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KASHMIR UNIVERSITY LAW REVIEW

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CONTENTS

Human Rights and their Protection

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Abstract

In their origin and development Human Rights have a long history and garnering respect for them has been the concern of the humans from the inception of human race. Different religions, cultures and philosophies have contributed to the evolution of the concept of human rights, and emphasized the need for their promotion and protection. The need for strengthening human rights was felt more after the World Wars, which saw least regard for human rights, leaving behind a trail of sighs and sorrows, in numberless deaths, countless disablements and a state of wailing and sobbing. It is not only during the wars that human rights have been abused and their abuse has been witnessed in normal times too at the hands of despotic rulers. The democracies have also not been successful in protecting humans from the violation of their birth rights as the people in power perceive every call for protection of these rights as a challenge to their authority. Hence, the very idea of protection of human rights is denounced and the champions of these rights are ridiculed and harassed at the hands of the rulers in a bid to perpetuate their misrule. Even in the so called civilised societies these rights are not spared as has been seen in the policies of apartheid, denial of the right of self-determination and disregard of human dignity in umpteen other ways. Although the present century is full of promises on this front but the abuse of human rights goes unabated.

The United Nations Organisation (UNO) and its relevant organs and agencies have made tireless efforts to improve the situation of human rights in the world. Although these efforts have had considerable effect, at least in creating awareness about these rights, the condition is still far from satisfactory. Here, an attempt is made to trace the historical evolution of human rights, the contribution of the individuals, groups, schools of thought- philosophical and others, Religions and the UNO in the process of promotion and protection of these rights. The reasons for either the absolute or partial failure of these efforts would be identified and some suggestions would be put forth with a view to seek further strengthening of the UNO and its organs and agencies in order for them to be stronger and more effective in promoting and protecting these rights. After all it is a question of preservation of human dignity.

Key Words: Human rights, Natural Rights, UNO, UDHR, ICCPR, ICESCR

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I. Introduction

It is highly reprehensible that even after millions of years of existence of man we have failed to realise the essence of his dignity and ensure its protection. Most nations of the world claim to be civilized but most of them have a dismal record on the front of human rights[1].The United Nations Organisation (UNO), which was perceived, inter alia, as a protector of human rights has also not beenfully successful in its task. The UNO has, in this regard, proved a weak organisation, being lopsided in the constitution of its organs as well as its functioning. Its attempts made from time to time in garnering respect for human rights have not been fully successful, as the states, which have a dismal record of protection of human rights, have defended themselves under the shield of 'state sovereignty', thereby keeping the world community at bay from interfering in their domestic affairs. Nevertheless, the UNO's perseverance in its efforts for the cause of human rights, at least in spreading awareness about these rights, cannot but be appreciated.

In 1993 World Conference on Human Rights in Vienna we saw a solemn commitment of all states to fulfil their obligations to promote universal respect for, and observance and protection of

[1]United States of America, which claims to be a champion of the human rights, has also not had a spotless record in this regard. The treatment meted out to the prisoners in Guatanamo Bay (in Cuba) is well known as in utter disregard of the basic human rights. It was a centre for torture based interrogation, intimidation and revenge, where different kinds of sexual abuse were practised in addition to forcing prisoners to drink salt water until they vomit, punishment of keeping prisoners standing for prolonged periods, sleep deprivation, water boarding, loud noise, beating on the face and ribs while immersed in ice to hide the bruising [see Muhammad Auld Slahi (of Mauritia—the most tortured prisoner in Guatanamo Bay prison) 2015]. These abusive practices of punishment in violation of international law were also used in Iraq and Afghanistan prisons post- 9/11 as also in some ships in international waters. The cases of racial discrimination are also not uncommon. Similarly in the Tiananmen Square episode in China in 1989 military tanks were used to bulldoze the protestors demanding democratic reforms, freedom of speech including that of press and action against corruption. Martial law was imposed in Beijing and the state action cost 180-2600 lives of civilians, 50 soldiers and policemen as estimated by the Chinese Red Cross.

all human rights and fundamental freedoms for all in accordance with Charter of the United Nations, other relevant instruments, and international law. This was a welcome development which raised high expectations among the people, particularly those who face large scale abuses of their human rights. Astonishingly, after about thirty four years of the Vienna reaffirmation, the commitment remains unfulfilled. Human rights abuses are taking place in almost all parts of the world without any concrete action being taken at the international level, other than a hollow condemnation, unless the violator is a weak country when the stronger countries, under the guise of human rights protectors, immediately intervene with intent to implement their ulterior geo-political agenda. Ironically, the violation of human rights generally takes place at the hands of the state against whom these rights were essentially meant. The concern shown for human rights in such situations of their violation is perceived by the state as a challenge to its authority thus concealing its failure. The failure of the international organization in fully preventing such violation of human rights exposes its weakness.

What exactly is meant by the expression "human rights" has not been conclusively determined. There are differences among different countries of the world in their approach to the concept of human rights. The differences arise due to the different perceptions of human rights in different countries based on their varying stages of economic, social, cultural and other development, which determine the aspirations of their people. The problem arises also due to the divergent ideologies surrounding the concept of human rights and different criteria at the international, regional or national levels adopted for their determination and their protection. Added to this is the attachment of the people to their traditions and moors deep rooted in traditional societies. It is for such reasons that all attempts to formulate a universal definition of the expression "Human

Rights" have failed giving rise to a state of uncertainty about their content, their scope and the extent and urgency of their protection. Although at the international level the importance and the need for framing a complete index of the human rights was felt but the task was found to be difficult[2]. This problem is also manifest in the definition of the expression "Human Rights" in the Indian Protection of Human Rights Act (PHRA), 1993, which defines it under section 2 (d) as "….the rights relating to life, liberty, equality and dignity of the individual, guaranteed by the constitution or embodied in the international covenants and enforceable by the courts in India". Here again the definition is vague and the qualifications added thereto make it hard for one to fall within its ambit, rendering it a lame duck to protect all those people whose human rights have been violated and who deserve protection. This definition constricts the scope of human rights and confines them to only those human rights which are enforceable by the courts in India. The fundamental rights guaranteed under part III of the constitution are acknowledged as human rights but these do not encompass the ever growing texture of such rights as known in today's world. Consequently the other international human rights, the international humanitarian rights and the international customary human rights have been left out unless the state of India affirms them as such. This approach reflects the tendency that the human rights are the creation of positive law rather than the outcome of the dignity of a human being bestowed upon him by his creator, rendering them inviolable and inalienable. This definition also fails to give an exhaustive list of the rights that qualify as human rights, although Indian judiciary has widened the scope of these rights through its humanistic approach.

Hereunder an attempt is made to trace the historical evolution of the concept of human rights at the national, regional and

[2]This is admitted in the preface of the UDHR.

international level, evaluate the scope of these rights and find out various kinds of violations of these rights in today's world especially by the state through the instrument of its police and security forces. It would also be well in place to know and identify the weaknesses of the UNO in enforcing these rights. At the end some suggestions would be put forth aiming to further strengthen the UNO and its organs for a better and effective protection of human rights.

II. Historical Evolution of Human Rights and Their Protection

Although it is during the wars that human rights are ravaged and the need for their protection is vigorously felt, the normal times too have witnessed their abuse at the hands of despotic rulers**.** Hence, the realisation had dawned much earlier, that humans are a special kind who have been bestowed with dignity and honour by their creator, which dignity and honour deserves respect and protection in all circumstances. The Islamic jurisprudence, which is next to none, highly respects human dignity and imposes the duty of its protection on the state as well as on the people. Since it is their creator and not the ruler who has bestowed this dignity on the humans in the form of basic human rights, the ruler has no authority to abrogate these rights nor does the man have the power to alienate or relinquish these rights. Islam unequivocally commands the observance of human rights both in normal times as well as in war. Islam is the oldest and the original religion of mankind revealed by Allah through His messengers from time to time[3]. Hence Islam is the original source of the human rights as against the claim of the West to have first evolved them during the

[3]Allah ordained the religion of Islam through the first prophet Adam (asws), which was later transmitted to prophet Mohammad (pbuh). It is the same religion as Allah had commended upon prophets Noah (asws) and Abraham (asws) and Moses (asws) and Jesus (asws). This is expressly stated in The Quran VXII:13.

nineteenth and the twentieth century. In Islam the individual human life and dignity ranks very high and is inviolable and inalienable. The Quran ordains that it was prescribed for bani-Israel (through prophet Moses (asws) that one who kills a human being without reason is deemed to have killed the whole of humanity; one who saved the life of one human being it shall be as if he had saved the whole of mankind[4]. Islam prohibits the killing of a soul which Allah has made sacred except through due process of law[5].The right to life is considered sacrosanct in Islam. Prophet Mohammad (pbuh) in his 'Farewell Sermon' proclaimed "O People your lives are wholly forbidden to one another until the Day of Judgement." It is proclaimed "Do not take away life that Allah has made sacred- except when the law so demands"[6]. The repeated emphasis on its protection reflects the consideration that Islam has for human life and dignity. Human dignity under Islam is universal and not confined to Muslims alone. It avails equally to non-Muslims[7].

In Islam the political and social system is based on the concept of Justice. Islam repeatedly ordains justice for all irrespective of nationhood, caste, creed, colour or religion[8]. One has to be just even to his own opponents and enemies[9]. There is repeated emphasis on the ruler's responsibility to govern with justice[10] for one day in the office of a just ruler is better than sixty years of

[4]Quran V: 32
[5]Quran VI: 151
[6]Quran VI: 151, Human dignity in Islam as the basis of all the human rights has been commended by many Western scholars, see for example C.S.Rhyne, International Law, Washington 1971 at p 409 citing Mousa, Islam and Humanity's Need of It, Cairo 1966 as referred to by C.G. Weeramantry in Human Rights in Islamic Law, IOC Publication 1993 ed. Tahir Mahmood.
[7]T.P.Iyon, 'Roman Law and Mohammedan Jurisprudence' 6 Michigan Law Review 1907 cited in Weeramantry *supra* n 6; also see M. Khalafalla Ahmad, 'Islamic Law, Civilization and Human Rights' 12 Egyptian Review of International Law 1956 cited in Weeramantry *supra* n 6.
[8]Quran V:3,8 and IV:135
[9]Quran V: 3, 8
[10]Quran IV: 58

worship[11]. Quran ordains each one to stay clear of oppression, for oppression is darkness on the Day of Judgement[12].The principles underlying Islamic law also pertain to unity of mankind, the protection of minorities, collective obligation for public welfare, the promotion of knowledge, and responsibility towards future generations[13].

Women are protected under Islam under all circumstances both in war and peace. The chastity of a woman cannot be outraged irrespective of her religion or nationhood[14].

Islam abolished slavery during the time of prophet Mohammad (pbuh), who is reported to have said "there are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement; Of these three one is he who enslaves a free man then sells him and eats this money"[15].

Islam teaches equality among human beings without discrimination on the basis of nationhood, colour or religion[16].Thus the most clamoured right today, viz., the 'right to equality' was proclaimed in Islam as universal-- trans-national, trans-racial and trans-economic. The discrimination between the ruler and the ruled was eliminated and absolute rule of law was established[17]. The caste system has, therefore, no place in Islam. Freedom from want is achieved in Islam through the institution of

[11]IbnTaimiya's works referred by Ahmad Ibrahim *infra* in his "The Concept of Justice in Islam" 2 Malayan Law Journal 1985.

[12]see also Weeramantry supra n 6quoting from IbnTaimiya's Works, Mishkat-al-Masabih, I:586 cited in Ahmad Ibrahim*supra* n 11.

[13]A.A.Said 'Precept and Practice of Human Rights in Islam', I *Universal Human Rights* 1979 pp63-68, cf. Mishkat-Al-Masabih, *supra* n 12, I: 586.

[14]Quran XVII: 32; see also Abul A'la Maududi, Human Rights in Islam, Institute of Objective Studies, 1993, ed. Tahir Mahmood.

[15]Shahi Bukhari and Ibn Maja.

[16]Prophet Mohammad (pbuh) in his 'Farewell-Sermon' in Mecca in 632 A.D said that "No Arab has any superiority over a non-Arab and vice versa; nor does a white man have any superiority over a black man and vise versa; and the rich has no superiority over the poor; You are all the children of Adam and Adam was created from clay" Bayhaqi and Bazaz.

[17] Quran IV: 135.

"zakat" which obligates every rich person to contribute a certain portion of his wealth for the poor and needy people. This also helps in bringing about economic justice in the society.

In Islam, in war, the non-combatants, children and females shall be spared, the crops and the trees shall not be destroyed, no harm shall be caused to pagans who ask for asylum instead they shall be escorted to the place where they can be secure[18]; during war the hostilities shall stop between the sun set and the sun rise, the dead bodies shall not be disrespected. It was on the basis of the human rights and the values enshrined in the holy Quran that the Universal Islamic Declaration of Human Rights document was prepared by eminent Islamic scholars and representatives of Islamic movements across the world, which was proclaimed in Paris in 1981 by the Islamic Council of Europe. This document proclaims in its preamble that the rights decreed by the divine law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice. It guarantees the Right to Life, Right to Freedom qualified by social responsibilities, Right to Equality, Right to Justice including the Right to Fair Trial, Right to participate in the conduct and management of public affairs. The economic and social rights include the rights relating to the status and dignity of workers, right to food, shelter, clothing, education and medical care. These are derived from the general principle that all means of production should be used in the interest of the community as a whole without neglect or misuse. All these human rights carry corresponding duties. Religious intolerance is abhorred in Islam. Islam does not permit compulsion in religion but gives the religious minorities a choice to be governed in their civil and personal matters by their own law.

Gradually human rights received the attention of other civilizations. For example these were respected in Babylonian

[18]Quran IX: 6.

laws, 2000 years before Christ; the Assyria laws, the Hittiti laws, the Vedic period in India, and the jurisprudence of Lao-Tze and Confucius in China. In fact Iran in 1968 International Conference on Human Rights, held in Iran, claimed that the precursor to the modern documentation of human rights was promulgated by the Iranian ruler Cyrus the Great about 2000 years earlier[19].

III. Contribution of Greeks and Romans

The Greeks and the Romans, have advocated the cause of human rights with their philosophical contribution. Their philosophical acumen prompted them to think of the essence of being, through which they realised that humans were a special kind who were bestowed with dignity by the creator of the world, which was inalienable and inviolate. By virtue of this dignity the humans inherited some rights, which the Roman thinkers termed as natural rights or basic rights. The later political philosophies founded the existence of natural rights on the social contract theory under which the people as social elements entered into the contract to surrender some—but not all-- of their basic rights to the society, thereby making possible the political governance of the society[20]. At the same time the philosophical school was conscious of the propensity of the ruler for abusing his authority, hence it felt the need to emphasize that the sovereignty pertained to the people as a whole and not to the monarch and that the government was only an instrument for securing the lives of the people, their properties and their well-being without endangering them in any way. Neither was the government perceived as a

[19]C Daubie, 'Cyrus le Granddes Droits de I homme', Human Rights Journal, V, 1972, p. 293-Cf: A. H. Robertson and J.G. Merrills, Human Rights in the World,4th edition, 1st Indian Reprint 2005, 1996 p 7.

[20]Social Contract theory as given by Locke (1632-1704) stated that man by contract gave up part of his liberty to a sovereign and that the purpose of the government was the protection of human entitlements; the theory was used by Hobbs (1588-1679) to justify authoritarian government; Rousseau (1712-1778), considered social contract as a mystical construct by which the individual merges into the community and becomes part of the general will.

master nor was the positive law the source of their human rights. It was a voluntary creation of the people and maintained by them to secure their own good. Thus making it clear that the positive law was not the source of human rights but these were owned by a human being by birth, by virtue of being human and that these rights were made available to people essentially against the state which was perceived as the frontal violator of these rights.

In the process of their evolution under the modern European thought, these rights, in their earlier frame, were guaranteed in respect of only some aspects of human life. For example the Magna Carta of England of 1215 guaranteed *freedom from imprisonment or dispossession of the property, freedom from persecution or exile* except under law and *fair trial among others*. This was followed by independence of judiciary and freedom of press as the harbingers of these freedoms. Gradually the scope of these rights was extended to other aspects of human life till they reached their present status.

It was perhaps under the influence of Roman philosophical approach that in America President Thomas Jefferson asserted that Americans were free people who derived their rights from the laws of nature and not as a gift from their Chief Magistrate. *Life, liberty* and *pursuit of happiness* were the three cardinal rights of the people[21].He thus emphatically refuted the idea of positive law being the source of human rights.

The essence of these basic human rights was felt earnestly by the liberal democracies of Western Europe where again these were formulated in general terms and guaranteed to the people. The French Declaration of Rights of Man and the Citizen, of 1789, is an early example of this acknowledgement. Similarly under the 1937 constitution of Ireland the natural and inalienable rights of man, viz., *liberty, property, security,* are conserved as antecedent and

[21]A. H. Robertson and J.G.Merrills, *supra* n 19 p 5.

superior to all positive law[22]. President Franklin Roosevelt perceived human rights in a latively broader perspective when in his message to American congress in 1941 he called for a world founded on four essential freedoms, viz., *freedom of speech, freedom of religion, freedom from want* and *freedom from fear*[23].

This freedom from fear is something which is pivotal and is an index to the level of the human rights that the people enjoy. This is the right which the people need earnestly in order to live a free and dignified life, with an opportunity to fearlessly bloom their talent and skill. Unfortunately, this freedom from fear is lacking from the lives of Muslims in the whole of the world as also in India where they live in a constant threat to their lives and their property, facing the wrath of religious intolerance inspired by Hindutva.

IV. Human Rights at International Level and the Drawbacks

With gradual realization of the essence of basic freedoms of man, by the world community, the same was acknowledged in the Charter of United Nations Organisation. The Universal Declaration of Human Rights (UDHR) adopted by the General Assembly on 10th December 1948 was an articulation of this acknowledgment. The UDHR was followed by two important Covenants transforming the principles enunciated in UN declaration into treaty provisions thereby establishing legal obligations on the countries that ratified the two covenants. The first was the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol. The second was the International Covenant on Economic, Social and Cultural Rights (ICESCR). The civil and political rights were perceived to guarantee people's participation in the governance of the country.

[22]Ibid
[23]Id at pp3-4

However, these rights would be meaningless in the absence of economic, social and cultural rights, which worked towards removing the economic and social inequalities and also preserved different cultures, particularly in societies with religious plurality. Hence, the two classes of rights carried equal weightage.

The civil rights under ICCPR are grouped as the first generation human rights as these have an older origin deriving from the 17th and 18th century reformist theories in the aftermath of the English, American and French revolution. These rights protect citizens from acts of murder, torture, cruel and unusual punishment and prevent ex-facto legislation. These rights also prohibit the denial of habeas corpus and imprisonment without due legal process. The political rights ensure participation of the people in their own governance. These rights under ICCPR, allowing a person to participate in the governance of the state, include the right to vote, right to stand for elections and, if successful, be elected at genuine periodic elections, right to take part in conduct of public affairs directly or through chosen representatives. These rights are negative in the sense that no positive action involving financial resources is needed in their fulfilment. It is only a matter of allowance of certain participatory activities to the people and avoidance of inhuman punishment to them in the event of wrong on their part.

The economic, social and cultural rights under ICESCR are also called as second generation human rights. These relate to the guarantee of minimum necessities of life to human beings, which enable them to live a meaningful life. These rights include right to adequate food, clothing, housing and adequate standard of living; freedom from hunger; right to work; right to social security; right to physical and mental health and right to education. These rights are labelled as positive rights as they require active intervention, not abstention, on the part of the state with monetary funding. The state is required to take active measures for the improvement of the people's economic, social and cultural conditions. These

involve adequate resources for their fulfilment, which is not normally within the financial competence of every state to bear. Hence, their realization is neither easy nor prompt. Although some of these rights have been given the status of enforceable rights but their fulfilment is a long distance away from reality. These rights are fundamentally based on the concept of social equality and economic upliftment of the poorer people. The respect for these rights is gaining momentum after their importance was realised at the world level.

Notwithstanding the merits of these internationally recognised and acclaimed human rights, not all sections of the people of the world seem to be satisfied with their content. Some sections allege that their aspirations have not been satisfied. It has all along been alleged that these rights portray the Western approach to the human rights because the whole of the Bill of Human Rights was drafted under the leadership of the Western leaders. Most of the African and Asian countries remained unrepresented due to their colonial status at the time of their drafting. Hence the non-western values were left out from the concept of Human rights. For example, there is no place for group rights in these documents thereby the rights of the minorities remain unprotected. Although the UDHR through its individualistic approach to freedoms, affirms every individual person's claim to the cultural rights, being indispensable for his dignity and free development of his personality and although these individual rights belong to him as a member of a group in minority, having distinct national, ethnic, religious or linguistic, or cultural identity, such groups are not explicitly recognised as right bearing entities. This aspect of the lack of recognition of the cultural, moral and political values of the weaker states was raised by the representative of Saudi Arabia in the debates on the Universal Declaration of Human Rights in the Third Committee of the UN[24]. This was because the patterns of the

[24] The UN Committee on Social, Humanitarian and Cultural Affairs.

Western culture were frequently at variance with the patterns of culture of the Eastern states. Concerns were also raised by the western countries during the discussion while adopting the articles on economic, social and cultural rights, which the USA, the UK, Canada, Israel, the Netherlands and New-Zealand opposed. The concerns for non-representation were finally conceded to in the final draft of the Covenant, especially the one for the right of self-determination.

An off-shoot of the non-congruence of the culture of the International Bill of Rights, drafted under the dominant influence of the West, with the culture of the rest of the world, was a cause of annoyance for the non-western cultures, which was responsible for various regional adaptations of human rights in congruence with their culture. The American Regional Declaration on the Rights and Duties of Man, the European Treaty based on human rights mechanism of the region, the African mechanism of 1981 and the Arabian adoption in 2008, are the cases in support. In view of the delicacy of the matter and the gravity of the resentment, the world body was constrained to incorporate these collective rights in Article 1 of both ICCPR and ICESCR in 1996.The collective rights of the vulnerable groups were acknowledged and have earned the name of 'the third generation rights'. These include right to economic and social development, right to a healthy environment, right to self-determination, right to natural resources and the right to physical protection of group as such through the prohibition of genocide. Many of these rights have not been enacted in legally binding documents, notwithstanding the admission of the successive human rights conferences that there is hardly any difference between these different generational rights.

In the past the UNO has shown a reactive approach to human rights violations. Its role was generally confined to promotion of human rights including the laying down of international standard of these rights. However, now there appears to be a shift in its

approach from being reactive to proactive. Lately, a shift in emphasis has been observed where more attention is paid to the protection of human rights and to prevent and remedy their violation. Unfortunately, the impact of the UN's proactive approach and its positive stance on international human rights front has rather been indirect and belated. Its attempts to promote and protect human rights entail considerable time for a positive impact. As a result of these drawbacks the human rights continue to be widely breached around the globe. The basic rights of individuals, such as the right to life, liberty and physical security and their collective rights pertaining to social and cultural identity continue to be threatened by forces of repression, ethnic hatred, religious intolerance, exploitation, torture and cruel and inhuman punishment. The UN has not been able in such cases of mass human rights violations to take any deterrent action. The UN intervention in such cases is contested on the ground that it would amount to meddling into the internal/domestic affairs of a sovereign nation in violation of the UN Charter[25].The argument has also been accepted by the International Court of Justice (ICJ) that the principle of non-intervention is a part and parcel of customary international law and the right of every sovereign state to carry out its affairs without interference is an essential manifestation of this principle[26]. In recent past, with a view to overcome this obstacle, a new ground, viz., the 'humanitarian ground' has been invoked as justification for outside intervention in a country where human rights are violated. However, intervention on humanitarian ground is fraught with dangerous consequences, for, the armed intervention on purportedly humanitarian grounds is invariably influenced by geopolitical interest of the intervener country which ends up in huge

[25]Art. 2, para 4 of the UN Charter prevents it from intervening in matters which are essentially within the domestic jurisdiction of a state.
[26]*United Kingdom of Great Britain and Ireland v Albania*[1949] ICJ Rep 4;*Nacaragua v United States* 1984 ICJ Rep 39.

sufferings of the affected populations. Nonetheless, the idea is gaining acceptance that in the event of failure or inability or unwillingness of a state to protect its citizens from the catastrophes the responsibility should be taken by the wider international community[27]. However, in the absence of set rules and a set procedure the discretionary and unprincipled power of humanitarian intervention gives the big powers an opportunity to execute their nefarious designs of geo-political nature. In the process the human rights of the people get trampled and the innocent humans face grave suffering. It is feared that the absence of a set procedure for international intervention would render the provisions of the UN Charter, the UDHR, various international covenants and conventions and countless activities, resolutions and actions of the UN and other international bodies *ultra- vires*[28].

Recently some more teeth have been added to the effectiveness of UNO in matters of human rights violations by adopting the doctrine of 'Responsibility to Protect' (R2P). The doctrine of R 2 P has now been incorporated in the UN System in the form of General Assembly Resolution World Summit Outcome Document 2005. This provision is meant to be invoked in rare cases as a last resort when all peaceful persuasive measures have failed. The Security Council Resolution exhorts, in the first place, to use appropriate diplomatic, humanitarian, and other peaceful means in accordance with Chapter VI and VII of the Charter to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. It prescribes a collective action in a timely and decisive manner, through Security Council on a case by case basis in accordance with the Charter, in co-operation with the relevant regional organizations, as appropriate, shall peaceful

[27]This was based on the recommendation of the UN High Level Panel's Report on Threats Challenges and Change.

[28]Henki, 'Human Rights and Domestic Jurisdiction' in 'Human Rights International Law and the Helsinki Accord' (1977) ed. Thomas Buergenthal P. 23.

means be inadequate. Unfortunately, the dominant powers of the world have failed to observe the norms prescribed in the Resolution, which has put the concept of R2P to question. The NATO intervention in Libya is an example which has been condemned as a device to serve pure political purpose of imperialism under the guise of humanitarian intervention, resulting in the loss of peace and thousands of human lives besides causing huge loss of property. The misuse of this power of intervention has been vehemently opposed by some countries. Brazil, Russia, India, China and South Africa (BRICS), in their conservative attitude on the prerogative of sovereignty, have resisted the interventionist foreign policy doctrines of the West. The interventions made at the international level on humanitarian grounds have not followed the strict rules and the objectives of international law. The war in Afghanistan, in the name of war on terror was far from a humanitarian intervention. Same is true of the war in Iraq for which the Bush administration of the US cited the humanitarian cause of promoting democracy as one of the reasons. The humanitarianism was used as a ploy for intervention in the region aimed at establishing a US centred regional order in the Middle East. The UN Charter under Chapter VII permits UN intervention by the Security Council to take action against the erring state in case the human rights are outraged. Such actions by the Security Council, in the past, under Chapter VII of the Charter, have proved successful, such as in Rhodesia, South Africa (1977), Yugoslavia (1992-95), Somalia, Liberia, Haiti (1993), Rwanda, East Timor (1997/2000), Sierra Leone, Sudan and Libya (2011)[29]. It calls for a collective action conferring no authority on any individual country to take preventive action on its own, particularly in the absence of the Security Council Resolution.

[29]See Agarwal. H. D., Human Rights, 15th ed. 2014, p. 21.

V. Human Rights in India

India has ratified both, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) but with certain reservations. In as far as ICCPR is concerned, the main reservation is in respect of the right of self–determination of the people, which is guaranteed under Article 1 of the Covenant to all the people, without any discrimination. The Indian stand is that this Article, under International law gives this collective human right of self-determination only to the people of former colonies, either of trust territories or of non-self- governing territories. The trust territories are those which are administered by other states under the supervision of the United Nations and the non-self-governing territories are those which were of colonial type at the time of the adoption of the Charter of the United Nations. In the case of former, India argues, that the right of self-determination is regarded to be achieved by self-government or independence and for non-self-governing territories, either by emerging as a sovereign and independent state or free association with an independent state or integration with another state. Thus, the Indian position on Article 1 of ICCPR is that it shall apply only to the people under foreign domination and not to the people of sovereign independent state or to a section of a people or nation. This India considers the essence of national integrity. This reservation of India has special bearing on the right of self-determination of the people of the state of Jammu and Kashmir where every human rights' norm is thrown to winds and no regard is shown to the human dignity by the Indian authorities. About 10,000 women have been raped and molested in Jammu and Kashmir by the Indian security forces and around 23,000 women have been widowed. In the beginning of the uprising in Jammu and Kashmir, during early 1990s, rape and molestation of Kashmiri women by Indian Security forces often occurred during

crackdowns, cordon-and-search operations[30]. Security forces systematically used rape as a war weapon in order to victimise, punish, humiliate, intimidate, coerce and degrade the people of the state[31].Besides the women suffered forced prostitution, sexual slavery, impregnation and termination of pregnancy[32]. Sexual violence was perpetuated by abducting women and subsequently raping them within army facilities without any regard of age health or disability[33]. Besides there are huge number of persons who have mysteriously disappeared and a number of mass graves have been found in Kashmir. All this has taken place in gross violation of the resolutions passed by the Security Council of the UN, which were aimed at protecting the honour of women and girls and punishing the perpetrators of sexual violence, particularly in conflict areas. The Beijing Declaration of 1995 in the World Conference on Women reasserted the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after the conflicts. It called on the parties to armed conflicts to take special measures to protect women and girls from gender based violence, particularly rape and other forms of sexual abuse. Resolution 1325 of 2000, of the Security Council reaffirmed the Beijing Declaration. The Resolution 61/143 in 2007, adopted by the General Assembly of UN, explicitly urges the states to ensure the protection of women and girls in situations of armed conflict, post armed conflict settings and refugee and displaced settings where women are at a greater risk of being targeted for violence and where the ability to seek and receive redress is often restricted, and to

[30] www.kmsnew org

[31]Manchanda Rita 'Guns and Burqa: Women in the Kashmir Conflict', in Manchanda (ed) Women War and Peace in South Asia; Beyond Victimhood to Agency) Sage Publications, New Delhi, 2001 p 73.

[32]Saeedur-Rehman Siddiqui, 'Women day in Kashmir' Wailing Woes, http://www.Kashmirnewz.com/a0027.html

[33]Report prepared by the Jammu and Kashmir Coalition of Civil Societies (JKCCS) see www.kmsnew.org

eliminate impunity for gender based violence in situations of armed conflict. This was followed by the Security Council Resolution 1820 of 2008, which recognised that sexual violence is a security concern, which needs to be urgently addressed. The sexual violence targeted primarily at women and girls can represent "a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group". Such violence could significantly exacerbate conflicts and impede peace processes. The Council affirmed its readiness, where necessary, to adopt steps to address systematic sexual violence, deliberately targeting civilians, or as a part of a widespread campaign against civilian population. The UN Security Council in its Resolution 2106 of June 2013 encourages member states to include the full range of crimes of sexual violence in national penal legislation to enable prosecution for such acts.

Despite the presence of sufficient provisions under all the three interrelated branches of international law, i.e. International Humanitarian Law, International Human Rights Law and International Criminal Law, to prohibit sexual violence in its different forms and in different contexts including in armed conflicts, the disrespect for it is rampant and unabated particularly in situations of armed conflict.

The argument that Article 1 of ICCPR is restricted to certain colonies is untenable as the article does not make any such reservation. Again, the state of Jammu and Kashmir, before its temporary and conditional accession to India, was an independent sovereign state and was never a part of India. In this regard a number of resolutions have been passed in the Security Council of the United Nations, granting the people of the state the right of self-determination. Hence the right of self-determination cannot be denied to the people of Jammu and Kashmir.

Under the ICCPR, the ethnic, religious and cultural minorities have been given the right to enjoy their own culture, to profess

and practice their own religion and to use their own language[34]. The General Assembly, through its Declaration on Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1992, acknowledged the rights of the minority to conserve its identity, culture, language and religion individually and collectively. It also proclaimed a specific Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief in 1981. In India this Declaration is shown scant respect where Muslims are being marginalised from political landscape. Full freedom has been given to the radical and aggressive sections of the majority community to dominate the political scenario and deprive the minorities of their political, religious, and cultural rights. Religious norms, here, are sought to be laid down by the majority community for all religious communities and restrictions are sought to be imposed on the religious practices of the Muslims.

The ICESCR has also been ratified by India but the rights conferred by this covenant have not been regarded as human or fundamental rights and have, therefore, not been considered at par with the rights under part IIIrd of the Indian constitution. However, some of these economic, social and cultural rights have been incorporated under the Directive Principles of State Policy under part IVth of the constitution and that too subject to certain reservations. These include the right to equal pay for equal work for both men and women; the right to protect the childhood and youth from exploitation; the right to secure just and human conditions of work and for maternity relief; the right to work; the right to a decent standard of life and full enjoyment of leisure and social and cultural opportunities and the right to raise the level of standard of living and right to free and compulsory education. These directive principles have been laid down as guidelines for the state to pursue in their policies in order to achieve social

[34]Article 27 of ICCPR.

justice but are not enforceable in the courts of law. However, it is gratifying that the Indian judiciary has risen to the occasion by giving a liberal interpretation to certain fundamental rights imbuing the essential directives. The judiciary has thus adopted the Directive Principles approach to enforce the economic and social rights. This trend took off in 1980s when the Supreme Court realised and declared that the judiciary had a responsibility to address the vast poverty and misery in India. It was the creative interpretation of the socio-economic rights by the judiciary which has resulted in giving some of the rights under ICESCR the status of fundamental rights in India. Thus, the right of equal pay for equal work[35], right of workmen to medical benefits[36], right to livelihood[37], right to shelter[38], right to health[39] and finally the right to food have been considered essential for the purposeful enjoyment of right to life[40]. These rights have thus been placed on the pedestal of fundamental rights.

India has also raised objections to Article 1 of ICESCR, which lays down the right of self-determination for all the people. These objections are based on the same grounds as in respect of the ICCPR discussed above.

Unfortunately, freedom from fear, which constitutes the core of the right to life, is absent from the lives of most of the people today, be it in the USA, Africa or Asia. In India the minorities these days live in a constant fear of their lives where least regard is

[35]*State of MP* v *Pramod Bhartiya* AIR 1993 SC 287; *Randhir Singh* v *Union of India* AIR 1982 SC 879.

[36]*Regional Director E.S.I. Corporation and Anor v Francis De Costa and Anor* SCC 4 (1993) p 100.

[37]*Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180*; D.K.Yadav v J.M.A Industries* (1993) 3 SCC 258.

[38]*Chameli Singh v State of UP* (1996 2 SCC 549.

[39]*Consumer Education and Research Center* v *Union of India* (1995)3 SCC 42; *Paschim Bengal KhetMazdoorSamity&Ors v State of West Bengal &Anor* AIR 1996 SC 2426; *C.E.S.C Ltd v Subhas Chandra Bose* AIR 1992 SC 585.

[40]*KishenPattnayak&Anor v State of Orissa*, and *People's Union for Civil Libertis v Union of India And Others*(1997) 3 SCC 433: AIR 1997 SC 1203.

shown to the right to freedom from fear[41]. Religious intolerance pervades the political scenario. Interference in the religious matters of Muslims in the name of abolition of triple talaq (divorce) and attempts of bringing in a Uniform Civil Code constitutes an affront to the multi-religious texture of the Indian populace. These acts of abuse of authority by the ruling class have reverberated in political circles and stand rejected also by the political parties in opposition. An echo of the rejection of such undemocratic and non-secular policies was heard in the recent Congress Working Committee meeting held in Delhi on 06-06-2017. In the meeting the congress party made a scathing attack on the BJP lead NDA government for its divisive and dictatorial policies. The Congress president Sonia Gandhi charged the ruling party of unleashing a reign of fear. Sonia Gandhi said that we must be ready to protect the essence and idea of India which the Modi government is seeking to extinguish. The Congress president said that there is a brazen campaign to straitjacket the whole country into regressive and narrow-minded world view during the three years of NDA government[42]. Leader of opposition in the Rajya Sabha, Gulam Nabi Azad accused the Modi government of crushing voices of dissent. The congress leader said whether it is political parties, print media or electronic media, the government does not respect voices of dissent. It seems it does not respect democracy[43]. Recently the senior journalists of

[41] The present government is pursuing the agenda of *Hindutva* (Hinduization) in utter disregard of the express constitutional guarantee of freedom of religion. This also violates secularity of the nation enshrined in the preamble of Indian constitution. This has put the religious minorities, the Muslim in particular, under constant fear, through the incidents of lynching of Muslims in the name of cow protection. This is being done by cow vigilante groups (gawrakhshak brigades) all over India without any action being taken by the state. This has culminated in the closure of slaughter houses in Uttar Pradesh, which were largely run by Muslims and has resulted in the closure of many tanneries and leather industries in the country.

[42]See Kashmir Reader, 07-06-2017, p.3.

[43]See The Hindu June 7, 2017.

India accused the government of gagging the press by making false allegations against journalists and suppression of the voice of the people by implicating media houses in false cases. They vowed that freedom of press as a pillar of democracy would not be allowed to be curbed[44].This was followed by the Congress leader Malikarjun Kharge's charge that the Prime Minister says something and does something else. Hindustan, he said "should not be allowed to become Lynchistan"[45]. Malikarjun also alleged that this government is against minorities, dalits and women who bore the maximum brunt of mob violence.[46]

These anti-secular and undemocratic actions of religious fanatics have also resulted in a re-rise of Indian nationalism posing a great threat to the basic structure of the Indian constitution. This has shaken the foundations of secularism as one of the basic pillars of India's multi-religious and multi-cultural social texture. The minorities in India in general and the Muslims in particular are put into a process of assimilation through a constant threat to their lives and their properties. Their religious activities are disliked and disallowed. They are prevented from offering religious sacrifices of particular animals. They are forced to shut down their animal trade, which the BJP and RSS consider to be against their faith. Efforts are also on to grossly interfere in the religious matters of Muslims by asking them to give up some essential religious beliefs and practices in matters of their personal law and also to believe in and perform some acts which go against their religious belief and practice.[47]

There are certain other rights, regarded as human rights under ICESCR some of which find no place either as the fundamental rights under Part III[rd] of the Indian constitution or as Directive

[44]In their recent gathering in Press Club of India Delhi.

[45] This has reference to lynching of people, particularly Muslims, by Hindu majority mobs on the suspicion of keeping or eating beef.

[46]See The Hindu August 1, 2017.

[47]such as singing vandematrum and planting tulsi trees in their backyards.

Principles of State Policy under Part IV[th] of the Indian constitution. Two of these rights, viz., the right against torture or cruel, inhuman or degrading treatment or punishment and the right not to be subjected to medical and scientific experimentation are considered by the world community to be of utmost importance for a respectable life of a person. India has adopted the policy to ignore these rights with the result that these rights are observed only in their abuse. Nevertheless, it is once again the Indian judiciary, which has realised and shown its aliveness to the basic human rights of the people and has, by giving an extended meaning to right to life and liberty under Article 21 of the constitution, attempted to safeguard these rights. In the case of prisoners or under-trials the Indian Supreme Court has emphasised that they have certain rights as human beings, which cannot be denied to them. This paved the way for some of the human rights enshrined in ICESCR to be judicially adopted. In a host of cases like *Hussainara Khatoon v Home Secretary Bihar*[48], a number of under-trial prisoners in jail were ordered to be released and speedy trial was held to constitute a fundamental right of the accused under Article 21 of the constitution. The Supreme Court has emphasised the importance of just and human treatment to the prisoners in jail which is concomitant to the right to life and liberty under Article 21 of the constitution of India[49]. Krishna Iyer, J. of the Supreme Court, while delivering the majority judgment in *Sunil Batra (2)*[50], held that integrity of the physical person and his

[48]AIR 1979 SC 1369; These principles were reiterated in cases of *KadraPehadiya v State of Bihar* AIR 1981 SC 939, *A. R. Antulay and Ors v R.S.Nayak* AIR 1992 SC 170; *Raj Deo Sharma v State of Bihar* Allahabad Criminal Cases vol 37 (1998) p 834.

[49]In cases like *Sunil Batra v Delhi Administration* (No 1) AIR 1978 SC 1675; (N0 2) AIR 1980 SC 1579;*Charles Shbraj v Superintendent Central Jail Tihar* AIR 1978 SC 1514;*Kishore Singh v State of Rajasthan* AIR 1981 SC 625;*Francis Coralie Mullin v The Administrator, Union Territoryof Delhi* AIR 1881 SC 746;*Joginder Kumar v State of U.P. &Ors*1994 SC 1349SCC 3 (1995) P 743;*D.K.Basu v State of West Bengal* AIR 1997 SC 610;*State of Andhra Pradesh v Challa Ram Krishna Reddy* AIR 2000 SC 2083

[50] *Sunil Batra (2) v Delhi Administration* AIR 1980 SC 1579.

mental personality is an important right of a person and must be protected from all kinds of atrocities

However, one fails to understand the non-ratification by India of the right against torture or cruel, inhuman or degrading treatment or punishment, which constitutes the essence of human rights. It is tantamount to giving a carte blanche to the jail authorities, police and the security forces to subject people to cruel and inhuman treatment with absolute impunity. It is common knowledge that cruel and inhuman treatment at the hands of police and security personal is a normal practice in India. The *Bhagalpur Blindings* case[51] is just one such case exposing the notoriety of the jail authorities in ill-treating the prisoners and the under-trials. Justice A. S. Anand of the Supreme Court sharply reacted to the custodial killings and ill-treatment of the prisoners when he held that custodial death is perhaps one of the worst crimes in a civilised society governed by rule of law. Any form of torture or cruel, inhuman or degrading treatment, would fall within the inhibition of Article 21 of the constitution, whether it occurs during investigation, interrogation or otherwise[52]. In its very recent judgment, the Supreme Court said that in cases of breach of fundamental rights the state cannot claim immunity based on state sovereignty as the violation of fundamental rights is an exception to the doctrine of sovereign immunity. Upholding the right of the citizens to peacefully protest, raise slogans, assemble without arms to express dissent or grievances before the authorities as a democratic process, the court said that the police misusing its powers by using excessive force to the extent of barbaric brutal torture; custodial violence imposes a liability on the state under public law, criminal law and tort law to provide monetary compensation for the same.[53] The inhuman and

[51]*Khatri and Ors v State of Bihar and Ors* AIR 1981 SC 1068; in this case the prisoners were blinded while in police custody.
[52]*D. K. Basu v State of West Bengal* AIR 1997 SC 610.
[53] *Anita Thakur & Ors v Government of J & K & Ors* AIR 2016 SC 3803.

degrading treatment meted out to the people in general and the political prisoners of Jammu and Kashmir in particular depicts horrible stories whereby their lives are made miserable by the state authorities. It appears that India has chosen to blind its eye to such atrocities. This is evident from the fact that despite having signed the UN Convention against torture way back in 1997, India has not ratified the convention. On the contrary an alternative domestic law to deal with such cases of abuse of human rights was mooted. For that purpose, the Prevention of Torture Bill has already been passed by the Lok Sabah on 6th May 2010, which was also recommended by the Select Committee of the Rajya Sabah. However, despite its urgency, the proposed legislation has not seen the light of the day even after the lapse of more than seven years. The strategy of the government in preventing or prolonging the passage of such legislation has been disapproved by the Supreme Court when it recently rejected the Central Government's argument that the IPC and Cr. P.C were sufficient to take care of such cases. The National Human Rights Commission (NHRC) has also strongly supported such a specific law, as it was aware of the cases of torture and inhuman treatment prevalent in India, even though the Commission kept count only of custodial deaths and not of those cases where the torture did not result in the death of the victim. It is because of the notoriety India has earned for torture and inhuman treatment that the foreign governments refuse to extradite their nationals who have committed crimes in India. In its recent utterance the Supreme Court has asked the government of India to consider promulgating a standalone comprehensive law to define and punish torture as an instrument of human degradation by state authorities as it was a matter of both Article 21 and international reputation. This advice came on the heels of CBI's failure to get Kim Davy-a Danish citizen and prime accused in the Purulia arms

drop case of 1995, extradited from Denmark, for the reason of India's notoriety for torture and inhuman treatment meted out to prisoners[54]. It is therefore evident that the state of India does not want such a law to see the light of the day as that would put it to question at the hands of judiciary both at home and abroad.

i. Indian Legislation on Human Rights and its Drawbacks

The Protection of Human Rights Act, 1993 (PHRA) was enacted with the object of constitution of the National Human Rights Commission (NHRC) and the State Human Rights Commissions and for the setting up of Human Rights Courts at district levels, so as to have a better mechanism for the protection of human rights. This was done under tremendous pressure and criticism from within and outside the country. Ironically, the object of an effective human rights protection mechanism is far from being achieved. The Human Right Commissions at the national and the state level have proved to be most ineffective in carrying out their responsibilities. Even for the purpose of carrying out their investigations, the Commissions are not equipped with sufficient and independent investigating agencies, for which they have to rely on the state agencies. The Commission has no power of prosecution. The growing number of Human Rights violations and the inefficacy of the Commission in dealing with the complaints is evident from the increasing number of complaints of human rights violations and the increasing number of cases pending before it. The number of complaints has gone up from 496 in 1993-1994 to 69082 in 2001-2002. The number of cases pending before the Commission has gone up from 13512 in 1997-1998 to 31881 in 2006-2007. In the month of May, 2017 the number of complaints received by the Commission was 7180, which number rose to 7560 in June 2017. The number of cases pending with the Commission in May 2017 was 31163 while in June of the

[54]See The Hindu 25th April 2017, p.10.

same year the number was 29593.[55] Most of the human rights violations take place at the hands of security forces, which ironically have been put beyond the jurisdiction of NHRC. In those states where State Human Rights Commissions have been set up, the same look like lame ducks for want of manpower and the necessary infrastructure. Similarly, the Human Rights Courts in the districts suffer from many infirmities and have not been able to function and achieve their purpose. These courts suffer from ambiguity as the nature of cases that can be taken up by them has not been stated by the NHRC. Nor has their jurisdiction and the procedure to be followed been laid down. The Human Rights Commissions have been reduced to mere investigating and recommending agencies for the government, and the government is not bound by their recommendations, which it is free to accept or reject. It was with the view to overcome these short-comings that the NHRC set up a committee headed by former chief justice of India, Justice A.M. Ahmadi to suggest changes to PHRA 1993. The committee identified three basic infirmities in PHRA and recommended, inter alia, for three relevant changes. First, the NHRC should have financial autonomy; Second, the constitution of NHRC should be changed so as to include two judicial and three non-judicial members of whom one should be a woman; Third, the definition of 'armed forces' should be changed so as to include para-military personal and bring them under the purview of the NHRC. Unfortunately, these recommendations appear to be shelved without any positive action being taken.

ii. Need for Change of Mind-Set

The need for protection of human right was prompted by their rampant violation both in war as well as in normal times. The law of human rights was evolved, essentially, to ensure that the individuals are protected from the excesses of the state. Unfortunately, it is the state which has become the perpetrator of

[55] http:/nhrc.nic.in, Visited on 30-08-2017.

the abuse of these rights. It is, therefore, imperative for the world community to ensure that human dignity with its basic rights and fundamental liberties is not violated by the state or its agencies or any non-governmental body. The laws for the protection of human rights have, therefore, to be primarily focused on the misuse of state authority by its organs and agencies.

The task would become easier if we succeed in changing the mind-set of the government impressing upon it that the respect for human rights would not belittle the government; that respect for human rights is not anti-administration or anti-government but is something which adds to its credibility and to its political status, as necessary for an honest attempt to advance humanism in the process of nation building. Hence, the state should encourage the efforts of the human rights activists and human rights organisations rather than taking it as an affront and persecuting them. The apathy of the government towards the Human Rights is obvious from its initial reluctance to constitute the Human Rights Commissions or, if constituted, to starve them of their necessary basic requirements including the infrastructure and the manpower. This attitude has to be changed. The Human Rights Commissions can be of great help in, at least, creating and spreading awareness about human rights. In India, the poor masses hardly know the meaning and the ambit of human rights. Two time meals is the only right they know of. Their political and other rights are meaningless and even unknown to them. This is where human rights education and honest effort for the protection of these rights is most needed. In view of the fact that human rights violations generally take place at the hands of the state, it is imperative that the target groups for human rights education are widened so as to include people in high and important positions in the state, the politicians and the administrators, as these are the people who can be greatly effective and immensely helpful in creating an environment of regard and respect for human rights. Police, military and paramilitary forces, who happen to be the

frequent violators of these rights, are in dire need of human rights education, if serious business of protection of human rights is meant.

VI. Conclusion and Suggestions

It can be safely concluded that human rights violations are taking place, in one way or the other, in almost all parts of the world, and the culprit generally is the state. In the process of their material advancement, the nations have made long strides but morally the people, particularly the people in power, have yet to pass at the anvil of human rights. One reason, among others, for violation of human rights by the state going unpunished, is the prevention of international intervention under the cloak of state sovereignty. This cloak of sovereignty has been mainly responsible for the failure of the UNO and its relevant organs and agencies in preventing human rights violations in the world. Their role has generally remained confined to the creation and spread of awareness about human rights. This, however, is the promotional aspect of human rights, which is only secondary. The primary role of the UN should focus on the protection aspect of human rights. The UN should have the power of intervention, backed by the Security Council, in case of human rights violation by a state. However, it needs to be ensured that the individual states do not usurp this duty to themselves. International intervention in such events should take place only with the sanction of the Security Council so as to prevent external states from intervening with the object of implementing their own geo-political agenda.

In fit cases for UN intervention the action should be prompt and of effective level so as to be deterrent and of real help to the victims of human rights violation. After the protection of the human rights has been secured the UN should immediately withdraw its forces from the territory of the target country. For this purpose the doctrine of R2P could be used as an effective and purposeful tool with sincerity and commitment.

The human rights activists including the NGOs can play an effective role in preventing human rights violations. They should be given a facilitated access to the countries alleged to violate human rights. Their unbiased reports should be treated as credible and the UN agencies should immediately take note of such reports and take prompt action against the violating country.

In India, the National and the State Human Rights Commissions should have financial autonomy, with legal luminaries, social activists- having contribution in the field of human rights, and a woman representative as its members. The reports and the recommendations of the Human Rights Commission should have a binding force. The police, military and para-military forces should be brought within the jurisdictional ambit and powers of the Human Rights Commissions, particularly while dealing with the civilian population. The voice for the promotion and protection of human rights should not be taken as an affront to the state. It should rather be taken in good spirit and appreciated in the process of rectification of mistakes or misdeeds.

In India the agenda of dividing the nation on religious basis by pursuing the policy of religious intolerance would prove detrimental to the national interest. The wise words of the newly elected president of the country are an eye opener when he said that "Key to India's success is its diversity; our diversity is the core that makes us so unique. Nations, he said, were not built by governments alone and required national pride in the soil and water of the country, in its diversity and inclusiveness, in its culture and the little things we do every day"[56].

[56]The president Ram Nath Kovind said this after his oath taking ceremony on July 25, 2017, see The Hindu July 26, 2017.

Incidence of Divorces in District Srinagar of the State of Jammu and Kashmir: A Socio-Legal Study

Abstract

Divorce has become trendy at the moment, which seems an unhealthy trend and contrary to the laws of nature. In the past little thought was given to divorce, its evil effects, causes, prevention and control or incidence, while at the same time there were fewer divorces, fewer broken homes. Certainly the difference between the past and the present is that now the causes of divorce are on the increase. Social life has assumed a form in which the causes of the separation, disunion and the breaking of the ties of home life have been multiplied. The same is true in district Srinagar of the state of Jammu and Kashmir, where the frequency of divorces is on high pace and an assortment of key factors seems to be accountable for the same. The paper makes an analysis of the causes, as well as, the promising steps that can be taken to curb the problem.

Key Words: Marriage, Divorce, Jammu and Kashmir

I. Introduction

Marriage undoubtedly is essential for social life and healthy society. Marriage as an institution of personal law has been playing an extremely significant role as an instrument of regulation of social behavior. Marriage is not merely a union of a male and female person, but it is the foundation of a nucleus around which the whole concept of family revolves.

It is nevertheless a universal and acknowledged fact that the institution of marriage has ceased to remain an indissoluble union as in the past. There are a number of failures, economic, political, social, etc. that makes this institution quite vulnerable. The institution of marriage has by no means remained infallible. A certain proportion of marriages are bound to fail as no fool proof, mathematical system, can be worked out to sustain such relationship as the human behavior can hardly be quantified.. The

societies have to accept infallibility of marriage as a gnawing reality eating up the vitals of the society and the need to devise methods to deal with the incidence of unsuccessful marriages.

Since, the divorce conception has now Willy nilly come to stay with us; its aftermath should no longer be ignored. One imperative thing clearly stands out which need our focused attention, namely the ground root causes behind the rising rate of divorces in the state of Jammu and Kashmir and what achievable steps should be taken to hold back the problem.

II. Divorce and Islam: A Historical Retrospect

Muslims are governed by their personal laws under which Nikkah i.e. marriage is a contract and may be permanent or temporary and permits a man four wives if he treats all of them equally. It was the Holy Quran that for the first time in the history of the Arabia concept of divorce was recognized. Among the pre Islamic Arabs, the power of divorce was unlimited they could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce and divorce again as many times as they preferred. The reforms of Prophet Muhammad (pbuh) marked a new departure in the history of eastern legislation. He restrained the unlimited power of divorce by the husband and gave to the women the right of obtaining a separation on reasonable grounds. He pronounced Talak to be the most detestable before God of all permitted things for it prevented conjugal happiness. Divorce is the most hated permissible things in the sight of Allah. It dissolves families and deprives children the family atmosphere. The Prophet (peace and blessings be upon him) said:

"*The most hateful permissible thing (al-Halal) in the sight of Allah is divorce.*"*(Abu Dawud, Hadith 1863, Ibn Majah, Hadith 2008)*. Divorce is the most hateful thing to Allah, but it is allowed (*halal*) only in the case of absolute necessity.

Divorce or dissolution of marriage is one of the ways society attempts to rectify broken marriages. Divorce has been explained as the dissolution of a valid and subsisting marriage. Divorce follows only when married life cannot be endured. But one thing is comprehensible that divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting reconciliation have failed, the parties may proceed to dissolution of marriage by Talak or by Khula. Divorce is contrary to the laws of nature the annulling of the marriage bond and the separation of those who should be life partners is a denial of a true nature of man as created and as at his best. Any society, in which divorce becomes more numerous, with his consequent breakup of families, evidences its deviation from nature and her requirement.

The Prophet (pbuh) however, warned of all things which have been permitted "*Divorce is the most hated by Allah*".

Due to the sacredness of the marriage contract, Islam asks both the husband and the wife to keep and respect this bond. Thus, each partner in this sacred relationship must treat the other kindly and properly. A man must not divorce his wife to bring harm upon her, as this constitutes an act that demolishes this noble establishment, breaks the woman's heart, and possibly separates the woman from her children without any reason. Thus, the separation between a man and his wife was considered one of the major and grave sins, and one of the most beloved actions of Satan, as was narrated in a number of Hadith. This is, of course, a form of oppression which is totally forbidden in Islam.

Since the husband must never divorce his wife in order to bring harm upon her without reason, it is also forbidden for a woman to ask for a divorce without a sensible reason. The Prophet (peace and blessings be upon him) said:

"Any woman who asks her husband to divorce her without an acceptable reason will never smell the scent of Paradise.

Given the above, it becomes crystal clear that neither the husband nor the wife has the right to resort to divorce without justification. Divorce should be the last resort after all attempts of reconciliation fail. The Prophet (peace and blessings be upon him) said:

*"Let a believing man not dislike a believing woman. If something in her is displeasing to him, another trait may be pleasing."*And Allah Almighty says," *And consort with them in kindness, for if you dislike them, it may be that you dislike something in which Allah has placed much good."* (An-Nisa'4:19)

It is to be remembered that each device has multiple effects on their own self and also for children who get hung between father and mother. Islam fences in the man's power of divorce with many limiting safeguards, a man may not put away his wife by violence, harassment, injury or in a way which may drive her to life of immorality and corruption, thus Islam has far centuries surpassed anything achieved in western countries in its initiative to remove differences and restore understanding in family life. If a couple tried their best to reconcile their differences, but they still could not agree and they found impossible to live with each other, then only in that case they should separate in a proper and decent manner.

III. An analysis of the rising rate of divorce: A Case Study

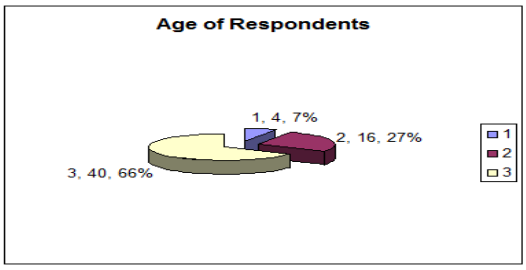
In earlier days, in spite of the existence of far-reaching disparity between the spouses, either of the two was expected to compromise with the other so that their marital bonding survives. Reflecting a negative social trend, the number of couples seeking divorce is on the rise in the current state of affairs and the same seems to be factual in the state of Jammu and Kashmir State with the official data showing that the young generation, are always inclined to break marriages even on trifling issues.

Since the problem has assumed grave dimensions, the present researcher decided to analyze some vital factors which seem to play central role for the increase in divorce rate in the state of Jammu and Kashmir like cruelty by husband or in- laws, desertion, late marriages/lack of issue/impotence, extra-marital affairs, economic independence of women etc. With all the objectives of the study in mind the researcher decided to study a sample of 60 women respondents from the district Srinagar of Jammu and Kashmir state who were seeking divorce. The whole data concerning the present study is presented in the form of simple statistical tables as under:

IV. Profile of the respondents (Divorcees)

The researcher tried to ascertain the incidence of divorce between different age-groups to analyze the problem at hand. It is observed that frequency distribution of respondents in not statistically uniform ($p<0.01$). The figure A shows the incidence of divorces based on the age factor as under:

Total no of respondents	Below 21 years	Between 21-25 years	Above 25 years	P-value
60	4	16	40	<0.01



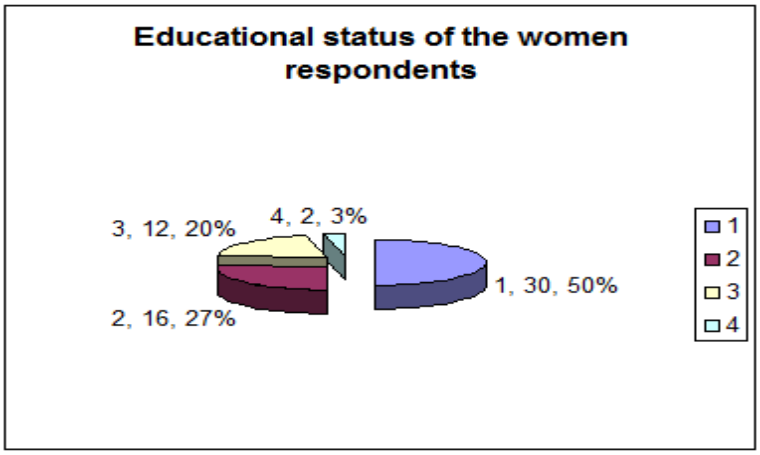
[Figure A]

The Figure [A] shows that out of the 60 women respondents whose responses were sought by the researcher 4(7%) respondents were below 21 years of age, the other 16(27%) were 21

years to 25 years of age while as rest 40(66%) were above 25 years of age. Hence, majority of the respondents were above 25 years of age. It indicates that divorces are taking place at a stage when remarriage is rather impossible putting the women folk in a greater mental and economic stress.

Here the researcher analyzes the educational status of women divorcees in order to ascertain the awareness of the respondents regarding the concept of divorce and its consequences. Statistically, education status of women and divorce rate is related.

Total No. of women respondents	Illiterate	Primary	Higher Secondary	Graduate or above	-value
60	30	16	12	02	0.01



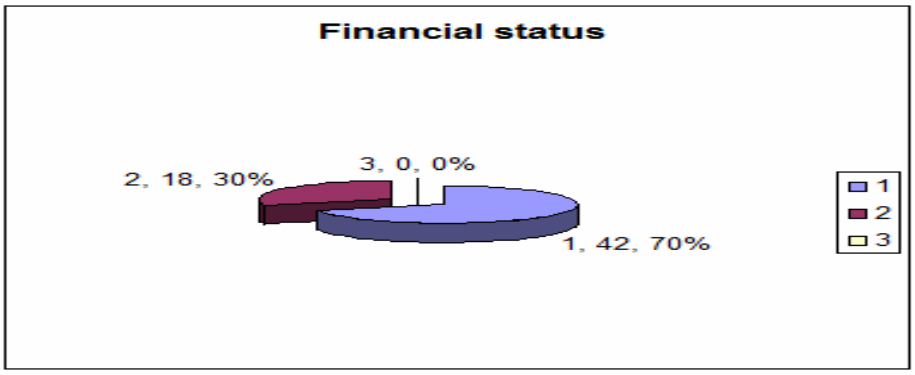
[Figure B]

The Figure [B] Reveals that out of 60 women respondents 30(50%) were found to be illiterate, 16(27%) were with primary education, 12(20%) were found to have passed their higher secondary and only 2(3%) of the women respondents had

completed their graduation. Therefore majority of the respondents belonged to the illiterate class. It becomes clear that majority of the women divorcees are not aware of the concept of divorce and its ill effects.

The researcher here, tried to analyze the class in which majority of the women divorcees belong so as to ascertain the problem at hand. Statistically, type of family and divorce is related.

Total no. of Respondents	**Poor (Labour Class)**	**Emerging middle Class**	**Upper middle**	**P-value**
60	**42**	**18**	**0**	< 0.01



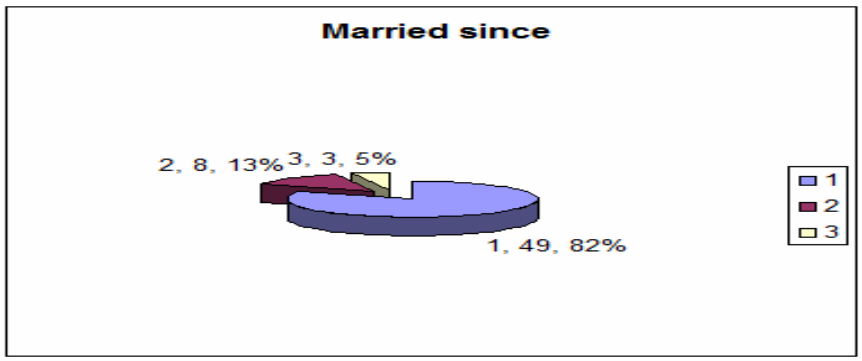
[Figure C]

The above table reveals that out of 60 women respondents 42(70%) belong to the poor (labour class) of the society, 18(30%) belonged to the emerging middle class of the society while as there was no respondent belonging to the upper middle class(0%). It clearly indicates that majority of the divorcees were not

financially stable which itself is one of the factor for the rising rate of divorces as they are not able to take their financial decisions together.

The researcher here makes an analysis of the incidence of divorce between different time periods of marriage so as to discover the exact time period in which there were frequent divorces. Statistically frequency distribution of the respondents is not uniform (P<0.01).

Total no. of respondents	5 years	6 - 12 Years	Above 12 years	P-value
60	49	8	3	z<0.01



[Figure D]

The Figure [D] reveals that out of the 60 respondents 49(82%) respondents who were seeking divorce had been married only since 5 years, 8(13%) respondents were married since 6 - 12 years while as only 3(5%) respondents who were married for more than 12 years were seeking divorce. Hence it is revealed that majority of the divorce seekers were newly married. They have

very high expectations from their marriage but gets disillusioned early.

The researcher tried to find out the incidence of the rising rate of divorces by analyzing the foremost factors accountable for the same so as to study the problem at hand.

Total No. of Respondents	xtra marital affair	Incompatibility/ Intolerance and economic independence of women	Cruelty by husband or relatives of husband/dowry demand	Late marriage/lack of issue,/impotence	Desertion	other reasons
60	34	5	6	12	1	2

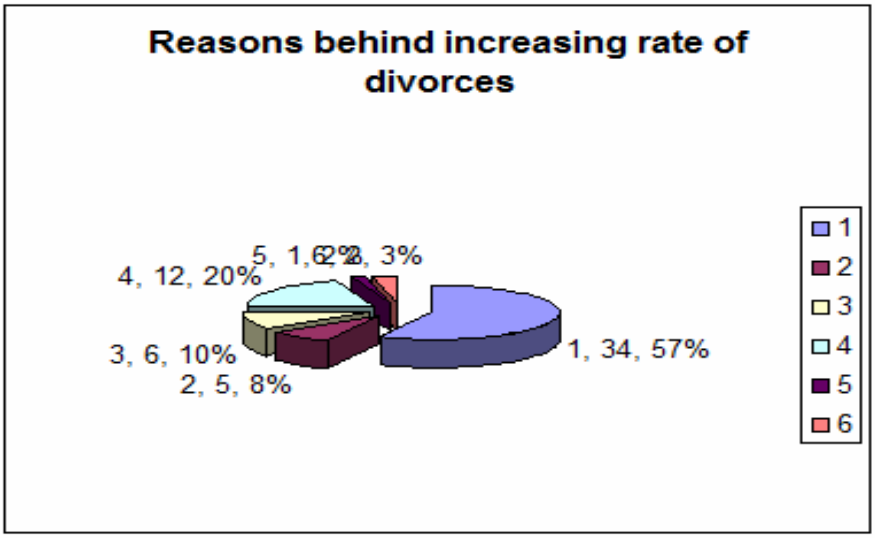


Figure [E]

The above Figure[E] reveals that out of 60 women respondents who were seeking divorce 34(57%) of the respondents were seeking divorce mainly on the ground of extra marital affair, 5(8%) of the respondents were seeking divorce on the Incompatibility/ Intolerance and economic independence of women, 6(10%) of respondents on the ground of Cruelty by husband or relatives of husband/dowry demand, 12(20%) respondents were seeking divorce on ground of Late marriage/lack of issue./impotence,1(2%) of the respondent was seeking on the ground of desertion while as 2(3%) respondents were seeking divorce on the ground of other reasons. It becomes transparent that lack of commitment is the biggest problem as most of the divorcees were seeking divorce on the ground of extra-marital affairs which in turn is vulnerable for a healthy society.

When asked the questions whether there should be more mediation centre's and family courts in our State, majority of the respondents replied in affirmative (P<0.01) as given under:

Total No. of respondents	**Yes**	**No**	**P-value**
60	40	20	<0.01

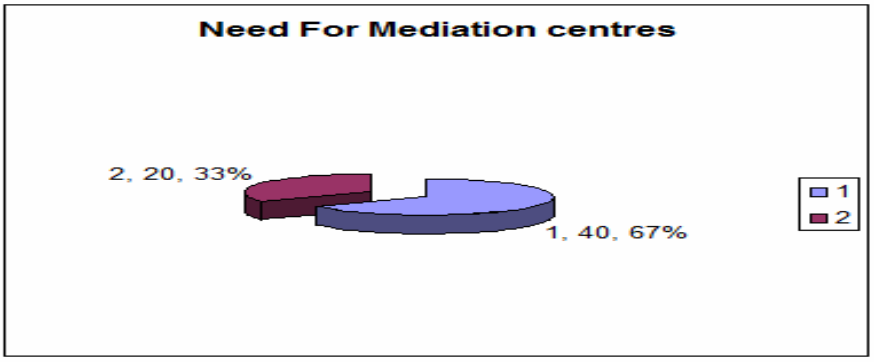


Figure [F]

The Figure [F] above reveals that out of 60 respondents 40(67%) of the respondents replied in affirmative while as 20(33%) respondents replied in negative. Therefore, it is clear that there is a need of mediation centre's and family courts in our State.

The official data makes it clear that the state of Jammu and Kashmir has of late witnessed 60% increase in divorce cases. More alarming is the fact that nearly 70 percent of these divorce seekers fall in 25 to 35 age group. The data revealed that most of these couples applied for divorce within 1 to 3 years of their marriage.

As per the report of the State Women's Commission, the Jammu and Kashmir state is witnessing a rise in marital discord with 2500 cases registered with State Women's Commission (SWC) this year. As per data out of 2500 cases 1900 are from Kashmir Valley only. Women cite various reasons like harassment, extramarital affairs, the denial of maintenance by husbands, collapsed health-care services, which apparently have worst impact on the their children as well. As far as the religious parameters of marriage is considered it is forbidden for a man to enter in illicit relation with a women but the women's commission witnessed that there is also a rise in extra marital affairs.

V. Conclusion

The incidence of divorce has been the result of conflict between spouses whether justified or not, right from the establishment of institution of marriage. The people seem to be incapable of comprehending the social and moral wisdom behind marriage and its sanctity. The sound family ties fulfill one essential principle of the formation of a coherent and united society, and if the foundation is weakened, the entire society will be at risk. The fact that the divorce rate is on the rise signals that

more people could not grasp the rights and benefits of marriage as a social bonding.

As the Present day generation has high expectation from their partners and these young couples think that their life is hijacked by his or her partner, so even on a petty quarrel end up the relationship for good. Unfortunately, in the near future, it is likely to become more serious and a range of factors seem to be responsible for the rising rate of divorces, some of which are as follows:

- The spouses often have poor conflict resolution skills;
- They may have too high expectations of married life and get disillusioned early in their marriage.
- People have become selfish and too lazy to work on their relationships; good relationships are about give and take, compromise, understanding and teamwork.
- Lack of commitment is the biggest problem;
- Lack of understanding and absence of responsibility
- Intolerance and employment of couples (economic independence of couples)
- Incompatibility between the parties
- Late marriages ;
- Extra marital affairs.

VI. Suggestions

On the basis of the above study, it becomes abundantly clear that there is an increase in the incidence of divorces with highest human cost and social scourge which could be averted if the following suggestions are adhered to:

- The people need to be properly instructed regarding the guidelines prescribed by religion in the matter of divorce;

- The people need be acquainted with the pristine pure procedure of divorce like *Talak Hassan* and *Talak Ahsan*, so that the rigours and pangs of divorce are averted and chances of reconciliation remain open;

- There should be women's courts (*Mahila Adalats*) to resolve disputes related to divorce as the chances of reconciliation multiply due to the proactive role of women mediators;

- The institution of mediation need to be strengthened providing sufficient space for settling the inter se disputes by involving the well wishers from both the sides as ordained under the Quranic injunctions;

- Parents need to be educated about the repercussions and ill effects on the children born from marriages culminating in divorce;

- Regular counseling on marital obligations ought to be given by centers established at the societal level like Marriage *Hamsafar* Council, Mahila *mandal*,(women's circle) *Mahila manch* (women's platform) , *nari nyaya samiti* (women's justice committee) etc. to lessen the burden on formal adjudication and litigation;

- Last but not the least, the fact that the act of divorce has rendered children the victims of divorce for no fault of their own, so the parties before seeking divorce should soften their hearts and recall the good points which had been lost under the pains of discord, so that they seek reunion for the betterment of all especially their off-springs.

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Educational Safeguards and Scheduled Tribes of Jammu and Kashmir: An Analysis

Abstract

Education has remained a serious concern since independence. Education is a precondition for removing the barriers of backwardness and marginalization in any society or community. This paper is based on a nationwide research study entitled "Educational Status of Scheduled Tribes in India: Attainments and Challenges" commissioned by ICSSR, New Delhi. The research has been carried out to understand the attainment of STs in the sphere of education. The peculiar aspect of tribal of Jammu and Kashmir is their scattered population inhabiting the difficult and remote geographical terrain which is a hurdle to their speedy educational and socio-economic development. This research paper attempts to emphasis on the affirmative action in Education among Scheduled Tribes in Jammu and Kashmir. This paper analyses the factors responsible for not availing or facing difficulties in getting the welfare/schemes in education. This paper evaluates the factors that hinder progress of STs in the spheres education level. Finally, the paper recommends urgent implementation of strategies in order to improve the attainment levels among the STs of Jammu & Kashmir.

Key Words: Constitutional safeguards, Welfare schemes, Participation, Student's Aspirations and Affirmative Actions

I. Introduction

Indian society is marked by considerable heterogeneity and therefore has been studied by social anthropologists and sociologists in terms of its diverse nature. Taking advantages of the vast literature on tribes by early British administrators like Dalton and Risley, census officers like Grigson and Hutton and by ethnographer anthropologists like S.C Roy, B.S Guhaetc., the

Government of independent India equipped itself with deep insight into tribal problems. N.K Bose felt during his research on Jaung tribes of Orissa and the Mundas and Oraons of Chota Nagpur that the tribal people were under constant pressure to abandon their isolation in favour of integration in wider society and this pressure was generated mainly by economic circumstances. Surajit Sinha dealt with the tribal movements in context of their self consciousness. Sinha also pointed out that one of the tribal solidarity movements arise out of ecological; cultural isolation, economic backwardness, a feeling of frustration vis-a-vis the advanced sections.

Functionalism treats education as a means through which the social order is maintained. The conflict theory adopts a completely different approach in treating education as a means through which powerful classes in society perpetuate ideological hegemony. Interactionism upholds that the nature of the interaction of students with their teachers determines their positions in the educational system. An effective education system is one in which students are encouraged to actively participate in all aspects of the learning process. Postmodernism challenges the notion of compulsory education comprising the inculcation of reading & writing skills. It favours the inclusion of traditional skills and wisdom as part of education.

Many social scientists, politicians, educationists and educational planners consider education as an important instrument of social change particularly in the context of third world countries. The radical and innovation functions of education are hard to reconcile with its role in the transmission of the culture. Education plays a positive role in enhancing a person's chances of social mobility.

One of the dominant themes in educational reforms in both the 19th and 20th centuries has been the extension of educational opportunities to a wider section of the community with the

objective of providing equal educational opportunities for all classes. Since, India contains a large number of different regional, social and economic groups, each with distinctive customs and cultural practices; there are some groups and communities who suffer because of economic, political, regional, educational and other such factors due to the existing social order and consequent cultural ethos. The SCs and STs living throughout the country fall in these categories. The situation of SCs and STs in J&K is no better than in other parts of country. They also have to face inequality and discrimination. The situation is so complex that the attainment of education, conventional as well as technical and the consequent occupational mobility has not ensured total social change and mobility among these communities. This paper intends to analyze the socio-demographic diversity among SCs and STs in the state and the educational status of STs and SCs in Kashmir division of J&K.

Education has remained a serious concern since independence. Education is a precondition for removing the barriers of backwardness and marginalization of any society or community. Therefore, education of STs has been a priority for the Government. The Ministry of Tribal Affairs continues to implement various Schemes or Programmes like Special Central Assistance to Tribal Sub-Plan (SCA to TSP), Vocational Training Centers, Strengthening education among ST girls in low literacy districts, Village Gram Bank Scheme and Scheme of Development of Primitive Tribal Groups (PTGs) aimed at welfare and development of STs. In addition to these, there are some of the programmes and schemes launched for the promotion of education among this disadvantaged section of the society.

II. Status of STs in Jammu and Kashmir

The state of Jammu and Kashmir can be divided into three regions; Ladakh, Kashmir valley and Jammu. In census 1961, there were 9 districts. One new district was added during 1961-71and

the number increased to 10 districts. Further, in 1971-81 4 new districts were created and thus the total number of districts of Jammu & Kashmir reached 14 and it remained the same during census 2001. The total number of districts recorded in census 2001 is 14. There are 59 sub-districts, 121 CD blocks and 6652 villages. According to the census 2001, the total population of J&K is 10,143,700 which is 0.99% of the total population of the country. Out of this population 5,360,926 are males and 4,782,774 are females. The rural population is 7,627,062 and urban population is 2,516,638. The average population size of the districts in the state is 724,550. Among the entire 14 districts Jammu district recorded the maximum population of 1,588,772 persons and minimum population of 117,232 persons is in Leh. Sex Ratio of the state works out to be 892. During 1991 to 2001, 29.98 percent increase was recorded in its total population.

The overall literacy rate of J&K has increased by about (13.67%), between 2001-2011 from (55.50%) to (68.74%) with male literacy at (78.26%) and female (58.01%). Female literacy has increased by (15%). As per the census 2001, the literacy rate of tribals is (37.5%) which is far lower than the average literacy (47.1%) of tribal at national level. The literacy rate of male tribals of J&K (48.2%) is much lower than the tribals at national level (59.2%). Also the literacy rate of female tribals (25.5%) of J&K is low in comparison to female tribals at national level (34.8%).

According to the 2001 Census, The population of SCs and STs are around 15% and 7.5% of the total respectively, or around 22.5% in total.The term ST first appeared in the Constitution of India. Article 366(25) defined STs are such tribes of tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be STs for the purposes of this Constitution. The article says that only those communities who have been declared as such by the President

through an initial public notification or through a subsequent amending act of parliament will be considered to be STs

In Jammu and Kashmir, eight communities vide the Constitution (Jammu and Kashmir) STs Order, 1989 and four communities namely Bakerwal, Gaddi and Sippi were notified asSTs vide the Constitution (STs) Order (Amendment) Act 1991. All the twelve STs were enumerated officially for the first time during the 2001 census recording a population of 1,105,979. The STs account for 10.9% of the total population of the state and 1.3% of the total tribal population of the country. The STs are predominantly rural as 95.3 % of them reside in villages.

The tribal population of Jammu and Kashmir is among the emerging tribal groups joining the mainstream of planned development to which they have brought a distinct cultural variety. Generally their economy is closely linked with the forests and they are living a substandard life because of primitive mode of livelihood. Majority of them are placed below the poverty line, possessing meagre assets and are exclusively dependent on wages, forest produce and farming.

The peculiar aspect of tribals of our State is their scattered population that inhabits the difficult and remote geographical terrain which is a hurdle to their speedy socio-economic development.

The Constitution of Jammu and Kashmir recognizes twelve (12) tribal groups/communities as STs of the state:

1. Bakerwal
2. Balti
3. Beda
4. Bot, Bota
5. Brokpa,Drokpa, Dard, Shin
6. Changpa
7. Gaddi

8. Garra
9. Gujjar
10. Mon
11. Purigpa
12. Sippi

Source [the Constitution (Jammu & Kashmir) ST, 1989 and the Constitution (STs) order (Amendment) Act, 1991]

III. Methodology

The central objective of the paper is to gather information and examine to what extend education has spread among STs and its implications for their empowerment and development. The paper also has focus on the various welfare schemes/ provisions/ facilities given in education for weaker sections and to examine to what extent they help them to access to and participate in various levels of education.

IV. Overall Objective

To study the educational status of STs in terms of problems, attainments and challenges faced by the ST students in the process [teacher, student and external environment] of education.

Specific objectives:

I. To study major obstacles and factors in the educational development of STs

II. To measure the academic performances and achievements in terms of marks and grade at different levels of education general , professional and vocational

III. To evaluate the role of education institutions [colleges-government, private] in developing and building the intellectual growth of ST students

IV. To understand the impact of Affirmative Action

Since, STs are found in all the districts of the state, *[Census 2001]* therefore, the universe of this study is entire Jammu and Kashmir. During the course of study five districts representing all the three regions: Jammu, Kashmir and Ladakh were taking into consideration for the collection of primary and secondary data. The shortlisted districts were Srinagar, Budgam, Baramulla, Doda and Ladakh. The districts were shortlisted on the basis of the parameters designated at national level. The parameters were:

Table No 1.1: High Population/High Literacy, High Population/Low Literacy, Low Population/High Literacy and Low Population/Low Literacy

S.no	***District*** ***Parameters***	
01	*Srinagar* *Headquarter District*	
02	*Baramulla* ***LP/HL***	
03	*Budgam****LP/LL***	
04	*Doda****HP/LL***	
05	*Leh* ***HP/HL***	
06	***Total districts visited***	***05***

V. Sample of the Study

The sample of the research paper is composed of 1457 which includes the students of upper primary (513), higher secondary (513) and colleges students (431) fromfive districts of Jammu and Kashmir. It was selected on the basis of the parameters like population and literacy [HP/LL, HP/LL, LP/LL, and LP/HL.]

The following specific methods / techniques in the research study were used:

a) Questionnaires (ST and Non-ST)

b) Focused group Discussions

c) Direct Observation

VI. Review of literature

Surat Singh in Dynamics of Tribal Development has discussed the various approaches towards tribal development like Constitutional provisions for STs, tribal community development plans, tribal movements and other programmes and schemes for STs.

The Constitutional provisions for STs include Article 46 that directs the state to protect STs against educational and economic injustice and all forms of exploitation. Article 15(4), 16(4) and 17(5) provides for imposing reasonable restrictions on fundamental rights in the interest of protecting STs and SCs.

Constitutionals concessions were in the form of reservation for tribal in educational institutions, government services and elected bodies.

The tribal community development plans, special plans and sub-plans were initiated to create an atmosphere to enrich the tribal economy, particularly facilities such as roads, electricity, agricultural inputs such as improved seeds, fertilizers, credit facilities as grants and loans.

One more approach to tribal development, according to the author is in the form of tribal movements. Some activists have worked among the tribals to organise them to revolt against their exploitation by feudal lords and state agents, etc.

Author has also talked about other programmes like National Extension Schemes (NES), Community Development Project (CDP), Tribal Development Block (TDB), the programmes which were planned after the development efforts attempted in the earlier periods and they turned out to be not in tune with tribal primordiality. Therefore, there was a structural constraint.

Besides for the development of STs, many Centrally Sponsored Programmes like girls hostels, research and training and aid to voluntary organizations have been implemented. Now Ashram Schools have also been established through these schemes.

Approaches to Tribal Development by Surat Singh (2000) has discussed the various approaches towards tribal development like Constitutional provisions for STs, the tribal community development plans, tribal movements, various programmes and schemes for STs.

The Constitutional provisions for STs include Article 46 that directs the state to remove from STs the educational and economic injustice and all forms of exploitation. Article 15(4), 16(4) and 17(5) provides for imposing reasonable restrictions on fundamental rights in the interest of protecting STs and SCs.

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Besides for the development of STs, the centrally sponsored programmes like girls' hostels, research and training and aid to voluntary organisations have been implemented. Now Ashram Schools have also been established through centrally sponsored schemes.

Author has given some measures which may prove helpful to bring the STs on par with others in regard to the education of STs:

- Priority should be accorded to opening primary schools in tribal areas under the normal funds.
- Educated and bright ST youth should be encouraged and trained to take up teaching in tribal areas

- In areas predominantly inhabited by STs informal education centre and residential schools can also give a boost to the tribal education

Author is of the view that the tribal development has suffered because programme planning and implementation have remained stereotyped. The ultimate result of such defective planning and implementation is the emergence of an undulating socio-economic situation in which certain tribal groups and areas have progressed, while others have remained static.

[Source: Approaches to Tribal Development by Author: Surat Singh (2000)]

In Minority Education Rights, Supreme Court Judgment, Iqbal Ansaro discusses the Supreme Court Judgment on minority education rights. According to others the judgment was not only related to educational rights of religious and linguistic minorities under articles of 29 & 30 of the Constitution but the educational rights of non-minorities were also included in this.

[Source: Minority Education Rights, Supreme Court Judgment by Iqbal A Ansaro]

On an average, the difference between the literacy rates of the general category and that of STs has been around 20%. Though is fact that literacy rates among tribals has gone up yet the increase is slower as compared to the general population.

The departments of Elementary Education and Literacy and of Higher Education in states have provided special incentives to ST students which include textbooks, uniform, abolition of tuition fee, and so on. Various programmes and schemes have also accorded special focus to ST students, however, the problem of adequacy of the school buildings, both in number and in facilities, still remain unsatisfactory. The lack of education in the mother language or dialect in primary classes, ignorance of non-tribal teachers about tribal languages and ethos and the delay in

distribution of scholarship, textbooks, and uniforms, continue to be a source of worry.

[Source: Factors influencing Tribal Education in India: An assessment of Constitutional and legal provisions, By Dr.AlokChantiaAndDr.Preeti Mishra; Education Scenario of Tribal in India Current Issue and Concerns, Published by Manglam Publications and Distributors, Delhi, 2011.]

Dr. A.K Ravi Shankar has given a detailed account of the Policies Programmes and Strategies to Strengthen Educational Base of Tribes.

A provision for educational opportunities forms a very important part of the programme for the welfare of the STs. A number of special programmes have been initiated with a view to motivate the ST children and enable them take advantage of educational facilities at various levels. Some of the policies and programmes are under the National Policy on Education 1986 which lays special emphasis on removal of disparities by attending to the special needs of those who have been denied equality so far. The NPE provides policy directives for special efforts to be aimed at educationally disadvantaged groups, particularly the STs. The schemes are

- Programme of Action (POA) 1992
- Schemes for Construction of Hostels for ST girls and Boys.
- Schemes for the establishment of Ashram Schools in tribal sub-Plan
- Schemes of Post-Matric Scholarship Scheme (PMS)
- Scheme of book banks
- National Overseas Scholarship Scheme for higher studies abroad
- Rajiv Gandhi National Fellowship (RGNF)
- Schemes of top class education for ST students
- Vocational Training Centres in tribal areas

- Schemes of strengthening education among ST girls in low literacy district
- Schemes of development of Particularly valuable Tribal Groups (PTGs)

Further, the author discussed the strategies in school education sector such as:

- Sarva Shiksha Abhiyan (SSA)
- National Programme for Educational of girl's at elementary level (NPEGEL)
- Kasturba Gandhi Balika Vidyalayas
- Mid-day Meal Scheme
- Kendriya Vidyalayas (KVs)
- National Institute of open schooling
- National instituted of educational planning and Administration (NIEPA)

The author analyzed the schemes run by University Grants Commission (UGC) which are:

- Remedial Coaching at UG/PG level for ST students
- Coaching Classes for preparation for National Eligibility Test (NET)
- Post-graduate Scholarship for STs Students
- Establishment of Centres in Universities for study of social exclusion and inclusive policies
- Indira Gandhi National Tribal University
- Central Institute of India Language
- National University of Educational Planning and Administration (NUEPA)

[Source: Programmes and Strategies to Strengthen Educational bases of Tribes in India, by Dr. A.K Ravishankar; Educational Scenario of Tribes in India - Current Issues and Concerns, Published by: Manglam Publishers and Distributors, Delhi]

Virginis Xaxa has focused on the various provisions and laws that have been ensured in the Constitution of India for the development of tribes since independence.

According to the author tribes as citizens of free India were extended civil, political and social rights in equal measure to others. Civil and political rights have been ensured within the preview of the fundamental rights of the Indian Constitution while social rights have been envisaged in the Directive Principles of the Indian Constitution.

Besides the above tribes were also extended certain special rights as being members of a distinct community. Such rights include provisions for:-

- Statutory Recognition - (Article 342);
- Proportionate Representation in Parliament and State legislatures- (Article 330 & 332);
- Restriction on the right of the ordinary citizens to move freely or settle in particular areas of acquire property in them- [Article 19 (5)]
- Dialects and culture etc [Article (29)]

The Constitution also has a clause that enables the State to make provisions for the reservations in general [Article 14(4)] and in particular in jobs and appointments in favour of tribal communities [Article 16(4)].

There is also a directive principle of the Constitution that requires that the educational and economic interest of the weaker sections of society including tribes is especially promoted (Article 46)

Besides these, there are provisions in the 5th and 6th schedule of the Constitution[Article 244 and 244(a)] that empower the state to bring the area inhabited by the tribes under special treatment of administration.

Author is of the view that despite a large number of well meaning Constitutional provisions and laws aimed at protecting and safeguarding the welfare and interest of the tribal communities, the processes of marginalization of the tribals has gone on unabated. Ironically, at the roots of such marginalization are the laws themselves. As tribes had no tradition of reading and writing & no tradition of record keeping & dealing with such laws, the non-tribals have taken advantage of such laws and have been depriving tribals of their lands through a variety of ways and means.

[*Source: Constitutional Provisions, Laws and Tribes, by Virginis Xaxa; Yojana, A Development Monthly Vol. 58 January 2014]*

"Safeguards under Constitution of India" deals with the safeguards provided for the SCs and STs under the Constitution of India. It covers the survey of all the relevant provisions relating to social, educational, economical, service, political and administrative safeguards**.**

1. **Social Safeguards:** To uplift them Constitution has safeguarded the interest of the SCs and STs and thus incorporated the following provisions through different articles which can be collectively called as social safeguards of SCs & STs.

- Article 14 - Equality before law.
- Article 15 - Prohibition of discrimination on grounds of religion, race, sex or birth of place.
- Article 17 - Abolition of untouchability
- Article 23 - Prohibition of traffic in human beings & forced labour.
- Article 24 - Prohibition of employment of children in factories, etc.
- Article 25(2) (b) - Provision relating to temple entry.

2. **Educational and Economic Safeguards**: To raise the educational and economic status of STs & SCs and consequently

improve their self image so that they may assert their rights, the Constitution provides safeguards through different articles. These are as under:-

- Article 15(4) - Special provision for the advancement of SCs& STs**.**
- Article 15(5) - Provision for reservation of SCs& STs in private educational institutions.
- Article 46 - Promotion of educational & economic interest of SCs& STs**.**
- Article 275(1) - Grants from the union to certain states.

3. **Service Safeguards**: Constitution provides service safeguards for STs & SCs through following articles:-

- Article 16(4) - Reservation of posts in public employments.
- Article 335 - Claims of SCs & STs to services & posts.

4. **Political Safeguards:** The various articles which provide for political safeguards to SCs and STs are as follows:-

- Article 330 - Reservation of seats for STs & SCs in the house of the people.
- Article 332 - Reservation of seats for STs & SCs in the legislative assemblies of the States.
- Article 334 - Reservation of seats & special representation to cease after sixty years.
- Article 234(D) - Reservation of seats in every Panchayat.
- Article 243(T) - Reservation of seats in every municipality.
- Article 164(1) - Minister in charge of tribal welfare.

5. **Administrative Safeguards**:- The Constitution of India has some provisions relating to administrative, monitoring and control of various activities towards securing social justice and rightful share for the most under privileged & marginalized section to the society. The provisions are as under:-

- Article 224 - Administration of scheduled areas and tribal areas.
- Article 339 - Control of the union over the administrative scheduled areas & the welfare of STs.
- Article 338 - National commission for SCs.
- Article 338 A - National commission for STs.

[Source: Safeguards under Constitution of India, By Deepak Kumar Srivastava; Legal protection of SCs and Tribes - Constitutional Safeguards and Social Justice, Published by: Deep and Deep publications Pvt. Ltd., Delhi, 2012]

Satya Sundaram in "Tribal Development Strategies" has discussed tribal development strategies. According to the author the government is totally indifferent to tribal problems. The government did initiate a number of schemes from time to time for the upliftment of the tribals. But these met with limited success as the tribal environment has peculiar characteristics of its own.

The tribal development programmes, according to the author has shown increasing trend of allocation which would be helpful to develop infrastructure in the tribal areas but their plight worsens, when they borrow for social functions.

An attempt made to bring about development of tribal regions through industrialization has created new problems for the tribals. The rural industrialisation programme should be area-specific. Thus, in a tribal region emphasis should be on education and intensive extension of economic and social infrastructure; gradual application of modern farm technology, market facilities, simultaneous development of agriculture and industry, and agro and forest based small industries and effective coordination between block administration and government departments and other institutions.

The government has made attempts to strengthen the Vocational Training Centres in tribal areas and the states tribal development cooperative operating in minor produce.

Under the central schemes launched recently to encourage literacy among the tribal women, essential educational complexes will be set up in 48 districts where the rate of literacy among tribal women is less than 2percent. It will impart education and vocational training. There is provision for free uniforms, periodical health check up and incentive of Rs 30 per month to parents for sending their children to residential schools. The scheme is to be implemented by the government through voluntary organisations.

The success of tribal development schemes should not be judged in terms of funds allotted for such schemes. It should be assessed by the positive achievements attained in the direction of social transformation. Finally, the author gives concludes that tribal development strategy succeeds only when there is inter-departmental coordination and more funds are allotted to tribal developmental schemes. The selection of schemes should take into account the wishes of the tribals and also the absorptive capacity of tribal regions**.**

[Source: Tribal Development Strategies, By I Satya Sundaram; Dynamics of Tribal Development Published by: Deep and Deep publications Pvt. Ltd., Delhi, 2000]

Devandra Thakurand and D.N. Thakur in Impacts of Education Policy in India have discussed several impacts of education policy that highlight the major accomplishments, limitations and unintended consequences of education policy in India.

According to the authors Indian education policy has succeeded at all levels in placing education within easy reach of almost all people. There is now a primary school in every

neighbourhood. There are special incentive schemes to get girls and SC and ST children to go to school and stay in school. There are free hostel facilities, Ashram Schools and merit scholarships to encourage bright students from the weaker sections of society to continue their education beyond primary and middle school levels.

The social impacts of higher education though hard to quantify are nevertheless real and important. Distinctions based on caste, religion and social origin are challenged by the social and intellectual milieu of colleges and universities.

Also education policy has had a significant impact on the level of literacy in India. The literacy has gone up from 16% in 1951 to 36% in 1981. Authors are of the view, that access based education policy has clearly not been very successful in reaching India's poorest and the most disadvantaged. Its impact has been uneven. It has helped males in advanced states most spectacularly, but has left SC and ST females in poor and backward statesalmost completely untouched.

According to the authors the policy of 'education for all' has established schools far and wide where none existed before, has at the same time contributed to creation of mass mediocrity and elite quality. It has been an important factor in the creation of a dual system of education; one for the well-to-do few and the other for the masses. Authors are of the view that the mediocre education is better than illiteracy or no education at all. Mediocrity can improve a while a non-existent school cannot. Author has given the conclusion that education policy has accomplished much, but it must be continually modified as more is learned about its unanticipated and unintended consequences and shortfalls.

[Source: Impacts of Education Policy in India, By Devandra Thakur and D.N. Thakur; Tribal Education, Published by: Deep and Deep publications Pvt.Ltd. Delhi].

Education development is a stepping stone to economic and social development and the most effective instrument for empowering tribal. In this regard, efforts were made by different schemes with the objective of enhancing access to education through provision of infrastructure by construction of hostels for ST students, establishment of Ashram schools, vocational training centers as well as to maximize retention of ST students in the various stages of school education and promoting higher learning by providing monetary incentives in the form of scholarships such as pre-matric and post-matric scholarships, scholarship of top-class education, Rajiv Gandhi National fellowship and National overseas scholarship for ST students. "Various programmes and schemes have also accorded special focus to ST students, however, the problem of adequacy of the school buildings, both in number and in facilities, still remain unsatisfactory" *(Alok Chantia, 2011).*

In recent years, the most visible evidence of this in the public policy arena is that it is believed that the Affirmative Action now provides an unfair advantage to minorities. From the perspective of others who daily experience the consequences of ongoing discrimination, Affirmative Action is needed to protect opportunities likely to evaporate if an affirmative obligation to act fairly does not exist.

Free and additional incentives are given to children but many of the benefits do not reach the beneficiaries. In some cases it was found the some incentives like free uniforms, books and note books reach the target groups but they are of poor quality or do not reach in time. "Educational policy has accomplished much, but it must be continually modified as more is learned about its unanticipated and unintended consequences and shortfalls." (*Devandra Thakur*)

Since Affirmative Action supports equality of access, equal chances for academic success, and credentials for entry into educational institutions, the population is earnestly attempting to

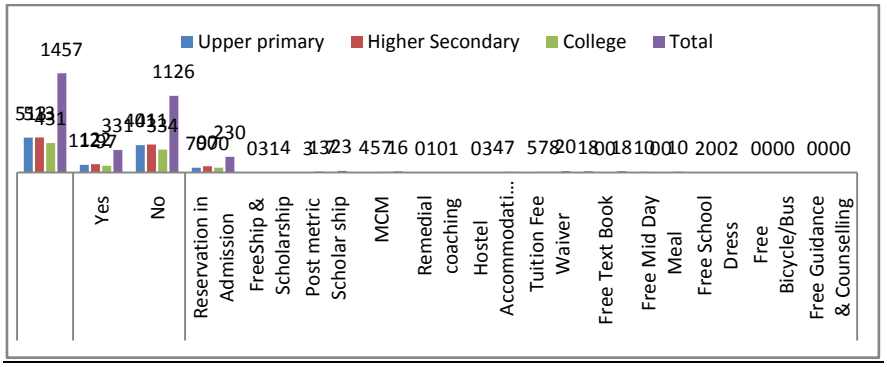
find solutions for maintaining an inclusive educational environment but due to the lack of awareness about Affirmative Action they are not benefited as much as they should be. Opponents of affirmative action often characterize the policy as being unfair, claiming that it violates a cherished system of meritocracy. Proponents take a markedly different stance. At the most basic level, proponents wonder why affirmative action is singled out for disapproval while the critics remain silent about many other common practices that disrupt meritocracy.

The awareness and availing the schemes were evaluated in this paper and the finding were as under:

AFFIRMATIVE ACTION

	No of Respondents	Awareness About Schemes		If Yes Which Scheme Availing											
		Yes	No	Reservation in Admission	FreeShip& Scholarship	Post metric Scholar ship	MCM	Remedial coaching	Hostel Accommodation	Tuition Fee Waiver	Free Text Book	Free Mid Day Meal	Free School Dress	Free Bicycle/Bus	Free Guidance & Counselling
Upper primary	513	112	401	70	0	3	4	0	0	5	18	10	2	0	0
Higher Secondary	513	122	411	90	3	13	5	1	3	7	0	0	0	0	0
College	431	97	334	70	1	7	7	0	4	8	0	0	0	0	0
Total	1457	331	1126	230	4	23	16	1	7	20	18	10	2	-	-

Graph



VII. Conclusion and Suggestions

A sound and effective system of education has a predominant role in the enlightenment, empowerment and achievement of a better and higher quality of life. Education is an important indicator for social development. Through various programmes and schemes the government has been making serious efforts for improving educational standards in general and SCs and STs in particular. Merely launching these programmes and schemes is not a solution for the evils of illiteracy among tribal masses. The benefits of these schemes have percolated to them insufficiently. The study has identified, analyzed, interpreted and discussed multiple reasons have hindered the participation of STs in education. Through this piece of research the researchers would like to suggest the following improvements drawn from our statistical analysis of the questionnaire survey and the qualitative data from the in-depth individual and group discussions.

The present policies of the governments both State and Central have been guided mostly by social workers. It is time that the social scientists role in public administration is recognized and an increasing association between social science and a policy of reconstruction is encouraged. In formulating policies and programmes for tribal education it is essential to understand the complex realities of tribal life and the expectations of tribal from the system.

One of the major constraints of tribal education at planning level is the adoption of a dual system of administration. The Tribal Welfare Department deals with tribal life and culture and administers developmental work at the local level, including education. But the Tribal Welfare Department lacks expertise in educational planning and administration in general and academic supervision and monitoring in particular. On the other hand the Education Department is the sole authority for planning of educational development (guidelines and instructions regarding curriculum, textbooks, teacher recruitment etc.) at the state level. The department tends to formulate uniform policies for the entire state.

Through this piece of research it was found people think that affirmative action is a quota system or a system of racial or gender preferences tend to dislike affirmative action. The low level of awareness about these schemes among the tribal masses, peculiar nature of their dwellings and the apathy of administrative officials

in implementations of these schemes and programmes are bottlenecks in the education of STs. Local media and ST intelligentsia can work jointly for creating awareness among STs. The administrative machinery should be sensitized towards peculiarities of the tribal habitat. Education and Communication (IEC) activities should be carried out for dissemination of schemes to enable them to avail these schemes effectively.

One of the objectives of education is to foster socio-psychological support to students but as far as reservation is concerned the researcher found that the beneficiaries were less confident after availing the benefit of reservation as they see it as a stigma attached to them. Therefore, there is a need to sensitize both ST and non-ST population in order to reduce the hostility generated due to reservation. To avoid the emergence of creamy layers in ST's it is necessary that reservation is to be given to one generation only. Otherwise this will lead to polarization among ST's themselves. Affirmative action can allow inclusion of more diverse pools of eligible applicants while compromising little in terms of merit or productivity.

This research hopes to enable us to visualize the need for renovating, reshaping and redesigning the policies governing the system of education in order to strengthen the existing system which contributes towards quality improvement. Apart from hardware like infrastructure, teaching staff, TLM, community participation, administrative input and budget enhancement to

educational system for STs, the need is for qualities like sincerity, dedication, professional commitment, strong will and accountability and a sense of responsibility, transparency, concern, competence and honesty be ensured for development of the Nation through quality education for STs[8.3% of the National population; 11% of the State population]

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The paper that does not comply with the above instructions will not be sent to the referee for review.

Acknowledgement:

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I, Prof. Mohammad Hussain hereby declare that the particulars given above are true to the best of my knowledge and belief.

A Constitutional Perspective on Article 35-A and its Role in Safeguarding the Rights of Permanent Residents of the State of J&K

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Abstract

The state of Jammu and Kashmir occupies a special position within the Indian Constitution which not only makes it distinct but clothes the state with a constitutional identity of its own. The state of J&K has been guaranteed a greater measure of legislative autonomy by virtue of Article 370 of the Constitution which has allowed the state to carve out an autonomous character, exemplified by the fact that J&K has a separate constitution, a feature found nowhere within the Indian federal polity. By virtue of this autonomous character the state has been able to preserve for its permanent residents certain privileges through the device of Article 35-A.These privileges which date back to the erstwhile Dogra rule are specifically with reference to matters of employment within the state services, purchase of immovable property, and provision of state aid and scholarships. Of late, these special privileges accorded to the permanent residents have been subjected to a series of challenges before the constitutional courts in India. There have been catena of petitions challenging the constitutionality of Article 35-A of the Constitution. The filing of these petitions has given a fresh impetus to the debate revolving around the legality of Article 35-A. This paper is an attempt at contributing to this invigorating debate by buttressing the notion that Article 35-A is not in congruence with well established canons of Indian constitutionalism but also serves as an important legislative device to put into effect the solemn commitments made to the leadership of the state by the Union of India from time to time.

Key Words: Federalism, Constitutionalism, Permanent Residents, Constituent Power

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I. Introduction

The Indian Constitution provides for a federal[1] form of arrangement between the Union and the states characterized by an elaborate scheme of division of powers. Within the comity of Indian states, the state of J&K constitutes a class in itself and cannot be compared with the other states of the country[2]. By virtue of Article 370 the state is endowed with greater administrative, legislative and fiscal powers. The special status enjoyed by the state has been justified on the basis of historical reasons as alluded to by the Apex Court in Santosh Gupta v State Bank of India wherein R.F. Nariman, J. observed

> It is interesting to note that the state of Jammu & Kashmir though a state within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning because of certain events that took place at the time the erstwhile ruler of Jammu and Kashmir acceded to the Indian Union[3].

[1] In a *federal government,* on the other hand, the allied states form a union,—not, indeed, to such an extent
as to destroy their separate organization or deprive them of quasi sovereignty with respect to the administration of their purely local concerns, but so that the central power is erected into a true state or nation, possessing sovereignty both external and internal,—while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, *as* citizens of the nation. (Excerpted from Black's Law Dictionary {Fourth Ed., 1968} P.740). K.C.Wheare has the term Indian federal system as Quasi-Federal on account appreciable bias towards the Union in the scheme of distribution of powers as well emergency provisions provided under the Constitution whereas as according to V.N.Shukla and M.P.Jain Indian Constitution predominantly establishes a federal polity notwithstanding the unitary features within the Constitution.

[2] Bhupinder Singh Sodhi and Ors v Union of India AIR 2015 (NOC) 1262 J&K Per.

[3] State Bank of India v Santosh Gupta AIR 2017 SC 25 at P.32.

Article 370 had been incorporated because of certain circumstances which made the situation of the state of J&K somewhat unique. Goppalaswami Ayyangar recounted these exceptional circumstances on the floor of the Constituent Assembly. Ayyangar elucidated the following factors that made the case of Kashmir somewhat unique (1) that there had been a war going on within the limits of Jammu & Kashmir State; (2) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on; (3) that the conditions in the State were still unusual and abnormal and had not settled down;(4) that part of the State was still in the hands of rebels and enemies;(5) that our country was entangled with the United Nations in regard to Jammu & Kashmir and it was not possible to say when we would be free from this entanglement;(6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and (7) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union Jurisdiction over the State[4].

According to the S.P.Sathe,

> Article 370 was included in the Constitution, not as an afterthought but after mature consideration by the Constitution-makers. It was a condition of Kashmir's accession to India and if that accession is sacrosanct, the condition must also be sacrosanct. Kashmir did not obviously want to join Pakistan.

[4] These exceptional circumstances have cited on the floor of the constituent assembly By Sir Gopalaswami Ayyangar on October, 1949 (CAD-VOL.X P.426: See also Understanding Article 370 http://www.thehindu.com/opinion/lead/understanding-article-370/article5426473.ece

> Kashmir procrastinated between independence and accession to India and chose the latter. Accession to India was conditional on Kashmir retaining its distinct cultural and regional identity. Article 370 assured the state all benefits of independent Kashmir without sacrificing the advantages of being a part of the larger Indian federation.[5].

In Bhupinder Singh Sodhi and Ors. v Union of India[6], the Honorable High Court of State of J&K again reiterated the special status enjoyed by the State of J&K with Indian Polity, The Court observed

> The sovereignty of the State of J&K under the rule of Maharaja , even after signing of Instrument of Accession and in view of framing of its own Constitution, thus, legally and constitutionally remained intact and untampered. The sovereign character of the State Constitution and State Assembly, which, like other wings of the State, is creature of State Constitution, has, thus, sovereign power to make laws for its subjects. … .. . . .In the community of States of India, in view of law laid down by Hon'ble the Supreme Court in Prem Nath Koul and Sampat Prakash's cases, the State of J&K occupies a distinct, unique and special position. Thus, in law, the State of J&K constitutes a class in itself and cannot be compared to the other states of the country[7].

[5] S.P.Sathe, Article 370: Constitutional Obligations and Compulsions. Economic & Political Weekly (Vol.25, 1990).P.1.
[6] J&K High Court judgment delivered on 16-07-2015 See also AIR 2015 (NOC) 1262 (J&K).
[7] Ibid.,

> Citizens of Jammu and Kashmir in view of their constitution constitute a separate class in themselves[8]

Article 370 is a *sui generis* provision which has no matching provision within the Constitution neither in terms of its content nor its ambit of operation. Article 370 seeks to encapsulate the residual sovereignty of the state which it enjoyed at the time of signing of the instrument of accession by limiting the legislative competence of the Parliament to the matters related to defence, external affairs and communication. In this context, the recent judgment of the J&K High Court is illuminating wherein Masoodi, J. has succinctly elucidated his view on the special status enjoyed by the state of J&K. According to the learned judge

> It emerges that the state of Jammu and Kashmir while acceding to Dominion of India, retained limited sovereignty and did not merge with the Dominion of India, like any other Princely states that signed the Instrument of Accession with the Dominion of India. The state continues to enjoy special status to the extent of limited sovereignty retained by the state. The limited sovereignty or special status guaranteed under Article 370 of the Constitution-only provision of the Constitution that applied to the state ex-propriogorige or on its own.[9]

Article 370 has become one of the basic features of the Constitution by assuming a place of permanence in the constitution. This provision is beyond amendment, repeal or abrogation as laid down by the state High Court in Ashok Kumar's case[10]. By virtue of Article 370 the state was able to embark upon an exercise of formulating a Constitution through

[8] AIR 2015 (NOC) 1262 (J&K) Per., Justice Muzaffar Hussain Attar at P.494.
[9] Ashok Kumar v State of J&K AIR 2016 JK1 at P. 15.
[10] Ibid., P.17.

the device of the state Constituent Assembly which was finally adopted on 17th November, 1956.[11]. With the coming into force of the Constitution, the state began to be governed by its own Constitution which endowed the state with a unique distinction of being the only state in India to be governed by two separate *grundnormen*[12]. According to Virendra Kumar the fact that the state is governed by two constitution is the most "distinguishing factor" in relation to the special status enjoyed by the state of J&K[13].

II Background to Article 35-A

Owing to its autonomous character within the ambit of Article 370 the state was able to preserve certain privileges enjoyed by the Permanent Residents during the Dogra rule through the device of Article 35-A. However, before elucidating the scope of Article 35-A it would be frugal to shed some light on the historical reasons which favored such a special treatment of the state subjects. The preferential treatment meted out to the permanent residents of the state has a historical background to it. During the regime of Maharaja Pratab Singh from 1885-1925 a number of educated persons from outside the state were brought and recruited within the state services because of non-availability of educated people in the state. With the growth of educated persons in the state the people in general and the Dogras of Jammu in particular developed a sense of deprivation of their

[11] The Constitution of J&K came into force on 26th January, 1957.

[12] *Grundnorm* refers to a Constitution which is the fundamental law of the land. According to Hans Kelsen "in every legal order, no matter with what preposition of law one begins, a hierarchy of oughts is traceable back to some initial, fundamental ought on which the validity of all the other ultimately rests, and he calls this Grundnorm the basic or fundamental norm". (Excerpted from R.W.M.Dias, *Jurisprudence* (3rd Ed., 1970).P. 411.

[13] Virendra kumar, *The Jammu and Kashmir Permanent Residents (Disqualification Bill) 2004-A Constitutional Perspective.* Journal of Indian Law Institute (Vol.40, 2004). PP.540, 541.

rights for which they had expectations from the ruler[14]. In the late 1920s, the people of Jammu and Kashmir launched an agitation for the protection of their rights especially with reference to the avenues of employment within the state services. It was in response to this popular agitation that the Maharaja's government promulgated a notification in 1927 which provided a strict definition of the term state subject. This notification read with the state notification of 1932 provided to some extent the law of the citizenship of the state[15]. By virtue of these two state subject notifications certain privileges in respect of acquisition of immovable property, employment within the state services, state aid and scholarships had been secured for permanent residents of the state. Under this legislative framework four classes of state subjects were recognized[16] for the purposes of conferring aforementioned privileges[17].

This legislative framework governing the permanent residents of the state of J&K continued, notwithstanding the accession of the state with union of India. Moreover, on the eve of the coming into force of the Indian constitution, and its incremental application to the state, the laws related to the permanent residents were left untouched. In fact the leadership of the state of J&K had vehemently canvassed for preserving the privileges of the State Subjects in its parleys with the Union of India as a prelude to the Delhi agreement[18]. This fact is borne out by the communications between the state leadership and Union of India. Moreover, the following statement of Sheikh Abdullah on the floor of the state constituent Assembly clearly highlights the

[14] R.P.Sethi, *Commentary on the Constitution of Jammu and Kashmir (*2005*)* P.163.
[15] A.S.Anand, *The Constitution of J&K-Its Development and Comments* (8th Ed., 2016*)*, P.192.
[16] See R.P.Sethi, *Commentary on the Constitution of Jammu and Kashmir (*2005*)* Supra note 14 PP.175-177.
[17] Refer to the state subject notification.
[18] See A.G.Noorani, *Article 370-A Constitutional History of Jammu and Kashmir* (2001).P.167.

mutual understanding between union of India and state of J&K with reference to keeping intact the laws related to state subjects.

> There are historic reasons which necessitate such constitutional safeguards as for centuries past; the people of the state have been victims of exploitation at the hands of their well to do neighbours. .. . . .I am glad that the Government of India appreciated the need for such a safeguard[19].

These privileges conferred on the Permanent Residents have been entrenched and recognized within the Constitution of J&K read with state subject notification. Section 6 of the state constitution provides an exhaustive definition of the permanent residents whereas Section 8 confers the exclusive power on the state legislature to define the Permanent Residents[20]. Moreover the Permanent Residents of the state have been recognized as distinct class under section 10 of the state Constitution[21].

III Enacting Article 35-A

At the time of coming into force of the Indian Constitution only two provisions were applicable to the State of J&K i.e. Art.1 and Article 370 of the Constitution[22]. However, Article 370 provided a mechanism by virtue of which other provisions of the Constitution could be made applicable to the state of J&K. Clause 1 of sub clause (d) of Article 370 provides a mechanism of 'Constitutional Orders' (hereinafter referred as C.Os) through

[19] *JK's The Jammu & Kashmir Constituent Assembly Debates* (1st ED., 2015).P.478.

[20] Section 8 of the state Constitution which corresponds to Art.35-A provides- Nothing in this forgoing provisions of this Part shall derogate from the power of the State Legislature to make any law defining the classes of persons who are, or shall be , Permanent Residents of the state.

[21] Refer to Ss 6-10 of the State Constitution; See also the views expressed by Attar, J. in Bhupinder Singh Sodhi and Ors v Union of India AIR 2015 (NOC) 1262 (J&K) at P.494.

[22] Sub-Clause (c) of Clause 1 of Article 370 provides-the provisions of article 1 and of this article shall apply in relation to that State.

which other provisions of the Constitution could be made applicable to the state[23]. This unique mechanism allows for application of any constitutional provision to the state through the C.Os based on the concurrence of the state government[24]. However, in essence the mechanism of the C.Os was transitory in nature[25] as the contours of the constitutional relationship between the state and Union of India were to be ultimately shaped by the Constituent Assembly of the state. The power vested in the President to issue the C.Os is a *sui generis* power which could be exercised without reference to the Parliament. According to M.P.Jain, Article 370 empowers the President to adapt the constitutional provisions applied to the state of Jammu and Kashmir in the light of the situation existing in the state from time to time. This is a flexible arrangement under which the constitutional position of the state could be defined from time to time[26].By virtue of this mechanism the President could not only apply a constitutional provision to the state but modify it, in its application to the state. In exercise of this power, the President of India issued a slew of constitutional orders including the Constitution (Application to J&K) Order 1954. The C.O.1954 was designed to give a formal shape to the covenants of the Delhi

[23] Sub clause(d) of Clause 1 of Article 370 provides- such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:
Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:
Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

[24] The transitory nature of C.Os flowed from Clause 2 of Article 370.

[25] Clause 2 of Article 370 is instructive in this regard it provides - If the concurrence of the Government of the State referred to in paragraph (*ii*) of sub-clause (*b*) of clause (1) or in the second proviso to sub-clause (*d*) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

[26] M.P.Jain, *Indian Constitutional Law* (Fourth Ed., 2003). P.921.

Agreement executed between leadership of the state and Union of India[27]. Under the aegis of the C.O. of 1954 a substantial corpus of provisions of the Indian Constitution were made applicable to the state including Part III dealing with the fundamental rights. Consequently, by virtue of the C.O.1954 the permanent residents of the state of J&K were guaranteed basic human freedoms which hitherto were not available to them even after the coming into force of the Indian Constitution in 1950. However, the application of Part III of the constitution to the State would have led to a legal conundrum with reference to purported incongruity[28] between Article 13 and the State Subject laws[29]. At that time there was an apprehension that the state subject laws which purport to confer special privileges to permanent residents could be subjected to challenge under Art.14 and Art 19 of the Constitution, since such privileges seemingly differentiate between the permanent residents of the state and citizens of other parts of India. In order to get around this legal impasse, it was thought frugal to immunize the state subject laws from being challenged on the grounds of being violative of the rights provided in Part III of the Constitution. As such by virtue of the C.O. 1954, Article 35-A was

[27] Supra note 15 at P. 121

[28] Supra note 14 at P. 188

[29] Article 13 provides that -(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

added to the rights mentioned in Part III of the Constitution in its application to the state.

Article 35-A provides that

> Notwithstanding, anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State: (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—
>
> (i) employment under the State Government;
>
> (ii) acquisition of immovable property in the State;
>
> (iii) settlement in the State; or
>
> (iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

Article 35-A begins with a non-obstante clause which thereby implies that it overrides all other provisions of the constitution. The protective umbrella of Art.35-A specifically seeks to protect a select category of laws (a) defining the classes of persons who shall be the permanent residents of the state or (b) conferring on such permanent residents special privileges. Article 35-A not only saves the pre-existing state subjects laws from being declared un-constitutional but also immunizes any future law enacted by the state legislature related to the permanent residents. Article 35- A therefore, not only operates retroactively but it also offers a prospective protection to laws which may be enacted by

the state legislature dealing with the permanent residents. Article 35 A is thus a quintessential legal device which seeks to protect the rights of the permanent residents of the State of J&K.

IV. Article 35-A & Contemprorary Discourse

With reference to Article 35-A of the Constitution certain objections have been pointed out like : (a) That there is no power in the President to amend the Constitution by incorporating a new article in the Constitution (b) That the Constitution can only be amended by the Parliament (c) It creates a special class of citizens within a class of Indian Citizens. Cumulatively taken this objections basically revolve around the ambit of the president's power under Article 370; theory of separation of power, constituent power of the parliament and purported violation of Article 14 of the Constitution.

i. Article 35-A is not a new Article

One of the contentious issues that arose in relation to Article 35-A is that it introduces a new Article in the Constitution which is wholly beyond the competence of the President of India acting under Article 370 of the Constitution. This notion is premised on the fact that this provision has been numbered as 35-A and not placed as an exception within Article 13. In this context it is submitted that Article 35-A when analysed in reference to its scope and content serves to operate as an exception to operation of Article 13 in relation to the laws related to permanent residents of the state. The rationale of placing it in Article 35 can be best explained by referring to the observation of Wazir C.J., in Mohammad Subhan and Ors. V State[30] wherein the learned judge made the following observation in relation to Article 35-C

> What has the President done by inserting the clause c to Article 35? Instead of putting this provision at the end of Article 35 if it had been put under Article

[30] AIR 1956 J&K 1.

> 13 saying that Article 13 shall apply subject to the exception that it shall not apply to the preventive detention act of Jammu and Kashmir state that would clearly be an exception to Article 13. The reason why it has been put at the end of Article 35 is that the President applied the fundamental rights to the state of Jammu and Kashmir except to the law of preventive detention. . . . . It would have been inconvenient to put this exception in Article 13 in its two parts. In order to avoid the inconvenience an omnibus clause has been inserted at the end of article 35 the effect of which is that the Jammu and Kashmir Preventive detention act is excerpted from the operation of the fundamental rights[31] .

The aforementioned rationale advanced by Justice Wazir in reference to Article 35-C is equally applicable to Article 35-A as both the provisions seek to carve out an exception or modification to the operation of Article 13. On that analogy it is submitted that rather than placing this modification within Article 13 it was thought frugal to place an "*omnibus*" provision like Article 35-A at the end of Article 35 keeping in view the consideration spelled out in the aforementioned judgment.

Moreover, this article basically does not provide any substantive right to the permanent residents of the state rather it maintains the status quo with reference to the privileges enjoyed by the permanent residents. This preposition has been buttressed by the State High Court in Bhupinder Singh Sodhi v Union of India[32], wherein while referring to Article 35-A , the court has observed

[31] Ibid., Per C.J.,Wazir at P 4.
[32] See Supra note 6.

> Constitutional provisions and laws, which have been extended to the State of J&K, are applied to a class of people, who are State subjects of the State of J&K. These laws have not been made applicable, in the same form, to the people of rest of the States of the country. Article 35(A), as has been applied to the State of J&K, not only recognizes but clarifies the aforestated constitutional and legal position. This article, on its own, does not give anything new to the State of J&K.

ii. Whether the President can incorporate a new Article under Article 370?

In Puran Lal Lakhanpal v Union of India, the Supreme Court has laid down that the term 'modify' in Article 370 would even include the power to amend. The court in that case made the following observation with reference to the President's power under Article 370.

> We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that state. . . . . if he could efface a particular provision of the Constitution altogather in its application to the state of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the state of Jammu and Kashmir. . . We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word modification as used in Article 370(1) and in that sense it includes an amendment. There is no reason to limit the word modification as used in Art.370 (1)

> only to such modification as do not make any radical transformation[33].

Similarly, in Sampat Prakash v State of J&K, the Supreme Court expounded the reasoning and scope of the Presidential power under Article 370 of the Constitution. The court observed that

> The legislative history of this article will also support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not be applicable Jammu and Kashmir under Article 394 under which it came to be established under Article 394 . . . . . It was envisaged that the President would have to taken into account the situation existing in the state when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation would demand an exception or modification of the provision applied; but subsequent changes in the situation may justify the rescinding of those exceptions or modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Article 370[34].

On the basis of the law laid down by the Supreme Court in the aforementioned cases it can reasonably concluded that the President's power under Article 370 is co-terminus with the amendatory powers of the Parliament and as such the Presidential power extends to not only affecting modification or exceptions but

[33] AIR 1961 SC 1519 at P.1521.
[34] AIR 1970 SC 1118 at P. 1124.

also to the extent of introducing even an amendment in the form of new Article. This is preposition can also be buttressed on the analogy of new Articles incorporated within the Constitution through varies amendatory interventions by Parliament.

iii. Article 35-A and notion of Constituent Power

One of the arguments posited against Art.35-A is that it has been enacted through a Presidential order without reference to the Parliament. Those toeing this line of thought stress that the sole power to amend the constitution vests with the parliament by virtue of Article 368 of the Constitution. It thus alleged that the mechanism of Presidential Orders under Article 370 truncates upon the Constituent Power of the Parliament. In this context, it is submitted that firstly, Article 35-A was incorporated through the mechanism provided under Article 370 which has been judicially validated in a number of pronouncements of the Supreme Court as in Sampat Prakash v State of J&K, the Court validated the incorporation of Article 35-C through the device of constitutional order of 1954[35]. The mechanism of applying the constitutional provisions with modifications without reference to the parliament has been constitutionally sanctioned and does not truncate upon the constituent power of the parliament. Moreover, the constituent power of the parliament is a derivative power which flows from the constitution itself under the auspices of Article 368[36]. It thus follows that being in the nature of derivative power this constituent power is not absolute rather it is subject to the procedural[37] and substantive conditionalities imposed by the constitution. A glaring recognition of this preposition has been the doctrine of basic structure which has been judicially crafted in the constitutional jurisprudence of India. This doctrine clearly brings

[35] AIR 1969 SC 1153. See also Mohd. Maqbool Damnoo v State of J&K AIR 1972 SC 963.

[36] See H.M.Seervai *Constitutional law of India-A Critical Commentary* (Vol III 4th Ed., 1996) P.3119.

[37] Article 368 provides the procedural mechanism for amending the Constitution.

forth the fact the constituent power of the Parliament is subject to the condition that it does not infract the basic structure of the Constitution[38]. Article 370 seeks to carve out an exception to the constituent power of the Parliament by empowering the President to apply constitutional provisions to the state with modifications without reference to Article 368 of the Constitution. As such the President within the ambit of Article 370 is not acting as a delegate of the Parliament rather he is exercising a power given to the President by the Constitution itself which was entitled to set up a legislature[39].

iv. Article 35-A and theory of Separation of Powers

Moreover, the procedure provided in Article 370 for applying constitutional provisions to the state of J&K does not breach the principle of Separation of Powers characterized as a basic feature of the Constitution[40]. The principle of Separation of Powers which according to Montesquieu postulates allocation of executive, judicial and legislative powers in three separate entities without any transgression or interference amongst the three entities has not been rigidly applied in the constitution of India[41]. Indian Constitution rather believes in comingling of the executive and legislative spheres[42], the practical application of spirit of rule of separation of powers is to be found only in the context of segmentation of powers between the executive and legislature on one side and judiciary on the other[43]. As such the constitution recognizes the fact the law making powers can be co-shared

[38] Kesavananda Bharti v State of Kerala AIR 1973 SC 1461.

[39] See Supra note 30 State[39] See also V.V.Chitaley & S.Appu Rao, *The Constitution of India* (2nd Ed., 1974).P.385.

[40] See Ibid. See also S.R.Bommai v Union of India AIR 1994 SC 1918.

[41] Indira Nehru Gandhi v Raj Narain AIR 1975 SC 2299; See also M.P.Singh, *V.N.Shukla's Constitution of India* (12TH Ed., 2013).P.A-49.

[42] See Article 74(1); Article75(3);Article 123;Article 213 of the Constitution.

[43] See State of Bihar v Bal Mukund Sah AIR 2000 SC 1296;See also Indira Gandhi v Raj Narain AIR 1975 SC 2299,; Minnerva Mills v Union of India AIR 1980 SC 1789. SCARA V Union of India AIR 1994 SC 268..

between the executive and the parliament. On this analogy the President's power to issue the Constitutional Order of 1954 does not militate against the doctrine of separation of powers as adapted within the Indian Constitution

v. Special Rights of Permanent Residents and Article 14

The differential treatment meted out to the permanent resident of the state is not uncommon to the constitutional jurisprudence of India which allows for a flexible application of the fundamental rights. This flexible approach is exemplified throughout the constitution. Article 14 which is couched in absolute terms is subject to the doctrine of classification which serves as an exception to it[44]. In addition to it, there are express provisions within the Indian Constitution that carve out an exception to the general principle of equality such as the (a) provisions related to the making special provisions for children and women[45], (b) provisions enabling the state to take affirmative action in favor of socially and educationally backward class of citizens[46], (c) privileges conferred central[47] and state legislatures

[44] See State of West Bengal v Anwar Ali Sarkar AIR1952 SC 75; See also Ram Krishna Dalmia v Justice S.R.Tendolkar AIR 1958 SC 538

[45] Clause (3) of Article 15 provides- Nothing in this article shall prevent the State from making any special provision for women and children.

[46] Clause (4) of Article 16 provides-Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

[47] Article 105 provides(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
(2) No member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined,

qua the citizenry[48] (d) Qualified immunity on conferred on constitutional functionaries Moreover, there are constitutional provisions which allow the parliament to enact laws which may not only restrict the application of rights of Part III but also allows it to abrogate the fundamental rights with reference to a segment of the citizenry. Under Article 33 of the Constitution, the Parliament has been empowered to restrict the application of the rights conferred in Part III of the Constitution with reference to the members of the armed forces[49]. Article 358 of the Constitution

shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

[48] Article 194 provides.—(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

[49] Article 33 provides- Parliament may by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-

(a) the members of the armed forces: or
(b) the members of the forces charged with the maintenance of public order or
(c) persons employed in any bureau or other organization established by the state for purposes of intelligence or counter intelligence; or

secures laws promulgated during the operation of the emergency which may derogate from the rights protected by Article 19 of the Constitution[50]. Article 359 provides for suspension of enforcement of fundamental rights apart from Articles 20 and 21 during the operation of the national emergency[51]. All these constitutional provisions in one way or the other seem to circumvent the operation of Article 13 of the constitution which seeks to invalidate pre and post constitutional laws abridging or abrogating any of the rights secured in Part III of the Constitution[52]. As such it becomes clear that the constitution allows for differential application of the rights enumerated in Part III of the Constitution. Article 35-A provides an instance of a constitutional provision aimed at carving out an exception to the

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any force, bureau or organization referred to in clauses (a) to (c)

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

[50] Clause (1) Article358provides- While a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect:

[51] Clause(1) of Article 359 provides- Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

[52] Clause 1 & 2 of Article 13 provides-(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

operation of Article 13 which otherwise provides for supremacy of fundamental rights over the ordinary laws of the land[53].

IV. Conclusion

Article 35A has been added to the constitution by virtue of the mechanism of Constitutional Order which has been upheld by the Apex Court in a catena of petitions. It thus seems obscure to challenge its validity on the premise that mechanism of incorporating Article 35-A is *ultra vires* the constitution. Moreover on the basis of the aforementioned account addressing the various legal dimensions of the Article it can be reasonably concluded that the Article 35-A is in conformity with the established canons of Indian Constitutional jurisprudence. As such it becomes imperative to acknowledge the fact the Article 35-A is an intrinsic part of the legislative framework governing the relation of state of J&K with the Union of India. Notwithstanding its role in the constitutional sphere, Article 35-A is important from political standpoint also as it is an outcome of solemn commitments made to leadership of the state by the Union of India in relation to the issue of safeguarding the interests of the Permanent Resident of the State. These commitments form an important part of the covenants of the Delhi Agreement of 1952 which was given a formal shape under C.O. 1954. If the court were to invalidate the mechanism of constitutional orders under Article 370 such a judgement will have to be made applicable to all the Constitution Application Orders from 1950 till date. On that analogy all those constitutional provisions which have been made applicable to the state through the device of Presidential order of 1954 would have to be done away with. Such a situation would legalistically turn the hands of the clock back to the stage of signing of instrument of accession since Article 370 itself has been made applicable to the state initially through the Para 3 of Constitution (Application to

[53] V.N.Shukla's Constitution of India (12th Ed., 2013) p.36.

J&K) order 1950[54] and later by virtue of C.O 1954 which superseded it[55]. Additionally, doing away with Article 35-A would not only tantamount to breaching the solemn commitments made to the leadership of the state but it could have a debilitating impact upon the interests of the Permanent Residents of the state.

[54] See P.N.Kaul v State of J&K AIR 1959 SC 749.

[55] Para 2 of the C.O.1954 provide: It shall come into force on the fourteenth day of 1954 and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950. See also V.V.Chitaley & S.Appu Rao, *The Constitution of India* (2nd Ed., 1974).P.385.

Anton Piller Order– Analysed and Catalysed

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Abstract

Anton Piller Order is a sort of remedy of provisional measure designed to help the plaintiff in amassing evidence etc. to support his allegation of infringement of his intellectual property rights. In fact, Anton Piller Order is usually sought through an application made against a defendant *ex parte* in camera so that hearing is closed to the public, in contrast to other form of ex *parte* reliefs, like *ex parte* injunction in front of the public, immediately prior to, but in the context of and not independently of, the commencement of the proposed infringement proceeding lest the news of the order is leaked to the defendant who may then be able to destroy, hide, remove or dispose of the evidence before the order is served on him, thereby, rendering him unable to do so. It helps the judicial authorities to adopt the provisional measures *inaudita altera parte* where there is a demonstrable risk of evidence being destroyed thereby helping the plaintiff to preserve relevant evidences in regard to the alleged infringement by dispossessing them off from the infringer' control.

This paper speaks about the origin of the concept of Anton Piller Order, explores its nature and features and justification, current statutory provisions as marks of its wider acceptance. Lastly, the paper explores the perceived aspects of the various pros and cons of the Orderand ends with suggestion of balancing the two equally prejudicial rights of the opposite parties to such an Order. Finally, the paper ends with concluding remarks.

Key Words: Anton Piller Order, pre-trial, *ex parte* court order

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I. Introduction and Origin of the *Anton Piller Order*:

In England and other common law countries, an Anton Piller order[1], also known as 'search order' in some countries[2], is a 'pre-trial *ex parte* court order/injunction in Camera' as a civil remedy for the infringement, in particular, of intellectual property rights. It is intended to give the plaintiff and his Solicitors a right/authority to enter the defendant's premises only on the latter giving permission on the court's order so issued without prior warning to him, i.e. before the start of normal trial, and to inspect the papers, files or things and seize or remove such of them as belong to the plaintiff, where there is a real danger that the defendant will destroy the vital evidence if normal litigation procedures are followed[3]. This prevents destruction of relevant evidence, generally in cases of alleged infringement of intellectual property rights, and particularly of patent, copyright and trademark.

Such being the nature and concept of the Anton Piller Order, it can be said that it is an specialized form of injunction[4], that is, an injunction issued *exparte* in camera. In its modern form, as an improvement over the primitive nature of it, the Anton Piller Order can rightly be referred to, as submitted above, as a 'pre-trial in-camera-*ex parte* injunction'.

Anton Piller Order is so called after the name of the plaintiffin the English case of *Anton Piller K.G. v. Manufacturing Processes Ltd. and others.*[5] Mr. Hugh Laddie, appearing on behalf of the Appellants (Plaintiffs) in the instant case before the Chancery Division of the Supreme Court of Judicature (Court of Appeal)

[1] Frequently misspelt *Anton Pillar Order*
[2] For example, England, Wales and Western Australia.
[3] Hilary Pearson & Clifford Miller, *Commercial Exploitation of Intellectual Property*, 2nd Indian Reprint,Universal Law Publishing Co. Pvt. Ltd., 1997, at 226.
[4] Id.
[5] [1975] EWCA Civ. 12: [1976]1 All ER 779: (1976) Ch.55: (1976) RPC 719.

could rightly be considered the forerunner of conceiving the concept behind the Anton Piller Order. He convinced the court to put its seal of approval to his concept and pass what is called 'Anton Piller Order' of a kind, not known before the year 1976.[6]In this case the plaintiffs, Anton Pillers, a German Manufacturers of electric motors and generators made an appeal from the Order of Mr. Justice Bright man refusing their request/prayer, *inter alia,* for permission to enter the premises of the defendant English Company called Manufacturing Processes Limited to inspect the documents of the plaintiffs therein and remove them, or copies of them despite his (Mr. Justice) appreciation of the fact that "*There is strong prima facie evidence that the Defendant company is now engaged in seeking to copy the Plaintiffs' components for its own financial profit to the great detriment of the Plaintiffs and in breach of the Plaintiffs' rights*"[7], but equally justifying his refusal to the said request by saying that "*it seems to me that an Order on the lines sought might become an instrument of oppression, particularly in a case where a plaintiff of big and deep pocket is ranged against a small man who is alleged on the evidence of one side only to have infringed the plaintiff's rights*"[8]. Mr. Hugh Laddie argued in the said appeal before the Appellate Court not only this that the plaintiffs be permitted to enter the premises of the defendant company to inspect the documents of the plaintiffs and remove them, or copies of them, but also on the new point that "*in this case it was in the interests of justice that the application (for an order that the defendant permits him entry into his premises to inspect and seize vital evidentiary materials out of his possession) should not be made public at the time it was made(for fear that the defendant, if forewarned, would destroy or dispose them off to defeat the end of justice.)*"[9]. The Court agreed and the

[6] [1975] EWCA Civ. 12, n. 5, para 1.
[7] Id., para 11
[8] Id.,para 12.
[9] Id., para 3. Brackets supplied which, in turn, are based on the observation made in the decision of the court.

Master of the Rolls, Lord Justice Denning, observed: "*So we heard it in camera*"[10]. And on the authority that the court has *inherent jurisdiction*[11] to pass order, "The Court orders the defendant to give permission"[12] with added remarks that in past "The judges have been making these Orders on *ex parte* applications without prior notice to the defendant"[13]."It orders the Defendant to permit one or two of the Plaintiffs and one or two of their Solicitors to enter the Defendant's premises for the purpose of inspecting documents, file or things, and removing those which belong to the Plaintiffs"[14].

Anton Piller case and, for that matter, the Order passed therein, itself concerned the copyright and confidential information in a machine, but since then it became the subject of increasing concern of major practical importance in all cases of intellectual property right. "Since 1975, the English courts have been allowing the right-holder to secure the evidence of the alleged infringement by way of an *ex parte* order for inspection of the defendant's premises and seizure of the material relevant to the infringement"[15] and says Mr. Justice Dato Zakaria of Malaysia "Anton Piller Order is a very effective tool for the plaintiff to enter the defendant's premises and make discoveries in respect of intellectual property cases." [16] The importance and wider acceptance of the *Anton Piller Order* in preventing the infringement of intellectual property right could be highlighted by the fact that the very order the courts now venture to pass even against unidentified/unnamed/anonymous defendant, and the order

[10] Id.
[11] Id., para 16.
[12] Id.,para 2.
[13] Id., para 2.
[14] Id., para 19.
[15]Dr. Joachim Bornkamm of Germany, *Action and Remedies for Infringement of Intellectual Property Rights,*WIPO Pub.No.726 (E), at93.
[16]Mr. Justice Dato Zakaria B.M. Yatin, *Country's Report on the Judiciary and Intellectual Property System in Malaysia,*WIPO Publication No. 726(E), at210.

itself getting referred to as 'Rolling Anton Piller Order' or John Doe Order.[17]

II. Nature of the *Anton Piller Order*

From the above quoted observation of the Court it is patently clear that an Anton Piller Order is a specialized form of *ex parte* injunction. It gives the plaintiff and his Solicitors a right/authority to enter the defendant's premises, only on the latter giving permission to them under the court's order so issued without prior warning to him before the start of normal trial, so as to inspect the papers, files or things and seize or remove such of them as belong to the plaintiff, where there is a real danger that the defendant will destroy the vital evidence if normal litigation procedures/trial are followed.

It, therefore, shows that by nature Anton Piller Order is an *ex parte* injunction/order because it is issued on the evidence of one side/party to have infringed that party's rights say, for example, his intellectual property rights. This, however, is not the unique feature of the Anton Piller Order in the sense of laying down a new feature of its own kind because, for that matter, every *ex parte* order/injunction is traditionally so issued as, for example, in case of 'stay order'**.** In fact an *ex parte* injunction, traditionally, means commanding, directing or restraining one to commit or omit something passed after hearing only one party in matters of great urgency in open chamber, without notice to the defendant or other parties to be followed by a full hearing with notice to all the concerned parties on a later date[18]**.**No doubt, in any traditional type of *ex parte* injunction there is a possibility that defendant may

[17]cf. *Vinod Chopra Films Pv Ltd. V. John Doe,* 2010 FC 387. It was observed in the instant case that the misnomer name "John Doe" as a defendant in an action is permissible only if the defendant's true identity is unknown and not easily ascertainable. It can not be used as an attempt to introduce a new party by way of addition or submission.

[18] cf. Business Dictionary.com, definition, Ex parte Injunctionhttp://www.businessdictionary.com/definition/ex-parte-injunction.html. Site accessed on 15. 05. 2015.

learn, informally, that the order is being sought, or the defendant may be concerned where his defence counsel (like the standing council) appears on the motion who may be briefed sufficiently to cast doubt over the plaintiff's entitlement to move *ex parte* application and consequently to an *ex parte* injunction or may fully contest the motion without the benefit of sufficient time to prepare, or may seek for an adjournment with the court passing an interim order if it thinks fit[19]**.** Hence the traditional type of *ex parte* injunction can in no sense be regarded to have been passed without defendant's knowledge of the facts leading to the passing of such injunction. Not only this, such injunction passed in the open house means that the facts supporting the said injunction were brought to the notice of each and every member of the public including the defendant in question.

Secondly, an Anton Piller Order apart from being an *ex parte* order is so issued to confer on a private party, the plaintiff, a right or authority to do something, that is, to enter the premises of the defendant in contrast to the traditional type of the *ex parte* order where generally no right is conferred but only duties are cast either on both the parties, such as duties to maintain the status quo, or on one party, generally, the defendant to do or not to do something, like duty not to commit or omit something that could cause harm to the plaintiff. But here also this feature of the Anton Piller Order of conferring right on private party, the plaintiff, could not be said a unique feature in the sense of not known earlier, because it could be said that, in the language of Lord Denning MR, "it was fully considered in the House of Lords 150 years ago and held to be legitimate"[20].The two aspects of the

[19].cf. Wendy Matheson, *The Law of Injunctions: Ex Parte Injunctions,* www.torys.com/Publications/Documents/.../AR2001-14T.pdf. Site accessed on 15. 05. 2015.

[20]*Supra note* 5, para 15, where Lord Denning cited the case of *East India Company v. Kynaston*, (1821) 3 Bligh, 153 and quoted the observation of Lord Redesdale there in at page 163 as under: "The arguments urged for the Appellants at the Bar are founded upon the supposition that the court has directed a forcible

Anton Piller Order, conferring of right on the plaintiff to enter the premises of the defendant and casting duty on the defendant to so permit, issued on personal request of the plaintiff, seem to make it resemble like a 'search warrant' issued on official request. In other words, "[This] may seem to be a search warrant in disguise"[21] –a privatization of the search warrant whereby a non-State agency is permitted/authorised to make a direct interference on the personal liberty of some one –the defendant. But the Order really speaking is not a 'search warrant' because in contrast to search warrant "[It] does not authorise", in the words of Lord Denning MR, "the Plaintiff's Solicitors or anyone else to enter the Defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the Defendants. The Plaintiff must get the Defendant's permission"[22], and in the words of Lord Justice Ormrod "The Order is an Order on the defendant in person am to permit inspection. It is, therefore, open to him to refuse to comply with such an Order, ..."[23]. It is erroneous to say, it is humbly submitted, if it is said "Anton Piller Orders (Search and seizure orders) including breaking down doors of shops which are closed"[24].The defendant's option, however, does not mean that he can shut his door to the plaintiff and his Solicitors with impunity, for if he refuses entry and inspection he will be guilty of contempt

inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the Court . . . It is an order operating on the person requiring the defendants to permit inspection, not giving authority of force, or to break open the doors of their warehouses". Lord Redesdale observation in a sense reveals as if the ex parte order has conferred a right on the plaintiff to enter the defendant's premises and a duty on the defendant to permit the entry.

[21]*Supra note* 5, para 15.

[22]*Id.* para 14.

[23]*Id.* para 22.

[24]Lawrence Liang, *Meet John Doe's Order: Piracy, Temporality and the Question of Asia,* IJIPL, 2009, vol. 29, at 162.

of court. The Order stands there as sanction. "[It] does do this: It brings pressure on the Defendants to give permission"[25]. Not only this, but in the words of Lord Denning MR "it does more. It actually orders him to give permission –with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court"[26]. Nay, "It put him in peril not only of proceedings for contempt, but also of adverse inferences being drawn against him"[27]. In other words, "the refusal to comply may be the most damning evidence (of committing infringement) against the defendant at the subsequent trial"[28].

So what is the unique feature or features that could be said to make an Anton Piller Order a specialized form of *ex parte* injunction. It could be seen that its unique feature lies in the fact that (i) apart from being an *ex parte* order it was an order made in camera i.e. closed to public including defendant as well as his defence council that is not a feature of the traditional type of *ex parte* injunction, (ii) apart from being an *ex parte* order in camera, it was an order that implies, without being warranted by any law or court decision[29], a right on a private party, the plaintiff, which again is not a feature of the traditional type of *ex parte* injunction, and (iii)apart from being an *ex parte* order in camera implying a right on the private party, the plaintiff, it was an order that the defendant do permit entry of the plaintiffs and their Solicitors into his premises for the purpose of inspecting documents, file or things, and removing those which belong to the plaintiffs, and for no other purpose.[30]

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[25]*Supra note* 5, para 14.
[26] *Ibid.*
[27]*Id.* para 18.
[28]*Ibid.* As per Lord Justice Ormrod at para 22. Bracket supplied.
[29]In the case of *East India Company v. Kynaston* (1821) 3 Bligh, 153 the court judgments do confer right on the private party, but that was a case not involving *ex parte* order.
[30]The case of *East India Company v. Kynaston* , as per Lord Denning, "was not, however, concerned with papers or things. It was only to the value of a warehouse; and that could not be obtained without an inspection."

III. Jurisdictional Basis of the *Anton Piller Order*

The moot question that could be asked is what was the justification that could be said to provide a jurisdiction for the court, in the absence of any legal provision, to pass an order like Anton Piller Order in cases of pre-trial *ex parte* application in Camera without prior warning to the defendant. Lord Redesdale decision in *East India Company v. Kynaston* directing the defendant to permit entry of the plaintiff in his premises affords ground to Lord Denning in Anton Piller Case "for thinking that there is jurisdiction to make an Order that the defendant "do permit" when it is necessary in the interest of justice"[31]and that jurisdiction he referred to as "inherent jurisdiction of the court"[32] that could be exercised if it was the demand of justice out of the given case that justifies such exercise. In the instant case the demand of justice could be seen at two levels, firstly "that the plaintiff should have inspection so that justice can be done between the parties" and for such inspection it becomes justified that the defendant be ordered to permit him entry into his premises, and secondly that the order to permit should have been made *ex parte* in camera, i.e. without prior notice to the defendant of the application/motion of the plaintiff for such inspection because "if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, the papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the end of justice be defeated"[33].

IV. Basic Norms of the *Anton Piller Order*

In the Anton Piller's case (1975) the three judges of the Chancery Division made the orders of a kind not known before. Lord Justice Denning MR mastered the judgment and the Order in the case; Lord Justice Ormrod, agreeing with all that the Lord Denning MR said, put his own observation on the proposed

[31] *Supra note* 5,para 16.
[32] Ibid.
[33] Ibid.

Order; and Lord Justice Shaw agreed with both the judgments of their Lordships. For the making of such an Order their observations are as quoted below:

As per Lord Dinning:

> *"It seems to me that such an Order can be made by a Judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice could be done between the parties: and when, if the defendant were forewarned, there is a grave danger that the vital evidence will be destroyed, the papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the end of justice be defeated: and when the inspection would do no real harm to the defendant or his case"* **[34].**

And according to Lord Ormrod:

> *"There are three essential pre-conditions for the making of such an Order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is real possibility that they may destroy such material before any application inter partes can be made."* **[35]**

And says Lord Shaw:

> *"when such an order is made, the party who has procured the Court to make it must act with prudence and caution in pursuance of it."* **[36]**

Anton Piller Order as a 'pre-trial ex parte injunction in Camera' is, as said above, an specialized form of ex parte injunction, which, in turn, is an specialized form of injunction proper. So in its final analysis an Anton Piller Order, which is

[34] Ibid.
[35] Ibid., para 21.
[36] Id., para 25.

always sought without notice (direct or indirect) to the defendant and hence are essentially unfair to him but made for rendering justice, must satisfy the already onerous requirements for an injunction, like the plaintiff must show urgency, and make full and frank disclosure of the facts and law relevant to both sides, and added to such norms must be the norms needed by virtue of the Anton Piller application based events. Thus, all in all the following minimum norms could be deduced from the above quoted observations:

1. There must be an extremely strong prima facie case on the merits. This requires, thereby, full and frank disclosure of the facts and law relevant to both sides (a norm behind every injunction to pass) including the full disclosure of the fact with clear evidence that the defendants have in their possession infringing documents or things belonging to the plaintiff (a norm by virtue of the Anton Piller application based events), and not a mere allegation to be supported later by evidence of the defendant's conduct after the *Order* was passed.
2. There must be clear evidence of the existence of urgency (a norm behind every injunction to pass) in the sense that the defendant's activities with regards to the possession of infringing documents or things are such that if not checked is to cause, in real possibility, a 'very serious' irreparable damage or injury to the plaintiff (a norm developed by virtue of the Anton Piller application based events)., otherwise a negative reference will be drawn as to whether there was a foundation for the *Order.*
3. That there must be real possibility or grave danger of the vital evidence, like infringing documents or things, being destroyed or lost if application is made inter partes (a norm developed by virtue of the Anton Piller application based events). Mere averment/swearing on affidavit on

the nature of the defendant activities that simply reported the information received from here and there will not suffice the passing of the *Order*.

4. That the justice would be done between the parties (a norm behind every injunction to pass) in the sense that the Order would do no real harm to the defendant or its case if plaintiff is permitted entry in the premises of the defendant and to have inspection of the vital evidence (a norm developed by virtue of the Anton Piller application based events).
5. That the interest of justice would not be brought into disrepute (a norm behind every injunction to pass) in the sense that in executing the Anton Piller Order there must be observed the norms like 'if the plaintiff acts with due circumspection; if on the service of it, the plaintiffs are attended by their Solicitor, who is an officer of the Court; if they give the defendant an opportunity of considering it and of consulting his own Solicitor; If the defendant wishes to apply to discharge the order as having been improperly obtained, he must be allowed to do so; if the defendant refuses permission to enter or to inspect, the plaintiffs and their Solicitors must not force their way in but rather must accept the refusal, and bring it to the notice of the court afterwards, if need be, on an application to commit.'[37] So speaking, it could be said that Anton Piller Order obtained otherwise say, for example, for the purpose of allowing the plaintiff and its agents to harass persons suspected of infringing the plaintiff's right will certainly bring the

[37]cf. Lord Denning in [1975] EWCA Civ. 12,*supra* note5, para 16. In the words Lord Justice Ormrod, "Great responsibility clearly rests on the Solicitors for the applicant to ensure that the carrying out of such an Order is meticulously carefully done with the fullest respect for the defendant's rights, . . . , of applying to the court, should he feel it necessary to do so, before permitting the inspection." *See*[1975] EWCA Civ. 12, *supra* note 5, para 22.

interest of justice in disrepute[38]. Justice would not be brought to disrepute in the enforcement of Anton Piller Order obtained for the primary purpose of allowing the plaintiff and its Solicitors to enter the premises of the defendant and inspect the infringing documents with the norms that were laid in the Anton Piller' case for the execution of the Anton Piller Order.

V. General Acceptance of *Anton Piller Order*

The most basic question that could be asked in the context of Anton Piller Order is where from the court derives its source of jurisdiction to pass such an Order. As stated above, in the absence of any statutory provisions Lord Denning in the Anton Piller case was jubilant in declaring that it was the "inherent jurisdiction of the court"[39] that provides the court a jurisdiction for passing an order, like Anton Piller, and for which he cited the precedent of a case like *East India Company v. Kynaston* (1821)[40]. In other words, the jurisdiction in England is embedded in common law rules.

The Anton Piller Order, passed since its inception in 1975, now stands to be one of the effective measures for providing civil remedies for the infringement of the intellectual property rights either by granting it a statutory recognition or otherwise. For example, in some jurisdictions like Hong Kong and South Africa where there is no statutory search order provision on the request of private party, the Anton Piller Order is still often used[41]. They are also available in Australia and are available on grounds similar to that of England. In some other countries like Canada, France and Italy, the Anton Piller Order has been given a statutory

[38]www.lexology.com/library/detail.aspx?g=159df26f-a86f-4fb4.
[39]*Supra* note 5, para 16.
[40] (1821) 3 Bligh, 153
[41]See for South Africa the case like *Mathias International Ltd. and Another v. Baillache and Others* (233347/09) [2010] ZAWCHC 68 (8 March 2010) as available at http://www.saflii.org/egibin/disp.pl?file=za/ cases/ZAWCHC/ 2010/68, html&query=anton%20piller.

acceptance [42] to constitute a common *ex parte* procedure in intellectual property related matter [43]. Anton Piller Orders like provision are now required in the rest of Europe, under Art. 7 of the Europeans Union Directive on the Enforcement of Intellectual Property Rights. Similarly, orders like Anton Piller Orders have been codified in the United States under Sec. 503 (a) of the Copyright Act [17 USC, 503 (a)]. Apart from such acceptance and recognition, the High Court Rules and Supreme Court Rules of many countries do provide the guidelines for the Anton Piller Orders.

The statutory recognition [44] of this civil remedy, namely, *Anton Piller Order*, in the Indian legal system in the context of the intellectual property rights, particularly in cases of patent, copyright, design, trade mark, geographical indications, plant varieties, and biological diversity could be derived from the provisions of the appropriate statutory enactments.[45]Each of them provides reliefs, mutatis mutandis, to the effect that the court may *(i) grant, in any suit for infringement, any relief including an injunction*

[42]See France: Industrial Property (Part II), Code (Consolidation), 01/07/1992 (18/12/1996), No. 92-597 (No 96-1106) Art. L. 615-5.

[43] Anton Piller Orders are known in France and Belgium as "saisie-contrefacon" order translated literally "infringement seizure" orders, (or in Belgium also as "saisie-description" orders, translated literally "descriptive seizure" orders).

[44] In some countries like Hong-Kong, and South Africa, where there is no statutory search warrant/order, the Anton piller, like any other search order, is still often issued by court under its discretionary powers.

[45] *See* Sec. 108 of Patents Act, 1970 for various reliefs for patent infringement, Sec. 55 of Copyright Act, 1957 for copyright infringement, Sec. 22 (2) of Designs Act, 2000 for registered design infringement, Sec. 135 of Trade Marks Act, 1999 for trademarks infringement or trademarks passing off, Sec. 67 of Geographical Indications of Goods (Registration and Protection) Act, 1999 for registered geographical indications infringement or geographical indications passing off, Sec.66 of the Protection of Plant Varieties and Farmers' Rights Act, 2001 for registered variety infringement, Sec. 6 of the Biological Diversity Act,2002 inviting indirectly the reliefs for patent infringement if patent has been sought for the 'invention' based on any research or information on a biological resource obtained from India. It may be pointed out here that Semiconductor Integrated Circuit Layout Design Act, 2000 deals only with criminal remedy, and not civil remedy, for infringement etc. of lay-out design.

(subject to such terms, if any as the courts thinks fit) and, at the option of the plaintiff, either damages or an account of profits, and/or (ii) order that the goods, which are found to be infringing and materials and implements, the use of which is in the creation of infringing goods shall be seized, forfeited or destroyed, as the court deems fit under the circumstances of the case.

It is, however, clear from the reliefs provisions of the above said enactments that none of them provides in so many express terms the specific use of the term '*Anton Piller Order*'. But a little exercise reveals that it could be read there in between the lines of the expressions like *'The reliefs…include an injunction…'*or '*order that the goods and materials and implements, the use of which is in the creation of infringing products shall be seized, forfeited or destroyed'*, used in each of such enactments. Not only this, the reliefs provided under the section of a given enactment are only inclusive, and not exclusive of remedies other than those expressly included therein. In other words, it is not exhaustive of the reliefs that a court may grant. The court, therefore, can also grant reliefs, other than those specified/included there in the given section. One such relief, of course, is the generally recognised remedy of the nature of *Anton Piller Order* which the court is equally empowered to grant in its discretion under the relevant laws of the land, be it intellectual property laws or any other laws.

VI. Pros and Cons of *Anton Piller Order*

It could be said that in the absence of the *Anton Piller* Order the right holder may rely on the investigation by the prosecution and the police –a co-ordination that may sometimes be turned counter-productive to the expeditious trial of the main suit because of its lengthy, complicated and detailed operation. The pros of the *Order*, therefore, cannot be mellowed down simply, but the cons are more alarming.

It is criticized that the Anton Piller Order proceedings turn upon the plaintiff's evidence alone and that too in Camera, that is,

not in the hearing of the public, including defendant. If a single judge is satisfied of the prima facie infringement of the right, the order could be issued, while the understanding, according to natural principle norm, is that, before starting an action for infringement, the right-holder must have a clear conception of the infringement: it is not considered the task of the defendant to assist, voluntarily or under compulsion, the plaintiff in his action brought against him (the defendant). Therefore, any application to hear evidence that is not based on particulars (i.e. documentary or oral testimony) could be turned down on the ground that the law does not allow an exploration; it does not allow, 'fishing expeditions'. Only an infringement has been shown that the right-holder, as a matter of substantial law, may ask for details, which he may need to measure damages[46]. This understanding, however, does not seem, it is submitted, sound and plausible particularly where there are particulars (though not based on documentary or oral testimony but on affidavit) to prove infringement and help in the administration of justice, but halted because of non-availability of the same to the court. Even if it is admitted for a moment that defendant is not to assist the plaintiff in action brought against him there is larger requirement of aiding and helping those whose duty is to render justice in the matter. It is everybody responsibility or, say, prime duty to help the court in the administration of justice.

Again, it is the privatization of the Oder that makes it remarkable: a non-State agency is permitted to make a direct interference on the personal liberty of some one –the defendant, under the garb of 'search and seizure' of the infringing materials alleged to be in his possession. The effects on the defendant are devastating: the Anton Piller Order proceeding occurs in camera; there is no warning or notice of it to the defendant; the first time

[46] *See* Dr. Joachim Bornkamm, J, of Germany, *Action and Remedies for Infringement of Intellectual Property Rights*, WIPO Pub. No.726 (E), at 93.

he knows of it is when the plaintiff through his solicitor launches his own attack on the material and property of the defendant with that order; he is to react sensibly and that too in a very short time he is given to consult his solicitor. "Those executing the order are likely to believe that right is on their side and that they must put on a show of aggression if they are to secure what their client needs and deserves."[47] This may cause the defendant to loose his temper and thus there may become a law and order problem. Refusal to comply with the order in the tension generated carries the possibilities of the defendant being punished for the contempt of court as well as the possibility of adverse inferences being drawn against him if the case ever comes to the trial. It is in the context of 'search and seizure' that the Anton Piller Order has been criticized as being "draconian and essentially unfair".[48] In the words of learned author Hilary & Clifford, "This search and seizure order is probably the most Draconian order a civil court can issue"[49].

Although in its primary nature "an Anton Piller Order is an order directed to the defendant requiring him to permit the persons specified in it to enter upon his premises and to inspect, take copies of, and to remove, specified materials or classes of materials", says Justice P.E. Powell of Australia, "there may be joined with it other forms of order."[50] For example, the defendant may be required to deliver up infringing goods,[51] to permit sample to be taken[52], to keep infringing stock or incriminating

[47] Cornish, W. R., *Intellectual Property: Paten, Copyright, Trade Marks and Allied Rights,* 67 (3rd ed. 1966, reprinted as Second Indian Reprint, 2003).
[48] Scott, J in *Columbia Picture v. Robinson* (1986) 3 All ER 33.
[49] *Supra* note 3, at 226.
[50] Mr. Justice P.E. Powell of Australia, *Judicial Remedies For Passing Off and other Means of Protection Against Unfair Competition*, WIPO Pub.No.726 (E), at 121-122.
[51] *See Universal City v. Mukhtar* (1976) FSR 252; *Gates v. Swift* (1982) RPC 339.
[52] *See EMI Ltd. v. Pandit* (1975) 1 WLR 302.

matter intact[53], and even to give information by affidavits, for instance, about his source of supply of such stock and materials or the destination where they passed through his hands[54], to give the names and addresses of the suppliers of the infringing goods as well as those of the retailers and others to whom he had distributed the said items[55]. This definitely affects the defendant's prospects of doing business in the market. It was considered such a devastating effect of the Anton Piller Order that 'an obituary in The Daily Telegraph stated that Hugh Laddie, who is generally credited with the conceiving of the idea of Anton Piller Order, later described the order "as a Frankenstein's monster that went far beyond his original design brief."[56] It was to cut to size such a devastating effect of the Anton Piller Order that in *Caterpiller Tractor Co. v. Hock Guan*[57], the court took the view that the defendant can not be compelled to reveal the name of his customers at the interlocutory stage unless extremely necessary to prove the infringement.

Supplying of evidence etc. by the defendant, in compliance of the Order, for example, disclosing the name and address of the supplier of the infringing goods to him or those of the retailers or other distributors to whom he supplies goods, or of any other kinds of evidence, it is said, may be sometimes of *self-incriminating* nature. For example, the supplier, retailer or distributor etc., may be person of criminal record or the dealing in the goods by the defendant may likely be of nature to implicate him in some criminal offence. The question to be considered here is whether the defendant is bound to disclose to the plaintiff the evidence that may incriminate him, for "a double threat would be produced by having the police simultaneously execute a search warrant

53 *See EMI v. Sarwar* (1977) FSR 146 CA.
54 *See A.J.Bekhor& Co. Ltd v. Bilton* (1981) 1 Q.B. 923.
55 *See Television Broad Casts Ltd. v. Mandarin Video,* Sdn. Bhd. (1980)2 MLJ 346.
56 "Professor Sir Hugh Laddie", *The Daily Telegraph* (London), December 3, 2008.
57 SdnBhd (1988) 1 MLJ, at 787.

procured on suspicion of criminal conduct such as dealing in obscene material or, for that matter, adulterated goods"[58].

Thus, in *Rank Film Distributors Ltd. v. Video Information Centre*[59] the defendant sought to plead in response to an Anton Piller Order a privilege against self-incrimination. The English Court of Appeal upholding this plea held that the part of the Anton Piller Order requiring disclosure of certain incriminating evidence was contrary to the well-established principle of 'privilege against self-incrimination'. Temple man L.J. in his judgment in the instant case observed as quoted below-

> *". . . . . an order ex parte or otherwise for discoveries or interrogatories under threat of committal for disobedience should not be made if it is obvious that the compliance with the order will involve the danger of self-incrimination. . . . In my judgment the doctrine against self-incrimination entitles the defendant to concealment and silence. Effective concealment cannot be maintained once discovery has taken place. Any other conclusion would in practice make a mockery of the doctrine against self-incrimination".*[60]

On appeal, the House of Lords upheld the decision of the Court of Appeal in the above-cited Rank case with the following observation:

> *"Since a charge against the respondents, of conspiracy to defraud, would not be a contrived, fanciful or remote possibility but an appropriate and exact description of what the respondents and the other persons involved had done, it was clear that disclosure by the respondents of the information sought would tend to expose them to such a charge, which would be a serious charge and would, if*

[58] *Supra* note 47, at 68.
[59] (1980)2 All ER 283.
[60] Id., at 293.

proved, attract heavy penalties. It followed that the claim of privilege against self-incrimination should be upheld."[61]

In other words, the House of Lords can be said to uphold the plea against self-incrimination in any case where there was more than a remote or fanciful chance that a serious charge, attracting heavy penalties, might result.

However, in the context of the Indian legal system the issue that could arise is whether a person is entitled to claim the privilege against self-incrimination when confronted with an Anton Piller Order particularly in view of the fact that the privilege against self-incrimination has been withdrawn by Sec.132 of the Indian Evidence Act, 1872 that runs to the following effect:

"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness or that it will expose or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind;

Proviso –Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

It can be argued that in the light of the said section, a witness can be compelled to answer a self-incriminating question or to produce documents or materials etc. even at the cost of being exposed to self-incrimination but once he divulges accordingly, he, by virtue of the Proviso to the said section, can claim not to be arrested or prosecuted. In other words, privilege against self-incrimination is no longer the law of the land. Thus,

[61] *Rank Film v. Video Information* (1982) AC 380.

with reference to Sec.132[62] of the Malaysia Evidence Act, 1950, which is *in paramateria* with Sec.132 of the Indian Evidence Act, 1872, a High Court of Malaysia observed, in its judgment in *Television Broadcasts Ltd. v. Mandarin Video Holdings*[63], in the following words:

> *" . . . . In this country the privilege is withdrawn by section 132 of the Evidence Act, 1950 . . . . Sec.132 (1) has already withdrawn or removed the privilege. It follows that the privilege can no longer be 'enforced' or 'invoked'. It is not there any more. Also by Sec.132 (2) first limb, there would no longer be any risk of arrest or prosecution, so the privilege is lost. There is no longer any question of 'enforcing' or 'invoking' the privilege. It is gone."*

In other words, according to the above observation, if there is no longer any risk of arrest or prosecution, as per Sec. 132(2) first limb, there is no question of exercising privilege against self-incrimination. It could be argued that since there is no law supporting privilege against self-incrimination so a person who gives or is compelled by a court order, say the Anton Piller Order, to give evidence then he also cannot claim any privilege against self-incrimination for there is no statutory law in support of such privilege. The problem with this type of reasoning or argument is that it forgets the fact that Sec.132 of the Indian Evidence Act, 1872

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[62] Sec. 132 of the Malaysia Evidence Act, 1950 runs as under:

"(1) *A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding upon the ground that the answer to that question will criminate, or may tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.*

(2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by that answer.

(3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of sub-section (2)."

[63] *Supra* note 57, at 346.

or, for that matter, Sec.132 of the Malaysia Evidence Act, 1950 is concerned with the disclosure etc. by a witness i.e. a person who testifies on oath or affirmation in a court of law or in judicial tribunal. He is subjected to examination-in-chief, cross-examination and re-examination. But a person who merely produces a document in court without being subjected to such examination is certainly not a witness. Therefore, it can be said that privilege against self-incrimination is no longer available to a witness but to a person not appearing as such witness. Such a view can be found in the judgment of a Malaysia High Court in a subsequent case of *P.M.K. Rajah v. Worldwide Commodities* wherein the court expressed the same observation as to the meaning and interpretation of section 132 of the Malaysia Evidence Act, 1950.[64]

Not only this, one must not forget that the existence or non-existence of a statutory formulation does not affect the validity of broader fundamental principle based on logical reasoning. Viewed as such, the Singapore High Court, in *Riedel-de-Haen AG v. Liew Keng Pang,* in response to a question whether the defendant who was served with an Anton Piller Order was entitled to discard the said order on the ground that it infringed the privilege against self-incrimination, observed in the following terms:

"*Secondly, in a more general context, where the Anton Piller Order is directed against the defendant, it offends against the fundamental principle that in an adversarial system of justice . . . the defendant has a right to remain silent and to refuse to defend himself.*" [65]

The above observation of the Singapore High Court, it can be seen, reinforces the views of the English Court of Appeal and that of the House of Lords in *Rank Film Distributors* case reported respectively in 1980 and 1982 cited above.

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[64] Id., at 86.

[65] (1989)2 MLJ 400, at 403.

The negative side of such a privilege, particularly in respect of the intellectual property cases, is that a defendant to patent infringement suit, as in any other infringement suit, who is served with an Anton Piller Order may refuse to divulge to those parts of the Order that may incriminate him to a criminal proceeding on the plea of broad fundamental principle of privilege against self-incrimination. If he is asked to appear as a witness in that proceeding to testify the self-incriminating evidence searched and seized by the plaintiff, or asked by the court to produce before it, in pursuance of an Anton Piller Order, he, by virtue of Sec.132 of the Indian Evidence Act, 1872 is bound to divulge the same as a witness and the plea of privilege against self-incrimination will be of no help to him, but, according to the Proviso to the said section no answer which he divulges shall subject him to any arrest or prosecution or be proved against him in any criminal proceedings except a prosecution for giving false evidence by that answer. Consequently, a defendant, served with the Anton Piller Order is left Scott-free to continue with his infringing activities, without appearing as witness, under the shield of privilege against self-incrimination. In the words of Cornish, "upshot was to offer a haven to those apparently most culpable …" [66] .Such a negative side compelled the English Parliament to intervene and incorporate a provision in the form of Sec.72 of the Supreme Court Act, 1981[67]where under by virtue of

[66] *Supra* note 47, at 70.

[67] *"72(1). In any proceedings to which this sub-section applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty."*
(a) from answering any question put to that person in the first-mentioned proceedings;
(b) from complying with any order made in those proceedings."
(2) Subsection (1) applies to the following civil proceedings in the High Court, namely-
(a) proceedings for infringement of rights pertaining to any intellectual property or for passing off ;
(b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off ; and
(c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.

the combined effect of sub-sections (1), (2), (3) and (4), a defendant to an infringement proceeding, as to any other proceedings, may after all be compelled to answer the question or comply with an order which would even tend to expose him or her or spouse of either to proceedings for a related offence or related penalty, but can claim, as a matter of right, not to be arrested or prosecuted except for perjury proceedings. As a corollary, it can be said that it is not possible to use any statement or admission procured in pursuance of the Anton Piller Order in any equivalent criminal proceedings or to launch an independent criminal proceedings against the said defendant, that is, in such proceeding where such

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(3) Subject to subsection (4), no statement or admission made by a person-
(a) in answering a question put to him in any proceedings to which subsection (1) applies ; or
(b) in complying with any order made in any such proceedings, shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the spouse of that person.
(4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court. Supreme Court Act 1981 c. 54 49
(5) In this section- PART III "intellectual property "means any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property ; " related offence ", in relation to any proceedings to which subsection (1) applies, means-
(a) in the case of proceedings within subsection (2)(a) or (b)-
(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate ; or
(ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty ;
(b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings; "related penalty ", in relation to any proceedings to which subsection (1) applies means-
(a) in the case of proceedings within subsection (2)(a) or (b), any penalty incurred in respect of any- thing done or omitted in connection with the infringement or passing off to which those proceedings relate ;
(b) in the case of proceedings within subsection (2)(c), any penalty incurred in respect of any act or omission revealed by the facts on which the plaintiff relies in those proceedings.
(6) Any reference in this section to civil proceedings in the High Court of any description includes a reference to proceedings on appeal arising out of civil proceedings in the High Court of that description."

statement or admission, if made as a witness, shall no longer be a justification for initiating a criminal proceeding.

VII. Anton Piller Order and Balancing the Optimal Balance of Interests

The pros and cons of the *Anton Piller Order* highlighted above, thus, requires in the words of Hoffman a "*careful balancing of, on the one hand, of the plaintiff's right to recover his property or to preserve important evidence against, on the other hand, violation of privacy of the defendant who had no opportunity to put his side of the case. . . . To borrow a useful concept from the jurisprudence of the European Community, there must be proportionality between the perceived threats to the plaintiff's right and the remedy granted.*" [68]

In fact, Article 8 of the European Convention on Human Rights, 1950[69] contains a guarantee of respect for private life and the home, but allows for exceptions where public authority acts 'in accordance with the law and, amongst others, for the protection of right and freedoms of another.' Such a provision, no doubt, makes the Anton Piller order and the process a justifiable issue. Taken in that perspective it can be argued that Anton Piller Order could only be legitimate if executed by a public authority like a court official and not through private agency. But the European Court of Human Rights upheld, in *Chappell v. United Kingdom* [70], the

[68] *Lock International v. Beswick*(1989) 1 WLR 1268, at 1281.

[69] ARTICLE 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[70] (1989) FSR 617: European Court of Human Rights (1990) 12 EHRR 1 30March 1989. In this case the applicant was suspected of committing some Copyright infringements. Under an Anton Piller order made by the High Court against him, the applicant's business premises which were also his home were searched by the authorities. The order was executed simultaneously with a police search warrant. The applicant filed suit alleging violations of Article 8 of the European

execution of the Anton Piller Order through private agency, instead of public officer, as not disproportionate to the legitimate aim pursued against a commercial infringer. Subsequently, concern about the abuse of the Order led Nicholls VC to state clear guidelines for its grant in *Universal Thermosensors v Hibben.*[71] These guidelines, *interalia* others, have now been incorporated in the Civil Procedure Rule (CPR) made under Civil Procedure Act 1997.The position under the CPR is regulated by the English Practice Direction-Interim Injunctions (Mareva Injunction and Anton Piller Order) July 28, 1994 which supplements the material provisions of the CPR to make the Order a more effective relief by incorporating the provisions like providing that a suitable definition to the Anton Piller Order incorporate all the necessary conditions to be proved by the plaintiff; the order should be granted only if the plaintiff has submitted a cross-undertaking in damages and the court is satisfied of his solvency at the date of such undertaking; the order covering any premises under the control of the defendant must be made only in exceptional circumstances; the order must make the provision that the inspection must do no real harm to the defendant or his case; the Order must be served by a solicitor, and inspection carried out under his supervision; where premises are likely to be occupied by an unaccompanied woman, one of those attending the premises must be a woman; the solicitor must supply the defendant with a copy of the order and of the evidence the

Convention on Human Rights. The court held that there was no breach of Article 8. There had been a sufficient legal basis for searching the applicants resident. Under Article 8(2) 'legal' may refer to both the Common and Civil law systems. The Court again asserted that it had no authority to review the validity of the domestic laws which were primarily the realm of English courts. Nevertheless, the Court found that the relevant domestic law was 'accessible' and sufficiently precise to satisfy the 'foresee ability' criterion of Article 8. The Court also noted that Article 8(2) mandated that domestic law contain protections against arbitrary procedures. In this case, the safeguards surrounding the order were examined in the context of the necessity of the interference and found adequate.

[71] [1992] 3 All ER 257.

plaintiff had put before the court to get the order; the effect of the order must be explained to the defendant; the order must advise the defendant to seek immediate legal advice and prescribe the time for such advice; the order must indicate that the defendant may make an urgent application to discharge or vary the order; the order should provide for a mandatory return date, after its execution, to the court issuing the order and the court must have power to assess the damages, if any, arising out of search and seizure at once; if business records of the defendant have been seized in pursuance of the order, the same should be returned to the defendant after necessary information has been extracted from there; if infringing materials have been seized the same should be returned to the defendant after their being recorded and upon undertaking that the defendant shall keep them intact and produce in the court if and when required.

In the context of the Indian legal system, it could be a land mark development in order to give a balancing effect of the Anton Piller Order if it strives to provide as certainability in the invoking of the Order by rules on the pattern of the British legislations like, *inter alia,*Sec.72 of the English Supreme Court Act, 1981, English Practice Direction-Interim Injunctions (Mareva Injunction and Anton Piller Order) July 28, 1994.

VIII. Conclusion

Anton Piller Order is a 'pre-trial *ex parte* court order/injunction in Camera' as a civil remedy for the infringement, in particular, of intellectual property rights. The order originated in Lord Denning's judgment in *Anton Piller KG v Manufacturing Processes Ltd*. It is intended to give the plaintiff and his solicitors a right/authority to enter the defendant's premises only on the latter giving permission on the court's order so issued without prior warning to him and to inspect the papers, files or things and seize or remove such of them as belong to the plaintiff, where there is a real danger that the defendant will destroy the

vital evidence if normal litigation procedures are followed. It is a specialized form of ex parte injunction in the sense of having some unique features over and above the common features of the ex parte injunction. The jurisdictional justification for the passing of such an order lies imbedded in the so-called 'inherent jurisdiction of the court'. In the history of its evolution, there have been evolved some basic norms for its being passed by a competent court. It now permeates in each and every legal system of the countries. The purpose of the order is to fulfill a legitimate purpose, such as protecting the claimant's copyright or other intellectual property right but the court is required to bear in mind the broader principle of human right issue of 'privacy' and the 'privilege against self incrimination' claimed by the opposite party. The subsequent legislations of many countries, particularly the British enactments, have beautifully addressed to the conflicting rights of the parties that now stand as codified rules requiring the court to take them into consideration while issuing an Anton Piller Order. The Indian legal system as respect to the protection of intellectual property rights does provided recourse for obtaining the Anton Piller Order at the discretion of the court in the manner it thinks fit, yet it is suggested that because of the paramount importance of the order suitable policy measures could be taken to codify the law relating to it on pattern like British legislations and others so that it could be obtained as a matter of right.

An Appraisal of Fraud Rule Exception in Documentary Credit Law with special Emphasis on India

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Abstract

In financing international and domestic trade, documentary credits are widely used financial instruments. Autonomy principle differentiates this instrument from other modes of financing instrument since the bankers are bound to make payment to the seller irrespective of any dispute that arise between the parties to the underlying contract. Payments are assured by the banks solely based on documents. Therefore, they are 'documents driven' and not 'fact driven'. This peculiar feature of this instrument becomes a hideout for unscrupulous parties to indulge in commercial frauds based on documents which may include money laundering activities, if go unchecked. The law in this area remains nebulous. Fraud rule as an exception to this autonomy principle has been recognized by the English and Indian courts to overcome the abuse. Accordingly, the courts and banks can interfere with the payment disputes between the parties and decide on the basis of proof of fraud. Apart from this, at International level uniform practices has been developed by the commercial parties and codified in the form of international rules like UCP 600. Nonetheless, there is provision for defeating fraud mentioned in this rules which indicates the intention of the drafters to leave it to the municipal laws of the various countries. This vacuum created provides as an incentive for various jurisdictions to fashion fraud rule to suit the marketability of credits issued by banks in their countries and implement liberal laws to govern the financial transactions.

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This shows that there is no uniformity in the application of the laws. In India the principles of UCP 600 is followed by making it part of contractual terms by the parties. Nonetheless, judicial interference is necessitated because of the dispute that arises between the parties involved. However, the case analysis relating to this area shows that the practical applicability of the fraud rule in the documentary transactions is very limited. This trend will encourage unscrupulous traders and fraudsters to indulge in documentary credit fraud through the channel of banks. This paper aims to examine the doctrine of fraud rule exception recognized by courts as an exception to the principle of autonomy of credit. Its application in the Indian context in comparison with the laws of major countries will also be made. In the context of emergence of new electronic forms of payment and increase in the financial frauds, the diminution in the commercial utility of this instrument will also be made.

Key Words: Documentary credit, Fraud, Bill of lading, e-commerce.

I. Introduction

In documentary credit transactions, banks make the payment to the seller merely based on the documents presented by him. The banks issuing documentary credit (also known as letters of credit) are under an obligation to pay the parties irrespective of any factual discrepancy raised by the parties. There is no obligation on the banks to check the factual authencity of the documents presented to them.[1] The theory behind the use of documentary credit is often referred to as "pay now, litigate later".[2] This results in major difficult situations including a major avenue for fraudsters for fraudulent activities including money laundering only on the basis of documents.

[1]Richard Schaffer *et.al., International Business Law and its Environment,* (West EducationalPublishingCo.,U.S.A. 1999).

[2] Jacqueline D Lipton, "Documentary Credit Law and Practice in the Global Information Age", 22 Fordham Int'l L J1972 (1999).

Generally, the documents presented in this transaction by the seller includes an invoice for the goods shipped, an insurance certificate in respect of the goods, a bill of lading or other evidence of transport of the goods by the seller. These documents provide seller to receive payment for the goods delivered before the buyer actually receives the goods. This liberty cans me misused by unscrupulous seller to create a forged document without shipping any physical goods. Unless the forgery is obvious, the bank is entitled to pay because documents usually indicate dispatch of the cargo and documents may be presented for a non-existent cargo.[3]By the time the buyer comes to know about this, he might have lost his money. The insurers generally do not pay for a non-existing cargo. This resulted in the recognition of fraud as an exception to the absolute payment principle i.e. autonomy principle[4] in the letters of credit. This fraud exception rule exempts banks from paying to the parties if it knows that the tendered document is false or contains a forged signature.[5]

In documentary credit, fraud occurs in various forms. Therefore banks are expected to act in a reasonable manner in case of allegation of fraud in relation to the commercial documents. A mere allegation of the fraud by the trader does not affect the obligation of the banker to make payment to the seller on his presentation of required documents.[6] Evidence of fraud is required for the refusal of payment by the banks. However, there is no clarity with regard to the degree of evidence of fraud required to be proved by the alleged party. Similarly, it is not clear

[3] Carole Murray, David Holloway (Eds.), *Schmithoff's Export Trade*, (Sweet and Maxwell, London, 2012).
[4]Article 3 (a), Uniform Customs and Practice of Documentary Credits(UCP 500). The principle of autonomy is codified under this provision.
[5]*Gian Singh Ltd*. v. *Banque de l'Indochine*, [1974] 2 All E.R.754.
[6] Hans Van Houtee,*The Law of International Trade*, (Sweet and Maxwell, London, 2002).

whether the knowledge of such fraud to the seller beneficiary and the bank is necessary to invoke fraud exception. Hence, in the context of minimizing the risk undertaken by the concerned parties, an examination of the fraud rule becomes necessary.

II. Fraud Rule in Documentary Credit: Concept and Meaning

The autonomy principle is recognized as the cornerstone of the documentary credit transactions which emphasis the obligation of banks to deal with documents only and not to get concerned with the underlying sales transactions between the buyer and seller.[7]This instrument is not designed to prevent fraud and therefore fraudsters use this mechanism to indulge in fraudulent transactions which will in turn effect the integrity of the business transactions. They use different means to perpetuate fraud in documentary credit transactions. Sometimes the documents will appear as genuine but the beneficiary perpetrates a fraud which the issuing bank comes to know afterwards. The fraud exception remains too narrow and the banker is liable to pay irrespective of fraud. Thus in *Discount Records Ltd* v. *Barclays Bank Ltd.*,[8] Megarry J., refused to grant injunction on an allegation of fraud. He observed:[9]

> I would be slow to interfere with banker's irrevocable credits, and not lease in the sphere of international banking, unless a sufficiently good cause is shown; for interventions by the court that are too ready or too frequent might

[7] Ross Cranston, *Principles of Banking Law*, (Oxford University Press, New York, 2002).
[8] [1975] 1 All E R 1071 (C.D.).
[9] *Id.* at 1075.

> gravely impair the reliance which, quite properly, is placed on such credits.

In this case the buyers failed to establish the evidence of the alleged fraud. When they opened the cartoons they found that it contained only a small quantity of goods ordered. Some of the cartoons were empty and contained goods which were not ordered. But the bank accepted the draft which was in order. The facts of this case showed that the buyer communicated to the bank that fraud had occurred. But on enquiry the bank found that the alleged discrepancies were insignificant and the beneficiary was not a party to such fraud.

Similarly in an earlier case, U.S. Court refused to invoke the fraud exception[10]. They believed that issuing bank's liability relates only to the verification of documents and checking whether they are on the face complies with credit only. A mere doubt regarding the quality of goods will not amount to fraud. Hence banks cannot refuse payment. However Justice Cardozo dissented and took a different version for fraud.[11]He held that fraud means misrepresentation. This view can be ascertained from the following:

> We have to bear in mind that this controversy…arises between the bank and a seller whohas misrepresented the security upon which advances are demanded… I cannot acceptthe statement of the majority opinion that the bank was not concerned with any question as to the character of the paper. If that is so, the bales tendered might have been rags instead of paper, and still the bank would have been helpless, though it had knowledge of the truth, if the documents tendered by the seller were sufficient on their face.

[10]*Supra* note 1.
[11]*Ibid*.

According to Cardozo's statement, in order to invoke the fraud rule, a misrepresentation should amount to complete nonperformance of the contract. Therefore a clear understanding of the meaning of fraud is required in order to apply in cases of documentary credit.

In order to overcome this situation, common law recognized the importance of fraud rule in *United City Merchants (Investments) Ltd* v. *Royal Bank of Canada.*[12]

i. Meaning of Fraud

The term 'fraud' in letters of credit is not defined apart from the Contract Act[13] in India. Similarly the British courts tried to interpret and give meaning to the fraud under letters of credit through various decisions. In *Beauman* v. *A.R.T.S. Ltd.*,[14] it was observed that the term "fraud" connotes dishonesty or deceit by may be of far wider application. The burden of proof which requires establishing dishonesty leading to fraud is different. Fraudulent misrepresentation or deceit will be the basis of many types of fraud. In *Derry* v. *Peek*,[15] Lord Herschel tried to define fraud exhaustively though only a general classification of the fraud, by stating that in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it is true or false. On the other hand, a fraud in relation to letters of credit involves documents and also goods. However, the fraud in relation to goods is difficult to establish. Even if such an allegation arises before the payment is made, payment cannot be withheld by the

[12] *Infra* 48. This case is also known as American Accord case.
[13] S.17, The Indian Contract Act, 1872 (Act 9 of 1872).
[14] [1949]1 KB 550.
[15] (1889) 14 App.Cas.337 at p.376.

bank unless there is proof that the seller has committed the fraud.[16]

Courts have given a very narrow meaning to the term 'fraud'. The courts recognized fraud only in cases relating to the outrageous conduct of the parties which shocks the conscience of the courts.[17] This narrow interpretation is justified on the ground that a broader rule would defeat the certainty of letter of credit transaction. However there are two wider interpretations of the term 'fraud'. One is breach of standard contract, the other is intentional fraud standard.[18] The customer would be entitled to get an injunction against payment only by showing that there is a standard breach of contract with the underlying contract.[19]It can be seen that the traditional "egregious fraud" standard is followed in the intentional fraud standard. According to that a beneficiary who presents confirming documents under a letter of credit should be prevented from receiving payment only when his own wrongdoing has led to the creation of these documents.[20] Later broader definition of "wrong doing" was adopted to include a false representation.[21] However courts insist narrow definition and are reluctant to broaden the definition. For instance, in *Roman Ceramics Corpn*. v. *Peoples National Bank*,[22] the district court enjoined payment by finding that the beneficiary knew that the invoices covered by letter of credit had been paid. But the issuing

[16]*Supra* note 8.
[17] Harfield, "Enjoining Letter of Credit Transactions", 95 *Banking Law Journal*596 (1978).
[18] Michael Stern, "The Independence Rule in Standby Letters of Credit", 52 *University of Chicago Law Review* 218 (1985).
[19]Note, "Fraud in the Transaction Enjoining Letter of Credit during the Iranian Revolution", 93 Harv.L. Rev. 992 (1980).
[20] Stephen H.Van Houten, "Letters of Credit and Fraud: A Revisionist View", 62 *Canadian Bar Review* 371 (1984).
[21]Agasha Mugasha, "Enjoining the Beneficiary's Claim on a Letter of Credit or Bank Guarantee", [2004] J.B.L. 515.
[22]714 F. 2d.1207 (3d Cir.1983) cited in Mark S. Blodgett and Donald O Mayer, "International Letters of Credit: Arbitral Alternatives to Litigating Fraud", Am.Bus.L.J.443 (1998).

bank attempted to get payment by misrepresenting this fact. While applying the definitions of fraud in the transaction, the court observed that the circumstances that justify the injunction are limited narrowly to the fraud committed by the beneficiary.[23]Therefore, traditionally, it can be seen that 'egregious fraud' was followed in letter of credit transactions in foreign countries.

ii. Fraud rule in the *Sztejn* Case[24] : An overview

This is perhaps the most important case law relating to fraud universally accepted and followed in case of documentary credit. The seller in this case shipped rubbish materials under a contract of sale. He obtained a bill of lading from the carrier fraudulently, stating that the goods shipped in the container are in good condition. However, the buyer refused to accept the documents on suspecting fraud. Injunction suit was filed by him to restrain the issuing bank from accepting the documents from the seller and making him payment. The court held that the principle of autonomy is the important element of documentary credit and fraud is an exception to this. Sheintag J., said,

> …[W]here the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller.[25]

Nonetheless, certain questions relating justification of the degree of knowledge of fraud for refusal of payment by the issuing bank and the payment made without knowledge of fraud is protected or not, also the position of negotiating banker is left unanswered.

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[23]*Ibid*.

[24]*Sztejn* v. *J. Henry Schroder Banking Corporation*, 31 N.Y.S.2d 631 (1941), available at http://uniset.ca/other/cs4/31NYS2d631.html (last visited on April 27, 2015).

[25]*Ibid*.

Apart from this it is to be noted that although in *Maurice's Case*[26] a breach of warranty was involved. In this case the seller shipped inferior quality of newsprint paper, whereas in *Sztejn* case[27] the seller shipped the bales of worthless rubbish material and presented the documents before the bank covering the goods ordered by the buyer and committed the fraud. According to Richard Shaffer, *Maurice O'Meara*, *Sztejn* case presents a clear distinction between a mere breach of warranty and fraud.[28]

However whenever the question of fraud comes, the courts looks into the Sztejn rule. This rule has been expressly adopted in English decisions. In *American Accord* case[29], the sellers were unaware of the fraud committed by the shipping agent by fraudulently dating the bill of lading in order to convey the impression that the goods had been shipped before the expiry of the period specified in the documentary credit. Macatta J, by referring to Sztejn's case observed that the banker is not expected to pay under the letters of credit if he knows that the documents are forged and the request is made by the seller fraudulently.[30]

In *Establissement Esefka International Anstalt* v. *Central Bank of Nigeria,*[31] the bank paid against a set of documents which included a bill of lading and a certificate of origin. Bill of lading was a forged and certificate of origin included fraudulent misstatements. The bank refused to make payment. The seller sued the bank for not complying with the letters of credit agreement. The court justified the banks action and Lord Denning M.R. J observed that in case if the forged and fraudulent documents are presented by the seller in any one of the parcels

[26]*Supra* note 1.
[27]*Supra* note 24.
[28]Richard Schaffer et.al., *International Law and its Environment*(West EducationalPublishingCo.,U.S.A. 1999).
[29]*Supra* note 12.
[30]*Ibid*.
[31] [1979] 1 Lloyd's Rep. 445.

contained in the credit the banker is justified as a defense to refuse payment.[32]

Therefore it can be seen that fraud rule of *Sztejn* case has influenced and shaped the fraud exception in all jurisdictions across the world. In United States it even became a part of statue.[33] Accordingly if the letter of credit is fraudulent, forged or fraud in the transactions exists in the underlying sales contract buyer can restrain banker from making payment. The Code specifies certain factors which the court must consider in order to determine the applicability of fraud exception. These factors include the effect of injunction on the beneficiary, the prohibition of injunction by another law and the availability of a remedy for fraud or forgery against the responsible party.[34]

III. Documentary Credit Frauds: An analysis

The soul of documentary credit system is the integrity of the documents. The volume is documents used in this transaction are often very high which makes the task of banker more tedious. Apart from this, different types of documents are used which are very technical too and the parties are at the liberty to include the documents of their choice. This loophole generates the scope for fraudsters to indulge in the fraudulent activities with the help of documents of their choice. It is to be noted that the banks are making payment to the parties purely on the basis of documents presented which many a times appear genuine. Fraudsters use forged documents in different ways to perpetuate the fraudulent activity. Some of the documents used for fraud are discussed.

[32]*Ibid*.
[33] Uniform Commercial Code 1995,article 5, s.109 available at https://www.law.cornell.edu/ucc/5(last visited on April 28,2015)
[34]*Ibid*.

i. Bill of lading Frauds

Bill of lading is the most vital and relied document by the parties of trade in letters of credit. Long standing recognition for this document is that it may pass both title in the goods and all rights to sue under the contract of carriage for the breach.[35] The frauds committed through this document are as follows:

(a) Non shipment of goods

In this type of fraud, a bill of lading will be issued by a known shipping company to the party concerned without actually shipping the goods. Sometimes bill is made by using imaginary names for the carrier and ship. In such cases the carrying vessel named in the bill may not even exist. For instance, in *Hindley & Co.* v. *East Indian Produce Co. Ltd,*.[36] when Kerr J., remarked that "If no goods had in fact been shipped, the sellers had not performed their obligation",[37] the sellers argued that they were not party to the non-shipment of the goods as it the duty of the shipping company to verify it. However the court held that the seller cannot avoid his liability to the buyer. The seller has to ship goods of the contractual description. He should tender proper sales, insurance and shipping documents to the buyer and should not indulge in fraudulent activities. Of course, the seller is not concerned with the safe arrival of goods and their subsequent delivery to the buyer.[38] But during initial stage, he should be vigilant.

However, in connivance with the shipping company, fraudulent seller commits fraud since, when a bill of lading document comes into the hands of a banker as part of the letter of credit transaction; the banker will verify only authen city of

[35] For a discussion, see T.K. Thommen, *Bills of Lading In International Law and Practice*, (Eastern Book Company, Lucknow 1986).
[36] [1973] 2 Lloyd's Rep. 515
[37] *Ibid*., at p.518.
[38] *Biddle Bros.* v. *Clemsens Horst Co.,* [1911] 1 K.B. 214.

the document presented and makes payment to the seller. Actual inspection is beyond the scope of the duty of banker. This increases the scope for committing fraud through bill of lading by non-shipment of goods ordered by the buyer.

(b) Short shipment of goods

Fraud can be committed through bill of lading by shipping lesser quantity of goods than actually contracted. The primafacie evidence of shipment of goods is the bill of lading document. The onus of proof is on the carrier to show that the goods have not been shipped or goods are shipped in lesser quantity than the order placed with it.[39]A proof of extreme probability and satisfactory evidence is required in this type of shipment. It is the subjective satisfaction of shipper. Any removal of goods during transit is not sufficient.[40] Here also the banker cannot deny payment to beneficiary since the bill of lading presented will be in terms with those mentioned in letters of credit. It is the buyer who is put into trouble when he receives lesser quantity of goods. As fraud is not proved, he cannot raise any claims against the banks.

(c) Falsification of Bill of Ladings

In this situation a bill of lading is altered after it has been issued. It is most commonly used when goods are shipped late. The date is often altered to show that shipment had been made in time. In *Kwei Tek Chao* v. *British Traders and Shippers Ltd.*,[41] it was proved that the bill of lading showed the goods in question was loaded in the ship not within the actual time mentioned in the document but at a later stage. The court held that the bill of lading was a forged. However in fact, in this case fraud was that of the forwarding agent and not that of the seller. Even then the court held that the banker could reject the document as the

[39]*Smith* v. *Bedouin S.N.Co.,* [1896] A.C. 70
[40]*Hain S.S. Co.* v. *Herdman & MacDougall* (1922) 11 Ll.L.Rep. 58.
[41] [1954] 2 Q.B. 459.

beneficiary's blamelessness will not be a concern when fraud is proved beyond any doubt. Nonetheless, the provision under U.C.P. frees banks from liability or responsibility for the falsification or legal effect of documents.[42] However this relief may not be enough to avoid all the consequences of fraud.

Apart from the bill of lading, there are various other documents like railway receipts *etc*. that are used for payment under letter of credit. Therefore it can be seen that shipping documents are often used by the fraudsters to commit the fraud and takes shelter under the letters of credit instrument where the banks are committed to make payment solely on the basis of the documents presented to them by the seller.

IV. Fraud Exception: A Comparative view

In the cases relating to the documentary credit frauds, the courts in the United States played an important role. They have decided a large number of cases where fraud has been proved while dealing with the letters of credit transactions. The landmark case of *Sztejn*[43] was decided by the court of US. This paved way for the country to bring a codified legislation to prevent the commission of frauds while dealing with this financial instrument. Perhaps, it is the only country which contains a codified legislation.[44] It contains a state of the art provisions with respect to fraud rule. However neither the code nor its comments gave any hint as to what type of fraud gave the bank an option to pay. This resulted in formulation of a number of standard frauds. Some courts took a strict and restrictive approach and adopted an egregious standard of fraud,[45] while

[42] Article 34, the U.C.P. 600.
[43] *Supra* note 24.
[44] Article 5 of Uniform Commercial Code
[45] *International Industries* v. *Girard Trust Bank*, 336 A.2d 316 (Pa.1975) available at http://www.leagle.com/decision/1975804461Pa343_1748.xml/INTRAWORLD%20IND.,%20INC.%20v.%20GIRARD%20TRUST%20BK. (last visited on March 28,2016)

other courts adopted a constructive standard of fraud. There is no certainty in fraud standard even though it is recognized statutorily. A task force was setup to study the case laws and make recommendation for the revision. They made several observations regarding the issue of fraud and recommended for the adoption of 'material fraud' as the standard of fraud. Thus the legislation was revised to include this proposition suggested and recommended by the task force.

In England fraud rule adopted is relatively rigid and narrow. It requires a high standard of proof. Accordingly it is very difficult to establish fraud. The situations where the fraud rule is applied by the courts are very limited. In *R.D. Harbottle (Mercantile) Ltd* v. *National Westminster Bank Ltd*.,[46] is perhaps the first decision which discusses the fraud rule. Though this case was not a case of established fraud, a restrictive view was taken to enable the circumstances in issuing bank to justify refusal to pay. They considered the proof of 'Material misrepresentation' as the standard of fraud in the law governing letters of credit.[47]This shows that they have adopted the position close to that of the United States. However, in United States, the courts will give more severity to the effect of the fraud on the transaction rather than the state of fraud of the beneficiary, while in the U.K. the courts require proof of the state of the mind of the fraudster.

The courts in Canada gave focus to the standard of proof rather than standard of fraud in applying the fraud rule with regard to the documentary credit transactions.[48]They considered whether the rule is confined to cases of forged or fraudulent documents or can it be extended to fraud in the underlying

[46] [1977]2 All.E.R. 862.
[47]*United City Merchants (Investments) Ltd* v. *Royal Bank of Canada*, [1983] 1 A.C. 168.
[48] Stephen Van Houten, "Letters of Credit and Fraud: A Revisionist View", 62 *Canadian Bar Review* 371 (1984).

transaction.[49]They addressed this issue in a very simple way. Fraud in Canada means something of 'dishonesty or deceit or clearly untrue or false'. Being a country of English tradition, the Canadian courts traditionally follow the approach of their English counterparts and hence they adopted the standard of common law fraud. Therefore, it can be seen that the position in Canada on the standard of fraud is somewhat confusing or contradictory.[50]

In Australia the fraud rule was considered only in a small number of cases. They recognized two kinds of standard fraud. One is the intentional fraud and the other is the gross equitable fraud. However, it can be seen that while applying the fraud rule by the courts only intentional fraud was accepted and the application of gross equitable fraud was rejected. For instance, in *Olex Focas Pty Ltd*. v. *Skoda Export Co.*,[51] Bhatt J of the Supreme Court of Victoria observed that only when it is proved that the banker was aware of the fraud at the time of making payment and also in situations where forged document was presented by the seller-beneficiary the fraud rule will be applied.

V. Application of Fraud Exception in India

Generally, the courts are hesitant to interfere in the cases relating to documentary credit. They try to refrain from interfering with the commercial disputes involving letters of credit considering the commercial utility of the instrument and also because of the banking institutions involved in these transactions.[52]However, the courts have observed that these principles need not be treated as sacrosanct, therefore while deciding the cases involving letters of credit, they have

[49] Jeffrey J Browne, "The Fraud Exception to Standby Letters of Credit in Australia", 11 *Bond Law Review* 98 (1999).
[50]*Ibid*.
[51] (1996) 13 4 F.L.R.331.
[52]*United Commercial Bank* v. *Bank of India*, (1981) 2 SCC 766.

recognized fraud as an exception to the principle of autonomy of the letters of credit.[53]

Thus in the cases where there is serious dispute between the parties involved and a good prima facie fraud is established the courts interfere,[54] though they blindly follow the English precedents. For instance, the most quoted observation Mukherjee J,[55] while deciding the cases involving letters of credit is as follows:

> ..[A]n irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is well-settled principle of the law in England. This is also a well settled principle of law in India…

The courts in India insist for the establishment of fraud and a mere allegation of fraud is not sufficient to invoke the fraud exception.[56]They also try to adopt the meaning for "fraud" in documentary credit by referring to the definition of fraud in the Indian Contract Act, 1882.[57]The courts make it clear that fraud should be established against the beneficiary which is of an egregious nature and must be established beyond reasonable doubt.[58] A finding as to the commission of fraud cannot be based on mere suspicion. Also, it cannot be based on the basis of mere

[53]*Hindustan Steelworks Construction Ltd.* v. *Tarapore & Co.* (1996) 5 SCC 34.
[54]*U.P. Co-op Federation Ltd* v. *Singh Consultants and Engineers (P) Ltd.* (1988) 1 SCC 34.
[55]*Ibid*.
[56]*General Electric Technical Services Company Inc.* v. *Punj Sons (P) Ltd*., AIR 1991 SC 1994.
[57]*State Trading Corporation of India Ltd.* v. *Jainsons Clothing Corporation* (1994) 6 SCC 597. Also *Ram ChandraSingh* v. *Savitri Devi* (2003) 8 SCC 319.
[58] *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Company*, AIR 2007 SC 2798.

non supply of goods.[59]Moreover, the courts are inclined to add any additional grounds to the fraud exception. Thus, in *BSES Ltd*. v. *Fenner India Ltd*., [60]the court declined to accept the averment that "lack of good faith" or "enforcing with an oblique purpose" as the additional grounds to constitute the fraud rule exception. Hence, the court would examine each case in order to find out whether the case falls within any of the classes relating to fraud rule or not. It can be seen that major hurdle faced in India is regarding the difficulty to produce solid proof of fraud and the rigid approach of courts.

VI. Fraud Exception: Modern trends

In the law governing documentary credit, fraud rule is a very confused area. The proof of fraud is different in different jurisdictions and generally the courts leave the matter to be settled by merchants themselves under the contracts or by arbitration. They mostly interfere only in the cases of established fraud in which the banks have notice. This trend needs revisit in light of changes taking place in business scenario like the e-commerce and the increase of financial crimes like money laundering.

i. Impact of e-commerce in fraud exception

E-commerce is fast developing trade without much legal protection. The familiarity of banks and international trading parties with the current documentary credit system may create a practical problem because of this new method of trade.[61] Now electronic letters of credit, electronic bill of lading are increasingly used in financing trade by the parties. This will in turn decrease the use of paper documents and the need to ship goods. Mostly these transactions involve items that are

[59]*I.T.C. Limited* v. *Debts Recovery Appellate Tribunal* (1998) 2 SCC 70.
[60] A.I.R. 2006 SC1148
[61]*Supra* note 3.

themselves electronic and can be delivered to a buyer by electronic means rather than by physical shipment. Even in cases of requirement of physical shipment of tangible goods, the contract negotiation and drafting are conducted electronically rather than in traditional paper form. Hence, the traders can open letters of credit from terminals of their desktops directly to their banks' branch.[62] This will in turn increase the scope for fraudulent activity as the transactions are conducted through online.[63]Therefore it can be seen that e-commerce may generate an ample chance for electronic documentary fraud. Moreover, it is difficult to prove the legal authenticity of the electronic documents presented before the banks. It is said that the use of digital signatures can prevent a fraudster from impersonating either a carrier or legitimate trader, or tampering with the contents of an electronic document.[64] But it is doubtful how far they will alleviate fraud possibilities at payment and delivery. Though eU.C.P makes provision for validating the electronic transmission of documents tendered it is silent regarding the fraud aspect. They do not combat the commercial risks involved and in turn protect the bank and effectively pass the risk of fraud to the applicant.[65]

ii. Documentary credit fraud and money laundering

Money laundering has become a major international and national financial concern. These activities are usually carried out in an international context through the medium of banks and financial institutions. In this the fraudsters try to convert the illegal money into legal money from their secret hideouts.[66] They

[62] Notes, "Electronic Letters of Credit", *Banking World* 80 (1985).
[63] Susan Barkehall Thomas, "Electronic Funds Transfer and Fiduciary Fraud", [2005] J.B.L. 48.
[64] Paul Todd,*Maritime Fraud*, (LLP, London 2003)
[65] Article 12, eU.C.P.
[66]Bhure Lal, Money Laundering: An Insight into the Dark World of Financial Frauds, (Siddharth Publications, New Delhi, 2003).

adopt different methods to commit this crime which can include the documentary credit frauds also. If the fraudster opens a letter of credit for the supply of goods and in reality no such goods are shipped at all or fill the containers with rubbish materials and make forged documents which may look perfect to obtain payment from the banks. By the time the bank realizes the fraud it will be too late to identify the source of money and the culprit.[67]Moreover, no serious study has been undertaken from this angle to know the involvement of banks in this type of activities in our country. Of course autonomy of credit attracts this financial instrument as a most reliable form of payment; however, fraudsters take advantage of this principle and indulge in many fraudulent activities. For instance, in India a law graduate was arrested for duping a Korean based bank for Rs.5.52 crore by furnishing a forged document to avail a loan. He submitted a 'fake letter of credit' document to the bank and availed payment.[68] Therefore, there is a need to monitor that they are not used for the money laundering activities by the parties involved in it.

VII. Conclusion

Fraud as an exception to this principle of documentary credit has been recognized by the courts of different countries[69] including India. However, they are applied in a very narrow sense and there is no uniformity for the test applied by the courts.[70]This will adversely affect the interest of genuine person

[67] Emmanuel T Laryea, "Payment for Paperless Trade: Are there viable alternatives to the Documentary Credit?, 33 Law & Pol'y Int'l Bus. 3 (2011).

[68] V. Narayan 'Law Grad held for 6 cr bank document fraud, *Times of India*, July 15, 2015 available athttp://timesofindia.indiatimes.com/city/mumbai/Law-grad-held-for-6cr-bank-document-fraud/articleshow/48038232.cms (last visited on 20.12.15)

[69]*Themehelp Ltd* v. *West* [1996] Q.B. 84

[70]*Craznikow-Rionda Sugar Trading Inc*. v. *Standard Bank London Ltd*., Q.B. available at http://www.simic.net.cn/upload/2010-06/20100621140426611.pdf (last visited on April 29, 2015).

involved in trade. Similarly, in a situation where a fraudulent document appears genuine, leaving it to the discretion of municipal laws may generate problems because of the lack of certainty in those laws and also vary from country to country. Even the U.C.P. 600 also does not attempt to set out the principle to address this issue.

Generally, to overcome this problem, International communities refer the United Nations Convention of Independent Guarantees and Standby Letters of Credit.[71] However a different view has been accorded to the term 'fraud' in this convention. It has defined fraud as a kind of misconduct and clarifies that it is the misconduct that may prove the commission of fraud. To a certain extent they only provide a good guidance for the courts to decide fraud cases. Thus its scope is very 'clear and narrow'. Of course, it is considered as an excellent international standard with regard to fraud exception.[72] However while this convention required 'manifest and clear' evidence to invoke the fraud rule, it does not mention about the proof of intention of the wrongdoers. This gives an impression that emphasis is given more to the nature of the misconduct rather than the fraudster's state of mind. Therefore, the UCP guideline also needs a revision to include provisions on fraud exception and it should be seen as an attempt to restore the balance of equities between the buyer and the seller.[73]

Apart from this, there are certain limitations that are attached to the fraud exception in documentary credit. One such limitation is the difficulty of the banker to determine the

[71]Article 19, United National Convention on Independent Guarantees and Standby Letters of Credit.

[72] Gaoxiang & Ross Buckley, " A Comparative Analysis of the Standard of Fraud required under the fraud rule in letters of credit", 13 *Duke Journal of Comparative & International Law* 293.

[73] Razeen Sapideen, International Commercial Letters of Credit: Balancing the Rights of Buyers and Sellers in Insolvency", [2006] J.B.L. 133.

discrepancy between the description of the goods mentioned in the document presented by the seller and its actual nature that may amount to fraud. It has been asserted by the courts that the banker cannot assert the deficiency of goods against the seller unless there is a blatant fraud.[74] Secondly, the fraud committed by the seller on the buyer through letters of credit needs to be proved beyond reasonable doubt, a mere contention is not sufficient.[75] And lastly, fraud cannot be raised against a third party. Therefore in practical perspectives, these limitations will create hindrance to prove the fraud exception.

In the matter relating to the electronic documentary frauds, several attempts have already been made by international communities to create a new legal framework for the use of electronic transport documents. However this attempt aims to develop methods for claiming transferability of rights and liabilities electronically.[76] There is a need to reform the law in this area to meet the technological documentary fraud[77] which may be crept in since the existing provisions in municipal laws are inadequate to address the electronic documentary frauds.

Hence, it is clear that the law regulating documentary credit is silent with regard to the issue of fraud in India. The courts in India are also hesitant to invoke the fraud exception in the documentary credit transaction mainly may be because of the sensitivity of this document in the area of financing both national and international trade. It is true that in case if fraud is defined too narrowly it will encourage the growth of fraudulent conduct

[74] E.P.Ellinger, "Fraud in Documentary Credit Transactions", [1981] J.B.L. 258.
[75]Dulien Steel Products Inc. of Washington v. Banker's Trust Co., 298 F 2d 836 available at http://openjurist.org/298/f2d/836/dulien-steel-products-inc-of-washington-v-bankers-trust-company (last visited on 29 April 2015).
[76] Caslav Pejovic, "Documents of title in Carriage of goods by Sea: Present Status and Possible future directions", [2001] J.B.L. 461.
[77] Samuel O Maduegbuna, "The Effects of Electronic Banking Techniques on the Use of Paper-based Payment Mechanisms in International Trade", [1994] J.B.L. 338.

by the beneficiary and will affect the smooth flow of trade on the other hand its liberal interpretation will erode the principle of autonomy and affect the use of letters of credit in trade. Hence a balanced view considering the facts of each case may be a solution. However it may create uncertainty and inconsistency in the application of fraud rule. A proper legal framework considering the modern trend and incorporating the fraud exception is the suggested solution apart from the need for arbitral alternatives. Nonetheless, by the time the legislative framework initiate its process, considering the increase in financial frauds in the country, judiciary should interfere and take appropriate measures to curb the menace of documentary credit fraud by upholding the reliability of the traders in this instrument for commercial transactions.

The Expanding Horizons of Professional Misconduct of Advocates vis-a-vis Contempt of Court: A Review of the Code of Ethics of Advocates

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Abstract

The paper explores the responsibility of lawyers towards their profession regardless of any profitable purpose. Although the phrase 'Professional ethics' itself might bring a smile to the face of some, the issue is extremely important. Growing chaos and disrespect for laws in the recent years can be blamed, in part, to ethical failures on part of Advocates involved. The paper reviews the code of ethics in order to ascertain that why the nobility, greatness and honour of the legal profession are declining fast in recent days and advocates are converting legal profession into a trade or business. Advocacy being a noble profession is looked upon with honour and prestige and it is due to code of its ethics governing the relation of lawyers with rest of the society. Only due to this code of conduct, legal profession is treated to be the guardian and vindicator of Justice delivery system and liberty of people. The paper analysis the standard- intellectual and ethical, for the Bar and better services to the society thereby providing the expanding horizons of professional misconduct vis-a-vis contempt of Court.

Key Words: Misconduct, Contempt of Court, Advocate

I. Introduction

Legal profession by the common consent of generations the world over for several centuries is regarded as an honourable

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profession. The Advocates owe a dual duty, firstly to the Court, i.e., the Justice delivery system and secondly, to the society at large. Public reposes great confidence in the judicial system of the country of which lawyers are an indispensable part.[1] The honour and prestige accorded to the legal profession is due to the code of its ethics governing the relation of lawyers with the rest of the society. Without code of ethics, legal profession is simply a trade or business to earn livelihood and acquire wealth. Legal profession is a learned profession but it is learned only till Advocates maintain the quality of their service.

The profession of Advocates besides being controlled by the statutory provisions of the Advocates Act, 1961 and the Bar Council of India Act, and the rules framed there under is also expected to maintain certain high values and standards of professionalism. [2]

This paper seeks to explore the emerging trend and expanding arena of the legal profession which strictly aims at encompassing advocacy as an institution of public good rather than just a vocation for private gain. In legal profession money should not follow the work; rather work should follow money. Legal profession prohibits certain kinds of conduct on the ground that though they may be profitable to the individual, they are calculated to bring into disrepute the legal profession.[3]

'Professional misconduct' as a topic is extremely wide in nature. The author, therefore, aims at honesty and integrity being the touchstone of all professional ethics. The advocates are the guardians in modern society and civilization of order, justice and liberty. The advocates share with the judges the responsibility of maintaining order in the community. But while discharging duties as a representative of a party, it is always treated as an officer of

[1]C.P.Singh Chauhan v. State of U.P & Anr. 2012 AIR (SCW) 1219.
[2]Ibid.
[3]Sanjiva Row, The Advocates Act, 154, 7th ed., (2005).

Court, owes a duty to the system to act with utmost dignity, respect and morality.

The paper tries to review the expanding horizons of professional misconduct of Advocates vis-a-vis contempt of court and to introduce you not only to the rules of lawyers ethics but also, more importantly, to the principles behind the regulations. This is crucial because cases that can be dealt with under the rules are easy; hard cases are those in which it is not clear whether a rule applies or which of the two rules apply. In these cases, it is necessary to know the principle behind the rules to access the best way forward.

Further, the author tries to explain the ethical issues and criticism of the current approach of the Advocates.

II. Professional Misconduct- A definitional conundrum

Advocates are seen as professionals. That is an important aspect of how they understand themselves and how they are viewed in society.[4] Legal profession is different from other types of jobs, in the sense that it requires advocacy skills and these skills will be improved with experience. The precise definition of the term 'profession' is a matter of quite debate. It seems that the notion of a profession involves a complex social, political and economic process.[5] In 2012, a government report suggested that there were some 13 million professionals in U.K, amounting to 42 percent of total employment.[6]

[4]J. Evetts, "Professionalism: Value and Ideology" (2013)61 Current Sociology 778.
[5]D.Nicolson and J.Webb,"Public rules and private values: Fractured Profession (alism) s and institutional ethics" (2005)12 International Journal of the Legal Profession 165.
[6]H.M.Government, Fair Access to Professional careers: A Progress Report (HM Government, 2012), 2.

John Leubsdorf promotes three models of professionalism, as follows[7]:-

1. *Professionalism as helping the market*: Professionalism enables clients to be informed about the services on offer, and ensures that there is a reasonable quality of service that is reasonably priced.
2. *Professionalism as promoting public utility*: This model sees professional services as being a matter of public good, and argues that we need professional regulation to ensure the efficiency and quality of these services.
3. *Professionalism as protection*: This model recognizes the dangers that exist in a relationship between a lawyer and a client, which can work against the interest of a client. Professionalism provides a means of ensuring that there is an intervention to protect clients.

'Misconduct' according to Oxford Dictionary means a wrongful, improper or unlawful conducts motivated by premeditated act. It is a behaviour not conforming to prevailing standards or law, or dishonest or bad management, especially by persons entrusted or engaged to act on another's behalf. The expression "Professional Misconduct" in the simple sense means improper conduct.

The term 'Misconduct' has been defined in Blacks Dictionary as a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behaviour, wilful in character, improper or wrong behaviour. Its synonyms are misdemeanour, impropriety, mismanagement, offence but not negligence or carelessness. Both in law and in ordinary speech, the term misconduct usually implies an act done wilfully with a wrong intention. When this definition is applied to professional

[7]J.Leubsdorf, 'Three models of professional reform (1981)67 Cornell Law Review 1021.

people, it includes unprofessional acts even though such acts are not inherently wrongful.[8] At common law 'Professional Misconduct' is defined in a circular and self-regulatory way as 'something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. *Darling, J.* defined the expression 'Professional Misconduct' in re A Solicitor ex-parte the law society, in the following words

"if it is shown that an advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to say that he is guilty of professional misconduct."

This definition of professional misconduct adopted by *Darling, J.* was approved by the Privy Council in George Friergrahama v. Attorney-General, Fiji.[9]

In *Bar Council of Maharashtra v. M.V. Dabhollcar*[10], Justice Iyer observed that the vital role of a lawyer depends upon his probity and professional life – style. The central function of the legal profession is to promote the administration of justice. The nation statutorily grants monopoly to the legal profession. This necessitates that the lawyers scrupulously observe such norms that make him worthy of the confidence of the community at large. Legal profession is monopolistic in character, and the monopoly itself incurs certain high translation which their members is expected to upkeep and uphold. As misconduct has not been defined, it's important in common parlance would guide its meaning. The term has to be examined with the lens of

[8]Henry Campbell Black, (Ed.), Black law Dictionary, 999,6th ed. (1990).
[9]AIR 1936 PC 224.
[10]AIR 1976 SC 242.

propriety, decency and the fitness of the person to be on the role of an advocate[11].

In the case *State of Punjab v. Ram Singh*[12], the Supreme Court has explained the term "misconduct" in connection with the misconduct of a personal in the Police Department but may be applied in determining whether or not a conduct amounts to misconduct. The Supreme Court has observed that the term 'misconduct' may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, wilful in character forbidden act, a transgression of established and definite rule of action code of conduct, but not mere error of judgment, carelessness or negligence in performance of duty; the act complained of bears forbidden quality or character. The Court has made it clear that its ambit has to be construed with reference to the subject – matter and the context wherein the terms occurs regard being had to the scope of the statute and the public it seeks to serve.

In other case *Tulsidass Amanmal Karim*[13], it has been observed by the Court that to treat a conduct as misconduct, it is necessary that it should involve moral turpitude. It further added that it is in narrow moral turpitude. Any conduct which in any way renders a person unfit for the exercise of his profession or is likely to tamper or embarrass the administration of justice may be taken as misconduct.

Hence, from the above cases *State of Punjab v. Ram Singh* and *Tulsidass Amanmal Karim*, it is clear that tem "misconduct" includes moral turpitude, which means that an advocate involved in such an act is quality of professional misconduct. From section 24-A[14], it is clear that a person cannot be admitted as an Advocate

[11]U.Dakshinamoorthy V Commission of Enquiry, A.I.R 1980 Mad. 89.
[12]AIR 1992 SC 2188.
[13]AIR 1941 Bom. 228.
[14]The Advocates Act, 1961.

on a State role if he is convicted of an offence involving moral turpitude. Thus, a person who is convicted of an offence involving moral turpitude is disqualified from being admitted as an advocate on the Stat role of advocate. This means that the conduct involving conviction of an offence involving moral turpitude which will disqualify a person from being enrolled as an advocate has to be considered a serious misconduct and when found to have been committed by a person who is enrolled as an advocate, it would call for the imposition of the punishment of removal of the name of the advocate from the role of Advocates[15]. Thus, any act which is a disqualification for being enrolled as an advocate cannot become justified if committed after being enrolled as advocate. Any person who is to or who has been enrolled as advocate should be a person of high moral values and if has been found involved in moral turpitude will not be worthy of this highly integrated profession. In the words of *Cardazo* 'a lawyers' life is not of cloistered ease to which you dedicate your powers. This is a life that touches your fellow men, of every angle of their being, a life that you must live in the crowd, and yet apart from it, man of the world and philosopher by turns.[16]

In *Shambhu Ram Yadavv. Hanuman DassKhatry*[17], it was held that credibility and reputation of legal profession depends upon the manner in which advocates conduct themselves.

In *NoratanmalChaurasia v. M.R Murlia*[18], the Supreme Court has held that misconduct has not been defined in the Advocate Act, 1961. Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay-down exhaustively as to what would constitute misconduct and indiscipline which however, is wide enough to include wrong omission or

[15]HimkatAlikhan v Ishwar Prasad Aryan, AIR 1997 SC 864.
[16] Supra note 1 at 15.
[17]AIR 2001 SC 2509.
[18] AIR 2004 SC 2894.

commission, whether done or omitted to be done intentionally or unintentionally. It means improper behaviour, intentional wrong doing or deliberate violation of a rule of standard of behaviour. Misconduct is said to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law. A member of legal profession which is a noble one is expected to maintain a standard in dignified and determined manner. The standard to be maintained by the member of the legal profession must be commensurate with nobility thereof. A lawyer is obligated to observe those norms which make him worthy of the confidence of the community and as an officer of the Court. Although the power of the Bar Council is limited, the thrust of charge must be such which would necessitate initiation of disciplinary proceeding or other misconduct committed by a member of the profession should ordinarily be judged qua profession. To determine the quantum of punishment which may be imposed on advocate, the test of proportionality shall be applied which should also depend upon the nature of the act complained of no universal rule, thus, can be laid down as regard initiation of a proceeding for misconduct of a member of the profession.

In R.D *Saxena v. Balram Prasad*[19], Professional misconduct may consist in betraying the confidence of a client in attempting by means to practice a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal professions or to alienate the favourable opinion which the public should entertain concerning it.

In *D.P Chandha v Trijugi Narian*[20], the term "misconduct has not been defined in the Act. However, it is an expression with a sufficient wide meaning. In view of the prime position which

[19](2000) 7 SCC 264.
[20] (2001)2SCC221.

the advocate occupies in the process of administration of Justice and justice delivery system, the Court justifiably expect from the lawyers a high standard of professional and moral obligation in the discharge of their duties. Any act or omission on the part of a lawyer which interrupts or misdirects the sacred flow of justice or which renders a professional unworthy of right to exercise the privilege of the profession would amount to misconduct attracting the wrath of disciplinary jurisdiction.

The term 'misconduct' may be taken to mean infamous conduct[21]. An advocate invites disciplinary order not only if he is quality of professional misconduct, but also if he is quality of other misconduct and this other misconduct which may be directly concerned with his professional activity as such, may nevertheless be of such a dishonourable or infamous character as to invites the punishment due to professional misconduct itself[22]. The Indian legislature by using the words "Professional or other misconduct" intended to confer on the disciplinary committee disciplinary jurisdiction in all cases of misconduct whether in a professional or other capacity leaving it to the discretion of the disciplinary committee to take action only in suitable cases.

Not every misconduct falls within the mischief of the Penal code. Professional misconduct is of infinite variety and it is of utmost importance in the administration of justice that proved professional lapses which shake the confidence of the litigants and which should be punished[23]. Only if the conduct of an advocate is such as it makes him unworthy to remain a member of the honourable legal profession and to be entrusted with the responsible duties than an advocate called upon to perform, he

[21]P.D Khandelkar v. Bar Council of Maharashtra, A.I.R 1957 SC 149.
[22]In the matter of Mr "P" an advocate, AIR 1963 SC 1313.
[23] Supra note 11 at 8.

will be held guilty of misconduct and may be punished therefore. In this case[24] following two tests have been laid down:-

(a) The misconduct is such that he must be regarded as unworthy to remain a member of the honorable profession; and

(b) The misconduct is such that he must be regarded as unfit to be entrusted with the responsible duties that an advocate is called upon to perform.

These two tests have been interpreted as disjunction in *Mana Mohamed Ismail v.Balarathnam*[25]and therefore the fulfilment of anyone of the said condition would be sufficient to treat the conduct as misconduct.

III. Professional Misconduct: Legislative Framework

The Advocates Act, 1961 is a comprehensive legislation that regulates the legal practice and legal education in India. It envisages for the establishment of Bar Council Of India and State Bar Councils with various disciplinary committees to deal with misconduct of the Advocates. Chapter V containing sections 35 to 44 deals with the conduct of Advocates. It provides for punishment of Advocates for professional and other misconduct and disciplinary powers of the Bar Council of India.

Section 49 of the Advocates Act, 1961empowers the Bar Council of India to frame rules relating to standards of professional conduct. The rules laid down by the Bar Council of India forms the code of conduct for Advocates and in broad sense any violation of such rules or code of conduct can be termed as professional misconduct.

[24]In the matter of an advocate, AIR 1934 Rang 33.
[25]AIR 1963 SC 1313.

IV. Contempt of Court as Professional Misconduct: Emerging trends

Part of what gives Advocates their particular social status is the ethical code that binds them. Professional ethics can be seen as a building block in power. That is not immediately apparent-indeed, they might be thought of an inhibition of power-but a code of ethics helps to make lawyers distinct and therefore protects them from threats to their monopoly. It is possible, therefore, to view ethical regulations in a cynical light. Many Advocates would claim that ethical codes are there to protect clients from the few 'rotten apples'. Practising Advocates are more likely to see ethical codes as an inconvenience, rather than as way of drumming up business.

In the case of B.M. Verma v. Uttrakhand Regulatory Commission[26] Court noted that, it was given the wide powers while exercising contempt jurisdiction. In the case of Court of its own motion v. State[27]dealing with contempt proceedings involving two senior advocates observed that 'given the wide powers available with Court exercising contempt jurisdiction, it cannot afford to be hypersensitive and therefore, a trivial misdemeanour would not warrant contempt action.

But the court gave a wide connotation in the most controversial and leading case of R.K. Anand v. Registrar of Delhi High Court[28], whereon 30th May, 2007, a T.V news channel NDTV carried a report relating to a sting operation. The report concerned itself with the role of a defence lawyer and the special public prosecutor in an ongoing session's trial in what is commonly called the BMW Case. On 31st May,2007, a Division Bench of this court, on its own motion, registered a writ petition and issued a direction to the Registrar General to collect all materials that may

[26]Appeal No.156 of 2007.
[27]2008 DLT 695 (Del.,D.B).
[28]2009(8) SCC 106.

be available in respect of the telecast and also directed NDTV to preserve the original material including the CD/Video pertaining to the sting operation. The question for our consideration is whether Mr. R.K. Anand and Mr. I.U. Khan, Senior Advocates and Mr. Sri Bhagwan Sharma Advocate have committed criminal contempt of Court or not. It was observed that prima facie their acts and conduct were intended to subvert the administration of Justice in the pending BMW Case and in particular to influence the outcome of the pending judicial proceedings. The court said that the Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and Justice. The machinery for dispensation of Justice according to law is operated by the Court. Proceedings inside the Court are always expected to be held in orderly and dignified manner. The very sight of an Advocate, who was found guilty of the contempt of Court on the previous hour, standing in a Court and arguing a case or cross-examining a witness on the same day, unaffected by the contemptuous behaviour he hurdled at the Court, would erode the dignity of the Court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the Courts. This necessitates vesting of power with the High Court to formulate rules for regulating the proceedings inside the Court including the conduct of Advocates during such proceedings. That power should not be confused with the right to practise law. Thus Court held that there may be ways in which conduct and actions of an advocate may pose a real and imminent threat to the purity of Court proceedings. In such a situation the Court doesn't only have the right but also the obligation to protect itself. In the present case since the contents of the sting recordings were admitted and there was no need for the proof of integrity and correctness of the electronic materials. Finally the Supreme Court upheld High Court's verdict making Anand guilty on the same count.

The same principle has been reiterated by the Supreme Court in Bar Council of India v. High Court of Kerala.[29]

In Re Ajay Kumar Pandey[30] the Supreme Court gave a wide interpretation of the concept of Contempt of Court, as professional ethics focus mostly on acts, rather than character and held that an Advocate has no wider protection than a layman when he commits an act which amounts to contempt of Court. The Court further held legal profession has inherent right of expression under Article 19 of the Constitution of India and under the Advocates Act, but this right also carries with it the duty to be dignified in the use of expression and to maintain decorum and peace in the Court proceedings.

In S.C. Bar Association v. Union of India and Another[31], the Court held that the power of contempt of Court is not to be exercised to protect the dignity of Judges but for protecting Administration of Justice from being maligned. In the general interest of the community it is imperative that the authority of Courts should not be imperilled and there should be no unjustifiable interference in the administration of Justice.

In Re Rameshwar Prasad Goyal, Advocate (SC)[32], the Supreme Court explained the role of lawyers in administration of justice. As an officer of the Court the overriding duty of a lawyer is to the Court, the standards of his profession and to the public. Since the main job of a lawyer is to assist the Court in dispensing Justice, the members of the Bar cannot behave with doubtful scruples or strive to thrive on litigation. Lawyers must remember that they are equal partners with judges in the administration of Justice. If lawyers do not perform their function properly, it would

[29]2004(6) SCC 311:2005(1) Cri.CC 225: 2005(1) Apex Court Judgments (SC) 34.
[30]1999(1) CLJ (Criminal) 134: 1999(1) Apex Court Journal 264.See also State V. L. Amarnath Bagotra, Mirpur (Jammu and Kashmir) (F.B), 2010 (7) J.K.J.746.
[31]1998 (4) SCC 409. See also Bal Thackrey v. Harish Pimpalkhute, (SC): 2005(1) R.C.R. (Criminal) 288.
[32]2014(1) SCC (Cri.) 481. See also 1995(2) RCR (Cri.) 355.

be destructive of democracy and the rule of law. The Court further held that "Law is no trade, briefs no merchandise". An Advocate being an officer of the Court has a duty to ensure smooth functioning of the Court.

In Chandra Prakash Singh Chauhan v. State of U.P & Another[33],the Supreme Court held that being an officer of the Court the Advocate owes a dual duty, firstly to the Court, i.e., the justice delivery system and secondly, to the society at large. Public reposes great confidence in the judicial system of the country, of which lawyers are an indispensable part.

In Dhanraj Singh Choudhary v. Nathulal Vishwakarma[34], the Court held that person practising law has to practise in spirit of honesty and not in spirit of mischief-making or money-getting. An Advocates attitude towards and dealings with his client have to be scrupulously honest and fair. Any compromise with laws nobility as a profession is bound to affect faith of people in rule of law and, therefore, unprofessional conduct by an Advocate has to be viewed seriously. Advocate has an obligation to maintain probity and high standard of professional ethics and morality.

V. Conclusion

Professional ethics should never be concerned with the morality of Advocates; rather it should be concerned only with the morality of the acts Advocates do.[35] The notion of 'rule of law' is covered in detail in books of Constitutional law. We will not go into the concept now, but it should be clear that access to well-qualified Advocates plays a crucial role in achieving the rule of law. The law cannot be accessible to all or understood by all unless there are Advocates to advice people and to bring proceedings on their behalf. Advocates do therefore play a central

[33]2012(1) Recent Apex Judgments (R.A.J) 539.
[34](2012) 1 SCC 741.
[35]A.Woolley, 'Philosophical legal ethics:Ethics, morals and Jurisprudence-Introduction: The legitimate concerns of legal ethics' (2010) 13 Legal Ethics 168.

role in society.[36] Part of what gives Advocates their particular social status is the ethical codes that bind them. 'Professional misconduct' and 'Contempt of Court' are two interrelated concepts which go hand in hand while dealing with the code of conduct of Advocates. Present society cannot be termed as an 'ideal world'. In an ideal world, no one would ever wrong anyone else. There would be no disputes or, if there were any, they would be quickly resolved over a mug of hot chocolate. Sadly, we do not live in an ideal world. People do behave wrongly and harm others. Society needs a way of righting these wrongs. We need to ensure that those who have lost out as a result of the wrong behaviour of others are compensated, and that those who have behaved very badly are held to account for what they have done, and if necessary, are punished. This is what litigation is all about. As Neil Andrew has put it, litigation is about making 'order out of chaos.' The litigators/Advocates owe duty to the Court- duty of disclosure, duty not to abuse the process, duty not to corrupt the administration of Justice, duty to conduct cases efficiently and expeditiously. However, it is agreed that the duty that an Advocate owes to the court is broader than the provisions of the Advocates Act, 1961 and the Code of conduct of Advocates provided therein. Duty towards court means duty towards the Justice system as a whole and any lawyer who overlooks this duty is guilty of contempt of court and his act amounts to professional misconduct. Secondly, anAdvocate owes a duty towards his client which in the present context doesn't mean that the Advocate must follow the client's instructions but it lays emphasis on promoting good, caring relationships. This means that Advocates should be trying to understand their obligations within their emotional and relational contexts and uphold moral standards required by an officer of the Court. An Advocate, as an officer of the Court also

[36]A.Demack, 'Public Interest or common good of the community? Bringing order to a dog's breakfast' (2003) 6 Legal Ethics 23.

has a responsibility to render services of sound quality to his client.

If Courts and the justice system are seen to lack an ethical foundation, society-that is, PEOPLE- will lose respect for the laws. A degree of respect for Advocates and the legal system is crucial for a well-functioning society.

Furthermore, the bar and bench form a noble and dynamic partnership geared to the great social goal of administration of Justice, and the mutual respect of the Bar and the Bench is essential for maintaining cordial relations between the two. It is the duty of an Advocate to uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute, and ensure that at no point of time, he oversteps the limits of propriety.

Eagle Eye on the New Age of Corporate Governance: A Critical Analysis

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Abstract

With the surfacing of several scams and frauds in the recent past, issues relating to Corporate Governance have gained a considerable importance in business world. The weak laws and policies on corporate law in India are only responsible for governance failure. In India, since 1990s, the regulators, policy makers and lawyers continuously and effortlessly have been working for the better corporate governance. And as result, the Companies Act, 2013 and Securities Law (Amendment) Act, 2014 have reframed several weak corporate governance norms. But it is interesting to watch, how much these new laws and policies guideline help corporate world to grow. The present research work in dealt with corporate governance divided into three parts, first part; discuss about the recent development in corporate governance particularly after the Companies Act, 2013. Second part; explain about SEBI amendment norms on corporate governance and final part of the paper discuss about the quasi-judicial and regulatory bodies framed to stop fraud and scams.

Key Words: Corporate Governance, Fraud, Business ethics, Whistleblower

I. Introduction

Nowadays Governance has become a key word which was rarely used by corporates few decades back. It has been experienced that number of organizations ranging from companies to universities, local authority and charity follow governance to run their organizations with particular emphasis on its accountability, integrity and risk management. Basically, corporate governance involves a set of relationships between a company's management, its shareholders, its creditors and other

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stakeholders. There were countless reasons which were accountable for underlining the importance of corporate governance. The surge of financial crisis in 1998 in Russia, some parts of Asia, and Brazil affected seriously the world economies and thereby destabilized the global financial system. Besides, the growing corporate scandals in United States of America and European countries were surfaced due to bad corporate governance practiced by corporates. In India, corporate governance has gained a lot of importance after the Satyam corporate fraud and other frauds of similar kinds. To cut down the cases of fraud, malpractices in companies and financial instability, both policy makers and business managers emphasized the importance of improved standards of corporate governance. Further, the advent and rapid pace of liberalization and globalization obligates companies to adopt effective strategy to implement improved standards of corporate governance to run their business concerns.

At international level, Organization OECD and World Bank continuously worked upon better corporate governance and adopted a set of principles to strengthen corporation. Similarly, in India there were several reforms taken through the Securities and Exchange Board of India (SEBI) and the Ministry of Corporate Affairs, Government of India (MCA) to improve the corporate governance norms among the corporations. The Companies Act, 2013 is one of the steps to improve corporate governance in India. In this paper we will focus on the new development and emergence of new Companies Act, 2013 and good practices incorporated in the Act.

II. Need of Corporate Governance

Good corporate governance is utmost crucial for the emerging countries to achieve economic goals. The need for a good corporate governance image enhances the reputation of the organization and makes it more attractive to customers, investors

and suppliers. Through good corporate governance the company can produce a number of benefits to the organization, such as, the first is the increased access to external financing by firms. This in turn can lead to larger investment, higher growth, and greater employment creation. Secondly, lowering of the cost of capital and associated higher firm valuation. This makes more investments attractive to investors, also leading to growth and more employment. Thirdly, better operational performance through better allocation of resources and better management. This creates wealth more generally. Fourthly, good corporate governance can be associated with a reduced risk of financial crises. This is particularly important, as financial crises can have large economic and social costs. Lastly, good corporate governance can mean generally better relationships with all stakeholders. This helps improve social and labor relationships and aspects such as environmental protection.[1]

III. Statutory Provisions to Corporate Governance

i. Companies Act, 2013

It has been seen that before Companies Act, 2013, corporate governance was mainly being followed by the Clause 49 of the Listing Agreement of the SEBI. But the Introduction of Companies Act, 2013 bring new provisions and regulations in corporate sectors. This Act deals with 470 sections spread over 29 chapters and 7 schedules, which replaced the old Act of 1956. The basic objective of the Act is to promote self-regulation and introduces novel concepts including one-person company, small company and dormant company. [2] It also promotes investor protection and transparency by including concepts of insider trading, class action suits, creation of a National Financial

1. Available at http://www.adfiap.org/ceoforumviii/wp-content/uploads/2011/09/ Good-Governance-word-version-Devt-Bank-of-Turkey.docx accessed on November 15, 2016 at 4:10 PM.
2. Geetika Vijay (2014), "Corporate Governance under the Companies Act 2013: A More Responsive System of Governance", Volume: 4 | Issue: 4 | Apr 2014 | ISSN - 2249-555X.

Reporting Authority and establishment of Serious Fraud Investigation Office for investigation of serious fraud. Further, a mammoth section 2 containing 94 definitions has been added for better clarity.

In October23, 2008, Companies Bill, 2008 was introduced in the Lok Sabha to replace existing Companies Act, 1956. In 2009, Companies Bill was reintroduced on August3, 2009 in the Lok Sabha. Here the Bill was referred to the Standing Committee on Finance of the Parliament for examination and submission of report. In 2010, report of the Standing Committee of Finance on Companies Bill, 2009 was introduced in the Lok Sabha on August 31, 2010. In 2011, Companies Bill 2011 introduced in the Lok Sabha on December14, 2011 and finally in 2012the Companies Bill, 2012 was introduced and got its assent in the Lok Sabha on December18, 2012. Further, the Rajya Sabha passed Companies Bill, 2012 on August 8, 2013. After having received the assent of the President of India on August29, 2013, it has now become the much-awaited Companies Act, 2013.[3]

ii. Comparative Analysis of Companies Act, 1956 & Companies Act, 2013

Composition: The Companies Act, 1956 contains 13 parts having 658 sections and 15 schedules, whereas Companies Act, 2013contains 29 chapters having 470 sections and 7 schedules.

New Definition: The Act of 1956 deals with very few definitions whereas, the Companies Act, 2013 deals with new definitions and also existing definition in broader sense on accounting standards, auditing standards, financial statement, independent director, interested director, key managerial personnel, voting right etc.[4]

One Person Company: In the Act of 1956, there was no provision one man company. It only dealt with private and public

3.http://eduvisors.com/dwnld_assets/PDF/Ideas_Insights_by_Eduvisors_CSR_in_Education_and_Impact_of_New_Companies_Bill2.pdfaccessed on November 15, 2016 at 11:40 PM.

4. See Section 2(60) of the Companies Act, 2013.

companies. While Companies Act, 2013 introduced a new class of company called 'One Person Company' (OPC), by which individual can carry business with limited liability[5] along with private companies and public companies.

Prohibition on issue of shares at discount: The 1956 Act was dealing with power to issue share at discount, whereas under the Act of 2013 the companies cannot issue shares at discount except sweat equity shares subject to fulfillment of certain conditions as given under section 54 of the Act.[6] The rights, limitations and restrictions and provisions as are for the time being applicable to the equity shares shall be applicable to sweat equity shares issued under discount and the holder of such shares shall rank *paripassu* with other equity shareholders.[7]

Prohibition on acceptance of deposits from public: The earlier Act stated that without advertisement deposits would not be invited,[8] the current Act totally prohibits the acceptance of deposits from public.[9]

Corporate Social Responsibility (CSR): Earlier Act did not talk about CSR, whereas the new Act of 2013, deals with CSR. The Act established Corporate Social Responsibility (CSR) under section 135. Through this provision company who are making huge profits has to spend on CSR related activities. Companies net worth of Rs 500 crore or total turnover of Rs. 1000 crore or net profit of Rs 5 crore, shall ensure that these company spends at least 2 percentage of the average net profits during every financial year.[10]For that purpose, such companies shall have to constitute a Corporate Social Responsibility Committee comprising of three or more directors, out of which shall be an independent

5. See Section 2(62) of the Companies Act, 2013.
6. See Section 53 of the Companies Act, 2013.
7. See section 54(2) of the Companies Act, 2013.
8. See Section 58A of the Companies Act, 1956.
9. See Section 73 of the Companies Act, 2013.
10. See Section 135 of the Companies Act, 2013.

director.[11]Such Corporate Social Responsibility Committee shall formulate and recommend to the Board of Directors a Corporate Social Responsibility policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII.[12]

Serious Fraud Investigation Office (SFIO): There was no concept and provision of Serious Fraud Investigation Office on earlier Act, whereas the present Act, as per the Central Government by notification establishes an office to investigate the serious frauds relating to a company[13]. This Act under section 212, has given more power to SFIO to Investigate frauds in corporate sectors. It has the power to arrest in respect of certain offences and take action by penalty for frauds.

Maximum number of members for private companies: According to earlier Act the maximum number of members in private companies was 50. But according to the new Act of 2013 the members' strength has exceeded to 200.

Maximum number of directors: As per the old Act of 1956, the limit is 12. More can be appointed by the approval of central government. However, section 166 of the Act of 2013 provides that a company may have a maximum 15 directors on the board.[14] However, on the requirement of more directors, the company need special

11. See Section 149(6) of the Companies Act, 2013.
12. Such activities relate to-
    (i) eradicating extreme hunger and poverty;
    (ii) promotion of education;
    (iii) promoting gender equality and empowering women;
    (iv) reducing child mortality and improving maternal health;
    (v) combating human immuno-deficiency virus, acquired immuno- deficiency syndrome, malaria and other diseases;
    (vi) ensuring environmental sustainability;
    (vii) employing enhancing vocational skills;
    (viii) social business projects;
    (ix) contribution to the Prime Minister' National Relief Fund or any other fund set up by the Central Government or the State Governments for the socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and
    (x) such other matters as may be prescribed.
13. See Section 211 of the Companies Act, 2013.
14. See Section 149(1)(b) of the Companies Act, 2013.

resolution and requires shareholders' approval. For the first time, the Act also defines the role and responsibility of Board of Directors and makes them accountable more and more with company's functions. Failure of these duties and responsibility will lead them to punish with fine.

Directorship & Women Director: According to the old Act, the maximum number of directorship of a director was 15. Whereas, under the new Act the maximum number of directorship of a director is 20 out of which 10 can be public companies.[15] Similarly, in the old Act no women director was mandatory earlier, whereas, now under the new Act at least one women director is compulsory in Board of directors of some class or classes of companies.[16]

Independent Director (IDs): The new Act, under section 149, introduced the concept of Independent Directors (IDs). It states that all listed companies must have at least one-third of the board as Independent Directors and the term of the IDs as five consecutive years. The Act also prescribes detailed qualifications for the appointment of an ID, such as independent director to be a person of integrity, relevant expertise and experience. About the duties of the IDs, the Act included professional conduct for IDs by prescribing facilitative roles, such as offering independent judgment on issues of strategy, performance and key appointments, and taking an objective view on performance evaluation of the board. This Act empowers the independence directors because of greater accountability and transparency in the company.

Special Courts: In the Act of 1956, no provision was there, whereas under the Act of 2013 the concept of Special Courts to deals with speedy results for offences has been introduced in new Act.[17]Section 436 of the 2013 Act provided for the offences triable by Special Courts. For that purpose and in relation to a person

15.See Section 165(1) of the Companies Act, 2013.
16.See proviso to Section 149(1) of the Companies Act, 2013.
17. See Section 435 of the Companies Act, 2013.

accused of, or suspected to the commission, of an offence under this section who has been forwarded to it, Special Courts may exercise the same powers which a magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to a person who has been forwarded to him under that section.[18]

IV. Institutional Framework of Corporate Governance

The SEBI was established by the Government of India in 1988 and given statutory powers in 1992 with the passing of SEBI Act, 1992. Indian Government on August25, 2014 notified the Securities Laws (Amendment) Act, 2014 (SLAA, 2014).The SEBI is managed by its members and situated at Mumbai. The main objective of the SEBI is to "*...to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto*"[19]. SEBI is known as quasi-legislative, quasi-judicial and quasi-executive body and worked as a multi-function body such as it conducts investigation and enforcement action in its executive function and it passes rulings and orders in its judicial capacity. Though this makes it very powerful, there is an appeal process to create accountability. There is a Securities Appellate Tribunal, which is a three-member tribunal.[20]

i. Securities Law (Amendments) Act, 2014:

The main objective behind the separate Securities Laws was felt by the government against the backdrop of lacs of small investors being duped by numerous fraudulent investment

18. See Section 436(1)(c) of the Companies Act, 2013.
19.See the Preamble of the Securities and Exchange Board of India, 1992.
20.Available at http://en.wikipedia.org/wiki/Securities_and_Exchange_Board_of_India#cite_note-6 accessed on November 18, 2016.

schemes across the country, like in the alleged Sahara scam and Saradha scam and other several scams of the same kinds.

a. New Powers of SEBI:

The Securities Laws (Amendment) Act, 2014 empowers the Securities Exchange Board of India (SEBI) to clamp down on illicit money-pooling schemes, arrest of defaulters, to access call data records and other frauds. It is a part of the government and regulators' efforts to tighten noose around fraudsters in the wake of several cases of illicit money-pooling activities that includes ponzi operators. It would also facilitate setting up of a special SEBI court to fast-track the investigation and prosecution process. It also grants approval for search and seizure operations in suspected cases of frauds. It has as many as 57 clauses to amend various sections of the SEBI Act and two other related legislations.[21]

ii. SEBI on Corporate Governance Norms:

After implementation of the Companies Act, 2013, SEBI has made amendments to Clause 35B and Clause 49 of the Listing Agreement, such as amendments relating to independent directors, related party transactions, disclosures etc.

Woman Director: SEBI amended Clause 49(II)(A)(1) which states that the appointment of woman director will be applicable w.e.f. April 1, 2015.[22]

Limit on number of directorships for independent directors: The revised Act of 2014 has expanded the disqualification criteria for independent directors, and thus, makes the definition more restrictive. Also, the definition specifically excludes a nominee director. Provisions are made relating to Restriction on the limit on number of directorship, *i.e.* ,maximum 7 listed companies. The company shall familiarize the independent directors with the

21 Available at http://www.jagranjosh.com/current-affairs/union-government-notified-securities-laws-amendment Act, 2014 accessed on November 18, 2016.

22. Available at http://www.ingovern.com/wp-content/uploads/2014/12/Governance-Watch-October-2014.pdf accessed on November 18, 2016.

company, their roles, rights, responsibilities in the company, nature of the industry in which the company operates, business model of the company, etc., through various programmes. The details of such familiarization programmes shall be disclosed on the company's website and a web link thereto shall also be given in the Annual Report.

Definition of related party & approval of related party transactions[23]*:* the current amendment stated that all related party transactions should require prior approval of the audit committee. All material related party transactions shall require approval of the shareholders through special resolution and the related parties shall abstain from voting on such resolutions.

Sale of a material subsidy: The revised Clause states that special resolution to dispose of shares in its materials subsidiary, which would reduce the shareholding to less than 50% or result in loss of control over the subsidiary. Further selling, disposing and leasing of assets amounting to more than 20% of the assets of material subsidiary shall also require prior approval of shareholders by way of special resolution.[24]

Whistle Blower Policy: The revised Clause 49 has formalized the whistle blower policy requirements and mandates that the company shall establish a vigil mechanism for directors and employees to report concerns about-

23.Related party transactions are any contract or arrangement with related party with respect to –

(a) sale, purchase or supply of any goods or material;
(b) selling or otherwise disposing of, or buying, property of any kind;
(c) leasing of property of any kind;
(d) availing or rendering of any services;
(e) appointment of any agent for purchase or sale of any goods, materials, services or property;
(f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
(g) underwriting the subscription of any securities or derivatives thereof, of the company. (Section 188 ofthe Companies Act, 2013).

24 Available at http://gtw3. Grant thornton.in/ assets/ Strengthening_ Corporate_Governance-Revised_Clause_49.pdf accessed on November 19, 2016.

- *Unethical behavior*
- *Actual or suspected fraud*
- *Violation of the company's code of conduct or ethics policy*

This mechanism should also provide for adequate safeguards against victimization of individuals who utilize such mechanism to report any concerns. The details of establishment of such mechanism shall be disclosed by the company on its website, and in the report of Board of Directors.[25]

V. Functioning of Regulatory Bodies

The Companies Act, 2013 has changed many existing provisions and introduced many new concepts for better governance. The basic idea behind these new concepts and provisions not only established for better governance but also to watch like an eagle to protect corporate frauds. The Act has given more power to old institutions and established few new institutions for better result. This section explains the entire new establishment and their impact on corporate governance.

i. National Company Law Tribunal (NCLT) & National Company Law Appellate Tribunal (NCLAT):Under the Companies Act, 2013, the provisions relating to the establishments of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) have been incorporated which shall replace the Company Law Board (CLB). The National Company Law Tribunal and the Appellate Tribunal shall consist of both judicial members and technical members.[26] However, the President is the head of the Tribunal, while the chairman is the head of Appellate Tribunal. According to Companies Act, 2013, to become a judicial member at NCLT, an individual is or should have been a High Court Judge or District Judge for at least five years or with a minimum of ten years'

25Available at http://gtw3.grantthornton.in/assets/Strengthening_Corporate_Governance-Revised_Clause_49.pdf accessed on November 19, 2016.

26. See sections 408 and 410 of the Companies Act, 2013.

experience as an advocate of a court. Similarly, to become a technical member, an individual is or should have at least 15 years of experience in chartered accounts or cost accounts or as a company secretary.[27] However, the process of formation of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) has been kept in abeyance on account of a legal challenge in the Supreme Court to certain provisions of the Companies Act, 2013 relating to the constitution and composition of these bodies. The detailed procedure for transfer of pending cases will be finalized by the NCLT after it is established.[28]

Possible Impact of NCLT & NCLAT: Nowadays, the tremendous growth and development in corporate sectors required a dispute settlement mechanism like NCLT and NCLAT. The objectives of this mechanism is to handle the settlement of dispute, and to help to reduce the pendency of winding-up cases, shortening the winding-up process, and avoiding multiplicity and levels of litigation before high courts, the Company Law Board and the Board for Industrial and Financial Reconstruction. This Tribunal will also cover merger and acquisition disputes and the dispute arising while converting Public Limited Company to Private Limited Company. There is plan to set up 15 NCLT benches all over India to speed up corporate dispute redressal. However, the final decision is yet to be taken. So it will not wrong if we say that it is a good decision taken by the government and policy makers to smother the governance system. However, we have to watch the further development regarding the setting up of the tribunal so that it could function.

ii. National Financial Reporting Authority (NFRA): A new regulatory authority known as National Financial Reporting

27. See sections 409 of the Companies Act, 2013.

28.Smt. Nirmala Sitharaman gave this information, MoS in the Ministry of Corporate Affairs in written reply to a question in the Lok Sabha on August 8, 2014. Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=108368 Accessed on November 18, 2016.

Authority (NFRA)[29]is introduced under the Companies Act, 2013 replacing of National Advisory Committee on Accounting Standards (NACAS). The basic objectives to establish this authority is to advice, enforce and monitor the compliance of accounting and auditing standards as well as to act as a regulatory body for accountancy profession. The NFRA, is a quasi-judicial body, which consist of a Chairman and such other prescribed members not exceeding 15.[30]The head office of the NFRA shall be at New Delhi and it may, meet at such places in India it deems fit. The NFRA consist of three committees such as; Accounting Standards Committee, Auditing Standards Committee and Enforcement Committee etc.

Possible impacts Corporate Governance: This is one of the crucial steps taken by government, as this national level body has to regulate standards of all types of reporting such as; financial as well as non-financial matters. This authority has the power to recommend to the Central Government on the formulation and lying down of accounting and auditing policies and standards for adoption by companies or their auditors. It also monitors and enforces the compliance with accounting standards etc. in best possible ways. Further, the Authority has also given the power to

29. See sections 132 of the Companies Act, 2013.

30. 1) A Chairperson who is an eminent person and has expertise in accounting, auditing, finance or law.
2) A maximum of 15 members comprising of
a) Member- Accounting,
b) Member- Auditing and
c) Member- Enforcement.
3) A representative of the Ministry of Corporate Affairs who is not below the rank of Joint Secretary or equivalent.
4) A representative of RBI, nominated by it and who is a member of RBI Board.
5) A representative of SEBI who is its Chairman or whole-time member and is nominated by SEBI.
6) A retired Chief Justice of a High Court or a person who had been a High Court Judge for not less than 5 years to be nominated by the central government.
7) President of the Institute of Chartered Accountants of India (ICAI).
The Chairperson and other members who are in full time employment of NFRA cannot be associated with any audit firm including related consultancy firms during the course of their employment and two years after the expiry of such appointment.

investigate *suo moto* or a reference made to it by the CG by bodies corporate or persons into the matter of professional or other misconduct committed CA and CS firms. By doing this, this will create fear among the firms and corporates to be honest and transparent in financial and non-financial matters, which will lead a good governance atmosphere inside the company.

iii. Investor and Education Protection Fund: The Companies Act, 2013 also provided for the establishment of the Investor Education and Protection Fund (IEPF) Authority[31]. And Investor Education and Protection Fund (established under section 125(1) of the Companies Act 2013) to educate and protect interest of investors, constituted and notified under section 125(5) of the Act and managed by the Authority.[32] The head office of the Authority shall be at New Delhi and may established offices at other places in India with the prior approval of Central Government. Corporate Affairs Ministry Secretary would be the ex-officio chairman of the authority. Besides, there would be nominees from Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) an eminent legal expert and three members having at least 15 years' experience in investor education and protection related activities. The CEO would be on the level of Senior Administrative Grade (SAG) in Indian Company Law Services or similar central government Service and shall be responsible for day-to-day operations and management of the authority.

Possible impacts on Corporate Governance: Now MCA has notified under rules that Investor Education and Protection Fund made mandatory for every company to file e-form 5INV containing the information of unclaimed and unpaid amounts. Through this new rule, shareholders and debenture holders will be able to know

31. See sections 125 of the Companies Act, 2013.

32. See Chapter I and Chapter II of the Investor Education and Protection Fund Authority Rules, 2013. Availablehttp://www.onepersoncompany.in/ uploads/ 6/9/1/2/6912590/final_iepf_authority_establishment_rules_24_10_2013-1.pdf accessed on 19 November 2016.

their unclaimed amount (including interest on them) every year from the website of their companies and also from the MCA IEPF website. As a result there would be clarity and transparency within the company to maintain account matters.

iv. Serious Fraud Investigation Office (SFIO): To investigate corporate frauds, the Ministry of Corporate Affairs under the government of India has established the Serious Fraud Investigation Office (SFIO) [33] . SFIO, a multi-disciplinary organization with a Director and experts from all backgrounds such as accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation. Generally, SFIO, take up investigation in such cases of fraud received from Department of Company Affairs. The Government has also granted statutory status to SFIO by incorporating its provisions under the Companies Act, 2013.

Possible impacts on Corporate Governance: According to MCA, in the last three years, 64 cases were referred to SFIO, out of which the SFIO completed 55 cases. Now, Ministry of Corporate Affairs developed a "Fraud Prediction Model" in SFIO for generating early warning signals for prediction of fraud and malfeasance in the corporate sector. The ministry also set up a High-powered Steering Committee with technical experts in various fields to design a comprehensive framework for a fraud prediction model. The Director of the SFIO, has got the power to arrest persons if he has reason to believe that such persons are guilty of certain offences, including fraud. The investigator of the SFIO, have now certain powers vested in a civil court under the Code of Civil Procedure with respect to discovery and production of books of accounts and other documents, the inspection of books, registers and other documents and the summoning of and enforcing of attendance of persons. Some of the major scandals investigated by SFIO are Satyam Scandal, Reebok and now Saradha Group scam, where SFIO proved its efficiency. So the recent fraud in Saradha group is also an example that shows the need and importance for

33. See sections 211 of the Companies Act, 2013.

effective investigation and prosecution of corporate fraud.[34]From the above points it is clear that SFIO has got its wing now to take certain steps to investigate corporate frauds independently, which is essential for good governance.

v. ***SEBI Special Court to fast-track:*** The new Securities Law Amendment Act, 2014 proposed to setting up of a special SEBI court to fast track to strict the investigation and prosecution process, including by granting approval for search and seizure operations in suspected cases of frauds. This step of setting up a designated court to hear SEBI cases, which will give the regulator for carrying out search and seizure operations, to crack down on fraudsters in the wake of several cases of illicit money-pooling activities, including by ponzi operators, across the country.[35]

VI. Conclusion

From the above study, it is clear that really the government has taken all the best initiatives by amending different provisions to provide good corporate laws to regulate corporates. The new Companies Act, 2013 introduced many significant changes in the provisions related to governance, e-management, compliance and enforcement, disclosure norms, auditors and mergers and acquisitions. Also, new concepts such as one-person company, small companies, dormant company, class action suits, registered valuers and corporate social responsibility have been included. In addition to that that the major initiatives taken to set up SEBI courts, SFIO more power, and the establishment of other regulatory bodies to monitor governance and stop corporate frauds. Now it's the time to wait and watch the positive and negative aspects of these new laws and guidelines on corporate governance.

34. Giving teeth to Serious Fraud Office. Available at http://www.thehindu.com/opinion/oped/giving-teeth-to-the-serious-fraud-office/article4807786.eceaccessed on 18 November 2014.
35. Available at http://freepressjournal.in/special-court-to-hear-sebi-matters-likely-soon/ accessed on 18 November 2014.

Empowerment of Women vis-a-vis Labour Welfare Legislations in India: A Socio-Legal Analysis

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Abstract

Over the years, efforts have been made to empower women socially, economically and politically. Female Labour has been important segment of workforce of India. The principle of gender equality is also enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles of State Policy. During the preceding century, Parliament of India has come up with a number of legislative measures providing various safeguards and empowering the female workforce so that they can live with dignity and peace. But the welfare schemes underlying these laws have proved to be extremely difficult and challenging in view of the limited resources of the country. Thus, there is a need to sensitize the whole society and increase the awareness levels towards securing the working women with rights and protection from being discriminated at the workplace. In the present paper, an attempt has been made to bring forth the concerns and challenges met by the working women in India and the initiatives taken to empower them in the light of various labour laws enacted from time to time.

Key Words: Equality, Gender, Work Participation Rate, Discrimination, United Nations, Unorganised.

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I. Introduction

Women play a crucial role in the socio-economic development of a country. But both in the industrially developed and less developed countries, women are with cumulative inequalities as a result of discriminatory socio-economic practices. The situation is much worse particularly in case of the rural women. Unfortunately, a major and often overlooked feature of third world agrarian systems, particularly in Asia and Africa is the crucial role played by women in agricultural production. According to a survey of women's situation in different parts of the world by the United Nations Centre for Economic and Social Information, women for the most part neither fully participate nor share equality in the benefits of economic and social progress and development. However, empowerment and equality are based on the gender sensitivity of society towards their problems. The intensification of women issues and rights movement all over the world is reflected in the form of various conventions passed by the United Nations. The legislative provisions for protection and welfare of women workers are largely inspired by the ILO Conventions. Similarly the idea of welfare state has prompted India to provide socio-economic protection to the working women through the passing of various labour welfare legislations such as Employees State Insurance Act, 1948, Factories Act, 1948, Maternity Benefit Act 1961, Equal Remuneration Act, 1976 and Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013. These laws have been in operation for over six decades now but still there are a number of loopholes present in these enactments. These bottlenecks ultimately slowed down the progress especially in the area of administration and enforcement of these legislations. Similarly the lack of organisation of women labour further results in the weak implementation of labour laws in our country.

Another notable fact is that as many as 94% of total female workers work in the informal sector in India but they have to face gender discrimination which is almost inexistent in formal sector.[1]As per census 2011, female workers constitute 25.51% of the total working population in India. At the all India Level, the percentage share of females as cultivators, agricultural labourers, workers in the household industries and other workers stood at 24.01%, 55.21%, 5.71%and 29.18% respectively. The percentage of female main workers to the total female population stood at 25.5%. Work participation of female workers in rural areas is higher which stood at 30.00% as compared to work participation rate of 15.40% in urban areas.[2] As far as the State of J&K is concerned female main and marginal workers comprise of 19.11%, cultivators as 42.55% and agricultural workers as 11.83%, workers in household industry as 7.21% and other workers as 38.42% respectively.[3]In the organised sector where these legislations apply, the statutory provisions are not strictly complied with.

Although the two legislations i.e, the Employees State Insurance Act and the Maternity Benefit Act are covering the same field of maternity benefit yet they are not uniform in contribution periods and actual benefits provided.[4]Likewise, even under Equal Remuneration Act instances are not lacking where women do not assert their rights due to fear of losing their jobs. Although this legislation is in right direction yet it does not go far. In many cases it has been found that the protective measures such as prohibition of working women at night or near dangerous machines and the facilities of washing, separate urinals and crèches are either not

[1]V.Tulsi Das & S.K.Gowsiya, Strategies for Empowerment of Women Labour in Informal Sector, Empowerment of Women in India: New Strategies by Nagaraju Battu Ed.2014, p. 323-345.
[2]Stastical profile of Women Labour, 2009-2011, Labour Bureau, Ministry of Labour & Employment, Government of India.
[3]Economic Survey, Government of J&K, 2012-2013.
[4] G.Q.Mir, Women Workers and the Law, Valley Book House, Srinagar, 1st Ed., 2001.

provided or are not adequately maintained. In recent times, the Mahatma Gandhi Rural Employment Guarantee Act (MGNREGA) seeks to provide at least one hundred days of guaranteed wage employment in a financial year to every household, priority has been given to women by reserving at least one-third of the jobs for women who have registered and requested for work under the Act. Thus there is a dire need to ensure protective discrimination in favour of women workers otherwise it would have an adverse impact on the scope or the avenues of their employment. Hence, it becomes imperative that a balanced and reasonable approach may be adopted in order to achieve the desired results. The present paper is an attempt in this direction.

II. Need for Women Empowerment

Over the years, the main objective of policies of Government of India with regard to female labour has been to remove the handicaps under which they work to strengthen their bargaining capacity, to augment their skills and to open better employment facilities for them. It is hoped that female labour in India will be well received in various academic circles. The status and significance of women have also been defined in *Surat-ul-Nisa* of "The Holy Quran" in detail. The verses of this particular *surah* lay down emphasis on the rights and empowerment of the women folk. Even though it is a characteristic feature of labour markets all over the world that certain jobs are performed only by men, while others are performed only by women, in most societies there still are other jobs which may be done both by men and women. This is virtually true of all agricultural jobs. In villages, it is customary that certain jobs are specified for men and other for women, while some others are either jointly undertaken, or interchangeable between men and women. But still, in agriculture, women in general take up only specific jobs, which the male workers usually avoid. However, there have been instances where women themselves have insisted on low wages in comparison to their

husbands to satisfy their ego and ensure peace at home.[5] It shows a tendency towards a system of job-segregation in the agriculture labour force. Such job segregation has several consequences. It creates a disparity in wage rates between the males and females, the reservation of high prestige and high wage jobs for men and low prestige and low wage jobs for women workers. It brings down the bargaining power of women workers and reduces them to the state of marginal, intermittent or reserve labour which is mostly unorganised. "By this discrimination within the market, it is implied that workers who are distinguished by some characteristic (such as sex, caste, status, etc.,) that does not affect their present capacity but are treated less favourably in a given employment than others who are of no greater capability but are not marked off by the characteristic."[6]

To quote Ester Boserup, "the division of labour according to sex is often explained as a natural result of psychological differences between men and women. But apart from the obvious case of child-bearing, there are extremely few convincing examples of sex division of labour being truly explicable in terms of natural differences between men and women. This is apparent when the sex pattern of work in different parts of the world is compared. In different human committees, quite different tasks are labelled as male and female tasks."[7] Clearly the Key to understanding these patterns is in the field of culture rather than in human physiology or anatomy.[8]

[5]Gender Equality of the Second Report of the Administrative Reforms Committee, Unlocking Human Capital, Entitlements and Governance – A Case Study, (July 2006).

[6] Henry Phelps Brown, The Pay Inequality, Oxford University Press, Walton Street, Oxford, 1977, P.145.

[7] Ester Boserup, 'The Traditional Division of Work between Sexes', a source of inequality- Women in the Labour market, Research series No.21, July to Aug. 1984, P. 1.

[8]*Ibid.*

In the current scenario, one can identify the following characteristics of women's work in India:

1. Volatility of employment - particularly export-oriented employment. In less than one generation, there had been massive shifts of women's labour into the paid workforce and then the subsequent ejection of older women and even younger counterparts into more fragile and insecure forms of employment. Women's livelihoods in rural areas had been affected by the agrarian crisis in most developing countries.

2. Changes in the nature of women's work - including an increase in informal work characterized by greater reliance on casual contracts and an increase in service work. There had been a substantial increase in self-employed low-end service work, especially in domestic and retail trade.

3. Increase in unpaid work -The impact of the decline in the public provision of many basic goods and services had meant a substantial increase in unpaid work.

4. Crisis of livelihoods in agriculture - The effect of trade liberalization had been accompanied by a decline in world agriculture prices. Agriculture constituted the main employer of women in the developing world and the basic source of income for most of the world's poor.

5. Massive increase in women's migration for work - What was new historically was the fact that women were moving alone. Cross-border migration had become a huge issue. While it had become a source of macroeconomic stability, it was also a source of exploitation. Internal migration had also increased. Migrant workers had few rights, and governments rarely thought about ensuring their protection.

III. International Perspective

i. International Labour Organisation (ILO)

International Labour Organisation (ILO), is a specialized agency of United Nations dedicated to improving labour conditions and living standards throughout the world. The ILO is a tripartite organisation, in which employers and workers have 25 per cent of seats of the Governing Body at the annual International Labour Conference while Governments have 50 per cent of allocated seats. The ILO also provides technical assistance in social policy and administration and in workforce training, compiles labour Statistics, conducts research on unemployment and under-employment, labour and industrial relations especially those concerning working women and helps to protect the rights of working class through its conventions. Perhaps, the most important conceptual advance in the international law of women's rights is the CEDAW[9], which provides that women be given equal rights to those of men on equal terms.

ii. India's Position vis-a-vis ILO

India is a member of ILO since 1919 i.e., from its inception. Even before India became free of British rule, it had ratified 14 conventions. Within 4 years of Independence 4 more conventions were ratified by which time ILO had passed 107 conventions. In 1954 Government of India appointed a committee to make recommendations on ratifying ILO conventions. Following recommendations, Government ratified 5 more conventions. Some of the fundamental conventions which India ratified so far is listed below:

(i) Forced Labour Convention,1930.(Ratified in 1954)

(ii) Equal Remuneration Convention,1951.(Ratified in 1958)

[9]Convention on the Elimination of all forms of Discrimination against women, adopted by General Assembly of UN on December 18, 1979.

(iii) Abolition of Forced Labour Convention, 1957.(Ratified in 2000)

(iv) Discrimination (Employment and Occupation) Convention, 1958. (Ratified in 1960)

However some important conventions concerning working women have always been side-lined by the different Governments in India from time to time such as,

(i) Underground Work (Women Convention), 1935.

(ii) Safety and Health in Agriculture Convention, 2001.

(iii) Occupational Safety and Health Convention, 1981.

(iv) Minimum Wage Convention, 1973.

(v) Working Environment (Air pollution, Noise and Vibration) Convention, 1977.

IV. Constitutional Safeguards for Working Women

The Constitution of India not only grants equality to women but also empowers the state to adopt measures of positive discrimination in favour of women for neutralizing the socio-economic, education and political disadvantages faced by them.The entries with regard to labour and its regulation in the 7th Schedule of the Constitution of India are given below:

Union List:

Entry No. 55: Regulation of labour and safety in mines & oil feeds.

Entry No. 61: Industrial disputes concerning union employees.

Entry No. 65: Union agencies and institutions for professional, technical or vocational training.

Concurrent List:

Entry No. 22: Trade unions; Industrial and labour disputes.

Entry No. 23: Social security and social insurance; employment and unemployment.

Entry No. 24: Welfare of labour including conditions of work, provident funds, employers liability, workmen's compensation, invalidity and old age person & maternity benefit.

The Preamble and Fundamental Rights, among others ensure equality before law and equal protection of law: prohibits discrimination against any citizen and guarantee equality of opportunity to all citizens in the matters of employment. The constitutional provisions pertaining to working women in this regard include:

(i) Equality before Law for Women (Article 14).

(ii) The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15).

(iii) The State to make any special provisions in favour of women and children (Article 15(3).

(iv) Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16).

(v) Right to life and personal liberty is not merely a right to protect one's body but the guarantee under this provision contemplates a larger scope especially to working women.

(vi) Right against exploitation and human trafficking (Article 23).

(vii) The state to direct its policy towards securing for men and women equally the right to adequate means of livelihood (Article 39(a).

(viii) Equal pay for equal work (Article 39(d).

(ix) The State to make provision for securing just and humane conditions of work and for maternity relief (Article 42).

(x) To promote harmony and the spirit of common brotherhood and to renounce practices derogatory to the dignity of women (Article 51(A)(e)).

V. Labour Welfare Legislations pertaining to Working women

To uphold the Constitutional mandate, the State has enacted various legislative measures intended to ensure equal rights, to counter social discrimination and various forms of violence and atrocities and to provide support services especially to working women. However, the National Commission for Enterprises in the Unorganised Sector (NCEUS) while analysing the effectiveness of the coverage of different labour laws found that "the actual coverage of the labour regulations in India is very small; the laws themselves apply only to a small proportion of workforce and they are actually implemented in the case of even smaller segments."[10]Although all laws are not gender specific, the provisions of law affecting women significantly have been reviewed periodically and amendments carried out to keep pace with the emerging requirements. Some Acts which have special provisions to safeguard women and their interests are:

(i) The Minimum Wages Act, 1936.

(ii) The Employees State Insurance Act, 1948.

(iii) The Plantation Labour Act, 1951.

(iv) The Maternity Benefit Act, 1961 (Amended in 1995).

[10]National Commission for Enterprises in the Unorganized Sector, The Challenge of Employment in India, An Informal Economy Perspective, Volume I, Main Report, 2009.

(v) Beedi and Cigar Workers (Conditions of Employment) Act, 1966.

(vi) Central Civil Service Rules of 1972.

(vii) The Contract Labour (Regulation and Abolition) Act, 1976.

(viii) The Equal Remuneration Act, 1976.

(ix) The Factories (Amendment) Act, 1986.

(x) Building and Other Constructions (Regulation of Employment and conditions of service) Act, 1996.

(xi) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

(xii) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (NGNREGA).

(xiii) Unorganized Workers Sector Social Security Act, 2008.

VI. Protective Provisions for Working Women under these Laws

Some of the important protective provisions for safeguarding the interests of working women are:

A. Safety measures

(i) Section 22(2) of the Factories Act, 1948 provides that no women shall be allowed to clean, lubricate or adjust any part of the prime mover or any of the transmission machinery in motion.

(ii) Similarly, Section 27 of the Factories Act, 1948 prohibits employment of women in any part of a factory for pressing cotton while it is in work.

B. Prohibition of Night Work

(i) Section 66(1)(b) of the Factories Act, 1948 states that no women shall be required or allowed to work in a factory except between the hours of 6 a.m to 7 p.m.

(ii) Section 25 of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 states that no women shall be required or allowed to work in any industrial premises except between 6 a.m to 7 p.m.

(iii) Section 46(1)(b) of the Mines Act, 1952 prohibits employment of women in any mine above ground except between the hours of 6 a.m and 7 p.m.

C. Prohibition of Sub-terrain Work

(i) Section 46(1)(b) of the Mines Act,1952 prohibits employment of women in any part of mine which is below ground.

D. Health measures

(i) Section 19 of the Factories Act, 1948, Rule 53 of the Contract Labour (Regulation and Abolition) Act, 1976, Section 20 of the Mines act,1952 and Section 9 of the Plantation Labour Act,1951 states to have separate latrines and urinals for working women.

E. Welfare measures

(i) Section 57 of the Contract Labour (Regulation and Abolition) Act, 1970, Section 42 of the Factories Act, 1948 and Section 43 of the Inter-State Migrant Workmen Act, 1979 clearly points out to have separate washing facilities for female workers.

(ii) Similarly, Section 48 of the Factories Act, 1948, Section 44 of the Inter-state Migrant Workmen (RECS) Act, 1979, Section 12 of the Plantation Labour Act, 1951 and

Section 35 of the Building and Other Constructions (Regulation of Employment and conditions of service) Act, 1996 elucidates to provide facility of Crèches for young ones of working women.

F. Provisions for Equal Pay for Equal work

(i) The Equal Remuneration Act of 1976 provides for equal pay for both men and women doing the same or similar work. It also forbids discrimination on the basis of sex at the time of recruitment and thereafter.

G. Maternity Benefit

(i) Section 4 of the Maternity Benefit Act, 1961 says that no employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery or miscarriage, nor shall any women work during this period. Every such women shall be entitled to and her employer shall be liable for the payment of maternity benefits at the rate of the average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day.

(ii) Similarly, Section 46 of the Employees State Insurance Act, 1948 states that for the entitlement to maternity benefit, the insured women should have contributed for not less than 70 days in the immediately preceding two consecutive contribution periods corresponding to the benefit period in which confinement occurs. The daily rate of benefit is double standard sickness benefit rate, i.e. full wages.

(iii) The Central Civil Service Rules of 1972 also provide maternity protection. However the scope of application

and quantum of relief differs vastly from other above mentioned legislations

(iv) Section 52 of the Mines Act, 1952 and Section 79 of the Factories Act, 1948 provides for the maternity leave for any number of days not exceeding 12 weeks.

(v) Similarly, Section 32 of the Plantation Labour Act, 1951 provides for the sickness and maternity benefits in case of the sickness being certified by a qualified medical practitioner.

H. Prohibition of Sexual Harassment at Workplace

(i) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 seeks to protect women from sexual harassment at workplaces in both organized and unorganized sectors working hours by creating a mechanism for redressal of complaints in the form of Local complaints Committee. Non-compliance with the provisions of Act shall be punishable with a fine of up to Rs. 50000/-

VII. Women's Work in India: Invisible and Unrecognized

In India, policies and programmes of government at different levels cover various dimensions and strategies of gender development. There are various labour welfare legislations in vogue which stress upon the socio-economic welfare of labourers in general and women workforce in particular. With the changing socio-economic scenario, women's productive roles have assumed new dimensions. Time and again, the Supreme Court has stressed upon their dignity, conducive working conditions at work places, protection of their health, better standard of living, and hygienic conditions, eradication of disparity in wages, insurance cover etc. to make their life meaningful. India has 481 million workers out of

which 149.89 million are women. The women workers in urban areas comprise 28.0 million of total population while as 121.8 million are in rural areas. Only 7% of India's labour force is in the organized sector while 93% is unorganized. To add up, 96% of women workers are in unorganized sector. However it is encouraging to see that Female work participation rate (WPR) has increased from 19.6% in 1981 to 25.6 % in 2001. But in 2011 census, it has registered a decline and stood at 25.5%.In rural areas female WPR has increased from 23.1 to 31% while as in urban areas it has increased from 11.88% to 15.4%.[11] The highest Labour Force Participation Rate (LFPR) in case of females is 305 persons out of 1000 persons under the CWS approach, followed by 300 persons out of 1000 persons under the UPSS approach. The lowest LFPR for females is seen under the CDS approach, where it is estimated at 252 persons out of 1000 persons.[12]ILO methodological studies indicate that measured female labour-force activity rates rose radically with a wider definition of "economic activity" to cover informal sector and non-market activities from 13% to 88% in India.

The unorganized sector is large in India, accounting for 370 million workers, constituting 93% of the total workforce and 83% of the non-agricultural work force. Women account for 32% of the workforce in the informal economy, including agriculture and 20% of the non-agricultural workforce. 118 million women

[11]Office of the Registrar General, India, Census of India, 2011.

[12] In the Report on Employment and Unemployment Survey of 2011-2012, Government of India, Ministry of Labour and Employment, Labour Bureau, Chandigarh, the Labour force estimates were based on the following 4 approaches. Usual Principal Status (UPS) approach where a person has worked for 183 days or more during the preceding year of the survey; Usual Principal and Subsidiary Status (UPSS) approach where a person has worked for 30 days or more during the preceding year of the survey; Current Weekly Status (CWS) approach where a person is found employed or seeking/available for work for one hour or more during the preceding week of the survey; and Current Daily Status (CDS) approach where the person has worked for 4 hours or more during the day she will be considered

workers are engaged in the unorganized sector in India, constituting 96% of the total women workers in India.[13] The informal sector in then on agriculture segment alone engaged 27 million women workers in India.Women informal workers are concentrated mainly in agriculture, so much so that three-quarters of all employed women are in informal employment in agriculture. 90% of those employed in manufacturing and construction are also unorganized sector workers. Within manufacturing, they predominate in certain industries such as garments, textiles, food and electronics. The seasonality of work in this sector and the lack of otheravenues of work make them vulnerable to a range of exploitative practices. They remain the most vulnerable and the poorest. And yet they are economically active and contributing to the national economy.

Notably there is a gender wage gap in both the formal and informal sectors, with male workers earning a higher wage on average in both sectors.

Table 1.0: Average Daily Wage (Rupees)

	Formal 1/	Informal
Female workers	481.9	120.3
Male workers	632.2	194.2

Source: NSS Employment and Unemployment Survey. 1/ Classified as a formal job if employee has a contract or is eligible for paid leave.

i. Home based work

A large number of women work as home based workers. About 23% of the non-agricultural workers were home based or working in their own dwellings. Home base workers were an overwhelming 57% of the workforce among women. Home-based

[13]Report of the Working Group on Empowerment of Women for the XI Plan Ministry of Women and Child Development Government of India, 2006.

worker refers to the general category of workers who carry out remunerative work with in their homes or in the surrounding grounds. Women turn to home-based work for a number of reasons. Lack of necessary qualifications and formal training, absence of childcare support, social & cultural constraints and absence of alternatives are some of the reasons. Families need cash incomes for their survival. Loss in formal employment and reduced returns from agriculture often result in men migrating to urban centres, leaving behind women and children. With home-based work being the only alternative available to poorest communities, it is not confined only to women but also involves children, especially girls. There are positive aspects to home-based work also. It gives women the opportunity to combine work with domestic chores, flexible and sometimes better working conditions. While designing strategies to meet the challenges, it is important to retain the positive aspects of home-based work.

ii. Street vendors

Computed from the NSSO 55th round data, the number of street vendors in urban areas in India, are estimated at 1.15 million, out of which 18% are women. It is estimated in another study that in India 10 million women and men are dependent on vending commodities for their livelihood. Mumbai has the largest number, around 200,000. Ahmedabad and Patna 80,000 each and Indore and Bangalore 30,000 hawkers. Calcutta has more than 1000,000 hawkers. The sex composition of the hawkers often is in favour of men. In Mumbai over 75% of the hawkers are males. In the other cities, namely, Ahmedabad, Bangalore and Bhubaneswar males form around 60% of the hawkers. Imphal is the only city covered where hawkers are exclusively women. In all the cities, with the exception of Imphal, the income of the female hawkers is substantially lower than the males. This is for mainly two reasons. Firstly, women hawkers sell cheaper goods and in small quantities as they lack capital. In most of the cities (Mumbai, Ahemdabad,

Bhubaneswar, Patna and Bangalore) they sell vegetables, fruits and flowers in small quantities. Secondly, women hawkers cannot spend as much time on hawking as their male counterparts as they need to take care of the daily needs of the family such as child care, cooking, cleaning etc. Since they lack capital to invest in their goods, they are unable to buy greater quantities of goods to increase their income.

iii. Services

Despite the fact that the Indian Service Sector is growing quickly and makes up more than half of India's GDP, no programs or policies in place for this sector. Male work force participation is greater in this sector – 15.5% as against 3.5 % female participation. Further, there is a shortage of skilled workforce in distribution services and there are very few retail-oriented education courses. It is important also to note that nearly 60% of women from the organized sector are employed in community, social and personnel services. Women are even more under-represented in high status, higher paid and senior management level jobs.[14]

VIII. Work Participation Rate(WPR) in India and J&K: A Comparative Analysis

The status of women is very much associated with their contribution towards the economic activities of the nation and access to it. The Census of India 2001 and 2011 has redefined work. Recognition has been given to the distinct role played by women in the agrarian as well as employment and such other sectors where earning livelihood is a family endeavour. However, the percentage of women engaged in gainful employment is very low as compared to men. It is clear from the Table 1.0 that J&K is the one of the States to have a less Female Work Force Participation Rate lower than the national average. Ranking among in this

[14] Ibid.

respect, J&K has a Female Work Participation Rate of 19.1 per cent. The current Census of 2011 saw an improvement, primarily due to the redefinition of work and J&K has moved from its place at the bottom to the average place among the States with a Female Work Force Participation Rate of nearly 20 per cent. The State's rate is lower than the national average of Participation Rate of 25.5 percent. The percentage of women as main workers and marginal workers is alarmingly low (9.0%) when compared with the total population in the State. Table 1.2 indicates that the gap between the male work participation and the female work participation is very wide, particularly in urban areas. It is pertinent to mention here that cultivators are part of every category of workers, be it main or marginal workers. The Work Participation Rate (WPR) for the country works out to 39.8 per cent according to 2011 census. This is marginally higher than the corresponding WPR of 39.1 per cent in Census 2001. The WPR for males has increased to 53.3 per cent in 2011 in comparison to 51.7 per cent in Census 2001. The female WPR has reduced marginally to 25.5 per cent in 2011 from 25.6 per cent in Census 2001.[15] In J&K total WPR is 34.5, WPR for males is much higher from females, for males it is 48.1 and females 19.10. Main and Marginal Workers as percentage of total Workers has also decreased as per Census 2011, out of 481.7 million total workers, 362.4 million are main workers and the remaining 119.3 million are marginal workers. The percentage of main workers among the total workers, in census 2011, is 75.2 per cent against 77.8 per cent in Census 2001.The percentage of main workers

[15]As per Census 2011, the total number of workers (who have worked for at least one day during the reference year) in India, is 481.7 million. Of this, 331.9 million workers are males and 149.9 million are females. Out of the increase of 79.5 million workers during the decade 2001-2011, male workers have accounted for 56.8 million and female workers 22.7 million. The workers have registered a growth of 19.8 per cent, which is marginally higher than the overall population growth rate of 17.7 per cent during the decade. The male workers have grown by 20.7 per cent and female workers by 17.8 per cent.348.6 million workers are in the rural areas and 133.1 million, are in the urban areas. The female workers in rural and urban areas are 121.8 and 28.0 million respectively.

among the male workers is 82.3 per cent and female workers 59.6 per cent. The percentage of male main workers has reduced from 87.3 per cent and female workers 59.6 per cent. The percentage of male main workers has reduced from 87.3 per cent to 82.3 per cent in the last decade.

Table 1.1: Work Participation Rate (WPR) in India & J&K State (by Sex &Residence)

Country/ State	TotalWPR by Residence*			WPR by Sex & residence					
	Rural/Urban			Males			Females		
	Persons	Rural	Urban	Persons	Rural	Urban	Persons	Rural	Urban
India	39.8	41.8	35.3	53.3	53.0	58.8	25.5	30.0	15.4
J & K	34.5	34.2	35.2	48.1	46.3	52.7	19.1	20.8	15.5

Source: Census of India-2011, Government of India.

Table 1.2 : Percentage of Total Workers, Main Workers, marginal Workers and Non-workers to the Total Population of India and J&K State

	Total Workers				Percentage of Main Workers to total workers		Percentage of Marginal Workers to total workers			Percentage of Non-Workers to total workers			Percentage of Cultivators to total workers		
India/ J&K State	P*	M*	F*	P	M	F	P	M	F	P	M	F	P	M	F
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
India Total	39.8	53.3	25.5	75.2	82.3	59.6	24.8	17.7	40.4	60.2	48.7	74.5	24.6	24.9	24.0
Rural	41.8	53.0	30.1	70.5	78.5	55.6	29.5	12.4	44.4	58.2	47.6	69	33.0	35.2	28.8
Urban	35.3	53.8	15.5	87.6	90.5	77.0	12.4	9.5	23.0	67.8	46.2	84.6	2.8	2.7	3.1
J & K Total	34.5	48.1	19.1	61.2	72.2	30.0	38.8	27.8	70.0	65.5	52.9	80.9	28.8	24.0	42.5
Rural	34.2	46.3	20.8	53.6	65.7	24.0	46.4	34.3	76.0	65.6	53.7	79.2	37.9	33.0	50.0
Urban	35.2	52.7	14.5	80.5	86.7	53.7	19.5	13.3	46.3	64.8	47.3	85.5	5.4	3.6	12.9

*** P-Persons, F-Female, M-male.**

Source: Census of India-2011, Government of India.

IX. Judicial Approach

The role of judiciary has also been quite significant with respect to the women working class. The Indian judiciary to a certain extent has taken a lead in securing socio-economic justice to women. An analysis of the decided cases reveals that there is a new trend in the judiciary to interpret laws so as to provide better protection to women folk in respect of the attainment of their rights.

In *Dr. Hemlata Sarswat v. state of Rajasthan and Ors*[16], the court held that the communication made by the Directorate of Medical and Health Services, Rajasthan denying maternity leave to the petitioner on the ground that the rules did not mention about the grant of such leave to the medical officer working on consolidated salary was unjustified and did not apperar to be bonafide.

In *Simi Dutta v. State*[17], the Jammu and Kashmir High Court rejected the position of State holding that a distinction had to be made between the female employees appointed on the regular basis and those on adhoc basis. Thus, the claim of a lecturer, appointed on adhoc basis, for maternity leave was allowed.

In *Vishaka & Ors v. State of Rajasthan*[18], the honourable Supreme Court of India has laid down certain guidelines for the prevention of sexual harassment of women at workplace. The guidelines have the force of law under Article 141 of the Constitution.

In C.B.Muthumma v. Union of India[19], a writ petition was filed by the petitioner, a senior member of Indian Foreign Service, complaining that she had been denied promotion to grade I illegally and unconstitutionally. She also pointed out that several

[16]MANU/RH/004/2008.
[17]2001(4) SCT 726.
[18] AIR 1997 SC 3011.
[19] (1979) 4 SCC 260.

rules of civil service were discriminatory against women. The Supreme Court through V.R.Krishna Iyer and P.N.Singhal, JJ held that the facts speak a story which makes one wonder whether Article 14 and 16 belong to myth or reality and that the sex prejudice against indian womanhood pervades the service rules even after three decades of achieving independence.

In *Air India v. Nargesh Mirza and Ors*[20], the judiciary has played an active role in enforcing and strengthening the constitutional goal of "equal pay for equal work."

Similarly, in *Randhir Singh v.Union of India*[21], the Supreme Court observed that equal pay for equal work is not a mere democratic slogan. It is a constitutional goal capable of attainment through constitutional remedies by enforcement of constitutional rights.

In the case of *Rajendra Grover v. Air India Ltd & Ors*,[22] adjudicated in the Delhi High Court, members of the male cabin crew moved the Court to challenge a directive issued by Air India Ltd. dated 27.12.2005 which allowed both male and female crew to perform the job of In-flight Supervisors. This effectively meant that male cabin crew could be expected to serve on a flight under the supervision of a woman IFS which was challenged by the pre-1997 male cabin crew as unconstitutional. The Court held that there was nothing unreasonable about this directive and that "in effect it removes the men-only tag on the function of the IFS" and found that it enabled the female cabin crew to break the "glass ceiling". The provisions of the ERA itself were not the subject of interpretation in this case, but the facts in the judgement reflects the level of discrimination between men and women even in terms of access to the same kinds of work. Fortunately the Court was

[20]AIR 1981 SC 1929.
[21]AIR 1982 SC 829.
[22]*Rajendra Grover & Ors v. Air India Ltd* and Ors, 8th October 2007, Delhi High Court.

able to uphold the principles of non-discrimination in this judgement.

The Madras High Court in the case of *Vasantha R. v. Union of India*,[23] struck down Section 66(1)(b) on the grounds that it was violative of Article 14, 15 and 16 of the Constitution of India. The petitioners were women workers who were working in the mill and some who were on the management of the various mills or factories filed petitions challenging the constitutionality and the batch of writ petitions was filed on the grounds that no discrimination should be practiced against women on account of their gender. The petitioner could not work in the third shift between 10 p.m. and 6 a.m. due to the statutory provisions banning night work of women. The Court held that, "potential employment cannot be denied on the sole ground of sex when no other factor arises" and struck down Section 66(1) (b). The Court laid out detailed guidelines in order to ensure the safety and welfare of women workers in the night shift.

In the case of *Gujarat Electricity Board v. Hind Mazdoor Sabha & Ors.*,[24] it was contended that the workers had been exploited by contractors to work in a Thermal Power Station of the Gujarat Electricity Board at Ukai in Gujarat. The Court dealt with the question of who can abolish contract labour, in what circumstances can contract labourers be absorbed as employees and whether an industrial dispute can be raised in these circumstances. The Court held that is only the appropriate Government which has the authority to abolish genuine labour contract. The Court further held that even after the contract labour system is abolished, the direct employees of the principal employer can raise an industrial dispute for absorption of the ex-contractor's workmen and the adjudicator on the material placed

[23]61 (2001) II LLJ 843 Mad. See also *Triveni K.S. v. Union of India*, 2002 (5) ALT 223 (High Court of Andhra Pradesh).
[24] AIR 1995 SC 1893.

before him can decide as to who and how many of the workmen should be absorbed and on what terms.

X. Conclusion and Suggestions

It is true that economic theory plays an important role in prescribing remedies for labour problems specifically in relation to wage differentials based on sex. But correct policies can be formulated only if such theory is satisfactory or adequate. A particular labour theory, for example will prove to be true only if the basic assumptions underlying the theory are valid in specific situations being examined. In the case of sex discrimination, the economic theorists claim quite accurately that competitive markets would tend to erode sex discrimination. But in the real world, the existence of social factors such as prejudice and sex discrimination makes it very difficult for the tendencies to work themselves out. Therefore while making policies, it becomes necessary to present the economic factors responsible for wage differentials keeping in view the social realities connected with it. Furthermore, most of the problems that beset working women are in reality rooted in the social perspective of the position of women. Traditionally, men are seen as bread winners and the women as housekeepers, child bearers and child rearers and this type of cast role model continues to put obstacles before the working women. The law too has hitherto served the interests of one gene (male) at the immense cost and disadvantage of the other (female).

A fundamental change is required in the attitudes of employers, policy makers, family members and the public at large so that a woman is considered as an appendage of the male counterparts. The recommendations of the ILO committed to remove all forms of discrimination has to be implemented in letter and spirit. It is pertinent to mention that there is no lack of labour welfare legislation being enacted from time to time, but there has to be more awareness and enforcing mechanism for their suitable implementation, especially in remote areas where women are

uneducated and unaware about the laws due to lack of resources. More specifically, the provisions relating to maternity, health, safety and welfare find themselves in majority of legislations and thus creating a lot of confusion and ambiguity. In addition to it, most of the protective provisions meant for working women in these labour welfare legislations apply only to the organised sector and do not regulate the working conditions in unorganised sector. Thus the need of hour is to create an umbrella legislation covering all the fields of protective measures for female labour. It is also suggested that in remote areas, labour inspectors be asked to visit factories and establishments at regular intervals, enforce attendance of women employees and make aware of laws and take action on problems. Lastly, in order to make labour legislations result oriented, oriental infrastructural facilities along with the organisation of women labour should be provided and strengthened. Some of the important suggestions are:

(i) Comprehensive legislation for the Unorganised Sector is needed with provisions relating to ESI, leave, pension, housing and child care, a complaints committee on sexual harassment, regulation of employment, wages and conditions of work, work records, safety and occupational health, work tools and safety equipment's, Rights over Resources, dispute resolution bodies at District level and Appellate Body at the State Level.

(ii) There is an urgent need for ensuring regulations in this sector that deal with employment, conditions of service, social security and welfare.

(iii) Social Security provisions must be created that encompass the right to health and medical care, employment injury benefit, maternity benefit, group insurance, housing safety measures, and Gratuity and Pension benefits.

(iv) Tripartite Boards for each broad sector with adequate representation for women in the Board including complaints committee for sexual harassment, with 50%workers' representation with proportionate representation to women;

boards to be formed at local, taluk, district, state and national levels.

(v) Budgetary allocation (3%) for the social security needs of the unorganized sector. The funds can be drawn from the cess/ levy on the sector itself and contribution from the Central and State governments. A social security fund should be constituted.

(vi) Promulgation of Government Orders for regularization of Labour of unorganised workers whether casual or contract, with identity card, fair wages, weekly holiday, weekly leave, hours of work, maternity and child care, ESI, pension. P.F., safety and occupational health.

(vii) A Policy of equal opportunity should be formulated to encourage women's increased participation within sectors with a poor gender ratio. There should be a Equal Opportunity Commission set up to make this policy operational within a time bound frame.

(viii) A social audit should be done of public sector companies– from workers, middle management and higher. This should be a mandatory five yearly audit. The Gender Budgeting Cells set up in the Departments/Ministries should ensure this.

(ix) Collection and dissemination of gender disaggregated data related to all sectors should be made mandatory. Every ministry of the government should have gender disaggregated data online, giving a break-up for each industry. At present there is little or no data available for the organized as well as unorganized sector.

(x) Women headed enterprises from this sector should be exempted from tax.

(xi) The tax rebate for women employed in this sector should be further increased.

(xii) There should be a tax incentive to encourage women entrepreneurial ventures in industries where there are low numbers of women workers and/or management.

Digital Licensing Under Copyright Regime: Problems and Perspectives

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Abstract

The digital copyright environment is facilitated by different technological means, including copyright licensing, not only by helping to locate and identify licensors and licensees instantaneously, but also by providing virtual platforms for exchange and automating e-contracts, e-payments and other methods of delivery of goods and services. The proliferation of licensing practices appears to reflect not only the development of collaborative creation but also a new and more dynamic position of the user in the network environment. Recently developed forms of copyright licensing includes the creative commons (CC) system and open source software (OSS) which rather than representing renunciation or abandonment of copyright are actually new ways of exercising the rights provided by copyright regime and a form of distribution that relies upon the copyright owners exclusive rights. There are many issues that confront copyright law in the sway of digital dissemination. An attempt has been made to highlight some of the major issues that copyright licensees encounter while negotiating terms and conditions in the given nauseating digital environment.

Key Words: Digital licensing, Creative commons, Open Source Software, DRM technology, General Public License.

I. Introduction

The digital copyright environment is facilitated by different technological means, including copyright licensing, not

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only by helping to locate and identify licensors and licensees instantaneously, but also by providing virtual platforms for exchange and automating e-contracts, e-payments and other methods of delivery of goods and services.[1] In this regard, digital technology is greatly impacting on the territorial and temporal framework for copyright licensing. Moreover, a number of new licensing practices are emerging in the new technological environment[2].

The proliferation of licensing practices appears to reflect not only the development of collaborative creation but also a new and more dynamic position of the user in the network environment. While licensing is finely tuned for the analog world, the digital environment has changed the way in which copyright content is marketed, distributed, delivered and consumed, and this has had significant consequences for the upstream and downstream processes of rights clearance[3]. In this paper an attempt is made to analyze and appreciate the problems that crop up due to change over from analogue to digital dissemination through licensing and need for legal control.

II. Digital Licensing-Meaning and Scope

According to *Black's Law Dictionary*, a "license" is "the permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort.[4] It is that license

[1] See Munnazzar Ahmed and Ujwal Prabhakar Nandekar November 1, 2012; paper presented at *University of Petroleum and Energy Studies: National Seminar on Intellectual Property Rights on Copyright, Patent and Protection of Indigenous Medicinal Plants, Herbs, Roots and Practices, India, 24-25 November 2012*

[2] Diane Rowland and Elizabeth Macdonald, information technology law, 1st ed (1997) London , Cavendish Publishing limited.

[3] Lloyd Jassin (The Law Offices of Lloyd J. Jassin), Bonnie Beacher (McGraw-Hill Education), Richard Nash (Cursor), Dana Newman (Dana Newman) , Copyright, Intellectual Property Rights, and Licensing Issues in the Digital Era, 1:40pm Tuesday, 02/15/2011 General New York West.

[4] Licensing also connotes, Permission to do something which without the license would not be allowable. See for details, Black's Law Dictionary, at

which allows us to download an e-book onto our e-book reader, upload computer software, and legally obtain music online. In fact, with digital content, licensing has become an integral part of our access to, and use of, informational, educational, and entertainment content. And yet the meaning of a license is still not understood by all. It continues to be confused with an assignment or transfer of rights as opposed to a "mere permission" to use content under specified or agreed upon terms and conditions.[5]

Recently developed forms of copyright licensing includes the creative commons (CC) system and open source software (OSS) which rather than representing renunciation or abandonment of copyright are actually new ways of exercising the rights provided by copyright regime and a form of distribution that relies upon the copyright owners exclusive rights[6]. Both CC and OSS are increasingly used for commercial purposes like traditional, proprietary licenses in the form of software products which combine both proprietary and open source code in the same technology or application. It is necessary to examine the compatibility between traditional copyright licenses and newer forms of licensing in order to identify potential problems[7].

III. Digital Dissemination and Licensing

It is important to note that WIPO has already developed relevant activities in this field, showcasing different licensing practices and their connection to a variety of business models[8]

[5] Lesley ·Digital Licensing, Clicking "I Agree", E-Book & iPod Licensing, Copyright Newsletter, Digital, Licensing Digital Content · Tagged: e-book, licensing, permission ; Tuesday 26 July 2011.

[6] There is ,therefore, useful work to be done in terms of collecting the facts concerning different copyright licensing practices describing and analyzing them in a manner useful to the member's states.

[7] Philippe Chevet: COPYRIGHT LAW IN THE DIGITAL ERA : www.hypernietzsche. orchallenges of the digital era - European Digital Rights www.edri.org/files/paper07_ copyright.pdf g/events/lmu/chevet.html

[8] In 1995 WIPO published a guide on the licensing of copyright and related rights.

This was authored by a number of experts in different fields and provided information on licensing practices involving a variety of softwares and audio visual[9].

Moreover WIPO has launched a series of regional seminars of software and IP, in Asia, Africa or Latin America[10]. However, copyright licensing transaction in particular when they are cross border is prone to dispute. The WIPO Arbitration and Mediation Center provides cost and time efficient alternative dispute resolution option that is particularly appropriate in such licensing disputes[11].

The interface between the intellectual property system and competition policy has allocated increasing attention in recent years as intellectual property rights have gained increasing importance in the knowledge economy and a number of countries have established or enhanced the role of national authorities entrusted with competition policy.[12] As a reliable source of information on the different rights in different territories, an International Music Registry (IMR) would be instrumental for the

[9] Beneficiary - WIPO ; www.wipo.int/tad/en/activitysearchresult.jsp?bcntry=MW - Activity Title: Training Seminar for Senior Officers and Examiners from Africa, Beijing.... WIPO Regional Seminar on Intellectual Property, Software, and E-Health ...and www.wipo. int/tad/en/ activitysearch result.jsp?bcntry=CI

[10] The cause of this series of events was the WIPO-African regional seminar on intellectual property, software and e-health, trends issues, prospects, which took place in Kigali Rwanda on June 3 and 4 2010[10].available at: WIPO Regional Seminar on Intellectual Property, Software, and E ...www. wipo.int/ meetings/ en/ 2010/wipo_ip_kgl_10/

[11] The WIPO development agenda specially the development agenda thematic project on intellectual property and completion provides a solid and balanced framework for undertaking focused activities in the field of copyright licensing.

[12] Lloyd Jassin (The Law Offices of Lloyd J. Jassin), Bonnie Beacher (McGraw-Hill Education), Richard Nash (Cursor), Dana Newman (Dana Newman) , Copyright, Intellectual Property Rights, and Licensing Issues in the Digital Era1:40pm Tuesday, 02/15/2011 General New York West]

development of a healthy and balanced digital market for creative content.[13]

A digital license protects an author or owner's intellectual property rights to regulate how content is sold or used, monitors compliance to terms and conditions and regulate compensation. The goal of digital license automation is to provide an infrastructure that makes it easy for programs to negotiate with each other when they need services taking the human at least partly out of the loop. A pervasive low-overhead digital licensing infrastructure could enlarge the component software marketplace and lead to greater availability of reusable software component[14].

IV. A Model for Digital Licensing: Conditions for Reference

If digital licensing is to become widely useful, it first needs a standard reference model to define its functionality. A reference model is a high-level specification that defines a family of related system in terms of functional capabilities, thus enabling a comparison of similarities in differences among specific implementation. The copyright and patent law outlines the rights and repositories where boiler plate license are widely available[15]; Web services, including SAO's services exist simultaneously[16]. Relatively little work has been done towards developing a general purpose infrastructure framework for widespread use of digital

[13] Is copyright licensing fit for purpose for the digital age, www.ipo.gov.uk/dce-report-phase1.pdf -

[14] Philippe Chevet: COPYRIGHT LAW IN THE DIGITAL ERA www.hyper Nietzsche. Or challenges of the digital era - European Digital Rights www. edri. org/files/paper07_copyright.pdf g/events/lmu/chevet.html

[15] License Boilerplate - Mozilla http://www.mozilla.org/MPL/boilerplate-1.1/ May 29, 2012 ... Boilerplate is any text that is or can be reused in new contexts or applications ... the Creative Commons Attribution-Share Alike License

[16] *Web Services* Bauru *São* Paulo Web Publish Informatica Ltda ... *www.dailymotion.com/.../xe9fw1_web-services-bauru...*Aug 4, 2010;http://www.sitelocacao.com.br Web Publish Informatica Ltda located in *São* Paulo is an excellent choice.

licensing[17] but some sub services are ready being separately standardized.

i. Digital licensing service

A licensing server is the administrative hub of the digital licensing service. It brokers negotiations between vendors and consumers, grants licenses, and regulates their usage to ensure that the service's terms and conditions are met, prevents unauthorized access to the software and compensates the licensor.

ii. Negotiation service

Negotiation involves offers and counter-offers between vendors and consumers until they reach an agreement. The agent community has invested considerable research in exploring various market-based negotiation services; the negotiation process itself can be manual, semi automated, or automated.

iii. License: an xml document

The end result of the negotiation is a license-an xml document that encodes terms and conditions of use for the object under license. Sections of an xml license can include machine readable constants, such as, digital rights, service-level agreements (SLA'S) and micro payments, etc. The license can also be transferred-via extensible style sheet language transformations (XSLT), e.g. to a textual document for vendor or consumer review, the digital licensing service can manage a repository of licenses[18].

iv. Digital rights management service

A digital rights management service dynamically enforces the license's terms and conditions at run time, the license specifies which operation are permitted or denied. In open digital rights

[17] No LARKE "distributed software licensing frame work based on web services and SOAP" Dept of computer sciences trinity college MAY 2002.

[18] *XML* Introduction-What is *XML*? - W3Schools *www.w3schools.com/* ***xml/xml_*** *whatis.asp*

language[19] an example of a rights expression language (real); we use it in the eye[20], primarily because it is an open standard and has, wide acceptance and defined in XML[21].

A digital rights expression can indicate that a service can be used n times during a certain time period for set purposes and that the license can grant limited rights to third parties[22].

v. Service-level agreement

An SLA defines an optional section of a license. Although most licenses involve the transfer of rights to a consumer and compensation for service use to the vendor, some licenses also contain penalties- a vendor might agree to pay for under performance below some quantified level of service e.g. An SLA encodes these conditions and penalties in (xml) and on SLA service monitors them.

vi. Compensation service

A license usually defines a compensation scheme and a method of payment. License servers would use compensation models such as:

[19] (url:http;odrl.net)is
[20] C Caloianu and C Thompson digital rights for agents IEEE press 2005 pp 492-496
[21] ODRL has four main components:
I Subject –the service's creator, end user, distributor and so on.
II Object-are source under license (the title of a song by a certain artist;
III Rights –rules that govern consumption use, copying and transfer;
IV Constraints-date and time intervals, the number of times a resource can be used or the logical or physical environment in which the license is enforced.
See also : *XML* Introduction - What is *XML*? - W3Schools ,*www. w3schools. com/**xml**/**xml**_ whatis. asp* . But still, this *XML document* does not do anything. It is just information wrapped in tags. Someone must write a piece of software to send, receive or display it.
[22] ODRL Version 2.0 Core Model | ODRL Community Group - W3C ; http://www. W3.org/community /odrl/ two/model/ Apr 24, 2012 **...** This specification was published by the W3C ODRL Community Group. It is not a W3C Standard nor is it on the W3C Standards Track.

- Pay-me now perpetual or term limited licenses. The consumer purchases a license for use of a given object over a specified time period.

- Pay-per-user license: the license server generates license keys based on the number of stand-alone application the service requestor purchases.

- Pay-per-use or subscription licenses: the consumer purchase units of usage of some resource, so a license key is generated every time the service is invoked.

A trend has emerged towards subscription-based rather than perpetual license; in such arrangement vendors' benefits from constant revenue streams rather than one time fees and consumers benefit by paying only for services consumed. Subscription license may involve many tiny transaction payments in fractions of a set (micro payments[23]).

Ongoing research into efficient micro payment systems includes the micro payment transfer protocol and peppercorn. MPTP assumes that the broker compensation is a financial intermediary that can economically handle numerous transactions and keep and aggregate records for both vendors in consumers. Peppercorns scheme uses probability sampling rather than transaction aggregation making charges with fractions-of-a-cent-accuracy. A trend has emerged towards subscription based licensing rather than perpetual licenses[24].

[23] Mptp:www.w3org/ecommerce/micropayment
[24] See IEEE - License Agreements
http://www.ieee.org/publications_standards/publications/subscriptions/info/licensing.html
All IEEE online product subscriptions require a signed license agreement on file. While some licenses may require negotiation, basic license agreements

vii. Electronic receipt service

The electronic receipt service generates a persistent log entry (e-receipt) for each purchase or use of a resource. This receipt record which services were used and the form of payment. The service can generate receipts for web service usage, agent interaction calls to a database, or goods purchased over the internet or at a store. A receipt service can manage accounts for service suppliers and consumers and can provide an item or unit-of-use-level accounting.

viii. In case of additional services needed

Digital licensing will also need several other services. Security services are important because license generators exploit the interoperability in open system architectures. Key issues include secure end-to-end soap messaging, access control, identification and authentication of participants systems, confidentiality and data integrity. Various standards and specifications have already addressed security concerns, including secure sockets layer (ssl). Xml signature (xml-sigh), xml encryption, XML key management specification (xkms), security assertion markup language (Saml), and extensible access control markup language (xacml). Security services are needed in the digital licensing suite of services because the other digital license services must be trustworthy; we must be able to authenticate the parties; and we need ways to encrypt and transmit data securely. Security services provide all these capabilities[25].

Logging and auditing services provide persistent, trusted record keeping, and an accounting of licensed interactions. They lend assurance that records of transactions can be consulted if

[25] *Digital Licensing Service* for Agents and Web *Services* - Computer ... *www.csce. uark.edu/ .../2005-01--PAPER--KIMAS-05--Jena-Thompson--...* ehT - aneJ R yb*digital licensing* service is itself a composite service consisting of a collection of ... service, a binding service, a workflow service, and *security services*

needed. These additional services will be needed to make digital licensing services industrial strength. But they are likely to be needed separately for many other purposes. It makes sense to separate these concerns and implement these as independent services.

V. Benefits of Digital Licensing

A calling program typically binds directly to a remote web service by using the service's WSDL interface. Aspect–oriented software engineering-an architectural style that makes it easier to evolve large software programs-provides a clean way to wrap calls to a service and inject additional behaviors, which could include digital licensing services[26].These licensing services could be interleaved seam lastly in the communication path between the caller and the service. Not all digital licensing sub services are always needed and many may be subject to the policies. For instance, the electronic receipt service could be useful even without other digital licensing service. Similarly, policy choices might determine what compensation plan to use[27].

Several communities would benefit from the automation of digital licensing, including the web services and agent communities. With its focus on sharing computation and data, the grid community would also benefit from being able to license, monitor, and charge for processing and data as metered commodities[28]. The business to business and business to consumer communities could also benefit from being able to monitor and control supply chains.

Before communities can benefit, however the middleware community will have to test, improve and standardize a set of

[26] R.E. Filman etal.eds aspect oriented software dept. Addison Wesley 2005
[27] *WSDL* XML Schema - Xmlsoap.org; schemas.xmlsoap.org/wsdl/
[28] C Thompson "agents grids and middleware " IEEE internet computing vol Q no 5 2004 pp97-99

digital licensing services. The web service, agent, grid, business to business and business to consumer communities can all benefit from a common set of such services.

VI. Copyright in Digital Era

A copyright gives its owner the sole right to produce or reproduce the protected work. Copyright can subsist in any original literary, artistic, musical or dramatic work, or any substantial part thereof, in any material form whatever. The copyright arises automatically upon creation of the work- no registration is required, although registration does offer some limited presumptions of validity in the event of litigation. Copyright offers a far more limited scope of protection than a patent, because it protects the expression of the original work, but not the underlying ides as long as there is no actual copying involved, anyone can produce a similar work even if they are using the same underlying ideas[29].

Under copyright law, there are a no of related and more specific rights including the right to:

- Perform the work in public.
- Publish the work if it is unpublished.
- Produce, reproduce performer publish any transaction of the work.
- Convert a dramatic work into a novel or other non-dramatic work;

[29] *Copyright*: challenges of the *digital era* | EDRI, *www.edri.org/ edrigram/number11.3/copyright-challanges-digital-era* – 2013 ,13 beF ,*Copyright*: challenges of the *digital era* ... Union has discussed how to support, develop and protect creation in the digital environment.

- Convert any non-dramatic work into a dramatic work by a way of performance in public or otherwise.
- Make a sound recording, cinematograph film or musical work can be mechanically reproduce or performed.
- Reproduce, adapt or publicly present any work as a cinematographic film.
- Communicate a work to the public by way of telecommunication.
- Publicly exhibit for a purpose other than sale or hire, any artistic work created after June 7 1988 other than maps, charts or plans.
- Rent a capable computer program or sound recording (for musical works) and
- Authorize any of the above acts.

Any of the above rights may be licensed individually or as a bundle of rights granted to a license .Copyright law also recognizes moral rights accorded to original authors of protected works. Moral rights may not be assigned and can only be waived. Moral rights enable authors to protect the integrity of the work[30].

In Canada, copyright generally subsists for the life of the author plus 50 years, but they're exceptions depending on the type work or whether it was authored by one or more persons.

[30] Seven *Copyright* Principles for the *Digital Era* | Brookings Institution *www.brookings.edu/blogs/up-front/.../05-copyright-principles-villasenor* – 2013 ,5 beF , rof retneC eht dna seidutS ecnanrevoG ni wollef roines tnedisernon a si ronesalliV nhoJ .sgnikoorB ta noitavonnI ygolonhceT

VII. Grant of Rights

The grant clause is the most important clause in any intellectual property license agreement. It specifies "who gets what" e.g. A grant clause could be as simple as the license hereby grants to the licensor a license to use the software in the territory for the term of this agreement. Recovers may be necessary to the definitions clause in order to find out the meaning of the capitalized terms. Alternatively the grant clause could be far more comprehensive providing the licensee with the right to be the only person entitled to exploit a patented invention or market a product using a trademark.

The object of the grant clause is to grant permission to the license to use certain intellectual property right of the licensor.

Care must be exercised by the licensor that the grant clause does not grant "all right, title and interest in and to the intellectual property" to the licensee, such a clause would constitute an assignment of the intellectual property rights.

i. ***Degree of exclusivity***

The licensor can grant to the licensor a license of varying scope a license may be exclusive , sole or non exclusive.

a. Exclusive licenses: The broad scope of license that can be granted is an "exclusive" an exclusive license excludes the use of the intellectual property right licensed to everyone but the licensee. After granting an exclusive license, the licensor is excluded from continuing to use the intellectual property. The grant of an exclusive license is as close as one can come to assigning the intellectual property right. The licensor retains ownership but licenses away everything else.

b. **Sole license:** A sole license once granted, prevents the licensor from licensing the intellectual property to anyone else. The licensor retains the right to use the intellectual property.

c. **Non-exclusive license:** A non-exclusive license can be granted as often by the licensor to as many licensees as desires. Most commercial software licensed today is licensed on a non-exclusive basis.

ii. ***Sub license***

In addition to the types of license discussed above, a grant may include the right of the licensee to "sub licensee" the intellectual property rights granted to it. The sub license may encompass all or only a portion of the rights granted to the licensee e.g., a license may be granted the right to use copy and modify source code, and to sell the resulting software product in object code. It may in turn be granted the right to sub license the right to sell the software product through distribution channels or sales agents, but not the right to sub license its right to modify to the source code[31].

A licensor will want to be particularly cautious about sub licenses of any trade secrets (in the above example the source code could be considered a trade secret) as direct control of the intellectual property right is one party "removed" in a sub license arrangement a sub license right is granted , it is common for the agreement to include a provision allowing the licensor to approve the terms and conditions of any sublicense , or at the very least to require that the sub license be on terms and condition that are substantially the same as those set forth in the agreement. This is particularly critical when trademarks are sub licensed, as it is necessary for the trademark owner to ensure that the use of any

[31] Boilerplate Contract Clauses (Public Services) | National Council for ... www.ncvo-vol..org.uk/ advice.../definitions-boilerplate-clauses.

licensed marks are monitored and quality standard are imposed on any products or service bearing the licensed marks. Sub licensees may either pay royalties or other license fees directly to the licensor , or to the license who would then share the royalties or license fees with their licensure on an agreed to basis[32].

A grant is usually personal to the license. Therefore any rights granted may only be exercised by the named license, in the agreement. Sometimes a license knows ahead of time that its subsidiaries or affiliates will need to be able to exercise the license rights on behalf of the license or for their account, e.g., it may be more cost effective for a licensed foreign affiliate to manufacture licensed produce which would then be sold by the license. As another example tax or other legal considerations in certain jurisdiction may necessitate the establishment of a local entity for distribution if their concerns the license should ensure that it either has a right to sublicense or that grant is expanded to include subsidiaries and affiliates the licenses.

iii. Scope of grant

The scope of the actual grant will depend on the type of intellectual property licensed. It may also depend on the commercial deal struck by the parties. The scope of the grant may well be less than the full range of rights afforded to the owner of the intellectual property.

VIII. Remedies- An Overview

The remedies typically available in intellectual property infringement actions are injunction, damages and accounts of profits. Most auctions start with an application for any form of primary or interlocutory relief, and in most cases does not get beyond this preliminary stage.

[32] Ibid

i. Preliminary Relief: the Interlocutory Injunction

Preliminary remedies are of the at most importance to the [protection of all these intellectual property rights. The period from the time of commencement of proceedings for the final determination of a case can allow significant damage to be done to sales and profits and to reputation, due to other exploitation of material and/or information further more the nature of the infringement or other unlawful conduct may be such as to make damages or an account of profits an inadequate remedy one of the reasons for this is that the defendant may be impecunious or may disappear. But these will not be the only reason and why in a particular case, damages may not be an inadequate remedy[33].

More often, this is because of the nature of the intellectual property right in question and the difficulty of reaching a precise estimate of the loss suffered as the result of an infringement. If in such a case the defendants unlawful conduct is restrained at the outset, the problem of damages may either disappear from the case altogether or be very much less difficult than otherwise would be the case.

The most useful and widely used preliminary remedy is the interlocutory or interim injunction, the main purpose of which is usually described as 'begin to preserve the status quo' until the hearing of the safeguard. The status quo order at the time of making application is usually the most appropriate order this is not the main concern of such injunctions, the primary matter with which the court is concerned with granting an intellectual injunction. Thus, a court will sometimes order that an earlier position to be restored, or that the parties arrange their affairs in some other way that is more in accordance with the requirement of justice.

[33] Is Copyright Licensing Fit For Purpose For The Digital Age-www.Ipo.Govt.Uk/Dce-Report-Phase1.Pdf/ March 21, 2012?

In an increasing number of cases interlocutory injunctions are not sufficient to protect intellectual property rights against the threat of continuing infringement. This is often because the evidence needed to sustain an application for both interim and final relief is not readily available and will not become available through the usual process of discovery. In such a case the plaintiff will be unlikely to obtain a one-time injunction because he will not have the necessary evidence; sometimes the defendant will remove or destroy the informing material. In recent years a speedy and effective means of obtaining and presiding such evidence will developed by courts in the united kingdom. The relief granite is an expert order for entry and inspections of premise and removal of evidence. These orders are known as Anton pillar orders, and may be a necessary step before interlocutory injunctions can be obtained.[34]

Similarly, the corrections of evidence and even a final judgment in favour of a plain fill may be to know avail if the defendant has assets which can be used to fund any damage ordered. This is a serious problem given to the increasing resource fullness of those attempting to avoid their obligations, the ease with which money can be moved from one country to another and advances in technology. In order to address this problem the courts of common law countries have formulated and developed the Mareva injunctions which operates to prevent defendants from removing assets from the jurisdiction or from disposing or dealing with them within the jurisdiction in such a way as to frustrate any judgment that may be entered against them.

ii. **Final injunction**

In the normal course, a successful plaintiff in an industrial property action will be entitled to a final injunction. The grant of

[34] N. Clark, Distributed Software Licensing Framework Based On Web Services And Soa,'' BA Thesis, Dept of Computer Science, Trinity College, May 2002

injunctions is discretionary and only used in unusual situations (e.g. Where the defendant is the source of a life-giving drug or in a copyright case, where there has been an extreme delay) will a permanent injunction be refused. If an injunction were not granted, e.g. To a successful patent property, the result would be tantamount to enabling the defendant to take a compulsory license under the patent without having to go through the statutory provisions relating to compulsory licenses, should the injunctions be breached, the plaintiff can move for contempt of court and in the field of industrial property experience shows that such action on the part of a plaintiff is not at all infrequent.

iii. Damages or account of profits

The assessment of damages in industrial property cases invariable demands as a first step in the election of the successful plaintiff as to whether he will take an inquiry as to damage on the one hand, or an account of profits on the other. These alternatives are of course mutually exclusive since by electing to go for an account, the plaintiff has adopted the defendant's act as his own. The choice in each case will depend on the facts sometime for instance, time may be of the essence of the trial as to liability may have generated itself enough material evidence to enable the plaintiff to move speedily for an account. Sometimes a defendant may have been able to secure more sales of the product in issue during infringing period than the plaintiff could possibly have done. In such cases, the plaintiff will again be likely to choose an account rather than an inquiry which will incidentally be for net profits.

Usually, however a successful plaintiff will ask for an order that an inquiry as to damages be taken. When this is done in a difficult case, the plaintiff may have to endure a fresh trail almost as substantial as the trial as to liability for this reason, fully litigated industrial property cases seldom go as far as fully inquire

as to damages, they tend to sell when liability has been established. The assessment of appropriate damages in industrial property cases varies somewhat between the several causes of action passing. Off and trademark infringement may be considered together as may patents and registered designs. Judicial views on the correct approach to damages for breach of confidence have been divergent, and in copyright case special statutory provisions exist. There is however no universally appropriate test or formula for assessing damages. In any of these fields are notoriously difficult to assess with any degree of accuracy, and the courts have sensibility taken this into account by declining to lay down general rules.

A common approach has been to useless damage on the bases of a national arms length license: this will arise e.g. When the parties are competitors and are usually appropriate for patent and registered design cases. Damages for infringement are then based upon a payment of a royalty in respect of, e.g. each infringing article. But problems do arise here-particularly when in reality the plaintiff would never have granted a license. This approach has also been used in breach of confidence and copyright infringement cases. Another approach which is more difficult to prove is through consideration of sales lost to the plaintiff. In this case the plaintiff is entitled to entitle lost profit.

IX. The General Public License (GNU or GPL)

The GPL is the most widely used[35] free software license, which guarantees end users (individual, organizations, companies) the freedom to use, study share (copy) and modify the software, software that ensures that these rights are retained is called free

[35] General Public License, Explained – Site Point http://www.sitepoint.com/public-license-explained/ May 23, 2001 ... An attorney's cure for corporate unreasonable fear of Open Source infection: the truth. Whether you are an Open Source software provider.

software. The license was originally written by Richard Stallman of the free software foundation (FSF) for the GNU project.

The GPL grants the recipients of a computer program the rights of the free software definition[36] and uses copyright to ensure the freedoms are preserved whenever the work is distributed, even when the work is changed or added to. The GPL is a copyright license, which means that derived works can only be distributed under the same license terms. This is in distinction to permissive free software license, of which the bsd licenses are the standard examples.GPL was the first copy left license for general use[37].

As of August 2007, the GPL accounted for nearly 65% of the 43,442 free software projects listed on fresh meat[38] and as January 2006, about 68% of the projects listed in source forge. Not[39] similarly a 2001 survey of red hat Linux 7.1 found that 50% of the source code licensed under the GPL[40] and a 1997 survey of meth lab then the largest free software archive showed that the GPL accounted for about half of the software licensed there. Prominent free software programmers licensed under the gaps include the Linux kernel and the gnu compiler collection (gas). Some other software programmers (my sal) are a prominent example, are dual- licensed under multiple licenses often with one of the licenses being the GPL. It is believed that the copy left provided by the GPL was crucial to the success of Linux based systems, giving the programmers who contributed to the kernel the assurance that their work would benefit the whole world and remain free, rather

[36] GPLFAQ does using theGPL for a program make it GNU software
[37] BSD licenses - Wikipedia, the free encyclopedia ,http://en.wikipedia.org/ wiki/BSD_licenses BSD licenses are a family of permissive free software licenses, imposing minimal restrictions on the redistribution of covered software.
[38] Fresh meat statistics page
[39] Source forge.net software map “dwheelcr.com.retrieved 17 Nov. 2008”.
[40] David A Wheeler estimating link size

than being exploited by software companies that would not have to give anything back to the community[41].

X. Use of licensed software

Software under the GPL may be run for all purposes, including commercial purposes and even as a tool for creating proprietary software, e.g. When using GPL licensed compilers[42] users or companies who distribute GPL-licensed works (e.g. Software), may change a fee for copies or give them free of charge. This distinguishes the GPL from software licenses that allow copying for personal use but prohibit the commercial software distribution, or proprietary licenses where copying is prohibited by copyright law. The fsf argues that freedom-respecting free software should also not restrict commercial use and distribution, (including redistribution). The GPL explicitly states that GPL works may be sold at any pro.

In purely private (or internal) use-with no sales and no distribution the software code may be modified and parts reused without requiring the source code to be released. For sales or distribution, the entire source code needs to be made available to end users; including any code changes and add-in that case copy left is applied to ensure that end users retain the freedoms defined above[43].

However, software running as an application in program under a GPL licensed operating system such as linux is not required to be licensed under GPL or to be distributed with source code availability-the licensing depends only on the used libraries

[41] C Thomson "Smart Devices Soft Controllers" Ieee Internet Computing Vol. 8 No1 2005 pp.82-85
[42] GPC FAQ: use GPC tools to develop non free programs.
[43] GPL FAQ:GPL require source posted to public an released modification internal distribution.

and software components and not on the underlying plateform[44] e.g. If a program consists only of own original custom software, or is combined with source code from other software components[45], then the own custom software components need not be licensed under GPL and need not make their code available; even if the underlying operating system used is licensed under the GPL, application running on it are not considered derivative, works, only if GPL parts are used in a program (and the program is distributed), then also other source code of the program needs to be made available under the same license terms. The gnu lesser general public license (lgpc) was created to have a weaker copy left then the GPL in that it does not require own custom-developed source code to be made available under the same licensing terms.

XI. Copy left

The distribution right granted by the GPL for modified versions of the work is not unconditional. When someone distributes a GPL work plus his/her own modifications, the requirements for distributing the whole work cannot be any greater than the requirements that are in the GPL.

This requirement is known as copy left. It earns its legal power from the use of copyright on software programs because a GPL work is copyrighted, a licensee has no right to redistribute it, not even in modified form (barring fire use) except under the terms of the licensing. One is only required to add here to the terms of the GPL if one wishes to exercise rights normally restricted by copyright law. Such as redistribution conversely, if one distributes copies of the work without abiding by the terms of the GPL (for

[44] GPL FAQ post program to GNU/Linux.
[45] If only GWD-(LGPL) libraries-LGPL software components and components with permission from software licenses are used.

instance by keeping the source code secret), he or she can be sued by the original author under copyright law.

Copy left thus uses copyright law to accomplish the opposite of its usual purpose instead of imposing restrictions. It grants right to other people, in a way that ensures the right cannot subsequently be taken away. It also ensures that unlimited redistribution rights are not granted, should any legal law be found in the copy left statement.

Many distributions of gp program, Ed programs bundle the source code with the executable. An alternative method of satisfying the copy left is to provide a written the source code on a physical medium (such as a cp) upon request. In practice, many GPL programs are distributed over the internet, and the source code is made available over FTP or http for internet distributions this complies with the license.

Copy left applies only when a person seeks to redistribute the program. One is allowed to make private modified versions, without any obligation diverge the modification as long as the modified software is not distributed anyone else. Note that the copy left applies only to the software and to its output unless the output is itself is a derivative work of the program. E.g. A public web portal running a modified derivative of a GP Led content management system is not required to distribute its changes to the underlining software because its output is not a derivative.

There has been debate on whether it is the violation of the GPL to release the source code in obfuscated form, such as in cases in which the author is less willing to make the source code available. The general consensus was that while unethical, it was not considered a violation. The issue was clarified when the license was altered to require that the 'preferred' version of the source code be made available .

XII. Conclusion

Digital licensing is an accepted norm of transmission in the present cyberspace. Different technological methods have been adopted to secure the rights of the intellectual property holder but effective control is yet to be discernible. Copyright violation in digital era has multiplied because of ease with which transmission of copyrightable material is passed on across the space without any control by the actual owner over his creation. This has made the position of a copyright holder the most vulnerable and exploited lot. But the invention of technologically digital devices creates real term problems for bona fide users especially when the matter in public domain finds its place in protected digital form.

Ethnicity and Ethnic Crimes: Legal Scenario

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Abstract

To comprehend the human diversity of any country, it is important to understand the criteria commonly used for making group distinctions. These generally are based on cultural or biological factors. Ethnicity refers to selected cultural and sometimes physical characteristics used to classify people into groups or categories considered to be significantly different from others. In some cases ethnicity involves merely a loose group identity with title or no cultural traditions in common. In contrast, some ethnic groups are coherent sub cultures with a shared language and body of tradition. It is important not to confuse the term minority with ethnic group. Ethnic groups may be either a minority or a majority in a population. Whether a group is a minority or a majority also is not an absolute fact but depends on the perspective. The development of law is inextricably linked to matters of race and ethnicity. It is challenging for law to define ethnicity. The paper will highlight the relation between ethnicity and conflict. Relations between different ethnic groups are always a matter of widespread concern. Discrimination on the basis of the national origin, descent, skin colour and language has been deemed by various laws as discrimination on the basis of ethnicity. Ethnic cleansing is the systematic forced removal of ethnic or religious groups from a given territory with the intent of creating a territory inhabited by people of a homogeneous or pure ethnicity, religion, culture and history. Ethnic cleansing is usually accompanied with the efforts to remove physical and cultural evidence of the targeted group in the territory through destruction of homes, social centers,

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religious places etc. Ethnic cleansing is a form of behavior embracing a number of crimes that fall within war crimes, crimes against humanity, and on the occasion, the crime of genocide itself.

Key Words: Crime, Conflict, Culture, Discrimination, Ethnicity, Political, Protection, Population

I. Introduction

An ethnicity is a group that defines itself or is defined by others as sharing common descent and culture. So ethnic cleansing is the removal by members of one such group by another such group from a locality they define as their own. A nation is such a group that also has political consciousness, claiming collective political rights in a given territory. A nation-state results where such a group has its own sovereign state. Not all self-conscious nations possess or desire nation-states. Some claim only local autonomy or entrenched rights within a broader multiethnic state.

Despite continuing controversies over its definition, the concept of ethnic cleansing has become firmly anchored within international law. It remains to be seen how mechanisms to prevent and deal with ethnic cleansing will develop and be implemented. Therefore, ethnicity is often associated with a fixed ethnic identity. This however is being increasingly challenged, as is the idea of ethnically homogenous national states. Ethnicity is a social construct specific to a social and historical context. However, notwithstanding the contested definition of ethnicity, ethnic identities have a material foundation and exist in contemporary societies as social forces. Ethnicity can explain

inequalities in our societies and is therefore crucial to capture ethnic identities.[1]

II. Ethnicity and Ethnic Cleansing: An Overview

It results from complex interactions among leaders, militants, and "core constituencies" of ethnonationalism. [2] Democracy has always carried with it the possibility that the majority might tyrannize minorities, and this possibility carries more ominous consequences in certain types of multiethnic environments. Ethnic and religious conflicts continue in: Northern Ireland, the Basque Country, Cyprus, Bosnia, Kosovo, Macedonia, Algeria, Turkey, Israel, Iraq, Chechnya, Azerbaijan, Afghanistan, Pakistan, India, Sri Lanka, Kashmir, Burma, Tibet, Chinese Xinjiang, Fiji, the southern Philippines, various islands of Indonesia, Bolivia, Peru, Mexico, the Sudan, Somalia, Senegal, Uganda, Sierra Leone, Liberia, Nigeria, Congo, Rwanda, and Burundi. Over half of these cases involve substantial killing.[3]

Murderous cleansing has been moving across the world as it has modernized and democratized. Unless humanity takes evasive action, it will continue to spread until democracies – hopefully, not ethnically cleansed ones – rule the world. For serious ethnic conflict to develop, one ethnic group must be seen as exploiting the other.

The brink of murderous cleansing is reached when, the less powerful side is bolstered to fight rather than to submit (for submission reduces the deadliness of the conflict) by believing that aid will be forthcoming from outside – usually from a

[1] R. Afkhami, Ethnicity: Introductory User Guide, ESDS Government, UK, available at www.ukdataservice.ac.uk

[2] Michael Mann, Dark side of the democracy: Explaining ethnic cleansing, Cambridge press,2005, available at : www.untag-smd.ac.id

[3] Ibid

neighboring state, perhaps its ethnic homeland state. In this scenario both sides are laying political claim to the same territory, and both believe they have the resources to achieve it. This was so in the Yugoslav, Rwandan, Kashmiri, and Chechen cases, for example. [4] Going over the brink into the perpetration of murderous cleansing occurs where the state exercising sovereignty over the contested territory has been factionalized and radicalized amid an unstable geopolitical environment that usually leads to war. Out of such political and geopolitical crises radicals emerge calling for tougher treatment of perceived ethnic enemies. In fact, where ethnic conflict between rival groups is quite old, it is usually somewhat ritualized, cyclical, and manageable. Truly murderous cleansing, in contrast, is unexpected, originally unintended, emerging out of unrelated crises like war. Conversely, in cases where states and geopolitics remain stable, even severe ethnic tensions and violence tend to be cyclical and manageable at lesser levels of violence.

Violence perpetrated against people on the grounds of their real or perceived ethnicity, race, religion, sexual orientation, gender identity or on any other prohibited ground, constitutes a form of discrimination. The war in Bosnia and Herzegovina has contributed a new term to the vocabulary of international relations with the expression 'ethnic cleansing'.[5]

Sometimes ethnic cleansing has been described as a 'systematic process',[6] a 'campaign'[7] or a 'pattern',[8] 'policy'[9] or 'practice'.[10]

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[4] Ibid

[5]Commission of Expert in its *First Interim Report* of 10 February 1993, UN Doc. S/25274.

[6]*War Crimes in Bosnia and Herzegovina, Helsinki Watch, A Division of Human Rights Watch,* April 1993 (hereafter referred to as *Helsinki Watch 2nd Report),* at 2.

[7]Ethnic cleansing was so described in UN Security Council Resolution 819 (1993) of 16 April1993, paragraph 6, where it was stated that the Security Council 'Condemns and rejects the deliberate actions of the Bosnian Serb party to force

This word describes a set of human rights and humanitarian law violations. It has also been adopted as part of the official vocabulary of UN Security Council documents and by other UN institutions and governmental and non-governmental international organizations.

It includes forced labour very often including work on the front-lines of armed conflict,[11] prohibiting women of particular ethnic groups from giving birth in hospital, and 'voluntary' transfer of property by forcing people to sign documents stating that the property was permanently abandoned by the owner.[12] These have included forced removal of lawfully elected authorities, [13] dismissal from work [14] , massive deportation, detention and ill-treatment of the civil population and their transfer to prisons and camps, shooting on selected civilian targets or blowing-up and setting fire to homes.

A very specific element of ethnic cleansing is rape and other forms of sexual abuse such as castration. Rape has been used most

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the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent *campaign* of ethnic cleansing'.

[8]*Preliminary Findings and Recommendations of the International League for Human Rights Mission to the former Yugoslavia* (14-22 November 1992, hereafter referred to as *Human Rights Mission),* at 2. A *Wound to the Soul,* Amnesty International, January 1993, AI Index: EUR63/03/93,2.

[9]*War Crimes in Bosnia and Herzegovina, A Helsinki Watch Report, Human Rights Watch,* August1992 at 1

[10]It is a commonly employed expression of UN Security Council, and appeared in Resolutions 780,787, 808,819. 820.827 and 836.

[11]*Fifth Mazowiedd Report 11, UN,* at 12, point 84

[12]*First Mazowiedd Report /*, at 3 and 5, points 11 and 23. This was so widespread that the SecurityCouncil was moved to announce that it 'endorses the principle (...) that all statements orcommitments made under duress, particularly those relating to land and property, are wholly nulland void...' See Resolution 779 (1992) of 6 October 1992, para. 5*; Mazowiedd Report II,* at9, point 59

[13]*Third Mazowiedd Report I,* at 8

[14]*Fourth Mazowiedd Report I,* at 7, point 17; See alsoexample given in *Time,* September 1992, at 41

frequently against women of different ethnic origin, and in the case of ex-Yugoslavia it has been committed systematically.[15] It has been connected with military operations, but has very often continued after the cessation of military operations. Women of all ages have been victims, often including very young girls.[16] It has frequently been committed in front of the victim's parents, children or other members of the family.[17] There are a number of testimonies indicating that special women's camps were established for these purposes and committed with the intent of making the woman pregnant, and victims have also been detained until the late days of pregnancy.[18]

Another possible approach to identifying ethnic cleansing would be to examine conduct by reference to its goal.

Special Rapporteur Mazowiecki defined ethnic cleansing in his report of 17 November 1992 in the following terms: 'The term ethnic cleansing refers to the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups.'[19]

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[15] *Second Interim Report* of the Commission of Experts, UN Doc. S/26545 of 6 October 1993, points 68 and 69

[16] See 'A Pattern of Rape", *Newsweek* 11 January 1993, at 26.

[17] *Rape and Sexual Abuse by ArmedForces,* Amnesty International, January 1993, AI Index: EUR 63/01/93, at 5

[18] *Preliminary Findings and Recommendations of the International League for Human RightsMission to the former Yugoslavia* (14-22 November 1992), at 2 where it U noted that 'Rape it often part of tnii pattern...'; *Third Mazowiecki Report I,* at 12, point 27: 'Rape is another repugnant feature of ethnic cleansing.'; Report of the team of experts on their mission to investigate allegations of rape in the territory of the former Yugoslavia from 12 to 23 January 1993, Annex II to *Fourth Mazowiecki Report I,* at 73, point 62; 'In Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic Hanging'; Bell-Fialxoff, *supra* note 4, at 12th '... rape indeed became a new and gruesome weapon in the ancient quiver of ethnic cleansing'.

[19] UN Doc. A/47/666 and S/24809 of 17 November 1992

Most ethnic cleansing methods are grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocols. In fact, when the UN Security Council used the term ethnic cleansing for the first time in Resolution 771 (1992) of 13 August 1992, it expressly stated that it violated international humanitarian law.[20]

Ethnic cleansing is recognized as crime against humanity. These are described in the Charter of the International Military Tribunal which was held at Nuremberg.[21] The UN Secretary-General, in his proposal on the Statute of the Tribunal for former Yugoslavia, explained that 'crimes against humanity are aimed at any civilian population', and listed the examples of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhuman acts.[22] Ethnic cleansing is achieved through such offences, either singly or in combination of all crimes.

The term also appeared in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)* in which the former sought the enforcement of the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice. Both Parties mentioned this crime in their respective requests for provisional measures. The Court noted that the crime of genocide: shocks the conscience of mankind, results in great losses to humanity and is contrary to moral law and to the spirit and aims of the United Nations.[23] The Court went on to conclude that: (...) great suffering and loss of life has been sustained by the

[20]UN Security Council's Resolution T71 (1992) at para. 2. See also 780 (1992), 787 (1992). 808 (1993), 819 (1993), 820 (1993), 824 (1993), 827 (1993); UN General Assembly Resolution 46/242 of 23 August 1992, UN Doc. A/RES/46/242

[21]In Article 6(c): 'namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against *any* civilian population, before or during the war, or persecutions on political, racial and religious ground in execution of or in connection with any crime within the jurisdiction of the Tribunal.

[22]UN Doc S/25704, at 13, points 48-49

[23]General Assembly Resolution 96(1) of 11 December 1946

population of Bosnia- Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations. UN General Assembly Resolution 47/121 of 18 December 1992 is very explicit in its paragraph 9 of the Preamble, declaring that: (...) the abhorrent policy of 'ethnic cleansing' (which) is a form of genocide.

Further, the motivating factors behind ethnic cleansing policies in the former Yugoslavia were not historical, but stem from strategic political interests.[24]

The ICTY[25] concluded that what happened in Bosnia was genocide, while Kosovo was described as 'ethnic cleansing' despite 11 000 dead in 529 mass graves, a systematic campaign to burn or destroy bodies of the dead to obliterate the evidence, the destruction of 1200 cities and towns, commander-organized rapes, castrations, violation of medical neutrality, enslavement, imprisonment in concentration camps, torture, enforced prostitution, slaughter of leaders and elites, and persecution on political, 'racial', and religious grounds.[26]

The prominent genocide legal scholar William Schabas has asserted that 'ethnic cleansing' can never be genocide because the intent of 'ethnic cleansing' is to drive out a population, whereas the specific intent of genocide is to destroy it. But this distinction ignores the fact that genocidal massacres often have both intents.

[24] Ethnic Cleansing - An Attempt at Methodology, Drazen Petrovic,Senior assistant of the Sarajevo University Law School; Research student at the European University Institute Florence; Ph.D. Student of the Geneva University Law School

[25]International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Radislav Krstic, 2 August 2001, OF/P.I.S./609e

[26]UN Security Council resolutions 1166 (13 May 1998), 1329 (30 November 2000) and 1411 (17 May 2002.) See also Ethnic Cleansing in Kosovo: An Accounting. United States Department of State, December 1999.

They intentionally destroy a substantial part of an ethnic group, the specific intent necessary to prove genocide, and also have the intent to terrorize a population into flight or forced deportation. There is relationship between ethnic cleansing and genocide.[27]

In the 20th century, the death toll from genocide, massacres, forced starvation, expulsions and other atrocities is estimated to have exceeded 170 million.[28] The proportion of non-combatant deaths in wars has increased from 5% of the total death toll in World War I to 60% during World War II, to 80% in the civil wars of the 1970s and 1980s, and a large majority of the current 20 million refugees from war are women and children.[29] In all instances of genocide since 1948, there has been shameful delay in response by the UN, regional alliances, and major powers to first reports of genocidal acts, despite immediate media attention.[30]

Recently Burmese authorities and members of Arakanese groups have committed crimes against humanity in a campaign of ethnic cleansing against Rohingya Muslims in Arakan State since June 2012, Human Rights Watch said. The 153-page report, "All You Can Do is Pray': Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State," describes the role of the Burmese government and local authorities in the forcible displacement of more than 125,000 Rohingya and other Muslims and the ongoing humanitarian crisis. Burmese officials, community leaders, and Buddhist monks organized and encouraged ethnic Arakanese backed by state security forces to

[27]Rony Blum et al, *Ethnic cleansing' bleaches the atrocities of genocide*, The European Journal of Public Health Advance Access, published May 18, 2007
[28] Charny I. Encyclopedia of genocide. New York: ABC-Clio, 2000:16; Rummel R. *Death by government*, New Brunswick, NJ: Transaction Publishers, 1997.
[29]Markusen E, Kopf D. *The Holocaust and strategic bombing: genocide and total war in the twentieth century*, Boulder, CO: West view Press, 1995
[30]Blum R. Ghost brothers: adoption of a French tribe by bereaved native America. Montreal & Kingston: McGill-Queen's University Press, 2005:58–9

conduct coordinated attacks on Muslim neighborhoods and villages in October 2012 to terrorize and forcibly relocate the population. The tens of thousands of displaced have been denied access to humanitarian aid and been unable to return home.

Following sectarian violence between Arakanese and Rohingya in June 2012, government authorities destroyed mosques, conducted violent mass arrests, and blocked aid to displaced Muslims. Dead are buried in mass graves, burnt, butchered, further impeding accountability. The apparent goal has been to coerce them to abandon their homes and leave the area.

III. Legal Scenario

Ethnic cleansing is a blanket term, and no specific crime goes by that name, but the practice covers a host of criminal offenses. The United Nations Commission of Experts, in a January 1993 report to the Security Council, defined "ethnic cleansing" as "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."

The Commission's final report in May 1994 added these crimes: mass murder, mistreatment of civilian prisoners and prisoners or war, use of civilians as human shields, destruction of cultural property, robbery of personal property, and attacks on hospitals, medical personnel, and locations with the Red Cross/Red Crescent emblem.

Perpetrators of such crimes are subject to individual criminal responsibility, and military and political leaders who participated in making and implementing the policy "are also susceptible to charges of genocide and crimes against humanity, in addition to grave breaches of the Geneva Conventions and other violations of international humanitarian law," the 1994 report said.

Only the security of the civilian population or "imperative military reasons" may justify evacuation of civilians in occupied territory, according to the Fourth Geneva Convention. Additional Protocol II of 1977 extends this rule to civilians in internal armed conflicts.

Article 49 applies to international conflict and Article 3 common to the four Geneva Conventions applies to "conflict not of an international character." This article states that "people taking no active part in the hostilities" shall always "be treated humanely, without any adverse distinction founded on race, color, religion or faith, birth or wealth." It prohibits "humiliating and degrading treatment" and "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture."

There is also the Nuremberg Charter to consider. Article 6 defined "crimes against humanity" as including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during a war." And Nuremberg made it clear that population transfer is a war crime.[31]

There is need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. It was stated: "It is therefore, amply clear, that there is no legally binding commitment and the

[31] "Forced Population transfers as crime against Humanity" Available at; http://www.hrw.org/reports/2003, last visited on 19/9/2017

General Assembly is charged, in terms of its responsibility under the Charter to develop and elaborate a legal basis".[32]

The five main documents in which responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity has been articulated are the: "Report on Threats, Challenges and Change"; the Secretary-General's Report "In Larger Freedom"; the Outcome Document of the World Summit 2005; UN Security Council Resolution 1674; Secretary-General's Report on "Implementing the Responsibility to Protect". None of these documents can be considered as a source of binding international law in terms of Article 38 of the Statue of the International Court of Justice which lists the classic sources of international law.

When it comes to exercise of power by international criminal court against crimes of humanity by aggressors, there are various hurdles. The other hand the elements of a so called timely and decisive response are far more problematic. Articles 24 and 27 of the Charter prohibit the use of force. Article 24 confers on the UN Security Council responsibility to maintain peace and Article 39 to determine any threat, breach of peace or aggression and measures to restore peace. Article 41 spells out breaking diplomatic relations, sanctions, and embargoes. If these fail Article 42 empowers force. None of these would cover responsibility to protect unless the situation is a threat to international peace and security. The Security Council's powers are not directed even against violations of international legal obligations but against an immediate threat to international peace and security.

[32] Office of the President of the General Assembly,' Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity' UN.

Collective security is a specialized instrument for dealing with threats to international peace and security and not an enforcement mechanism for international human rights law and international humanitarian law. The discretion given to the Security Council to decide a threat to international peace and security implies a variable commitment totally different from the consistent alleviation of suffering embodied in the responsibility to protect. The Security Council has not been willing to relinquish to the International Criminal Court its power to determine crimes of aggression. Similarly, is it not enough to simply ask member states to become parties to the Rome Statute of the International Criminal Court. It is also essential to have a definition of aggression under the Rome Statute in order to develop better protective mechanism. Moreover, the International Criminal Court remains accountable to the Security Council in the sense that the Council has the power to delay consideration of a case by a year and then another year, indefinitely.

The United Nations say that genocide is a criminal act intended to destroy an ethnic, national, or religious group, which is targeted for destruction as such. This definition is sometimes criticized because it includes both too much and too little. It adds that "partial" destruction counts as genocide.

But ethnic cleansing has long been treated as a problem of states.

The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population. Rules of IHL apply equally to both sides of a conflict, irrespective of who is the "aggressor", and the absolute prohibition under international customary and treaty law on

targeting the civilian population precludes military necessity or any other purpose as a justification.[33]

IV. Crimes Relating to Ethnicity

The establishment of the ICC reinforced the links between ethnic cleansing and other offenses such as genocide, crimes against humanity, and war crimes. In its finalized text on the elements of the crimes in the court's jurisdiction, the Preparatory Commission for the International Criminal Court made clear that ethnic cleansing could constitute all three offences within the ICC's jurisdiction. Genocide, for example, was defined as an act that may include the systematic expulsion of individuals from their homes; the threat of force or coercion to effect the transfer of a targeted group of persons was recognized as an element of crimes against humanity; and the "unlawful deportation and transfer," as well as the displacement, of civilians were recognized as elements of war crimes.

ICTR Statute, Article 2: 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

[33] Moinina Fofana et al., Case No. SCSL-2003-11-A, Appeal Judgement, 28 May 2008, P. 247

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

Akayesu (Trial Chamber), September 2, 1998, para. 731: The Chambers held that acts of sexual violence can form an integral part of the process of destruction of a group. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

It is not required that an entire population of an area be targeted. Population refers to a larger body of victims and crimes of a collective nature.[34] It is enough to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way that demonstrates that the attack was in fact directed against a civilian population, rather than against a small and randomly selected number of individuals.[35]

Rutaganda, (Appeals Chamber), May 26, 2003, para. 524: "In order to prove specific intent, it must be established that the enumerated acts were directed against a group referred to under

[34] Duško Tadid, Case No. IT-94-1-T, Trial Judgement, 7 May 1997, P. 644

[35] Kunarac et al., AJ ; 90; Stanislav Galid, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ; 143; Krnojelac, TJ p. 56; Kunarac et al., TJ pg. 424-425; Mladen Naletilid et al., Case No. IT-98-34-T, Trial Judgement, 31 March 2003, p. 235; Akayesu, TJ ; 582; Georges A. N. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, 26 May 2003, p. 71; Kayishema, TJ p. 128

Article 2 of the Statute and committed with the intent to destroy, in whole or in part, the said group as such."

Kamuhanda, (Trial Chamber), January 22, 2004, para. 630: "It is required to show under Article 2 that the Accused, in committing genocide intended to destroy 'a national, ethnical, racial or religious' group."[36]

At the ICTY and ICTR, grounds for discrimination can be political, racial or religious. In addition to these, the Rome Statute includes national, ethical, cultural, or gender or "other grounds that are universally recognized as impermissible under international law".[37] Although persecution often refers to a series of acts, at the ICTY a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds. However, the Rome Statute requires that the persecution be committed in connection with at least another crime against humanity or crime within the jurisdiction of the ICC.

Acts which have been found to amount to persecution include:

- deportation, forcible transfer or displacement;
- destruction of property, including religious buildings;[38]
- attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages;
- detention of civilians who were killed, used as human shields, beaten, subjected to overcrowding, physical or

[36] See also Kajelijeli, (Trial Chamber), December 1, 2003, para. 811
[37] Rome Statute, Art. 7(1)(b)
[38] Before the ICTY it has been held that destruction of cultural and religious property can constitute persecution even though it is not specifically listed under Art. 5 of the Statute, See Vlastimir Đorđevid, Case No. IT-05-87/1-T, Trial Judgement, 23 Feb. 2011, pg. 1770-1774; Kordid et al., AJ p.834

psychological abuse and intimidation, inhumane treatment or deprived of adequate food and water;

- humiliating and degrading treatment;
- any sexual assault falling short of rape, embracing all serious abuses of a sexual nature;
- denial of fundamental rights such as the rights to employment, freedom of movement, proper judicial process and proper medical care;
- violations of human dignity such as harassment, humiliation and psychological abuses
- hate speech, on the basis that it violates the right to human dignity and the right to security; and
- forced labour, excluding work (even if forced) required or permitted in the ordinary course of lawful detention, but including forced labour assignments which require civilians to take part in military operations or which result in exposing civilians to dangerous or humiliating conditions amounting to cruel and inhumane treatment.[39]

The Rome Statute also includes apartheid as a crime against humanity. Although apartheid has long been recognised as a crime against humanity,[40]

ICC Definition of Apartheid

[39] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS 5, Art. 4(3), available at http://www.unhcr.org/ refworld /docid/3ae6b3b04.html (accessed 28 June 2011); Krnojelac, AJ p. 200; Third Geneva Convention, Art. 52(2); Simid et al., TJ pg. 91-93

[40]Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); UN General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), 30 November 1973, A/RES/3068(XXVIII), available at http://www.unhcr.org/refworld/docid/3ae6b3c00.html

1. The perpetrator committed an inhumane act against one or more persons.

2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.

3. The perpetrator was aware of the factual circumstances that established the character of the act.

4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.

5. The perpetrator intended to maintain such regime by that conduct

"Inhumane acts" in the context of apartheid can include murder, torture, arbitrary detention, persecution, conditions calculated to cause the destruction of a group or legislative measures to prevent a group's participation in politics, society, or economic and cultural activities, etc. At the ICC, apartheid is a specific intent crime, requiring that the perpetrator intend to maintain a regime of systematic oppression through the commission of inhumane acts.

War crimes and CAH (crimes against humanity) may overlap. For example, a mass killing of civilians can be both a war crime and CAH. The main differences between a war crime and CAH include:[41]

- War crimes require a nexus to an armed conflict, whereas a CAH do not (despite CAH often being committed

[41] International Criminal Law & Practice Training Materials: Crimes Against Humanity, Developed by International Criminal Law Services, UNICTY

during armed conflicts), but CAH require an attack on civilian populations;

- War crimes focus on the protection of certain protected groups, including enemy nationals, whereas CAH protect victims regardless of nationality of affiliation to the conflict; and
- War crimes regulate conduct on the battlefield and military objectives, whereas CAH regulate actions against civilian populations.

V. Conclusion and Suggestions

Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The first task is to be clear as to what the responsibility entails. At a minimum it entails the following: (a) the state should ensure that people under its jurisdiction are not subjected to genocide, war crimes, ethnic cleansing and crimes against humanity; (b) a state should take effective and credible measures to ensure that such things do not happen; and (c) that when they do happen the state should punish those that perpetrate the atrocities and provide reparations to the victims. What states should do to promote a world free of genocide, war crimes, ethnic cleansing and crime against humanity is eloquently answered for us by the United Nations Charter, which in article 1 proclaims the promotion of, and encouragement of, respect for human rights as one of the purposes of the United Nations.

The international community should as appropriate encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability at both United Nations headquarters and regional levels. They should also encourage regional organizations to develop early warning systems to compliment efforts at the international level.

Some of the key factors that should trigger the attention of the international community about the likelihood of the commission of genocide, war crimes, ethnic cleansing and crimes against humanity are the following[42] (a) people in leadership positions concentrated in one or a set of ethnic groups with display of their ethnic attributes and hostility toward other ethnic groups; (b) existence of ethnic based political tensions; (c) composition of the police and armed forces concentrated in one or a set of ethnic groups with a policy of exclusion of others; (d) existence of private militias; (e) types of weapons purchased by the armed forces as that may indicate for whom the weapons are meant for and (f) a history of human rights violations by the police and armed forces.

[42] Responsibility To Protect Populations From Genocide, War Crimes, Ethnic Cleansing And Crimes Against Humanity, Muna Ndulo,