US on nuclear program of the former, there is still a big question mark on the possibility of this engagement.

The pro-Islamic statements and speeches from Quran preached by Laden aimed to infuriate the anti- American sentiments among the Muslim community and to invoke a sense of self- confidence and proud for their culture and traditions. The US war against terrorism was started to be misjudged and interpreted as a war against Islam and their esteemed culture. All this seemed to be working on the thesis of Clash of Civilizations as prophesized by Samuel Huntington. There is no incompatibility between Islam or any other culture and democracy: the example of political pluralism in one country will be emulated.[8] US tried to arrest this rhetoric as is visible

in the speech delivered by President Obama at Cairo University on 4th of June 2009 which read:

…I made clear that America is not- and never will be- at war with Islam. We will however, relentlessly confront violent extremists who pose a grave threat to our security…The situation in Afghanistan demonstrate America's goals, and our need to work together…We did not go by choice, we went because of necessity…The sooner the extremists are isolated and unwelcome in Muslim communities, the better we will all be safer…[9]

3. India's Response

The September 2001 terrorist attacks on twin tower in USA provided an opportunity to India to offer United States "full cooperation and the use of India's bases for counterterrorism operations, the offer reflected the sea change that has occurred in recent years in the US-India relationship, which for decades was mired in the politics of the Cold War and India's friendly relations with the Soviet Union.[10]India's instantaneous response to US war on terrorism was not an act of Tokenism but was the manifestation of fulfilling the goal of rein-in terrorism- regionally and globally.

In some quarters of India's foreign and security policy- making community the renewal of the US-Pakistan nexus generated fears that the nascent Indo- American relationship would now suffer.[11] India criticized this dual policy posture of US on terrorism because on one hand, it has declared war on terrorism under its "Operation Enduring Freedom"[12] and on the other, it was engaging Pakistan as a frontline state, which has been responsible for patronizing many terrorists outfits and exporting cross-border terrorism to India. Pakistan had played a major role in bringing the Taliban to power, motivated by the desire to extend its influence over Afghanistan.[13]

After 9/11, US established a global surveillance system against terrorism and almost all the countries of the world extended their instant support. India also felt very enthusiastic as she has been viewing the problem of Pakistan sponsored cross-border terrorism to India, from the perspective of a part of the problem of global menace of terrorism. As C. Raja Mohan observed:

> Neither of these could have ever been accomplished by India alone…India did not have the power to persuade or compel Pakistan to either give up cross- border terrorism or adopt a fundamentally new national course…It needed the full might of the world's sole superpower to nudge Pakistan into at least promising to embark on a different path.[14]

No doubt, there were reasons for India to appreciate the efforts of US of banning many terrorist organizations like Lashkar-e-Toiba (LeT), Jeish-e-Mohammad (JeM), Hizbul Mujahedeen (HM) etc and tried to starve these organizations of funding. But to India's dismay, there has been a huge gap between what India expects from US in its war against terrorism and what US has been able to deliver actually. Pakistan has been remained the main spot of disagreement between the two in the context of war on terrorism. Pakistan had always been exposed before the world regarding its patronizing of many militant outfits and it is under the close scrutiny of the international community because of its active role in the proliferation of nuclear technology to the "rogue states". Details of the activities of the network, as published even in the Pakistani media, clearly show that it was not a rogue operation by one man with a small number of accomplices without the knowledge of the military- intelligence establishment.[15] The charade created by Pakistan was tacitly accepted by US on the issue of nuclear black marketing run by Abdul Qadir Khan. The dubious umbilical connection between the Pakistan Army and its secret agency ISI in nurturing and infuriating the terrorist activities in India have been proved many times.

India's viewpoint regarding the US Af-Pak strategy is divided. Although, India has many reasons to feel enthusiastic on this new strategy like the inclusion of regional approach, conditional funding to Pakistan and due recognition to the principles of United Nations yet India is apprehensive about some issues relating Af-Pak strategy. First issue of apprehension is the liberal US non- military aid to Pakistan would be used by Pakistan for anti- India activities. Indian Foreign Secretary, Shiv Shanker Menon commented on this as 'financial aid given to Pakistan is just like to give alcohol to an alcoholic and drugs to a druggist'. Second, although, India appreciated US recognition of connection between Pakistan and Al-Qaeda, yet India now wants US not to follow the 'Carrot and Stick policy' but harder sticks and less carrot policy viz-a-viz Pakistan. Pakistan has been remained the single source of Afghan instability so long as the border sanctuaries remain.[16]

Third, India criticized the US newly coined policy of 'Moderate Taliban.' India argued that there is no such thing like Moderate or Extremist Taliban. It is just the two sides of the same coin and a strong and non-discriminatory approach is required to uproot this evil permanently. Former Indian Ambassador, M.K.Bhadrakumar while writing on separation between Moderate and Extremist Taliban, has quoted the words of former Taliban

Ambassador to Pakistan, Mullah Abdul Salam Zaeef that 'distinguishing between the hardliners and the moderate Taliban will not be acceptable to anybody because it is like telling two brothers that you love one and want to play with him, while you want to kill the other one.[17] Although India initially felt enthusiastic when military rule was replaced by civilian rule in Pakistan yet the apprehensions remained there regarding the ability of Pakistan to curb the anti-Indian activities provided the deep-rooted nexus of military rule, leadership, ISI, Islamic radicalists and terrorists. There is a need to minimize the influence of army on shaping the foreign policy of Pakistan- as the agenda of army and ISI has always got blurred in the national interests of Pakistan. One more cause of concern for India is that even the India-friendly Bush Administration was never eager to see India expanding its security role in Afghanistan and constantly reminded New Delhi of Islamabad's concerns, that India should limit itself to economic reconstruction.[18]

Here one question needs to be answered that If India aspires to become a global power then why she has been expecting that US would lead the war on terrorism in Kashmir on her behalf? Every country bounds to follow only that course in international relations by which she would accomplish the goals of her national interests. Here India needs to understand that its security concerns primarily are of her own and she has to counter this menace of terrorism by relying on her own potential. No outside power- whether global or regional, could be expected to lead India's war against terrorism in Kashmir.

4. Balancing India and Pakistan in Afghanistan

In Af-Pak strategy, Obama Administration articulated that since Pakistan is the part of problem of terrorism in Afghanistan, it can be part of the solution as well. Although, Pakistan is a crucial ally of US in war against terrorism yet it is also a breeding ground of Islamic radicalism, cross- border terrorism and nuclear black marketing. In order to have assured support of Pakistan for the successful completion of its Afghan war, the US, however, sees itself being blackmailed and duped by Pakistan.[19] Afghanistan needs substantial and long-term outside assistance to manage its own security, and Washington should actively support the process in the knowledge that the greatest danger of an Afghan collapse might be the radicalization of large parts of Pakistan, along with the re- Talibanization of Afghanistan.[20] Washington does not want disorder here; it would like to dry up the swamps that breed terrorists.[21]

India and Pakistan tried to further their respective objectives in the wake of US led war on terrorism. By standing behind the US, besides championing their cause against terrorism, which was of course genuine, India also tried to enlist America's support in its own anti-terrorist campaign in Kashmir.[22] On the other hand, Pakistan wanted to exploit the opportunity in the wake of GWOT, to engage US to play a mediatory role in solving the entangled issue of Kashmir. On her part, Pakistan is not very comfortable with Indian active involvement in the developmental programs in Afghanistan. The Afghanistan-Pakistan Trade Transit Agreement, which was finalized on 19 July 2010 in the presence of US Secretary of State, Hillary Clinton, while allowing Afghan trucks to carry goods to the Wagah border for onward dispatch to India, does not allow these trucks to carry back Indian goods to Afghanistan. [23] A central aim for Pakistan's military is to make sure that the future political make- up in Afghanistan does not allow India to expand its security or even development footprint.[24]

After the Mumbai attacks, there has been a rising wave of anti-rapprochement in India against Pakistan. India made clear that terrorists manufacturing in Pakistan must be stopped if credible peace- dialogue is to be made a reality. Indeed, that dialogue is dependent on Pakistan actions against terrorists groups who are operating in India from Pakistan's soil. India's Prime Minister, Manmohan Singh, told reporters that dialogue could resume when the 'terror machine' in Pakistan is stopped.[25]In India's opinion, there was a similar parallel between the ways the Taliban provided a safe haven to Bin Laden and the way Pakistan had harbored terrorists who operate in Kashmir.[26]The Indian response and Pakistan's counter-moves led the United States to conclude that war was all but imminent in the region.[27]

The madrassas in Pakistan are preaching fanaticism under the garb of religious teaching. As there is a complex nexus between these madrassas, the religious extremism and international Islamic funding, something like a 'Jihad International Inc.' has emerged, which is extremely difficult to do away with.[28]Therefore, all eyes are focused on America's actions against Pakistan because Iraq was also attacked on the similar grounds. But, the signals coming from the US are once again indicating a soft attitude towards Pakistan because of its help as a strategic partner to US led war against terrorism.[29] This dual policy posture adopted by US towards Iraq and Pakistan is a big source of discontent in India. Obviously, India has a just reason to believe that its security concerns viz-a-viz Pakistan, are being overlooked by US. Although the South Asia Association for Regional

Cooperation (SAARC) has adopted a counterterrorism protocol similar to that of the United Nations but trust among South- Asian nations is low on counterterrorism- related issues.[30]

The US policy to engage India and Pakistan simultaneously created a critical situation for its policy- makers in terms of striking a balance between its new- found strategic partner India and the indispensable partner Pakistan in the context of global campaign against terrorism.[31] But, credit goes to Bush Administration for pragmatically handling these two "uneasy partners" very cautiously with proficiency. In developing agendas for cooperative action with other main centers of power in Asia, the US appears to have concluded that, measured by any indices; India is undoubtedly the pre- eminent and pivotal power in South Asia with corresponding interests in maintaining regional stability.[32] US could neither afford to isolate India nor wanted to quiet the wave of normalcy with India and for pursuing this goal; US started to give practical shape to its de-hyphenation strategy by labeling Pakistan as a major non- NATO ally in 2004 and simultaneously declaring NSSP with India in the same year.

There is also a second dimension to US war on terrorism. A strong vocal section charged US policy against terrorism just a pretext for establishing its control over the vast resources of Gas and Oil in the South and Central Asian region. Pipeline politics will certainly come to the forefront, but it would be wrong to view the American involvement in the Caspian Sea exclusively through the prism of oil and gas.[33] To establish its control over the hydro carbon resources of South and Central Asia is the long term objective of US policy regarding GWOT apart from the immediate objective of punishing the Al-Qaeda activists who were responsible for 9/11 attacks on US.

5. Future Course for US

Obama Administration calculated that the success of Af-Pak strategy would depend profoundly on its policy of handling Pakistan. The objectives of US and Pakistan in the Af-Pak region do not converge as US wants to see a stable, democratic and moderate Afghanistan but Pakistan aspires for weak, pro-Pakistan political establishment for gaining strategic depth in Afghanistan. It is imperative for US to engage the military and civilian leadership of Pakistan in order to make its Af-Pak strategy a success. Given the pivotal place of Pakistan in this US policy, many scholars started

suggesting renaming Af-Pak strategy as Pak-Af strategy. For accomplishing this objective, US should concentrate on the following course:

- As US announced to withdraw its troops from Afghanistan by 2014, with only 10,000 US soldiers would continue to stay there, still it needs a well-conceived and tactical implementation of this strategy. US should cautiously implement this strategy in post 2014 so as to avoid any chance of re-Talibanization of Afghanistan and for that matter, the radicalization of Pakistani society.
- US should adopt Neo-Nixon approach here if it wants to get assured success in its war on terrorism in general and Af-Pak strategy in particular. Although US pre-dominance is inevitable in this region at present yet it would be more fruitful for US to strengthen the regional powers and allow them playing an active role to resolve the regional issues by themselves.
- Besides accelerating the development and reconstruction efforts, US should strive hard to promote and establish credible democratic structures in Afghanistan. It must try to take into confidence the local people of all the religious sects living in Afghanistan for penetrating deep into its social, economic and political structures as it would also help US to change its image of being an anti-Islamic country throughout the Islamic world.
- To train and strengthen the Afghanistan National Army for dealing with the insurgents and terrorist, particularly, post US withdrawal in 2014, apart from repositing more faith in her NATO allies and other like-minded countries that are also fighting against terrorism. Along with this, instead of exporting western experts to Afghanistan, the local civilian strata should be trained in good governance and crisis management mechanisms.
- It has to frame a more credible policy for breaking the vicious chain of narcotics, terrorists and illegal arms-trading. In addition, it should also protect the nuclear arsenals of Pakistan and stop the proliferation of nuclear technology and material either to states or non-state actors.
- US should promote domestic stability in economic, political, social and religious spheres in Pakistan. Real and promising democratic establishment in Pakistan must be set up in order to marginalize the influence of Islamic fundamentalists. All the military and non-

military aid to Pakistan by US should be made conditional and accountable. The US policy regarding Pakistan should be changed from 'carrot and stick' to 'harder sticks and less carrot policy'.

- The meetings of US-Pakistan-Afghanistan trilateral forum should be made an annual event. US should engage the political leadership of Pakistan in policy-making regarding Afghanistan.
- To promote bilateral composite dialogue between India and Pakistan, as it would be a determinant factor for establishing peace and stability in the South-Asian region.

6. Conclusion

In the end, it can be concluded that although, the mastermind of Al-Qaeda, Osama Bin Laden has been killed in May 2011 in operation 'Geronimo' doctored by US, yet the task of uprooting the terrorist network globally has not been accomplished. US has been criticized for her leniency towards Pakistan in the context of war on terrorism but how much credibility Pakistan actually had in the eyes of US got amply testified by the fact that US neither gave any indication nor shared a bit of information with Pakistan before launching operation to kill Osama, who was hiding and residing in Abettabad in Pakistan from the past many years. India and US are concerned about the possible threat of proliferation of WMD into the hands of terrorists, who are not obliged to follow the rules of nuclear deterrence.

Further, there is an explicit correlation between Islamic fundamentalism, fanaticism and terrorism. It will be suicidal to American security if she would continue with this unilateral and self- serving perspective on terrorism and other global issue as it would be tantamount to result in anti-Americanism throughout the world. This war against terrorism should neither be confined to any particular region or country of the world nor it should be seen specifically as US war on terrorism, but, if the problem of terrorism is to be rooted out, a worldwide approach and collaboration is warranted. US must take into consideration all the pros and cons before deciding to withdraw its troops from Afghanistan as any small miscalculation could again tend to result in Talibanization of Afghanistan as happened after the withdrawal of the Soviet forces from Afghanistan in 1989. And this time, the risk is doubled as there is a challenge before US how to tackle Pakistan apart from Afghanistan as the former is also increasingly getting radicalized and Talibanized.

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LIBERTY, EQUALITY AND FRATERNITY UNDER INDIAN CONSTITUTION: JUDICIAL ARTICULATIONS

Dr. Ajit Singh Chahal[*]

Abstract

"Positively, my social philosophy may be said to be enshrined in three words: Liberty, Equality and Fraternity. Let no one; however, say that I have borrowed my philosophy from French-Revolution. I have not. My philosophy has its roots in religion and not in political science. I have derived them from the teachings of my master, the Buddha. In his philosophy, liberty and equality had a place; but he added that unlimited liberty destroyed equality, and absolute equality left no room for liberty. In his philosophy, law had a place only as a safeguard against the breaches of liberty and equality; but He did not believe that law can be a guarantee for breaches of liberty or equality. He gave the highest place to fraternity as the only real safeguard against the denial of liberty or equality or fraternity which was another name for religion."

DR. B. R. AMBEDKAR[1]

Introduction:

Peace, harmony and brotherhood among the different castes, creeds and races of the society were promoted by *Emperor Ashoka* by administering *Panchsheela* in ancient time. *Emperor Ashoka* followed the *Buddha's* teachings on this issue. Truth, Non-violence, Peace, Justice, Liberty, Equality and Fraternity are the basic principles of *Buddha Dhamma* as propounded by the *Buddha*. It is universal truth that the *Buddha's* teachings are manifold and multi-disciplinary and not only covered all the social stratum in Ancient India but it also has been applicable and relevant all through the ages and being so even in this contemporary world of Globalization and advance Technology.

Present Indian Judicial System is based and controlled by the Constitution of India which is known as '*the Law of the Land'*. The Preamble of the Constitution of India itself secure to all its citizens Justice, Liberty, Equality, Fraternity and the Unity and Integrity of the nation.

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Although, now after 42nd Amendment to the Constitution of India, India is declared a *'secular'* country, but basically the Constitution of India establishes an Independent Judicial System in India by incorporating the *Buddha's* teachings in it. Keeping this view in mind let's study the *Buddha's* teachings and relevant provisions of the Constitution of India, so that we can prove the relevancy and applicability of the *Buddha's* teachings in Indian Constitutional System.

Liberty, Equality and Fraternity-Basic Principles:

Dr. Ambedkar did not have the least faith in the Hindu Social System, their philosophy of life and society based on *Chaturvarana,* the concept of graded inequality, injustice, discrimination and exploitation rejected it outrightly. He fought for the reclamation of human dignity and personality which had been suppressed and mutilated by the Hindu Social System[2]. He instilled in them the spirit of rebellion and revolution to fight against the monster of casteism, injustice, discrimination and exploitation cautioned and armed them with the best workable modern weapon-'*educate, agitate and organize*'[3]. All this was aimed at bringing out a change in the existing social set up. According to Dr. Ambedkar the education alone would help create the sense of setting up organizations to fight for their social and political advancement, self-respect and the urge to attain human dignity. He wanted to establish right relationship between man and man irrespective of caste, religion, distinction of birth and set up a society based on the principles enshrined in three words-liberty, equality and fraternity, his philosophy having roots in religion and not political science, he derived from the teachings of his master *Lord Buddha*. The values emanating from the three principles of liberty, equality, and fraternity speak of their close relationship to all the human beings and not for a particular class. It is wrong to presume that since it emanated from Dr. Ambedkar, these principles related to dalits alone and none else[4].

Dr. Ambedkar thus viewed philosophy of his life in his own splendid way and said that, *"Every man should have a philosophy of life, for everyone must have a standard by which to measure his conduct. And philosophy is nothing but a standard by which to measure…….. Indians today are governed by two different ideologies. Their political ideal set out in the Preamble to the Indian Constitution which affirms a life of liberty, equality and fraternity. Their social ideal embodied in their religion denies them."*[5]

So, Dr. Ambedkar was of the view that the political ideas of a large number of Indians will, one day, turn out to be the social ideal for everybody. In 1915, the Editor of Mahabodhi Society's Journal of Calcutta asked Dr. Ambedkar to write an article for the *Vaishakh Number*. In that article

Dr. Ambedkar argued that the *Buddha's* religion was the only religion which a society awakened by science could accept and without which it would perish. He also pointed out that for modern world *Buddhism* was the only religion which it must have to save itself. That *Buddhism* makes slow advance is due to the fact that its literature is so vast that no one can read the whole of it.[6]

Dr. Ambedkar had an in-depth study of all the religions, the three principles of *Buddhism* namely *Prajna, karuna and Samata* made their appeal to him, unlike the other religions who were bothering themselves with God and soul and life after death. He claimed that *Buddhism* was a complete answer to *Karl Marx* and his communism. The Russian type communism aims to bring it about by a bloody revolution; the *Buddhist* communism can achieve the same by bloodless mental revolution. He urged those inclined towards communism to study the *Buddha* and what he preached. He was of the view that the three principles of *Buddhism* should make an appeal to the world to save society.[7]

This is what Dr. Ambedkar Said:

"In the short time allotted to me I am asked to answer two questions; first *is "Why I like Buddhism" and the* second *is "How useful it is to the world in the present circumstances. I prefer Buddhism because it gives three principles in combination which no other religion does. All other religions are bothering themselves with God and Soul and life after death. Buddhism teaches Prajna (understanding as against superstition). It teaches Karuna (love). It teaches Samata (equality). This is what man wants for a good and happy life an earth. These three principles of Buddhism make their appeal to me. These three principles should also make an appeal to the world. Neither God nor Soul can save the Society…….……Unfortunately the Buddha's teaching have not been properly interpreted and understood. That his gospel was a collection of doctrines and social reforms have not been completely understood. Once it is realized that Buddhism is a social gospel, the revival of it would be everlasting event for the world will realize why Buddhism makes such a great appeal to everyone."*[8]

Dr. Ambedkar in Book-III, Part-II and Chapter 2 (what other have understood him to have Taught) of '*Buddha and his Dhamma'*, discussed different principles of the *Buddha's Dhamma* which are enlisted further by Dr. Ambedkar in Indian Constitution. These basic principles of the *Buddha's*[9] may be read as:

1. Truth.
2. Ahimsa, Non-Violence.

3. Peace.
4. Justice.
5. Liberty.
6. Equality.
7. Fraternity.

Liberty, Equality and Fraternity under Indian Constitution:

Dr. Ambedkar India's first Law Minister in his speech[10] entitled *"Religion No Longer Be Inherited but Be Examined Rationally by Everybody"*, emphatically asserted that *"Buddhist renaissance had again commenced in India. He supported this assertion by pointing out that the President of the Republic had to approach Buddhism for the symbol over free India's National Flag, Ashoka Chakra, finding nothing from a search into Brahmanism. Buddhism again came forward to furnish to the Republic her emblem of the three lions and when the first President of India was being sworn in, at that history making occasion, idol not of any of the countless Hindu God or Goddesses but of the Lord Buddha was installed to record the event"*[11].

Dr. Ambedkar said that time had arrived, he declared, when religion should no longer be inherited from the father to son like goods and Chattels, but should be examined rationally by everybody before personal acceptance.[12] Further, Dr. Ambedkar made it clear that he did not believe as socialists and communists did, that religion was unnecessary. He stated categorically, *"I believe that religion is necessary for the mankind. When religion ends, the society would perish too. After all no Government can safeguards and discipline mankind as niti or dharma can."*[13]

Burma's Ambassador, Sir *Maung Gyee*, who presided over the meeting, stated that the world which was in pain and trouble would find peace, and solace in *Buddhism*. An official of the Mahabodhi Society declared, *"The society's rejoicing over the fact that Dr. Ambedkar has joined our ranks."*[14]

Abovementioned seven points are the basic principles of *Buddhism*, which were promoted by Dr. Ambedkar by inserting them in the Constitution of Indian. Some Constitutional aspects may be discussed within the light of these principles of *Buddhism*:

Preamble:

The Constitution of India opens with the Preamble. The Preamble to an act sets out the main objectives which legislation is intended to achieve.[15] In re *Berubari*,[16] the Supreme Court of India has said that the

Preamble to the Constitution is a key to open the mind of the makers and shows the general purpose for which they made the several provisions in the Constitution. The Preamble includes, Justice, Liberty of thought, Equality of status and of opportunity, Fraternity assuring the dignity of the individual and the unity and the integrity of the Nation. The Preamble of the Indian Constitution includes all these basic principles of *Buddhism* such as, Peace, Justice, Liberty, Equity and Fraternity to promote *Buddhism* under Indian Constitution. It seems that the Preamble is promoting the ideology of *Buddhism* in India.

Fundament Rights:

There is a long list of Fundamental Rights under Part-III of the Constitution of Indian. The basic aim of having a declaration of Fundamental Rights is to provide certain elementary rights to all without any type of discrimination to the people on the pattern of *Buddhism*. These elementary rights which included in the Constitution of India are such as, right to life, [17] right to equality,[18] right to freedom,[19] right against exploitation, [20] and cultural and educational rights [21] etc. These rights are very essential to protect the right and liberties of the people against any type of encroachment. The chapter of Fundamental Rights under Constitution of India is based on the basic principles of *Buddhism* and *'Bill of Rights'*.

Justice Jackson explained the nature and purpose of the *'Bill of Rights'* in *West Virginia State Board of Education* v. *Barnet*[22] said; *"one's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no election."*

In *Maneka Gandhi* v. *Union of India*,[23] **Justice P.N. Bhagwati** discussed the importance of fundamental rights and observed; *"These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individuals and create conditions in which every human being can develop his personality up to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights and impose negative obligation on the state not to encroach on individual liberty in its various dimensions.[24]"*

But it is submitted that there is no doubt that the fundamental rights represent the basic values but these values were not cherished by the people of this country since the Vedic times. In the Vedic period, the society was based on *Varana* System and the people belonging to fourth *Varana* i.e. *'Shudra'* ware not allowed to avail these rights as such. When **Justice P.N Bhawati** was discussing about the importance of fundamental

right in *Maneka Gandhi* case perhaps forgotten that these values were available to all people without any discrimination in *Buddhist* era only.

A five judge Bench of the Supreme Court of India comprising (C.J.I.,Y.K.Shabharwal, K.G.Balakrishnan, S.H.Kapadia, C.K.Thakker and C.K. Balasubramanyam,JJ.) in *M. Nagraj* v. *Union of India*,[25] has unanimously speaking about the importance of the fundamental rights held that fundamental rights are not gift from the State to Citizens. Part-III does not confer fundamental rights but confirm their existence and give them protection. Individuals possess basic human rights independently in any Constitution by reason of basic fact that they are the human race. These rights are important as they possess intrinsic values.

It seems that during *Buddhist* era it was established fact that human rights were available to the people by the reasons of their humanity and human race, intrinsic values and natural justice.

Directive Principles of State Policy:

The concept of Directive Principles of State Policy is inspired from the Constitution of Ireland which had taken from the Spanish Constitution. The idea of welfare state envisaged by our Constitution can only be achieved if states endeavor to implement them with high sense of moral duty.[26] The object of welfare is to provide *'maximum happiness to maximum persons'* is the basic principle of *Buddhism* which provides equal opportunity to all people to grow without any restrictions. Today, we are living in an era of a welfare state which has to promote the prosperity and well-being of the people. The Directive Principles lay down certain economic and social policies to be pursued by the various Government's in India. They impose certain obligations on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.[27]

Dr. Ambedkar aptly describes the objectives of a welfare state in Constituent Assembly and said; *"while we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy. The ideal is economic democracy, whereby, so far as I am concerned, I understand to mean one man, one vote. They are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believes in the communistic idea as the most perfect from of economic democracy. It is therefore, no use saying the directive principles have no value. In my judgment, the directive*

principles have a great value; for they lay down that our ideal is an economic democracy. So, we deliberately included the Directive Principles of State policy in our Constitution."[28]

Social order based on justice,[29] Principles of Policy to be followed by the State for securing economic justice,[30] Participation of workers in management of Industries,[31] just and human conditions to work,[32] Living wages for workers,[33] Promotion of educational and economic interest of weaker section,[34] Equal justice and free legal aid to economically backward classes[35] and Uniform Civil Code[36] are among some of the Directive Principles which promote the principle of *'maximum happiness of maximum persons'* under the Constitution of Indian, it seems that which is based on *Buddhism*.

Dr. Ambedkar said, *"The Buddha, of course was a great democrat. Buddha's method was the safest and the soundest. Thus, do I advise the younger generation of the Buddhist countries to pay more attention to the actual teaching of the Buddha. I am quite confident that if we all become one tenth as enlightened as the Buddha was, we can bring about the same result by the methods of love, of justice and goodwill."*[37]

Fundamental Duties:

A bunch of 11 Fundamental Duties[38] is specified in Constitution of India. Some of these fundamental duties seems to promote the *Buddhism* are such as; to abide by Constitution and respect its ideal and institution, the National Flag and National Anthem,[39] to uphold and protect the sovereignty, unity and integrity of India,[40] to defend the country and render national service when called upon to do so, [41] to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religions, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women,[42] to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creature, [43] to develop the scientific temper, humanism and spirit of inquiry and reform,[44] and to safeguard public property and to abjure violence.[45]

Liberty, Equality and Fraternity- Judicial Articulations:

Each political society in the world has its own legal system. India also has its own legal and judicial system. The whole judicial system in modern India is organized on hierarchical pattern. At the apex, there is a Supreme Court then comes the High Courts in States, below the High Courts there are Subordinate Civil and Criminal Courts. It means the Supreme Court, High Courts and Subordinate Courts. *"The Judiciary was*

to be an arm of social revolution upholding the equality that Indians had longed for." The Supreme Court is credited as the guardian of the Constitution and final interpreter of Human Right in India. The Constitution of India is the *'Law of the Land'* and in case of need the Supreme Court interprets the Constitution. So, the Supreme Court has been called upon to safeguard civil and minority rights and plays the role of *"guardian of the social revolution."*[46] It is also the highest and final interpreter of the general law of the country. So, the Supreme Court is to promote the idea behind the Preamble of Indian Constitution, promote and take action for Fundamental Rights, Directive Principles of State Policy and Fundamental Duties for the welfare of the people at large by deciding the cases in this regard. The relevant provisions under the Preamble, Fundamental Rights, Directive Principles of State Policy and Fundamental Duties are to promote *Buddhism* in India. Following are the some cases decided by Indian Judiciary which seems to promoting the *Buddhism* in India:

In *Consumer Education & Research Centre* v. *Union of India*,[47] the Supreme Court held that the Constitution of India profess to secure to the citizen social, economic and political Justice. Social justice means the abolition of all sorts of inequities which may result from the inequalities of wealth, opportunity, status, race, religion, caste, title and the like.

To achieve this ideal of social justice, the Constitution of India lays down the Directives for the State under Part-IV.

In *Valsamma Paul* v. *Cochin University*,[48] the Supreme Court has held that in order to secure the Justice in real sense to the people of India, the Constitution, not only secures equality of status and of opportunity by prohibiting discrimination on various grounds, at the same time, makes special provisions for the promotion of the interests of socially and educationally backward classes of citizens and other weaker sections of the society.

In *Randhir Singh* v. *Union of India*,[49] the Supreme Court relying on the Preamble and Articles 14 and 16 held that Article 39-A envisages a Constitutional right of *"equal pay for equal work"* for both men and women.

In *Kesavananda Bharati* v. *State of Kerala*,[50] the Supreme Court said that the Preamble of Indian Constitution declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of government polity which was to be established.

In *Buckingham & Carantic C. Ltd.* v. *Venkatiah*,[51] the Supreme Court held that it is this concept of brotherhood of man which is contained in the Preamble of the Constitution and is given practical shape by abolishing

untouchability (Article 17) and title (Article 18) and many other social evils which swayed the social arena of Indian society.

In *Maneka Gandhi* v. *Union of India*,[52] **Justice P.N. Bhagwati** of the Supreme Court of India said that *"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like boarding omnipresence."*

In *Romesh Thapper* v. *State of Madras*,[53] **Justice Patanjali Sastri** of the Supreme Court has held that *"freedom of speech and of the press laid at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government is possible."*

In *Maneka Gandhi* v. *Union of India*,[54] the Supreme Court held that right to live is not merely confined to physical existence but it included with its ambit the right to live with human dignity.

In *Francis Coralie* v. *Union Territory of Delhi*, [55] the Supreme Court has held that the right to live is not restricted to mere animal existence. It means something more than just physical survival and also includes *"the right to live with human dignity."*

In *Peoples Union for Democratic Rights* v. *Union of India*,[56] the Supreme Court held that the scope of Article 23 is wide and unlimited and strikes at *"traffic in human beings"* and *"beggar"* and *other forms of forced labour"*

In *Bandhua Mukti Morcha* v. *Union of India*,[57] the Supreme Court held that Article 32 does not merely confers power on the Court to issue a direction, order or writ for the enforcement of the fundamental rights but it is also lays a Constitutional obligations on this court to protect the fundamental rights of the people and for that this court has innovated new methods and strategies particularly for enforcing the fundamental rights of the poor and disadvantaged who are denied their human rights and to whom freedom and liberty have no meaning."

In *Air India Statutory Corporation* v. *United Labour Union*,[58] the Supreme Court held that the concept of *'social justice'* consists of diverse principles essentials for the orderly growth and development of personality of every citizen. *'Social Justice'* is then the integral part of justice in the generic sense. '*Justice is the genus, of which social justice is one of its species.' 'Social justice'* is dynamic devise to mitigate the sufferings

of the poor, weak, dalits, tribals and deprived section of the society and so elevate them to the level of equality to live a life with human dignity.

In *Unni Krishnan* v. *State of A.P.*,[59] Supreme Court held that it is thus well established by the decisions of this court that the provisions of Part-III and IV of Indian Constitution are supplementary and complementary to each other and that fundamental right are but a means to achieve the goal indicated in Part-IV. It is also held that the fundamental rights must be construed in the light of the directive principles."

In *M.C. Mehta (2)* v. *Union of India*,[60] the Supreme Court has held that under Article 51-A (g) it is the duty of the Central Government to introduce compulsory teaching of lessons at least for one hour in a week on protection and improvement of natural environment in all the educational institutions of the country. It directed the Central Government to get textbooks written on that subject and distribute them to the educational institutions free of cost. In order to arouse amongst the people, the consciousness of cleanliness of environment, it suggested the desirability of organizing-keep the city clean week, keep the town clean, keep the village clean week in every city, town and village throughout India at least once in a year.

Conclusion & Suggestions:

Truth, Non-violence, Peace, Justice, Liberty, Equality and Fraternity are the need of present Indian society and these basic principles of *Buddhism* are promoting harmony and brotherhood as elementary needs of present society. These needs are established and promoted in Indian society by the law of the land i.e. the Constitution of India because of its formation is of such a nature. In re *Berubari* the Supreme Court of India rightly decided that the Preamble is the key to open the mind of the framers of the Constitution. Among the framers of the Constitution, Dr. Ambedkar is standing in the first in the row and known as the chief architect the father of the Constitution of India. On 3rd October 1954, Dr. Ambedkar made it clear that the philosophy of their life borrowed from the teachings of their master, the *Buddha* who showed the way of peace, harmony and brotherhood to the world. So, when the principles of *Buddhism* are prevailing in the world then how India can stay behind in the world. So, nobody can deny about the sustainability of *Buddhism* in Indian Judicial system as it appears from the study of various relevant provisions of the Constitution of India embedded in its Preamble, Fundamental Rights, Directive Principles of State Policy, Fundamental Duties and Indian Judicial system.

Stoutly it is submitted that humanity needs truth, peace, harmony, liberty and justice to shunt out the violence, lying, deceitfulness, disloyalty and corruption from the society. The absolute peace and harmony cannot be attained without following the principles of Liberty, Equality and Fraternity which is embedded *Buddhism* and the humanity is walking towards *Buddhism*, in which India is not to be behind. Further, it is submitted that sustainability of Liberty, Equality and Fraternity i.e. *Buddhism* in Indian Constitutional System gives no threat to the secularism and not destroying the basic structure of the Constitution of India.

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WOMEN EMPOWERMENT AND SOCIAL JUSTICE THROUGH EDUCATION—A CRITICAL ANALYSIS

Dr. Ashok Kumar[*]

A. Introduction

Education has been considered an effective instrument which provides the betterment in the society. It increases the equality and brings about reduction of inequalities in the society. It also changes the aspirations of the human being and values of the peoples as a whole. Universal Declaration of Human Rights included the education as one of the basic rights of the every human being. Article 26 declares that every one has the right to education and education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and Professional education shall be made generally available and higher education shall be equally accessible to all on basis of the merit. The education status of women have not been satisfactory neither in the vedic period nor in the ancient period. In present scenario, the position of the women are also not good. Most of the women are also illiterate today. India is home to the largest number of illiterate women in the world.

The position in the rural India is that out of every 100 girls who enroll in the first class only one enters or approaches to class 10+2. As far as urban position is concerned only 14 girls enter in class 10+2. The reason may be parental apathy in this regard. In 1993, Sixth Elementary Educational Survey conducted which indicated that total number of children enrolled in the primary classes was 97.74% million, out of which girls were only 43.1% and boys were 56.9% and there were 5,75,000 schools in the country and registration rate was 8.78% since 1983. According the Fifth Elementary Education 94.5% of the rural population had schools within a walking distance of 1 Km. The position of Secondary Education has been very poor. According to Sixth All India Education Survey, there was a 50% growth in girl's enrolment, while 21% increase in boys.[1]

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B. Meaning of Empowerment

Empowerment is a process which provides help to the people for gaining control over their lives through raising awareness, taking action and working in order to exercise greater control. In other words, it facilitates change and enables to persons to do what they want to do. It is a feeling which activates the psychological energy to recompiles end's goals. From the institutional point of view or perspective, it is a process of settling the right environment and structure and creating the circumstances where people may use their facilities and abilities to fully actualize their potential. It means that institutions should recognize that people may carry potential for self-actualization. From individuals point of view, the individuals needs to be recognized and facilitated to take personal responsibility for improving end's achievement. Women should get access to the modes and mediums of expression of their self and self-actualization and they should, get achievement through the empowerment.[2]

C. Education Empowerment

General meaning of this is to have control/power over the education or to get authority in the education sector/field. Because education is an insurance against economic need which provides economic independence guarantee and leads to social status. Education not only changes the lives of women at personal level by altering the pressures of dependency hierarchy and domination but it ables to trigger social engineering leading to the fissures in particular social order.[3]

D. Goal of Education

Education has following goals for all :-

(i) It extends the development and careful activities for all the persons.

(ii) It reduces the illiteracy.

(iii) It increases the awareness among the people.

(iv) It provides the universalization of equality.

(v) It provides opportunities to maintain and upgrade the social status.

(vi) It creates the necessary structure for the people.

(vii) It improves and provides the better environment for all.

(viii) It is a tool of changing.

(ix) It changes the aspiration of the human being.

E. Educational Programme and Policies for Women

The Govt. of India has been taking many educational initiatives for empowering the women. For this purpose, the govt. has set up many commissions and committees those are as follows:

		Year
(i)	Dr. Radhakrishan Commission (University Education Commission)	1948-49
(ii)	Mudaliyar Commission (Commission for Secondary Education)	1952-53
(iii)	Durgabai Deshmuk Committee (National Women Commission)	1958-59
(iv)	Women Education Council	1959-60
(v)	Bhakta Vatsalam Committee	1963-64
(vi)	Hans Mehta Committee	1964-65
(vii)	Kothari Commission	1964-66
(viii)	First National Education Policy	1968
(ix)	Phulerna Gulea Committee	1974
(x)	Second National Education Policy	1986
(xi)	Acharya Ramamurthy Committee	1990
(xii)	Janardan Reddy Committee	1992
(xiii)	Right to Education Act,	2010

F. The Objectives of the Commissions and Committees

These Commissions and Committees have the following objectives:

(i) To provide maximum Educational facilities for women and encourage for domestic management.

(ii) To open separate schools for girls at the secondary level and promote domestic science.

(iii) To recommend for expansion of education among woman.

(iv) To prepare public opinion in favour of women education in India.

(v) To identity the factors responsible for the lack of public support.

(vi) To recommend proposals regarding the difference in syllabus at secondary level for boys and girls.

(vii) To make education necessary for girls and give opportunities to them for higher education.

(viii) To ensure equal educational opportunities for boys and girls.

(ix) To establish co educational schools.

(x) To create effective managerial structure for expansion of women education

(xi) To appoint lady teachers in 50 percent posts of secondary level.

(xii) To provide special facilities for promotion of women education.

(xiii) To provide free and compulsory education to the children.

G. Others Ongoing Programmes and Schemes

The Govt. has been launched some other programmes , schemes and strategies which are ongoing are discussed as under:

(i) Mahila Samakhaya :- It is running in the 4 states : Uttar Pradesh, Gujarat, Andhra Pradesh and Karnataka. The main aim and objective of it is to bring about changing in women's perspective about themselves and society and to create an healthy environment for seeking knowledge and information about new things.

(ii) Lok Jumbish :- It is running in the Rajasthan state and main objective of this is to emphasis the gender centrality, improvement in teachers status, consensus for participatory planning, evaluation and commitment of quality and mission mode.

(iii) Decentralized Planning for Elementary Education :- It is working in 7 states : Assam, Haryana, Madhya Pradesh, Maharashtra, Tamil Nadu, Karnataka and Kerala. The main object of this is to decentralize the planning with special gender focus to universalize the elementary education.

(iv) Education Project - Mahila Samakhya - Bihar :- It is running in Bihar and its main aim is to conceive education as a decisive intervention towards women's equality and empowerment and enable the women to come together to gain information and knowledge, ask questions and take issue based collective action.

H. Kasturaba Gandhi Balika Vidyalaya

This Schemes launched in July, 2004. The main aim of this

schemes is to set up residential schools at the upper primary region primarily for girls from SC, ST, OBC families as well as minority communities. Under this scheme 75% seats to be reserved for the SC,ST,OBC and minorities, remaining 25% for the BPL families.

I. Early Childhood Care and Education

This scheme launched for children. The main aim of it is to prepare children for schooling so that they could get education and save their lives from any exploitation.

J. Integrated Child Development Services

This scheme started for the development of the children. The main aim of it is to promote pre- school education and to train Anganwari workers, primary school teachers , health workers, pregnant women, and children between 0 to 6 years of age from the poorest to poor families , disadvantaged, area, backward, rural, tribals and slums area.

K. Kishori Shakti Yojana

This scheme provides the benefit to the girls of 11 to 18 years age and improves the nutritional, health and status of adolescent girls.

L. Vocational Training Institutes for Women

There is one National Vocational Training Institute and about 10 Regional Vocational Training Institutes. As far as the Indian Technical Institutes, in different States, are concerned, there are about 189 women's ITIs and more VTIs and ITIs are to be introduced very soon.

M. Colleges for Women

There are more than 25951 colleges in all over India out of them 2565 are special colleges for the women are imparting the education to them. There 14000 colleges are under section 2f and 12b and 2780 are accredited by NAAC. These colleges may be funded by UGC, State and self are not only providing the general education but also providing the technical and professional education to women.

N. Universities for Women

There are total about 504 Universities at the National level, 243 States, 130 Deemed, 81 Private, 42 Central and 05 Women Universities. The 5 Women Universities are as follows:

(i) Sri Padamvati Mahila Vishwavidyalaya, Tirupati.

(ii) Karnataka State Women University, Bijapur.

(iii) Smt. Natubai Damodar Thachersey Women University Mumbai.

(iv) Mother Teresa Women University , Kodaikanal.

(v) Bhgat Phool Singh Mahila Vishwavidyalaya Khanpur Kala Sonepat, Haryana.

O. University Grant Commission

The UGC is playing a major role on empowerment of women. It is not only providing the affiliations and funds to the universities and colleges in all over India but also assisting them to run some special centres and programmes for the women These above mentioned 5 universities are imparting the special education for women but there are also some other universities which are assisting or not assisting by the UGC but are running centres and multidimensional programmes for empowerment of women. These are more than 22 Universities. The UGC is supporting the special refresher and orientation programmes and also providing the age relaxation to improve their opportunities and skills in academic programmes as many wish to enter vocations after marriage and childbirth.. The National Open University, through distance education, is providing education and developing multidimensional programmes on empowerment of women.

P. Percentage of Educated Males and Females Year-Wise[4]

Year	***Educated Males***	***Educated Females***	***Ratio of Educated Males and Females***
1901	9-83	0-60	11%
1911	10-56	1-05	12%
1921	12-21	1-81	7%
1931	15-59	2-93	6%
1941	24-29	7-30	4-1%
1951	24-95	7-93	3-7%
1961	34-44	12-95	3-5%
1971	39-45	18-69	2-8%
1981	56-50	29-85	3%
1991	64-13	39-29	3%
2001	75-85	54-16	2-7%

Q. Current Position: Year 2011

According to current census trends, overall literacy educated rate in India improved further to settle at 74.4% from the last decade. In the last decade from 1991 to 2001 year it was only 13.17 percent. Nationally, the literacy rate for males has shot up to 82.14 percent (up by 6.9 percent as against a corresponding increase of 11.72 per cent over 1991-2001) while that for females has gone to 65.46 an improvement of 11.8 percent over 2001 (as against 14.87 percent over previous decade). The credit goes to women who have out numbered men among 21, 77, 00, 941 literates added in the last 10 years, 11,00,69,001 of these are women. So far as literacy goes, Kerala leads the list with a rate of 93.91 percent and lowest literacy gender gap of 4 percent. It has the highest literacy rate of 91.98 percent in India, the lowest being for Bihar.[5]

R. Female Literacy Rate in Different States

Different States have different literacy rate. The female literacy rates of some states are as follows:-

(i) Punjab: - The census conducted and released in April, 2011 , the total literacy is 76.68 percent, the females literacy is 71.34 and males 81.48 percent . The literacy in Punjab has actually gone up.[6]

(ii) Haryana: - According to provisional data released by the Registrar-General and census commissioner of India, in 2011 the total literacy rate in the state is 76.64 percent. While for males it is 85.3 percent and for females it is 66.8 percent.[7]

(iii) Bihar: - Bihar had been considered the lowest-literacy state in India but it is very surprising for everyone that it posted the second highest decades growth in female literacy rates in country. In Bihar the number of literate women are more that from 10,4,65,201 in 2001 to 21,6,78,279 in 2011. It is 107% growth in Bihar. Today, Bihar posts magic growth of 107% in female literacy.[8]

(iv) Jammu and Kashmir: - According to census, the literacy rate has increased from 55 percent in census 2001 to 68 percent in census 2011, female literacy rate in 1981 was 20 percent and in year 2011 it is 58 percent. The males literacy rate in 1981 was 44 percent and in 2011 it is 78 percent. While female literacy rate has increased 20 percent, the male increased 78 percent.[9]

(v) Himachal Pradesh: - **According to census 2011, the literacy rate of the state is as follows:**

Distt.	*Male*		*Female*	
	2001	2011	2001	2011
1. Champa	76.41	84.19	48.85	62.14
2. Kangra	87.54	92.55	73.01	80.62
3. Lahaul-Spiti	82.82	86.97	60.70	66.50
4. Kullu	83.98	88.80	60.88	71.01
5. Mandi	85.94	91.51	64.82	74.37
6. Hamirpur	90.15	95.28	75.70	83.44
7. Una	87.73	92.75	73.18	81.67
8. Bilaspur	86.04	92.39	69.55	78.90
9. Solan	84.75	91.19	66.89	78.02
10. Simour	79.36	86.76	60.37	72.55
11. Shimla	87.19	90.73	70.07	77.80
12. Kinnaur	84.30	88.37	64.40	71.34

Total Literacy rate of male is 90.83% and females is 76.60[10]

(vi) Jharkhand:-According to census, 2011 the percentage growth of females literacy is 83.64 percent.[11]

(vii) Arunachal Pradesh: - According to census, 2011 the growth rate of literacy of females is 84.80 percent.[12]

(viii) Uttar Pradesh: - According to census, the percentage of growth rate of female literacy is 78.78 percent.[13]

Conclusion

From the above evident it is clear that the women are empowering through education but complete empowerment has not been made so far. There are some states those have very low literacy rates. Among the northern states and union territories, the lowest growth rate in female literacy has been registered as Himachal Pradesh at 31.18 percent, Punjab at 32.42 percent, Uttarakhand at 46 percent, Delhi at 40.10 percent, Haryana 49 percent etc. For complete empowerment in education it will take some more time.

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PROTECTION OF ENVIRONMENT DURING INTERNATIONAL AND NON INTERNATIONAL ARMED CONFLICTS: AN ODYSSEY FROM INETRNATIONAL ENVIRO-HUMAN RIGHT LAWS TO INTERNATIONAL HUMANITARIAN LAWS

*Dr. Md. Zafar Mahfooz Nomani**

I. HUMANISING ENVIRONMENT IN ARMED CONFLICT

The explicit references to protection of environment during international and non-international armed conflict are reflected in a number of multilateral conventions. The ontology of these international norms has sought to place limitations on the deliberate infliction of environmental damage during armed conflict.[1] A critical analysis of legal regime reveals four distinct phases of evolution and development. The first phase is being marked by 1949 Geneva Conventions and Hague Conventions. The second phase heralds 1977 *Environmental Modification Convention, Rio Declaration* and *UN General Assembly Resolution* 47/37, 1992. The third phase is the meticulous interpretation of legal doctrines and judicial precedents under *Nuclear Weapons Advisory Opinion,* the *Corfu Channel* case, *Nicaragua* case. Fourth phase is of contemporary sophistication of norms of the international law governing the protection of environment under law of armed conflict in the conspectus of international human right and humanitarian laws reflected in the enunciating principles of the *ILC's Code of Offences Against the Peace and Security of Mankind* and the *Statute of the International Criminal Court,*1998 and *Fatima Kestini Report*. The paper subsumes the corpus of enviro protective laws in the context of international law in general and international environmental laws, and international human right and international humanitarian laws in particular.

II.INTERNATIONAL LEGAL REGIME

A classical version of the protection afforded by restraints on methods of warfare and the infliction of unnecessary suffering found in the 1949 *Geneva Conventions*, *Hague Conventions*, and *Nuremberg Tribunal Award*.[2] The *express verbis* recognition found in *Environmental*

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*Modification Convention,*1977 which prohibits the hostile use of environmental modification techniques having 'widespread, long- lasting or severe effects'. The Convention is ratified by major military powers of the world.[3] The 1977, *Additional Protocol I* to the *Geneva Conventions,*1949 similarly prohibits methods of warfare intended or expected to cause 'widespread, long term and severe damage to the natural environment', or 'to prejudice the health or survival of the civilian population'.[4] The Protocol requires parties to take care to protect the natural environment, and places limits on the circumstances in which 'works or installations containing dangerous forces', including dams and nuclear power plants, can be made the object of attack.[5] The latter limitations are also found in *Protocol II* dealing with non-international armed conflict. These protocols are widely ratified, with the exception of major Western military powers. During the 1991 conflict with Iraq, a number of nuclear installations, power plants, and water supply systems were attacked by Western air forces, causing serious damage, and casting doubts on the usefulness or general acceptability of the 1977 Protocols.[6]

The adoption of a *Fifth Geneva Convention*, intended to cover protection of the environment in times of armed conflict.[7] The *ILC's Code of Offences Against the Peace and Security of Mankind* and the *Statute of the International Criminal Court,* 1998 also treat certain acts of serious and intentional harm to the environment as war crimes and allow for individual responsibility.[8] Besides these rules of customary international law to regulate environmentally harmful attacks, the *Rio Declaration,*1992 asserts that 'States shall. ..respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary'.[9] *UN General Assembly Resolution* 47/37 (1992) also states that 'destruction of the environment not justified by military necessity and carried out wantonly, is clearly contrary to existing international law'.

III. JUDICIAL DOCTRINES & PRECEDENTS

In the *Nuclear Weapons Advisory Opinion,* the ICJ referred to both these instruments and held that as a matter of general international law:

> States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[10]

The 'tests of necessity or proportionality' which govern military actions in general international law and applied to the case of Iraq.[11] The

ICJ in the *Corfu Channel* case,[12] referred to 'elementary considerations of humanity' in finding Albania bound to notify approaching warships of a known danger from mines. Where as in the *Nicaragua* case,[13] the Court treated restrictions on the threat of use of force as peremptory norms of international law. More4over, as against states not parties to an international armed conflict, belligerents enjoy no special privileges and remain bound by general rules of international law.

Multilateral treaties for the protection of the environment may be applied in times of armed conflict by the application of doctrine of *rebus sic stantibus,*[14] and in the light relations between belligerent and non-belligerent states is not otherwise affected.[15] Such treaties will not be suspended; *a fortiori,* if the conflict is not having international character. Few environmental treaties make explicit provision for derogation or suspension in time of war. However, the general rule is one of non-suspension of such treaties in time of armed conflict.[16] In this regard ICJ pointed out in the *Nuclear Weapons Advisory Opinion,* that environmental treaty obligations cannot have been intended to deprive a state of its right of self defence under international law.

IV. ENVIRONMENTAL TREATIES & ARMED CONFLICT

Most of the environmental treaties contain clauses which preclude their application to ships or aircraft entitled to sovereign immunity. Neither the *Intervention Convention,* 1969 nor the *Salvage Convention,* 1989 applies to such vessels, nor the *London or Oslo Dumping Conventions*. Some treaties, while denying jurisdiction over foreign vessels entitled to immunity, require their parties to ensure as far as possible that their sovereign vessels act in a manner consistent with the treaty's requirements. Both the 1973 *MARPOL Convention,* and the marine pollution provisions of the 1982 *UNCLOS* are in this category.[17] Moreover, although both the 1969 *Intervention Convention* and the 1969/92 *Conventions on Civil Liability for Oil Pollution Damage* do not apply to military vessels, several parties to the 1986 *Convention on Early Notification of Nuclear Accidents* have taken cognizance of destruction of environment. Conventions dealing with nuclear safety and liability for nuclear accidents do not apply to military facilities, but, like the *Oil Pollution Convention,* 1969 the operator or owner is relieved of all liability for incidents due to armed conflict, hostilities, civil war, or insurrection.[18]

The law of armed conflict is one of the least sophisticated parts of contemporary international law.[19] It lacks an institutional structure for supervision of compliance and relies mainly on the good faith of the parties. The possibility of resort to criminal sanctions *ex post facto* is not a reliable means of ensuring its satisfactory operation. The international law does

not however relieve states of their obligations of environmental protection during conflicts. In the case of Iraq, responsibility for environmental injury was afforded by adequate assurance of military restraint. To ensure a more precautionary or preventive approach which, environmental law-making is often applied to the military sphere.[20] Chemical and biological weapons, and other forms of warfare can be assessed in advance to determine their likely impact on the environment. A number of treaties place limitations on chemical and biological weapons,[21] and the *Environmental Modification Treaty* is an indicator in sight to restrain use of toxic defoliation agents in Vietnam. The *World Heritage Convention,* 1972 protect the sites of special cultural or ecological significance from attack or military use. The control of environmental destruction during armed conflict remains largely unsatisfactory of civil uses of nuclear energy.[22] The *Nuclear Weapons Advisory Opinion* demonstrates that although international law constrains the use of environmentally destructive weaponry, it does not prohibit the use of nuclear weapons, or of other weapons not specifically banned by international agreements.[23] Consequences of military decisions under the 1977 Protocols remain controversial. However, the continued relevance of international law governing protection of the environment in armed conflict needs to be broadened and refurbished.

V. INTERNATIONAL HUMAN RIGHTS NORMS

In order to identify the goal posts for the implementation of human rights norms for environmental protection in the third world countries , it is deemed necessary to have a brief overview of the enviro-human rights tenets underpinned in the soft and hard core international law principles. The *express verbis* recognition to human right to the desideratum of international human right and environmental treaties and conventions attributed to Stockholm Declaration failure in not drafting of *Universal Declaration on Environmental Rights*. The *Universal Declaration On Human Right,*1948 has no direct reference to environment right *per se* none the less right it resolves that "every one has the right to a standard of living adequate for the health and well being of himself and for his family, including food , clothing, housing and medical care and necessary social services…".[24] In its later elucidation, the Declaration significantly envisages that "nothing in the present covenant shall be interpreted as impairing the inherent right of all the people to enjoy and utilize fully and freely their natural wealth and resources". The *Founex Report* provided impetus and *generated* enlightened opinion making on the subject. The Report believes that if, by miracle these entire people were to be brought to the standard of living now enjoyed by the people of United States… (the extraction of

resources to achieve this desirable goal will deplete the earth resources) their extraction would virtually deplete the earth of all living off the leanest of the earth substances the water or the sea and ordinary rock.[25]

The *General Assembly Resolution on The Permanent Sovereignty Over Natural Resources, 1962* balances the right of state and people in far greater clarity. The resolution maintains that "the right to people and the nation to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and well being people of the state concerned".[26] The *Stockholm Declaration*, 1972 proclaimed for the first time that "man has fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for the present and future generation."[27] But it rejected the proposal for a *Universal Declaration On The Protection And Betterment Of The Environment* as a counter part to *Universal Declaration Of Human Rights*, by saying that 'the sovereign right to exploit the natural resources should be in conformity with the Charter of United Nation and the principles of international law'.[28]

The *Declaration on Right to Development, 1986* obligates the state "to undertake all necessary measures for the realization of the right to development such as equality of opportunity for all in their access to basic resources, education, health, food, housing, employment and fair distribution of freedom, equality and adequate conditions of life in an environment of quality".[29]

VI. INTERNATIONAL ENVIRONMENTAL LAWS

The promotion of an environmentally and healthy society contributes to meaningful realization of human rights of the people, therefore, states are placed under a solemn obligation for the 'common but differentiated responsibilities' for the promotion of human right to environment. The *Rio Declaration on Environment and Development, 1992* states that 'human being is at the center of concerns for the sustainable development and entitled accordingly to a healthy and productive life'.[30] Entitlement to healthy and productive life in harmony with nature and recognition of centrality of human being in sustainable development is articulated in *Vienna Declaration on Human Rights* in the wake of flagrant human rights violations on account of deleterious impact of indiscriminate proliferation of hazardous waste.[31] The realization of enviro-human right is to be addressed under the purview of natural environment, pollution of water, air, land, depletion of ozone layer and climatic changes. The human right to a sound environment also demands an entitlement of natural resources by combating desertification, deforestation, soil erosion, extinction of flora

and fauna and exhaustion of non-renewable resources. The human right to environment is also heavily dependent on demography, town and country planning for the ultimate realization of clean human environment, ergonomic condition and ecological balance.

This dovetailing of new sets of right necessitates a dexterous treatment at international law and national legislatures to imbibe human right norms in to the constitutions and law of third world countries. Under this backdrop, *Sub-Commission on Prevention of Discrimination and Protection of Minorities* , endorsed by the *Commission on Human Rights,* under the Special Rapporteurship of Fatma Zohra Ksetini put forth the symbiotic relationship of human right and environment .The Special Rapporteur, in the preliminary report and a progress report[32] included an analysis of national and international provisions and decisions and comments by human right bodies relating to human right and the environment, as well as information on the results of *Conference on Environment and Development,* 1992 in which she had participated as an observer. A second progress was made available to the Sub-Commission at its 1993 session and implementation of environmental rights as a human right on the basis of the standards and practices developed at the national, regional and universal levels.[33]

VII. DRAFT DECLARATION ON HR AND ENVIRONMENT

This finally culminated in the *Draft Declaration of Human Right and Environment* popularly known as *Fatima Zohra Ksetini Report.*[34] *The Sub-Commission on Prevention of Discrimination and Protection of Minorities,* endorsed by the *Commission on Human Rights,* under the Special Rapporteurship of Fatma Zohra Ksetini that the problem of environment is no longer being viewed exclusively from the angle of the pollution affecting the industrialised nations but seen rather as world wide hazard threatening the planet and the well being of future generations.[35] She meticulously engaged in exploring the seminal relevance and connection between human right and the environment and finally recommended a Draft Declaration to serve as a basis for formal international legal instrument on human right and environment. The Draft Declaration subscribes that right to secure, healthy and ecologically sound environment by articulating environmental dimension of a wide range of human rights.[36]

On 16 May 1994, an international group of experts on international human rights and environmental law convened at the United Nations in Geneva and drafted the first-ever declaration of principles on human rights and the environment. The Geneva group assembled at the invitation of the Sierra Club Legal Defense Fund—in cooperation with the Association mondiale pour l'école instrument de paix and the Société suisse pour la

protection de l'environnement—on behalf of Ms. Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. As U.N. Special Rapporteur, Ms. Ksentini presided over a five-year examination of the connections between human rights and the environment. Ms. Ksentini presented her final report to the Sub-Commission in August 1994, with the Draft Declaration included as an annex. The final report includes a recommendation that the Draft Declaration serve as a basis for a formal international legal instrument on human rights and the environment.[37] The Draft Declaration is the first international instrument that comprehensively addresses the linkage between human rights and the environment. It demonstrates that accepted environmental and human rights principles embody the right of everyone to a secure, healthy and ecologically sound environment, and it articulates the environmental dimension of a wide range of human rights. The U.N. Human Rights Commission has recognized the Draft Declaration as a significant standard-setting activity and has called for governments, specialized agencies, and intergovernmental and nongovernmental organizations. The UN Human Rights Commission has recognized the Draft Declaration as a significant standard setting parchment on the subject. The Declaration ideally suited to the of human right to environment across the world and third world as well.

VIII. FROM HUMAN RIGHT TO HUMANITARIAN LAWS

In view of the seminal importance it is worthwhile exercise to underline the basic ethos of the Declaration for the ultimate embodiment in enviro-human right discourse. The report says that 'all persons, individually and in association with others, have a duty to protect and preserve the environment'.[38] Whereas 'all States shall respect and ensure the right to a secure, healthy and ecologically sound environment. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration. These measures shall aim prevention of environmental harm, provision of adequate remedies, and at the sustainable use of natural resources and shall include, *inter alia*,

- collection and dissemination of information concerning the environment
- prior assessment and control, licensing, regulation or prohibition of activities and substances potentially harmful to the environment;
- public participation in environmental decision-making;
- effective administrative and judicial remedies and redress for environmental harm and the threat of such harm;

- monitoring, management and equitable sharing of natural resources;
- measures to reduce wasteful processes of production and patterns of consumption;
- measures aimed at ensuring that transnational corporations, wherever they operate, carry out their duties of environmental protection, sustainable development and respect for human rights; and
- measures aimed at ensuring that the international organizations and agencies to which they belong observe the rights and duties in this Declaration'.[39]

It is also incumbent on 'States and all other parties shall avoid using the environment as a means of war or inflicting significant, long-term or widespread harm on the environment, and shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development'.[40] It is also emphasized that 'all international organizations and agencies shall observe the rights and duties in this Declaration'.[41] The Draft Declaration also enjoins that 'in implementing the rights and duties in this Declaration, special attention shall be given to vulnerable persons and groups'.[42] The rights in this Declaration may be subject only to restrictions provided by law and which are necessary to protect public order, health and the fundamental rights and freedoms of others.[43] The report, therefore, concludes that 'all persons are entitled to a social and international order in which the rights in this Declaration can be fully realized'.[44]

IX. CONCLUSION AND SUMMATION

In order to conscentise expression to the right to environment, there is a need for development strategies that are directed towards the implementation of a substantive part of that right. This includes effective realization of the right to development, right tot life, right to health, right to work in the precincts of the enviro-human rights. On the other hand, this must go in harmony with the promotion of the related procedural right including due process of law, rule of law, right of participation and information in environmental decision making, freedom of expression relating to eco-centric values and ethos and right to seek effective remedy, recourse, implementation and compliance. Having done so, the ambit and scope of enviro-human right can be extended to series of entitlement relating to ecological balance, sustainable development and human right conscientised approach to environment.

This is more so because the right to sound and satisfactory environment is also a right to the conservation of the nature for the ultimate benefit of the future generations. The futuristic dimension restores substantially the basic precept of the enviro-human right for the inter-generational equity, survival of human civilization and planetary eco-system which is by any measuring rod a quantum leap in the environmental and human right jurisprudence and solidarity right. The rules of Customary International Law generally do not protect environment in times of armed conflict. The Rio Declaration has reflected on this desideratum in 1992 maintaining that State shall…respect international law, providing protection for the environment in times armed conflict and cooperate in it's further development as necessary'. The UN General Assembly Resolution, 1992, strongly substantiated the Clarian provision of Rio Declaration by stating that 'destruction of environment not justified by military necessity and carried out wantonly is clearly contrary to international law'. Despite these exhortations, the law of armed conflict is one of the least sophisticated parts of the contemporary international law. As a natural corollary to it lacks an institutional structure for supervision and compliance and therefore take refuge mainly on the principle of good faith of the parties. The situation seems to be more compounded because the possibility of resorting to criminal sanction ex-post facto is not a reliable means of ensuring satisfaction. In such a situation the ILC's version of universality principle along with the concept of port state jurisdiction under *United Nation Convention on Law of Sea*,1982 sounds a more plausible mechanism.[45] Thus, in the present scenario ILC's Code of Offences against the Peace and Security of Mankind, 1996 and Statute of International Criminal Court, 1998[46] have a potential to arrest environmental crime by applying universal jurisdiction during international and non-international armed conflict.

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CALLOUSNESS IN MEDICAL FIELD UNDER CONSUMER PROTECTION ACT, 1986

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Introduction

The body of human being and diseases are inseparable. Earlier man used to regard death and diseases as natural phenomena. But later on it was realized that diseases and illness could be cured by human efforts. As a result, man developed a vast complex of beliefs, techniques, knowledge, norms, values, ideologies in learning to treat diseases. This complex system is called 'medical system'. Since this system is to be handled by human beings, mistakes are bound to occur as doctors are not infallible. It is said, "to error is human" but mistakes committed by medical professionals which may lead to death of a person or permanent impairment can be costly and as far as law is concerned it does not provide punishment to doctors for all their errors but only to those which are done out of sheer negligence.Mistakes do occur but those mistakes which are the result of carelessness and negligence cannot be done away with.[1]

Professional negligence, more specifically medical negligence[2], is such an area which requires ponderations. It is the result of some irregular conduct on the part of any member of the profession in charge of professional duties person can be held liable.[3]

Medical profession is considered as a noble profession around the globe. The prime object of the medical profession is to serve the humanity but now it seems that some of the medical professionals are propelled more by voracity than to serve human race. They have become careless in their approach. As a result, more and more accidents are reported every now and then. It could be due to increased pressure on hospital facilities, to failing standards of professional competence or, more probably to the ever increasing complexity of therapeutic and diagnostic methods.[4]

In the law of negligence, professionals such as lawyers, doctors, architects etc. fall in those category of persons which require some special skill and knowledge. Any person entering into such profession

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impliedly assures that the skill which he possesses would be exercised by him with due care and caution. Thus, which such kind of assurance, it would not be fair on part of doctors to exonerate themselves from liability if case of negligence is meted out against him.

Actions against erring doctors

A person can be held accountable for professional negligent in the following two cases. (1) He does not posses the required skills, which he claims to posses. (2) He does not exercise with reasonable proficiency the skills he possesses.[5]

The question now which comes here is what kind of actions can be brought against erring doctors.[6]

1. Person who is aggrieved from negligent conduct of the doctor can file a civil suit for damages in a civil court. It should be remembered the negligence is a tort and tortuous liability of negligent doctor extends not only to compensate the patient but also his family who has suffered equally along with the patient.[7]
2. A physician may be charged with culpable homicide if death occurs due to the negligent act of a doctor. Section 304-A[8] of IPC deals with it. If anything less than death is caused, the person would be charged under Section 337 or 338 of the code depending upon the type of injury caused i.e. simple or grievous hurt.[9] Here, it would not be out of place to mention a statement of law on criminal negligence by reference to surgeons, doctors, and unskillful treatment contained in Roscoe's law of Evidence (fifteenth Edition).

"Where a person, acting as a medical man, whether licensed or unlicensed, is so negligent in his treatment of a patient that death results, it is manslaughter if the negligence was so great as to amount to a crime, and whether or not there was such a degree of negligence is a question in each case for the jury in explain in to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used, many epithets, such a 'culpable', 'criminal', 'gross', 'wicked'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond mere matter of compensation between the subjects and showed such disregard for the life and safety of others as to amount to a crime against the state, and conduct deserving punishment.[10]

3. Disciplinary proceedings can be initiated against the erring doctor before appropriate medical council but the working of this council is debatable. The MCI initiates disciplinary proceeding only when a complaint is filed by the member of the public. People are not that much aware of the procedure, as a result, most cases never come up before the council. Even if few cases that come before the council, the Act does not prescribe any procedure to be followed, and to add over there are ad-hoc committees who look into the matter which take ample of time to submit their reports since they are not answerable to any one. The result is, hardly any disciplinary action is taken against the erring doctors.

People hesitant to sue against erring doctors

Although a person can move to different forums against erring doctors, but again there are many deterrents:[11]

1. Due to hefty court fees and exorbitant fees of lawyers, people hesitate to file a case of medical negligence against erring doctors. Since it is a costly affair, additionally, the lawyers themselves are not in a position to speculate the quantum of damages if awarded would be sufficient to meet the cost of litigation[12], as a result, people are hesitant to file case against negligent doctors and thus there are very few cases that are filed against such doctors.[13]
2. The procedure that is provided is very complicated and cumbersome. It is time consuming and dilatory exercise which takes years to conclude.[14]
3. The amount of compensation that is provided in India is by and large niggardly. Because of this reason people are hesitant to initiate proceedings against doctor. The procedure being cumbersome leading to delays and to top it all, the amount of compensation that a person gets after complying with so many formalities are sufficient enough for a person to deter him for filing a case against doctors. [15]

The picture is not that gloomy and it is not that nothing has been done to remove difficulties of patients. The redressal that is available is, in the form of Consumer Protection Act, which was passed in the year 1986.[16]

Whether doctors included under Consumer Protection Act, 1986

Earlier, the doctors were not explicitly mentioned in the Act.

This task was set at rest in the case of *Indian Medical Association v. V.P. Shantha & Others.*[17] But before this case, there was a controversy whether medical professionals were included or not under the Act.

Earlier,in the case of *Consumer Unity and Trust Society, Jaipur, v. State of Rajasthan,*[18] The woman had undergone an abdominal tubectomy operation in the Govt. hospital. She contended that after operation, she suffered serious complications on account of negligence of Civil Surgeon. The State Commission laid down that the woman and her husband were not consumers under section 2(1)(d)[19] of the CPA, 1986, because they had not hired services for consideration. They went in appeal to the National Commission. The advocate laid emphasis on the following points before National Commission.

(i) That tax could be regarded as payment of consideration the return for which tax payer gets only the participation in the common benefits.

(ii) That it is guaranteed under the Constitution that state should provide a good standard of life and health facilities.

(iii) That the words 'hires or avails' should be taken to mean any person who prevails or uses any service.

(iv) That the expression "service free of charge" no doubt appears to mean service without reward or remuneration (gratuitous service) but the word 'charge' has various other meanings for instance duty, liability and burden etc.

(v) That CPA, 1986 is a beneficial piece of legislation (a measure of social welfare) which needs to be liberally construed for the protection of interests of larger number of people.

The National Commission rejected the above contentions and upheld what was laid down by Rajasthan State Commission. The following observation was made.

"The conclusion is evitable that persons who avail themselves of the facility of medical treatment in Government hospitals are not consumers and that the said facility offered in Govt. hospitals cannot be regarded as service 'hired' for consideration. Hence no complaint under the Act can be preferred either by any person or by a Consumer Association on his behalf……**"**

This decision that was given by National Commission became law and was given in number of cases like *Ram Kali* v. *Delhi Administration*[20], *Soubhaya Prasad* v. *State of Karnataka*[21], *Kohlon* v. *Bawa Hospital*[22] etc. to name a few.

However in the case of *Cosmopolitan Hospital* v.*Vasanth P. Nair*[23] the National Commission endorsed the observations of Andhra Pradesh State commission "while a medical officer's service may be called personal, it will be incorrect, inflicitious and crude to describe it as personal service. Thus, by saying this National Commission had set rest the controversy that was governing private medical practitioners, nursing homes etc. National commission approved what was laid down by the state commission stating that services which were rendered for payment falls within the ambit of the expression 'service' as defined in section 2(1)(0) of the Act and if there is deficiency in the service, the aggrieved person can file a complaint before Consumer Forum having jurisdiction….

This decision given by National Commission had been followed by other State Commissions. It will not be out of place here to mention the case of *C.S.J. Subramaniam* v. *Kumaraswamy*[24] where medical professionals had filed several writ petitions claiming that medical service be kept out of the ambit of CPA, 1986.

Madras High Court observed:

(i) The services rendered to a patient by a medical practitioner or an hospital by way of diagnosis and treatment both medicinal and surgical would not come within the meaning of 'service' or defined in section 2(1)(0) of the Act.

(ii) A patient who undergoes treatment under medical practitioner or an hospital by way of diagnosis and treatment both medical and surgical cannot be considered to be 'consumer' within the meaning of section 2(1)(d) of the Act.

(iii) The medical practitioner or hospital undertaking and providing paramedical services of any categories or kind cannot claim similar immunity from the provisions of the Act and they would fall to the extent of such services rendered by them within the definition of 'service' and a person availing of such service would be a 'consumer' within the meaning of the Act.[25]

Thus, the above judgment went in favour of the medical professionals in which they had claimed immunity from the application of CPA, 1986 on them. But this was soon set at rest in the landmark case of *Indian Medical Association* v. *V.P. Shanta & others*[26]. The Supreme Court of India in the said case had stated that every person who avails services rendered by doctor and pays consideration for it, is a consumer and that

medical profession would fall within the ambit of the Consumer Protection Act, 1986.[27]. The court in this case stated:

1. Service rendered to a patient by medical practitioner (except where the doctor render service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment both medicinal and surgical, would fall within the ambit of service' as defined in section 2(1)(a) of the Act.
2. The fact that medical practitioner belong to the medical profession and are subject to the disciplinary control of the Medical Council of India or State Medical Council Act would not exclude the services rendered by them from the ambit of the Act.
3. A 'Contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner. The service rendered by a medical practitioner to the patient cannot be regarded as service. Such service is rendered under a contract for personal service and is not covered by exclusionary clause of the definition of 'service' contained in section 2(1)(0) of the Act.
4. The expression 'contract of personal service' in section 2(1)(0) of the Act cannot be confined to contract for employment of domestic servants only and the said expression would include a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined i.e. section 2(1)(0) of the Act.
5. Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital nursing home where such services are rendered free of charge to every body, would not be service or defined in section 2(1)(0) of the Act. The payment of a token amount for registration purpose only at the hospital/ nursing home would not alter the position.
6. Service rendered at a non government hospital/nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor)are given free service is outside the purview of the expression 'service' as

defined in section2(1)(o) of the Act. The payment of token amount for registration purpose only at the hospital/nursing home would not alter the position

7. Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing of such services falls within the purview of the expression 'service' as defined in section 2(1))(0) of the Act.

8. Service rendered at a non-government hospital/nursing home where charges are required to be paid by a person who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in section 2(1)(0) of the Act irrespective of the fact that the service is rendered free of charge would also be 'service' and the recipient a 'consumer' under the act.

9. Service rendered at a Government hospital/health centre/ dispensary where no charge whatsoever is made from any person availing of the services and all patients (rich and poor) are given free service is outside purview of the expression 'service' as defined in section 2(1)(0) of the Act. The payment of the token amount for registration purpose only at the hospital/nursing home would not alter the position.

10. Service rendered at a Government hospital/heath centre/ dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such services would fall within the ambit of the expression 'service' as defined in section 2(1)(0) of the act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be 'service' and the recipient a 'consumer' under the Act.

11. Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in section 2(1)(0) of the Act.

12. Similarly where as a part of conditions of the service, the employer bears expenses of medical treatment of an employer

> and his family members dependent on him, the service rendered to such a hospital/nursing home would not be free of charge and would constitute 'service' under section 2(1)(0) of the Act.

The above mentioned judgment which included medical professionals within the ambit of CPA, 1986, has since then been followed in plethora of cases. To name a few: *Poonam Verma* v. *Ashwini Patel*[28],*Harjot Ahluwalia* v. *Spring Meadows Hospital*[29], *Aparna Dutta* v. *Apollo Hospital, Madras*[30], *C. Sivakumar* v. *Dr. John Arthur &Another*[31], *Lakshmi Rajan* v. *Malar Hospital ltd*[32], *Shefali Bhargava* v. *Indraprastha Apollo Hospital*[33], *Sham Lal* v. *Saroj Rani*[34], *Nizam Institute of Medical Sciences* v. *Prasanth S. Dhananka & Ors*[35], *Samira Kohli* v. *Dr. Prabha Manchanda &Anr*[36] etc.

It was generally believed that now it would be easy for the patients to seek redressal under the Act and additionally doctors also cannot claim immunity from their negligent acts and would thus act as a deterrent for the erring doctors. However, if we see the reality, it presents a totally different picture. One cannot deny a fact that number of medical negligence cases in the court have mounted up but what about the success rate? The success rate of these cases is very grim. Most of the cases that are filed in the court fail to establish the liability of the doctor, as a result, patient does not get anything from the court.[37]

The Consumer Protection Act has failed to achieve its goal of providing cheap, easily accessible and fast succor. It is mainly due to the fact that there are many loopholes in the so called efficacious Act. Under the Act, the complainant is required to produce and show certain documents which deals with the case. Documents are hardly provided to the patients on the pretext of secrecy and confidentiality. As a result, the patient is unable to prove his case. Not only this, under the Bolam Test as was laid down in the case of *Bolam* v. *Friern Barnet Hospital Management Committee*[38], it was observed by theHigh Court of England: "A doctor is not negligent if he acts in accordance with the practice accepted at the time as proper by responsible body of medial opinion even though other doctors adopt a different approach."[39]

Now this is very subjective. The court simply relies on expert witnesses who are all doctors and these doctors are very hesitant and reluctant to give any evidence against their colleagues. They also have this apprehension that whatever they are going to say will also be applicable to them in future. As a result, application of judicial mind is minimal and

it simply follows whatever has been laid down.Additionally, this system of consumer succour does not talk about sub standard care. Compensation under the Act is provided only for an injury that is proximate result of fault of medical practitioner but there is no compensation for low standard treatment which does not result in any direct damage to the patient.[40]

The failure of the Consumer Protection Act was also endorsed by Supreme Court in the case *of Dr. J.J. Merchant* v. *Shrinath Chaturvedi*.[41] The Court observed: "After enactment of the Act, appropriate steps have not been taken by the Government for ensuring that the National Commission or the state forums can function properly. Also the consumer or the state forums can function properly. Also the consumer dispute redressal agencies have not been fast enough in disposing cases. Several bottlenecks and shortcomings have also come to light in the implementation of the various provisions of the Act.'

Concluding Remarks

The purpose of passing Consumer Protection Act was to provide cheap, speedy and easily accessible remedy.One of the drawbacks of the system is in every case documents are not available to the person. Our judicial system goes for evidence.The question is why aren't photocopies of the document given to the patients? Aren't it should be a transparent system? Apart from this, application of judicial mind should not be niggardly. The judiciary should also apply its own brains and should not completely rely on the witnesses of doctors.

Additionally, there is no doubt about a fact that the Act provides for compensation to the person who is the victim of medical negligence but the question here is, is it sufficient to just give compensation to the person? What about the erring doctor? Can he escape his liability? The Consumer Protection Act does not deal with this issue.

It is submitted that a mechanism should be evolved not only to give compensation but also to punish the erring doctors so that it should act as a deterrent for others. This should be taken seriously and should be pondered over because no one on this earth has got a right to take or play with the life of others. One should not forget, life of a person is very precious and it should be handled with due care.

References

1. Santosh Paul, 'Judicial Scrutiny of Medical Negligence Cases by Consumer Forums', All India Reporter, Vol 90, 2003, p.369
2. Medical negligence means negligence resulting from the failure on the part of doctor to act in accordance with medical standards in vogue, which are being practiced by an ordinary and reasonably competent man practicing the same art.
3. Home Shapurji, Medical Law and Ethics in India, 1st Ed. 1963, p. 179.

   "Negligence on the part of a medical man is the omission to do something which a reasonable competent medical man guided by such knowledge and practice as a commonly known at the time and at the place where he practices and further guided by such other considerations which ordinarily regulate the conduct of reasonable competent medical man would do or doing something which a reasonably competent medical man would not do.
4. See generally Mason & Mc Call Smith Law and Medical Ethics 191 (4th Edn.)
5. C.V. Jain, "Doctor's defense in cases of Medical negligence under CPA 1986: A speech", Gujrat Law Herald, Vol 1, 1999, p.35.
6. Sudesh Kumar Sharma, "Medical Negligence, patients and Consumer Forums: Reflections from the Indian Experience", M.D.U.Law Journal, 2007, (vol.5), pp.128-129
7. Mahesh Bijawat , "Hospital and Doctor's Negligence", Journal of Indian Law Institute, Vol. 34, 1992, pp. 254-62.
8. Section 304-A, IPC provides "whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide will be punished with imprisonment for a term of two years, or with fine or with both".
9. Section 337 of IPC "Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

   Section 338 of IPC "whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safely of others, shall be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees or both.
10. Mritunjay Kataria, "Medical Negligence: Criminal Liability of the Doctor and Criminal Law Medical Establishment", Criminal Law Journal, Vol. 109, 2003, p. Ji-7p.
11. Supra note 6 p 129-130
12. Santosh Paul-"Judicial Scrutiny of Medical Negligence Cases by Consumer Forums". All India Reporter 28- 30(February,1995)
13. During the period 1975 to 1985, an analytical research study was done by Prof Marc Galanter. The study showed that during this period various High Courts and Supreme Court disposed of 416 cases, out of which claims under Motor Vehicles Act and Medical Negligence were 360 and 3 in number respectively. See Upendra Baxi and Thomas Paul, Mass Disasters and Multinational Liability: The Bhopal Case 214-218 (1986)
14. P.N. Rao v. Jayaparkash, AIR 1990 AP 207. in the said case, the plaintiff when he was 17 in the year 1966, suffered damage due to negligent act of doctor. He

was given compensation after the gap of 24 years in the year 1990, this inspite of the fact, that he did not move to the Supreme Court. If he would have gone there it would have taken another 15-20 years.

15. Mahesh C. Bijawat, "Hospital and Doctor's Negligence", 34, J.I.L.I 254 at 261.
16. The purpose of this Act was to provide cheap and speedy remedy to the consumers.
17. AIR 1996 SC 550.
18. (1991) 1 CPR (30).
19. See 2 (d) Consumer Protection Act,1986.
20. (1993)1CPJ, p. 1001
21. (1993)1CPJ 694
22. (1994)III CPJ p. 286
23. (1993)II CPJ 633
24. (1994) 2 CPJ p. 294
25. As mentioned in Rifat Jan's, 'Judicial Attitude Towards Medical Negligence under CPA: An Appraisal', Civil and Military Law Journal, pp.61- 63
26. Supra note 17.
27. The court declared that "Service rendered to a patient by a medical practitioner by way of consultation, diagnosis and treatment, both medical and surgical falls within the ambit of 'service' as defined in Section 2(0) of the Act".
28. AIR 1996 S.C.2111: In the said case, the doctor put the patient on intravenous glucose drip without ascertaining the level of blood sugar by simple blood test. He was a homoeopath who administered allopathic drugs without having qualifications for the same. A compensation of Rs.30,000 was decreed against the erring doctor.
29. II (1997)CPJ 98(N.C); the National Commission awarded a compensation of Rs 12.5 lacs to the minor child and Rs 5 lacs to his parents stating that there was deficiency in service in the present case.
30. AIR 2000 Mad 340; In this case, the surgeon who performed operation of a plaintiff who had developed cyst near one of her ovaries left abdominal pack in the abdomen. A compensation of Rs. 5,80.000 was awarded to the plaintiff.
31. III (1998)CPJ 436; The erring doctor in the said case, completely cut of penis of the complainant who had difficulty in passing urine. As a result, the patient not only could pass urine normally but had also become impotent. A compensation of Rs. 8,00,000 was decreed against the negligent doctor.
32. III (1998)CPJ 586;The doctor was directed to pay Rs 2 lacs as compensation to a lady aged 40 years who had developed a painful lump in her breast. Doctor without any justification removed her uterus.
33. (2003)1 CPJ 216 (NC); The doctor in the said case instead of using mother's blood which was same as that of patient (complainant) used prepared blood. This caused Hepatitis-C. Cost that was incurred on medical treatment was allowed as compensation to the patient.
34. (2003)1 CPJ 47 NC; In the present case, an intramuscular injection was given intravenously to the patient. It resulted in combolism of heart and stopped blood circulation to his heart which led to his death. The negligent doctor was liable to pay compensation.

35. (2009) 6 SCC1; in the said case, the doctor without the consent of the patient operated on him. The patient completely loss control of lower limbs.
36. (2008)2 SCC1; The court laid down that performance of AH-BSO surgery was an unauthorized invasion and interference with complainants body and constituted deficiency in service.
37. R.K. Bag, Law of Medical Negligence and Compensation, (2nd Ed. Eastern Law House Pvt. Ltd. Calcutta (2001) at p. 11.
38. (1957) 1 WLR 582
39. Upholding this principle, SC in Vinitha Ashok v. Lakshmi Hospitals, AIR 2001 SC 3914, reiterated, "A doctor will not be held guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that art."
40. Shobha Singh, "Consumer Redress of Medical Negligence in India: A Critical Analysis, Allahabad Law Journal, (2004) pp.26-28
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SOCIO LEGAL ASPECTS OF LIVE-IN-RELATIONSHIP: AN OVERVIEW

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Introduction

All over the Hindu and Christian world, marriage began as a sacrament. Marriage began as a sacrament implied a permanent and indissoluble union. It was a union not merely in this life but also in all lives to come-an eternal union. The Shanskarars ordained that once is a maiden given in marriage, and the injunction was: "a true wife must preserve her chastity as much after as before her husband's death"[1]. Indian society has been in a state of transition from the old world to the new, altering old customs and traditions in light of the cultural changes and the influence of the west. The sanctity of marriage is still deeply guarded by the society but that is not to say that people don't adopt alternative forms of living arrangements. A live in relationship is just such an alternative arrangement which is gathering momentum and acceptance today. Earlier *mahahrajas, nawabs, zamindars* and other rich men of status in the society used to have several live-in women in their *zenanas*, apart from their legally wedded wives. Such live-in relationships were in addition to marriage and it was not considered immoral for men to indulge in this practice[2]. Sometimes an additional household was maintained by men for live-in women away from their families. Now such relationships are generally in place of marriage instead of being additional to marriage. Young men and women, who do not want to undertake the commitment and responsibilities of a marriage, start living together with the freedom to walk away any time. In metropolitan cities, this practice is encouraged to some extent by high cost of accommodation and reduced societal control.

The concept of 'Mitru Sambandh' is nothing but a concept of the 'Live-in-relationship' or 'Living relationship'. Generally speaking, in modern age increasing concept of live-in relationship means a male and female staying together as a friend without marriage. This is unstable form of family. Many people imagine that living together before marriage resembles taking a car for a test drive. Live-in-relationships are not new in our society. The only difference is that now people have become open about it. A living

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arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.

The Supreme Court in *D Veluswamy v.D Patchaiammal*[3] has explained the definition of Live- in-relationships with reference to Domestic Violence Act. The Court in its judgment in the mentioned ruled:

Section 2(f) states: "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family";

Having noted the relevant provisions in The Protection of Women from Domestic Violence Act, 2005, court pointed out that the expression 'domestic relationship' includes not only the relationship of marriage but also a relationship 'in the nature of marriage'. The question, therefore, arises as to what is the meaning of the expression 'a relationship in the nature of marriage'. Unfortunately this expression has not been defined in the Act. Since there is no direct decision of this Court on the interpretation of this expression we think it necessary to interpret it because a large number of cases will be coming up before the Courts in our country on this point, and hence an authoritative decision is required.

In the words of Dhingra J., "There are no legal strings attached to this relationship nor does this relationship create any legal-bond between the partners. People who choose to have live-in relationship cannot complain of infidelity or immorality as live-in relationships are also known to have been between a married man and unmarried woman or vice-versa"

Live-in-relationship is contractual relationship. There is offer and acceptance between parties to live in relationship so such relationship should be framed within ambit of law. We need special legal rules to deal with consequences of such relationship. In spite of no clear and specific legal sanction, there has been a huge societal change in the attitude towards live-in relationships, the multinational companies providing health insurance benefits to domestic partner of the employees[4].

Recognition and status of Live-in-relationship in India

No law at present deal with the concept of live-in-relationships and their legality. Still even in the absence of a specific legislation on the subject, it is praise-worthy that under The Protection of Women from Domestic Violence Act, 2005, all benefits are bestowed on woman living in such kind of arrangement by reason of being covered within the term "domestic relationship" under Section 2(f). If we propose to enact a law to regulate

live-in-relationships, though it would grant rights to parties to it but at the same time it would also impose obligation on them. Female live-in partners have economic rights under Protection of Women from Domestic Violence Act, 2005

The Hindu Marriage Act, 1955 does not recognize 'live-in-relationship'. Nor does the Criminal Procedure Code, 1973. The Protection of Women from Domestic Violence Act, 2005 (PWDVA) on the other hand for the purpose of providing protection and maintenance to women says that an aggrieved live-in partner may be granted alimony under the Act.

The Fundamental right under Article 21 of the Constitution of India grants to all its citizens "right to life and personal liberty" which means that one is free to live the way one wants. Live in relationship may be immoral in the eyes of the conservative Indian society but it is not "illegal" in the eyes of law.

Section 114, Indian Evidence Act, 1872, lays down that where independent evidence of solemnization of marriage is not available, it will be presumed to be a valid marriage by continuous cohabitation between the parties unless the contrary is proved.

International aspects of the concept of Live in Relationship

Live in relationships in various countries are either recognised as it exists or it's finding recognition via implied provisions of different statutes that protect property rights, housing rights. Many countries provide for live in relationship contracts in which partners can determine their legal rights. However, when it comes to the right of child born under such relationship, law of various countries exudes a uniform tenor of protecting their rights.

France

In France, there is the provision of "Civil Solidarity Pacts" known as "*pacte civil de solidarite"* or PaCS, passed by the French National Assembly in October 1999 that allows couples to enter into a union by signing before a court clerk. The contract binds "*two adults of different sexes or of the same sex, in order to organise their common life"* and allows them to enjoy the rights accorded to married couples in the areas of income tax, housing and social welfare. The contract can be revoked unilaterally or bilaterally after giving the partner, three month's notice in writing.

Philippines

In Philippines, live in relationship couple's right to each other's property is governed by co- ownership rule. Article 147, of the Family Code, Philippines provides that when a man and a woman who are capacitated

to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership[5].

United Kingdom

In the UK, live in couples does not enjoy legal sanction and status as granted to married couple. There is no obligation on the partners to maintain each other. Partners do not have inheritance right over each other's property unless named in their partner's will. As per a 2010 note from the Home Affairs Section to the House of Commons, unmarried couples have no guaranteed rights to ownership of each other's property on breakdown of relationship. However, the law seek to protect the right of child born under such relationship. Both parents have the onus of bringing up their children irrespective of the fact that whether they are married or cohabiting[6].

Scotland

The live in relation were conferred legal sanctity in Scotland in the year 2006 by Family Law (Scotland) Act. Section 25 (2) of the Act postulates that a court of law can consider a person as a co-habitant of another by checking on three factors; the length of the period during which they lived together, the nature of the relationship during that period and the nature and extent of any financial arrangements, in case of breakdown of such relationship, Section 28 of the Act gives a cohabitant the right to apply in court for financial support. This is in case of separation and not death of either partner. If a partner dies intestate, the survivor can move the court for financial support from his estate within 6 months[7].

U.S.A.

Laws in the U.S. as well do not provide the live in relationship couple with the rights as enjoyed by married couple. Nonetheless, couple can enter into cohabitation agreement containing stipulation with regards to their rights and liabilities. Many decisions of the courts in USA, the concept of palimony has been considered and developed. The US Supreme Court has not given any decision on whether there is a legal right to palimony, but there are several decisions of the courts in various States in USA. A law has been passed in 2010 by the State legislature of New Jersey that there must be a written agreement between the parties to claim palimony. In *Watts v. Watts*[8] the Supreme Court of Wisconsin held that a domestic partner could bring a cause of action based on unjust enrichment in the absence of an express or implied contract.

Canada

Canada recognises live in relationship as "Common Law Marriage". The couple is accorded legal sanction if the couple has been living in conjugal relationship for a year or the couple is parents of a child born by birth or adoption[9].

Living together is legally recognized as 'common-law-marriage'. In many cases comman-law couples have the same rights as married couples under the federal law of the country. A comman-law relationship gets legal sanctity if the couple has been living in a conjugal relationship for at least twelve continuous months or the couples are parents of a child by birth or adoption or one of the couple has custody and control of the child and the child is wholly dependent on that person for support.

China

In China, couple can sign a contract for live in relationship. The rights of the child are secured as the child born outside the wedlock has the same benefits as enjoyed by the child born under a marriage[10].

Ireland and Australia

The laws of Ireland and Australia also recognises live in relationship. The family law of Australia recognises "de facto relationship" between couples, while in Ireland the impetus is towards greater recognition to live in relationship as there has been demand for right to maintenance by separated live in couples.

The position that emerges with respect to live in relationships is not very discernible and lacks a definition in majority of the countries. While some countries have passed legislation according legal status to live in couples, some countries are granting greater legality to such couples by the implied provision of their statutes as discussed. In India as well, via various decisions of the court, law is exhibiting a tendency of giving legal tinge to live in relationships.

Nevertheless, the fact remains; the legal progress of laws with respect to live in relationship and the sweeping increase in number of such live in relationships are not running parallel to each other. The law needs to whiz up to prescribe and proscribe speculation with respect to live in relations.

Judicial approach towards the concept of Live in Relationship

However, living together has been long considered to be presumption of marriage until some facts prove it to be otherwise under Section 114 of Evidence Act. In, *A.Dinohamy v. W.L.Blahamy*[11], the Privy Council

laid down the general proposition that; "where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary be clearly proved that they were living together in consequence of a valid marriage, and not in a state of concubinage."Long cohabitation by a man and a woman has all along, directly or indirectly, been recognised by the judiciary in India. Even in the nineteenth century, courts enforced some agreements where the consideration was past cohabitation. According to Section 23 of the Indian contract Act, 1872 if court regards the consideration of an agreement immoral, it is unlawful and consequently the agreement is void. Where a man and a woman live and cohabit together, although not lawfully married to each other and the man in consideration of the past cohabitation agrees to transfer property to the women or to make provision for her maintenance, the question often arises as to the enforceability of such an agreement.

In *Dhiraj Kaur v.Bikramjit Singh*[12], the Allahabad High Court allowed a woman to recover arrears of allowance promised to her for past cohabitation. The Patna High Court, in *Godfrey v. Parbati*[13], held that a contact to compensate a woman for what she had lost on account of past cohabitation with the promise was not immoral and hence enforceable. However, if cohabitation amounts to adultery under the Indian Penal Code, such agreements are void for consideration being forbidden by law. The Madhya Pradesh High Court also enforces an agreement in *Subhashchandra v. Smt. Narbadabai*[14] where the consideration was apparently past cohabitation. In this case, Narbadabai has been living in exclusive keeping of one Seth Kishanlal, a married man for the past about fifty years and was entitled to claim maintenance (as mentioned in the agreement) during her lifetime from the estate of Kishanlal. The cohibtation was not shown to be adulterous. It was held by the high Court that agreement embodied a valid contract and was enforceable.

In *D.Nagaratnamba v. Kunuku Ramayya*[15],Justice Bachawat of the Supreme Court of India recognised past cohabitation as a good consideration. These cases were concerning enforceability of agreements where the consideration was past cohabitation without marriage and upholding lawfulness of consideration in such cases amounted to legal recognition of live-in relationship by the judiciary.

In *Mohabhat Ali v. Md. Ibrahim Khan*[16], the Privy Council, which was the highest court of appeal for Indian cases prior to Supreme Court, held that, "the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years."

The Supreme Court stated in *Badri Prasad v. Dy. Director of Consolidation*[17] a case where a man and a woman lived together for around 50 years that, there would be strong presumption in favour of wedlock. The Court however added that, "the presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy."

The Supreme Court in *Gokal Chand v. Parvin Kumari*[18] observed that continuous cohabitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them[19].

In the judgments before 2000 there is hardly any case where the Courts have used the word "live-in relationship" to clarify the legal status of a domestic partner or in any other such connections. In 2001, the Allahabad High Court held in *Payal Sharma v. Superintendent, Nari Niketan, Agra*[20], that a major man and woman can stay together without getting married if they want and this is not illegal.

The Supreme Court in the case of *Vidyadhari v. Sukhrana Bai*[21], issued a Succession Certificate to the live-in partner, who was nominated by the deceased. In, *Abhijit Bhikaseth Auti v. State of Maharashtra*[22], the Bombay High Court observed that it is not necessary for a woman to strictly establish the marriage, to claim maintenance under section 125 of Cr.P.C. In, *Koppisetti Subbharao Subramaniam v. State of A.P.*[23], the Supreme Court extended the protection against dowry under Section 498 A of the Indian Penal Code so as to "to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband" and resort to cruelty or torture to the women. This case has extended the protection of women from dowry even when they are in a live-in relationship. In *Tulsa v. Durghatiya*[24], the Supreme Court re-recognised the rule that there would be a presumption of marriage when there has been long cohabitation.

The year 2010 was a significant year in the legal sphere related to live-in relationships, with the judiciary in both the Supreme Court and the High Courts delivering numerous decisions on the legal status of live-in relationships. In *S. Khushboo v. Kanniammal*[25], the Supreme Court, placing reliance upon its earlier decision in *Lata Singh v. State of U.P.*[26], held that a live-in relationship is permissible only in unmarried major persons of heterogeneous sex and is not a criminal offence under any law. The court said even Lord Krishna and Radha lived together according to

mythology. The apex court said there was no law which prohibits live-in relationship or pre-marital sex. The apex court made the observation while reserving its judgment on a special leave petiton filed by noted south Indian actress Khusboo. Living together is a right to life," the apex court said apparently referring to Article 21 which granted right to life and liberty as a Fundamental Right. "It's better to have a live-in relationship rather than having a divorced life!" This is common and quite rational line favoring live-in relations in the world. Live in relationship are not new for western countries but these days the concept is adjusting its roots in east also.

The Supreme Court on 13 August, 2010 in the case of *Madan Mohan Singh v. Rajni Kant*[27] has once again entered the debate on legality of the live-in relationship as well as legitimacy of a child born out of such relationship. The Court while dismissing the appeal in the property dispute held that there is a presumption of marriage between those who are in live-in relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship. In the case of *Bharata Matha v. R. Vijaya Renganathan*[28] dealing with the legitimacy of child born out of a live-in relationship and his succession of property rights, the Supreme Court held that such a child may be allowed to succeed inheritance in the property of the parents, if any, but doesn't have any claim as against Hindu ancestral coparcenary property.

However, in another case, *Revanasiddappa v. Mallikarjun*[29], the Supreme Court observed that taking into consideration the current social circumstances, it is necessary that the amended Section 16 (3) of the Hindu Marriage Act must be interpreted to give right of inheritance to an illegitimate child to the ancestry property.

The Delhi High Court in its decision on 10 August 2010, in *Alok Kumar v. State*[30] while dealing with the validity of live-in relationship observed that, "'Live-in relationship' is a walk-in and walk-out relationship. There are no strings attached to this relationship, neither this relationship creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time." Further, the persons entering into such relationships are debarred from complaining of infidelity or immorality of the other partner.

In the case of *Chanmuniya v. Virendra Kumar Singh Kushwaha*[31], the Supreme Court observed that "in those cases where a man, who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserts her. The man should not be

allowed to benefit from the legal loopholes by enjoying the advantages of a *de facto* marriage without undertaking the duties and obligations." Court also wanted to interpret the meaning of "wife" broadly under Section 125 of Cr.P.C. for claim of maintenance, so that even women in live-in relationship can claim maintenance. The Court further declared that a woman in a live-in relationship in entitled to claim any relief mentioned under Protection of Women from Domestic Violence Act, 2005.

The Supreme Court in the case of *D. Velusamy v. D. Patchaiammal*[32] held that, a 'relationship in the nature of marriage' under the 2005 Act must also fulfill the following criteria:

(a) The couple must hold themselves out to society as if they are spouses,

(b) They must be of legal age to marry,

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried and

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act.

The Court further clarified that, "merely spending weekends together or a one night stand would not make it a 'domestic relationship'." It also held that "if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a 'relationship in the nature of marriage'.

The executive is not far away from taking reformative stance. The Malimath Committee Report[33] suggested that the meaning of "wife" within Section 125 of the Cr.P.C. need to be amended "so as to include a woman who was living with the man as his wife for a reasonably long period, during the subsistence of the first marriage." Later, in October 2008, the Government of Maharashtra accepted the proposal of Malimath Committee Report.

Concept of Live-in Relationship and Legal implication under Indian System

Though there have been a few recent judgments regarding live-In relationships as discussed above, there are few issues which have not been addressed or not adequately addressed.

One of the main concerns which remain unclear is what length of time of cohabitation will enable the person to be qualified as domestic partner. While a casual "walk-in walk-out" relationship cannot qualify a partner for succession rights, long time-period of continuous cohabitation

has been accepted as a marker for grant of successful succession or maintenance rights. It is necessary to statutorily make a fixed time or make differentiation between a "walk-in walk-out live-in relationship" and a live-in relationship which will make a person qualify for a succession rights. Another intertwined issue is the question of "proof of continuous cohabitation like married couple". It is essential that the party represents themselves like married couples to the society and there has been social recognition to that effect. The Courts have specifically mentioned any negative evidence regarding the period of continuous cohabitation can weaken the case.

While it threatens the very notion of husband and wife and the cognition of marriage that enjoys high level of sanctity when it comes to India, it also tends to prop up adultery, as there is no such proscription that live in partners should be unmarried. Thus, a person might be married and be living with someone else under the garb of live in relationship.

Another question which is under debate is that live-in relationship promotes bigamy. The Court have addressed that a person needs to be unmarried to be granted maintenance rights.

Contrastingly, the Court has also held that in live-in relationship, there can be no complain of infidelity or immorality[34]. However, it is not clear, if bigamy is allowed under the person's religion whether such claims can be sustained. Another contrasting problem, is that person who is deserted remains helpless in such cases where the persons lived into a bigamous relationship and the courts considers unmarried status to be one of the condition for granting maintenance. In such cases, the deserters go scot free, due to the loop-holes present in the law. According to the author, in case of long period of cohabitation, where the couples represent themselves as a married couple, there can be an exception in providing maintenance rights and grounds of the person to be unmarried will be considered as an exception. It is necessary to take a proper stand and differentiation should be made between the rights and liabilities that are in bigamous live-in relationships.

Even if rights of maintenance etc are provided to the live in female partner, there is no guarantee that she can actually avail those rights. Marriages grant social recognition, but there is no proof of live in relationship; a person can easily deny the fact of live in relationship to evade liability. In sum and substance the rights of woman remains precarious.

Recently, The Bombay High Court on 3rd December 2012, stayed till December 17 the proceedings in a case of domestic violence against family members of Rajesh Khanna by a woman claiming to have been in a live-in relationship with the late superstar[35].

The proceedings in a Metropolitan Magistrate's Court at Suburban Bandra were stayed by Justice K U Chandiwal, who issued notice to Anita Advani, the lady who claimed to have looked after the actor in the last few years of his life as a wife would do. The Court was hearing a petition filed by Khanna's actress wife Dimple and actor son-in-law Akshay Kumar challenging the processes started by the magistrate against them and other family members. Twinkle and Rinki Khanna's daughters, are also in the process of filing similar petitions.

Advani, in her complaint against Dimple and others, has claimed she was driven out of Khanna's Bandra bungalow 'Ashirwad' after his death and sought maintenance from the actor's estate.On the other hand, Dimple contended that she was the legally wedded wife of Khanna and as such no other woman can claim share in the wealth left behind by her husband.

The Magistrate should not have entertained the complaint which has made "baseless" charges.She contended that it was "unreasonable" for the Magistrate to even suggest that she and her family go in for a compromise with the complainant in which case he would refer the matter for mediation.

The Magistrate, while hearing Advani's complaint, had earlier last week issued summonses to Dimple, her daughters Twinkle Kumar and Rinki Saran and son-in-law Akshay Kumar asking them to appear in person before the court to answer the allegations, which besides domestic violence includes forging Khanna's will.Akshay Kumar supported Dimple's contention that Advani had no right to claim any share from Khanna's properties which is said to be to the tune of Rs 500 crores.

The law of succession depends on the religion of the deceased person. However, there may be confusion regarding the rights of children born out of inter-religious live-in relationships. These concerns need to be addressed by a proper mechanism.

An interesting issue regarding the caste of a child born to live-in partners, where male and female partners belonged to different castes, came before the Supreme Court in *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*[36], Sobha's mother Simhachalam, who belonged to *Bagatha* scheduled tribe in Andhra Pradesh, had a live-in relationship with Marahari Rao, an upper caste man and Sobha was born out of this relationship. Later on, the relationship had ended and Sobha was brought up by her mother and married to a person from *Bagatha* community. Sobha Hymavathi Devi was elected to the Andhra Pradesh Legislative Assembly in 1999 on a Telugu Desam ticket from Sringavarapukota constituency reserved for scheduled tribes. Sobha's election was challenged by the defeated candidate on the ground that she did not belong to *Bagatha*

community, which had been notified as a scheduled tribe community, because her father was an upper caste man. Sobha's plea was that her father was not married to her mother and therefore, she should be treated as member of the community of her mother. She had further stressed that she was brought up as a part of *Bagatha* tribe and married to a man belonging to that tribe only. The Andhra Pradesh High Court drew a presumption of marriage between the father and the mother of Sobha because of long cohabitation in a live-in relationship. The High Court held that she did not belong to *Bagatha* community and set aside her election from the reserved constituency. In her appeal challenging the High Court judgment before the Supreme Court she had stated that her community would be determined by that of her mother and not father as there was no marriage between two. But the Supreme Court agreed with the view expressed by high court and observed, "We must say that on the evidence here, including the documentary evidence relied on by the High Court, the presumption arising from long cohabitation of Marahari Rao and Simhachalam of a valid marriage between them, gets strengthened and there is no material circumstance which can be said to rebut such presumption arising from long cohabitation."

Concluding Observations

The law on live in relationship need to demonstrate a clear cut picture keeping in mind the present social context alongwith the basic structure of tradition and culture that characterises Indian society.

While the court in few cases granted the status of married couple to live in couple, in some cases court held that live in relationship does not cast any obligation on the couple, as the whole idea of live in relationship is to evade such bondage, evincing a penchant towards an obligation less, free society.

Nonetheless, another thought that seek attention is that if the law lobs same kind of obligation with respect to maintenance and succession as exist in the institution of marriage, then why will a couple prefer to get into a live in relationship, when the basis of getting into live in relationship is to evade all bondages and entanglement. A different point to be observed is that, if the rights under live in relationships and marriage are equated, it will bring in conflict the rights of wife if the person who is in relationship is already married and the rights of live in partner, secondly this will make the circumventing of liability much easier and matters more complicated by shuffling between the rights and liability under marriage- live in relationship and will lead to entanglement in judicial meanders if judicial discourse is taken.

Outside the legal arena, live in relationship also faces the social speculation; the tenor of live in relationship is the characteristic motif of metropolitan area, However, when we look at the masses that define India, live in relationship does not find consensus of majority and is accused of tampering with the Indian culture of values and morality.

Live-in-Relation would give rise to child pregnancy and has far reaching ramifications, adding despite its aim to restrict multiple partners. It would have an adverse impact on the youths and result in the spread of HIV/Aids. Therefore awareness amongst youth in most important.

Hence, as observed many questions with respect to live in relationship remains unanswered. On the one hand it faces speculation from society and secondly legal status of live in relationship evinces contingency. The more clear approach and attitude of law and the changing time and stance of society will determine the future of live in relationship. Laws should be made by the parliament, which should keep a check on the practice of evading bondages.

Live in relationships should be granted legal status after specific speculated period of its existence, providing the partners as well as the child born out of such relationship with all the legal rights of maintenance, succession, inheritance as available to a married couple and their legitimate offspring, also securing their rights after the dissolution of such relationship due to break up or death of one of the partner. The guidelines given in *D. Veluswami v. D. Patchaimmal*[37] is worth noting in this context and should be followed. Since, proving *de facto* live in relationship is difficult, the burden of proof should be relaxed, so that the rights that are conferred upon partners, specifically female live in partner can be availed. However, if the person in live in relationship is already married, then live in relationship should be considered as the second marriage, hence should be considered an offence of bigamy. This will definitely ensure the rights and privileges in live in relationship without possessing any threat to the institution of marriage. A good legal system always tends to adapt to the gradual social changes. As such, the law should not remain state when the number of live in couples is increasing tremendously. The rights of live in couples should be legally recognised while ensuring that it does not impede upon the system of marriage.References

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LEGAL PROTECTION OF KASHMIRI *KHATAMBAND:* POST GI ISSUES AND CHALLENGES*

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Introduction

Kashmir is a beautiful land with pristine waters and bracing landscape. Kashmiris have won a great admiration as artisans who are hardworking. Their artistic creativity is depicted through various art forms and handicraft activities occupy an important position in this sector. Handicraft activities play an important role in building the economic structure of Kashmir valley. As there are four months of severe winter in valley, people prefer to remain indoors during these months. They do not sit idle in their homes; rather they develop beautiful handicrafts by using their creative skills. The beauty of their paisley homeland is depicted in these handicrafts. The handicrafts which are worth mentioning include Shawls, Sozni embroidery, Crewel and Chain Stitch, Namdha felts, Walnut Wood Carving, Lattice work (pinjrakari), Papier machie, Gabbas, Metal works, and numerous other miscellaneous crafts.

These artistic designs have become an important field of intellectual property which accords protection to them in domestic as well as international markets. In contemporary period, these creations are traced to their origin as they are intimately associated with a particular place and are protected as Geographical Indication against unscrupulous traders who come to produce worthless imitations of these crafts. In India, largest number of GIs are from handicraft sector because of their unique design, artistic flavour, local material etc. The GI has now proved a viable mechanism to protect its locally rooted properties and in turn maintain its quality. At the same time GIs give the consumers the proper value of their money

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which they spend for purchasing these articles. Various studies have quantified the price premium associated with GI products. A consumer survey undertaken in the European Union (EU) in 1999, for instance, found that 40 percent of consumers would pay a 10 percent premium for origin guaranteed products.[1] The handicraft products of Kashmir would definitely fetch a premium price provided they fulfil the quality standards.

Geographical Indication

The Geographical Indication of Goods (Registration and Protection) Act, 1999 (hereinafter referred to as the GI Act, 1999) is the first Act in India to provide for registration and better protection of GI to goods. The definition of GI as per the Act is:

Geographical Indication in relation to goods means an indication that identifies such goods as agricultural goods, natural goods or manufactured goods as originating or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.[2]

The goods eligible for GI registration thus may be, agricultural goods, natural goods, manufactured or man made goods, handicrafts, industrial goods and food stuff. Each of these items may belong to one or more classes of the Fourth Schedule % Classification of goods % Name of the classes of the GI Act, 1999. The goods mentioned in the Fourth Schedule provide for a speedy identification of the general content of numbered international classes. They correspond to the major content of each class and are not intended to be exhaustive in accordance with the international classification of goods.[3]

Identification of Geographical Indication

Any candidate for possible GI should be one of the items with territorial / regional or local geographical characteristics. Such geographical characteristics in items are to be the manifestation of:

(a) weather/climate or environment of a locality
(b) soil or water induced products
(c) biological attributes of the locality
(d) cultural attributes of the locality
(e) bio-cultural attributes of the locality
(f) traditional age-old practices of the locality
(g) traditional expression having local bindings
(h) social/environmental/spiritual/religious beliefs or practices

The steps for identifying a possible GI are:

1. Attributes of a GI candidate should be categorized into one or many of the above geographical characteristics. This happens to be the first step towards identification of a GI candidate.
2. The second step is the marketing and production feasibility assurance of the good(s). There are standard procedures of survey of samples for both feasibility studies and experimental marketing.
3. The third step is to consolidate an organized effort through 'any association of persons or producers or any organization or authority, established by or under law, representing interest of producers of the concerned goods'.[4] This is required to fulfill the 'need to ensure equitable treatment to producers of the goods concerned, that consumers of such goods shall not be confused or misled in consequence of such registration'. GI, being a collective right, identification of an association is must.

Khatamband

There is perhaps no feature of Indian Art that manifests so great a diversity nor so many points of interest as that of wood work. No aspect of Indian Art can have so much to teach the student as that of wood work.[5]

Khatamband is one of the art forms of Kashmir. It is an art of ceiling-making by fitting small pieces of wood into each other in geometrical patterns. There is no doubt that this manufactured good originating from this region is resultant of a unique combination of the geoclimatic conditions and socio-cultural history of the region.

Khatamband is one of the marvellous crafts of Kashmir. When a commoner looks on *Khatamband,* he losts in an imaginative world by thinking that whether really these are the human hands and mind which work together to create such an artistic creation. The designs are developed free-hand by Kashmiri artisans.

Kashmiri *Khatamband* is a registered GI. It was filed for registration as GI under Application Number 204. The application was filed by the Craft Development Institute, Srinagar which is a Registered Society under the Jammu and Kashmir Societies Registration Act, 1998.[6]

Definition of goods and classification

Khatamband comprises of a locally grown raw material as well as an indigenous process and related practices that are unique to the said region. i.e., specific raw materials and the production method used in the manufacture of *Khatamband* are both originating in parts of the Kashmir region.

The *Khatamband* craft falls within the definition of 'goods' in the GI Act, 1999.[7]

For the purpose of the registration of a GI or as an authorised user, goods shall be classified in the manner specified in the Fourth Schedule to the GI Act, 1999. The craft *Khatamband* falls within the purview of Class 20 of the Fourth Schedule.[8]

Khatamband-GI Definition

Khatamband is one of the oldest known wooden craft manufactures of Kashmir. It is a special kind of traditional panelling with little pieces of wood that is both aesthetic and cost effective. Each piece of wood is prepared, intricately carved and then fitted together to form intricate geometrical designs with a definite mathematical foundation. Further the fitting of all the small wooden pieces is done without using nails or glue so that it can be assembled and reassembled again somewhere else down to the last component. The word *Khatam* is an Arabic word, which means 'patch' and *band* is a Persian word meaning 'lock'.[9] This combination of Arabic and Persian words is the most accurate translation of the word *'Khatamband'* literally meaning 'locking the patches'.

The other local definition of the term *Khatamband* is that it is a Persian word and its meaning is related to the method of the craft. *'Khat'* is drawing lines and 'band' is one scale, pronounced as *'Khat m band'*. The band or scale here refers to the most essential *'kannat'* or a master ruler which has all the markings needed to make a particular pattern. According to this definition, the literal meaning would be 'drawing lines from the *kannat*'.

Both these definitions capture the two most crucial operations, one at the start and another at the end, for producing *Khatamband* that renders it unique. Both these operations continue to be made entirely by hand even today while many of the other processes have been mechanised for the last twenty years.

Proof of origin with historical reference

There are different stories as far as the origin of *Khatamband* in Kashmir is concerned. The technique of *Khatamband* can be traced back to Arab times and subsequently came to parts of central Asia with the Islamic conversions during the Timur period but seemed to have been referred by different names. The Turkish doors, windows and pulpits use a similar technique but called by another name *"Kundekari"*.

It is believed to have come to Kashmir during the Sultanate rule. Since there is absolutely no evidence of wood work made of many small pieces

mentioned prior to the 14th century this is assumed to be most likely, though Kashmir was renowned for carving skills and amazing construction of wooden houseboats and massive deities even before that.

Some have credited the introduction of *Khatamband* in Kashmir to Mirza Hyder Tughlaq, a military general who captured Kashmir during early Mughal times in 1541.[10] Mirza was a Turkic speaking Prince. The second version is linked to the coming of Mir Syed Ali Hamdani and his 700 disciples into Kashmir in 1373 AD, of whom the large number of Sufi saints were artists, calligraphers, masons, metal engravers, embroidery artisans and carpenters.[11] The last reference seems most plausible as it also corresponds with the artisans own stories of their ancestors.

Khatamband is also said to have been introduced in Kashmir by Sultan Zain-ul-Abidin during 1423-1470 when he invited artisans from Central Asia to settle in Kashmir and upgrade the traditional crafts here. Since there is no mention of this in his detailed chronicles, it is more likely that he improved *Khatamband* in Kashmir rather than being part of its origin in Kashmir.

In the last 100 years, *Khatamband* evolved as an important craft. Its use was promoted in all the public buildings and colonial residences in Kashmir and even exported to England as an aesthetic and effective insulation that was also a cheaper alternative for residents there.[12] The delicate wood carving and fine *naqashi* embellishments of gold and mineral colours also decreased and instead a type of mullion work with glass and mica were used for windows, doors and *roshandaans.* During the late 19th century the houseboat owners gave a further impetus to this craft industry when all the houseboats for tourists were furnished with extensive Kashmir wood work.

Geographic Location of Practice/Production

The Geographic location for *Khatamband* production is District Srinagar and particularly the areas of Safa-kadel and Idgah where there are presently around 150 artisan families practising *Khatamband* for around 100 years now. They claim that their ancestors learnt the technique from Central Asian artisans before the 16th century.[13]

The raw material that is generally used to make *Khatamband* ceilings or panels is wood of either silver fir *(Budloo)* or Deodar all of which grow in Kashmir valley at various altitudes mainly in Districts of Anantnag and Kupwara.

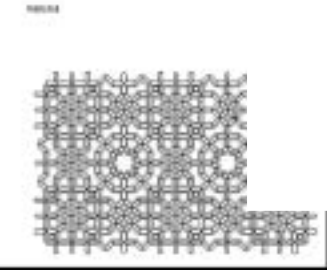
Description and Uniqueness

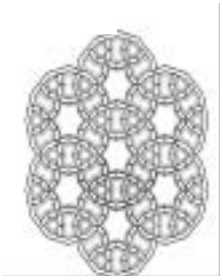
1. The basic technique consists of small flat pieces of wood inserted into grooven battens. These pieces are in geometric shapes like

triangles, squares, pentagons, hexagons, octagons and multi-sided polygons like star shapes etc. The battens are the structural part of *Khatamband*, intersecting each other by the harved lap and bidder joints and mitter joints. As the battens and the pieces are alternatively fitted to each other, the panelling gradually builds like a jigsaw puzzle into a beautiful geometric pattern that is stunningly intricate. One of the most intricate and time consuming design is the *Bara Murabba* which has around 3750 pieces in a ceiling of 10ft×10ft size. The smallest piece is sometimes less than 40 mm or 1.5 inches.

2. It is partially handmade and extremely labour intensive. In spite of partial mechanisation that has helped in reducing time and therefore, the cost of making *Khatamband*, it is still extremely labour intensive and time consuming. Therefore, it is expensive but long lasting. *Khatamband* lasts for more than 100 years with very little maintenance and repair and gets a burnished sheen over time.
3. A panel of *Khatamband* is formed of small wooden pieces that are held together by joints in such a way that there is no need for glue or nails to fit them together. Nails are used at certain distance to fix the panel onto the under-structure to prevent the whole ceiling from falling off, but the pieces themselves are held together with the help of three different types of joints which form the basic technique of *Khatamband*. These joints are the mortise-tenon joint, halved lap and bridle joint and a third type of joint called the miter joint; the first is how the pieces are held by the battens and the other two are the joints used in the battens.
4. The final product is detachable and reusable. The use of the joints enable the entire *Khatamband* to be detached piece by piece and reused somewhere else again saving precious wood as well as human labour. This feature distinguishes Kashmiri *Khatamband* from Irani *Khatamkari* which is not detachable.
5. Although *Khatamband* in the form of wall panels exist from the 16th century, it became well known during the latter 19th century when the European travellers visited Kashmir and found this traditional system of making false ceilings that provide excellent insulation against the freezing cold as unique to Kashmir and did not exist anywhere else in India.[14] The gap between the understructure and the panelling pieces allows air to be trapped there providing an insulating effect to prevent heat loss.

6. *Khatamband* also combines wood with other materials like glass, mica for making windows. This is called mullion work especially found in early 20th century buildings. Most *Khatamband* has some value addition of hand carving. The old *Khatamband* that is found in monuments are richly decorated with fine naquashi work where the wooden pieces are coated with papier-mache layer and painted in traditional Kashmiri motifs and even gold embellishments. The shrines of Dastagir Sahib or Naqshbandi have the finest examples of such *Khatamband* work in Kashmir built.
7. The designs are many and repeat in geometric pattern. *Mouje, Panch Muraba, Muraba Badam, Shesh Gul, Chahr Gul, Pohul Girdan, Pohul Taruk, Dawazdha Girdh* and *Barah Muraba* are some of the well known designs and there are more than 120 known designs. Designs are named after the shapes that are predominantly used in it.





Mouje Lehar *Dawazdha Girid* *Hastubul*

8. The *kannat* or master scale is used to produce all the components of one design. It contains all the coded information and calculations of that particular design, represented in the form of marking on a wooden batten and passed from one generation of artisans to another .It is looked upon with great reverence by the producers and artisans as the knowledge about *Khatamband* craft given to them by their ancestors. A set of *kannats* are what is considered most necessary to set up a new *karkhana.*[15] Therefore, an artisan has to undergo several years of training under a master craftsman and learn all the stages of production before he is given a set of basic *kannats* from his master craftsman to set up his own unit of production, if he so desires.

For the formation of *kannat* there is a separate elaborate process which involves a geometrical and mathematical calculation. The process has been kept a trade secret.[16]

Khatamband: Prospects and Challenges

After getting an understanding of the working of the craft in the Saffa-Kadel and Idgah Clusters in Srinagar city, an initial phase involving meeting the artisans / unit holders working in the area was done. For this purpose a random sample of 100 artisans (50 from each area) based on job done, scale of investment, and turnover etc. was chosen representing different areas of Safakadel and Idgah Clusters and data was collected with the help of questionnaires. During the second phase, meetings were arranged with the traders and various Business Development Service (BDS) providers working in the area. Investigation pertaining to existing government schemes functional in the area and the people benefiting from those schemes was done. The government organisations and the departments like Directorate of Handicrafts, Small Scale Industries Development Corporation (SIDCO), were contacted and information on various aspects relevant to the clusters was collected through detailed interactions and discussions. Discussions with officials and people associated with the craft industry were held in order to clarify issues related to raw material, quality and certification and production value.

While conducting the empirical survey following facts come to fore:

There are only four practitioners of *Khatamband* listed as per the State Handicrafts Department.[17] However, this does not present the true picture. The figures as per the J&K *Khatamband* Ceiling Carpenters Union are provided below:

Year	*1981*	*1991*	*2001*	*2008*	*2011*
Number of *Khatamband* Artisans registered with the Union	170	200	250	319	350-400

Similarly about 300 *Khatamband* artisans are registered with the office of the Development Commissioner Handicrafts, Ministry of Textiles Government of India, Marketing and Service Extension Centre, Srinagar.

Costing at a glance:

Total number of Units = 80-85

Average number of Artisans per Unit = 5

Average number of working days per year = 300

Average output per Artisan per day = 6 sq. feet

Total annual output = 6×85×5×300 = 7,65000 sq. feet

Average cost of *Khatamband* per sq. feet = Rupees 140/-

Total annual turnover = 765000×140 = Rupees 10,7100000/-

(Prepared on the basis of the survey conducted by the researchers)

Issues Related to *Khatamband* Artisans

1. Quality Control and Enforcement

Quality, reputation and characteristics are three criteria to be specified before the registration of a GI. While the GI Act ensures benchmarking of reputation and characteristics, there is no provision for quality control before and after registration. Quality control and enforcement calls for effective regulatory mechanism.

There is a provision in the GI Act and Rules that calls for furnishing of information on the "particulars of the mechanism to ensure that the standards, quality, integrity and consistency or other special characteristics…which are maintained by the producers, makers or manufacturers of goods …".[18] It also requires the applicant to furnish the "particulars, if any, to regulate the use of the GI … in the definite territory, region or locality mentioned in the application".[19] However, as indicated by the phrase "if any", the inspection structure is not a mandatory requirement to be fulfilled while registering GIs in India. As for quality control, often furnishing details about initiatives/plans to set in place quality control mechanisms (rather than already established mechanisms) may be sufficient to have a GI registered, while the mechanism may follow suit.[20] While it is imperative on the part of the GI Registry to implement these provisions stringently, it is also important for the stakeholders of GIs to ensure that appropriate quality control mechanisms are set in place.

However, in the State of Jammu and Kashmir there is Jammu and Kashmir Handicrafts (Quality Control) Act, 1978 (Q.C.Act) for the improvement of quality of handicrafts and every manufacturer who is registered as such shall be allotted a Quality Control Mark which shall be stamped on a handicraft manufactured by him and the dealers who deal in such handicrafts should bear such Quality Control Mark (Q.C. Mark).[21] At present such quality control can be exercised only in respect of notified crafts.[22] *Khatamband* also deserves to be a notified craft so as to ensure its quality in the market.

Once legal rights over a GI are obtained, they have to be defended and enforced. This entails continuous monitoring of the markets to determine whether counterfeit goods are being passed off. While rampant misuse of many Indian GIs demonstrates the urgent need for effective enforcement, the extent of misuse that has already cropped up makes the task rather difficult. Instances of misuse from within and outside the country are plentiful for Indian handicrafts and Kashmiri crafts are not an exception. For instance the community of artisans associated with *Khatamband* is

very closed and insecure with the fear that their craft will be copied and result in loss of their livelihood. Citing example of what happened to walnut wood carving furniture craft, where people from Saharanpur, UP started to replicate the designs and styles from Kashmir which affected the walnut wood carving furniture and accessories market. Products from Saharanpur were made of inferior *Shisham* wood much cheaper than walnut wood which affected the prices of the finished product. Common customers usually cannot differentiate between the quality of the product and most times prefer less expensive and cheaper products.[23]

2. Availability of raw material

The manufacturers/unit holders always complain about the shortage of raw material. According to them the State Forest Department through its SFC depots distribute about 10 quintals of raw material per artisan through the All Kashmir *Khatamband* Ceiling Carpenters Union. This raw material is distributed among the artisans usually during the month of December-January out of the fire wood reserved for *Hamams* of Masjids and as such is of very low quality. Thus for about 10 months around the year the unit holders are left at the mercy of private wood suppliers. The government rate for *fir (budul)* is rupees 450 per quintal while same is offered by the private suppliers for about rupees 950 per quintal. This drastically increases their input costs that, in turn hit their margins and increase the cost of *Khatamband* and as such shrinking their market.

3. Unit / Plot of land

The unit holders complain of a step motherly treatment by various government agencies like the District Industrial Corporation (DIC). The unit holders demand that their industry be treated at par with the other industries of the State. Unit holders have been demanding units in the industrial areas or a plot of land where they could take their units to. Nearly all artisan traders run their units from their homes where the customers come to meet them. They are of the view that their privacy gets disturbed as their family members including their womenfolk also roam around. *Khatamband* as an art involves a lot of labour and that too varied labour. Therefore, lot of space is required. This would have resulted in more and more artisans being involved in this art and would have been a source of sustainable development for a lot of unemployed youths of the valley.

4. Exploitation by middlemen

The unit holders allege that that the traders or the contractors often exploit them and take government for granted. They often bid for high end designs in government institutions like *Barah-taaz* (Rupees 450 per feet)

while install low end designs like *pahel gardaan* and *mouj design* (Rupees 160 per feet). They in turn pay only Rupees 130 per feet to artisans.

5. Problems caused by police and forest officials in the movement of *Khatamband*

Material

The unit holders allege that the forest officials and J&K police often hamper the movement of their *Khatamband* related material (finished) on the pretext that the raw material used has been procured through the black marketing. They extract hefty bribe from the artisans/unit holders. According to the artisans this is the sole biggest reason that hampers the popularity of *Khatamband* outside Kashmir as artisans are always hesitant to move *Khatamband* related material not only outside but also within the limits of the city.

6. Ill- informed and un-informed artisans.

The artisans working in various units of *Khatamband* are the most ill informed and sometimes un-informed in the whole handicraft sector of the state. They have no idea about the various handicraft related schemes and various insurance policies of the State and the Centre. Rarely does an artisan possess an artisan card and when he does it, it mostly lies with the *wousta* (unit holder) or the union.

7. No investments in new designs and new installation formulae

There is such a huge demand for existing traditional products that the artisans rarely feel the need to experiment and try new designs. This may prove to be a big roadblock in the growth of this industry in future. The most complex process in the art of *Khatamband* is the installation process. It is the complexity of the installation process that has been the main hurdle in taking this craft to far of places. Unfortunately not enough time and money has been spent to simplify this process as this would have greatly promoted this craft.

8. *Najar* Monopoly

The *najar* family that brought this craft from Bijbehara area of Kashmir about 70 years ago consider themselves as the divine custodians of this art. In fact till about the 1990's the *najars* had a virtual stranglehold over this craft. It was not due to any free will but owing to huge demand that the *najars* opened this craft slightly to others. Nearly all the office bearers of All Kashmir *Khatamband* Ceiling Carpenters Union are *najars* and they have created barriers for others from entering this field. This has been the greatest impediment towards the flourishing of this craft like other handicrafts.

9. Judicial Activism

The Supreme Court in *T.N. Godavaraman v. Union of India*[24] has redefined the scope of the Forest Conservation Act, 1980, suspending tree felling across the entire country and sought to radically reorient the licensing and functioning of forest based industries. In this process the court has gone far beyond its traditional role as the interpreter of law and assumed the role of policy maker and administrator. Till 1996, the Forest Conservation Act was assumed to apply to reserved forests. The Supreme Court held that the Act applies to all forests regardless of their legal status or ownership. It also redefined what constituted "non forest purposes" to include not just mining but also operation of sawmills. The Court laid down:

> "The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of section 2(i) of the Forest Conservation Act. The term "forest land" occurring in the Act will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Govt. record irrespective of the ownership. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership and classification thereof.
>
> In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". Under the Act, all on-going activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that running of sawmills and mining of any mineral are non-forest purposes and are therefore, not permissible without prior approval of the Central Government."

To equate sawmills with mining, is really extreme. All this has created huge hurdles for new *Khatamband* unit holders as after 2001, the District Industrial Centre has refused to register new unit holders.

10. The various government agencies entrusted with marketing and creating awareness about the various arts and crafts like J&K Arts Emporium, Kashmir Chamber of Commerce and Industries, SIDCO, J&K Handicrafts Department have shown no interest in taking this art outside State.

11. New unit holders and budding entrepreneurs in this field allege that timely finance is not available to them. Although the government in general and the J&K Bank in particular do have some financial schemes like the *Khatamband* Scheme but they have remained only on paper. The paper work and other formalities like mortgage and a public servant as a guarantor are so stringent that artisans are rarely in a position to utilise their services.

Issues faced by Traders

1. Non recognition by the State Government

The craft of *Khatamband* has still not been recognised by the Department of Industry and Commerce. Thus its real demand and scope is not easy to comprehend and as such traders are not in a position to plan in advance and strategise. The various government policies vis-a-vis *Khatamband* as compared to other wood based industries are vague and not clear. The import-export policies, the taxation policy etc. are still not clear and are open to wide range of interpretations.

2. Non availability of raw material

Like artisans, the traders contend that the raw material is not easily availability throughout the year. The only source of raw material for the traders are the auctions by the State Forest Corporation (SFC) conducted mostly in summers and that too when dried and fallen trees are available. The traders who get orders in bulk have to wait for a long time for want of raw material. As their orders get delayed, the result is huge business loss.

3. Lacklustre attitude of the various State departments

The government departments and agencies like Handicrafts Department, Jammu and Kashmir (Sales and Export) Corporation Limited and the School of Designs with a clear mandate for the promotion of various crafts have done little or nothing for the promotion of this craft outside the State. The outlets of Jammu and Kashmir (S&E) Corporation don't carry *Khatamband* while the School of Designs don't work on *Khatamband* under one pretext or other. The Department of Handicrafts has not till date done any research, study or a market survey to look out for the opportunities for this craft. No investor would like to invest in a market that is uncertain and there is no sure way of calculating the future returns on investments. The various government departments are under an impression that the industry is in a great health and the artisans are earning huge profits and as such the industry needs no support from any quarter.

4. Vague government policies

The craft of *Khatamband* as an industry has for long been in the State of infancy even in its native State of Jammu and Kashmir. The laws and procedures with regard to this craft are still not clear to the various stakeholders like the Excise Department, Federation Chamber of Industries, the State Forest Department and Forest Protection Force. The various traders and exporters who have tried to take this craft outside the State are frequently harassed in the name of service tax. As compared to other crafts it is a Turnkey job and involves the process of installation.

Conclusion

Given the multi-faceted problems confronting *Khatamband,* it is quite unlikely that GI registration alone would be able to make a significant dent in the livelihood of artisans, especially in view of the significant post-registration challenges. Brand building and constant improvement in quality is required to maintain higher price premium. Steps should be taken to leverage on the registered GI-*Khatamband* for the benefit of owners and enable them to use it as a competitive tool for socio-economic prosperity. There is a need for suitable mechanisms for enforcement so as to prevent the unauthorised use of the word *Khatamband.* Last but certainly not the least, an obligation is imposed on the government to take the necessary steps to for the promotion of this craft within and outside the state. There is a need to launch massive skill development programs as also special welfare schemes for the benefit of artisan community.

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11. See Supra note 9, pp.130-31.
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    Section 32 (1) of the GI Rules replicates these provisions and, in addition, stipulates a few more documentation requirements.
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ROLE OF JUDICIARY IN THE FUNCTIONING OF ANTI-DEFECTION LAW WITH SPECIAL REFERENCE TO RECENT SUPREME COURT DECISIONS: A CRITIQUE

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Introduction

Elected Legislature is the sanctum sanctorum of the parliamentary form of democracy.[1] The political parties are inseparable from a parliamentary form of government. The idea of democracy without political parties cannot be conceived. They are part of the political system integral to the governance of a democratic society.[2]

The term defection refers to the break up of a political party. In essence, defection is a disloyalty, abandonment of duty or principle.[3] Political defection is also referred to variously as floor-crossing, carpet crossing, etc. in a manner best suited to them, consistent with their native realities.[4] A Parliamentary committee defines the defection as and when an elected member of a Legislature who had been allotted a reserved symbol of any political party shall be deemed to have defected if, after being elected as a member of any House, he voluntarily renounces allegiance to such political party.[5]

The defection and Parliamentary form of government go hand in hand. It is prevalent in all countries like corruption or inflation as these are international phenomena, but the politics of defection is a unique Indian phenomenon prior to the passing of anti-defection law.[6] There were many examples of defections in political parties till the present law was passed.[7] The number of defections was awesome.[8]

Objective of Anti-Defection Law

Defections are a national malady, which is eating into vitals of our democracy.[9] It is likely to under mine the very foundations of our democracy and the principles, which sustain it.[10] It may not be out of place to mention here that while stability of the Government is important, equally is its accountability to the House which consists of Members who in turn are

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accountable not only to their political parties but also to the electorates. It would have been appreciated if the defection in political parties be tackled by them only[11] but it did not happen.[12] Attempt was made to amend the Constitution to include anti-defection law in 1973,[13] but the real attempts were made later on,[14] when keenness was shown through its action.[15] The 52nd constitutional amendment was introduced on 24 January 1985. The amendment was unanimously approved by Parliament on 30 January, and 01 on March, 1985, became the law of the land in the field of political defections.[16]

The main objective of the law was to ensuring stability of the governments. The successful candidate is bound by pledges made by his party during the electioneering. He is expected to remain loyal to his party. If he chooses to leaves the party, he must loose his membership too. In view of the above, the anti-defection law should be an essential component of such a system to ensure that defecting members who gained their seats in Legislatures because of their position on the party list do not adversely affect the results of the election.

An Analysis of Tenth Schedule – The Anti-defection Law

The anti-defection law has added an additional ground of disqualification for the members of Parliament and State legislature under Articles 102(2)[17] and 191(2)[18] of the Constitution. The amendment to Constitution provides that an elected member of Parliament or a State Legislature, who has been elected as a candidate set up by a political party[19] and a nominated member of Parliament or a State Legislature who is a member of a political party at the time he takes his seat or who becomes a member of a political party within six months after he takes his seat would be disqualified on the ground of defection if he voluntarily relinquishes his membership of such political party or votes or abstains from voting in such House contrary to any direction of such party or is expelled from such party. An independent Member of Parliament or a State Legislature shall also be disqualified if he joins any political party after his election. A nominated member of Parliament or a State Legislature who is not a member of a political party at the time of his nomination and who has not become a member of any political party before the expiry of six months from the date on which he takes his seat shall be disqualified if he joins any political party after the expiry of the said period of six months. The constitutional amendment also makes suitable provisions with respect to splits in, and mergers of,[20] political parties.[21] A special provision has been included in the law to enable a person who has been elected as the presiding officer of a House to sever his connections with his political party. The exemption from this law is granted to speaker, deputy speaker, and chairman

and deputy chairman. The question as to whether a member of a House of Parliament or State Legislature has become subject to the proposed disqualification will be determined by the presiding officer of the House; where the question is with reference to the presiding officer himself, it will be decided by a member of the House elected by the House in that behalf. Such decision shall be subject to judicial review.[22]

Failure of the Anti-defection Law

The 52nd amendment allowed the split and merger of political parties and these matters were to be decided by the Speaker. The way this power had been exercised by the Speakers in various States had left enough scope for controversy.[23]

The question of defections has now haunted the Indian polity as individual defections have become rare; *en bloc* defections are permitted, promoted and amply rewarded. In fact, on an average more defections per year took place after the Anti-defection law.

(i) The term defection has not been defined in the Tenth Schedule to the Constitution or the Rules made there under. However, Members may resort to various ingenious methods of defections-split and merger.

(ii) The term 'voluntarily giving up membership' has also not been defined either in the Tenth Schedule or the Rules made there under. However, the Supreme Court, in the context of Anti Defection Law, made following observations in *Ravi S Naik v. Sanjay Bandekar,*[24] that even in absence of a formal resignation from the membership, an inference can be drawn from the conduct of member that he has 'voluntarily given up membership' of the political party to which he belongs, that the expression voluntarily given up membership is not synonymous with resignation and has wider connotation.

Keeping in view the controversial provision of split in a political party and role of the speaker in implementing the Anti-Defection law various commissions,[25] and committees,[26] have recommended that the large-scale defections may be done away with and decision-making power of the speaker can be vested in some other authorities.[27]

Anti-defection law and 91st Amendment in the Constitution in 2003

Demands have been made from time to time in certain quarters for strengthening and amending the Anti-defection Law as contained in the Tenth Schedule to the Constitution of India, on the ground that these

provisions have not been able to achieve the desired goal of checking defections. The Tenth Schedule has also been criticized on the ground that it allows bulk defections while declaring individual defections as illegal. The provisions for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule to the Constitution of India has, in particular, come under severe criticism on account of its destabilizing effect on the Government.

It provides that a defector should be penalized for his action by debarring him from holding any public office as a Minister or any other remunerative political post for at least the duration of the remaining term of the existing Legislature or until, the next fresh elections whichever is earlier. This Amendment also provides that abnormally large Councils of Ministers were being constituted by various Governments at Centre and States and this practice had to be prohibited by law and that a ceiling on the number of Ministers in a State or the Union Government be fixed at the maximum of 10% of the total strength of the popular house of the Legislature whether Unicameral or Bicameral. However, in case of smaller States, a minimum strength of twelve Ministers including chief Minister is fixed.

Working of the Anti-Defection Law after 91st Amendment Act

To some extent, the loopholes in tenth schedule are filled up by this amendment. The 91st amendment in Constitution provides stability to governments formed after every general election. The law on the defection therefore has become more stringent and hence more effective to the working of Parliamentary democracy in India. But still there is scope for the improvement, which requires further correction in the working of this law and making it more effective. The main shortcomings are as under;

(i) The provisions regarding merger of political parties are still there. In Indian democracy, multiple party systems prevails where merger of smaller parties having only two or three members with the other parties makes a negative on the working anti-defection law.

(ii) The machinery of the anti-defection law does not apply during the period between the polls and the swearing in of MPs/MLAs. There is a scramble for office in exchange for support. In *Kihotta's* case[28] the Supreme Court indicated that a person who leaves the party symbol on which he was elected, invites disqualification. But the law can be enforced only after Parliament is sworn in. The law on this needs some clarification before it can effectively dampen post-poll defections.

Judicial Scrutiny of the Working of Anti-defection Law

The role of judiciary is always important to give a reasonable look to any policy. This is necessary to discuss the role of courts while reviewing the decisions taken by the Speaker. The anti-defection law was first challenged before the High Court,[29] where two questions regarding its constitutional validity were raised. The decision of court on first issue was that except for paragraph 7 of the Tenth Schedule, is constitutionally valid. The Supreme Court in a subsequent decision has affirmed this opinion. In *Kihota Hollohon v. Zachilu*,[30] the Apex Court held that Para 7 of the Tenth Schedule is unconstitutional. The majority of 3-2 applied doctrine of severability by the constitutional bench. In the instant case, the role of Speaker for making decision under tenth schedule was much debated and finally the bench trusted the office of Speaker.[31] The Speaker/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of Parliamentary democracy.[32] The court observed that Speaker holds a high, important and ceremonial office, he is the very embodiment of propriety and impartiality and he performs wide ranging functions including the performance of important functions of a judicial character.[33]

In *Prakash Singh Badal v. Union of India*,[34] another interesting question was raised that whether the Speaker recognizes the leader of break away group prior to the decision of disqualification of members. The court answered the question in negative. In the 'BSP split' case in Uttar Pradesh, the Supreme Court found the decision of Speaker as vitiated by perversity.[35]

In another related case, the Apex Court,[36] held that proceeding under the Tenth schedule cannot be read or construed independent of Articles 102 and 191 of the Constitution and object thereto. The Speaker had decided the question of split in the BSP prior to the decision on the disqualification. The court observed that it goes against the very constitutional scheme of adjudication contemplated by the Tenth Schedule read in the context of Articles and of the Constitution. In another case,[37] legality of orders passed by the Speaker of *Haryana* Legislative Assembly disqualifying petitioners on various grounds from being members of the Assembly. The court finally dismissed the petitions and upheld the Speakers decision. In another case,[38] of an independent member the court has quashed the order passed by the Speaker disqualifying an independent member on the allegation of joining party on the ground of giving the proper hearing the disqualified members.

In *AR Antully v. RS Naik,*[39] it was observed that it is not enough that a claim is made of a split in the original party, in addition to showing that one third of the members of the Legislature Party have come out of the party, but it is necessary to prove it at least *prima facie*. In a subsequent decision[40] where *inter alia* it was observed that voluntarily giving up the membership of the original political party might be either expressed or implied confirmed the same opinion. Expelled members may be allowed to be the members of same political party unless and until it is proved that he has left his party.

In *Laxman Jaidav Satpathy v. Union of India,*[41] the court observed that the Speaker had no jurisdiction to permit any kind of correction or modification in the petition. In *Rajinder Prakash Maurya v. Swami Prasad Murya,*[42] the Supreme Court declared 13 MLAs disqualified but also upheld the split in the original political party. In *Yitachu v. Union of India,*[43] the High Court observed that violation of whip by a member of the House forms the basis for his disqualification and his subsequent disqualification does not obliterate vote given by such a member in the House.

The judiciary has exercised its power of judicial review in almost every case decided by the Speaker and has set some of the judicial principles. As a matter of fact defection in a party is political ploy employed by the an other political party. The question remains is that can judiciary undo the political trick? Since coming into being the Tenth Schedule the judiciary has not yet made any significant contribution in major defections cases. It is understandable as such that purely legislative and political issues relating to defections may not be tackled by judicial logic as the political logic is different and has the basis in the will of the people which at least not represented through the judiciary. In the below mentioned cases, of major defections/mergers in Karnataka and Haryana the role of the judiciary shall be scrutinized specifically.

A: Speaker *Haryana Vidhan Sabha v. Kuldeep Bishnoi & Ors.*
Civil Appeal arising out of SLP decided on 28 September 2012

Brief facts of the case are that the 12th Legislative Assembly Elections in Haryana were held on 13th October, 2009. The Indian National Congress Party, (INC) having won 40 out of the 90 seats in the Assembly. Since it was short of an absolute majority, the INC formed the Government in collaboration with seven independents and one MLA from the Bahujan Samaj Party. On 9th November, 2009, Legislative Members (except its president) of the Haryana Janhit Congress HJC (BL)', wrote to the Speaker of their intention to merge the HJC

(BL) with the INC in terms of the provisions of Para 4 of the Tenth Schedule to the Constitution of India. The Speaker by his order dated 9th and 10th November, 2009, accepted the merger with immediate effect. The president of the party, Sh. Kuldeep Bishnoi, challenged the orders of the Speaker on the ground that they had voluntarily given up the membership of their original political party and had joined the INC in violation of the provisions of paragraph 4(1) of the Tenth Schedule.

The Speaker after issuing the notice, continued to extend the time but in the mean time, Sh. Kuldeep Bishnoi filed a writ petition before the Punjab and Haryana High Court, seeking quashing of the orders passed by the Speaker on 9th and 10th November, 2009, and also for a declaration that the five MLAs be disqualified from the membership of the Haryana Vidhan Sabha, and, in the alternative, for a direction on the Speaker to dispose of the disqualification petitions within a period of three months.

Decision of the Single Bench, on 20th December, 2010, the learned Single Judge of the High Court allowed the Writ Petition and directed the Speaker to finally decide the disqualification petitions pending before him within a period of four months from the date of receipt of the certified copy of the Order.

The decision of the division bench did not choose to interfere with the directions given by the learned Single Judge to the Speaker to decide the petitions for disqualification of five MLAs within a period of four months. But in addition, directed that pending such decision, the five MLAs in question would stand disqualified from effectively functioning as members of the Haryana Vidhan Sabha. The order further prevented the five named MLAs, from effectively discharging their functions as Members of the Vidhan Sabha.

Questions of law before the Supreme Court, the Speaker and other MLAs filed special leave petitions/appeals before the Supreme Court. While entertaining the case the court granted stay on the decision of the High Court. The facts narrated above and proceedings taken by the parties before the high court/speaker give rise to the following substantial questions of law of public importance, namely;

1. Whether the High Court in exercise of its powers under Articles 226 and 227 of the Constitution, has the jurisdiction to issue directions of an interim nature to a Member of the House while a disqualification petition of such Member is pending before the Speaker under Article 191 read with the Tenth Schedule to the Constitution of India?

2. Whether paragraph 4 of the Tenth Schedule to the Constitution, read as a whole, contemplates that when at least two-thirds of the members of the legislature party agree to a merger between one political party and another, only then there is a deemed merger of one original political party with another? Moreover, those who do not accept the merger are subject to the anti-defection law prescribed in the Tenth Schedule.
3. Can the High Court, in its writ jurisdiction, interfere with the disqualification proceedings pending before the Speaker and pass an order temporarily disqualifying a Member of the State Legislative Assembly?
4. When a disqualification petition filed under Article 191 read with the Tenth Schedule to the Constitution of India is pending for consideration before the Speaker, can a parallel Writ Petition, seeking the same relief, be proceeded with simultaneously?
5. Did the High Court have jurisdiction to give directions under Order 41 Rule 33 of the Code of Civil Procedure, despite the express bar contained in the Explanation to Section 141 of the Code of Civil Procedure, in proceedings under Article 226 of the Constitution?

Argument before Supreme Court by the Petitioners are as under;

1. The Solicitor General of India, contended that this was not a case where the survival of the Government depended upon allegiance of the five MLAs under consideration, since the Government was formed with the support of seven Independents and one MLA from the Bahujan Samaj Party. In fact, the five MLAs, against whom disqualification petitions are pending consideration before the speaker, were not part of the Government when it was initially formed.
2. The two orders dated 9th mand 10th November, 2009, were not final or conclusive and that, in any event, when the disqualification petitions came to be decided, it would be open for the Speaker to reconsider the issue of merger.
3. The learned Solicitor General then challenged the orders of the Division Bench of the High Court on the ground of violation of the principles of natural justice. It was contended that while the High Court had concluded the hearing and reserved judgment on 20th July, 2011, and by order dated 12th October, 2011, it directed the Speaker to place on record the status of the

proceedings relating to the disqualification petitions. Although, the same were duly filed, without giving the parties further opportunity of hearing with regard to the said records, the Division Bench directed the matter to be listed for further consideration on 19th December, 2011. It was submitted that though the Bench did not assemble on 19th December, 2011, the Division Bench delivered the impugned judgment on 20th December, 2011, without any further opportunity of hearing to the parties.

4. The learned Solicitor General submitted that the procedure adopted was contrary to the law laid down in *Kihoto Hollohan v. Zachillhu*,[44] wherein it was stated that the limited scope of judicial review was available on account of the finality clause in Para 6. Judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman. It was submitted that the fact that the Speaker had not finalized the disqualification petitions for almost a period of two years, could not and did not vest the High Court with power to usurp the jurisdiction of the Speaker and to pass interim orders effectively disqualifying the five MLAs in question from functioning effectively as Members of the House.

5. The learned Solicitor General lastly urged that the single-most important error in the impugned judgment is that it sought to foreclose the right of the Speaker to decide the disqualification petitions under paragraph 4 of the Tenth Schedule. The said decision was also wrong since the High Court chose to follow judgments which related to the concept of 'split' under Para 3 of the Tenth Schedule, which today stands deleted there from.

6. It was further submitted that under paragraph 4 of the Tenth Schedule, the Speaker was not the deciding authority on whether a merger of two political parties had taken place or not. He is only required to decide whether merger was a defence in a disqualification petition filed under Para 6 of the Tenth Schedule.

7. The submission advanced on behalf of the Respondent No.1 that in view of the delay by the Speaker in disposing of the disqualification petitions, this Court should decide the same, was wholly misconceived, since it pre-supposes the vesting of power to decide such a question on the Court, though the same is clearly vested in the Speaker. Even otherwise, in the absence of any Special Leave Petition by the Respondent No.1, the most that could be done by this Court would be to dismiss the Special Leave Petition.

8. Distinguishing the various decisions cited before the Division Bench on behalf of the Respondent No.1, and, in particular, the decision in *Rajendra Singh Rana v. Swami Prasad Maurya*.[45] In that case, the life of the Assembly was almost over, whereas in the present case the next election would be held only in October, 2014. Further more, the same was a judgment where the final orders passed by the Speaker on the disqualification petitions were under challenge, unlike in the present case where the disqualification petitions are still pending decision with the Speaker.
9. If the order of the Speaker disqualifying a Member was to be set aside, the matter had to go back to the Speaker for a fresh decision, since it was not the function of this Court to substitute itself in place of the Speaker and decide the question which had arisen in the case.[46]

Argument on behalf of Respondent No. 1 (Sh. Kuldeep Bishnoi)

1. This was a case which clearly demonstrated how the process of law was being misapplied and misused by the Speaker so as to defeat the very purpose and objective of the anti-defection law. The Speaker had deferred the hearing of the disqualification petitions on one pretext or the other. Till today, the said disqualification applications are pending decision before the Speaker and since such delay in the disqualification proceedings was against the object of the Tenth Schedule to the Constitution. The prejudice caused to the Respondent on account of the inaction on the part of the Speaker in disposing of the pending disqualification petitions within a reasonable time. The impugned judgment was justified.
2. The interim order passed by the High Court under Order 41 Rule 33 of the Code of Civil Procedure, the High Court merely suspended the said Members from discharging all their functions as Members of the House, without touching their membership. He submitted that such a course of action was the only remedy available to the High Court to correct the deliberate and willful attempt by the Speaker to subvert the very essence of the Tenth Schedule to the Constitution. Since no final order had been passed by the Speaker on the disqualification petitions, which would have entitled the High Court to pass interim orders in exercise of its powers under Article 226 and 227 of the Constitution. It was also observed that the sweep of the power under Rule 33 is wide enough to determine any question, not only

between the appellant and respondent, but also between the respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case.[47]

3. The law relating to Order 41 Rule 33 CPC provides that the High Court was competent to pass interim orders effectively disqualifying a Member of the House, notwithstanding the provisions of Para 6 of Tenth Schedule to the Constitution. This Court as an appellate Court, has power to pass any decree or make any order which ought to have been passed or make such further decree or order as the case may require.

Observation of the Supreme Court are as under;

1. In the instant case we are really required to consider whether the High Court was competent to pass interim orders under its powers of judicial review under Articles 226 and 227 of the Constitution when the disqualification proceedings were pending before the Speaker. The scope of judicial review has been confined to violation of constitutional mandates, *mala fides*, non-compliance with rules of natural justice and perversity. But it was also very clearly indicated that having regard to the constitutional scheme in the Tenth Schedule, normally judicial review could not cover any stage prior to the making of the decision by the Speaker or the Chairman of the House, nor any *quia timet* action was contemplated or permissible.
2. Relying on the decisions of this Court in *Kihoto Hollohan's case*,[48] *Jagjit Singh v. State of Haryana*,[49] and *Rajendra Singh Rana*,[50] the learned Single Judge came to the conclusion that while passing an order under paragraph 4 of the Tenth Schedule to the Constitution, the Speaker does not act as a quasi-judicial authority and that such order would necessarily be subject to adjudication under paragraph 6.
3. Main challenge to the impugned decision of the Punjab and Haryana High Court is with regard to the competence of the Speaker of the Assembly to decide the question of disqualification of the Members of the HJC (BL) party on their joining/merger with INC. While construing the provisions of the Tenth Schedule to the Constitution in relation to Articles 102 and 191 of the Constitution, the Constitution Bench observed that the whole proceedings under the Tenth Schedule gets initiated as a part of disqualification proceedings.[51]

4. Since the decision of the Speaker on a petition under paragraph 4 of the Tenth Schedule concerns only a question of merger on which the Speaker is not entitled to adjudicate. The High Court could not have assumed the role of Speaker under paragraph 6 of the Tenth Schedule took jurisdiction under its powers of review before a decision to the Constitution. It is in fact in a proceeding under Para 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is amenable to the writ jurisdiction of the High Court.
5. Order 41 Rule 33 vests the Appellate Court with powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or the order, as the case may require. The said power is vested in the Appellate Court by the statute itself, but the principles thereof cannot be brought into play in a matter involving a decision under the constitutional provisions of the Tenth Schedule to the Constitution, and in particular paragraph 6 thereof.

The Supreme Court decides that the High Court had no jurisdiction to pass such an order, which was in the domain of the Speaker. The High Court assumed the jurisdiction which it never had in making the interim order which had the effect of preventing the five MLAs in question from effectively functioning as Members of the Haryana Vidhan Sabha. The direction given by the learned Single Judge to the Speaker, as endorsed by the Division Bench, is, therefore, upheld to the extent that it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months. The said direction shall, therefore, be given effect to by Speaker. The Speaker shall dispose of the pending applications for disqualification of the five MLAs in question within a period of three months from the date of communication of this order.

Analysis of the abovementioned case shows that the Speaker of the Legislative Assembly is at liberty to decide the case as per the Tenth Schedule and he cannot be subject to any inquiry for delaying the decision of a pending case. En number of times the Speaker has extended the hearing without any reasonable justification. It seems to be on the ground that such constitutional power to decide has been vested with Speaker and should not be questioned by the courts, which also derives power from the Constitution itself. If the Speaker of the Legislative Assembly is allowed to continue with such powers then it shall further weaken the anti-defection law. Defection in the legislative party is political ploy, which needs judicial correction. The High Court was right in taking audit of the functioning of

the office of Speaker and preventing the five MLAs in question from effectively functioning as Members of the Legislative Assembly. The High Court orders also reflected the effective judicial review of Speaker's decision making process. The partial reversal of the High Court orders by the Supreme Court shows and reaffirms that defection is the political ploy trick and only solution lies in politicking and not in the judicial process. But this is against the spirit of Tenth Schedule which has categorically vested the power of judicial review of the decision of the Speaker.

B: *Balchandra L Jarkiholi & Ors. vs B.S.Yeddiyurappa & Others*, Civil Appeal arising out of SLP decided on 13 May 2011

Brief facts are that on 6th October, 2010, 13 MLAs of BJP and five independent MLAs, who were supporting government, wrote identical letters to the Governor of the State, expressing lack of confidence and withdrew support to the Government led by Shri B.S. Yeddyurappa, the chief minister of Karnataka .The contents of the letter (all letters almost similar) read as under:

His Excellency,

I was elected as an MLA on BJP ticket. I being an MLA of the BJP got disillusioned with the functioning of the Government headed by Shri B.S. Yeddyurappa. There have been widespread corruptions, nepotism, favoritism, abuse of power, misusing of government machinery in the functioning of the government headed by Chief Minister Shri B.S. Yeddyurappa. A situation has arisen that the governance of the State cannot be carried on in accordance with the provisions of the Constitution and Shri Yeddyurappa as Chief Minister has forfeited the confidence of the people. In the interest of the State and the people of Karnataka I hereby express my lack of confidence in the government headed by Shri B.S. Yeddyurappa and as such I withdraw my support to the Government headed by Shri B.S. Yeddyurappa the Chief Minister. I request you to intervene and institute the constitutional process as constitutional head of the State.

With regards,

I remain

Yours faithfully,

On the basis of the aforesaid letters addressed to him, the Governor addressed a letter to the Chief Minister, on the same day requesting him to prove his majority support in favour of his government on or before 12.06.2010 by 05p.m. On the same day, Shri B.S. Yeddyurappa, filed an application, praying to declare that all the said thirteen MLAs elected on BJP tickets had incurred disqualification in view of the Tenth Schedule to

the Constitution. The Speaker issued show-cause notices to all 13 MLAs on 7th October, 2010. The Appellants were informed that their act was in violation of Para 2(1)(a) of the Tenth Schedule of the Constitution of India and it disqualified them from continuing as Members of the Legislature. Time was given to the Appellants till 5 p.m. on 10th October, 2010, to submit their objections, if any, to the application. They were also directed to appear in person and submit their objections orally or in writing to the Speaker, failing which it would be presumed that they had no explanation to offer and further action would thereafter be taken *ex-parte*, in accordance with law. The show-cause notices were pasted on the doors of the MLAs hostels of the concerned persons. In the preliminary reply on 09.10.2010, they have stated that none of the documents seeking disqualification had either been pasted on the doors of the MLA quarters or forwarded to the appellants along with the Show-Cause notice. A categorical request was made to the Speaker to supply the said documents and the appellants reserved their right to give exhaustive replies after going through the aforesaid enclosures to the Show-Cause notice as and when supplied.

The Speaker took up the Disqualification Application for hearing and framed the following issues:

(a) Whether the Respondents are disqualified under paragraph 2(1)(a) of Tenth Schedule of the Constitution of India, as alleged by the Applicant?

(b) Is there a requirement to give seven days' time to the Respondents as stated in their objection statement?

The main submissions made by the Appellants (disqualified members) are as under;

(i) The notice was in clear violation of the Disqualification Rules, 1986, and especially Rules 6 and 7 thereof. It was mentioned that Rule 7(3) requires copies of the petition and annexure thereto to be forwarded with the Show-Cause notice. The notice dated 7th October, 2010 called upon the Appellants to appear and reply by 5 p.m. on 10th October, 2010, which was in flagrant violation of Rule 7 of the aforesaid Rules which laid down a mandatory procedure for dealing with a petition seeking disqualification filed under the Rules.

(ii) It was mentioned in the reply to the Show-Cause notice that issuance of such Show-Cause notice within a truncated period was an abuse and misuse of the Constitutional provisions for the purpose of achieving the unconstitutional object of disqualifying sufficient number of Members of the Assembly from the

membership of the House in order to prevent them from participating in the Vote of Trust scheduled to be taken by Shri B.S. Yeddyurappa on the Floor of the House at 11 a.m. on 11th October, 2010. It was contended that the Show-Cause notices was ex-facie unconstitutional and illegal, besides being motivated and mala fide and devoid of jurisdiction.

(iii) In addition to the above, it was also sought to be explained that it was not the intention of the Appellants to withdraw support to the BJP, but only to the Government headed by Shri Yeddyurappa as the leader of the BJP in the House. It was further emphasized that even prima facie, "defection" means leaving the party and joining another, which is not the case as far as the Appellants were concerned who had not left the BJP at all. It was repeatedly emphasized in the reply to the Show-Cause notice that the Appellants had chosen to withdraw their support only to the Government headed by Shri B.S. Yeddyurappa as Chief Minister, as he was corrupt and encouraged corruption, and not to the BJP itself, which could form another Government which could be led by any other person, other than Shri Yeddyurappa, to whom the Appellants would extend support.

(iv) It was also categorically stated that as disciplined soldiers of the BJP the Appellants would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka. The Appellants appealed to the Speaker not to become the tool in the hands of a corrupt Chief Minister and not to do anything which could invite strictures from the judiciary. A request was, therefore, made to withdraw the Show-Cause notices and to dismiss the petition dated 6th October, 2010 moved by Shri B.S. Yeddyurappa, in the capacity of the leader of the Legislature Party of the Bharatiya Janata Party and also as the Chief Minister, with mala fide intention and the oblique motive of seeking disqualification of the answering MLAs and preventing them from voting on the confidence motion on 11th October, 2010.

Decision of the speaker was that the 13 MLAs had not denied their conduct anywhere and had justified the same even during their arguments. The Speaker was of the view that by their conduct the Appellants had voluntarily given up the membership of the party from which they were elected, which attracted disqualification under the Tenth Schedule. The Speaker further held that the act of withdrawing support and acting against the leader of the party from which they had been elected,

amounted to violation of the object of the Tenth Schedule and that any law should be interpreted by keeping in mind the purpose for which it was enacted. The decision of the Speaker was challenged before the High Court.

Main Question of law was involved was that whether the impugned order dated 10.10.2010 passed by the Speaker of the Karnataka State Legislative Assembly is in consonance with the provisions of paragraph 2 (1) (a) of the Tenth Schedule of the Constitution of India?

Decision of High Court as given by Justice J.S.Kehar, Chief Justice; On the main question as to whether the action of the Appellants had attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution, the Chief Justice came to a categorical finding that the Appellants had defected from the BJP and had voluntarily given up their membership thereof. The Chief Justice also rejected the allegations of mala fide on account of the speed with which the Speaker had conducted the disqualification proceedings within five days i.e. one day ahead of the Trust Vote which was to be taken by Shri Yeddyurappa on the Floor of the Assembly. The hearing had continued before the Speaker of the Karnataka Legislative Assembly, for several hours. The procedure required to be followed under the rules of natural justice was admittedly followed and procedure adopted has not resulted in any prejudice to the Petitioners. Anti-party action of the Petitioners, fully demonstrates that the Petitioners had voluntarily given up their membership to Bharatiya Janata Party. The Speaker, against whom the plea of mala fides have been made, and who was the author of the impugned order dated 10.10.2010, has not been impleaded as party by name.

Decision and Reason by Justice N. Kumar, it was clear that an act of no confidence in the leader of the legislative party does not amount to his voluntarily giving up the membership of the political party. Similarly, the act of expressing no confidence in the Government formed by the party, with a particular leader as Chief Minister, would not also amount to a voluntary act of giving up the membership of the political party. Deserting the leader and deserting the Government is not synonymous with deserting the party. If a Minister resigned from the Ministry, it would not amount to defection. What constitutes defection under paragraph 2(1)(a) of the Tenth Schedule is deserting the party. The dissent is not defection and the Tenth Schedule while recognizing dissent prohibits defection. The order of the Speaker impugned in the writ petition was in violation of the constitutional mandate and also suffered from perversity and could not, therefore, be sustained. The impugned order of the Speaker was, therefore, set aside by the learned Judge. On account of such difference of opinion between

the Chief Justice and his companion Judge, the matter was referred to a third Judge, Hon'ble Mr. Justice V.G. Sabhahit, to consider the same question of law.

The third Judge concurred with the decision rendered by the Chief Justice upholding the order passed by the Speaker. As a result, the majority view in the writ petitions was that the Hon'ble Speaker was justified in holding that the Appellants herein had voluntarily resigned from their membership of the Bharatiya Janata Party by their conduct. The said act of the MLAS attracted the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution and were rightly disqualified from the membership of the House.

The majority judgment of the High Court was challenged before the Supreme Court. The following submissions were made by the parties;

Appellants argued that the notice was in clear violation of the Rules. It was mentioned that Rule 7(3) requires copies of the petition and Annexures thereto to be forwarded with the Show-Cause notice and minimum notice period of 7 days was a requirement of the basic principles of natural justice in order to enable a MLA to effectively reply to the Show-Cause notice. It was further emphasized that even prima facie, "defection" means leaving the party and joining another, which is not the case as far as the Appellants were concerned who had not left the BJP at all.

Respondents argued that judicial review of the said order would be confined to infirmities based on (a) violation of constitutional mandate; (b) *mala fides;* (c) non-compliance with the rules of natural justice; and (d) perversity.

Decision of the Supreme Court is that the appeals are, therefore, allowed. The order of the Speaker dated 10th October 2010, disqualifying the appellants from the membership of the House under paragraph 2(1)(a) of the Tenth Schedule to the Constitution is set aside. The element of hot haste is evident in the action of the Speaker. MLAs were required to be given proper opportunity of meeting allegations mentioned in notices and also not served with notices directly, but same were pasted on outer doors of their quarters in the MLA complex. Three days time to reply to said notices was insufficient. Copies of affidavit filed by State President of concerned party relied upon by Speaker for his conclusion was also not supplied to them. Speaker's action amounted to denial of principles of natural justice. There was no compulsion on Speaker to decide disqualification application in a great hurry within time specified by Governor to Speaker to conduct vote of confidence in Government.

Analysis of this case shows that the Speaker was in hurry to decide the case, in view of the deadline given by the Governor. In this process his mind might be preoccupied and the shadow of 'trust vote' was clearly cast over it. The Speaker took the extreme action by expelling the MLAs and the beneficiary of the same was the Chief Minister who is not only petitioner against MLAs but also the person against whom the MLAs have shown the grudge. The High Court has interpreted the legal position of the Tenth Schedule in view of the facts and circumstances the case. The order has taken into consideration that Rule 6 and 7 are directory in nature and not mandatory.[52] The Speaker was under an obligation to decide the issue of eligibility of the Member to cast his vote before the Confidence Vote was taken. Any procedural irregularity is immune from judicial scrutiny in view of the provisions of paragraph 6(2).[53] Rules being in the domain of procedure, they were intended to facilitate the holding of an inquiry and not to frustrate same by introducing innumerable technicalities. Rule of prudence also say that principles of natural justice should not be stretched to overthrow the whole process. The decision of the High Court only confirmed the Speaker's decision. In the instant case the Supreme Court has reversed the decision of the High Court on procedural ground for not giving adequate time for replying the notice and did not squarely decide the issue of defection. The decision of the Supreme Court indirectly confirmed the instant political scenario as by that time the Chief Minister had a patch up with the dissidents MLA.

Conclusion and Suggestions

From the above discussion it can be concluded that defections in political parties in India have been regular phenomena. It continues to weaken the parliamentary structure of the government. There were defection prior to 52nd amendment to the Constitution and subsequently as well. Large-scale defections were encouraged and legalized by the said amendment. Therefore the law failed miserably. This law was misused up to 2003, till the time of 91st amendment in the Constitution. This latest amendment has been successful in checking defections to the extent that it has abolished the provisions in the tenth schedule regarding split in the political party. It also prohibits any remunerative position to the defected member along with his disqualification.

The decision making power under the tenth schedule are still vested with the speaker/ chairman of the respective House. The office of speaker/ Chairman of House is given to a member on the political considerations i.e. his/her affiliation to a particular/ruling political party. Under such circumstances he/she is not expected to give impartial decision. There are loopholes in the law which are – no time frame is given to him/her to decide

the matter; he/she sometimes passes interim orders because law does prohibit him/her to do so; he/she can also not review his decision but if he/she is not prohibited to do so powers could be exercised; by his/her orders sometimes a new political party is created before he decides upon the very basic and fundamental question of disqualification of a member/s. All these orders are passed at such a decisive moment that his/her orders has potential to make or mar the government.

Vesting such power in Speaker/Chairman, no doubt upheld by the Apex Court but it is submitted it requires reconsideration in view of the past experience since 1985. Constitutionally, the powers of disqualification of members are contained in Articles 102 and 191. The President/Governor respectively on the recommendations of the election commission exercises power under these Articles. But in case of tenth schedule a deviation has been made and powers are vested in the Speaker/Chairman. The recommendations of the various commissions should be accepted in this regard and power of disqualification of members may be vested in consonance with Articles 103 and 192 of the Constitution.

In India Parliamentary democracy is at the cross roads of coalition politics which is in the grip of smaller regional political parties. Here two issues need address. Firstly, provisions regarding merger like split should be abolished. It hardly makes difference of 1/3and 3/4 for smaller parties having only five to ten members. Secondly, to comprehensively stick to the coalition politics we need a law, which should be made applicable to such coalitions.

It is noticed in the cases under review, that Speakers exercise their powers under Tenth Schedule as per their political membership. In one case the Speaker decided the disqualification petition in hot haste and in the other case the Speaker is too reluctant to decide it even after the directions of the court. The facts in the both the cases are such that the Speakers have taken the position which suits to their party. It is understandable too, as we know Speaker belong to majority party and will stay only in that party in the long run. Unfortunately, the postion interpreted by the courts have also been beneficial to the political interest of the ruling party. Actually this is not the objective of Anti-defection law. The Tenth Schedule was enacted to do away with political defection in the respective parties because the members do break away from their original party as a political trick to take political mileage. In Karnataka case, the unique facts show that letter of dissent against the Chief Minister was treated defection and the matter was taken to the House for trust vote. In fact, such dissents are to be taken at the platform of political party for changing its leadership. Dissent can cause unrest in the political party but definitely cannot cause instability

in the government. It is submitted that 'vote of trust' in the House is a political test for the government and defection is a 'political trick' to influence it. Therefore, the decision on the defections/disqualifications is to taken in relation to test in the House. Prevailing legislative circumstances should be taken into consideration by the courts while deciding such petitions. Regarding Haryana case, the Speaker has taken a stance for not taking any decision, to ensure that the government in office should not fall because of its decision and this is confirmed by the courts. As a matter of fact and law once the Speaker decide the case it shall have another round of litigation as measure of judicial review. The submission in this regard is that judicial review should be conducted on the basis of the provisions available in the Tenth Schedule to achieve its objective. The power of judicial review is an independent of Speaker power and running of a majority government by a party. Interpretation of the Tenth Schedule by the judiciary is also a part of the defining the mandate of the people and may be understood as such. In gist of the rule of law, is that through judicial review legal spirit must prevail. The functioning of the Anti-defection Law shows that Speaker's decisions are motivated by the political affiliations and consideration. The judicial review should prevail over political consideration.

References

1. *Mohan Lal v.District Magistrate, Rai Bareily,* AIR 1993 SC 2042.
2. *S.R. Bommai v.Union of India,* AIR 1994 SC1918.
3. S. Aggarwal, *Anti Defection Law, Parliamentarian,* January 1986.
4. G.C. Malhotra, *Anti Defection Law in India and Commonwealth,* Lok Sabha Secretrait, (2005).
5. In the wake of a large number of defections in 1967 that severely affected the Congress Party, the Fourth Lok Sabha appointed a Committee on Defections under the chairmanship of then Home Minister Y. B. Chavan.
6. The period between 52nd amendment in 1985 and subsequently 91st amendment to the Constitution in 2005. For details see Iqbal Narain, *Continuity and Change in State Politics*, in Iqbal Narain, ed., State *Politics in India* Meerut: Neenakshi Prakashan, 1967). For a study of political defections in the 1960s, see Subhash C. Kashyap, *The Politics of Defection: A Study of State Politics in India* (Delhi: National, 1969).
7. In independent India, the story of defections dates back to 1948, when the Socialist members decided to leave the Indian National Congress. In 1950,23 Congress Legislators defected to from the Jana Congress in *Uttar Pradesh*. In 1953, the *Praja Socialist Party* (PSP) lead *Prakasam* defected from the PSP and joined the congress to from the Govt. in *Andra Pradesh.* Another PSP leader, *Thanu Pillai*, Chief Minister of *Travancore* and *Cochin* crossed floor and joined the Congress. Roughly 542 cases of defection took place during the period between the first and fourth General Elections. Among Independents, 157 out of a total of 376 elected

joined various political parties in this period. Out of total 210 defecting Legislators of the States of *Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West Bengal,* 116 were included in the Councils of Ministers.

8. Between the fourth and fifth general elections in 1967 and 1972 from among the 4,000 odd members of the *Lok Sabha* and the Legislative Assemblies in the States and Union Territories, there were nearly 2,000 cases of defections and counter-defections. By the end of March 1972, approximately 50% of the Legislators had changed their party affiliations and several of them did so more than once some of them as many as five times. One MLA was found to have defected five times to be a Minister for only five days. For sometime, on an average more than one legislator was defecting each day and almost one State Government falling each month due to these changes in party affiliations by members.
9. *Shri Y.B. Chavan,* the Chairman of the Committee on Defection and the then Union Home Minister.
10. With this object, the President gave an assurance in the Address to Parliament 23rd January 1985 that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.
11. Presiding Officers' Conference held in *New Delhi* on 14 and 15 October, 1967.
12. The committee included representatives of the political parties and independents was set up by the Union Government in February, 1968 under the Chairmanship of the then Union Home Minister *Shri Y.B. Chavan* to study defections in India and make recommendations thereon.
13. Through a Constitution (Thirty-second Amendment) Bill, 1973.
14. An early indication that *Rajiv Gandhi* gave on becoming the Prime minister was change of policy on defections.On December 29, 1984, Chief Minister Ramakrishna Hegde of Karnataka tendered the resignation of his *Janata Party* ministry, taking moral responsibility for his party's failure to win more than 4 of the state's 28 parliamentary seats in the national elections. *Rajiv Gandhi* neither permitted the Congress (I) in Karnataka to form the government with the help of defectors nor did he impose president's rule.
15. If Rajiv Gandhi played a leading role in the toppling of the Farooq Abdullah government in Jammu and Kashmir and the N. T. Ramarao ministry in Andhra Pradesh during the last four months of Mrs. Gandhi's rule, he did so as his mother's aide rather than on his own. In the case of Andhra, reports also say that Ram Lal acted in greater haste than even the union government could tolerate.
16. P. M. Kamath, *Politics of Defection in India in the 1980s,*Source: Asian Survey, Vol. 25, No. 10, (Oct., 1985) University of California Press. pp. 1039-1054.
17. A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.
18. A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.
19. Original political party, in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2; and legislature party, in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 4,

means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

20. Merger means and includes; when two-thirds of the members of the legislature party concerned have agreed to merger's original political party with another political party and he claims that he and any other members of his original political party have become members of such other new political party formed by such merger. But if a member have not accepted the merger and opted to function as a separate group, shall be deemed to be the political party to which he originally belongs.
21. (a) An elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member; (b) a nominated member of a House shall.-(i)where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party; (ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188 (oath by members).
22. *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412.
23. M.P. Jain, *Indian Constitutional Law,* (2006) pp 42-45. Also see Dr. J.N. Pandey, *Constitutional Law of India*, (2007) pp 431 & 541.
24. AIR 1994 SC 1558.
25. M.P. Jain, *Indian Constitutional Law,* (2006) pp 42-45. Also see Dr. J.N. Pandey, *Constitutional Law of India*, (2007) pp 431 & 541.
26. Hashim Abdul Halim, Chairman Committee of Presiding Officers on Need to Review The Anti-Defection Law. The committee constituted on 13 October and reconstituted on 26 July2001and again on18 July 2002.
27. The Commission submitted its report in two volumes to the Government on 31st March 2002.
28. *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412.
29. Before Punjab and Haryana High Court in *Prakash Singh Badal v. Union of India*, AIR1987 P&H 263.
30. AIR 1993 SC 412.
31. *Ibid*
32. G.V. Mavalankar, *The Office of Speaker,* Journal of Parliamentary Information, April 1956, Vol.2, No. 1, p.33 and Erskine May, *Parliamentary Practice*, 20th edition p.234 and M.N. Kaul and S.L. Shakdher in *Practice and Procedure of Parliament* 4th Edition.
33. *Kihota Hollohon v. Zachillu*, AIR 1993 SC 412.
34. AIR 1987 P & H 263.
35. *Mayawati v. Markandeya Chand*, AIR 1998 SC 3340.
36. *Rajendra Singh Rana v. Swami Prasad Muurya*, AIR 2007 SC 1305
37. *Jagjit Singh v. State of Haryana*, AIR 2007 SC 590.
38. *Shri Filipe Nery Rodrigues, Member of the Legislative Assembly of Goa v. Respondent:*

Shri Sadanand Mhalu Shet son of Mhalu Shet, Speaker, Goa Legislative Assembly and Shri Vishwas Satarkar, Ex-Speaker of the Goa State Legislative Assembly. 2006(2) BomCR424, (2006)108BOMLR227

39. AIR 1994 SC 1558.
40. *G. Vishwanath v. Speaker, T.N. Legislative Assembly,* (1996) 2 SCC 353.
41. AIR 1998 MP185.
42. (2007) 4 SCC 270.
43. AIR 2008 Gau 103.
44. AIR 1993 SC 412.
45. (2007) 4 SCC 270.
46. Rajendra Singh Rana's case (supra), is to be made applicable in the facts of this case, the same would be contrary to the decision of this Court in *Raja Soap Factory v. S.P. Shantharaj*, (1965) 2 SCR 800. Also, see *Mayawati v. Markandeya Chand and Ors.* (1998) 7 SCC 517.
47. *Mahant Dhangir and Anr. v. Madan Mohan and Ors.* (1987) Supp. SCC 528
48. Supra *note*
49. (2006) 11 SCC 1
50. (2007) 4 SCC 270
51. Constitution Bench in *Rajendra Singh Rana v. Swami Prasad Maurya,* (2007) 4 SCC 270.
52. Kihota Hollon. Rajendra Singh Rana's case, Ravi S. Naik's case
53. Dr. Mahachandra Prasad Singh's case